THE INTERNATIONAL CRIME OF GENDER-BASED PERSECUTION AND THE TALIBAN

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[This paper seeks to establish that the prohibition of gender-based persecution is already part of customary international law. We begin by tracing the history of crimes against humanity and the concept of gender-based crimes in international law; we argue that their historical background demonstrates that the concept of gender-based persecution is not an entirely novel one, in that the principle of non-discrimination on the basis of sex has been incorporated into customary law through its pervasiveness in both humanitarian law and human rights law. This argument is applied to the Taliban's treatment of women, which we argue qualifies as gender-based persecution as it is understood in customary international law. For this purpose we consider the jurisprudence of international and national courts to determine what constitutes persecution. From this jurisprudence we identify and analyse the six elements that need to be established for the successful prosecution of persecution as a crime against humanity as outlined in the Rome Statute of the International Criminal Court*. We conclude that the cumulative impact of the gender-based discrimination by the Taliban exceeded the threshold necessary for it to amount to persecution.]*

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I INTRODUCTION

In 1994, Rhonda Copelon, responding to reports of widespread rape being perpetrated in Bosnia, called for the expansion of the category of crimes against humanity to include persecution based on gender.[1] Since then, the *Rome Statute of the International Criminal Court*[2] has extended the definition of crimes against humanity to explicitly recognise both gender-based persecution and rape.[3] While the latter offence was included in the statutes of the ad hoc International Criminal Tribunals for the Former Yugoslavia[4] and Rwanda,[5] gender-based persecution had previously not been included in positive international law despite the fact that the prohibition of discrimination on the basis of sex has arguably become part of customary international law. The extension of the definition of crimes against humanity is significant in international law because persecution differs from other crimes against humanity in that it covers a wider scope of acts than specific crimes such as rape, murder, and extermination. It encompasses the severe deprivation of fundamental civil, political, social and economic rights, whether the harm resulting from the deprivation is physical or mental. In this sense, the inclusion of gender-based persecution in the *Rome Statute* significantly broadens the positive law conception of 'gender-based crimes'.

Hilary Charlesworth posits that expansions in international law are often a response by the international community to crises such as the Holocaust, the Bosnian and Rwandan conflicts, and more recently, events in Kosovo.[6] Although she argues persuasively that this constant cycle of responding to crises may not

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1 Rhonda Copelon, 'Surfacing Gender: Reconceptualizing Crimes against Women in Time of War' in Alexandra Stiglmayer (ed), *Mass Rape: The War against Women in Bosnia-Herzegovina* (1994) 197, 208.

2 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, [2002] ATS 15 (entered into force 1 July 2002) ('*Rome Statute*').

3 Gender-based persecution and rape have been classified as crimes against humanity by arts 7(1)(h) and 7(1)(g) of the *Rome Statute* respectively. For a description of how the recognition of gender-based persecution and other gender crimes was advocated by the Women's Caucus in the Preparatory Committee Sessions leading up to the Rome Conference on the Establishment of the International Criminal Court, see Brook Moshan, 'Women, War and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity' (1998) 22 *Fordham International Law Journal* 154, 173. See also Barbara Bedont, 'Gender Specific Provisions in the Statute of the ICC' in Flavia Lattanzi and William Schabas (eds), *Essays on the* Rome Statute of the ICC (1999) <http://www.iccwomen.org/resources/genderprovs.htm> at 1 October 2003; Barbara Bedont and Katherine Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) 6 *Brown Journal of World Affairs* 65; Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217, 233; Nicole Erb, 'Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court' (1998) 29 *Columbia Human Rights Law Review* 401, 434; Cate Steains, 'Gender Issues' in Roy Lee (ed), *The International Criminal Court: The Making of the* Rome Statute — *Issues, Negotiations, Results* (1999) 357.

4 *Statute of the International Criminal Tribunal for the Former Yugoslavia,* annexed to *Resolution 827*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, art 5(g), UN Doc S/RES/827 (1993) ('*Statute of the ICTY*').

5 *Statute of the International Criminal Tribunal for Rwanda,* annexed to *Resolution 955*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, art 3(g), UN Doc S/RES/955 (1994) ('*Statute of the ICTR*').

6 Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377.

always ultimately enrich the discipline of international law, these crises have certainly reinvigorated the development of international criminal law since the Nuremberg trials. In addition, they can be understood as playing a critical part in 'the broader movement to end the historical invisibility of gender violence as a humanitarian and human rights violation'.[7]

In light of this important development in international law, it is now necessary to reflect on the devastating effect of the Taliban regime on women in Afghanistan. This crisis point in women's rights should be used as a springboard for assessing gender-based persecution as an international crime, and for developing and refining international law in this area.

This article examines the institutionalised regime of discrimination against women by the Taliban in order to gauge whether this discrimination constituted gender-based persecution as defined as a 'crime against humanity' under art 7 of the *Rome Statute*. While we acknowledge that the relevant acts were committed before the International Criminal Court ('ICC') came into operation and therefore fall outside its temporal jurisdiction,[8] the aim of this article is to examine the potential of other courts, such as state courts or a special tribunal, to prosecute gender-based crimes without violating the principle of legality (*nullum crimen sine lege*).[9] For this purpose, the crime of 'gender-based persecution' as set out in the *Rome Statute* is used as a guide.

The argument in this article has two limbs. The first seeks to establish that gender-based persecution is already part of customary international law. Thus, after briefly outlining the Taliban regime's laws regarding women, we begin by tracing both the history of crimes against humanity and the concept of gender-based crimes in international law. We argue that the history of gender-based crimes demonstrates that the concept of gender-based persecution is not an entirely novel one, in that the principle of non-discrimination on the basis of sex has been incorporated into customary law through its pervasiveness in both humanitarian law and human rights law.

The second limb of our argument seeks to establish that the Taliban's treatment of women constitutes gender-based persecution as it is understood in customary international law. In this part of the article, we address the question of persecution and examine the level of discrimination required to constitute persecution as a crime against humanity. For this purpose we consider the jurisprudence of international and national courts to determine what constitutes persecution. From this jurisprudence we identify and analyse the six elements that need to be established for the successful prosecution of persecution as a crime against humanity as outlined in the *Rome Statute*. With the aid of reports of non-government organisations on Afghanistan, we evaluate the level of discrimination perpetrated against Afghan women by the Taliban in relation to

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[7] Copelon, above n 1, 207.

[8] Note that Afghanistan acceded to the *Rome Statute* on 10 February 2003: International Criminal Court (2003) <http://www.icc-cpi.int/php/statesparties/country.php?id=41> at 1 October 2003.

[9] In *Prosecutor v Kordic and Cerkez (Trial Chamber Judgment)*, Case No IT–95–14/2–T (26 February 2001) [192] ('*Kordic*'), the International Criminal Tribunal for the Former Yugoslavia explained that in order to avoid violating the principle of legality, acts of persecution for which the accused is indicted must constitute crimes under international law at the time of their commission.

these elements. We conclude that the cumulative impact of the gender-based discrimination by the Taliban exceeded the threshold necessary for it to amount to persecution.

II GENDER-BASED PERSECUTION UNDER THE TALIBAN

The following brief outline of the Taliban's treatment of women is based on research and interviews conducted by Human Rights Watch and other humanitarian organisations before the collapse of the Taliban in late November 2001.[10]

The Taliban had consolidated its control over much of Afghanistan by 1996 when it captured the capital, Kabul.[11] In late 1996, the Taliban issued edicts forbidding women to work outside the home, attend school, or even leave their homes unless accompanied by a close male relative.[12] In public, women were required to wear a burqa — an all-enveloping garment with only a mesh opening to see and breathe through.[13] Women were also forbidden to wear white shoes or socks, apparently because white is the colour of the Taliban flag.[14] Houses and buildings that could be seen by the public were to have the windows covered if women were present.[15]

In 1997, the Taliban issued further edicts, including one that called for separate hospitals for men and women.[16] The Ministry of Public Health ordered all hospitals in Kabul to turn away female patients and send them to the Rabia Balkhi facility, which had 35 beds and lacked a supply of clean water, electricity, surgical equipment, X-ray machines and oxygen.[17] Men had access to 20 hospitals in Kabul, but the city's half a million women had access to only one.[18] At the same time, the Taliban extended their prohibition against women working outside the home to female medical workers in all but the Balkhi facility. After several months, the Taliban partly rescinded its segregation order and allowed several more facilities to make beds available to women, provided they were kept in separate wards and treated by female medical workers.[19]

After the Taliban closed all schools to women, many humanitarian organisations supported the creation of schools for girls in private homes.[20] In

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10 See especially Human Rights Watch, *Humanity Denied: Systematic Violations of Women's Rights in Afghanistan* (2001). See also Amnesty International, 'Women in Afghanistan: The Violations Continue' (1 June 1997) <http://web2.amnesty.org/library/Index/engASA110051997> at 1 October 2003; Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, UN Doc E/CN.4/2000/68/Add.4 (12 March 2000); Commission on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*, UN Doc E/CN.4/2001/43 (1 February 2001); Physicians for Human Rights, *Women's Health and Human Rights in Afghanistan* (2001).

