

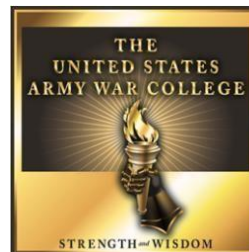
# Using the Rule of Law to Combat the Islamic State

by

Lieutenant Colonel (P) Stephen E. Schemenauer  
United States Army

Under the Direction of:  
Dr. Richard Shultz and Dr. Paul C. Jussel

While a Fellow at:  
The Fletcher School of Law and Diplomacy



United States Army War College  
Class of 2016

**DISTRIBUTION STATEMENT: A**

Approved for Public Release  
Distribution is Unlimited

The views expressed herein are those of the author(s) and do not necessarily reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. Government. The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

## Using the Rule of Law to Combat the Islamic State

(6,087 words)

### Abstract

As the most lethal and well-funded terrorist group in the world, the Islamic State represents an unprecedented threat to international peace and security. However, the international community's current efforts to combat the group are largely disjointed, ineffective, counter-productive, and costly. They also emphasize the role of force over the rule of law, drawing international criticism and fueling the flames of Islamic jihad.

This has led many in the international community to call for a more comprehensive strategy that includes prosecutorial efforts as an integral part of the solution.

Unfortunately, the international criminal justice system suffers from an institutional gap that allows the Islamic State's members to operate with seeming impunity. This paper recommends that the United Nations Security Council establish an Office of the Chief International Prosecutor for the Islamic State (UNOCIPIS) to fill that gap and provide the international community with a better legal tool to combat the Islamic State's worldwide criminal network.

## Using the Rule of Law to Combat the Islamic State

[The Islamic State's] violent extremist ideology, its terrorist acts, its continued gross systematic and widespread attacks directed against civilians, abuses of human rights and violations of international humanitarian law, . . . its eradication of cultural heritage and trafficking of cultural property, . . . its recruitment and training of foreign terrorist fighters whose threat affects all regions and Member States, . . . constitutes a global and unprecedented threat to international peace and security[.]

—Statement in United Nations (UN) Resolution 2249<sup>1</sup>

Notwithstanding the UN's pronouncement that the Islamic State<sup>2</sup> is the greatest threat to global peace and security, the international community's current efforts to destroy the group are disjointed, largely ineffective, arguably counter-productive, and very costly.<sup>3</sup> This has led many in the international community to call for a more comprehensive strategy that includes prosecutorial efforts to combat the Islamic State.<sup>4</sup> However, the mechanisms typically relied upon to dispense justice in the international criminal arena are ill-equipped to handle the current threat, resulting in an institutional gap that must be filled. Meanwhile, the Islamic State continues to develop its network, build its resources, and conduct attacks with increasing frequency and lethality all over the world, and the death toll continues to mount.<sup>5</sup>

This paper begins by examining the Islamic State's current status and the international community's ongoing efforts to combat the group. It then analyzes the various deficiencies of the institutions that typically investigate and prosecute crimes in the international justice system; namely, the International Criminal Court (ICC) and independent or *ad hoc* criminal tribunals (ICTs). Finally, this paper proposes a model for establishing a United Nations Office of the Chief International Prosecutor for the Islamic State (UNOCIPIS), which would fill the existing institutional gap in the international criminal justice system and provide the international community with a

capacity-building tool that would enable UN Member States to effectively investigate and prosecute members of the Islamic State's worldwide criminal network.<sup>6</sup>

### The Islamic State – Public Enemy #1

The United Nations' (UN) condemnation of the Islamic State as an "unprecedented threat to international peace and security" is not merely rhetoric. Indeed, the group is led by religious zealots bent on ridding the world of apostates and unbelievers, establishing a worldwide caliphate, and inciting a global apocalyptic war using any means necessary to accomplish its objectives.<sup>7</sup> It is without question that these goals are antithetical to every nation's sovereignty and continued existence.

With a net worth of over \$2,000,000,000, the Islamic State funds its reign of terror through a host of criminal activities, including smuggling stolen oil, looting banks, imposing taxes, kidnapping for ransom, engaging in protection rackets, selling stolen artifacts, extorting funds, exploiting natural resources, and controlling crops. As a result of these illicit and unprosecuted activities, the Islamic State is the most "financially endowed terrorist organization in history."<sup>8</sup>

Although geographically limited to Iraq, Syria, and Libya, the Islamic State's influence and operational capabilities extend well beyond its territorial base.<sup>9</sup> For example, groups in Algeria, Afghanistan, Bangladesh, Cameroon, Chad, Egypt, Indonesia, Libya, Niger, Nigeria, Pakistan, the Philippines, and Yemen have actively cooperated with, or sworn allegiance to, the Islamic State.<sup>10</sup>

Organizationally, the Islamic State is estimated to have anywhere from 9,000 to 200,000 members, including more than 30,000 foreign fighters from over 100 different countries.<sup>11</sup> The group also reportedly recruits 1,000 new fighters every month.<sup>12</sup> These

statistics are particularly alarming given the possibility that radicalized foreign fighters will return to their home countries and carry out attacks, expanding the Islamic State's geographic reach even further.<sup>13</sup>

Operationally, the Islamic State has conducted attacks in at least 35 countries, highlighting the group's increasing ability, and desire, to project its influence worldwide.<sup>14</sup> For example, the group has been linked to, or claimed responsibility for, a litany of attempted and successful attacks, including: 12 separate events in the United States, attacks in Paris, the downing of a Russian passenger jet over the Sinai Peninsula, and suicide bombings in Beirut.<sup>15</sup>

Finally, the Islamic State's brutality transcends the bounds of human decency and constitutes the most egregious crimes known to man, including crimes against humanity, war crimes, ethnic cleansing, and genocide.<sup>16</sup> In fact, according to the Global Terrorism Index, the Islamic State was responsible for 6,073 terrorist-related deaths and at least 20,000 "battlefield deaths" in 2014, making it the most lethal and destructive terrorist group in the world.<sup>17</sup> This finding is corroborated by a recent United Nations report finding that over 24,000 civilians were killed or injured in Iraq alone in 2014, much of which was attributable to the Islamic State.<sup>18</sup> In addition to these terrorist and battlefield related casualties, the Islamic State has harmed or killed thousands more in public executions (drowning, burning, beheading, and crucifixion), abductions, kidnappings, and other heinous acts.<sup>19</sup> The group is also reportedly destroying holy sites, stealing valuable antiquities, and holding 3,500 people as slaves raping, sodomizing, and forcing them to work.<sup>20</sup>

Fittingly, the UN has proclaimed the Islamic State public enemy number one, directing Member States to “take all necessary measures” to combat the group.<sup>21</sup> Nonetheless, the international community continues to struggle with the Islamic State problem.

#### Current Efforts to Combat the Islamic State are Ineffective

Despite calls to use “all means necessary” to eradicate the Islamic State, the international community’s current efforts have fallen short and, at best, have only disrupted or contained the group.<sup>22</sup> Indeed, the UN has not taken any concerted action to date, blocked in large part by political infighting between the Security Council’s permanent members (P5) over the situation in Syria.<sup>23</sup>

Similarly, the United States’ attempt to develop an international coalition to “degrade, and ultimately destroy” the Islamic State has failed to garner broad international support.<sup>24</sup> To date, the Obama administration has only assembled a coalition of 65 countries out of 193 UN Member States (representing 33% of the UN’s total membership), and it is questionable whether the majority of these members are truly committed to the fight.<sup>25</sup>

More importantly, the U.S.-led international coalition’s “grand strategy” continues to emphasize military power through air strikes, support to ground forces, and counterterrorism efforts.<sup>26</sup> A prime example of this is Operation Inherent Resolve, which has resulted in over 10,545 coalition air strikes against Islamic State targets in Iraq and Syria (7,061 Iraq/3,484 Syria), damaging or destroying 21,501 targets.<sup>27</sup> The total operating cost for this operation has exceeded \$6,200,000,000 in less than two years, equating to an average daily cost of \$11,500,000 and a per target cost of \$288,358.<sup>28</sup>

Noticeably absent in this “grand strategy” are legal efforts to investigate and prosecute Islamic State members for their crimes, which many believe would be a “great victory for the international justice.”<sup>29</sup> This is surprising because the Obama administration has noted, time and again, how effective prosecutions have been to combat terrorism in the post-9/11 years. It also begs the question as to why the U.S., and the international community, have not incorporated this effective counterterrorism tool into their fight against the Islamic State.<sup>30</sup>

In addition to joint efforts to combat the Islamic State, many countries have adopted unilateral approaches that have impeded cooperation and fostered ineffective and counter-productive strategies that exalt the role of force over the rule of law, or disregard the latter completely. For example, U.S. drone strikes in Yemen and Pakistan, and indefinite detention without charge or trial of prisoners at Guantanamo Bay, have elicited international condemnation, provoked the Islamic community, and provided a “propaganda windfall” for the Islamic State.<sup>31</sup>

Notwithstanding these impressive, yet costly, displays of military might, the Islamic State continues to be the most lethal and well-funded terrorist group in the world.<sup>32</sup> Consequently, many in the international community are calling for a more comprehensive strategy that includes prosecutorial efforts to combat the Islamic State.<sup>33</sup> Unfortunately, the international criminal justice system’s current framework has an institutional gap that makes it ill-equipped to assume such a role.

#### Issues with the Current Legal Framework

A growing number of voices have urged the international community to use the ICC or ICTs to investigate and prosecute the mass atrocities and human rights

violations committed by the Islamic State in Syria and Iraq.<sup>34</sup> However, these mechanisms suffer from a host of procedural, substantive, and institutional flaws that render them incapable of investigating and prosecuting the Islamic State's members for their crimes.<sup>35</sup>

### The International Criminal Court

The ICC was established by the Rome Treaty in 2002 and was the first permanent international criminal court designed to “help end impunity for the perpetrators of the most serious crimes of concern to the international community,” including war crimes, genocide, and crimes against humanity.<sup>36</sup> The Court does not have jurisdiction over terrorist acts unless they fall within one of the three categories of crimes delineated above.<sup>37</sup>

The ICC's jurisdiction is limited to the aforementioned crimes only if they were committed on the territory of a State Party (territorial jurisdiction) or by one of its nationals (personal jurisdiction).<sup>38</sup> However, these conditions do not apply if the UN Security Council refers a situation to the Chief Prosecutor or if a State accepts the Court's jurisdiction by declaration.<sup>39</sup>

As a court of last resort, the ICC is intended to complement, not replace, national criminal justice systems.<sup>40</sup> Based on this principle of complementarity, the ICC will not act if a case is being investigated or prosecuted by a country unless the national proceedings are disingenuous.<sup>41</sup> “In addition, the ICC only tries those accused of the gravest crimes.”<sup>42</sup>

The ICC's Chief Prosecutor can initiate an investigation or prosecution in one of three ways: (1) by a State Party referral of a situation; (2) by UN Security Council



request; or (3) on its own initiative (*proprio motu*) if the Prosecutor receives reliable information, but only after receiving authorization from the Pre-Trial Chamber.<sup>43</sup>

Seated at The Hague in the Netherlands, the ICC is independent of the UN, and it relies on States Parties' contributions and voluntary donations to fund its operations.<sup>44</sup> The ICC's requested budget for 2016 was €153,320,000 (\$168,644,334), of which €43,700,000 (\$48,888,938) was for the Office of the Prosecutor (OTP).<sup>45</sup>

