

GENDER, PERSECUTION, AND THE INTERNATIONAL CRIMINAL COURT: REFUGEE LAW'S RELEVANCE TO THE CRIME AGAINST HUMANITY OF GENDER-BASED PERSECUTION

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INTRODUCTION

The crime against humanity of gender-based persecution was first codified in the 1998 Rome Statute of the International Criminal Court.¹ The recognition of this specific form of persecution has been hailed as a significant advance in the field of international criminal law.² The crime against humanity of racially-, politically-, or religiously-based persecution has been explored by international tribunals and academic commentators, but the newly identified gender-based persecution has not been analyzed in the same depth. While cases and commentary on the more established grounds can and will assist the International Criminal Court (ICC) in examining gender-based persecution, especially with respect to the intersection of gender with race, political opinion, and religion, the ICC should also look outside of international criminal law for guidance.

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* Assistant Professor, University of Western Ontario Faculty of Law. This article was written in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University. The author would like to thank the Social Sciences and Humanities Research Council of Canada for its doctoral fellowship, Melodie Hughes and Kathleen Burke for their research assistance, and Sharryn Aiken, Lori Damrosch, and Melanie Randall for their comments on earlier drafts. All errors are the author's own.

1. Rome Statute of the International Criminal Court art. 7(1)(h), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 999, 1004 (1998) [hereinafter Rome Statute].

2. *E.g.*, Barbara Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court*, in *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 183, 201 (Flavia Lattanzi & William A. Schabas eds., 1999); Cate Steains, *Gender Issues*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 357, 371 (Roy S. Lee ed., 1999); Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 *MCGILL L.J.* 217, 237 (2000).

International refugee law has acknowledged gender-related³ forms of persecution since 1985.⁴ This influenced the drafters of the Rome Statute to include gender within the list of persecutory grounds

3. This article uses the term “gender-related” when referring to refugee law because this is the commonly used term in that field of law. *See, e.g.*, U.N. High Comm’r for Human Rights, *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*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR Gender Guidelines]. This article uses the term “gender-based” when referring to international criminal law because the ICC’s Elements of Crimes interprets “on . . . gender . . . grounds” found in the Rome Statute, *supra* note 1, art. 7(1)(h), as “based” on gender. Preparatory Comm’n for the Int’l Criminal Court, *Report of the Preparatory Commission for the International Criminal Court: Addendum, Part II, Finalized Draft Text of the Elements of Crimes*, at 15, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter *Elements of Crimes*]. Despite the different terminology, gender-related and gender-based have similar meanings. *See infra* notes 166-72 and accompanying text.

4. The United Nations High Commissioner for Refugees Executive Committee issued a conclusion in 1985 which “[r]ecognized that States, in the exercise of their sovereignty, were free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they lived may be considered as a ‘particular social group’ within the meaning of Article 1 A, paragraph 2, of the 1951 United Nations Convention relating to the Status of Refugees.” U.N. High Comm’r for Refugees, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the Work of its Thirty-Sixth Session, Addendum to the Report of the United Nations High Commissioner for Refugees*, ¶ 115(4)(k), U.N. Doc. A/40/12/Add.1 (Jan 10, 1986) (This conclusion is commonly referred to as the Executive Committee’s Conclusion No. 39(XXXVI).) [hereinafter *Conclusion No. 39*]. Subsequent practice has indicated that while states are “free to adopt” this approach, the UNHCR views it as a correct approach. *See, for example*, UNHCR Gender Guidelines, *supra* note 3, ¶¶ 28-31, for a discussion of gender-related claims under “particular social group” and the Guidelines as a whole for recognition that persecution may be gender-related. The UNHCR’s Executive Committee has repeatedly urged states to recognize that persecution may be gender-related. *E.g.*, U.N. High Comm’r for Refugees, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the Work of its Forty-Seventh Session, Addendum to the Report of the United Nations High Commissioner for Refugees*, ¶ 21(o), U.N. Doc. A/51/12/Add.1 (Oct. 16, 1996) (This conclusion is commonly referred to as the Executive Committee’s Conclusion No. 79(XLVII).); U.N. High Comm’r for Refugees, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the Work of its Forty-Eighth Session, Addendum to the Report of the United Nations High Commissioner for Refugees*, ¶ 17(t), U.N. Doc. A/52/12/Add.1 (Oct. 17, 1997) (This conclusion is commonly referred to as the Executive Committee’s Conclusion No. 81(XLVII).); U.N. High Comm’r for Refugees, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the Work of its Fiftieth Session, Addendum to the Report of the United Nations High Commissioner for Refugees*, ¶ 20(n), U.N. Doc. A/54/12/Add.1 (Oct. 8, 1999) (This conclusion is commonly referred to as the Executive Committee’s Conclusion No. 87(L).); U.N. High Comm’r for Refugees, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the Work of its Fifty-Seventh Session, Addendum to the Report of the United Nations High Commissioner for Refugees*, ¶ 17(n)(iv), U.N. Doc. A/61/12/Add.1 (Oct. 6, 2006) (This conclusion is commonly referred to as the Executive Committee’s Conclusion No. 105.).

in the crimes against humanity provision.⁵ Thus, there is a close link between the development of international refugee law and international criminal law with respect to gendered aspects of persecution. This link is helpful because international and domestic refugee law⁶ has explored certain elements of gender-related persecution that are, at present, unexplored in international criminal law. Therefore, when the ICC's judges are determining the content of the elements of the crime against humanity of gender-based persecution, they should examine principles or rules found within refugee law.⁷ This is not to argue that a definition of gender-related persecution found within international refugee law should be directly transferred to the crime against humanity of gender-based persecution. The *Kupreškić* decision of International Criminal Tribunal for the Former Yugoslavia (ICTY) strongly cautions against such a direct transfer.⁸ Rather, the ICC should evaluate how refugee

5. See Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 59 (2005); Steains, *supra* note 2, at 370 n.41.

6. This Article refers both to international refugee law and domestic refugee law. International refugee law comprises both "hard" (binding) and "soft" (nonbinding but persuasive) law. A central source of binding international refugee law is the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 2554 [hereinafter *Refugee Convention*], as updated by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 8791. These treaties do not directly address gender-related persecution. Rather, gender-related persecution has been addressed through a combination of non-binding UNHCR-issued documents and Conclusions of the UNHCR Executive Committee. Important standards on gender-related persecution include the 2002 UNHCR Gender Guidelines, *supra* note 3, and *Conclusion No. 39*, *supra* note 4. For an explanation of the "soft law" status conclusions and guidelines on international refugee protection, see JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 112-18 (2005). Domestic refugee law on gender-based persecution comprises domestic legislation and decisions or case law. In some jurisdictions, states have adopted guidelines to assist decision-makers with respect to gender-based persecution. See *infra* note 76.