11 Human Rights Watch, above n 10, 6.

12 Physicians for Human Rights, above n 10, 22.

13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid 23.

17 Commission on Human Rights, *Integration of the Human Rights of Women*, above n 10, [26].

18 Ibid.

19 Ibid.

20 Physicians for Human Rights, above n 10, 25.

1998, the Taliban ordered that all those schools be closed and issued new rules for private schools that limited education to girls aged eight and younger.[21] The only subject they could be taught was the Qur'an.[22]

The Taliban enforced these decrees in an arbitrary and brutal manner.[23] Groups of young men from the Department for the Promotion of Virtue and the Prevention of Vice, known as the 'religious police', enforced the edicts.[24] They answered directly to Mullah Muhammad Omar, the supreme leader of the Taliban. They patrolled public areas and summarily beat women whom they perceived to be in violation of the edicts. The beatings were carried out with a metal cable and were accompanied by threats of further violence and verbal harassment.[25] In sum, the punishment was cruel, inhumane and degrading. There was no due process and no right of appeal.[26]

Human Rights Watch has also received evidence that some women were imprisoned for violations of edicts controlling dress, movement, teaching, and work, and believes that they were also deprived of due process protections and the right to appeal. In addition, there were numerous reports of women being executed for pre-marital and extra-marital sex. However, Human Rights Watch does not have any first hand data on this nor does it know whether men were punished for the same activities.

The Taliban regime's treatment of women has been widely criticised. The question, however, is whether such treatment can be considered to constitute a crime against humanity at international law, and in particular, gender-based persecution as it is set out in the *Rome Statute*. Before addressing this question, it is first necessary to trace the history of crimes against humanity and gender-based crimes. The following section aims to map the framework in which the crime of gender-based persecution has evolved in customary international law.

III THE HISTORY OF CRIMES AGAINST HUMANITY

A *Pre-World War II*

The origin of the concept of crimes against humanity lies within the areas of humanitarian law and the international regulation of armed conflict. While it originates from many sources, the evolving concept was articulated in the preambles to the *Hague Convention (II) with Respect to the Rules and Customs of War on Land* of 1899 and the *Hague Convention (IV) Respecting the Rules and Customs of War on Land* of 1907:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result

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[21] Ibid 19.

[22] Ibid 25.

[23] Ibid 26.

[24] Ibid 26.

[25] Human Rights Watch, above n 10, 7, 12–14.

[26] Commission on Human Rights, *Integration of the Human Rights of Women*, above n 10, [10].

> from the usages established among civilized peoples, *from the laws of humanity,* and the dictates of the public conscience.[27]

According to M Cherif Bassiouni:

> The specific origin of the term 'crimes against humanity' as the label for a category of international crimes goes back to 1915 when the governments of France, Great Britain and Russia issued a joint declaration on May 28, 1915 denouncing the Ottoman government's massacre of the Armenian population in Turkey as constituting 'crimes against civilization and humanity' for which all members of the Turkish government would be held responsible.[28]

After World War I, the 1919 Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties concluded that an international court should be created to punish those 'belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against … the laws of humanity'.[29] No such court was created, and the quantum of crimes against humanity remained uncodified.

B *World War II*

The concept of crimes against humanity was first formulated and defined in the realm of positive law with the drafting of the *Charter of the International Military Tribunal* ('*Nuremberg Charter*') that created the Nuremberg Tribunal.[30] The *Nuremberg Charter* gave the tribunal jurisdiction over three categories of crimes: crimes against peace, war crimes, and crimes against humanity.[31] The International Law Commission, in the *Principles of the Nuremberg Tribunal*, claimed that these three categories were 'punishable as crimes under international law'.[32]

The *Nuremberg Charter* defined crimes against humanity as

> murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or *persecutions on political, racial or religious grounds* in execution of or in

27 Opened for signature 29 July 1899, [1901] ATS 131 (entered into force 4 September 1900); opened for signature 18 October 1907, [1910] ATS 8 (entered into force 26 January 1910) (emphasis added).

28 M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (1999, 2nd ed) 62.

29 Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference' (1920) 14 *American Journal of International Law* 95, 117.

30 Annexed to the *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, opened for signature 8 August 1945, 82 UNTS 280 (entered into force 8 August 1945).

31 Ibid art 6.

32 International Law Commission, '*Principles of the Nuremberg Tribunal*' (1950) principle VI <http://www.un.org/law/ilc/texts/nurnfra.htm> at 1 October 2003. See also 'Report of the International Law Commission covering its Second Session, 5 June – 29 July 1950' [1950] 2 *Yearbook of the International Law Commission* 364, 374.

> connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. [33]

This formulation was an expansion of the traditional scope of war crimes punishable under international law as it allowed the allies to prosecute crimes committed against *any* civilian population, whether domestic or foreign. However, the *Principles of the Nuremberg Tribunal* served to limit the ambit of such prosecutions by requiring a 'connexion with any crime against peace or any war crime'.[34] The original purpose of this limiting connection was to avoid any possible violation of the principle of legality (*nullum crimen sine lege*), which states that acts cannot constitute crimes unless previously declared to be crimes under the law.[35]

Similar, but not identical, formulations of the concept of crimes against humanity were found in the *Charter of the International Military Tribunal for the Far East*[36] and the *Allied Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*.[37]

Crimes against humanity, thus formulated, consisted of two types: murder-type offences and persecution-type offences. Persecution as a crime against humanity was limited in two ways by the *Nuremberg Charter*. First, it was restricted to three grounds: political, racial or religious.[38] Second, like the murder-type offences, the crime of persecution under the *Nuremberg Charter*, according to the *Principles of the Nuremberg Tribunal*, had to be connected with a war crime or crime against peace.[39]

However, this limiting connection was removed in the *CCL 10*. In its report analysing and comparing the *Nuremberg Charter*, *Tokyo Charter* and the *CCL 10*, the United Nations War Crimes Commission ('UNWCC') also took a significant step toward separating crimes against humanity from conflict:

> [There exists] a system of international law under which individuals are responsible to the community of nations for the violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of peoples and individual persons, that is inhuman acts, constitute international crimes not only in time of war, but also, in certain circumstances, in times of peace.[40]

The International Criminal Tribunal for the former Yugoslavia ('ICTY') held in its decision on an interlocutory appeal in *Prosecutor v Tadic* that:

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[33] *Nuremberg Charter*, above n 30, art 6(c) (emphasis added).

[34] '*Principles of the Nuremberg Tribunal*', above n 32, 377.

[35] See, eg, Antonio Cassese, *International Criminal Law* (2003), 70–2.

[36] Article 5(c) ('*Tokyo Charter*'), annexed to the *Special Proclamation by the Supreme Commander for the Allied Powers: Establishment of an International Military Tribunal for the Far East* (19 January 1946).

[37] (20 December 1945) art II(1)(c) ('*CCL 10*').

[38] *Nuremberg Charter*, above n 30, art 6(c). The *Tokyo Charter* was very similar, except that the equivalent provision (art 5(c)) did not include the ground of religious persecution, presumably because the drafters did not believe that Nazi crimes against the Jews had a counterpart in Asia. Article II(1)(c) of *CCL 10* did, however, include religion as a ground.

[39] '*Principles of the Nuremberg Tribunal*', above n 32, 377.

[40] UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 192–3.

> It is by now a settled rule of customary international law that crimes against humanity *do not require a connection* to international armed conflict. Indeed … customary international law may not require a connection between crimes against humanity and any conflict at all.[41]

This dictum can be contrasted with the *Statute of the ICTY*,[42] which does require a connection, but is consistent with the *Statute of the ICTR* which does not.[43]

The UNWCC made one other significant finding regarding the definition of crimes against humanity; it held that they 'may be committed by enacting legislation which orders or permits crimes against humanity, eg … racial discrimination, suppression of civil liberties, etc'.[44]

Another matter of significance was the inclusion of rape in the list of acts that could constitute crimes against humanity in the *CCL 10*.[45] Arguably, it was in these embryonic days of the conceptualisation of crimes against humanity that a gender perspective was first included in positive international law.

Despite this, and the promise of both the Nuremberg and Tokyo Tribunals, the post-war trials failed to address in any substantive manner crimes committed against women, either as war crimes or crimes against humanity. Although there were a few successful prosecutions of rape as breaches of the laws and customs of war at the Tokyo Tribunal, one of the most significant omissions of the Tribunal was its failure to prosecute for the systematic enslavement of and sexual violence against an estimated 200 000 comfort women by the Japanese military. Sexual violence was regarded less as a crime and more as an inevitable, although regrettable, by-product of war. Persecution was narrowly defined on political, racial and ethnic grounds.

C *Post-World War II Developments*

In the wake of World War II, numerous international treaties dealing with human rights and humanitarian law were drafted. The four *Geneva Conventions* of 1949 and their accompanying *Protocols* increased protections for victims of both international and civil conflicts, and prohibited any adverse treatment on the basis of, inter alia, sex. For example, *Geneva Convention I* prohibits adverse treatment of sick and wounded combatants based on sex;[46] *Geneva Convention II* prohibits adverse treatment of sick and wounded or combatants ship-wrecked at sea on the basis of sex;[47] *Geneva Convention III* prohibits adverse treatment of

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41 *Prosecutor v Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction),* Case No IT–94–1–AR72 (2 October 1995) [141] (emphasis added) ('*Tadic*').

