

ACADEMIC PAPER

IDENTIFYING GENDER PERSECUTION IN CONFLICT AND ATROCITIES

A TOOLKIT FOR DOCUMENTERS,
INVESTIGATORS, PROSECUTORS
AND ADJUDICATORS OF CRIMES
AGAINST HUMANITY

IDENTIFYING GENDER PERSECUTION



DECEMBER 2021
UN WOMEN

HUMAN RIGHTS &
GENDER JUSTICE CLINIC

MAIN STREET
LEGAL SERVICES

CUNY SCHOOL OF LAW



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EVALUATION SECTION
UN WOMEN

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Photo: UN Women/Allison Joyce, Kutupalong camp, March 8, 2018

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INTRODUCTION

In conflicts and atrocities across the globe, from Iraq to Colombia, armed actors have perpetrated gender-based crimes amounting to persecution as a crime against humanity in an effort to reinforce oppressive, discriminatory gender narratives. Rarely documented, perpetrators are hardly ever held accountable for these crimes. As a result, their crimes of persecution are often excluded from consideration by international and domestic tribunals, and in effect, are left out of history.

Evidence of gender-based crimes appears in modern international criminal law judgments, dating as far back as the International Military Tribunals of World War II. However, the crime against humanity of persecution on the grounds of gender—referred to here as gender persecution—was not an enumerated crime until the adoption of the 1998 Rome Statute, which governs the International Criminal Court (ICC). Despite over twenty years of official recognition, rarely is gender persecution specifically documented. Thus, perpetrators either evade accountability or are only prosecuted and tried for the underlying crimes, which do not fully represent their criminal conduct or the crimes suffered by the victims, nor the reasons for committing such a crime.

Until recently, gender persecution had not been prosecuted, leaving a gap in the development of international criminal jurisprudence. This jurisprudential silence is compounded by the lack of enumeration of gender persecution as a crime against humanity in the statutes of international criminal tribunals, other than that of the ICC, and in national penal codes. As a result, gender persecution is rarely investigated or charged, whether in international or domestic courts. It is omitted from the historical record, despite its consistent occurrence.

The Identifying Gender Persecution in Conflicts and Atrocities Toolkit is designed to provide investigators,

lawyers, advocates, documenters, first responders and others who engage in identifying gender-based crimes or their victims in conflict and atrocity settings a framework for recognizing and understanding illicit conduct that amounts to gender persecution. There are myriad fora where accountability might be rendered, ranging from international tribunals to domestic court proceedings to restorative justice models, but a first step to any justice process is agreement on what constitutes gender persecution. The toolkit discusses the need for the recognition of gender persecution as a crime against humanity. How accountability for gender persecution should be rendered is outside its scope.

As with all forms of persecution, accountability for gender persecution requires establishment of the underlying discrimination. Targeting women, men, girls, boys, LGBTQ+, non-binary and gender non-conforming persons on gender grounds is a crime against humanity. Redressing gender persecution would promote a survivor-centered or victim-centered approach and recognize their rights to participate in peace and transitional justice mechanisms. Finally, it would help build sustainable peace and disrupt the normalization of gender discrimination and violence institutionalized in existing law and practice.

1 International Military Tribunals of World War II are commonly known as The Nuremberg Tribunal and the Tokyo Tribunal (1945–1948).

2 This Toolkit uses both terms “victims” and “survivors,” recognizing that some persons who have endured harms identify with the term “survivor” while others prefer the term “victim.”

GENDER PERSECUTION TOOLKIT: OVERVIEW AND PURPOSE

This Toolkit is a resource for first responders, documenters, investigators, prosecutors and adjudicators of crimes against humanity. The Toolkit should better enable all stakeholders to understand and pursue claims of gender persecution. The aim of this Toolkit is to identify and clarify the concept of gender persecution and to show how it manifests in situations of armed conflict and atrocity. While persecution as a crime against humanity has been codified in various statutes, this Toolkit primarily relies on the persecution provision of the Rome Statute of the International Criminal Court (ICC) for the purpose of its analysis and guidance.

Section 1 of the Toolkit provides an overview of the international crime of persecution on gender grounds as a crime against humanity. It examines how international criminal law recognizes and contextualizes the concept of gender discrimination in the intent to commit crimes. **Section 2** outlines how persecution on gender grounds manifests, including through reliance on and reinforcement of entrenched gender narratives. This section also provides past and current examples

of gender persecution across a range of geographic, cultural and political contexts, and guidance on how to identify different forms of gender-driven discriminatory crimes such as murder, torture, enslavement, rape and other forms of sexual violence. **Section 3** provides exercises and tools to assist the reader with identifying and documenting gender persecution. The Toolkit concludes, in **Section 4**, with recommendations for ensuring accountability for gender persecution.



Photo: UN Women/Ryan Brown



Photo: UN Women/Ryan Brown

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LIST OF KEY TERMS AND ACRONYMS

Key Terms and Acronyms	Understandings
AQIM	Al-Qaeda in the Islamic Maghreb
Gender	For the purposes of this Toolkit, ‘gender’, refers to the definition under article 7(3) of the Rome Statute of the ICC: the two sexes, male and female, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys. ^t
Gender narrative	A set of ideas, beliefs, prejudices or stereotypes that define a social construction of an individual’s or group’s identity based on their perceived sex and/or gender including their roles, behaviors, activities or attributes.
Gender regulation	A gender narrative enforced—often through violence or other forms of fundamental human rights deprivations—on a person or group that regulates their roles, behaviors, activities or attributes.
Gender non-conforming person	A person who does not conform to prevailing social narratives that define accepted gender expressions.
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ISIL	Islamic State of Iraq and the Levant
LGBTIQ+⁴	Lesbian, gay, bisexual, transgender, intersex, and queer identified persons.
Non-binary person	A person who does not identify exclusively as a man or a woman, or as a boy or a girl.
OTP	Office of the Prosecutor for the International Criminal Court
Sex	Categories into which humans and most other living things are divided on the basis of their reproductive functions.
Sex characteristics	Sex characteristics refers to each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty. ^t
SOGIESC	Sexual orientation, gender identity, gender expression and sex characteristics

3 Excerpt from the ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes (2014).

4 While the acronym LGBTIQ+ is inclusive of a broad range of people, it is not exhaustive, nor is it the universally standard acronym.

5 The Yogyakarta Principles plus 10, 6 (2017).

Section 1

DEFINING GENDER PERSECUTION

This Toolkit follows the definition and understanding of gender persecution as a crime against humanity under the Rome Statute of the International Criminal Court. This section lays out the key elements to establish persecution based on gender. It first provides a brief overview of the overarching elements for crimes against humanity. Next it discusses the elements for persecution, including the crime of gender persecution. Finally, it examines how international criminal law recognizes and contextualizes the concept of ‘gender’ and its interlinkages with ‘sex’.

Crimes Against Humanity

Under Article 7 of the Rome Statute, a crime against humanity occurs when the accused:

- Commits an act prohibited under the Statute;
- That is part of:
 1. an “attack”
 2. which is “widespread or systematic,” and
 3. “directed against any civilian population”; and
- There is a link or “nexus” between the act of the accused and the attack.

A crime against humanity can be broken down into specific and contextual elements. Specific elements are the underlying elements of the prohibited act such as murder, torture, enslavement, sexual violence, etc. (The specific elements of persecution are discussed below.) The contextual elements are those elements describing the required overarching context, i.e. the “widespread” or “systematic” “attack” against any civilian population. The contextual elements establish that the specific acts were committed as crimes against humanity. Accordingly, an isolated act not linked to a “widespread or systemic attack” cannot amount to a crime against humanity.

Note: Recognition of crimes against humanity is reflected by the statutes adopted to establish international tribunals and has evolved under customary international law. This Toolkit focuses on the Rome Statute of the ICC. However, it is important to remember that the contextual elements for crimes against humanity contained in other statutes may differ.