7. When faced with a question that the Rome Statute, the ICC's Rules of Procedure and Evidence, and the Elements of Crimes do not answer, the ICC shall first apply "applicable treaties and principles and rules of international law," and failing that, "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards." Rome Statute, *supra* note 1, art. 21(1)(b)-(c).

8. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 589 (Jan. 14, 2000). The ICTY 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 the central determination to be made is whether the person claiming refugee status or likely to be expelled or deported has a "well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." The emphasis is more on the state of mind of the person

law approaches to gender-related persecution can shed considerable light on international criminal law's relatively undeveloped understanding of gender-based persecution. Even if the ICC decides that certain aspects of refugee law relating to gender-related persecution do not rise to the level of "principles and rules of international law" or general principles of domestic law, they may still help guide the ICC toward a full understanding of gender-based persecution. As A. Widney Brown and Laura Grenfell have commented, "[w]hile 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 is an absence of international criminal law jurisprudence"⁹

The ICC must be careful when it seeks to determine general principles of law on gender-related persecution from domestic jurisprudence. Feminist academic analysis has identified certain serious misinterpretations of the international refugee law on gender-related persecution by domestic judges and administrators.¹⁰ In certain jurisdictions, governments have taken steps to prevent these misinterpretations through the introduction of laws or guidelines.¹¹ In many cases, the decisions taken after the implementation of these steps have considerably improved the domestic level of analysis and understanding of gender-related persecution.¹² Even in these

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.

Id. (citations omitted). This decision incorrectly classifies international refugee law as focusing on the state of mind of the refugee claimant when it in fact considers both the subjective and, perhaps even more so, the objective elements of a refugee claim. See JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 65 (1991) [hereinafter HATHAWAY, LAW]. Hathaway argues that, unlike the characterization found in the *Kupreškić* case, the refugee determination process is inherently objective, as it "was intended to restrict the scope of protection to persons who can demonstrate a present or prospective risk of persecution, irrespective of the extent or nature of mistreatment, if any, that they have suffered in the past." *Id.* Even so, see *Kupreškić*, Case No. IT-95-16-T, ¶ 589, which highlights that there are important differences between the underlying requirements for a refugee determination and a determination of guilt or innocence within international criminal law.

9. A. Widney Brown & Laura Grenfell, *The International Crime of Gender-Based Persecution and the Taliban*, 4 MELB. J. INT'L L. 347, 360-61 (2003) (emphasis added).

10. *E.g.*, HEAVEN CRAWLEY, *REFUGEES AND GENDER: LAW AND PROCESS* ch. 2.1 (2001); THOMAS SPIJKERBOER, *GENDER AND REFUGEE STATUS* ch. 5.3 (2000).

11. *See, e.g., infra* note 76.

12. CRAWLEY, *supra* note 10, at 12-16. *See generally id.*, at 35-77 (proposing a standard framework for analysis of gender-related refugee claims based in part on gender-sensitive

jurisdictions, however, there are decisions that appear not to conform to the laws or guidelines.¹³ There is a rich feminist academic literature within refugee law that has analyzed how many domestic refugee decision-makers have failed to understand the meaning of “gender”; the link between gender, discrimination, and persecution; and how acts that may appear to some decision-makers to be “private,” and therefore not persecutory acts, are actually acts of gender-related persecution. The ICC must take these critiques into account if it is to determine general principles of domestic refugee law correctly and sensitively.

In addition, feminist academic writing has identified questions that have not yet been adequately addressed within international refugee law or domestic refugee decisions. For example, is persecution *because of* gender different from persecution of a person *as a* woman or man? Do these distinctions matter? These questions are relevant to the ICC, in part because it will need to delineate the scope of gender-based persecution, and in part because the difference in terminology between international refugee law—which tends to refer to gender-*related* persecution—and international criminal law—which criminalized gender-*based* persecution—raises the issue of whether these two areas of the law are addressing the same kind of violations or not.

This Article begins by examining the current state of the crime against humanity of persecution under international criminal law, including international case law of potential relevance to gender-based persecution. Next, this Article examines how refugee law can and should help inform the ICC’s analysis of gender-based persecution. Each ICC crime is accompanied by detailed elements.¹⁴ For gender-based persecution, there are two key elements that, when combined, differentiate this kind of persecution from persecution based on other grounds: the element that “[t]he perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights”¹⁵ and the element that the perpetrator’s targeting

refugee determination decisions in the United Kingdom, Canada, New Zealand, and elsewhere).

13. *E.g.*, SPIJKERBOER, *supra* note 10, at 101-05, 172-80.

14. The Rome Statute is accompanied by a non-binding document, *Elements of Crimes*, separating out the specific elements that the Prosecutor can be expected to prove for every Rome Statute crime. *See Elements of Crimes, supra* note 3.

15. *Id.* art. 7(1)(h).

was based on gender.¹⁶ International and domestic refugee law has scrutinized the issue of what amounts to a gender-related severe deprivation of fundamental rights. While not all refugee law examples of such severe deprivation may be applicable within the crimes against humanity context, they do help to illustrate that gendered violations are wide-ranging, and are not restricted to acts of sexual violence such as rape. In addition, refugee law has demonstrated the complex relationship between discrimination (including discrimination against women that is ubiquitous and frequent) and persecution, which will benefit the ICC as it contends with the same issue. Central to distinguishing between discrimination and persecution is a determination of whether acts are “public” or “private” in nature. Feminist academic commentators have critiqued domestic refugee decision-makers’ mischaracterization of certain gender-related acts as “personal” and therefore “private” and as leading to the unfortunate denial of refugee status to certain claimants. The ICC must be aware of such critiques so that it may avoid making the same mischaracterizations made by domestic refugee decision-makers, and because the determination of what is a “public” and therefore potentially persecutory act is interlinked with the ICC’s understanding of the phrase “context of society” within the Rome Statute’s definition of “gender.”

The other key element of crime, that the targeting was based on gender,¹⁷ is the very core of the crime against humanity of gender-based persecution. Refugee law has grappled with the question of what “gender” is in ways that can assist the ICC as it examines the same question. Refugee law’s successes and failures on this front provide critical guidance to the ICC as it addresses various legal and conceptual challenges. These include avoiding the conflation of “sex” and “gender”; understanding the multifaceted, complex, and situation-specific nature of gender; discerning the connection between sexual identity and gender; perceiving where gender overlaps with other identities that may also be grounds under the Rome Statute definition; and deciding whether it is important to differentiate between what amounts to persecution *because of* gender and persecution of a woman (or man) *as a* woman (or man).