To date, there have been 23 cases in 10 situations brought before the ICC.<sup>46</sup> However, recent efforts to have the ICC open a preliminary examination into allegations of widespread atrocities committed by the Islamic State in Syria and Iraq have been rejected by the ICC's Chief Prosecutor, Fatou Bensouda.<sup>47</sup> Bensouda found that while the atrocities allegedly committed by the Islamic State "undoubtedly" constituted grave war crimes and crimes against humanity that "threaten[ed] the peace, security and well-being of the region, and the world[,]" she did not have the jurisdictional basis to open a preliminary investigation. Moreover, because Syria and Iraq are not parties to the Rome Statute, the ICC lacked territorial jurisdiction and would only have limited personal jurisdiction over foreign fighters who were States Parties nationals, precluding prosecution of those most responsible for mass crimes.<sup>48</sup>

Given these issues, the ICC could only gain jurisdiction if Iraq and/or Syria acquiesced to it, or if the UN Security Council referred the situation to the Court.<sup>49</sup> The former is highly improbable because, by acquiescing to the ICC's jurisdiction, the governments of Iraq and Syria would potentially be opening themselves up to investigation and prosecution for their own alleged crimes.<sup>50</sup> Similarly, the latter is highly improbable given the Security Council's geo-politics. The U.S. and Russia are

both permanent members of the Security Council with veto power over any ICC referrals.<sup>51</sup> They are also conducting military operations in Iraq and/or Syria and would likely be concerned that the Court's scrutiny could potentially expose their troops to prosecution. Therefore, both would likely veto a referral unless it included an exclusion of jurisdiction clause, which would prohibit the Court from prosecuting U.S. or Russian nationals.<sup>52</sup> The Syrian situation is additionally problematic because the Russians are extremely wary of U.S. efforts to effectuate a regime change, as evidenced by the recent failed attempt to draft a resolution referring the Syrian situation to the ICC.<sup>53</sup>

Beyond these jurisdictional issues, some question whether the Islamic State, as an organization, can even constitute a "situation" under the Rome Statute.<sup>54</sup> A "situation" has consistently been defined by temporal, territorial and personal parameters. In this case, the Islamic State lacks elements of statehood under international law, notwithstanding various UN resolutions calling for prosecution of the group,<sup>55</sup> or the Islamic State's claim to a caliphate and "effective control" over territory in Iraq and Syria.<sup>56</sup> In fact, the ICC has already rejected a group-based definition for the referral of the Lord's Resistance Army, interpreting it more broadly as a referral of the situation in Uganda. Presumably, the ICC would similarly reject a group-based referral for the Islamic State, unless the "situation" was defined more broadly and tied to an "objective or territorial nexus."<sup>57</sup>

In addition to the geographic, jurisdictional, and situational limitations, the ICC also suffers from substantive issues that impede its ability to prosecute the Islamic State. For starters, its subject matter jurisdiction is generally limited to violent personal or property crimes covered by one of three categories: crimes against humanity, war

crimes, and genocide.<sup>58</sup> This means that the ICC could not prosecute “lesser” or inchoate crimes that do not fit within these three categories.<sup>59</sup> For example, financial crimes would be excluded, notwithstanding the critical nature of these crimes to the Islamic State’s global operations. Similarly, the ICC would not be able to prosecute those who conspire with, or aid and abet, Islamic State members to commit crimes, including financiers, recruiters, and logisticians. Even if all crimes could somehow be shoe-horned into one of the three categories, many “lesser” crimes would remain outside of the ICC’s reach because they would not satisfy the scale, systematicity, or gravity requirements.<sup>60</sup>

Even assuming that the ICC could overcome the technical issues preventing the Court from opening an investigation and prosecuting the Islamic State, the sheer volume of cases and geographic scope of the group’s crimes would impose a significant financial burden on the Court and present an overwhelming enforcement challenge. Based on a number of reports, the ICC would potentially be faced with investigating and prosecuting anywhere from 5,000-13,000 offenders in Iraq and Syria alone, and many more crimes have been committed in other parts of the world.<sup>61</sup> Despite having a staff of more than 700 people, 34 judges, and an annual operating budget of over \$166,000,000, the ICC does not have the capacity to deal with this volume of crime, as evidenced by the ICC’s current record of 2 convictions over a 14-year period at a cost of over \$1,000,000,000.<sup>62</sup>

Moreover, the lack of an enforcement mechanism would impede the ICC’s ability to prosecute the Islamic State, particularly given the volume of cases that would arise all over the world. Without an associated police force or other enforcement arm, the ICC is

wholly dependent on States Parties to enforce the ICC's indictments and otherwise support its work.<sup>63</sup> This has already proven problematic in a number of the ICC's cases, where states and inter-governmental organizations have been unwilling to enforce the ICC's actions against a small number of individuals.<sup>64</sup> It would only be exacerbated by the sheer number of Islamic State cases.

In sum, the ICC is not designed to prosecute the Islamic State's members, nor does it have the will to do so.<sup>65</sup> Recognizing the ICC's limitations, some in the international community have called for independent or *ad hoc* criminal tribunals to prosecute the Islamic State's members. However, these institutions are similarly ill-equipped.

#### International Criminal Tribunals

A number of proponents have argued for ICTs to overcome the procedural and substantive issues precluding the ICC from prosecuting the Islamic State's members.<sup>66</sup> However, these types of tribunals suffer from many of the ICC's same deficiencies.

ICTs require an enormous amount of political will and resources from the international community. Consequently, they take too long, are financially burdensome, and have a limited impact.<sup>67</sup> For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been criticized for failing to foster national reconciliation or to provide peace, security, or justice to victims and offenders.<sup>68</sup> Operating for over 23 years, these tribunals have accomplished little justice at great cost to the international community. In the ICTY's case, there were 161 indictments resulting in 80 convictions, 18 acquittals, 13 referrals to national courts, and 12 ongoing proceedings (four trials and eight

appeals).<sup>69</sup> This equates to an estimated total cost of over \$1,598,500,000, or \$19,981,250 per conviction.<sup>70</sup> In comparison, the ICTR indicted 93 individuals, concluded proceedings for 85 accused, convicted 62 individuals and referred 13 people to other jurisdictions.<sup>71</sup> This equates to an estimated total cost of \$2,200,000,000, or \$35,483,871 per conviction.<sup>72</sup>

In this case, the estimated cost to establish a limited criminal tribunal to prosecute the Islamic State in Syria and Iraq would cost hundreds of billions of dollars and take more than 20 years; a finding that comports with the ICTY's and ICTR's historical examples.<sup>73</sup> Applying the combined average cost to convict for the ICTY and ICTR (\$27,732,560.50) to the potential number of foreign fighters in Iraq and Syria alone, the total cost to conduct an Islamic State tribunal would range from \$138,662,802,500 to \$360,523,286,500. Clearly, this limited approach is not economically feasible, especially since it fails to account for thousands of potential offenders in other countries.<sup>74</sup>

Making matters worse, international criminal tribunals like the ICTY and ICTR have often been perceived as dispensing "victors' justice," which would only provide additional fodder for the Islamic State's propaganda machine and potentially provoke an escalation of atrocities.<sup>75</sup>

Finally, the ICTY and the ICTR were extremely limited in terms of time, space and scope due to the targeted threat.<sup>76</sup> That would not be the case with the Islamic State, where the sheer volume, range, type, and transnational nature of the crimes and offenders would tax a tribunal.<sup>77</sup> Indeed, the number of potential indictments would be in the thousands, even if only limited to one or two geographic regions.<sup>78</sup> Thus, the

ICTY and ICTR's ability only to indict 254 people over 23 years demonstrates how limited a criminal tribunal would be if faced with the high volume of cases and offenders that the Islamic State would likely present.<sup>79</sup>

Although more flexible than the ICC in technical terms, ICTs suffer from many of the same shortcomings, rendering them inadequate to meet the challenges presented by the Islamic State. In order to fill this gap, the international community must create an organization that can operate within Member States' legal frameworks, building their capacity and enabling them to effectively investigate and prosecute members of the Islamic State's worldwide criminal network. The following presents a proposed model to accomplish this goal.

#### UNOCIPIS – A Global Game-Changer

The international criminal justice system's current mechanisms are simply incapable of handling the complexity and enormity of the issues posed by the Islamic State. Therefore, the UN Security Council should take immediate steps to establish an independent, international body to fill that institutional gap.

Although a novel idea for combatting the Islamic State, the concept of uniting international legal efforts to tackle a transnational threat is not without precedent. For example, at the International Maritime Office's (IMO) prompting, the UN Security Council acted under Chapter VII of the UN Charter to adopt a series of conventions and resolutions to combat international piracy.<sup>80</sup> These conventions and resolutions called on all nations to cooperate with investigations and prosecutions of pirates, emphasizing the importance of collaborating to deter piracy and bring them to justice.<sup>81</sup> This

international regime effectively conferred universal jurisdiction on all states to suppress piracy along the Somali coast and prosecute pirates across territorial boundaries.<sup>82</sup>

Similarly, the European Union (EU) has proposed establishing an independent and decentralized body called the European Public Prosecutor's Office (EPPO), charged with investigating and prosecuting EU fraud and financial crimes across Member States' borders.<sup>83</sup> This proposal arose out of the EU Member States' inability to investigate and prosecute financial crimes transnationally, particularly where EU bodies like Europol and Eurojust lacked the mandate to conduct such investigations.<sup>84</sup> By "combining European and national law enforcement efforts in a unified, seamless and efficient approach," the EU could protect its financial interests and fill an "institutional gap" with an office having exclusive and EU-wide jurisdiction to deal with crimes falling within its purview.<sup>85</sup> The EU believes the EPPO would add value by: developing a "genuine European prosecution policy;" establishing a "uniform, consistent and systematic approach while linking in with the Member States' judicial systems;" enabling the "investigation and prosecution of all EU fraud cases;" and providing a "stronger deterrence and prevention effect."<sup>86</sup>

The EPPO would be led by a chief prosecutor, and its investigations will be carried out by delegated prosecutors in each Member State who would also continue to function as national prosecutors.<sup>87</sup> However, when acting on behalf of the EPPO, the delegated prosecutors would be fully independent from the Member State's prosecutorial bodies.<sup>88</sup> The EPPO's investigative powers would be "based on and integrated into the national law systems of the Member States[,]" and its investigations "would be subject to judicial review by the national courts."<sup>89</sup>

Perhaps the best example of an independent, international body created to investigate and prosecute crimes is the *Comision Internacional Contra la Impunidad en Guatemala*, or the CICIG.<sup>90</sup> The CICIG was established by the Agreement Between the United Nations and the State of Guatemala on the Establishment of an International Commission against Impunity in Guatemala, which sets forth the CICIG's operating guidelines.<sup>91</sup>

The CICIG has similar attributes to an international prosecutor. However, its scope is much more limited, operating under Guatemalan law, in accordance with Guatemalan criminal procedure, and in Guatemalan courts.<sup>92</sup> The CICIG's purpose is to help Guatemala's Public Prosecutor's Office, National Civil Police, and other State institutions investigate and prosecute crimes committed by members of illegal security forces and clandestine security structures (collectively, Illegal Groups) within the country.<sup>93</sup>

The CICIG's mandate consists of three objectives: determining the existence and structure of Illegal Groups committing crimes affecting the human rights of Guatemala's citizenry, including their links to Guatemalan officials, operating modalities, and funding sources; assisting Guatemala to disband Illegal Groups and "promote the investigation, criminal prosecution and punishment of the crimes committed by the[ir] members;" and making public policy recommendations to "eradicate and prevent the re-emergence of" Illegal Groups.<sup>94</sup> To accomplish these goals, the CICIG works in conjunction with Guatemalan legal authorities and, at times, also acts as a complementary prosecutor for certain complex cases. In doing so, the CICIG strengthens Guatemala's legal institutions and its entire justice system.<sup>95</sup>



Collectively, the UN's anti-piracy initiative, the EPPO, and the CICIG prove that the international community can unite to combat national and transnational threats, promote accountability, and strengthen the rule of law. More importantly, facets of these three programs could be adapted and incorporated into the model for UNOCIPIIS, providing the framework necessary to fill the existing institutional gap in the international criminal justice system.