Persecution

‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. —Rome Statute Art. 7.2(g)

Persecution is a prohibited act that may amount to a crime against humanity under **Article 7** of the **Rome Statute**. The prohibited act of persecution has three elements:

- Severe deprivation of a fundamental right or rights contrary to international law (actus reus);
- Against one or more individuals forming part of an indefinable (or targeted) group or collectivity (actus reus); and
- Committed with the intent to discriminate on one of the listed grounds (mens rea).

SEVERE DEPRIVATION OF FUNDAMENTAL RIGHTS CONTRARY TO INTERNATIONAL LAW

The first element of persecution is a “**severe deprivation of fundamental rights contrary to international law**” (Art. 7(2)(g)). International human rights law recognizes several fundamental rights. For example, the International Covenant on Civil and Political Rights (ICCPR)⁶ recognizes inter alia the right to life and human dignity; equality before the law; freedom of speech; assembly; association; religious freedom; privacy; freedom from torture; ill-treatment; arbitrary detention; gender equality; the right to a fair trial; right to family life and family unity; and minority rights. The International Covenant on Economic Social and Cultural Rights and the Universal Declaration of Human Rights (as well as other human rights treaties) also recognize the inherent dignity and of the equal and inalienable rights of all people, and that these rights are the foundation for freedom, justice and peace globally.⁷ Taken together, these three documents are known as the International Bill of Human Rights.⁸

The actus reus or severe deprivation of a fundamental right amounting to persecution as a crime against humanity under the Rome Statute must be in connection with an act that is enumerated in Article 7(1) of the Rome Statute or any crime within the jurisdiction of the ICC. For example, a severe deprivation of a fundamental right could occur in tandem with torture, which is a prohibited act listed under Article 7(1)(f).

Notably, the deprivation of a fundamental right does not need to be physical in nature (i.e., physical violence) to be “severe.” For example, in the context of the Rwanda genocide, the ICTR Appeals Chamber found that hate speeches and calls for violence against the Tutsi made after 6 April 1994 constituted underlying acts of persecution as a crime against humanity.⁹ It could include a range of psychological actions¹⁰ or omissions. Additionally, the deprivation of a right should be assessed with a view to both the impacts of restrictions that perpetrators impose, as well as to the way they treat those who violate those restrictions.

Note: International criminal tribunals have demonstrated a tendency to focus on proof of the specific sub-crimes as underlying acts of persecution instead of the requirement of a fundamental right violation, even when it is not required.¹¹ For example, in the ICTY Krnojelac case¹², when analyzing deportation as an act of persecution, the Trial Chamber applied the elements of the crime of deportation, rather than “conceptualizing them as violations of the victim’s right to live in their homes and communities without interference.”¹³ While the ICTY Appeals Chamber found this to be an error,¹⁴ the practice has often been repeated in other proceedings. This could be an obstacle to charging gender-based crimes as persecution in proceedings.

6 The ICCPR, together with the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights, are known as the International Bill of Human Rights.

7 OHCHR, Fact Sheet No.2 (Rev.1): *The International Bill of Human Rights* (1996).

8 *Id.*

9 *Prosecutor v. Nahimana et al.*, case no. ICTR-99-52-A, Judgment, ¶ 988 (ICTR, Nov. 28, 2007).

10 For example, the ICTY Appeals Chamber found that acts of harassment, humiliation and psychological abuse against Bosnian Muslims constituted underlying acts of persecution as a crime against humanity. See *Prosecutor v. Kvočka et al.*, case no. IT-98-30/1-A, Judgment, ¶ 325 (ICTY, Feb. 28, 2005).

11 Baig, Jarvis, Martin Salgado, & Pinzauti, *Contextualizing Sexual Violence: Selection of Crimes* in, PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 199-200 (Oxford Univ. Press, 2016).

12 *Prosecutor v. Krnojelac*, case no. IT-97-25-T, Judgement (ICTY, Mar. 15, 2002).

13 Baig, Jarvis, Martin Salgado, & Pinzauti, *Contextualizing Sexual Violence: Selection of Crimes* in, PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 189 (Oxford Univ. Press, 2016) (citing *Prosecutor v. Krnojelac* (Judgment), n. 112, ¶¶ 474, 476, 478, 480, 484-485).

14 *Prosecutor v. Krnojelac*, case no. IT-97-25-A, App. Judgement, ¶¶ 213-14, 216-25 (ICTY, Sept. 17, 2003).

AGAINST ONE OR MORE INDIVIDUALS FORMING PART OF AN INDEFINABLE (OR TARGETED) GROUP OR COLLECTIVITY

The second element of persecution focuses on individuals forming part of a targeted sub-set of the civilian population who were severely deprived of a fundamental right **“by reason of the identity of the group or collectivity.”** In other words, a group or collectivity may consist of one or more individuals who are targeted based on their real or perceived membership to a group. Article 7(2)(g)) Rome Statute. The individual or individuals targeted can be from any group. The discriminatory grounds on which persecution can be committed against members of the targeted group are political, racial, national, ethnic, cultural, religious and gender, but the list is not exhaustive.

Note: What constitutes discriminatory grounds for persecution has long been discussed by experts, including a diverse range of categories such as age, race, ethnicity or social origin, Indigenous status, language, religion or belief, political or other opinion, nationality, culture, wealth, birth, caste, health status, sex, gender, sexual orientation, gender identity, sex characteristics, disability status, statelessness, and status as a refugee or migrant, among other grounds.¹⁵

COMMITTED WITH THE INTENT TO DISCRIMINATE ON ONE OF THE LISTED GROUNDS

The third element of persecution is “discriminatory intent.” The perpetrator must consciously intend to discriminate on one of the above-listed grounds.

Note: Always check the requirements of the governing statute. Under the ICTY Statute, the acts of persecution—the deprivation of a fundamental right on intentional discriminatory grounds—did not require a connection to another crime against humanity or any other crime.¹⁶ Under the Rome Statute, as noted above, the persecutory act must be committed in connection with another enumerated crime.

In *Prosecutor v. Milorad Krnojelac*, the ICTY found that discrimination may be established through the identification of the group by the perpetrator. This includes the mere perception of a group by the perpetrator, irrespective of how the victim identifies.¹⁷ While crimes against humanity require that the widespread or systematic attack must be committed pursuant to a state or organizational policy, this does not mean it has to be a discriminatory policy per se.

While discriminatory grounds vary among the statutes of the international criminal tribunals,¹⁸ the category of ‘sex’ has been a recognized basis of impermissible discrimination since the 1948 Universal Declaration of Human Rights.¹⁹ By the time of the adoption of the Rome Statute in 1998, the international community understood that ‘gender’ is the more applicable term.

The ICC Office of the Prosecutor (OTP) Policy Paper of 2014 further clarifies the inextricable link between “sex” and “gender”, referring to “gender” as a social construct and “sex” as a biological determination.²⁰ For example, the Policy Paper explains that “sex” is “the biological and physiological characteristics that define men and

¹⁵ See U.N. Special Rapporteur to the Int’l Law Comm’n, Re: Comments Regarding the Persecutory Grounds in the Draft Crimes Against Humanity Convention (Nov. 30, 2018).

¹⁶ Baig, Jarvis, Martin Salgado, & Pinzauti, Contextualizing Sexual Violence: Selection of Crimes, in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 200 (Oxford Univ. Press, 2016) (noting that the acts of persecution were required to be of similar gravity to other crimes against humanity).

¹⁷ Prosecutor v. Krnojelac, case no. IT-97-25-A, App. Judgment, ¶185 (ICTY, Sept. 17, 2003).

¹⁸ The ICTR Appeals Chamber clarified that the three discriminatory grounds listed in the ICTR Statute (namely political, racial, and religious grounds) were only a limitation on the jurisdiction of the ICTR and that persecution as a crime against humanity under customary international law might not be restricted to these three discriminatory grounds. See Prosecutor v. Nyiramasuhuko et al., case no. ICTR-98-42-A, Judgment, ¶ 2136 (ICTR, Dec. 14, 2015).

¹⁹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, Art. 2, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

²⁰ ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes 3 (2014).

women.”²¹ It then goes on to clarify “gender-based crimes as those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.”²² In other words, gender narratives derive not only from a biological understanding of the concept of “sex,” but also from its social construction. Without “sex” there would be no regulation of “gender” including SOGIESC.