Refugee law contains important principles or rules that can be applied (but not transferred) by the ICC to the crime against

16. *Id.*

17. *Id.*

humanity of gender-based persecution. Additionally, academic commentary on refugee law can helpfully guide the ICC in three ways. First, the commentary provides insight into refugee decision-makers' approaches to persecution as a severe deprivation of rights and the meaning of targeting based on gender. Second, the commentary identifies domestic decisions that have deviated from internationally recognized norms and standards with respect to gender-based persecution.¹⁸ Finally, the commentators frame questions that the ICC should ask during its analysis of gender-based persecution. Therefore, this Article concludes that refugee law is crucially relevant to the ICC's determination of what amounts to gender-based persecution.

The connection between international criminal law and refugee law on the issue of gender-based persecution is not only of import to the ICC. The complementary¹⁹ nature of the Rome Statute has led many jurisdictions to implement the ICC's crimes—including that of gender-based persecution—into domestic legislation.²⁰ Thus, these same jurisdictions may need to consider how their domestic refugee decisions on gender-related persecution may assist in interpreting the ICC in implementing legislation. Australia's "Guidelines on Gender Issues for Decision Makers" on refugee and humanitarian visa applications correctly notes that "[g]ender-based persecution is sometimes more subtle than other forms" of persecution.²¹ Such subtlety will require domestic decision-makers and courts to take a particularly nuanced approach to examining the crime against

18. These decisions, therefore, should not be taken into account by the ICC when deriving general principles of law. Rome Statute, *supra* note 1, art. 21(1)(c).

19. Under the Rome Statute, the ICC is essentially a court of last resort. A case is not admissible if (1) it is "being investigated or prosecuted by a State which has jurisdiction over it, unless that state is unwilling or unable genuinely to carry out the investigation or prosecution"; (2) it has "been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute"; (3) the "person concerned has already been tried for conduct which is the subject of the complaint"; or (4) the "case is not of sufficient gravity to justify further action by the Court." *Id.* art. 17.

20. *E.g.*, Crimes Against Humanity and War Crimes Act, 2000 S.C., ch. 24, §§ 4, 6 (Can.); International Crimes and International Criminal Court Act 2000, 2000 S.N.Z. No. 26 § 10 (N.Z.); Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 § 4 (S. Afr.); International Criminal Court Act, 2001, ch. 17, § 50 (U.K.).

21. DEP'T OF IMMIGRATION AND MULTICULTURAL AFFAIRS OF AUSTR., REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS ¶ 4.10 (1996) [hereinafter AUSTRALIAN GENDER GUIDELINES]. Sometimes, gender-based persecution is perceived as more subtle than other forms of persecution simply because decision-makers do not understand how to do a gender-based analysis.

humanity of gender-based persecution, while at the same time drawing on or distinguishing decisions on gender-related persecution found in domestic refugee law.

I. INTERNATIONAL CRIMINAL LAW AND PERSECUTION

Persecution as a crime against humanity was first codified in international criminal law in the Charter of the International Military Tribunal, which limited the crime to political, racial, or religious grounds.²² The Charter of the International Military Tribunal for the Far East also included the crime against humanity of persecution, but limited the prohibited grounds to political or racial.²³ Control Council Law No. 10 provided the basis for the United States, United Kingdom, France, and the Soviet Union to prosecute individuals in Germany who had not come before the International Military Tribunal.²⁴ This law included “persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated” as crimes against humanity.²⁵ The Statute of the ICTY partly followed these precedents by including the crime against humanity of “persecutions on political, racial and religious grounds.”²⁶ The Statute of the International Criminal Tribunal for Rwanda (ICTR) contains the same act, but adds a persecutory element, requiring that the crime against humanity be committed not only “as part of a widespread or systematic attack against any civilian population,” but also as an attack be based on “national, political, ethnic, racial or religious grounds.”²⁷

Persecution is defined in the Rome Statute as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or

22. Charter of the International Military Tribunal art. 6, *in* the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279.

23. Charter of the International Military Tribunal for the Far East art. 5, Apr. 26, 1946, 4 Bevens 27 (replacing the original Charter, Jan. 19, 1946, 4 Bevens 20).

24. *See* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Jan. 20, 1946, 3 OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY 50.

25. *Id.* art. II(1)(c).

26. Statute of the International Criminal Tribunal art. 5(h), May 25, 1993, 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute].

27. Statute of the International Criminal Tribunal for Rwanda art. 3, Nov. 8, 1994, 33 I.L.M. 1602 (1994) [hereinafter ICTR Statute]. Commentators have noted that this formulation does not reflect customary international law. *See, e.g.*, Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 46 (1993).

collectivity.”²⁸ Persecution is prohibited “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 in connection with [any other crime against humanity] . . . or any crime within the jurisdiction of the Court.”²⁹ Persecutory grounds were reproduced in the Rome Statute from those mentioned in earlier precedents—political, racial, national, ethnic, and religious—and three new grounds were added: gender, cultural, and “other grounds that are universally recognized as impermissible under international law.”³⁰ Persecution was not defined in any of the earlier precedents and there was very little applicable ICTY or ICTR case law at that time,³¹ prompting some delegates who negotiated the Rome Statute to request that a clear definition be adopted. They were worried that this crime might be interpreted by an activist Court to include any discriminatory practice, thereby turning the ICC from a criminal into a human rights court.³² A definition was drafted to indicate that persecution had a specific threshold, resulting from the “intentional and severe deprivation of fundamental rights contrary to international law.”³³ In addition, persecutory acts were required to be connected with other crimes within the jurisdiction of the Court.³⁴ This high threshold of intention, severe deprivation, and required connection to other ICC crimes provided comfort to these states, which then agreed to the inclusion of persecution as a prohibited act.³⁵

Another point of concern expressed by some conservative states was that the term “gender” in the list of persecutory grounds was not defined.³⁶ Their fears reiterated the fears initially raised prior to the

28. Rome Statute, *supra* note 1, art. 7(2)(g).

29. *Id.* art. 7(1)(h).

30. *Id.*; see also Georg Witschel & Wiebke Rückert, *Article 7(1)(h)—Crime Against Humanity of Persecution*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 94, 95 (Roy S. Lee ed., 2001) (explaining that this was done to bring the Rome Statute “up-to-date”).

31. See *Prosecutor v. Tadić*, Case No. IT-94-I-T, Opinion & Judgment (May 7, 1997), noted in Witschel & Rückert, *supra* note 30, at 94-97 (explaining that at the time, only the ICTY judgment in *Tadić* addressed this crime).

32. Robinson, *supra* note 27, at 53.

33. Rome Statute, *supra* note 1, art. 7(2)(g).

34. *Id.* art. 7(1)(h).