42 *Statute of the ICTY*, above n 4, art 5.

43 *Statute of the ICTR*, above n 5, art 3.

44 UNWCC, above n 40, 179.

45 *CCL 10*, above n 37, art II(1)(c). Note that neither art 6(c) of the *Nuremburg Charter*, nor art 5(c) of the *Tokyo Charter*, explicitly included rape as an act which could constitute a crime against humanity.

46 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31, art 12 (entered into force 21 October 1950) ('*Geneva Convention I*').

47 *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85, art 12 (entered into force 21 October 1950) ('*Geneva Convention II*').

prisoners of war on the basis of sex;[48] and *Geneva Convention IV* prohibits adverse treatment of civilians on the basis of sex.[49]

While the *Geneva Conventions* of 1949 do not include gender-based crimes in the list of grave breaches, they do explicitly protect women from such crimes. Article 27 of *Geneva Convention IV* states that in times of war, '[w]omen shall be especially protected against any attack of their honour, in particular against rape, enforced prostitution, or any other form of indecent assault'. This protection does not apply to the nationals of the state responsible.[50] Article 3, which is common to the *Geneva Conventions*, provides additional protection against 'outrages upon personal dignity, in particular humiliating and degrading treatment'. This was supplemented by art 76(1) of *Additional Protocol I* which states that '[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'.[51] This extends the scope of protection by including all women who are under the power of parties to the conflict. In relation to non-international armed conflicts, art 4(2)(e) of *Additional Protocol II* prohibits '[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'.[52] Though limited, these provisions do provide some recognition of gender-based crimes. The four *Geneva Conventions* have virtually attained universal ratification and it is now understood that they reflect customary law.[53]

International human rights law also entrenches norms regarding gender discrimination. For example, the *International Covenant on Civil and Political Rights*[54] and the *International Covenant on Economic, Social and Cultural Rights*[55] strictly forbid discrimination on the basis of sex. Article 26 of the *ICCPR* goes a step further by calling for governments to recognise all people as equal before the law and expressly prohibiting distinctions before the law based on sex. These two covenants have been ratified by over 140 states.[56] Similarly, the *Universal Declaration of Human Rights* affirms 'the equal rights of men and

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48 *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, art 14 (entered into force 21 October 1950) ('*Geneva Convention III*').

49 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287, art 27 (entered into force 21 October 1950) ('*Geneva Convention IV*').

50 Ibid art 4.

51 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*').

52 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict*, opened for signature 12 December 1977, 1125 UNTS 609 (entered into force 7 December 1978) ('*Additional Protocol II*').

53 Theodor Meron, 'Customary Law' in Roy Gutman and David Rieff (eds), *Crimes of War: What the Public Should Know* (1999) 113, 113.

54 Opened for signature 19 December 1966, 999 UNTS 171, arts 2(1), 3 (entered into force 23 March 1976) ('*ICCPR*').

55 Opened for signature 19 December 1966, 993 UNTS 3, arts 2(2), 3 (entered into force 3 January 1976) ('*ICESCR*').

56 Office of the High Commissioner for Human Rights, *Status of Ratifications of the Principal Human Rights Treaties* <http://www.unhchr.ch/pdf/report.pdf> at 1 October 2003.

women' in its preamble.[57] The *Convention on the Elimination of All Forms of Discrimination against Women*, which has been ratified by 170 states, further explicates the prohibition against sex-based discrimination in international human rights law.[58] The *Convention on the Rights of the Child*, which has been ratified by every state except the US and Somalia, also clearly prohibits discrimination on the basis of gender in the enforcement of its provisions.[59] It follows that the argument that prohibition against gender-based discrimination has entered the realm of customary international law has much credibility.

D *The ICTY and ICTR*

In the wake of the conflicts in the former Yugoslavia and Rwanda, the UN Security Council authorised the creation of two ad hoc tribunals. The *Statute of the ICTY* defines crimes against humanity as crimes committed in armed conflict but directed against a civilian population.[60] Again, a list of examples is given in art 5: murder, extermination, enslavement, deportation, imprisonment, torture, rape and persecutions on political, racial and religious grounds.[61] This list reflects that in *CCL 10*.[62] Article 5 of the *Statute of the ICTY* is described by Bassiouni as 'a progressive codification of Article 6(c) of the [*Nuremberg Charter*]'. While it is modelled on art 6(c) of the *Nuremberg Charter*, art 5 'goes beyond the normative provisions of the *Charter'* by making several 'clarifications' such as the specific listing of rape.[63]

Critically, the nature of the atrocities committed in the Rwandan conflict led to the inclusion of ethnicity and national origin in the list of grounds for all crimes against humanity in the *Statute of the ICTR*.[64] The addition of these grounds in positive law demonstrates the ability of international criminal law, and in particular the category of crimes against humanity, to evolve in response to various forms of violence.

E *The ICC*

It was not until 1998 that persecution on the basis of gender was explicitly recognised as a crime against humanity through the *Rome Statute*. The *Statute*

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57 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948) art 2 ('*UDHR*').

58 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*'). The states parties to *CEDAW* are listed at Division for the Advancement of Women, UN Department of Economic and Social Affairs <http://www.un.org/womenwatch/daw/cedaw/states.htm> at 1 October 2003. Note that art 21(3) of the *Rome Statute* provides that the application and interpretation of the law by the ICC 'must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender'. It follows from this provision that the judges constituting the ICC are able to refer to international human rights instruments, such as *CEDAW*, when interpreting provisions of the *Rome Statute* and other relevant sources of law.

59 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 2(1) (entered into force 2 September 1990) ('*CROC*'). The states parties to *CROC* are listed in Office of the High Commissioner for Human Rights, above n 56.

60 *Statute of the ICTY*, above n 4, art 5.

61 Ibid.

62 *CCL 10*, above n 37, art II(1)(c).

63 *Statute of the ICTY*, above n 4, art 5(g).

64 *Statute of the ICTR*, above n 5, art 3.

recognises persecution as a crime against humanity, and defines it as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.[65] It proscribes persecution of

> any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, *gender* … or other grounds that are universally recognised as impermissible under international law, in connection with any other act referred to in this paragraph [on crimes against humanity] or any other crime within the jurisdiction of the court.[66]

The *Rome Statute* is the only binding international instrument that explicitly recognises gender-based persecution. However, the well-established recognition of persecution as a crime against humanity, when viewed in light of the sweeping prohibition against gender-based discrimination in human rights and humanitarian law, makes it clear that discrimination on any prohibited basis that rises to the level of persecution would be, at the least, foreseeable as a crime against humanity.

In light of the established principle of non-discrimination on the basis of sex and gender underpinning international humanitarian and human rights law, the prior failure of positive international criminal law to recognise gender discrimination as persecution can be seen as an aberration rather than a rule. This aberration reflects the tendency of international diplomats to view the persecution of women through the lens of race or ethnicity or religion, rather than on the basis of gender. This systemic failure at the level of diplomacy to recognise the gender-specific nature of the persecution perpetrated against both men and women is exemplified in particular by the Rwandan crisis. For example, the sexual violence perpetrated against Tutsi women in Rwanda was based on both their ethnicity *and* gender. The fact that Tutsi men were also victims in Rwanda meant that the general analysis of the victimisation that occurred was seen as primarily based on ethnicity. However, the specific form of the crimes committed against women and men in the conflict were gendered in that violence, rape and sexual mutilation were generally perpetrated against women, while men were more often the victims of murder. In *Tadic*, the ICTY explicitly recognised that discrimination exists beyond the listed political, racial and religious grounds. The court found that 'crimes against humanity may be committed on discriminatory grounds other than those enumerated in art 5(h) [of the *Statute of the ICTY*], such as physical or mental disability, age or infirmity, or sexual preference'.[67] Given this acknowledgment, it would not serve justice to restrict the prosecution of one type of crime against humanity (ie persecution) to a few, narrowly restricted grounds.

Similarly, it is clear that the drafters of the *Rome Statute* believed that the grounds of persecution should not be restricted. To the list of grounds that include gender, they add 'other grounds that are universally recognized as

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[65] *Rome Statute*, above n 2, art 7(1)(h).

[66] Ibid art 7(1)(h) (emphasis added).

[67] *Prosecutor v Tadic (Appeals Chamber Judgment)*, Case No IT–94–1–A (15 July 1999) [285] ('*Tadic*').

impermissible under international law'.[68] Although the requirement of 'universal recognition' sets a high standard, this open clause nevertheless allows the category of crimes against humanity to respond to possible future forms of persecution that violate international customary law. Importantly, it can be inferred from the presence of this open clause, together with the explicit recognition of gender as a ground of persecution, that gender-based persecution is already considered to be universally recognised.