Final Note: While three elements are necessary to establish persecution, it is important to remember that a single fact can demonstrate more than one element. Additionally, a single fact or set of facts can be the basis of multiple or cumulative charges. The next section shows how the cumulative charging of other crimes against humanity provisions and persecution on gender grounds could function.

Gender Persecution

The **Rome Statute** expressly lists gender as a ground for persecution. **Article 7(3)** of the Statute defines **gender** as “**the two sexes, male and female, within the context of society.**”

The **OTP** issued a **Policy Paper on Sexual and Gender-Based Crimes** in 2014, to provide guidance for its staff. The Policy Paper acknowledges “the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys.” This understanding of gender should be viewed from the perpetrator’s point of view, i.e., the

perpetrator’s understanding of gender and intent to enforce prescribed gender narratives of ‘maleness’ and ‘femaleness’.

While the OTP 2014 Policy Paper does not provide detail, its focus on the social construction of gender demonstrates that the OTP does not view gender as limited to a male/female biological binary and that the discrimination element of gender persecution can include discrimination against an individual or group because they do not fit socially-prescribed categories of “maleness” or “femaleness.” This is reinforced by Art. 21(3) of the Rome Statute which requires the Court to interpret its provisions in light of international human rights law. Notably, international human rights law has recognized the social construction and plurality of gender for over twenty-five years.²³ This understanding of gender under international criminal law has also been affirmed by the International Law Commission (ILC), the primary purpose of which clarifying the evolution of international law. When discussing grounds for persecution, the ILC reiterated that gender is understood as a social construct and has encouraged states to follow international law precedents confirming this.²⁴

Note: When assessing gender persecution, regulations or policies directed against to “men” and “women” as groups, such as dress or behavior codes, should be assessed from the perpetrator’s intent to enforce roles, behaviors, activities or attributes.

²¹ Id.

²² Id. at ¶ 16.

²³ As far back as 1995, the United Nations defined gender as “the ways in which roles, attitudes, values and relationships regarding women and men are constructed by all societies all over the world. Therefore, while the sex of a person is determined by nature, the gender of that person is socially constructed.” Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 64 HARV. HUM. RTS. J. 55, 67 (2005) (citing Comm’n on Hum. Rts. Report of the Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into U.N. Human Rights Activities and Programmes ¶ 13, U.N. Doc. E/CN.4/1996/105 (Nov. 20, 1995)).

²⁴ Report of the International Law Commission, ‘Seventy-first session (29 April – 7 June and 8 July – 9 August 2019)’ (UN 2019) UN Doc A/74/10, 45 [42].

Section 2

UNDERSTANDING GENDER PERSECUTION

This section of the Toolkit introduces gender-based crimes and how they can rise to the level of gender persecution, including through reliance on and reinforcement of entrenched gender narratives. This section also provides past and current examples of gender persecution across a range of geographic, cultural and political contexts, and guidance on how to identify different forms of gender-driven discriminatory conduct such as murder, torture, enslavement, rape and other forms of sexual violence.

Note: As with all forms of persecution, accountability for gender persecution requires recognition and understanding of the discrimination that underlies the crime. It is not enough to hold perpetrators accountable for crimes that take place during atrocities; justice also requires understanding how perpetrators justify such acts, if we are to eliminate discrimination and break cycles of violence.

What Are Gender-Based Crimes and How Do They Manifest?

The concepts of ‘sex’ and ‘gender’ are often treated as synonymous—a conflation that impedes identification, investigation and prosecution of gender persecution. This section endeavors to distinguish the term sex from gender. It outlines how gender persecution manifests and describes its reliance on and reinforcement of entrenched gender narratives. It also provides case studies of crimes against humanity that might have amounted to gender persecution.

Everyone is subjected to dominant gender narratives within their particular cultural and social context. In general, people are socially disciplined to remain in their culturally-assigned gender roles or risk societal disapproval or punishment. Recognizing gender narratives

and the steps some individuals and groups will take to punish those who do not fit into these narratives better enables the identification of persecution on gender grounds and gender-based crimes more broadly.

By definition, gender-based crimes target women, men, girls, boys, LGBTQ+, non-binary and gender non-conforming persons, on the basis of gender discrimination. Gender-based crimes are used as punishments against those who are perceived to transgress assigned gender narratives that regulate “accepted” forms of gender expression manifest in, for example, roles, behaviors, activities, or attributes. These narratives often regulate every aspect of life, determining the extent of individuals’ freedom of movement, their reproductive options, whom they can marry, if and where they can study and/or work, how they can dress and whether they are simply allowed to exist. Gender-based crimes may meet the threshold for gender persecution when, for example, underlying crimes such as rape, enslavement, torture or murder are used as punishments for deviating from gender narratives, or when the crime itself is the gender narrative.

Sexual Violence Crimes as Gender Persecution

Note: Gender narratives historically rationalized sexual violence as a normal “consequence of war”—essentially entertainment or reward for soldiers. Such framing greatly downplayed the gravity of sexual violence and portrayed rape as an inevitable byproduct of war, instead of as an act that may amount to gender persecution.

In 2018, the ICC Pre-Trial Chamber in the Al Hassan case recognized rape and other forms of sexual violence, torture and murder committed on “sexist grounds,”²⁵ bringing charges of gender as well as religious persecution as crimes against humanity.²⁶ Notably, the ICC lists charges of gender persecution and sexual violence separately, indicating that acts of sexual violence should not be subsumed by persecution or torture charges and should instead be tried cumulatively.

The Court also points out the intersectionality between forms of gender and racial discrimination that fuel crimes, noting that “violence against women could also have been motivated by considerations linked to skin color, since women with dark skin were more affected by this violence than others; the same goes for dark-skinned men who, according to some witnesses, were [more] persecuted than those with light skin.”²⁷

Similarly, the ICTY and ICTR decisions describe how gender narratives imposed by perpetrators can serve

as the underlying basis for crimes. These judgments provide additional building blocks for understanding sexual violence crimes as acts of gender persecution. While both of those tribunals’ statutes included political, racial and religious persecution, neither of them included gender persecution (and thus prosecutors did not charge gender persecution). However, their analyses of gender discrimination motivations in sexual violence crimes break ground for similar analyses in cases of gender persecution.

For example, in the ICTR’s Nahimana case, the Court addresses how Tutsi women were branded as “femmes fatales” and “seductive agents of the enemy,”²⁸ finding this discriminatory view a motivational factor behind the sexual violence and killings committed against them.²⁹ By doing so, the court recognized how sexual violence crimes were not only motivated by ethnic discrimination, but also by gender discrimination.

The ICTY’s Čelebići,³⁰ Kvočka,³¹ and Kunarac³² judgments also point to gender and ethnicity as discriminatory grounds, when finding acts of rape also amounted to torture.³³ These cases underscore how conflict-related sexual violence is often motivated by gender discrimination. The Trial Chamber in Čelebići concluded that the rape of two women detainees was committed in part because the victims were women.³⁴ The Trial Chamber in Kvočka found that sexual violence committed against women in detention was a “natural or foreseeable consequence” of their incarceration, since rape and humiliation were accepted forms of violence committed against women targeted as an ethnic enemy.³⁵ The Kvočka judgment also noted, that because the

25 Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18 ¶ 707.

26 Id.

27 Id. ¶ 702.

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

29 Id. at n.75.

30 Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

31 Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 1998).

32 Prosecutor v. Kunera, Case No. IT-96-23/1-T, Judgment, ¶ 491 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

33 Baig, Jarvis, Martin Salgado, & Pinzauti, Contextualizing Sexual Violence: Selection of Crimes in, PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 188 (Oxford Univ. Press, 2016).

34 Id. (citing Prosecutor v. Delalic, Case No. IT-96-21-T, ¶¶ 941, 963).

35 Id.

sexual violence was only committed against non-Serb detainees and only against women, the crimes were discriminatory on both ethnic and gender grounds.³⁶ The legal analyses in these cases can be analogized to that required for a finding of gender persecution.