35. See Robinson, *supra* note 27, at 54.

36. For example, the representative from Azerbaijan indicated that his delegation was concerned about the use of imprecise terminology, such as the word “gender.” U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, Comm. of the

1995 United Nations World Conference on Women.³⁷ Their apprehension centered on whether recognition of the term “gender” creates human rights based on sexual orientation or could lead to classification of certain laws and practices that affect women in their countries as crimes against humanity.³⁸ “Gender” was first included as a prohibited ground of persecution in the Rome Statute’s crimes against humanity draft text in February 1997, following international refugee law’s recognition of gender as grounds for persecution.³⁹ At that time, the term “gender” was put in brackets⁴⁰ as part of the debate over whether to include an illustrative (open-ended) list of prohibited grounds of persecution, or an exhaustive (closed) list.⁴¹ The reference to “gender” was left in brackets throughout the remaining preparatory negotiations⁴² and much of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of

Whole, 25th mtg. ¶ 61, U.N. Doc. A/CONF.183/C.1/SR.25 (July 8, 1998) [hereinafter Summary Record of the 25th Meeting]. See also U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Comm. of the Whole, 27th mtg. ¶ 22, U.N. Doc. A/CONF.183/C.1/SR.27 (July 8, 1998) (comments of the representative from Bahrain); U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, Comm. of the Whole, 28th mtg. ¶ 13, U.N. Doc. A/CONF.183/C.1/SR.28 (July 8, 1998) (comments of the representative from Kuwait).

37. The Holy See, certain Arab states, and conservative nongovernmental organizations had opposed the undefined use of the term “gender” in the outcome document of the Fourth World Conference on Women, the Beijing Platform for Action, with the latter group characterizing gender as a “profoundly elastic term, encapsulating a broad feminist rights strategy that includes abortion.” DORIS BUSS & DIDI HERMAN, *GLOBALIZING FAMILY VALUES: THE CHRISTIAN RIGHT IN INTERNATIONAL POLITICS* 113 (2003). See Doris E. Buss, *Robes, Relics and Rights: The Vatican and the Beijing Conference on Women*, 7 *SOC. & LEGAL STUD.* 339, 348-51 (1998); Dianne Otto, *Lesbians? Not in My Country*, 20 *ALTERNATIVE L.J.* 288, 289-90 (1995).

38. See comments by the delegate from Azerbaijan, asking if a gender-based persecution provision could “imply that a conviction by a national court for homosexual acts might be regarded as persecution and thus fall within the jurisdiction of the Court as a crime against humanity.” Summary Record of the 25th Meeting, *supra* note 36, ¶ 61. See also Oosterveld, *supra* note 5, at 63, 65-66.

39. Oosterveld, *supra* note 5, at 59. See Preparatory Comm. on the Establishment of an International Criminal Court, *Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997*, at 4, 5 n.7, U.N. Doc. A/AC.249/1997/L.5 (Mar. 12, 1997).

40. In international negotiations, square brackets are used to indicate text that has not achieved acceptance by consensus.

41. Oosterveld, *supra* note 5, at 59 n.24. In other words, the bracketing of the term “gender” at that time did not relate to the concerns eventually raised at the Diplomatic Conference.

42. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, Rome, Italy, June 15-July 17, 1998, *Report of the Preparatory Committee on the Establishment of the International Criminal Court*, at 26, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).

an International Criminal Court (Diplomatic Conference).⁴³ The definition of “gender” became the subject of lengthy and contentious negotiations during the Diplomatic Conference,⁴⁴ which, once resolved in the final days of the Conference, led to the acceptance of gender as a prohibited ground within the crime of persecution.⁴⁵

Undoubtedly, the ICC will refer to earlier case law on the crime against humanity of persecution when analyzing whether acts amount to gender-based persecution under the Rome Statute. The ICTY and ICTR have both examined the crime of persecution in some detail.⁴⁶ The ICTY has defined the required elements of the crime of persecution as consisting of an act or omission which does the following:

1. [D]iscriminates 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*).⁴⁷

43. For examples of lack of consensus, see sources cited *supra* note 36. See also U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, Comm. of the Whole, 3d mtg. ¶¶ 161-63, 166-69, U.N. Doc A/CONF.183/C.1/SR.3 (June 17, 1998) (illustrating Italy and Ireland arguing to maintain the term “gender” in the crime against humanity of persecution); U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, Comm. of the Whole, 4th mtg. ¶¶ 24-26, U.N. Doc. A/CONF.183/C.1/SR.4 (June 17, 1998) (illustrating Israel arguing to maintain the term “gender” in the crime against humanity of persecution); U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, Rome, Italy, June 15-July 17, 1998, *Crimes Within the Jurisdiction of the Court, Recommendations of the Coordinator*, at 2 n.2, U.N. Doc. A/CONF.183/C.1/L.44 (July 7, 1998) (indicating a placeholder definition for “gender,” since the definition was still being discussed).

44. Oosterveld, *supra* note 5, at 58-66.

45. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, Rome, Italy, June 15-July 17, 1998, *Report of the Working Group on Applicable Law*, at 1, U.N. Doc A/CONF.183/C.1/WGAL/L.2/Add.1 (July 14, 1998) (indicating agreement that “gender” be defined as the following: “For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from above”).

46. See, e.g., Prosecutor v. Tadić, Case No. IT-94-I-T, Opinion & Judgment, ¶ 345 (May 7, 1997); Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 621 (Jan. 14, 2000); Prosecutor v. Naletilić, Case No. IT-98-34-T, Judgment, ¶ 634 (Mar. 31, 2003); Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment & Sentence, ¶ 1072 (Dec. 3, 2003).

47. Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 431 (Mar. 15, 2002); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 185 (Sept. 17, 2003) (quoting *Krnojelac*, Case No. IT-97-25-T, ¶ 431); Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, ¶ 320 (Feb. 28, 2005) (quoting *Krnojelac*, Case No. IT-97-25-A, ¶ 185); Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 113 (Feb. 25, 2004) (quoting *Krnojelac*, Case No. IT-97-25-A, ¶ 185); Prosecutor v. Blaskić, Case No. IT-95-14-A, Judgment, ¶ 131 (July 29, 2004)

While the Statutes of the ICTY and ICTR do not provide for the crime against humanity of gender-based persecution,⁴⁸ certain Tribunal cases have dealt with persecutory acts that have a gender component.⁴⁹ These cases provide the ICC with a starting point for analysis of gender-based persecution. The ICTR, in *Nahimana*, addressed the relationship between gender identities and persecution on political or racial/ethnic grounds.⁵⁰ In *Nahimana*, the Trial Chamber found that the radio station Radio Télévision Libre des Mille Collines (RTLM), the newspaper *Kangura*, and the political party Coalition pour la Défense de la République (CDR) “essentially merged political and ethnic identity, defining their political target on the basis of [Tutsi] ethnicity and political positions relating to ethnicity.”⁵¹ Tutsi women were portrayed as “femmes fatale . . . seductive agents of the enemy.”⁵² This definition of Tutsi women “made the sexual attack and killing of Tutsi women a foreseeable consequence of the role attributed to them.”⁵³