Interestingly, there appears to have been little controversy at the Rome Conference on the Establishment of the ICC surrounding the inclusion of the ground of gender in the crime of persecution.[69] Robinson and von Hebel write that '[i]n order to modernize the provision, delegations included not only persecution on political, religious and racial grounds (which appear in the major precedents), but also on national, ethnic or gender grounds'.[70]

The *Rome Statute* has not been seen as breaking new legal ground, but rather as the codification of existing customary international law. For example, the International Committee of the Red Cross ('ICRC') argued this point in light of the fact that 'war crimes, crimes against humanity and genocide are already subject to universal jurisdiction under customary international law'.[71] Meron, an international law expert, also states that '[t]he *Rome Statute of the International Criminal Court* codifies many rules and principles of IHL [international humanitarian law] as customary criminal law'.[72]

IV DEFINING PERSECUTION

As outlined above, persecution is universally recognised in international law and is clearly part of customary international law. But how should it be understood or defined?

For various reasons, the international community has not yet reached a precise definition of persecution. Bassiouni offers the following definition:

> 'State action' or policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.[73]

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68 *Rome Statute*, above n 2, art 7(1)(h).

69 See Steains, above n 3, 365. However, as Steains notes at 365–75, there was much controversy about the definition of the term 'gender' and the crime of forced pregnancy. Note also that Steains' chapter includes a brief history of how gender crimes came to be included in the draft statute in 1997 through the work of the Women's Caucus for Gender Justice. See also Bedont and Martinez, above n 3.

70 Hermann von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court' in Roy Lee (ed), *The International Criminal Court*: *The Making of the* Rome Statute — *Issues, Negotiations, Results* (1999) 79, 101. The commentators have even mistakenly assumed that it was one of the grounds listed in the *Statute of the ICTR*: ibid.

71 ICRC, 'Establishment of an International Criminal Court' (Statement delivered to the Sixth Committee of the UN General Assembly, 55th sess, New York, US, 19 October 2000) <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList194/9844F028154D5609C1256B66005EDA81> at 1 October 2003.

72 Meron, above n 53, 114.

73 Bassiouni, above n 28, 327.

Commentators today largely reject this definition as being too restrictive in that it includes a *state* policy element.[74] In *Tadic*, the ICTY preferred the following definition offered by Christian le Gunehec of the French Court of Cassation in the prosecution of Nikolaus Barbie: 'above all these crimes offend the fundamental rights of mankind; the right to equality, without distinctions of race, colour or nationality, and the right to hold one's own political and religious opinions'.[75]

Both of these definitions focus on discriminatory measures in relation to fundamental rights. In general, persecution is understood as belonging to the same class as the offence of genocide. While the mens rea requirement for persecution is less demanding than that of genocide, it is higher than for ordinary crimes.[76] The aim of persecution is thus understood as 'the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself'.[77] While the aim of the Taliban was not to remove Afghan women from humanity, it is clear that its laws were aimed at removing Afghan women from public life.

In order to define persecution, the ICTY has generally turned to customary international criminal law, and in particular to the jurisprudence of the Nuremberg trials. It found that the Nuremberg Tribunal understood persecution to include a broad spectrum of acts, 'ranging from *discriminatory acts* targeting [Jewish people's] general political, social and economic rights, to attacks on their person'.[78] These acts included the imposition of a collective fine on Jewish people, the restriction of their movement, their seclusion in ghettos, and the requirement that they wear the yellow star.[79] It was considered unnecessary for these acts to be explicitly prohibited by the *Nuremberg Charter* and it was considered irrelevant that they were legal under national laws. It was more important that the acts 'were contrary to international legal standards'.[80]

Persecution covers a broad range of acts and in this respect differs from other crimes against humanity. In *Kupreskic*, the ICTY refused to restrict persecution to solely physical acts, and held that '[p]ersecution can also involve a variety of other discriminatory acts, involving attacks on political, social and economic rights'.[81] It also stated in *Prosecutor v Vasiljevic* that the persecutory act or

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74 See the International Law Commission's commentary on art 18 of the Draft Code of Crimes against the Peace and Security of Mankind in 'Report of the International Law Commission on the Work of its 48th Session' [1996] 2 *Yearbook of the International Law Commission* 1, 47, which was cited by the ICTR in *Prosecutor v Kayishema and Ruzindana (Trial Chamber Judgment)*, Case No ICTR–95–1–T (21 May 1999) [125] ('*Kayishema*'). See also *Tadic (Trial Chamber Opinion and Judgment)*, Case No IT–94–1–T (7 May 1997) [653]–[654]; *Prosecutor v Akayesu (Trial Chamber Judgment)*, Case No ICTR–96–4–T (2 October 1998) [580] ('*Akayesu*'). Note that a general policy element is still required.

75 *Tadic (Trial Chamber Judgment)*, Case No IT–94–1–T (7 May 1999) [696].

76 *Prosecutor v Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [636] ('*Kupreskic*').

77 Ibid [634].

78 Ibid [597] (emphasis added).

79 Ibid [610].

80 Ibid [614].

81 Ibid [615]. This reiterated the ICTY's finding in *Tadic (Trial Chamber Opinion and Judgment)*, Case No IT–94–1–T (7 May 1997) [710] that persecution could include 'inter alia [acts] of a physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights'.

omission 'may encompass physical or mental harm or infringements upon individual freedom'.[82]

The more recent ICTY cases have accepted and consolidated the findings by the courts in *Kupreskic* and *Tadic*. The Trial Chambers in *Prosecutor v Krnojelac* and *Vasiljevic* have offered the following definition of persecution as authoritative:

> The crime of persecution consists of an act or omission which:
> 1 discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
> 2 was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[83]

When looking specifically at gender-based persecution, it is tempting to draw upon the vast body of jurisprudence concerning persecution authored by national courts in their adjudication of individual asylum claims.[84] However, the *Kupreskic* case made clear that both refugee law and human rights law cannot provide the basis for individual criminal responsibility for a number of reasons, including the fact that these areas of law do not require that the determination of persecution be proven on an objective basis. The Trial Chamber stated:

> It would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law. In these bodies of law … [t]he emphasis is more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether persecution has occurred or may occur. In addition, the intent of the persecutor is not relevant. The result is that the net of 'persecution' is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility. The definition stemming from international refugee law or human rights law cannot therefore be followed here.[85]

While it makes sense that refugee law and human rights law cannot be used to define persecution, such law can surely be used to aid interpretation where there

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[82] *(Trial Chamber Judgment)*, Case No IT–98–32–T (29 November 2002) [246] ('*Vasiljevic*').

[83] *Prosecutor v Krnojelac (Trial Chamber Judgment)*, Case No IT–97–25–T (15 March 2002) [431] ('*Krnojelac*'); *Vasiljevic (Trial Chamber Judgment)*, Case No IT–98–32–T (29 November 2002) [244]. It is noted in *Krnojelac* that the accused must have the requisite mens rea for crimes against humanity: fn 1290.

[84] Like the above definition of le Gunehec, this jurisprudence addresses persecution as a violation of fundamental human rights. Although there is no universally recognised or precise definition of persecution, it is widely accepted by national courts and international bodies that at a minimum, it includes 'threats to life or freedom': see, eg, UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the* 1951 Convention *and the* 1967 Protocol Relating to the Status of Refugees, UN Doc HCR/IP/4/Eng/Rev.1 (1988) ('*UNHCR Handbook*'). The *UNHCR Handbook* states at [51] that '[i]t may be inferred that a threat to life or freedom … is always persecution'. See also Office of International Affairs, Immigration and Naturalization Service (US), *Consideration for Asylum Officers Adjudicating Asylum Claims from Women* (1995) 7 *International Journal of Refugee Law* 700, 707, which relies on *Matter of Acosta*, 19 Administrative Decisions under Immigration and Nationality Laws 211, 222 (Board of Immigration Appeals, 1985) to interpret 'persecution' to mean 'threats to life, torture, and economic restrictions so severe that they constitute a threat to life or freedom'.

[85] *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [589] (citations omitted).

is an absence of international criminal law jurisprudence, particularly with regard to gender-based persecution. We will return to this point later.

A few observations can be made from the above overview of crimes against humanity, gender-based crimes and the crime of persecution. First, the crime of persecution has become part of customary international law and there is no longer a requirement that such crimes be connected in any way to war crimes or armed conflicts. Second, under customary international law, the crime of persecution involves discriminatory acts or measures that violate fundamental rights and are perpetrated on certain grounds. Third, the principle of non-discrimination, in particular on the ground of sex, underlies the field of humanitarian law, as well as human rights law. The inclusion of this principle in numerous multilateral treaties, some of which have received almost universal ratification, indicates that this principle has become part of customary international law. Therefore, as the prohibition both against persecution and discrimination based on sex or gender has risen to the level of customary international law, it follows that any prosecution of the Taliban for gender-based persecution would not violate the principle of legality. This means that state courts, or a special tribunal, would be able to prosecute Taliban leaders and other perpetrators of these crimes if they entered their jurisdiction. The principle of universal jurisdiction empowers any state to bring to trial persons accused of international crimes, irrespective of the territory in which the crime was committed or the nationality of the perpetrator or the victim.[86]

V The Elements of Persecution

Having established that gender-based persecution is part of customary international law, this section of the article will examine the six elements of the crime of persecution as outlined by the Preparatory Commission for the ICC in its *Finalised Draft Text of the Elements of Crimes*.[87] As these elements are based on customary international law, the principle of legality is not at stake. For a successful prosecution of the Taliban, each one of these elements must be satisfied. For this reason, we explore each one in relation to the Taliban's treatment of women prior to the regime's collapse in November 2001.