Importantly, tribunals have found that a perpetrator may still have the required criminal purpose/intent regardless of the existence of a certain motive.³⁷ For example, perpetrators with sexual motives may still have the required discriminatory purpose/intent for persecution. In other words, the existence of a personal motive does not preclude the perpetrator from also having a specific (and different) intent (or even multiple discriminatory intent) to commit a crime. Therefore, the fact that perpetrators acted to gratify their own sexual motives or desires, does not cancel or replace any discriminatory intent the perpetrators might also hold.³⁸

Importantly, tribunals have found that a perpetrator may still have the required criminal purpose/intent regardless of the existence of a certain motive. For example, perpetrators with sexual motives may still have the required discriminatory purpose/intent for persecution. In other words, the existence of a personal motive does not preclude the perpetrator from also having a specific (and different) intent (or even multiple discriminatory intent) to commit a crime. Therefore, the fact that perpetrators acted to gratify their own sexual motives or desires, does not cancel or replace any discriminatory intent the perpetrators might also hold.

Remember: Intent is what a perpetrator seeks to achieve and motives are the reasons why they seek to achieve it. While perpetrators may have many different motives to commit sexual violence or other crimes, personal motivations do not void the intent to discriminate.

Examples of Gender Persecution Crimes

A gender persecution lens requires a careful examination of fundamental rights deprivations committed during conflicts and other atrocities, against women, men, girls, boys, LGBTQ+, non-binary and gender non-conforming persons. Gender persecution may be carried out through forms of punishment against victims who do not conform to prescribed gender narratives. For example, documented cases of potential gender persecution crime have included the murder, rape or torture of men perceived as behaving “effeminately”, or of women perceived as behaving “manly” or of persons for deviating from mandatory dress codes or occupations based on gender narratives. Consider these examples:

1. A woman is raped and then murdered for working a job not considered appropriate for women.
2. A woman is raped or tortured because her skirt is deemed too short or her headscarf too transparent.
3. Pregnant women are forced to have abortions because pregnancies are considered to interfere with women’s duties to provide sexual services to men.
4. Men are abused for being unwilling or unable to grow beards.
5. Afro-descendent women are raped because the perpetrators believe them to be innately lustful.
6. Men and women are condemned to death because of suspected homosexual behavior.
7. A group of young men are killed because they are perceived to be “aggressive” and likely to seek revenge.
8. Rape is imposed as a gender-specific sanction against women held in detention centers and forced into marriages.
9. Youth are forced to fight each other in a boxing ring to prove their masculinity.

³⁶ Id. at 188 (citing Prosecutor v. Kvočka, Case No. IT-96-23/1-T, ¶ 560).

³⁷ Id.

³⁸ See *Prosecutor v. Kunarac et al.*, case no. IT-96-23&IT-96-23/1-A, App. Judgment, ¶ 153 (ICTY, June 12, 2002).

10. Women and men are separated into two different groups. The women are enslaved and the men are killed.

Answer: All of the above examples trigger a gender persecution analysis.

Remember:

- A targeted group may include a single individual who is targeted on the basis of real or perceived membership to a group or collectivity.
- It is enough that the perpetrator perceives the victim to be a member of the group, even if the victim does not identify as a member.
- In the case of persecution committed on gender grounds, the “group” may, for example, be men or women, girls or boys, LGBTIQ+, gender non-conforming or non-binary persons or any combination.
- One victim may be enough to reach the threshold of gender persecution and the other elements of crimes against humanity including widespread or systematic.

Remember to look for multiple grounds of discriminatory intent that may constitute a single act. Most people have multiple and diverse identities and lived experiences. Those with marginalized identities (i.e., racial, ethnic or religious minorities, people with disabilities, women, girls, LGBTIQ+ people, migrants or refugees, etc.) are most vulnerable to multiple and intersecting forms of discrimination that may amount to other forms of intersecting grounds for persecution. When harmful gender narratives intertwine with other discriminatory narratives used to reinforce systems of oppression, such as racism or xenophobia, they create

new narratives that compound oppression for people who face multiple and intersecting grounds of discrimination. For example, Afro-descendant women and girls have experienced oppressive gender and racial narratives that emerged in countries shaped by slavery and colonialism continues to reverberate today.

Note: Family members who tried to intervene were often threatened, attacked or disappeared. Sometimes family members were forced to watch egregious acts committed against their loved one, causing them to endure psychological torture from witnessing such crimes. Family members may also be victims of persecution.

A LOOK BACK IN HISTORY - NAZI GERMANY & GENDER PERSECUTION

In the 1930s, the Nazi party began promoting a racist, misogynist and homophobic ideology. Nazism specifically called for the persecution of those perceived as homosexuals. Nazi members also interwove racial, ethnic, and gender narratives into their ideology. Some viewed homosexuals as racial degenerates, stemming from the “evil propensities of the Jewish soul.”^c Police created “pink lists” of suspected homosexual men. Somewhere between 5,000 and 15,000 men accused of homosexuality were sent to concentration camps and marked by pink triangle badges.⁴⁹ Police also collected information about lesbians and some were interned in work camps. Police applied the “asocial” designation (represented by the black triangle badge in concentration camps) to women perceived as lesbians and others caught breaking gender regulations. Transgender persons were seen as intentionally misrepresenting their sex assigned at birth, as opposed to living as their true selves and were also subjected to interrogations, imprisonment and concentration camps. By the end of

39 Harry Oosterhuis, *Male Bonding and the Persecution of Homosexual Men in Nazi Germany*, 17 *AMSTERDAMS SOCIOLOGISCH TIJDSCHRIFT* 27, 29 (1991). It should be noted that Oosterhuis also contends that Nazi racism does not explain its homophobic regulations as most Nazis likely considered homosexuality a social disease. *Id.* at 29-30.

40 Erik Jensen, *The Pink Triangle and Political Consciousness: Gays, Lesbians, and the Memory of Nazi Persecution*, 11 *J. HIST. OF SEXUALITY* 319, 344, fn. 122 (2002).

World War II, over 100,000 persons had been killed for “homosexual activity” under the Nazi regime.⁴¹

Note: Nazi gender regulations dictated that women should not take on jobs, such as that of judges or politicians, which were reserved for men’s gender roles, and instead should fulfill their “destinies” as mothers and caretakers. Nazi militants called for women’s dress and performance to be feminine and submissive, and for women to avoid wearing pants or other clothes deemed masculine.⁴²

Reflecting Back: Following World War II, the Nuremberg trials confirmed that the conduct of the Nazi regime met the elements of persecution on racial, religious and political grounds as crimes against humanity. The Nuremberg Tribunal found that acts such as denying Jewish persons the right to education or employment opportunities, or choice of spouse, are forms of religious persecution.⁴³ A gender discrimination analysis above makes clear that many of the Nazi regime’s crimes may have amounted to gender persecution, noting that the London Charter that governed the Nuremberg Tribunal did not list gender as a ground for persecution under crimes against humanity. Notwithstanding, women and LGBTIQ+ persons who transgressed the myriad restrictive gender regulations enforced by the Nazis were subjected to a systematic deprivation of fundamental rights.

While the London Charter did not list gender as a persecutory ground, it is worthwhile considering how these acts would fit into the elements of gender persecution if they took place today:

- **Was there a targeted group?** Yes. Persons who violated Nazi gender narratives by engaging in or being perceived to engage in non-heteronormative sexual conduct, or persons who did not act, dress or behave or otherwise express themselves in accordance with their prescribed gender roles were targeted.
- **Did the targeted group suffer a severe deprivation of a fundamental right?** Yes, individuals perceived as gay men, lesbians, transgender persons and others including women, were subjected to physical and psychological torture, arbitrary arrest and detention, imprisonment or internment in concentration camps, and, in some cases, death.
- **Did the alleged perpetrator(s) act with discriminatory intent?** Yes, the Nazi regime issued explicit instructions to punish, harm, detain and torture individuals who did not conform to the regime’s strict gender regulations.