### Proposed Model for UNOCIPIIS

The following proposal draws on the UN's anti-piracy efforts, the EPPO, and the CICIG to build a general framework for UNOCIPIIS, leaving the UN Security Council and the first Chief International Prosecutor to determine the office's finer details.<sup>96</sup> The proposal is broken down into six key areas with a discussion of each noted below.

#### Authority

The Security Council should create UNOCIPIIS by resolution to avoid a prolonged treaty process that would likely fail to gain unanimous consent.<sup>97</sup> This would also ensure that the relationship between UNOCIPIIS and the national authorities is based on primacy, avoiding sovereignty concerns and the ICC's complementarity issues, and allowing the Security Council to enforce UNOCIPIIS's actions and compel Member States' compliance.<sup>98</sup> Finally, passing a resolution would put teeth in the UN's condemnation of the Islamic State, overcome the lack of unity and cooperation that plagues the international community's current efforts, and strip the Islamic State of fodder for propaganda and recruiting by enhancing legitimacy.<sup>99</sup>

#### Structure<sup>100</sup>

UNOCIPIS should be independent of the United Nations, and its operations should be decentralized.<sup>101</sup> This would allow the office to better operate within the confines of Member States' law enforcement and judicial frameworks and ensure its success.<sup>102</sup>

The Security Council could structure UNOCIPIS in one of two ways, adopting either the EPPO's or the CICIG's approach. This decision would turn on funding constraints and which structure the UN deemed better suited to deal with the Islamic State. For example, the Security Council could follow the EPPO's model, appointing a Chief International Prosecutor (CIP) and requiring each Member State to appoint at least one Chief National Prosecutor (CNP).<sup>103</sup> Or, the Security Council could follow the CICIG's model, appointing just a CIP and allowing him or her to work directly with national authorities.<sup>104</sup> The latter would be less intrusive and more economical, as it would require less staffing and oversight and avoid the extreme costs and bureaucratic bloat associated with the ICC and ICTs.<sup>105</sup> However, the former may be more effective because the CNPs would presumably be more vested in UNOCIPIS and could facilitate a closer working relationship with the national authorities.<sup>106</sup>

Practically speaking, UNOCIPIS would strive to support Member States' efforts, taking the lead only where requested or required due to a national authorities' inability or unwillingness to investigate and prosecute alleged perpetrators.<sup>107</sup> This approach would recognize UNOCIPIS's primacy over national authorities without heightening concerns over a lack of sovereignty or perceived intrusion into internal affairs.

Finally, UNOCIPIS and the national authorities would divide their efforts accordingly. UNOCIPIS would take a more strategic approach, focusing on developing

the cross-border connections of the Islamic State's entire criminal network. Conversely, national authorities would take a more tactical approach, focusing on the crimes committed within their jurisdictions.<sup>108</sup> This dual-focused, and more holistic, approach would facilitate development of the entire network, enhancing the international community's efforts to defeat the Islamic State.<sup>109</sup>

#### Mission

UNOCIPIS's mission would be to support, strengthen, and assist the international community's global efforts to dismantle the Islamic State's worldwide criminal network by combining international and national law enforcement efforts to investigate and prosecute members of the Islamic State for their crimes.<sup>110</sup>

UNOCIPIS would accomplish its mission by collaborating and cooperating with international and national law enforcement agencies and judiciaries throughout the world to: investigate the Islamic State's entire criminal network and determine its structure (leadership, recruitment, training, etc...), forms of operation, sources of financing and logistical support, and any other relevant information; and prosecute members of the Islamic State for their crimes *sua sponte* or in conjunction with members of the international community.<sup>111</sup>

#### Powers

To discharge its mandate, and in accordance with the Member States' criminal laws and procedures, UNOCIPIS should be given the following powers:

- i. Advise and assist Member States' institutions with investigations and criminal prosecutions;<sup>112</sup>
- ii. Join in and/or initiate criminal investigations and proceedings;<sup>113</sup>

- iii. Enter into, and implement, cooperation agreements with Member State institutions, including, but not limited to, the CNPs or national authorities, Member States' courts, and national law enforcement authorities;<sup>114</sup>
- iv. Enter into, and implement, cooperation agreements with International Organizations including, but not limited to, INTERPOL, Europol, Eurojust, or any other organization that could facilitate UNOCIPIS's investigations or prosecutions;<sup>115</sup>
- v. Require the cooperation of International Organizations and Member State officials and institutions;<sup>116</sup>
- vi. Request and supervise an administrative, investigative, and legal staff, as required to accomplish its tasks;<sup>117</sup>
- vii. Take all measures necessary for the discharge of its mandate, subject to, and in accordance with, Member States' laws, rules and procedures (e.g., gather evidence, issue subpoenas and warrants, etc...);<sup>118</sup> and
- viii. Publish annual reports to the UN Security Council on its activities and results.<sup>119</sup>

Although not all-encompassing, this list of proposed powers would allow UNOCIPIS to carry out its mandate within the Member States' various legal frameworks. If additional powers are necessary, the UN Security Council and CIP can modify the list accordingly.

#### Applicable Laws, Rules and Procedures

UNOCIPIS would operate within Member States' law enforcement and judicial frameworks, abiding by their criminal laws, rules, and procedures to conduct investigations and prosecutions.<sup>120</sup> UNOCIPIS's actions would also be subject to

judicial review by a national court of competent jurisdiction.<sup>121</sup> This would make the office more efficient and effective and provide legal safeguards for suspected and accused persons. It would also avoid the various technical issues presented by the ICC's temporal, jurisdictional, situational, and subject matter limitations.<sup>122</sup> Finally, it would side-step the ICC's gravity and systematicity requirements, providing a broader and more flexible prosecutorial platform that would allow UNOCIPIS to fill the "impunity gap" by prosecuting all offenders for all crimes, including lesser and inchoate crimes.<sup>123</sup>

### Funding

Like the ICC, UNOCIPIS would be principally funded by Member State contributions based on a pro rata share of their gross national income, but additional funds could come from voluntary government contributions, international organizations, individuals, corporations, or other entities.<sup>124</sup> Where UNOCIPIS takes a lead role, the Member State would be responsible for all costs and expenses incident to the investigation and prosecution, in addition to that nation's annual contribution.

Compared to the ICC and ICTs, and the ongoing military operations to combat the Islamic State, UNOCIPIS is a veritable bargain. Assuming the Security Council decides to use the CICIG structure over the EPPO structure (appointing a CIP without CNPs in each Member State), this model could likely operate on 10% of the OTP's 2016 budget, or \$4,880,000.<sup>125</sup> To put this in perspective, UNOCIPIS's total annual budget would be approximately: 42% less than a single day of airstrikes (\$11,500,000) and 0.001% of Operation Inherent Resolve's annual operating cost (\$4,197,500,000); 0.011% of Guantanamo Bay's annual operating cost (\$445,000,000); 0.029% of the ICC's 2016 requested budget (\$168,644,334); 0.07% of the ICTY's annual operating

cost (\$69,500,000); and 0.05% of the ICTR's annual operating cost (\$100,000,000).<sup>126</sup>

Assuming all 193 UN Member States contributed equal shares, that would represent an annual contribution of \$36,269.43 per country – a fraction of what many of the Rome Treaty States Parties contribute annually to the ICC.<sup>127</sup> To be fair, the exact amount of Member States' annual contributions should be based on a pro-rata share of the budgeted goal and each Member State's gross national income.

In summary, this section drew on the UN's anti-piracy efforts, the EPPO, and the CICIG to build a general framework for UNOCIPIS. The next section applies the model to a hypothetical example, demonstrating the various advantages that UNOCIPIS has over the ICC.

#### Application of the Model – A Comparison of UNOCIPIS to the ICC

A simple hypothetical, loosely based off the San Bernardino, California, terrorist attack, illustrates how UNOCIPIS could overcome the ICC's deficiencies.<sup>128</sup> The hypothetical follows:

*On December 2, 2015, two shooters entered a U.S. government building in San Bernardino, California, killing 14 people and wounding 22 others. The U.S.-born shooters had a South Sudanese-based accomplice who provided funding and logistical support for the attack. The funds were transferred from an Islamic State account in Indonesia to the United States through multiple banks in Yemen, Lebanon, and Malaysia. All three participants were recruited and radicalized by Islamic State operatives in Pakistan. The shooters also received weapons and explosives training at an Islamic State training camp located in Iraq. To date, there have been no referrals of the "situation" by a State Party, the UN Security Council has not referred the matter, and no reliable information has been provided allowing the Pre-Trial Chamber to authorize the Chief Prosecutor to exercise her proprio motu powers.*

Given the facts of this hypothetical, it would be incredibly problematic, if not impossible, for the ICC to prosecute any of these offenders. However, UNOCIPIS could investigate and prosecute any or all of them.

1. Threshold Issues. Without a referral by a State Party or the Security Council, and lacking any reliable information to exercise her *proprio motu* powers, the OTP would not be able to investigate or prosecute the various offenders.<sup>129</sup> It is also highly unlikely that this scenario would even be considered a “situation” falling within the ICC’s purview.<sup>130</sup> However, UNOCIPIS would not be subject to these constraints because it would derive its power from a Security Council resolution and not the Rome Treaty.

2. Personal and Territorial Jurisdictional. Even assuming, *arguendo*, that the ICC could overcome the threshold issues and open an investigation, it would not be able to proceed because of the Rome Treaty’s jurisdictional limitations.<sup>131</sup> The offenders are all non-State Party citizens, and the crimes were all committed on non-State Party territory.<sup>132</sup> Therefore, the ICC lacks personal and territorial jurisdiction, and the Court could not proceed without a declaration by the implicated countries acceding to the ICC’s jurisdiction or a referral by the Security Council.<sup>133</sup> In contrast, UNOCIPIS would not be bound by these jurisdictional restrictions because it would operate within the Member States’ legal and judicial frameworks, including their laws, rules and procedures. Therefore, if the Member States had jurisdiction, UNOCIPIS would have jurisdiction.

3. Subject Matter Jurisdiction. The hypothetical also raises issues regarding the impunity gap created by the ICC’s subject matter jurisdiction. While the murders arguably fall within the category of crimes against humanity, the ICC would not have subject matter jurisdiction over the lesser and inchoate crimes that are reflected in the scenario, including conspiracy, aiding and abetting, and a whole host of financial

crimes.<sup>134</sup> Therefore, many of the offenders could escape justice.<sup>135</sup> UNOCIPIS, however, would not be bound by the Rome Treaty's categorical limitations, and it could fill the impunity gap by prosecuting any of the crimes found in the applicable Member State's criminal code.