The six elements are as follows:

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[86] Only some states (eg Austria, Belgium, Germany and Spain) have set out the principle of universal jurisdiction in their national jurisdiction. Some state courts have invoked this principle with respect to certain crimes: see, eg, *R v Finta* [1994] 1 SCR 701, 807, where the Supreme Court of Canada used the principle to affirm jurisdiction over crimes committed in Hungary in 1944 because they 'violated general principles of law recognized by the community of nations'; *Demjanjuk v Petrovsky*, 776 F 2d 571 (6th Cir, 1985); *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147. A number of other states have enacted legislation to try those accused of crimes during the World War II. For example, in Australia, the High Court held by a slim majority in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 that the *War Crimes Amendment Act 1988* (Cth), which operated extraterritorially and retrospectively to criminalise certain war atrocities committed in Europe during World War II, was constitutional. The decision of Toohey J indicated that retrospective criminal laws would only be constitutional if the law criminalised acts which were extremely grave and serious moral transgressions: at 689.

[87] *Report of the Preparatory Commission for the International Criminal Court: Addendum — Part II: Finalised Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (30 June 2000).

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the *Statute*, or other grounds that are recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the *Statute* or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[88]

A *Element 1: Severe Deprivation of Fundamental Rights*

The first question is: what constitutes a 'fundamental right'? Further, must the right relate to a specific act? These questions are answered in *Kupreskic*.

So far the jurisprudence of the ICTY and ICTR has established that the principle of legality is not violated by the fact that the crime of persecution encompasses acts that are not explicitly listed in the Tribunals' statutes.[89] Therefore, persecution need not involve acts of rape or murder, etc. However, the ICTY, in cases such as *Kupreskic*, has limited the range of acts by emphasising that not every denial of a human right constitutes persecution.[90] In that case, the Trial Chamber stated that while 'the realm of human rights is dynamic and expansive', there is a need for '*clearly defined limits* on the types of acts which qualify as persecution'.[91]

In order to set these limits, the Trial Chamber in *Kupreskic* turned to customary international law. While the Nuremberg trials were considered one source for determining this law, the Trial Chamber interestingly viewed the *International Bill of Rights*[92] and other such human rights texts as another. Here it clearly viewed human rights law as an acceptable aid for the interpretation of international criminal law. The Trial Chamber held that:

> in order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the *Universal Declaration on Human Rights of 1948*, the two *United Nations Covenants on*

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88 Ibid 15 (citations omitted).

89 *Tadic (Trial Chamber Opinion and Judgment)*, Case No IT–94–1–T (7 May 1997) [703]; *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [614]; *Prosecutor v Blaskic (Trial Chamber Judgment)*, Case No IT–95–14–T (3 March 2000) [233] ('*Blaskic*'); *Kordic (Trial Chamber Judgment)*, Case No IT–95–14/2–T (26 February 2001) [193]–[194].

90 *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [618]; *Krnojelac (Trial Chamber Judgment)*, Case No IT–97–25–T (15 March 2002) [434].

91 *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [618] (emphasis in original).

92 The *UDHR*, *ICCPR* and *ICESCR* are generally referred to collectively as the *International Bill of Rights*: Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed, 2000) 141.

> *Human Rights of 1966* and other international instruments on human rights or on humanitarian law. Drawing upon the various provisions of these texts it proves possible to *identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity*.[93]

The Chamber confirmed that the breach of *any* civil and political rights, as well as social and economic rights, can be considered an act depriving the victim of fundamental rights for the purposes of persecution. However, the Chamber refused to identify exactly which rights constitute fundamental rights for the purposes of persecution. They were concerned that to do so could lead to the implicit exclusion of some rights and therefore thwart the flexibility that is so vital in this field.[94]

The next question concerns the meaning of 'severe deprivation'. The Chamber stated that 'at a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5 [of the *Statute of the ICTY*]'.[95] In other words, the test does not relate to the type of act, but to the degree of the deprivation caused by the act.[96] An act can violate any fundamental right so long as it is of the same gravity as, for example, murder or torture.[97] The Chamber concluded that this 'delimitation' sufficed 'to satisfy the principle of legality, as inhumane acts are clearly proscribed by the *Statute*'.[98] In other words, the principle of legality will be satisfied so long as there is some definition and limitation of the types of acts that constitute persecution. Here there is no other limitation on the nature of the act besides the requirement that it be as grave and severe as other acts such as murder.

This test of gravity and severity was recently reiterated in *Krnojelac*.[99] It emphasised, however, that the acts or omissions should not be considered in isolation but in their context and with regard to their cumulative effect.[100] For example, an act against Jews during the World War II which was not of itself inhumane could nevertheless be considered inhumane in the context of the official state policy of the Nazi government of discrimination against and

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93 *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [621] (emphasis in original).

94 Ibid [623].

95 Ibid [619].

96 In *Kupreskic*, the Chamber stated that '[i]t ought to be emphasised, however, that if the analysis based on this criterion relates only to the *level of seriousness* of the act, it does not provide guidance on *what types of acts* can constitute persecution': ibid [620] (emphasis in original). It then goes on to discuss the *International Bill of Human Rights*.

97 In order to determine whether an act is a 'gross or blatant denial of a fundamental right', the ICTY recommended that the '*ejusdem generis*' criterion be used as a 'supplementary tool' to establish whether a relevant act reaches the level of gravity required: ibid. In other words, the prosecution must establish that the act was of the same genus with regard to gravity.

98 Ibid [622]. Arguably this is inconsistent with the previously stated view that the principle of legality would not be satisfied if human rights law jurisprudence was drawn upon for the determination of individual criminal liability.

99 *Krnojelac (Trial Chamber Judgment)*, Case No IT–97–25–T (15 March 2002) [434]. Here the Trial Chamber drew upon prior cases to find that 'acts or omissions must reach the same level of gravity as the other crimes against humanity … [and that this] test will only be met by gross or blatant denials of fundamental human rights'.

100 Ibid. See also *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [622].

extermination of the Jewish people.[101] Similarly, the isolated act of imposing a collective fine on the Jewish people may not be considered to reach the level of severity required for persecution. However, coupled with their seclusion in ghettos and the restriction of their movement, these acts cumulatively constituted the crime of persecution against Jewish people.

The 'unique nature of the crime of persecution as a crime of cumulative effect'[102] is useful in building a case against the Taliban. It is widely documented that under the Taliban, women were deprived of a range of fundamental rights such as freedom of movement and expression, freedom of conscience and religion, the right to education and health, and the right to physical integrity. Agents of the state subjected women who fell foul of Taliban policies to summary beatings. Although each individual Taliban edict and each individual act, in isolation, would not reach the requisite degree of severe deprivation of fundamental rights, the total impact of the discriminatory edicts was to deprive women of their freedom and even to threaten their survival.[103] We believe that these edicts and acts, considered cumulatively, do amount to persecution.

We turn now to consider in more detail the following types of acts, besides those resulting in physical harm, included in the category of persecution, which were perpetrated by the Taliban regime.

1 *Mental, Emotional or Psychological Harm*

It has been opined in recent cases that the persecutory act or omission may encompass 'mental harm or infringements upon individual freedom'.[104] In *Kayishema*, the ICTR stated that mental harm could be considered an inhumane act. It stated that it had 'no doubt that a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends'.[105]

Amnesty International, Human Rights Watch, Physicians for Human Rights and numerous other humanitarian organisations working with Afghan women have documented the extreme emotional harm to women inflicted on them by the Taliban. A report by Physicians for Human Rights that compared the responses of women living under the Taliban to other Afghan women found that a significantly higher percentage of the former group reported deterioration in their

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[101] *Krnojelac (Trial Chamber Judgment)*, Case No IT–97–25–T (15 March 2002) [446].

[102] *Kordic (Trial Chamber Judgment)*, Case No IT–95–14/2–T (26 February 2001) [199].

[103] The most significant threat to women's survival was the combination of edicts prohibiting women from travelling without a close male relative and the edict restricting women from being treated by male medical service providers. Many women were simply unable to access medical care because they could not get to a clinic or hospital. Other women were able to get to a clinic but could not receive even the standard of care available to male Afghans because male doctors could not treat them and most female medical providers were inadequately trained and supervised.

[104] *Vasiljevic (Trial Chamber Judgment)*, Case No IT–98–32–T (29 November 2002) [246]. In *Bucur v Immigration and Naturalization Service*, 109 F 3d 399, 405 (7th Cir, 1997), the Court held that when the state forbids the practice of one's religion, even absent the threat of imprisonment, torture, or banishment, the prohibition alone rises to the level of persecution. Similarly, it held that persecution exists where a law requires the wearing of an armband identifying a particular group or where it forbids a particular group to attend college: at 403.