The ICTY has also explored the intersection of gender with racially-, religiously-, and politically-based persecution. The *Krstić* judgment found that acts of sexual violence could constitute persecution when committed with the required discriminatory intent based on race, religion, or politics.⁵⁴ In that case, rapes were considered incidental as opposed to systematic crimes, but were still

(quoting *Krnjelac*, Case No. IT-97-25-A, ¶ 185); *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Judgment, ¶ 101 (Dec. 17, 2004) (quoting *Blaskić*, Case No. IT-95-14-A, ¶ 131); *Prosecutor v. Deronjić*, Case No. IT-02-61-A, Judgment on Sentencing Appeal, ¶ 109 (July 20, 2005) (quoting *Blaskić*, Case No. IT-95-14-A, ¶ 131). The ICTR has defined the material elements of persecution somewhat differently as: “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 [on crimes against humanity].” *Nahimana*, Case No. ICTR-99-52-T, ¶ 1072; *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgment & Sentence, ¶ 21 (June 1, 2000).

48. See generally ICTY Statute, *supra* note 26; ICTR Statute, *supra* note 27.

49. See *Nahimana*, Case No. ICTR-99-52-T, ¶ 1079 (addressing persecution of Tutsi women).

50. See *id.*

51. *Id.* ¶ 1071.

52. *Id.* ¶ 1079.

53. *Id.* Another helpful observation, though not focused on persecution *per se*, comes from the *Akayesu* Trial Chamber of the ICTR, which found that targeting Tutsi women for sexual violence was an act of genocide against the Tutsi group as a whole. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1998) (finding the acts against Tutsis amounted to genocide, a crime that included a definition of “group” similar to that for persecution).

54. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶¶ 617-18 (Aug. 2, 2001) (including rape as one of a number a crimes that when directed against Bosnian Muslims constituted persecution).

found to be a foreseeable consequence of persecution committed as part of a joint criminal enterprise.⁵⁵ As Patricia Viseur Sellers noted, “That wartime sexual assault crimes are ostensibly characterized as the natural and foreseeable consequence of *other* violations [such as persecution] is landmark jurisprudence.”⁵⁶ In *Prosecutor v. Kvočka*, the defendants were found guilty of persecution carried out through rape and sexual assault.⁵⁷ The Trial Chamber linked the issue of persecution with sexual violence, finding that, in light of the clear intent of those operating the Omarska camp to subject non-Serbs to persecution through violence and humiliation, “it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence.”⁵⁸ Therefore, any crimes that were natural or foreseeable consequences of the joint criminal enterprise of the Omarska camp, including persecutory sexual violence, can be attributed to participants in the criminal enterprise if committed during the time they participated in the enterprise.⁵⁹ On appeal, accused Radić asserted that the acts of rape and sexual violence charged did not involve discrimination based on religion, ethnicity, or political belief.⁶⁰ He submitted that “the Trial Chamber found personal motives in the acts of rape as persecution, but failed to establish what constituted his discriminatory intent.”⁶¹ The Appeals Chamber stated that Radić’s

55. Patricia Viseur Sellers, *Individual(s) Liability for Collective Sexual Violence*, in GENDER AND HUMAN RIGHTS 153, 184 (Karen Knop ed., 2004) (citing *Krstić*, Case No. IT-98-33-T, ¶ 617).

56. *Id.*

57. *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, ¶¶ 752, 755, 758, 761, 764 (Nov. 2, 2001). On appeal, Kvočka’s conviction for persecution through rape and sexual assault was overturned. The Appeals Chamber found that the “Trial Chamber had erred in stating that the rape and sexual assault with which Kvočka was charged were committed in Omarska during the time he was employed there.” *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment, ¶ 334 (Feb. 28, 2005). See also *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment, ¶ 1008 (Sept. 1, 2004) (finding that the act of rape is of sufficient gravity to constitute persecution). The Tribunal also noted that sexual assault, such as forced sex between detainees, running a knife along a Bosnian Muslim female detainee’s breast, or forcing a Bosnian Croat woman to undress herself in front of cheering Bosnian Serb police officers and soldiers, can amount to persecution. *Id.* ¶¶ 1012-13. See *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 806 (July 31, 2003), for similar findings.

58. *Kvočka*, Case No. IT-98-30/1-T, ¶ 327.

59. *Id.* Sellers notes that this test is natural *or* foreseeable, whereas the *Krstić* test was natural *and* foreseeable. Sellers, *supra* note 55, at 186.

60. *Kvočka*, Case No. IT-98-30/1-A, ¶ 369.

61. *Id.*

claim did not properly distinguish between intent and motive: “the Trial Chamber found that the sexual violence was directed only against women of non-Serb origin, and Radić does not contest this finding. It was . . . reasonable to conclude that Radić acted with the required discriminatory intent, notwithstanding his personal motives for committing these acts.”⁶² The Appeals Chamber reiterates this point later in its judgment, noting that “personal motives, such as settling old scores, or seeking personal gain, do not exclude discriminatory intent.”⁶³

Thus, the case law of the ICTY and ICTR can provide some guidance to the ICC on gender-based persecution. While neither of the Tribunals’ cases specifically analyze the distinct ground of gender-based persecution, they clearly illustrate a number of important themes: gender intersects with racial, religious, and political identities; gender identity, as negatively defined by the perpetrator(s), can inexorably lead to persecutory targeting on the basis of gender; other prohibited acts under crimes against humanity or war crimes can be inextricably linked to sexual (and therefore gender-specific) acts; and, while perpetrators can have personal motives for carrying out sexual violence, these personal motives do not negate the overall discriminatory intent behind gender-specific persecutory acts. These are all important lessons, but they only illuminate some of the required elements of gender-based persecution as set forth in the ICC’s Elements of Crimes document. It is helpful, therefore, for the ICC to look at the only area of international law that has explored persecution on gender grounds in detail: international refugee law, and the related domestic implementation of that law.

II. ELEMENTS OF PERSECUTION ON GENDER GROUNDS: GUIDANCE FROM REFUGEE LAW

The ICC’s Elements of Crimes document lists the elements that the ICC’s Prosecutor can be expected to prove in order to support a crime against humanity charge.⁶⁴ While these elements are not

62. *Id.* ¶ 370 (citations omitted). Note that, in international criminal law, intent and motivation are distinct, and intent is part of *mens rea*, while motivation is not. See Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 95 (June 7, 2001) (“It is worth noting that the *motives* (as distinct from the *intent*) of the Accused are not of relevance to the legal constitution of a crime against humanity.”).