4. Admissibility. Admissibility issues pose yet another problem for the ICC in this hypothetical, both from a gravity and complementarity perspective. It is doubtful that the deaths of 14 and wounding of 22 in an isolated incident like this would meet the ICC's scale or systematicity requirements necessary to satisfy the gravity threshold.<sup>136</sup> However, UNOCIPIS is not bound by the Rome Treaty's gravity requirements and would be able to proceed. It is equally unlikely, given the nature of the Islamic State threat, that any of the countries implicated in the hypothetical would not, or could not, investigate and prosecute the perpetrators. Consequently, the ICC would be precluded from participating in those cases. UNOCIPIS, on the other hand, would be able to complement the ongoing cases and/or take the lead if necessary.<sup>137</sup>

5. Additional Advantages. UNOCIPIS has a number of additional advantages over the ICC in this scenario. First, UNOCIPIS could act as a central and coordinating element for the multiple investigations and prosecutions being conducted throughout the various Member States. The CIP could act as a liaison between the various CNPs or national authorities and facilitate communication and information sharing to support each Member State's case.<sup>138</sup> Second, UNOCIPIS could focus on developing the connections of the broader network, while the national authorities focus on prosecuting the crimes committed within their jurisdiction.<sup>139</sup> Finally, UNOCIPIS could take a lead role if one or more of the Member States lacked the ability or



willingness to investigate the crimes and prosecute the perpetrators, thus having a capacity-building effect and ensuring that justice is served.<sup>140</sup>

This hypothetical underscores the litany of issues facing the ICC, which is currently the international community's best option to prosecute the Islamic State's members (notwithstanding its reluctance to do so).<sup>141</sup> It also illustrates how UNOCIPIS could overcome these shortfalls and serve as an extremely flexible and effective weapon to develop and combat the Islamic State's worldwide criminal network.

### Conclusion

While the international community remains united in its belief that the Islamic State represents an "unprecedented threat to international peace and security," its current efforts to combat the group remain largely disjointed, ineffective, and costly. The reason for this is two-fold.

First, the international community lacks a holistic strategy that combines all instruments of international power, resulting in an over-reliance on military force to the detriment of nearly every other element. While military force is clearly necessary, force alone cannot dismantle the Islamic State's worldwide criminal network. Consequently, the international community must broaden its strategy to include a critical, and missing, legal component.

This leads to the second issue plaguing the international community's efforts. There is no legal mechanism to effectively investigate and prosecute the Islamic State's members for their crimes. The ICC and ICTs are simply ill-equipped and inadequate to handle the Islamic State's unique challenges, resulting in the international legal

community sitting idly by while the group's members continue to commit horrific crimes worldwide with near impunity.

UNOCIPIS could help solve both problems, adding a critical legal component to the current strategy and filling the institutional gap that is preventing the international community from dispensing justice. Done right, UNOCIPIS could become an incredibly powerful weapon to combat the Islamic State's worldwide criminal network.

### Endnotes

<sup>1</sup> United Nations, "Security Council 'Unequivocally' Condemns ISIL Terrorist Attacks, Unanimously Adopting Text That Determines Extremist Group Poses 'Unprecedented' Threat," November 20, 2015, <http://www.un.org/press/en/2015/sc12132.doc.htm> (accessed March 21, 2016) (calling for Member States to "take all necessary measures, in compliance with international law, . . . to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by Isil . . . and to eradicate the safe haven they have established in Iraq and Syria."). This call to arms is too reliant on the use of military means, and too limited in geographic scope, to have a global impact on the Islamic State's worldwide criminal network. This is an endemic problem, as discussed herein, and is the genesis for the model proposed in this paper.

<sup>2</sup> Although known by many names, the "Islamic State" will be used throughout this paper because it is the "shortened version of the English translation of what [the group] calls itself." Elizabeth Jensen, "Islamic State, ISIS, ISIL or Daesh?" *National Public Radio Ombudsman*, November 23, 2015, <http://www.npr.org/sections/ombudsman/2015/11/18/456507131/islamic-state-isis-isil-or-daesh> (accessed March 21, 2016). It is also more indicative of the group's global status, as opposed to Daesh (an acronym created out of the group's full Arabic name, "al-Dawla al-Islamiya fi al-Iraq wa al-Sham"), ISIS (Islamic State in Iraq and al-Sham), or ISIL (Islamic State in Iraq and the Levant), which are limited to specific regions of the Middle East. See *ibid.*

<sup>3</sup> Indeed, the international community has been criticized for failing to unite to combat terrorism and other forms of injustice throughout the world. See generally, Parliamentary Assembly of the Council of Europe, *2001 Ordinary Session, Official Report of Debates*, vol. IV, (Strasbourg, France: Council of Europe Publishing, 2002), 972-983. (cataloguing criticisms of the international justice system and international calls for increased cooperation and development of a framework to combat terrorism). Some argue that this lack of unity is due to the inability to precisely define "terrorism," which "undermines attempts to generate international cooperation against terrorism and can lead to unilateral and (even if unwittingly) counterproductive strategies." Anthony Richards, "Frameworks for Conceptualizing Terrorism," *Studies in Conflict & Terrorism* 37, no. 3 (February 2014): 213-236; see also Alex P. Schmid, ed., *Handbook of Terrorism Research* (London, U.K.: Routledge, 2011), 86-87. (noting that "[w]hile there are many national and regional definitions, there is no universal legal definition approved by the General Assembly of the United Nations (the one proposed by the Security

Council in Res. 1566 (2004) is non-binding, lacking legal authority in international law”). This definitional issue is largely academic; it is a difference without a distinction. See Alex, P. Schmid, “Frameworks for Conceptualising Terrorism,” *Terrorism and Political Violence* 16, no. 2 (Summer 2004): 197-198. (noting that there is no widespread international consensus on what crimes are considered terrorist acts, and that the “conceptualisation of crime varies considerably across time and cultural space,” as laws and morality vary). After all, terrorist acts are criminal acts, and most, if not all of the Islamic State’s activities constitute multiple violations of various national and international laws. See *ibid.*; see also United Nations, “Security Council ‘Unequivocally’ Condemns ISIL Terrorist Attacks.” (reaffirming that “any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed[.]”). Therefore, the international community must expand its view and see the Islamic State as more than just a terrorist organization necessitating a military response. Rather, it must be viewed as a worldwide criminal network. This would allow the international community to overcome the limitations imposed by its current military-centric approach and develop a more comprehensive strategy that includes a legal component. See Assaf Moghadam, Ronit Berger, and Polina Beliakova, “Say Terrorist, Think Insurgent: Labeling and Analyzing Contemporary Terrorist Actors,” *Perspectives on Terrorism* 8, no. 5 (October 2014): 11-14. (arguing that by viewing a threat as terrorist in nature, a government limits its responses to law enforcement and military efforts; by broadening its viewpoint, it can develop more flexible and sustainable options)

<sup>4</sup> See, e.g., Salma El Shahed, “Prosecuting ISIS poses challenge to international justice,” *Al Arabiya News*, August 28, 2014, <http://english.alarabiya.net/en/perspective/analysis/2014/08/28/Prosecution-of-ISIS-poses-challenge-to-international-justice.html> (accessed March 21, 2016) (noting that an anonymous UN official recommended establishing a separate international tribunal to overcome the political issues associated with ICC prosecution); Julian Borger, “Call for special tribunal to investigate war crimes and mass atrocities in Syria,” *The Guardian*, March 17, 2015, <http://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria> (accessed March 21, 2016) (noting the UN Commission of Inquiry’s call for referral of the Syrian conflict to the ICC); Mark Kersten, “The ICC and ISIS: Be Careful What You Wish For,” *Justice in Conflict*, June 11, 2015, <http://justiceinconflict.org/2015/06/11/the-icc-and-isis-be-careful-what-you-wish-for/> (accessed March 21, 2016) (insisting that an ICC investigation of ISIS was warranted and that the Court was the best venue for bringing ISIS combatants to justice); John A. Bellinger III, “Make ISIS’ Leaders Face Justice,” *New York Times*, April 2, 2015, [http://www.nytimes.com/2015/04/03/opinion/make-isis-leaders-face-justice.html?\\_r=1](http://www.nytimes.com/2015/04/03/opinion/make-isis-leaders-face-justice.html?_r=1) (accessed March 21, 2016) (declaring its support for a UN Security Council referral of the Islamic State to the ICC); United States Commission on International Religious Freedom, “USCIRF Statement on the Designation of Victims of Genocide, Persecution, and Crimes Against Humanity in Syria and Iraq,” December 7, 2015, <http://www.uscifr.gov/news-room/press-releases/uscifr-statement-the-designation-victims-genocide-persecution-and-crimes> (accessed March 21, 2016) (recommending that the ICC investigate and prosecute Islamic State members in Iraq and Syria); Luigi Prospero, “Prosecuting ISIS Under International Law: Pros And Cons Of Existing International Justice Mechanisms,” [http://www.academia.edu/12258595/Prosecuting\\_ISIS\\_Under\\_International\\_Law\\_Pros\\_And\\_Cons\\_Of\\_Existing\\_International\\_Justice\\_Mechanisms](http://www.academia.edu/12258595/Prosecuting_ISIS_Under_International_Law_Pros_And_Cons_Of_Existing_International_Justice_Mechanisms) (accessed March 21, 2016) (noting that the former Chief Prosecutor of the UN-backed criminal tribunals proposed the establishment of an *ad hoc* tribunal); Beth Van Schaak, “Options for Accountability in Syria,” *Just Security*, May 22, 2014, <https://www.justsecurity.org/10736/options-accountability-syria/> (accessed March 21, 2016) (calling for an *ad hoc* tribunal for the Syrian situation)

<sup>5</sup> Indeed, some even predict that the Islamic State will “double-down” in 2016 with “increased attacks in Russia, Europe, Turkey and possibly Lebanon and Syria.” Daniel Benjamin and Steven Simon, “The Global Terror Threat in 2016: A Forecast,” *CTC Sentinel* 9, no. 1 (January 2016): 2, available at <https://www.ctc.usma.edu/posts/the-global-terror-threat-in-2016-a-forecast> (accessed March 21, 2016)

<sup>6</sup> UNOCIPIS, like military action, is not a panacea; rather, it should be considered as an integral part of a broader and more comprehensive strategy to defeat the Islamic State.