[105] *Kayishema (Trial Chamber Judgment)*, Case No ICTR–95–1–T (21 May 1999) [153].

mental health and suffering from depression.[106] Human Rights Watch research confirms that women who were accustomed to working and moving freely outside the home were mentally and physically devastated by the restrictions imposed on them and the constant threat of violence if they ventured out of the house.[107]

2 *Social and Economic Harm*

Persecution is not restricted to acts resulting solely in physical or mental harm and can include acts which result in social and economic harm. For example, in *Kupreskic*, the ICTY stated that '[p]ersecution can also involve a variety of other discriminatory acts, involving attacks on political, social and economic rights'.[108] In *Blaskic*, the ICTY concluded from its examination of the Nuremberg Trials and previous ICTY decisions that 'the crime of "persecution" encompasses acts … which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community'.[109]

The ICTY in *Kupreskic* clearly articulates that severe violations of economic rights constitute persecution. As an example, it cites the persecution of Jews who were deprived of the right to work and education, as well as economic and property rights.[110]

In *Blaskic*, however, the ICTY found that the dismissal and removal of Bosnian Muslims from the public service was not of the same level of gravity as other crimes against humanity listed in art 5 of the *Statute of the ICTY*. It stated that:

> This act would have to amount to an extremely broad policy to fit within Nuremberg jurisprudence, in which economic discrimination generally rose to the level of legal decrees dismissing all Jews from employment and imposing enormous collective fines.[111]

The Taliban issued edicts forbidding women to work outside the home. There were two minor exceptions to this exclusion: some female medical providers

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[106] Physicians for Human Rights, above n 10, 49, 52.

[107] Human Rights Watch, above n 10, 12.

[108] *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [615]. Although US courts have been reluctant to recognise economic deprivation as persecution, they have recognised that substantial economic disadvantage that 'is so severe as to deprive a person of all means of earning a livelihood' could rise to the level of persecution, and that '[t]he denial of the opportunity to earn a livelihood … is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual': *Dunat v Hurney*, 297 F 2d 744, 753, 746 (3rd Cir, 1962). As this form of persecution has been defined through jurisprudence, US, Canadian and European case law have evolved to explicitly recognise not only deprivation of all means of earning a livelihood, but also menial employment incompatible with a person's qualifications and experience: *Kovac v Immigration and Naturalization Service*, 407 F 2d 102, 106 (9th Cir, 1969). See also Atle Grahl-Madsen, *The Status of Refugees in International Law* (1972) 208 and James Hathaway, *The Law of Refugee Status* (1991) 8, who comment on the recognition of persecution involving social and economic harm in the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*').

[109] *Blaskic (Trial Chamber Judgment)*, Case No IT–95–14–T (3 March 2000) [233].

[110] *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [599].

[111] *Kordic (Trial Chamber Judgment)*, Case No IT–95–14/2–T (26 February 2001) [210].

were permitted to work, and widows were allowed to work under strict guidelines. However, the vast majority of women were forbidden to work. Teachers, journalists, and lawyers were fired from their jobs and restricted to their homes when the Taliban came to power. This presents a stronger case for a violation of social and economic rights than that made in *Blaskic* in that the removal of women from employment under the Taliban did not solely pertain to government positions — it was widespread, stipulated by national laws, and enforced by government officials.

3 *Ostensible or Disproportionate Punishment*

Persecution also encompasses ostensible or disproportionate punishment. Generally, states have a significant degree of latitude to punish crimes recognised under an established legal system. Punishment for violations of those laws will not generally constitute persecution. However, states may not hide behind sovereignty to justify oppression of their people. Laws may be considered persecutory if they criminalise the exercise of a fundamental, internationally recognised human right.

The ICTY, in *Kupreskic*, noted that the 'the prohibition of intermarriage between Jews and persons of German blood and the severe punishment of sexual intercourse between these groups' was a form of persecution.[112] Here, the intermarriage prohibition criminalised the fundamental right to marry and found a family, and the punishment was arguably disproportionate.

Under the Taliban, women were required to obey a strict dress code.[113] They reported being summarily beaten by the religious police for the slightest infraction of the code.[114] For example, women were beaten for showing an ankle or a wrist, for wearing an Iranian burqa instead of an Afghan burqa, and for lifting the corner of their burqa to breathe more easily or to see.[115] Women were required to travel with a male chaperone and they reported being beaten for travelling alone in public.[116] Women doctors who were exempt from this rule reported being beaten by the religious police who lashed out without asking for an explanation.[117] It can be argued that the Taliban's enforcement of its dress and movement laws violated women's fundamental rights to freedom of expression[118] and freedom of movement.[119] The regime's punishment of infractions of these laws could thus be seen as persecutory.

B *Element 2: Targeting by Reason of Group Identity*

This element is not controversial. Under the Taliban regime, women were clearly targeted in the regime's edicts on the grounds of their gender.

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112 *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [612].
113 Human Rights Watch, above n 10, 6–7.
114 Ibid 12–14.
115 Ibid 13.
116 Ibid 14.
117 Ibid.
118 *ICCPR*, above n 54, art 19.
119 Ibid art 12.

C Element 3: Targeting on Political, Racial, National, Ethnic, Cultural, Religious or Gender Grounds

In our view, it is likely that where there is an absence of international criminal law jurisprudence in a certain area, the ICC, or a special tribunal or state court, will look to other fields of law, such as international refugee law. International refugee law could be used as an aid, though not as authority, for defining gender-based persecution as a crime.

Under the *Refugee Convention*, gender is not explicitly listed as one of the five grounds of persecution.[120] Women fleeing repressive regimes, or those regimes where domestic violence or honour killings are condoned, 'must argue that they fear being persecuted for reasons of their membership of a particular social group, their religion, or their political opinions'.[121] In 1984, the European Parliament adopted a resolution calling upon states to consider women who faced persecution for transgressing social mores as constituting a 'particular social group'.[122] Since 1985, the Executive Committee of the UN High Commissioner for Refugees Program has issued a series of guidelines with regard to gender-based persecution. These guidelines exert normative influence at the international level. They were first issued in 1991[123] and then reissued in May 2002[124] and May 2003.[125]

A 1997 report of the Expert Group of the UN Division for the Advancement of Women addressed the definition of gender-based persecution. It proposed the following legal standard:

> severe discrimination and harassment, particularly, but not exclusively, in armed conflict or in an atmosphere of insecurity may constitute persecution. It is considered that *severe restrictions on women's enjoyment of their human rights, including with respect to education, employment, and freedom of movement, such as forced seclusion*, meet the definition of persecution for the purposes of the *Refugee Convention* in those cases where women experience such restrictions as profound violations of their dignity, autonomy and status as human beings. … [P]enalties imposed on women for violating social mores that do not amount to violations of human rights may be disproportionate. In such circumstances, social

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120 *Refugee Convention*, above n 108, art 1(A)(2).

121 Ibid.

122 European Parliament, *Resolution on the Application of the* Geneva Convention Relating to the Status of Refugees [1984] OJ C 127, 137.

123 UN High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women*, UN Doc EC/SCP/67 (22 July 1991).

124 UN High Commissioner for Refugees, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the* 1951 Convention *and/or its* 1967 Protocol Relating to the Status of Refugees, UN Doc HCR/GIP/02/01 (7 May 2002). The *Guidelines* state at [3]:

> Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.

125 UN High Commissioner for Refugees, *Sexual and Gender-Based Violence against Refugees: Guidelines for Prevention and Response* (2003).

> mores, and the threat of penalty for their transgression, taken together, will amount to persecution.[126]

A number of national jurisdictions have impliedly recognised gender-based persecution by issuing their own guidelines on gender. Canada took the lead in 1993 by issuing *Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution*.[127] The US followed in 1995 when its Office of International Affairs issued *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, which formed guidelines for asylum claim adjudicators.[128] Australia followed suit one year later,[129] and the United Kingdom published its own *Asylum Gender Guidelines* in 2000.[130] The US guidelines state that several variables should be considered when hearing claims from women, namely:

1. that '[t]he laws and customs of some countries contain gender-discriminatory provisions' that 'may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population' when they are breached, resulting in the diminishing of 'civil, political, social and economic rights of women';
2. that '[a]lthough women applicants frequently present asylum claims for reasons similar to male applicants, they may also have had experiences that are particular to their gender';
3. that the 'death or absence of a husband or other male family members' in 'societies that require that women live under the protection of male family members' may make a woman more vulnerable to abuse; and
4. that '[w]omen who have been raped or otherwise sexually abused may be seriously stigmatized' and may be 'subject to additional violence, abuse or discrimination because they are viewed as having brought shame and dishonour on themselves, their families, and their communities'.[131]

In the US, a number of individual asylum claims of gender-based persecution have not succeeded due to the narrow interpretation given to the five enumerated grounds of persecution,[132] and in particular the courts' reluctance to consider

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126 Division for the Advancement of Women, UN Department of Economic and Social Affairs, *Gender-Based Persecution*, UN Doc EGM/GBP/1997/Report (1997) [41] (emphasis added).

127 Immigration and Refugee Board (Canada), *Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution* (9 March 1993).

128 Office of International Affairs, Immigration and Naturalization Service (US), above n 84.

129 Department of Immigration and Multicultural Affairs (Australia), *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996).