A gender discrimination analysis unearths how Nazi anti-gender rights ideology targeted women and LGBTIQ+ persons for discrimination, exacerbating pre-existing misogynist, homophobic and transphobic narratives, while also intertwining those with racial and ethnic narratives to create multiple forms of oppression that reinforced tyranny and policed and targeted certain groups for violence and destruction.

Note: Conduct that may have amounted to gender persecution also took place in East Asia and the Pacific region during World War II. Most notable was the abuse of the “Comfort Women”— Korean, Chinese, Indonesian, Filipino, Malaysian and Taiwanese women and girls who were sexually enslaved.

41 John Connelly, *Gypsies, Homosexuals, and Slavs*, in *THE OXFORD HANDBOOK ON HOLOCAUST STUDIES*, 282 (2010).

42 Laurie Marhoefer, *Lesbianism, Transvestitism, and the Nazi State: A Microhistory of a Gestapo Investigation, 1939–1943*, 121 *Am. Hist. Rev.* 1167, 1176 (2016)

43 *Prosecutor v. Kvočka*, (Judgment) [2001] IT-98-30/1-T ¶ 186 (citing *U.S. v. Ernst von Weizsaker*, vol. XIV, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10*, p 471).

Examples from Recent Conflicts

GENDER PERSECUTION BY THE ISLAMIC STATE OF IRAQ AND THE LEVANT (ISIL)

ISIL created and enforced a severe and systematically organized gender-discriminatory set of policies known to be enacted by an armed group.

Gender Regulation of Women and Girls' Behavior: ISIL imposed gender regulations that permitted girls to be married off at the age of nine; called for the death penalty for women who have held professional jobs; and assigned strict dress codes for men and women with harsh penalties for non-compliance. When caught out of dress regulation, women were beaten with sticks and tortured with a flesh cutting instrument coined "the biter." In one documented instance, women doctors and nurses who removed their gloves to perform medical duties were severely beaten, as were women and girls who failed to wear gloves or veils in public spaces. Sometimes ISIL members beat women and girls to death. Rape and enslavement/sexual slavery were also systematically enacted as part of a larger plan to control gender norms and the ethno-religious make-up of future generations in Iraq, as well as for economic gain and to demonstrate territorial control.

Gender Regulation of Men and Boys' Behavior: ISIL also applied rigid gender narratives that regulate men and boys' gender expression. One key display of masculinity under ISIL' ideology is the ability to grow a full-bodied beard. Men were also forbidden from wearing stylish clothing or having trendy haircuts and could be accused of homosexuality for doing either, leading to their torture and death. Furthermore, pant lengths were required to fully cover men's legs. Men caught without a beard or out of dress code could be subject to beatings.

Gender Regulation of Men and Women suspected of Homosexual Behavior: ISIL systemically targeted individuals perceived as homosexual for execution. For example, after reviewing suspension records at Mosul University, ISIL issued death warrant for two women who were reported for kissing on campus. In another instance, ISIL accused a group of youths of homosexuality and sentenced them to death for wearing skinny jeans and hair gel.

Note: ISIL' rigid gender roles conflate socially-constructed gender narratives with actual sexual orientation. The mere absence of males "acting masculine" or females "acting feminine" was sufficient to risk accusations of being homosexual, regardless of actual sexual orientation or gender identity.

Enslavement: ISIL sexually enslaved females to impose gender regulations and to control the ethno-religious make-up of future generations. In 2014, Dabiq, ISIL' online magazine, circulated the article, "The Revival of Slavery" urging members to "embrace the practice of slavery and slave trading to eradicate 'pagan' Yazidi women and girls from the Muslim world."⁴⁴ ISIL also published a "frequently asked questions" pamphlet that detailed the policies on ownership of people enslaved, including rules on punishments, sales, and inheritance.⁴⁵ In addition to suffering routine rape by their owners, women and girls enslaved by ISIL were forced to strip naked at auctions, endure the trauma of being repeatedly slave traded, forced to imbibe drugs to hasten sexual maturation, and endure torturous and degrading acts for their perpetrators. Additionally, some young boys were kidnapped, enslaved and raised a "cubs of the caliphate."⁴⁶

44 Human Rights & Gender Justice Clinic (HRGJ) of CUNY School of Law, MADRE, and The Organization Of Women's Freedom In Iraq (OWFI), Communication To ICC Prosecutor Pursuant To Article 15 of The Rome Statute Requesting A Preliminary Examination Into The Situation of: Gender-Based Persecution And Torture As Crimes Against Humanity And War Crimes Committed By The Islamic State Of Iraq And The Levant (ISIL) In Iraq, para. 76 (November 8, 2017) <[www.madre.org/sites/default/files/PDFs/CUNY MADRE OWFI Article 15 Communication Submission Gender Crimes in Iraq.pdf](http://www.madre.org/sites/default/files/PDFs/CUNY_MADRE_OWFI_Article_15_Communication_Submission_Gender_Crimes_in_Iraq.pdf)> (hereafter HRGJ and others, Communication); Robert Mackey, Islamic State Propagandists Boast of Sexual Enslavement of Women and Girls, N.Y. TIMES (October 14, 2014).

45 HRGJ and others, Communication, para. 76; MEMRI, Islamic State (ISIS) releases pamphlet on female slaves (2014) <http://www.memrijtm.org/islamic-state-isis-releases-pamphlet-on-female-slaves.html>

46 Mia Bloom, Cubs of the Caliphate: The Children of ISIS, FOREIGN AFFAIRS (July 21, 2015).

Do the above-referenced crimes inflicted by ISIL amount to gender persecution? Consider how these acts would fit into the elements of persecution:

- **Was there a targeted group?** Yes. Women, men, girls and boys were targeted for their gender roles, behaviors, activities or attributes. There were prohibitions on women holding professional jobs, on women leaving their homes without a male relative, on women who failed to wear their gloves or headscarves in public, even in instances where such attire interfered with their medical duties, and on all on people who did not comply with strict gendered dress codes and behaviors assigned to men and women. Men accused of homosexuality were also targeted. Yazidi and other non-Muslim women and girls were targeted for sexual enslavement and subjected to rape, sexual slavery and forced/early marriage in crimes committed on the basis of both gender and ethnic discrimination. Some young boys were targeted to be fighters for the group.
- **Did the targeted group suffer a severe deprivation of a fundamental right?** Yes. Women and girls were subjected to harsh penalties, beaten, tortured, and killed. Young boys were kidnapped, enslaved and raised to take on a fighting role for the group. Men who failed to comply with acceptable masculine gender roles and behaviors (i.e., men who could or would not grow and maintain full beards, who wore trendy clothing or haircuts) could be subjected to beatings. Individuals suspected of homosexual behavior were sentenced to death and executed. Women and girls were routinely slave traded, enslaved, tortured, sexually abused and suffered degrading treatment.
- **Did the perpetrators act with discriminatory intent?** Yes. These crimes were conducted pursuant to ISIL' anti-gender rights ideology, documented in a manifesto that reinforces strict, binary gender regulations for men and women. ISIL ideology also calls for the extermination of LGBTIQ+ people. ISIL undertook acts in line with publications that regularized enslavement and slave trade practices in order to eradicate 'pagan' Yazidi women and girls from the Muslim world.
- **Are there intersectional grounds of discrimination?** – Yes. There is evidence of gender discrimination occurring alongside ethnic and religious discrimination.

Note: Perpetrators engaged in slave trade practices include architects of enslavement systems, market organizers, registration administrators, and those who “gift” enslaved persons to others for enslavement. All of these individuals could be held liable for contributing to gender persecution as a crime against humanity. This charge should be cumulative since a charge of enslavement or sexual slavery may not capture the full range of gender-based violence endured by women and girls. Thus, both persecution and enslavement could be charged. Note that the Rome Statute does prohibit enslavement, but does not contain a provision explicitly prohibiting the slave trade.