<sup>7</sup> Cole Bunzel, “From Paper State to Caliphate: The Ideology of the Islamic State,” *The Brookings Project on U.S. Relations with the Islamic World* 19 (March 2015): 10, available at <http://www.brookings.edu/~media/research/files/papers/2015/03/ideology-of-islamic-state-bunzel/the-ideology-of-the-islamic-state.pdf> (accessed March 21, 2016) (noting that Abu Bakr al-Baghdadi defined “offensive jihad” as “going after the apostate unbelievers by attacking [them] in their home territory, in order to make God’s word most high and until there is no persecution.”); Karen Yourish, Derek Watkins and Tom Giratikanon, “Recent Attacks Demonstrate Islamic State’s Ability to Both Inspire and Coordinate Terror,” *New York Times*, January 14, 2016, [http://www.nytimes.com/interactive/2015/06/17/world/middleeast/map-isis-attacks-around-the-world.html?\\_r=0](http://www.nytimes.com/interactive/2015/06/17/world/middleeast/map-isis-attacks-around-the-world.html?_r=0) (accessed March 21, 2016) (stating that one of the Islamic State’s goals is to expand the organization and use affiliates to “create chaos in the wider world” and “incite a global apocalyptic war”)

<sup>8</sup> Jose Pagliery, “Inside the \$2 billion ISIS war machine,” *CNN Money*, December 11, 2015, <http://money.cnn.com/2015/12/06/news/isis-funding/index.html> (accessed March 21, 2016) (noting that the Islamic State: makes \$500,000,000 per year from hijacked oil wells and refineries, and more than \$360,000,000 a year in taxes; collected \$20,000,000 to \$45,000,000 from kidnappings in 2014; and stole \$500,000,000 to \$1,000,000,000 from banks in its new territories); see also CNN World +, “ISIS Fast Facts,” January 28, 2016, <http://www.cnn.com/2014/08/08/world/isis-fast-facts/> (accessed March 21, 2016) (discussing the Islamic State’s strategy for revenue); Zachary Laub, “The Islamic State,” *Council on Foreign Relations*, March 3, 2016, <http://www.cfr.org/iraq/islamic-state/p14811> (accessed March 21, 2016) (noting that the Islamic State nets an estimated \$1,000,000 to \$3,000,000 per day in oil sales and \$8,000,000 per month in extortion); see also Charles Lister, “Profiling the Islamic State,” (Brookings Institution 2014): 2, 4-5, available at [http://www.brookings.edu/~media/Research/Files/Reports/2014/11/profiling%20islamic%20state%20lister/en\\_web\\_lister.pdf](http://www.brookings.edu/~media/Research/Files/Reports/2014/11/profiling%20islamic%20state%20lister/en_web_lister.pdf) (accessed March 21, 2016) (noting that the Islamic State was earning approximately \$2,000,000 per day and had a net worth of close to \$2,000,000,000 by September 2014, making it the “wealthiest terrorist organization in the world”)

<sup>9</sup> Laub, “The Islamic State”; see also Lisa Curtis, Luke Coffey, David Inserra, Daniel Kochis, Walter Lohman, Joshua Meservey, James Phillips and Robin Simcox, “Combatting the ISIS Foreign Fighter Pipeline: A Global Approach,” *The Heritage Foundation Special Report on Terrorism*, January 6, 2016, <http://www.heritage.org/research/reports/2016/01/combatting-the-isis-foreign-fighter-pipeline-a-global-approach> (accessed March 21, 2016) (noting that the Islamic State has “established a presence in at least 19 countries”)

<sup>10</sup> Laub, “The Islamic State” (noting that various militant groups have sworn allegiance to the Islamic State); see also Curtis, et al., “Combatting the ISIS Foreign Fighter Pipeline: A Global Approach.” (describing the Islamic State’s global presence)

<sup>11</sup> David Gartenstein-Ross, “How Many Fighters Does the Islamic State Really Have?” *War on the Rocks*, February 9, 2015, <http://warontherocks.com/2015/02/how-many-fighters-does-the-islamic-state-really-have/?singlepage=1> (accessed March 21, 2016) (noting a range of estimates provided by the Central Intelligence Agency, the Syrian Observatory for Human Rights, the Russian General Staff, Baghdad-based security expert Hisham al-Hashimi, and Kurdish Chief of Staff Fuad Hussein); Curtis, et al., “Combatting the ISIS Foreign Fighter Pipeline: A Global Approach.” (noting that a 2015 National Counterterrorism Center report found that there were more than 20,000 foreign fighters in Syria emanating from over 90 countries, 32 of which accounted for 100 foreign fighters or more); Institute for Economics and Peace, “Global Terrorism Index 2015,” (2015): 45-48, available at <http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf> (accessed March 21, 2016) (stating that “[o]verall estimates from UN and government reports indicate that nearly 30,000 foreign individuals have travelled to Iraq and Syria from roughly 100 countries.”); Chas Danner, “Report: ISIS Has Recruited as Many as 30,000 Foreigners in the Past Year,” *Daily Intelligencer*, September 27, 2015, <http://nymag.com/daily/intelligencer/2015/09/#> (accessed March 21, 2016) (reporting that the Islamic State recruited 30,000 foreign fighters from over 100 countries, doubling the number of recruits from the previous year)

<sup>12</sup> Danner, “Report: ISIS Has Recruited as Many as 30,000 Foreigners in the Past Year.”

<sup>13</sup> Laub, “The Islamic State.”; see also Brian Michael Jenkins, “Stray Dogs and Virtual Armies, Radicalization and Recruitment to Jihadist Terrorism in the United States Since 9/11,” (Rand Corporation 2011): 12. (noting that the return of foreign fighters who received terrorist training and experience abroad is one of the United States’ greatest concerns and citing the case of Faisal Shazad’s attempt to bomb Times Square in 2010 as an example)

<sup>14</sup> See Laub, “The Islamic State.” (noting that the Islamic State’s ambitions “have no geographic limits,” and that a series of attacks in 2015 “highlighted [the group’s] ability to strike beyond its territorial base.”); see, e.g., Lisa Lundquist, “The Islamic State’s global reach,” *Threat Matrix*, blog entry posted September 5, 2014, <http://www.longwarjournal.org/archives/2014/09/the-islamic-state-and-the-sham.php> (accessed March 21, 2016) (cataloging known or suspected Islamic State activity in 33 countries outside Iraq and Syria since 2013); Yourish, et al., “Recent Attacks Demonstrate Islamic State’s Ability to Both Inspire and Coordinate Terror” (charting attacks linked to, or inspired by, the Islamic State in 2015); Stephen Collinson, “Obama unyielding on ISIS as criticism mounts after Paris attacks,” *CNN Politics*, November 17, 2015, <http://www.cnn.com/2015/11/16/politics/obama-isis-strategy-paris-attacks/> (accessed March 21, 2016) (noting that President Obama’s critics “believe ISIS has morphed from a regional threat into a ravenous extremist group now spreading its tentacles through Libya, Egypt, Pakistan, Afghanistan and elsewhere and . . . is pulling off mass-casualty attacks on Western cities”)

<sup>15</sup> Laub, “The Islamic State.”

<sup>16</sup> Office of the Prosecutor, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS,” August 4, 2015, [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx) (accessed March 21, 2016)

<sup>17</sup> Institute for Economics and Peace, “Global Terrorism Index 2015,” 38-42. (noting that “battlefield deaths” are distinct from terrorist related deaths because the former includes military and civilian casualties; the latter only includes civilian casualties)

<sup>18</sup> United Nations Assistance Mission for Iraq (UNAMI) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), “Report on the Protection of Civilians in the Armed Conflict in Iraq,” (Baghdad, Iraq: UNHCR/OHCHR, January 5, 2016): i-ii, available at <http://www.ohchr.org/Documents/Countries/IQ/UNAMIRreport1May31October2015.pdf> (accessed March 21, 2016)

<sup>19</sup> CNN World +, “ISIS Fast Facts.”; see also Institute for Economics and Peace, “Global Terrorism Index 2015,” 20. (noting that the Islamic State kidnapped 101 people in 2014, targeting private citizens 44% of the time, police 25% of the time, and journalists 15% of the time)

<sup>20</sup> CNN World +, “ISIS Fast Facts.”

<sup>21</sup> Supra note 1; see also David Osborne, “Isis: United Nations Security Council resolution planned by world powers to declare war against group in Iraq and Syria,” *Independent*, November 19, 2015, <http://www.independent.co.uk/news/world/politics/isis-world-powers-plan-united-nations-security-council-resolution-to-declare-war-against-group-in-a6741181.html> (accessed March 21, 2016) (describing the UN’s resolution as a declaration of war designed to “eradicate’ jihadists in Iraq and Syria”)

<sup>22</sup> See supra notes 8, 12, and 17 (proving that despite the international community’s best efforts, the Islamic State continues to be the most lethal and well-funded terrorist organization in the world, with access to a steady flow of fighters); see also Nick Paton Walsh, “The inconvenient truth: There’s no easy military answer to war on ISIS,” *CNN Opinion +*, November 18, 2015, <http://www.cnn.com/2015/11/17/opinions/isis-no-military-answer-paton-walsh/index.html> (accessed March 21, 2016) (arguing that there is no “simple military solution to Syria”); David Welna, “After a Year Of Bombing ISIS, U.S. Campaign Shows Just Limited Gains,” *NPR*, August 7, 2015, <http://www.npr.org/sections/parallels/2015/08/07/430151358/after-a-year-of-bombing-isis-u-s-campaign-shows-just-limited-gains> (accessed March 21, 2016) (noting the limited effectiveness of the U.S. bombing campaign)

<sup>23</sup> United Nations, “Security Council ‘Unequivocally’ Condemns ISIL Terrorist Attacks.”; see also Amanda Barrow, “Summary of UN Efforts in Syria,” *Women’s International League for Peace and Freedom*, <http://www.peacewomen.org/e-news/article/summary-un-efforts-syria> (accessed March 21, 2016) (bemoaning the UN’s efforts and calling for more decisive action, including imposing an arms embargo, implementing targeted sanctions against Syrian leaders, and referring the situation to the ICC). The “P5” are the five permanent members of the UN Security Council, including: China, France, the Russian Federation, the United Kingdom, and the United States. United Nations Security Council, “Current Members,” <http://www.un.org/en/sc/members/> (accessed March 21, 2016)

<sup>24</sup> President Barack Obama, “Statement by the President on ISIL,” *The White House*, September 10, 2014, <https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1> (accessed March 21, 2016) (outlining the Obama administration’s “comprehensive and sustained counterterrorism strategy” to “degrade” and “ultimately destroy” the Islamic State)

<sup>25</sup> United Nations, “Member States of the United Nations,” <http://www.un.org/en/members/> (accessed March 21, 2016) (noting that there are 193 members of the United Nations); see, e.g., Peter Baker, “A Coalition in Which Some Do More Than Others to Fight ISIS,” *New York Times*, November 29, 2015, [http://www.nytimes.com/2015/11/30/us/politics/a-coalition-in-which-some-do-more-than-others-to-fight-isis.html?\\_r=0](http://www.nytimes.com/2015/11/30/us/politics/a-coalition-in-which-some-do-more-than-others-to-fight-isis.html?_r=0) (accessed March 21, 2016) (quoting President Obama’s former State Department Counterterrorism Coordinator, Daniel Benjamin, who said “I don’t know why the White House has put as much emphasis on the coalition as it has, because it’s been fairly transparent for a long time that the overwhelming majority of those nations have sent in their \$25 contributions and not done much more.”); U.S. Department of Defense, “Operation Inherent Resolve, Targeted Operations Against ISIL Terrorists,” [http://www.defense.gov/News/Special-Reports/0814\\_Inherent-Resolve](http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve) (accessed March 21, 2016) (noting that the U.S. conducted 8,076 of the 10,545 total coalition air strikes in Iraq and Syria, or nearly 77% of the total missions)

<sup>26</sup> David Hudson, “President Obama: ‘We Will Degrade and Ultimately Destroy ISIL,’” *The White House*, blog entry posted on September 10, 2014, <https://www.whitehouse.gov/blog/2014/09/10/president-obama-we-will-degrade-and-ultimately-destroy-isil> (accessed March 21, 2016) (outlining the coalition’s four-point strategy, including a systematic campaign of airstrikes, increased support to ground forces, drawing on counterterrorism capabilities, and providing humanitarian assistance to displaced civilians); see also Blaise Misztal and Jessica Michek, “An Overview of ISIS Threat and U.S. Response,” *Bipartisan Policy Center*, September 25, 2014, <http://bipartisanpolicy.org/blog/overview-isis-threat-and-us-response/> (accessed March 21, 2016) (providing an overview of the American strategy); Laub, “The Islamic State.” (noting that the U.S. has deployed nearly 3,000 uniformed personnel in Iraq, armed the peshmerga, and led airstrikes against Islamic State forces)

<sup>27</sup> U.S. Department of Defense, “Operation Inherent Resolve, Targeted Operations Against ISIL Terrorists.”