63. *Kvočka*, Case No. IT-98-30/1-A, ¶ 463.

64. *Elements of Crimes*, *supra* note 3.

binding,⁶⁵ they are the result of multilateral negotiation, and the Prosecutor, defense, and judges will likely refer to them extensively.⁶⁶ Although there are six elements listed for the crime against humanity of persecution,⁶⁷ the crux of gender-based persecution can be found in two separate, but interrelated, elements. The first key element of the crime against humanity of gender-based persecution is that “[t]he perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.”⁶⁸ With this element, the ICC will be the first international criminal tribunal to evaluate what amounts to an exclusively gender-based deprivation of fundamental rights. The second key element is that the perpetrator’s targeting was based on gender grounds.⁶⁹ With this element, the ICC will again be the first international criminal tribunal to determine the meaning of “gender” as a ground for persecution. Refugee law can assist in the elucidation of both elements, and therefore should be drawn upon as an interpretive aid.

65. See Rome Statute, *supra* note 1, art. 9 (stating that “Elements of Crimes shall assist the Court in the interpretation and application of” the crimes provisions).

66. See Herman von Hebel, *The Decision to Include Elements of Crimes in the Rome Statute*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, *supra* note 30, at 4, 8 (“Of course, while the elements are not binding *per se*, they will have persuasive force, reflecting the consensus view of the international community; ultimately, however, judges will have to reach their own understanding of the statute.”).

67. *Elements of Crimes*, *supra* note 3, at 15. The elements are:

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 [Rome] Statute, or other grounds that are universally 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 [Rome] 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.

Id. (footnotes omitted).

68. *Id.*

69. *Id.*

A. Severe Deprivation of Fundamental Rights

1. *Violations of Fundamental Rights.* The first element requires that the perpetrator severely deprive, contrary to international law, one or more persons of fundamental rights. The question therefore arises of how to define “fundamental rights” in the context of gender-based persecution. Case law of the ICTY and ICTR can provide some limited assistance in this respect. The ICTY has found that “there is no comprehensive list of acts” (which include omissions) that amount to violations of fundamental rights.⁷⁰ The acts may be those listed in the genocide, crimes against humanity, and war crimes provisions of the ICTY Statute, and may also include acts not enumerated in the Statute, such as those involving “physical or mental harm or infringements upon individual freedom.”⁷¹ The ICTY has determined that all acts must be examined in context because a single act that may not on its own amount to a violation of fundamental rights (and therefore persecution) may do so when considered in light of a number of acts.⁷²

The Tribunals have determined that a number of acts can amount to a deprivation of fundamental rights: rape and sexual assault; destruction of property or means of subsistence; attack or destruction of towns, villages, and cities; use of hostages as human shields; destruction and damage of religious or educational institutions; unlawful detention, deportation, or forcible transfer of civilians; harassment, humiliation, and psychological abuse; murder, extermination, and torture; attacks on political, social, or economic rights; and violations of the rights to life, liberty, and security of the person—not to be held in slavery or servitude; not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; and not to be subjected to arbitrary arrest, detention, exile, or imprisonment.⁷³

70. Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 246 (Nov. 29, 2002).

71. *Id.*; see Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 605-06 (Jan. 14, 2000); see also Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 185 (Nov. 2, 2001).

72. Kupreškić, Case No. IT-95-16-T, ¶ 622; Vasiljević, Case No. IT-98-32-T, ¶ 247.

73. Examples of the deprivation of fundamental rights have been identified by the ICTY. See Kupreškić, Case No. IT-95-16-T, ¶¶ 600, 615; see also Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (Aug. 2, 2001); Kvočka, Case No. IT-98-30/1-T, ¶¶ 186, 190; Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶¶ 202-207 (Feb. 26, 2001); Prosecutor v. Blaskić, Case No. IT-95-14-T, Judgment, ¶¶ 220, 227, 233, 234 (Mar. 3, 2000). Examples have also been identified by the ICTR. See Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment &

While these acts may have gendered components—the most obvious being rape and other forms of sexual violence—there is very little analysis in the existing Tribunal case law as to what specific violations of fundamental rights might result in gender-based persecution. International refugee law can provide assistance in this respect. The United Nations High Commissioner for Refugees' (UNHCR) 2002 *Guidelines on International Protection: Gender-Related Persecution* note that,

There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering—both mental and physical—and which have been used as forms of persecution, whether perpetrated by State or private actors.⁷⁴

In addition, these UNHCR Gender Guidelines identify discrimination on account of one's sexual orientation as potentially amounting to persecution because “the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex.”⁷⁵

Several countries have issued documents that are designed to either bind or assist asylum decision-makers in determining whether certain acts amount to gender-related persecution.⁷⁶ Canada's Guidelines, *Women Refugee Claimants Fearing Gender-Related Persecution*, identify the following as potentially falling into the gender-related persecution category: severe discrimination on

Sentence, ¶ 1071-72 (Dec. 3, 2003); Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgment & Sentence, ¶ 22 (June 1, 2000).

74. UNHCR Gender Guidelines, *supra* note 3, ¶ 9 (footnote omitted). *See also id.* ¶ 18 (providing more detail on trafficking).

75. *Id.* ¶ 16.

76. *E.g.*, AUSTRALIAN GENDER GUIDELINES, *supra* note 21, ¶¶ 1.1-2.4; CANADIAN IMMIGRATION AND REFUGEE BD., WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: UPDATE (1996) [hereinafter CANADIAN GENDER GUIDELINES]; U.S. DEP'T OF JUSTICE, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN (1995) [hereinafter U.S. GENDER CONSIDERATIONS]; UNITED KINGDOM HOME OFFICE, GENDER ISSUES IN THE ASYLUM CLAIM (2004) [hereinafter UK GENDER GUIDELINES]. *See also* U.N. High Comm'r for Refugees Evaluation and Policy Analysis Unit, Dep't of Int'l Prot., and Reg'l Bureau for Europe, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, ¶¶ 78-84, 97-123, U.N. Doc. EPAU/2004/05 (May 2004) (prepared by Heaven Crawley & Trine Lester) [hereinafter Crawley & Lester]; SPLJKERBOER, *supra* note 10, at 3. While the Canadian Gender Guidelines are, in theory, not binding, Canadian cases have ruled that a decision can be overturned if the Guidelines are not followed. *E.g.*, Elezi v. Minister of Citizenship and Immigration, [2003] F.C. 210 (Can.).

grounds of gender, domestic violence, violence directed against a woman in civil war, and acts directed against women as a consequence of their failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin.⁷⁷ The Canadian Guidelines also observe that circumstances which give rise to women's fear of persecution are often unique to women and could include "rape, . . . infanticide, genital mutilation, bride burning, forced marriage, domestic violence, forced abortion or compulsory sterilization."⁷⁸ These Guidelines also recommend that adjudicators refer to a number of human rights instruments when determining what constitutes prohibited or permissible conduct towards women, an approach which is also helpful for the ICC's consideration of the phrase "contrary to international law."⁷⁹