GENDER, ETHNIC AND RACIAL PERSECUTION BY ARMED ACTORS IN COLOMBIA

In Colombia's decades-long civil war, all parties to the conflict inflicted gender and race-based crimes that may amount to persecution:

Gender Regulation of LGBTIQ+, Non-Binary and Gender Non-Conforming Individuals' Behavior: Labeled as “bad queers,” LGBTIQ+ persons were subjected to sexual violence, torture, forced displacement, and executions under organized campaigns. To show their ability to keep public order, paramilitary groups would engage in what they called “corrective rape” and “social cleansing”: the raping or killing of people considered “undesirable” including those they labeled criminals, and those they presumed to be sex workers and LGBTIQ+ persons. In one incident, a paramilitary commander forced sixteen gay youths to fight each other in a boxing ring. In another instance, when two men were caught having sex, the man who had been penetrated was raped, tortured and killed by armed actors. At play here is the invocation of the “indignity” of “behaving” as both a woman (because he was in the presumed “passive” or female sexual role), and as a homosexual. This targeted discriminatory violence demonstrates a correlation between the gender oppression of women and LGBTIQ+ persons.

Gender Regulation of Women's and Girls' Behavior and Dress: Women and girls who did not conform to regulated, socially-constructed 'female' ideals were labeled

“bad girls,” and subjected to torture, degradation, forced labor, enslavement, sexual violence and executions. Armed actors regulated and monitored dress and behaviors of those under their control, including their jewelry, hairstyles and clothing length. Women were forbidden from wearing clothes that exposed their bodies and sometimes were ordered to wear specific garments. “Good girls” were considered those who adhered to dress and behavior regulations set by fighters.

Gender Regulation of Women and Girls Through Reproductive Violence: Paramilitary and guerrilla groups also controlled women’s and girls’ reproductive actions and decisions, including through forced abortions, forced pregnancies and sexual slavery. Pregnancies were prohibited from being carried to term because it was thought to interfere with women’s duties of providing sexual services to male militia members. Women who refused to have abortions could face torture and death.

Gender Regulation Intersecting with Racist Violence: Racist attitudes toward Afro-Colombian and Indigenous women and girls were used to justify sexual and other forms of gender-based violence during the conflict. Presumptions that Black women, in particular, are innately lustful and sexually deviant helped to rationalize sexual and other violence committed against them. This violence was discriminatory and was used to police and punish women and girls who were perceived not to adhere to prescribed gender narratives. Notably, Afro-Colombian and Indigenous persons are more vulnerable to abuse by armed groups than non-racialized individuals because they have long been the subjects of discrimination in Colombian society— historical enslavement and a legacy of colonialism that continues to reverberate today.

Consider whether the above-referenced crimes inflicted by armed groups in Colombia amount to gender and racial persecution:

- **Was there a targeted group?** Yes, women and girls, including those from Afro-Colombian or Indigenous communities, who did not comply with prescribed gender narratives or who were perceived to engage

in “undesirable” conduct were targeted. LGBTQ+ persons and homosexual behavior was considered particularly “undesirable” and punishable by torture, humiliation or death.

- **Did the targeted group suffer a severe deprivation of a fundamental right?** Yes, the above-referenced individuals suffered sexual violence (including “corrective rape”), other gender-based violence, torture, forced displacement, executions, forced abortions, forced pregnancies and sexual slavery.
- **Did the alleged perpetrators act with discriminatory intent?** Yes, the language used by armed groups when committing the above-referenced crimes (i.e., “bad girls” or “bad queers”), is evidence of their biased views and thus discriminatory intent. Additionally, entrenched racial narratives that depict Black women as innately lustful and sexually deviant also rationalized sexual and other violence committed against them. Homosexual behavior was considered an “undesirable” trait and punished through torture or death.
- **Are there intersectional grounds of discrimination?** – Yes. Here there is evidence of gender discrimination occurring along with ethnic and racial discrimination.

RAPE, TORTURE AND MURDER IN MALI

Between 2012 and 2013, women and men in Mali endured horrific abuses under the brutal regimes of Ansar al-Dine and al-Qaeda in the Islamic Maghreb (AQIM). AQIM’s ideology targeted all people under its control in Timbuktu, regulating every aspect of their lives through gendered and religious policies. Militia fighters established an “Islamic Police” to enforce a strict body of rules that regulated clothing, governed interactions between men and women, and provided harsh penalties for those who did not follow imposed gender narratives. Rape was used as a gender-specific sanction committed against women held in detention centers. While gender regulations were imposed on both women and men, the ICC noted the disproportionate effect of regulations and punishments imposed on women and girls, especially those of “darker skin” color.⁴⁷

⁴⁷ *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18 at ¶ 702.

Ansar al-Dine and AQIM fighters threatened, beat, flogged and maimed women for the slightest dress code violations. The AQIM issued gender regulations on dress and behavior based on anti-gender rights ideology. Ansar al-Dine dress codes for women included mandatory long skirts, head scarves and veils, and prohibited from wearing jewelry or perfume. Women reported being beaten for infractions such as wearing veils considered “too pretty” or “overly transparent.”⁴⁸ A woman caught giving a man water to drink or not wearing gloves at the market when exchanging money for goods, could be met with imprisonment or corporal punishment. In one case, militia members cut off a woman’s ear because she wore a skirt they deemed too short. Additionally, rape was used as a gender-specific sanction committed against women held in detention centers and forced into marriages.

Do the above-referenced crimes inflicted by the two identified armed groups in Mali amount to gender persecution? Consider how these acts would fit into the elements of persecution:

- **Was there a targeted group?** Yes, men and women were targeted under AQIM’s control in Timbuktu and subjected to restrictive gender and religious policies regulating clothing and governing interactions between men and women. Women and girls were disproportionately targeted under the harsh regulations and suffered gender-specific punishments such as rape and forced marriage for violating

the policies. Men and women with darker skin color were also disproportionately targeted for harsh abuses of gender transgressions.

- **Did the targeted group suffer a severe deprivation of a fundamental right?** Yes, women and girls faced threats, floggings, and maiming for even the slightest infractions under the AQIM’s strict dress code regulations which required long skirts, gloves, head scarves and veils, and prohibited the wearing of jewelry or perfume. Men and women with darker skin color were met with disproportionate abuse for gender transgressions.
- **Did the alleged perpetrator(s) act with discriminatory intent?** Yes, AQIM issued regulations to impose dress and behavior policies because they believed the population was not following religious values and gender regulations. The descriptions of women and girls’ veils as “too pretty” or “overly transparent” used by AQIM representatives when punishing women and girls for violating dress and religious policies is evidence of their anti-gender rights ideology and thus discriminatory intent. Additionally, rape was used as a gender-specific sanction committed against women held in detention centers and forced into marriages. These facts again provide evidence of discriminatory intent.
- **Are there intersectional forms of discrimination?** – Yes. There is evidence of gender discrimination occurring alongside racial and religious discrimination.

48 Prosecutor v. Al Hassan, case no. ICC-01/12-01/18, Decision on Confirmation of Charges, ¶¶ 282, 698 (ICC, Nov. 13 2019).

Section 3

DOCUMENTING GENDER PERSECUTION

This section of the Toolkit provides exercises and tools to assist the reader with identifying and documenting gender persecution. In particular, it provides examples of gender persecution and hypothetical scenarios with guiding questions. These are intended to assist the reader with identifying gender persecution crimes and the type of evidence and other information that aid investigators and support accountability.

Gender Persecution as a Crime Against Humanity

In order to establish a finding of gender persecution under the Rome Statute, the first step is to meet the overarching elements of crimes against humanity. See Section One for a review of the overarching elements for crimes against humanity under Article 7. For a finding of persecution as a crime against humanity, the next step is to establish that there was a severe deprivation of a fundamental right contrary to international law (actus reus) (which is linked to an enumerated crime under Article 7); committed against an identified (or targeted) group or collectivity; and with the intent to discriminate on a listed ground (mens rea).

Remember: While “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law”, in order to meet the standard for gender persecution under the Rome Statute, the conduct (act or acts) committed must be prohibited. The enumerated crimes that may amount to Crimes Against Humanity include:

- **Murder**
- **Extermination**
- **Enslavement**
- **Deportation or forcible transfer of population**
- **Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law**

In order to better understand this second step, this section takes a closer look at what gender persecution crimes may look like in conflict and atrocity settings. It provides examples and hypotheticals designed to highlight specific elements of gender persecution.