<sup>28</sup> *Ibid.*

<sup>29</sup> Kersten, “The ICC and ISIS: Be Careful What You Wish For.” (noting that prosecuting the Islamic State’s members would be a “great victory” as opposed to “venturing into additional and legally questionable military forays or expanding an already nefarious drone programme.”); see also Former Chief Prosecutor for the International Criminal Court Luis Moreno-Ocampo, interview by author, Cambridge, MA, January 18, 2016. (noting that a more comprehensive strategy, including a legal component, is necessary to combat the Islamic State’s worldwide criminal network)

<sup>30</sup> See, e.g., President Barack Obama, “Remarks at National Defense University,” public speech, National Defense University, Fort McNair, D.C., May 23, 2013, <https://www.gpo.gov/fdsys/pkg/DCPD-201300361/pdf/DCPD-201300361.pdf> (accessed March 21, 2016) (highlighting the “scores” of successful prosecutions in Article III courts, including Umar Farouk Abdulmutallab, Faisal Shahzad, and Richard Reid); The White House Office of the Press Secretary, “Remarks of John O. Brennan, ‘Strengthening our Security by Adhering to our Values and Laws,’” September 16, 2011, <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (accessed March 21, 2016) (Assistant to the President for Homeland Security and Counterterrorism stating that “Article III courts are not only our single most effective tool for prosecuting, convicting, and

sentencing suspected terrorists—they are a proven tool for gathering intelligence and preventing attacks. For these reasons, credible experts from across the political spectrum continue to demand that our Article III courts remain an unrestrained tool in our counterterrorism toolbox[,] . . . and “a wholesale refusal to utilize our federal courts—would undermine our values and security.”); United States Department of Justice, “Attorney General Eric Holder Speaks at Northwestern University School of Law,” March 5, 2012, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> (accessed March 21, 2016) (noting how “proud” the Obama administration was of the Department of Justice’s efforts to work with its “colleagues across the national security community . . . to prosecute suspected terrorists, and to identify and implement legal tools necessary to keep the American people safe.”)

<sup>31</sup> See, e.g., Steve Coll, “The Unblinking Stare,” *The New Yorker*, November 24, 2014, <http://www.newyorker.com/magazine/2014/11/24/unblinking-stare> (accessed March 21, 2016) (discussing the negative ramifications of U.S. drone strikes); Owen Bowcott, “Drone strikes threaten 50 years of international law, says UN rapporteur,” *The Guardian*, June 21, 2012, <http://www.theguardian.com/world/2012/jun/21/drone-strikes-international-law-un> (noting that the UN Special Rapporteur on extrajudicial killings and summary or arbitrary executions stated that the United States’ use of drones to carry out targeted killings challenges the international legal system and encourages other states to “flout long-established human rights standards”); Common Dreams, “Time to End the ‘Conspiracy of Silence Over Drone Attacks’: UN Investigator,” June 21, 2012, <http://www.commondreams.org/news/2012/06/21/time-end-conspiracy-silence-over-drone-attacks-un-investigator> (accessed March 21, 2016) (noting Pakistan’s UN Ambassador’s call for legal action to halt the United States’ “totally counterproductive [drone] attacks”); UC Davis Center for the Studies of Human Rights in the Americas, “Calls for the Closure of Guantanamo,” *Hemispheric Institute on the Americas*, <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/calls-for-the-closure-of-guantanamo> (accessed March 21, 2016) (collecting testimonials from the international community condemning operations at Guantanamo Bay and calling for its closure); Cassandra Vinograd and Mushtaq Yusufzai, “ISIS and Guantanamo Bay: Chain of Command Casts Spotlight on Re-engagement,” *NBC News*, February 11, 2015, <http://www.nbcnews.com/storyline/isis-terror/isis-guantanamo-bay-chain-command-casts-spotlight-re-engagement-n304241> (accessed March 21, 2016) (noting that the Islamic State “has seized on the propaganda value of Guantanamo Bay,” using the imagery of captives in orange jumpsuits in their propaganda videos and quoting Wells Dixon as saying “. . . Guantanamo serves as a propaganda windfall for ISIS.”); President Barack Obama, “Remarks by President Obama and Prime Minister Trudeau of Canada After Bilateral Meeting,” public speech, Bilateral Meeting at the Philippine International Convention Center, Manila, Philippines, November 19, 2015, <https://www.whitehouse.gov/the-press-office/2015/11/19/remarks-president-obama-and-prime-minister-trudeau-canada-after> (accessed March 21, 2016) (stating that “Guantanamo has been an enormous recruitment tool for organizations like ISIL[,]” and “[i]t’s part of how [the Islamic State] rationalize[s] and justif[ies] [its] demented, sick perpetration of violence on innocent people.”). The cost to operate the Guantanamo Bay detention facility for fiscal year 2015 was approximately \$445,000,000. U.S. Department of Defense, “Plan for Closing the Guantanamo Bay Detention Facility,” February 23, 2016, 7. [http://www.defense.gov/Portals/1/Documents/pubs/GTMO\\_Closure\\_Plan\\_0216.pdf](http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf) (accessed March 21, 2016)

<sup>32</sup> See *supra* notes 8 and 17 (finding that the Islamic State is the most well-funded and lethal terrorist organization in the world)



<sup>33</sup> Supra note 4 (describing some of the international community's calls for prosecution of the Islamic State)

<sup>34</sup> Ibid.

<sup>35</sup> Generally speaking, the international criminal justice system suffers from three main issues: (1) it lacks universal support due in large part to sovereignty concerns; (2) it lacks an international enforcement mechanism; and (3) the primary institutions for prosecuting crimes (the ICC and independent or *ad hoc* tribunals) suffer from a host of procedural, substantive, and systemic flaws. See., e.g., Council on Foreign Relations, "The Global Human Rights Regime," June 19, 2013, <http://www.cfr.org/human-rights/global-human-rights-regime/p27450> (accessed March 21, 2016) (noting that: western countries "resist international rights cooperation from a concern that it might harm business, infringe on autonomy, or limit freedom of speech; "[n]egligence of international obligations is difficult to penalize;" many nations are incapable of protecting rights within their borders; and "[t]he utility of accountability measures, such as sanctions or force, . . ." is debatable); Kyle T. Jones, "The Many Troubles of the ICC," *The National Interest*, December 6, 2012, <http://nationalinterest.org/commentary/the-many-troubles-the-icc-7822> (accessed March 21, 2016) (outlining the general issues associated with the expense, delay, and inefficiencies of the international criminal justice system). A more fulsome discussion of these problems exceeds the scope of this paper, which is dedicated to analyzing the current gap in the international criminal justice system that prevents the international community from effectively dealing with the Islamic State.

<sup>36</sup> International Criminal Court, "About the Court," [https://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx](https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx) (accessed March 21, 2016). For a complete listing of all 124 States Parties, see International Criminal Court, "The States Parties to the Rome Statute," [https://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (accessed March 21, 2016). Ironically, the ICC and ICTs are often criticized for creating an "impunity gap," not eliminating it. An "impunity gap" is created when an international court or tribunal only prosecutes high-level leaders for the most serious crimes, ignoring lower-level perpetrators who commit "lesser" crimes, thus failing to bring justice to a large number of victims. See International Center for Transitional Justice, "Criminal Justice," <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> (accessed March 21, 2016)

<sup>37</sup> International Criminal Court, "Frequently Asked Questions," [https://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/16.aspx](https://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/16.aspx) (March 21, 2016). The Court will also have jurisdiction over the crime of aggression in 2017, once all of the Rome Statute Review Conference conditions are fulfilled. International Criminal Court, "The ICC at a Glance," <https://www.icc-cpi.int/iccdocs/PIDS/publications/ICCAAtAGlanceEng.pdf> (accessed March 21, 2016)

<sup>38</sup> International Criminal Court, "The ICC at a Glance."

<sup>39</sup> Ibid.

<sup>40</sup> Ibid. The principle of complementarity "recognizes that States have the first responsibility and right to prosecute international crimes." International Criminal Court, "Informal Expert Paper: The Principle of Complementarity in Practice," (2003): 3, available at <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>

(accessed March 21, 2016). In contrast, a “primacy regime creates a hierarchy in which domestic jurisdictions retain the ability to prosecute perpetrators, but which preserves an ‘inherent supremacy’ for the international tribunal.” Jennifer Trahan, “Is Complementarity the Right Approach for the International Criminal Court’s Crime of Aggression? Considering the Problem of ‘Overzealous’ National Prosecutions,” *Cornell International Law Journal* 45 (2012): 574. For example, the relationship between the national courts and the International Criminal Tribunal for the Former Yugoslavia (ICTY) is one of “primacy,” meaning the latter trumped national court proceedings and had the first option to prosecute. *Ibid.*, 571, 573. The Security Council chose to create the ICTY by resolution to overcome concerns that it would not have the time or ability to negotiate a multilateral treaty. *Ibid.*, 573-574. It was able to do so because Chapter VII of the UN Charter gives the Security Council “preeminent authority to take measures to restore ‘international peace and security.’” *Ibid.* (noting that Chapter VII “enables the tribunal to issue directly binding international legal orders and requests to States, irrespective of their consent.”)

<sup>41</sup> International Criminal Court, “ICC at a Glance,” [https://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx](https://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx) (accessed March 21, 2016). For example, a proceeding could be deemed disingenuous if it was commenced solely to shield the accused from criminal responsibility. *Ibid.*

<sup>42</sup> *Ibid.* The Rome Statute does not define “gravity.” However, the Chief Prosecutor has assessed the gravity of a situation by considering: the scale, severity and systematicity of the crime; the manner in which it was committed; and the impact of the crime on victims. Susana SaCouto and Katherine A. Cleary, “The Gravity Threshold of the International Criminal Court,” *American Journal of International Law* 23, no. 5 (2008): 808-810. The practical effect of the gravity requirement is that many offenders go unprosecuted because their crimes do not meet the threshold, thus creating an impunity gap. See *supra* note 36 (noting the intent of the ICC)

<sup>43</sup> International Criminal Court, “The ICC at a Glance.”

<sup>44</sup> International Criminal Court, “About the Court.”

<sup>45</sup> International Criminal Court, “Assembly of States Parties Report on the Committee on Budget and Finance on the work of its Twenty-Fifth session,” November 9, 2015, 11. [https://www.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-15-ENG.pdf](https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-15-ENG.pdf) (accessed March 21, 2016) (noting that this represented an increase of €4,100,000 (\$4,586,834) or 10.4% over the 2015 budget); see also European Parliament, “ICC requests 17% increase for growing workload,” September 18, 2015, 1. [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/droi/dv/502\\_analysisiccbudget\\_/502\\_analysisiccbudget\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/droi/dv/502_analysisiccbudget_/502_analysisiccbudget_en.pdf) (accessed March 21, 2016) (noting that States Parties’ annual contributions are based on their gross national income). The States Parties’ assessed contributions for 2015 ranged from \$5,173 for Vanuatu to \$144,418,577 for Japan. International Criminal Court, “Assembly of States Parties Report on the Committee on Budget and Finance on the work of its Twenty-Fifth session,” 29-30.