130 Immigration Appellate Authority (UK), *Asylum Gender Guidelines* (2000). Norway issued guidelines in 1996 recognising gender-related persecution as a valid basis for seeking asylum: Justisdepartementet (Norway), *Retningslinjer for nye asylkriterier* (15 January 1996). The European Union is contemplating a final draft directive that includes recognition of gender-related asylum claims: *Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection* [2001] OJ C 051 E, art 7(d).

131 Office of International Affairs, Immigration and Naturalization Service (US), above n 84, 4.

132 Ibid.

women as a 'particular social group'.[133] This reluctance can be traced to unfounded anxiety that recognising women as a particular social group will automatically open 'floodgates' entitling all women to refugee status.[134] Since the 1996 case of *Matter of Kasinga*,[135] however, a number of asylum claims have been granted to women fleeing gender persecution in the form of female genital surgeries, domestic violence, 'honour killing' and persecutory laws of certain states.[136]

In Canada, gender was accepted as a characteristic of a particular social group in the landmark Supreme Court case of *Canada (A-G) v Ward*[137] and a number of claims have been successful. Similarly, the High Court of Australia has recently stated in *Minister for Immigration and Multicultural Affairs v Khawar* that it is open to conclude that women in Pakistan are a particular social group.[138]

In 1993, the Federal Court of Canada held in the case of *Namitabar v Canada (Minister for Employment and Immigration)* that the Iranian 'dress law' is a 'persecutory law'.[139] It stated that 'there is no question that a penalty of 75 strokes of the whip for a breach of the clothing code is disproportionate. Further, this penalty is inflicted without any procedural guarantees'.[140] Here the Court found the female applicant to have demonstrated that her fear of persecution was based on her political opinion.[141]

In contrast, a 1997 decision of the Australian Refugee Review Tribunal rejected the application of an Iranian woman who objected to the oppression of

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[133] This reluctance is evident in other jurisdictions. In Australia, for example, see *Lek Kim Sroun v Minister for Immigration, Local Government and Ethnic Affairs [No 2]* (1993) 45 FCR 418, [43]–[44]. Note, however, that there is evidence of a shift in this jurisprudence: see below n 138.

[134] This 'floodgates' argument fails to recognise that women asylum seekers would still need to prove the other elements, such as persecution, in order to be considered a refugee: see, eg, *Fatin v Immigration and Naturalization Service*, 12 F 3d 1233 (3rd Cir, 1993). In Canada, where the official guidelines on asylum incorporate the findings of *Canada (A-G) v Ward* [1993] 2 SCR 689, there has been no evidence of a 'flood': see Audrey Macklin, 'Cross-Border Shopping for Ideas: A Critical Review of the US, Canadian, and Australian Approaches to Gender-Related Asylum Claims' (1998) 13 *Georgetown Immigration Law Journal* 25, 34.

[135] 21 Administrative Decisions under Immigration and Nationality Laws 357 (Board of Immigration Appeals, 1996).

[136] Karen Musalo and Stephen Knight, 'Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States' (2001) 13 *International Journal of Refugee Law* 51. For some statistics, see Stephen Knight, 'Seeking Asylum from Gender Persecution: Progress amid Uncertainty' (2002) 79 *Interpreter Releases* 689, 690.

[137] [1993] 2 SCR 689, 739.

[138] (2002) 210 CLR 1. Gleeson CJ held that '[t]he size of the group does not necessarily stand in the way of such a conclusion. There are instances where the victims of persecution in a country have been a majority. It is power, not number, that creates the conditions in which persecution may occur': at [33]. See further *Islam v Secretary of State for the Home Department* [1999] 2 AC 629 ('*Shah*'), where three members of the majority in the House of Lords accepted that women in Pakistan formed a 'particular social group', while a fourth member favoured a narrower approach and held that the particular social group was 'women in Pakistan accused of adultery'.

[139] [1994] 2 FC 42, 47.

[140] Ibid.

[141] Ibid 49.

women in Iran and feared being subject to a forced marriage and punishment for violating Islamic dress codes. The Tribunal Member stated:

> The treatment of women in Iranian society is, I consider, quite abhorrent and unacceptable. Nevertheless, I feel obliged to say that it falls short of what I could consider to amount to persecution … Of course, whipping, stoning, rape and arbitrary execution and imprisonment and other such practices are clear cases of persecution. But it is open to a woman in Iran to avoid such treatment by complying with the requirements of Islamic law. If she is careful in observance of the Islamic dress code and other such regulations, she will not receive *persecutory* punishment.[142]

This decision fails to recognise that the restriction on dress in Iran is a direct violation of a woman's right to freedom of expression, religion and conscience, which is the substance of persecution.[143] Additionally, it ignores the social and political context, in which laws dictating how women must dress are but one thread in a fabric of oppression restricting Iranian women's autonomy and independence. Finally, the adjudicator failed to consider that the penalty for violation of the dress code is disproportionately severe to the infraction. The decision is clearly inconsistent with the UNHCR's guidelines on gender-related persecution, which state that '[w]here the penalty or punishment for non-compliance with, or breach of, a policy or law is disproportionately severe and has a gender dimension, it would amount to persecution'.[144] Thus, even if one rejects the contention that the proscription alone does not constitute persecution, one should conclude that the penalty does. However, putting this aside, the edicts issued by the Taliban in Afghanistan restricted women's lives in a greater number of ways than 'dress laws' in Iran, in that their cumulative effect on Afghan women reached of level of severe deprivation of human rights.

The above demonstrates that a number of international bodies, as well as various states and their higher courts, have recognised gender-based persecution and given close consideration to its required elements. This jurisprudence and the various guidelines should be viewed as aids, not only in determining whether Element 3 is satisfied, but also in interpreting the international crime of gender-based persecution as a whole.

D *Element 4: Connection with a Crime within the Jurisdiction of the Court*

This element is very technical. It requires that there be a *connection* between the act(s) of persecution and other criminal acts listed in art 7(1). The Trial

142 *RRT Reference: V97/05699* (Unreported, Refugee Review Tribunal, Member Hudson, 21 July 1997) (emphasis added). Note that this case was inconsistent with earlier rulings by the Tribunal: see, eg, *RRT Reference: N94/03738* (Unreported, Refugee Review Tribunal, Member Ransome, 5 June 1995), where it was held that the penalties for refusing to obey the dress code constituted persecution.

143 Akram Mirhosseini, 'After the Revolution: Violations of Women's Human Rights in Iran' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (1995) 72, 74. Mirhosseini quotes Ayatollah Ruhollah Khomeini, who said on 6 March 1979 that '[f]rom now on, women have no right to be present in the governmental administration naked. They can carry on their tasks provided they use Islamic dress'.

144 UN High Commissioner for Refugees, *Guidelines on International Protection*, above n 124, [12]. It further states that '[s]evere punishment for women who, by breaching a law, transgress social mores in a society could, therefore, amount to persecution': ibid.

Chamber in *Kupreskic* stated that while this required 'connection' in the *Rome Statute* 'may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law'.[145] It follows that a national court or special tribunal may not require this element to be established. Reportedly, this connection was requested by some delegations to the Rome Conference on the Establishment of the ICC who feared that the crime of persecution would otherwise lack a criminal focus, and thus be too vague and broad.[146]

The question here is to which criminal acts, listed in art 7(1) of the *Rome Statute*, the Taliban's gender-based persecution could be connected. Article 7(1) includes murder, extermination, as well as 'other inhumane acts causing great suffering, or serious injury to body or to mental or physical health'.[147] The category of 'other inhumane acts' is considered important and useful by international legal bodies such as the ICRC and the International Law Commission who believe that an exhaustive list would be both impossible and too restrictive.[148] As there is insufficient evidence in this case to argue that the Taliban regime had a policy of committing other crimes enumerated in the statute, such as the murder and extermination of Afghan women, this category is useful here as it provides a sufficient opening to allow regimes such as the Taliban to be prosecuted for the crime of persecution.

The next question is whether 'other inhumane acts' must themselves be crimes against humanity. Robinson asserts that 'it will suffice to show a connection between the persecution and any instance of murder, torture or rape *or other inhumane act, which need not amount to a crime against humanity in its own right*'.[149] If Robinson is correct, then it is possible to prosecute the crime of persecution on the basis of the perpetrator having committed: (1) one or more acts which amount to severe deprivations of fundamental rights; and (2) a connected 'inhumane act' — that is, another act which is a severe deprivation of a fundamental right — of the same gravity which causes 'great suffering, or serious injury to body or to mental or physical health' according to art 7(1)(k) of the *Rome Statute*.

In *Kupreskic*, the ICTY stated that the category of 'other inhumane acts' 'allows courts flexibility to determine the cases before them'.[150] The ever-changing and increasingly complex forms that attacks on humanity may take means that this flexibility is vitally important. The Chamber concluded that

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145 *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [580]. This connection requirement appeared in the '*Principles of the Nuremberg Tribunal*', above n 32, 377 and the *Tokyo Charter*, above n 36, art 5(c); but not in *CCL 10*, above n 37, art II(1)(c), the *Statute of the ICTY*, above n 4, art 7, or the *Statute of the ICTR*, above n 5, art 3.

146 Darryl Robinson, 'Defining "Crimes against Humanity" at the Rome Conference' (1999) 93 *American Journal of International Law* 43, 54.