Hypotheticals on Gender Persecution Crimes

Read the hypotheticals below and consider these questions: What underlying crimes may be present? What may indicate potential evidence of gender persecution? What additional information would you ask the investigator to gather? Remember to also look for intersecting forms of persecution. Below each hypothetical is a non-exhaustive list of the kinds of crimes,

- **Torture**
- **Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity**
- **Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law**
- **Enforced disappearance of persons**
- **Apartheid**
- **Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health.**

issues and follow up questions that may be triggered. See if they match your answers. Note any forms of fundamental rights deprivations that may not be listed below. Check your answers in Appendix A.

1. An investigator learned that three women were recently executed in public for “dishonoring their community, ancestors and divine law.” Witnesses report that one woman had spoken out against a local militia, another resisted a forced marriage and the third worked as a local politician. All three women were executed at the same time.
2. A local documenter is reporting on a militia camp 5 kilometers outside of the conflict zone. She reports that orphaned youth were recruited to join the militia often with promises of food and shelter. The report describes how armed actors trained one boy to fire a rifle and denied him food when he refused to fight. The report also notes that two girls in the camp cooked and cleaned for all of the soldiers and “stayed” with the commander.
3. An investigator meets a young man who reports that he was beaten in the street by militia members who saw that he was wearing his college graduation ring. One of the perpetrators remarked that it was inappropriate for men to wear jewelry.
4. A witness reports that when militia members first took over her town, the fighters lined up all the “pretty girls” to one side of the room and “old ladies” to the other. Fighters then took them away separately. It was later discovered that the “pretty girls” were given red dresses and white bonnets and forced live in commanders’ homes. They were married to the commanders in a special ceremony and forcibly made pregnant. The women labeled as “old ladies” were told to wear green dresses and headscarves and forced to cook and clean for the commanders and their families. The commanders and their families only wore blue clothing as per the militia’s rules.
5. A prosecutor is reviewing an investigator’s report about the treatment of prisoners at a detention camp. Amidst deprivation of food and aid, the prosecutor learned that some adolescent boys were occasionally forced to fight each other in front of

the armed militia members for entertainment. It was not clear in the report how or why the boys were selected to fight, but it did note that they were chosen because they dressed and acted “differently” and that they were “too friendly” with each other.

6. A shelter provider documents the story of two sisters who escaped captivity from militia fighters in a conflict zone. They recount that when they were “sold” at an auction, they were stripped so that potential buyers could view their naked bodies. The auctioneer talked about the women as being from a “good stock” of the local ethnic minority. A fighter bought the two women and took them home where they were forced to cook and clean, and were repeatedly raped. When one of the women became pregnant, she was forced to take a pill she believes caused her to miscarry.
7. Militia fighters flog a woman in the town square for taking her gloves off at the market, which women are required to wear in public. The militia fighters tell the crowd, “let this be a lesson to all of you. God is always watching what you do.”
8. Militia fighters sexually assault a local male police officer when they take over the town. They tell the police officer they want him to “remember his place is with the women.”
9. A journalist writes an article after interviewing a militia fighter regarding rapes that occurred in town. The fighter reports that their commander told them that, if they wanted, they could “take” the women as they please to “energize them” in their fight for freedom, but that it wasn’t mandatory.
10. Militia members’ wives beat a woman in the street for wearing a headscarf. She is told that “women who wear headscarves flaunt their religious and ethnic affiliation, which harms the unity of us all. Women should be proud of their beauty.”

These hypotheticals illustrate how gender persecution may manifest in conflict or atrocity settings. They provide examples of evidence that indicate gender persecution and its underlying conduct. Check Appendix A for a more detailed analysis of each example.

Section 4:

RECOMMENDATIONS TO THE INTERNATIONAL COMMUNITY FOR ADDRESSING GENDER PERSECUTION

This section provides recommendations for measures that can be taken to ensure accountability for gender persecution. These recommendations are intended for the international community at-large, including government officials, UN agencies, accountability mechanisms, documenters, police, prosecutors, judges and first responders.

1. National and international bodies responsible for establishing accountability mechanisms should include gender persecution as a crime against humanity in the mandates, statutes and governing documents of these mechanisms;
2. States should include gender persecution in legislation domesticating international crimes;
3. National and international accountability mechanisms should investigate crimes that may amount to gender persecution in conflicts and atrocities, including taking an intersectional approach and integrating a gender analysis throughout their work and ensuring that investigators have backgrounds in international human rights law investigation and legal analysis, in addition to criminal investigation and analysis;
4. UN entities should expand studies and reporting on conflict and atrocities to include an analysis of how and when sexual and gender-based crimes may also amount to gender persecution, and provide actionable recommendations to relevant actors, including States and international and regional organizations, on accountability and redress;
5. Transitional and restorative justice mechanisms, including truth commissions and reparations processes, should include the concept of gender persecution and, when relevant, its legal requirements as a crime against humanity, within their mandates and ensure the meaningful participation of survivors who face multiple and intersecting forms of discrimination;
6. National and international organizations and experts should train police, prosecutors, judges, documenters and other first responders on gender persecution, including recognition of gender-based crimes survivors;
7. The international community should provide sustainable financial support for direct service organizations that provide immediate and long-term services to survivors of gender persecution and other gender-based crimes.
8. States, civil society and the international community should include gender persecution in monitoring of global crises, especially in relation to periods of rising violent extremism, widespread insecurity, electoral violence, political instability and intercommunal tensions, and take appropriate action to

prevent early warning signs from escalating into international crimes.

9. States, as the primary duty-bearers, and other stakeholders should work to prevent future gender persecution by addressing the underlying gender inequality and gender-based discrimination that renders populations vulnerable, including by amending laws that discriminate against women, girls and LGBTIQ+ people; addressing harmful gender stereotypes, social norms and practices; and supporting a safe and enabling environment for the

work of women-led and LGBTIQ+-led civil society organizations and human rights defenders, including peacebuilders, politicians and journalists.

10. States and organizations supporting or participating in peace processes and peace negotiations should ensure or support the safe and meaningful participation of survivors of gender persecution, to ensure that pathways toward accountability for the crimes are included in process outcomes, from a survivor-centered approach.



Photo: UN Women/ Lauren Rooney

APPENDIX A

Analysis of the Hypotheticals on Gender Persecution Crimes

Read the hypotheticals below and consider these questions: What underlying crimes may be present? What may indicate potential evidence of gender persecution? What additional information would you ask the investigator to gather? Remember to also look for intersecting forms of persecution. Below each hypothetical is a non-exhaustive list of the kinds of crimes, issues and follow up questions that may be triggered. See if they match your answers. Note any forms of fundamental rights deprivations that may not be listed below.

1. An investigator learned that three women were recently executed in public for “dishonoring their community, ancestors and divine law.” Witnesses report that one woman had spoken out against a local militia, another resisted a forced marriage and the third worked as a local politician. All three women were executed at the same time.

What underlying crimes may be present? torture, and/ or ‘other inhumane acts.’

What may indicate potential evidence of gender persecution? Women may have been killed for transgressing gender narratives imposed by the perpetrator, such as “speaking out,” serving as a politician, and resisting forced marriage. Also forced marriage may also be an indicator of an assigned gender role for women as wives.

What additional information would you ask the investigator to gather? Look for supporting evidence of murder and forced marriage. Find out whether women were disproportionately killed for speaking out or for serving as politicians compared to their male counter parts. Look for statements, rules, regulations, or beliefs held by the perpetrator that forbade women from speaking out or hold certain jobs and permitted or regulated forced marriage.

2. A local documenter is reporting on a militia camp 5 kilometers outside of the conflict zone. She reports that orphaned youth were recruited to join the militia often with promises of food and shelter. The

report describes how armed actors trained one boy to fire a rifle and denied him food when he refused to fight. The report also notes that two girls in the camp cooked and cleaned for all of the soldiers and “stayed” with the commander.