<sup>46</sup> International Criminal Court, “Situations and Cases,” [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (accessed March 21, 2016). To date, four States Parties have referred situations occurring on their territories to the ICC, including Mali, Uganda, the Democratic Republic of the Congo, and the Central African Republic. In addition, the Security Council has referred the situations in Sudan and Libya, neither of which are parties to the Rome Statute. Finally, the Pre-Trial Chamber has authorized

the Prosecutor to open investigations *proprio motu* into the situations in Kenya, the Ivory Coast, and Georgia. Ibid.

<sup>47</sup> Office of the Prosecutor, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS.”

<sup>48</sup> Ibid. (noting that the Islamic State “is a military and political organisation primarily led by nationals of Iraq and Syria[,]” thus precluding the ICC from investigating and prosecuting those most responsible within the leadership of the organization due to a lack of personal jurisdiction)

<sup>49</sup> See supra note 39 (explaining the exceptions to the ICC’s jurisdictional limitations)

<sup>50</sup> El Shahed, “Prosecuting ISIS poses challenge to international justice.” (noting that “[b]y recognizing and accepting the jurisdiction of the ICC, states allow the ‘ICC Prosecutor to investigate for all crimes against humanity and war crimes potentially committed on the territory of the state, by any actor, during a specified time period[.]’”). In both cases, the governments of Iraq and Syria have allegedly engaged in crimes that would fall under the ICC’s subject matter jurisdiction. See, e.g., Stephanie Nebehay, “UN: ICC Should Prosecute ISIS Fighters for War Crimes,” *Haaretz*, March 19, 2015, <http://www.haaretz.com/middle-east-news/1.647771> (accessed March 21, 2016) (noting that “Iraqi government forces and affiliated militias ‘may have committed some war crimes’ while battling the insurgency”); Amnesty International, “‘Death Everywhere’ – War Crimes and Human Rights Abuses in Aleppo, Syria,” (London, U.K.: Amnesty International, Ltd, May 5, 2015): 6, available at <https://www.amnesty.org/en/documents/mde24/1370/2015/en/> (accessed March 21, 2016) (reporting that the Syrian government has subjected Syrian civilians to war crimes and crimes against humanity)

<sup>51</sup> #globalJUSTICE, “Veto of justice for Syria highlights need for Security Council reform,” *Coalition for the ICC*, May 28, 2014, <https://cicqglobaljustice.wordpress.com/2014/05/28/veto-of-justice-for-syria-highlights-need-for-security-council-reform/> (accessed March 21, 2016) (noting that “one of the permanent five members—the US, Russia, the United Kingdom, France and China—can prevent an otherwise united [Security] Council from acting.”)

<sup>52</sup> See Anna Marie Brennan, “Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles,” *American Society of International Law* 19, no. 21 (September 17, 2015), <https://www.asil.org/insights/volume/19/issue/21/prosecuting-isil-international-criminal-court-challenges-and-obstacles> (accessed March 21, 2016)

<sup>53</sup> United Nations, “Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution,” May 22, 2014, <http://www.un.org/press/en/2014/sc11407.doc.htm> (accessed March 21, 2016) (noting that Russia’s Vitaly Churkin pointed out that “the draft resolution proposed by ‘Western colleagues’ did not include a list of terrorist organizations, such as the Islamic Front, which led one to wonder whether there was an attempt to change the regime by force.”)

<sup>54</sup> Stan Carsten, “Why the ICC Should be Cautious to Use the Islamic State to Get Out of Africa: Part I,” *European Journal of International Law*, blog entry posted December 3, 2014, <http://www.ejiltalk.org/why-the-icc-should-be-cautious-to-use-the-islamic-state-to-get-out-of-africa-part-1/> (accessed March 21, 2016) (questioning whether the Islamic State, as an organization, could be a target for prosecution given its lack of statehood); see also El Shahed,

“Prosecuting ISIS poses challenge to international justice.” (noting the lack of clarity over the Islamic State’s “international legal personality”)

<sup>55</sup> Ibid.; see, e.g., United Nations, “Security Council Resolution 2178,” September 24, 2014, 4. [http://www.un.org/en/sc/ctc/docs/2015/SCR%202178\\_2014\\_EN.pdf](http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf) (accessed March 21, 2016) (calling for prosecution of terrorist groups including the Islamic State); United Nations, “Security Council Resolution 2170,” August 15, 2014, 1-5. [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2170\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2170(2014)) (accessed March 21, 2016) (deploring and condemning the Islamic State); United Nations General Assembly, “Human Rights Council Resolution S-22/1, 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,” September 1, 2014, 1-3. (targeting the Islamic State’s activities in Iraq)

<sup>56</sup> Stan Carsten, “Why the ICC Should be Cautious to Use the Islamic State to Get Out of Africa: Part I.” (stating that the territory conquered by the Islamic State remains part of the sovereign land belonging to Syria and Iraq, and that the Islamic State’s “claims over population and representation remain contested” because “they are grounded in the forcible submission” of the local inhabitants)

<sup>57</sup> Ibid.

<sup>58</sup> See supra note 36 (noting the Rome Statute’s three broad categories of crimes). The list of acts covered by the three categories is too voluminous to include herein, but the full text of the Rome Statute is available at [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (accessed March 21, 2016)

<sup>59</sup> See *ibid.* An inchoate offense is “[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment.” Bryan A. Garner, *Black’s Law Dictionary*, 10th ed. (St. Paul, MN: Thomson West, 2014), 1,250. Some examples include attempt, conspiracy, and solicitation. *Ibid.*

<sup>60</sup> See supra notes 36 and 59 (noting the absence of “lesser” crimes in the Rome Statute and providing examples of inchoate crimes); see also supra note 42 (discussing the ICC’s gravity, scale, and systematicity requirements)

<sup>61</sup> See, e.g., Yazda and Free Yezidi Foundation, “ISIL: Nationals of ICC states parties committing genocide and other crimes against the Yazidis,” September 2015, 1-49. <http://www.yazda.org/wp-content/uploads/2015/09/RED-ISIL-committing-genocide-against-the-Yazidis.pdf> (accessed March 21, 2016) (hereinafter, “Yazda Report”) (reporting a litany of potential crimes committed by over 5,000 to 7,500 foreign fighters in Iraq alone); United Nations, “Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters,” September 24, 2014, <http://www.un.org/press/en/2014/sc11580.doc.htm> (accessed March 21, 2016) (noting that the UN is tracking more than 13,000 foreign fighters from more than 80 Member States who have joined the Islamic State); see also supra notes 11-12 (describing various reports of the number of foreign fighters in Syria and Iraq)

<sup>62</sup> David Davenport, “International Criminal Court: 12 Years, \$1 Billion, 2 Convictions,” *Forbes*, March 12, 2014, <http://www.forbes.com/sites/daviddavenport/2014/03/12/international->

[criminal-court-12-years-1-billion-2-convictions-2/#127e19176440](#) (accessed March 21, 2016). This equates to a per conviction price of \$500,000,000. See *ibid.*

<sup>63</sup> Maryam Jamshidi, “The enforcement gap: How the International Criminal Court failed in Darfur,” *Aljazeera*, March 25, 2013, <http://www.aljazeera.com/indepth/opinion/2013/03/201332562714599159.html> (accessed March 21, 2016)

<sup>64</sup> See, e.g., Jamshidi, “The enforcement gap: How the International Criminal Court failed in Darfur.” (noting the difficulties associated with enforcing 6 indictments and 1 arrest warrant in the Darfur situation); International Criminal Court, “Situations and Cases.” (noting that of the 5 arrest warrants issued in the Uganda situation, 1 offender surrendered to authorities, 2 died, and 2 remain at large, including Joseph Kony, the Commander-in-Chief of the Lord’s Resistance Army)

<sup>65</sup> Notwithstanding these deficiencies, the ICC is currently the international community’s best and only option to prosecute the Islamic State’s members. Granted, those prosecutions would be limited to certain offenders, committing certain crimes, within certain jurisdictions. Nevertheless, even limited prosecutions would have more impact than the international community’s current, do-nothing approach.

<sup>66</sup> See *supra* note 4 (describing calls for ICTs to prosecute the Islamic State)

<sup>67</sup> See El Shahed, “Prosecuting ISIS poses challenge to international justice.” (stating that “such courts can last for more than 20 years and consume millions if not billions of dollars”)

<sup>68</sup> Lilian A. Barria and Steven D. Roper, “How Effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR,” *The International Journal of Human Rights* 9, no. 3 (September 2005): 363, available at <http://stevendroper.com/ICTY.pdf> (accessed March 21, 2016)

<sup>69</sup> United Nations International Criminal Tribunal for the Former Yugoslavia, “Key Figures of the Cases,” December 2, 2015, <http://www.icty.org/sid/24> (accessed March 21, 2016)

<sup>70</sup> This is a conservative estimate using the ICTY’s annual operating costs for its first decade extrapolated over 23 years. See David Akerson, “The Comparative Cost of Justice at the ICC,” *The View From Above*, March 26, 2012, <http://dijlp.org/1877/the-comparative-cost-of-justice-at-the-icc/> (accessed March 21, 2016) (calculating that the ICTY and ICTR spent \$695,000,000 and \$1,000,000,000, respectively, in their first decade of operations). This equates to an annual operating cost of \$69,500,000 for the ICTY and \$100,000,000 for the ICTR. See *ibid.*; see also United Nations International Criminal Tribunal for the Former Yugoslavia, “The Cost of Justice,” <http://www.icty.org/en/about/tribunal/the-cost-of-justice> (accessed March 21, 2016) (noting that “[a]s of February 2015, the ICTY employed 569 staff members representing 69 nationalities” and had an annual budget of \$179,998,600)

<sup>71</sup> United Nations Mechanism for International Criminal Tribunals, Legacy Website of the International Criminal Tribunal for Rwanda, “Key Figures and Cases,” <http://unictr.unmict.org/en/cases/key-figures-cases> (accessed March 21, 2016)

<sup>72</sup> See supra note 70 (noting that the ICTR spent approximately \$1,000,000,000 in its first decade of operations, or \$100,000,000 per year). Extrapolating this over the ICTR's 22 years of operations, the tribunal's total operating costs exceeded \$2,200,000,000. See *ibid.*

<sup>73</sup> El Shahed, "Prosecuting ISIS poses challenge to international justice." (noting that an Islamic State tribunal could last for more than 20 years and cost "millions, if not billions of dollars"); see also supra notes 69-72 (describing the ICTY's and ICTR's time span and costs)

<sup>74</sup> See supra notes 11, 13, 61, 70, and 72 (noting the existence of foreign fighters from over 100 countries and calculating the total costs for a combined tribunal based on the ICTY's and ICTR's average per conviction cost)

<sup>75</sup> See Prosperi, "Prosecuting ISIS Under International Law: Pros And Cons Of Existing International Justice Mechanisms."

<sup>76</sup> International Criminal Court, "About the Court." (noting that following the Cold War, the ICTY and ICTR were "established to try crimes committed only within a specific time-frame and during a specific conflict . . . .")

<sup>77</sup> See supra notes 9-20 (describing the Islamic State as a transnational network whose voluminous crimes transcend geographic boundaries)

<sup>78</sup> Supra note 61 (estimating 5,000-13,000 foreign fighters in Iraq and Syria alone). To be truly effective, an Islamic State tribunal would have to be able to investigate and prosecute crimes throughout the world. Limiting it to one or two geographic regions would have a minimal impact on the group's global network.