Other documents refer to similar examples of acts that amount to gender-based persecution.⁸⁰ The United States' *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* adds slavery to the examples identified in the Canadian Guidelines,⁸¹ while the United Kingdom's *Guidance on Gender Issues in the Asylum Claim* more specifically mentions domestic slavery.⁸² Australia's Guidelines, *Gender Issues for Decision Makers*, also cite systematic rape "used as part of ethnic cleansing," "societal oppression of women," and "denial of participation by women in political, civil or economic life" as examples of potentially persecutory acts.⁸³ The Swedish Migration Board's *Gender Guidelines* mention "physical, sexual and psychological abuse occurring [within] the family," such as sexual abuse of female children, dowry-related violence, "non-spousal violence and violence related to exploitation[;] . . . physical, sexual or psychological violence occurring within the general community [such as] rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and

77. CANADIAN GENDER GUIDELINES, *supra* note 76, § A(I).

78. *Id.* § B.

79. *See id.*

80. U.S. GENDER CONSIDERATIONS, *supra* note 76, ¶ 9; U.K. GENDER GUIDELINES, *supra* note 76, ¶¶ 3-5; AUSTRALIAN GENDER GUIDELINES, *supra* note 21, ¶¶ 4.5-4.10.

81. U.S. GENDER CONSIDERATIONS, *supra* note 76, ¶ 9.

82. U.K. GENDER GUIDELINES, *supra* note 76, ¶ 3.

83. AUSTRALIAN GENDER GUIDELINES, *supra* note 21, ¶¶ 4.7-4.10.

forced prostitution; and physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”⁸⁴

Numerous domestic cases have reiterated that these examples or categories of acts can indeed amount to gender-related persecution.⁸⁵ Deborah Anker notes that there is a growing body of refugee case law considering forms of violence against women such as rape,⁸⁶ female genital surgeries,⁸⁷ domestic violence,⁸⁸ “forced marriage, forced sterilization, forced abortion, forced prostitution, bride burning and honor killings, [as well as gender-discriminatory] denials of education, employment and health care.”⁸⁹ Heaven Crawley and Trine Lester also describe domestic cases involving other examples of gender-related persecution: for example, the “threat [to a woman] of a complete loss of a minimum subsistence level upon return”;⁹⁰ married women under threat because they had been unfaithful and left their country of origin without their husband’s permission;⁹¹ serious discrimination such as that under the Taliban in Afghanistan;⁹² sexual exploitation and trafficking;⁹³ transgression of social or religious mores governing women and men;⁹⁴ and persecution based on transsexuality.⁹⁵ While not all of the examples gleaned from the UNHCR Gender Guidelines, domestic policy, and domestic decisions

84. Crawley & Lester, *supra* note 76, ¶ 152. Crawley and Lester state that the Swedish Gender Guidelines define female genital mutilation and forced abortion as the only two forms of abuses that are exclusively gender-specific, on the basis that they only affect women. *Id.* ¶ 155. “This implies a very narrow view of gender which actually refers to sex rather than socially constructed gender roles and circumstances.” *Id.* ¶ 156.

85. *See generally, e.g.,* CRAWLEY, *supra* note 10, chs. 4-9 (describing the numerous domestic decisions).

86. Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 140-43 (2002) [hereinafter Anker, *Refugee Law*].

87. *Id.* at 143-46.

88. *Id.* at 146-49.

89. *Id.* at 150. Anker also cites examples of case law. *Id.* at 150 n.95. *See also* Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN’S L.J. 281, 291 (2002); *see also* Stephen M. Knight, *Seeking Asylum from Gender Persecution: Progress Amid Uncertainty*, 79 INTERPRETER RELEASES 689 (2002).

90. Crawley & Lester, *supra* note 76, ¶ 179.

91. *Id.* ¶ 181.

92. *Id.* ¶¶ 185, 193.

93. *Id.* ¶¶ 206, 217.

94. *Id.* ¶¶ 324, 331-33.

95. *Id.* ¶ 380.

may be applicable in the context of crimes against humanity,⁹⁶ the range of violations identified as persecutory in refugee law certainly helps identify the complex relationship between discrimination, persecution, and gender and highlights actions that should at least be considered by the ICC's Prosecutor and judges as potentially violating fundamental rights. Refugee law's understanding of acts that amount to gender-related persecution has clearly grown over time, as will the ICC's, but the ICC can start from a very different and more informed point.

These examples from refugee law, however, cannot provide specific guidance to the ICC on how to analyze the category of "gender" in specific situations. "Gender" is not a discrete ground of persecution under the Refugee Convention, which is restricted to the grounds of race, religion, nationality, membership in a particular social group, or political opinion.⁹⁷ Given that "gender" is not a specific ground, it is therefore to be considered under each of these grounds.⁹⁸ In practice, refugee decision-makers have tended to classify claimants within rather narrow gender-related sub-categories of those grounds. Examples of these sub-categories include, "young women of the Tchamba-Kunsuntu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice";⁹⁹ "married women living in a household which did not include a male blood relation to whom the women might look for protection against violence by the members of the household";¹⁰⁰ and "women in El Salvador abused by a perceived partner, a rebuffed ex-boyfriend."¹⁰¹ Randall has convincingly argued that this practice within domestic refugee law "has created [a] mechanistic and reductive classification problem . . . [leading to] artificial and ossified sub-categories."¹⁰² This "super-categorization" results in decisions

96. This is because crimes against humanity have a minimum threshold of acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute, *supra* note 1, art. 7(1).

97. Refugee Convention, *supra* note 6, art. 1(A)(2).

98. UNHCR Gender Guidelines, *supra* note 3, ¶¶ 22-23.

99. *In re Kasinga*, 21 I. & N. Dec. 357, 368 (B.I.A. June 13, 1996) (U.S.). See Randall, *supra* note 89, at 290.

100. *Minister for Immigration and Multicultural Affairs v. Khawar* (2002) 210 C.L.R. 1, ¶ 81 (McHugh and Gummow, JJ) (Austl.). Judge Kirby classified the group in this way: "there may be a particularly vulnerable group of married women in Pakistan, in dispute with their husbands and their husbands' families, unable to call on male support and subjected to . . . [threats]." *Id.* ¶ 129

101. *In re Q.A.E.*, C.R.D.D. No. 85 (2000) (Can.).