What underlying crimes may be present? child soldier recruitment, sexual slavery as stand-alone crimes and acts of enslavement and/or other inhumane acts

What may indicate potential evidence of gender persecution? The gender roles perpetrators assigned to girls and boys (girls as housekeepers and/or held in sexual slavery and boys as fighters). Look for evidence of enslavement of children.

What additional information would you ask the investigator to gather? Look for supporting evidence on the use of children as soldiers; Look for statements, rules, regulations, or beliefs held by the perpetrator that assigned girls to forced labor and sexual violence / sexual slavery / enslavement and boys to fight.

3. An investigator meets a young man who reports that he was beaten in the street by militia members who saw that he was wearing his college graduation ring. One of the perpetrators remarked that it was inappropriate for men to wear jewelry.

What underlying crimes may be present? torture or other inhumane acts.

What may indicate potential evidence of gender persecution? Dress codes assigned to men by perpetrators (men cannot wear jewelry).

What additional information would you ask the investigator to gather? Look for supporting evidence of torture or inhumane treatment. Look for statements, rules, regulations, or beliefs held by the perpetrator that regulate gender roles, behaviors, activities or attributes, and are often enforced through the use of violence, such as torture, or other forms of fundamental human rights deprivations, including additional information on dress codes assigned to men and women, girls and boys.

4. A witness reports that when militia members first took over her town, the fighters lined up all the “pretty girls” to one side of the room and “old ladies” to the other. Fighters then took them away separately. It was later discovered that the “pretty girls”

were given red dresses and white bonnets and forced live in commanders' homes. They were married to the commanders in a special ceremony and forcibly made pregnant. The women labeled as "old ladies" were told to wear green dresses and headscarves and forced to cook and clean for the commanders and their families. The commanders and their families only wore blue clothing as per the militia's rules.

What underlying crimes may be present? torture, forced pregnancy, rape, sexual violence and/or sexual slavery as stand-alone crimes and acts of enslavement and forced marriage as an act of enslavement.

What may indicate potential evidence of gender persecution? Dress codes and gender roles, behaviors, activities or attributes assigned to women including enslavement, forced marriage, forced pregnancy, and rape, sexual violence and/or sexual slavery/enslavement.

What additional information would you ask the investigator to gather? Look for supporting evidence of torture, enslavement, forced pregnancy, forced, marriage, and rape, sexual violence and/or sexual slavery/enslavement. Look for statements, rules, regulations, or beliefs held by the perpetrator that regulate gender roles, behaviors, activities or attributes, and are often enforced through the use of violence or other forms of fundamental human rights deprivations, including additional information on dress codes assigned to men and women, girls and boys.

5. A prosecutor is reviewing an investigator's report about the treatment of prisoners at a detention camp. Amidst deprivation of food and aid, the prosecutor learned that some adolescent boys were occasionally forced to fight each other in front of the armed militia members for entertainment. It was not clear in the report how or why the boys were selected to fight, but it did note that they were chosen because they dressed and acted "differently" and that they were "too friendly" with each other.

What underlying crimes may be present? torture or other inhumane acts

What may indicate potential evidence of gender persecution? Gender roles assigned to boys; potential homophobic beliefs.

What additional information would you ask the investigator to gather? Look for supporting evidence of torture or inhumane treatment. Look for statements, rules, regulations, or beliefs held by the perpetrator that regulate gender roles, behaviors, activities or attributes, and are often enforced through the use of violence, such as torture, or other forms of fundamental human rights deprivations, including additional information on homophobic beliefs.

6. A shelter provider documents the story of two sisters who escaped captivity from militia fighters in a conflict zone. They recount that when they were "sold" at an auction, they were stripped naked so that potential buyers could view their naked bodies. The auctioneer talked about the women as being from a "good stock" of the local ethnic minority. A fighter bought the two women and took them home where they were forced to cook and clean, and were repeatedly raped. When one of the women became pregnant, she was forced to take a pill she believes caused her to miscarry.

What underlying crimes may be present? torture, enslavement, sexual slavery, rape, and forced abortion.

What may indicate potential evidence of gender persecution? Enslavement assigned to women of an ethnic minority as their gender and ethnic roles. The women were stripped naked so that potential buyers could view their naked bodies. The auctioneer talked about the women as being from a "good stock" of the local ethnic minority. They were forced to cook and clean. Additionally, the crimes of enslavement, sexual slavery, rape and forced abortion are all evidence of gender and ethnic persecution, particularly if men of the same ethnic minority were not enslaved or enslaved in the same way.

What additional information would you ask the investigator to gather? Look for supporting evidence of torture, enslavement, sexual slavery, rape, and forced abortion. Look for statements, rules, regulations, or beliefs held by the perpetrator that regulate ethnic and gender roles, behaviors, activities or attributes, and are often enforced through the use of violence or other forms of fundamental human rights deprivations, including additional information on enslavement assigned as an ethnic/gender role (for establishing intersectional gender and ethnic persecution).

7. Militia fighters flog a woman in the town square for taking her gloves off at the market. The militia fighters tell the crowd, “let this be a lesson to all of you. God is always watching what you do.”

What underlying crimes may be present? torture, inhumane treatment

What may indicate potential evidence of gender persecution? The dress code assigned to women. The statement “let this be a lesson to all of you. God is always watching what you do.” May also indicate religious persecution.

What additional information would you ask the investigator to gather? Look for supporting evidence of torture or inhumane treatment. Look for additional information on dress codes assigned to men and women, girls and boys. Look for statements, rules, regulations, or beliefs held by the perpetrator that indicate religious beliefs or regulate gender roles, behaviors, activities or attributes, and are often through the use of violence or other forms of fundamental human rights deprivations.

8. Militia fighters sexually assault a local male police officer when they take over the town. They tell the police officer they want him to “remember his place is with the women.”

What underlying crimes may be present? sexual violence

What may indicate potential evidence of gender persecution? The statement made by the perpetrators, “remember his place is with the women” is evidence of gender roles prescribed to women and used as punishments against men.

What additional information would you ask the investigator to gather? Look for supporting evidence of sexual violence. Look for statements, rules, regulations, or beliefs held by the perpetrator that indicate religious beliefs or regulate gender roles, behaviors, activities or attributes, and are often through the use of violence or other forms of fundamental human rights deprivations.

9. A journalist writes an article after interviewing a militia fighter regarding rapes that occurred in town. The fighter reports that their commander told them that if they wanted they could “take” the women as they

please to “energize them” in their fight for freedom, but that it wasn’t mandatory.

What underlying crimes may be present? sexual violence, enslavement, sexual slavery

What may indicate potential evidence of gender persecution? Statement made by the perpetrators, that fighters may “take women as they please to ‘energize them’ in their fight for freedom” is evidence of gender roles prescribed to women as sexual chattel.

What additional information would you ask the investigator to gather? Look for supporting evidence of sexual violence, enslavement and sexual slavery. Look for statements, rules, regulations, or beliefs held by the perpetrator that indicate religious beliefs or regulate gender roles, behaviors, activities or attributes, and are often through the use of violence or other forms of fundamental human rights deprivations.

10. Militia members’ wives beat a woman in the street for wearing a headscarf. She is told that “women who wear headscarves flaunt their religious and ethnic affiliation, which harms the unity of us all. Women should be proud of their beauty.”

What underlying crimes may be present? torture, inhuman treatment

What may indicate potential evidence of gender persecution? Women are not allowed to wear headscarves. The statement “women who wear headscarves flaunt their religious and ethnic affiliation which harms the unity of us all” may be evidence of religious and ethnic persecution. The statement “Women should be proud of their beauty” may be evidence of gender persecution.

What additional information would you ask the investigator to gather? Look for supporting evidence of torture or inhuman treatment. Look for statements, rules, regulations, or beliefs held by the perpetrator that indicate religious beliefs or regulate gender, religious or ethnic roles, behaviors, activities or attributes, and are often through the use of violence or other forms of fundamental human rights deprivations.

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New York, New York 10017, USA

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