<sup>79</sup> Supra notes 69 and 71 (tallying the total number of indictments and prosecutions for the ICTY and ICTR)

<sup>80</sup> James Kraska and Brian Wilson, "Combatting Piracy in International Waters," *World Policy*, blog entry posted February 23, 2011, <http://www.worldpolicy.org/blog/2011/02/23/combatting-piracy-international-waters> (accessed March 21, 2016). The IMO has 167 Member States and is the UN's special agency for dealing with maritime matters. In 2005, the IMO urged nations to "take legislative, judicial, and law enforcement action to receive and prosecute or extradite pirates arrested by warships or other government vessels . . . .". *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> See *ibid.*; see also United Nations, "Security Council Renews Measures to Combat Piracy, Armed Robbery off Somali Coast, Unanimously Adopting Resolution 2246 (2015)," November 10, 2015, <http://www.un.org/press/en/2015/sc12113.doc.htm> (accessed March 21, 2016) (stating that "the [Security] Council stressed the need for the international community to take a comprehensive response to prevent and suppress piracy and tackle its underlying causes."); Donald R. Rothwell, "Maritime Piracy and International Law," *Crimes of War*, <http://www.crimesofwar.org/commentary/maritime-piracy-and-international-law/> (accessed March 21, 2016) (noting how the UN's conventions and resolutions deter and suppress piracy)

<sup>83</sup> European Commission, "European Public Prosecutor's Office," [http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index\\_en.htm](http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm) (accessed March 21, 2016).

Article 86 of the Lisbon Treaty provides the legal basis for the proposal and outlines the office's various competencies and procedures. EUR-Lex, "Proposal for a COUNCIL REGULATION on the establishment of the European Public Prosecutor's Office," <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52013PC0534> (accessed March 21, 2016). To read the complete text of Article 86, see The Lisbon Treaty, "Article 86," <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-v-area-of-freedom-security-and-justice/chapter-4-judicial-cooperation-in-criminal-matters/354-article-86.html> (accessed March 21, 2016)

<sup>84</sup> European Commission, "European Public Prosecutor's Office." Europol is the EU's law enforcement agency. Europol, "About Us," <https://www.europol.europa.eu/content/page/about-us> (accessed March 21, 2016). Eurojust is the EU's judicial cooperation unit, tasked with improving the cooperation and coordination of EU Member States' investigations and prosecutions. Eurojust, "Mission and Tasks," <http://www.eurojust.europa.eu/about/background/Pages/mission-tasks.aspx> (accessed March 21, 2016)

<sup>85</sup> European Commission, "European Public Prosecutor's Office."

<sup>86</sup> Ibid.

<sup>87</sup> Ibid. Each Member State will determine the exact number of delegated prosecutors, but the minimum is one.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> CICIG, "Mandate, Agreement to establish CICIG," <http://www.cicig.org/index.php?page=mandate> (accessed March 21, 2016)

<sup>91</sup> See generally, CICIG, "Agreement Between the United Nations and the State of Guatemala on the Establishment of an International Commission Against Impunity in Guatemala (CICIG)," December 12, 2006, 1-21. [http://www.cicig.org/uploads/documents/mandato/acuerdo\\_creacion\\_cicig.pdf#page=12](http://www.cicig.org/uploads/documents/mandato/acuerdo_creacion_cicig.pdf#page=12) (accessed March 21, 2016). The Commission's powers include the following:

- (a) Collect, evaluate and classify information provided by any person, official or private entity, non-governmental organization, international organization and the authorities of other States;
- (b) Promote criminal prosecutions by filing criminal complaints with the relevant authorities. The Commission may also, in accordance with this Agreement and the Code of Criminal Procedure, join a criminal proceeding as a private prosecutor (*querellante adhesivo*) with respect to all cases within its jurisdiction;
- (c) Provide technical advice to the relevant State institutions in the investigation and criminal prosecution of crimes committed by presumed members of illegal security groups and clandestine security organizations and advise State bodies in the implementation of such administrative proceedings as may be required against state officials allegedly involved in such organizations;
- (d) Report to the relevant administrative authorities the names of civil servants who in the exercise of their duties have allegedly committed administrative offences so that the proper administrative proceedings may be initiated,

especially those civil servants or public employees accused of interfering with the Commission's exercise of its functions or powers, without prejudice to any criminal proceedings that may be instituted through the Office of the Public Prosecutor;

(e) Act as an interested third party in the administrative disciplinary proceedings referred to above;

(f) Enter into and implement cooperation agreements with the Office of the Public Prosecutor, the Supreme Court, the Office of the Human Rights Ombudsman, the National Civilian Police and any other State institutions for the purposes of carrying out its mandate;

(g) Guarantee confidentiality to those who assist the Commission in discharging its functions under this article, whether as witnesses, victims, experts or collaborators;

(h) Request, under the terms of its mandate, statements, documents, reports and cooperation in general from any official or administrative authority of the State and any decentralized autonomous or semi-autonomous State entity, and such officials or authorities are obligated to comply with such request without delay;

(i) Request the Office of the Public Prosecutor and the Government to adopt measures necessary to ensure the safety of witnesses, victims and all those who assist in its investigations, offer its good offices and advice to the relevant State authorities with respect to the adoption of such measures, and monitor their implementation;

(j) Request and supervise an investigation team made up of national and foreign professionals of proven competence and moral integrity, as well as such administrative staff as is required to accomplish its tasks;

(k) Take all such measures it may deem necessary for the discharge of its mandate, subject to and in accordance with the provisions of the Guatemalan Constitution; and

(l) Publish general and thematic reports on its activities and the result thereof, including recommendations pursuant to its mandate[.]

Ibid., 14-16.

<sup>92</sup> CICIG, "About CICIG," <http://www.cicig.org/index.php?page=about> (accessed March 21, 2016)

<sup>93</sup> CICIG, "Mandate, Agreement to establish CICIG."

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> For example, the model proposed does not address the intricate details related to staffing, case management, or other ancillary details required to create the office and carry out its mandate.

<sup>97</sup> See supra notes 36 and 40 (noting that the Rome Treaty lacks unanimity and describing the Security Council's rationale for creating the ICTY by resolution)

<sup>98</sup> Supra notes 35, 40-42, and 63-65 (discussing primacy and the issues of sovereignty, complementarity, and enforceability)



<sup>99</sup> Supra notes 1, 3, 22-25, and 31 (discussing the international community's condemnation of the Islamic State, the lack of action and disunity of its fight against the group, and the impact of unilateral operations)

<sup>100</sup> The office's composition and organizational structure should be determined by the Chief International Prosecutor after the office has been established.

<sup>101</sup> See supra notes 83 and 87-89 (describing the EPPO's decentralized structure)

<sup>102</sup> See supra notes 85-89, 92-93, and 95 (discussing how the EPPO and the CICIG operate independently from the UN, but within the national structures of the Member States)

<sup>103</sup> See supra notes 87-89 (describing the EPPO's structure)

<sup>104</sup> See supra notes 90-92 (describing the CICIG's structure and listing its powers)

<sup>105</sup> See supra notes 69-72 (discussing the ICC's and ICTY's staffing and budgeting issues)

<sup>106</sup> See supra note 86 (listing the EPPO's advantages)

<sup>107</sup> See supra notes 40-41, 87-89, 92-93, and 95 (explaining the doctrine of primacy; noting how the EPPO and the CICIG operate within, and complementary to, the national systems; describing how the CICIG's prosecutors can play a complementary role in complex cases; and noting the capacity-building effect of the CICIG)

<sup>108</sup> See supra notes 87-89 and 92-93 (explaining how the EPPO's and the CICIG's prosecutors work with national authorities)

<sup>109</sup> See supra notes 84-85 (noting the current limitations on EU organizations to investigate and prosecute cross-border crimes)

<sup>110</sup> See supra notes 83-85 and 93-95 (discussing the EPPO's and CICIG's missions)

<sup>111</sup> Supra notes 94-95 (outlining the CICIG's goals)

<sup>112</sup> Supra note 91 (noting similar powers of the CICIG pursuant to Article 3(1)(c))

<sup>113</sup> Supra note 91 (noting similar powers of the CICIG pursuant to Article 3(1)(b))

<sup>114</sup> Supra note 91 (noting similar powers of the CICIG pursuant to Article 3(1)(f))

<sup>115</sup> Supra note 91 (noting similar powers of the CICIG pursuant to Article 3(1)(f))

<sup>116</sup> Supra note 91 (noting similar powers of the CICIG pursuant to Article 3(1)(h))

<sup>117</sup> Supra note 91 (noting similar powers of the CICIG pursuant to Article 3(1)(j))

<sup>118</sup> Supra note 91 (noting similar powers of the CICIG pursuant to Article 3(1)(k))

<sup>119</sup> Supra note 91 (noting similar powers of the CICIG pursuant to Article 3(1)(l))

<sup>120</sup> See supra notes 87-89, 92-93 (discussing the ways in which the EPPO and the CICIG operate in accordance with Member States' laws, rules, and procedures)

<sup>121</sup> See supra note 89 (noting that the EPPO's investigations are subject to review by courts of competent jurisdiction)

<sup>122</sup> See supra notes 49-60 (discussing the ICC's technical limitations)

<sup>123</sup> See supra notes 42 and 58-60 (discussing the impunity gap and the need to prosecute all offenders and all crimes, not just high level leaders who commit the gravest crimes)

<sup>124</sup> Supra notes 44-45 (explaining that the ICC is predominantly funded by States Parties' yearly contributions based on their gross income)

<sup>125</sup> See supra notes 87, 92-93 and 95 (noting that the CICIG's structure has significantly less personnel than the EPPO's structure, which requires a chief prosecutor and delegated prosecutors in each member state)

<sup>126</sup> See supra notes 27-28, 31, 45, 70 and 72 (displaying the annual budgets and operating costs for the associated entities)

<sup>127</sup> Supra note 45 (reflecting a 2015 assessed contribution range for States Parties of \$5,173 for Vanuatu to \$144,418,577 for Japan)

<sup>128</sup> This hypothetical is loosely based on the terrorist attack that took place in San Bernardino, California on December 2, 2015. The details have been changed to highlight the panoply of issues faced by the ICC, which is the only international institution currently capable of conducting limited investigations and prosecutions of the Islamic State, particularly since no ICTs have been established.

<sup>129</sup> Supra note 43 (discussing the three ways in which the ICC can open an investigation or prosecution)

<sup>130</sup> Supra notes 54-57 (explaining the problems associated with group-based definitions)

<sup>131</sup> Supra notes 47-48 (explaining that the ICC rejected the Islamic State referral due to jurisdictional issues)

<sup>132</sup> See supra note 37 (referring to a complete listing of States Parties to the Rome Treaty)

<sup>133</sup> Supra notes 38-39 (discussing the ICC's jurisdictional limitations and explaining how the ICC can overcome them via a State Party declaration or Security Council referral)

<sup>134</sup> Supra notes 58-60 (discussing the ICC's impunity gap created by lesser and inchoate crimes)

<sup>135</sup> Supra notes 42 and 58-60 (defining the "impunity gap")

<sup>136</sup> Supra note 42 (explaining the ICC's gravity requirements)

<sup>137</sup> Supra notes 40-41 (discussing the concepts of complementarity and primacy)

<sup>138</sup> See supra notes 107-111 (outlining UNOCIPIS's support role)

<sup>139</sup> See supra notes 87-89, 91-93, and 108-109 (differentiating the prosecutors' roles in the various organizations and discussing the CIP's broader focus)

<sup>140</sup> Supra notes 95, 103-111, and 112 (describing UNOCIPIS's capacity-building qualities)

<sup>141</sup> Supra note 47 (reflecting that the ICC rejected a recent referral for the Islamic State)