147 This clause is aimed at setting a threshold for the offence of 'other inhumane acts', the vagueness of which could otherwise violate the principle of legality.

148 *Kayishema (Trial Chamber Judgment)*, Case No ICTR–95–1–T (21 May 1999) [149]–[150]. The ICTY has also pointed out that 'other inhumane acts' can be usefully employed as providing a required connection with persecution: see *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [580].

149 Robinson, above n 146, 55 (emphasis added).

150 *Kupreskic (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [623].

'[e]ach case must therefore be examined on its merits'.[151] In our view, this connection, if required, should not be difficult to establish in the case of the Taliban's treatment of women as there were numerous acts which caused Afghan women great suffering, both physically and mentally.

E *Element 5: Widespread or Systematic Attack*

The test of whether the actions by the Taliban were 'widespread or systematic' is demanding, since crimes against humanity, by definition, have an impact not only on their victims but on humanity as a whole.[152] 'Widespread', according to ICTR jurisprudence, involves large-scale action and a significant number of victims.[153] 'Systematic' entails a high level of organisation and planning, as well as use of substantial public or private resources.[154] 'Directed against a civilian population' also implies a large scale,[155] and is defined in art 7(2)(a) as a 'course of conduct involving the multiple commission of acts … against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such an attack'. With regard to the policy element, as discussed earlier, customary international law no longer requires that the policy be established at state level. Nevertheless, the policy element is important as it gives crimes against humanity its essential international element.[156] For the purposes of prosecuting a regime such as the Taliban, this is not a problem as the policy of gender-based persecution was clearly that of the Taliban state.

The Taliban's edicts were effectively the law and policy that applied to all women within the borders of Afghanistan. At the height of its power, the Taliban controlled about 95 per cent of the country. The publication of the edicts, and their enforcement by the religious police who reported directly to the leader of the Taliban, demonstrates the systematic nature of the persecution of women. The persecution consisted not of the ad hoc actions of a group of rogue police, but of the conscious and deliberate tactics of an organised, widely feared and pervasive religious police enforcing the laws of the Taliban.

There is significant evidence that the persecution was also widespread. It was clearly not a case of random acts being committed by isolated individuals, but of state officials carrying out a policy which impacted on women on a large scale — on women all over Taliban-held Afghanistan, and in particular, urban and educated women.

Those who reject the contention that persecution was widespread point to the treatment of rural women. Specifically, there are reports that the edicts were less rigorously enforced in rural areas. Historically, there has always been a significant gap between the roles of women in urban areas, particularly between women in Kabul and rural women. Most educated Afghan women studied, lived, and worked in Kabul. They enjoyed a significant amount of autonomy and

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[151] Ibid.

[152] *Tadic* (*Trial Chamber Sentencing Judgment*), Case No IT–94–1–T (14 July 1997) [73].

[153] *Akayesu (Trial Chamber Judgment)*, Case No ICTR 96–4–T (2 September 1998) [580].

[154] Ibid.

[155] In *Kupreskic* the ICTY stated that a wide definition of 'civilian' and 'population' is intended: *(Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) [547].

[156] Bassiouni, above n 28, 327.

independence. Many were teachers, scholars, lawyers, journalists and doctors. When the Taliban came to power it immediately forbade all women except medical care providers from working. The religious police rigorously enforced the edict prohibiting women from working outside the home in urban areas. Although women in rural areas, most of whom work in the agrarian sector, technically worked outside the home, they were largely invisible and less harassed by the religious police. With regard to education, schools that taught girls were mainly located in urban areas. The Taliban closed down these schools. While there were no schools to close down in rural areas, it is worth noting that the absence of schools does not indicate that women in these areas were indifferent to education.[157]

The fact that women in Kandahar may not have resisted Taliban rule to the extent that women did in Kabul is irrelevant to the question of whether the acts were systematic or widespread. When the discrimination is so severe, the proper measure is the impact of the discrimination, not whether individuals were punished for challenging the discrimination.

F Element 6: Knowledge or Intention of Widespread or Systematic Attack

This element constitutes the mens rea requirement for the crime of persecution. It is not necessary for the prosecution to establish that the perpetrator — such as a member of the religious police — was responsible for the overarching attack. However, it is essential that the prosecution establish that the perpetrator was aware of a widespread or systematic attack directed against a civilian population. In the case of the Taliban, this element would not be controversial as the Taliban, legislators, judges, the Ministry of Promotion of Virtue and Prevention of Vice, the religious police, and other law enforcement officers clearly knew of the regime's policy regarding women via the edicts issued publicly by Mullah Omar Mohammad.[158] Thus, this element would not be difficult to establish.

G Conclusion

In our view, the cumulative impact of gender-based discrimination against women by the Taliban exceeds the threshold necessary to find that it rose to the level of persecution. The persecution was both systematic and widespread. In fact, it was the explicit policy of the Taliban. The recognition in international law that gender-based discrimination is a violation of the fundamental principle of non-discrimination would allow any court or tribunal with jurisdiction to try international crimes to prosecute members of the Taliban for the crime of persecution without violating the principle of legality.

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[157] All the Afghan women interviewed by Human Rights Watch in 2001, including many illiterate women, talked about how important it was for them to ensure that their daughters were educated.

[158] See, eg, the edicts reproduced in Human Rights Watch, above n 10, Appendix I.

VI FINAL THOUGHTS: COUNTERING SOME CURRENT PERCEPTIONS OF GENDER-BASED PERSECUTION

The term 'gender apartheid', as a description of the Taliban's treatment of women, has been used not only by women's rights groups,[159] but also by figures such as former US Secretary of State Madeleine Albright.[160] Many people feel, however, that there is little comparison between such systematic gender discrimination and apartheid as it was practiced in South Africa. This perception raises a few questions: Why is gender discrimination perceived as a lesser form of discrimination than race-based discrimination? Why is 'gender apartheid' not listed in the *Rome Statute* as a 'crime against humanity' in itself, alongside the crime of apartheid?[161]

There are a number of reasons for this perception of gender-based discrimination as a lesser form of discrimination. First, race-based discrimination is understood as impacting on every member of the oppressed community, whereas gender-based discrimination is seen as only affecting half the community, ie women and girls. There remains a strong perception that women and girls may rely on men to support and protect them, and that men's role as provider and protector is the natural order of things. In light of this perception, some may argue that the harm caused by gender-based discrimination against women is relatively insignificant. Of course, especially in conflict-torn countries, women must often provide for and protect their families. However, the paradigm of the woman who is independent and autonomous is still, in some contexts, viewed as an aberration at best, and a sin against nature or god at worst.

Second, the external evidence of systematic gender-based discrimination is the removal of women from the public sphere. This removal is arguably a unique feature of gender-based discrimination in that, by contrast, discrimination based on race is often perpetrated on a geographical basis. For example, in South Africa under apartheid, laws restricted blacks from living in certain geographical areas. While gender discrimination does not impose complete physical separation of women from men, it means that women are either restricted to private spaces or their individuality is erased, for example, through the imposition of the burqa or veil. Again, this removal from the public sphere is seen as a lesser harm because women in some cultures have rarely had significant roles in the public sphere. Therefore, women are not perceived as having lost their voice, because they were never perceived to have had a voice. In many minds, women's lack of agency, visibility, and political participation creates a higher bar when evaluating the claim of gender-based discrimination.

The true question is whether judgments made regarding women's experience in Afghanistan are culturally relative or are made with regard to the principle of non-discrimination based on gender. International law does not make, or allow for, relative judgments when it comes to the question of apartheid. In the 1970

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159 Feminist Majority Foundation, 'Feminist Majority Protests the Taliban's Violation of Afghan Women's Rights' (Press Release, 30 July 1997).

160 This statement was made by Albright during a trip to Pakistan in November 1997. See Sayed Salahuddin, 'Taliban Defends its Record on Treatment of Women', *The Philadelphia Inquirer* (Philadelphia, US), 8 March 1998, A17; Peter Beaumont, 'West's Women Are Sex Objects. Ours Have Dignity, Says Taliban' *The Observer* (London, UK), 8 March 1998, 4.

161 See *Rome Statute*, above n 2, art 7(1)(j).

Advisory Opinion regarding Namibia, the International Court of Justice refused to consider the purposes and objectives underlying South Africa's apartheid policies; neither the Afrikaaners' religious beliefs nor their cultural values were considered relevant.[162] Furthermore, the Court dismissed South Africa's argument that it should consider the effects of these policies upon the welfare of the inhabitants. And yet, governments around the world regularly invoke religion and culture to justify and rationalise systematic gender-based discrimination. Some regimes, such as the Taliban, also argue that the intended effect of their discriminatory policies is to promote the welfare of women. As this article fully demonstrates, the violation of fundamental rights is not considered, under international law, to equate to the promotion of welfare. It is hoped that the international crime of gender-based persecution, as set out in the *Rome Statute*, may lead the way in changing current perceptions of gender-based discrimination, so that it may be understood as being as unacceptable as race-based discrimination.

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[162] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding* Security Council Resolution 276 (1970) *(Advisory Opinion)* [1971] ICJ Rep 16, 57.