102. Randall, *supra* note 89, at 290.

that often “fail to grapple” with the full implications of gender as a consideration within the Convention refugee grounds.¹⁰³ Since the Rome Statute recognizes gender as a separate, prohibited persecutory ground, the ICC need not delve into refugee law’s categorizations and sub-categorizations of gender, which are unique to that area of the law. The ICC instead can take guidance from refugee decisions as to the variety and kinds of actions that might amount to the crimes against humanity of gender-based persecution.

2. *Ensuring Proper Delineation of “Public” Violations.* Similar to international criminal prosecutions, refugee status inquiries are “deeply and necessarily contextualized,”¹⁰⁴ and those involving an analysis of gender identity are no different. As Anthea Roberts notes in the refugee context, “[w]omen may experience distinct vulnerabilities created by their numerous overlapping identities.”¹⁰⁵ It is for this reason that the UNHCR’s 2002 Gender Guidelines urge that refugee status determinations be approached “holistically,” having “regard to all the relevant circumstances” relating to the person making the claim.¹⁰⁶ Thus, the challenge for the ICC’s Prosecutor and judges, as with refugee decision-makers, is to give full effect to the individualized and intersecting nature of the inquiry.¹⁰⁷

While some domestic refugee decisions have analyzed gender and other intersecting identities in the way envisioned by the UNHCR’s Gender Guidelines, academic commentators have critiqued numerous decisions as having misunderstood or mischaracterized intersectionality,¹⁰⁸ with the result that many women who should otherwise have been granted refugee status are denied

103. *See id.* at 291, 296.

104. Anker, *Refugee Law*, *supra* note 86, at 150.

105. Anthea Roberts, *Gender and Refugee Law*, 22 AUSTL. Y.B. OF INT’L L. 159, 188 (2002). *See also* Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213, 263 (1995). Alice Edwards provides the example of forced marriage of girls, which overlays age and gender considerations. Alice Edwards, *Age and Gender Dimensions in International Refugee Law*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 46, 57 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

106. UNHCR Gender Guidelines, *supra* note 3, ¶ 7.

107. Alice Edwards notes that the real challenge is to give “true effect to the individualized nature of the [refugee] inquiry,” which is cross-cutting. Edwards, *supra* note 105, at 48.

108. Kimberlé Crenshaw’s groundbreaking work on intersectionality has heavily influenced international feminist legal analysis. *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 93, 93-118 (Martha Fineman & Roxanne Mykitiuk eds., 1994).

this status.¹⁰⁹ For example, some refugee law decision-makers have misunderstood women's political relationship with the state. Some decision-makers have equated "political" with "public" in the context of two determinations: first, in order to examine the acts of the claimant's alleged persecutor, and second, to define the claimant's own identity.¹¹⁰ In the first example, refugee decision-makers have incorrectly deemed certain acts by an alleged persecutor as "personal," and therefore not amounting to persecution, because the acts occurred in "private" contexts, such as spousal relationships. The assumption, however, of what is a "private" context is intensely gendered, and has been critiqued as such by feminist academic refugee law commentators.¹¹¹ They have noted that these types of decisions are premised on the view that harm in what has traditionally been understood as the "private" sphere is, by its nature, perpetrated for personal reasons, thereby missing the overarching structural gendered patterns and dynamics.¹¹² This problematic assumption is not limited to refugee law. International human rights law has been criticized as privileging a masculine world view because it provides international regulation of actions only in the "public" or state-governed sphere, leaving many harms that women are subjected to in the "private" or non-state spheres of business, home, and family unregulated and not considered true legal concerns.¹¹³

109. For cases that have followed the approach of the UHCR Gender Guidelines, see Anker, *Refugee Law*, *supra* note 86, at 141. For cases that did not take intersectionality into account, see *id.* at 140. For UK decisions that dealt with intersectionality on appeal, see CRAWLEY, *supra* note 10, at 73-77.

110. Crawley provides a sophisticated analysis as to why 'political' has been mapped onto 'public' in some refugee decisions, which is related to the centrality of the public/private binary oppositions in Western political thought. CRAWLEY, *supra* note 10, at 21-26. She argues that "[p]olitics' has both private and public dimensions as reflected in, on the one hand, the extent to which the private domain is implicated in the political process and, on the other, the lack of fit between the public sphere and the boundaries of the political." *Id.* at 26. Therefore, the public/private dichotomy cannot provide insights into the content, form, and representation of political activity carried out by women in different parts of the world. *Id.* at 21-26.

111. See, e.g., *id.*, at 17-21; Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L. J. 391 (2001); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L. J. 625, 627-28, 646 (1993); Macklin, *supra* note 105, at 232-36.

112. E.g., Roberts, *supra* note 105, at 185. Roberts is referring to the Australian case of *Khawar*, but her comment is more widely applicable. As Crawley notes, "although international law is gender-neutral in theory, in practice it interacts with gender-based domestic laws and social structures which relegate women and men to separate spheres of existence." CRAWLEY, *supra* note 10, at 19.

113. Hilary Charlesworth, *What are "Women's International Human Rights?,"* in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 58, 60 (Rebecca Cook

The second mistaken assumption—that the claimant’s own identity is not “political”—has occurred because of a definition of politics that has focused upon conventional institutions, such as political parties, political organizations or movements, trade unions, and the work of political elites—all institutions that have tended to marginalize women.¹¹⁴ As Crawley notes, this narrow definition of what is political and therefore “public” is particularly detrimental to women “in the context of the asylum determination process because women often participate as political subjects in different ways than men, and the predominant emphasis on participation within formal, constitutional, government-oriented institutions or procedures provides a misleading view of women’s political identity.”¹¹⁵ Political activity should be seen to include ad hoc politics and protest activity directed against the existing regime.¹¹⁶ Some women may not be writing speeches, attending demonstrations, or writing publications, but they might be involved in “informal organisations and meetings, providing food, clothing and medical care, hiding people [and] passing messages from one political activist to another All of these activities may be essential for the on-going existence of the political organization, and the knowledge women gain through these activities puts them in danger and at risk” of persecution.¹¹⁷ Furthermore, since women’s status, identities, and beliefs are often subsumed into the status, identities, and beliefs of males in their family, there may be an assumption on the part of perpetrators that the women share the political views of the male family members.¹¹⁸

The assumption that women’s activities and experiences are not political has led to some troubling refugee determination decisions that have understandably been widely criticized.¹¹⁹ One oft-cited

ed., 1994); Hilary Charlesworth, *General Introduction*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW xix, xxii (Kelly D. Askin & Dorean M. Koenig eds., 1999).

114. CRAWLEY, *supra* note 10, at 22-26.

115. *Id.* at 24.

116. *Id.*

117. *Id.*

118. *Id.* at 25.

119. See, e.g., Anker, *Refugee Law*, *supra* note 86, at 140; Macklin, *supra* note 105, at 226; Kelly, *supra* note 111, at 638-40; Amber Ann Porter, Casenote, *The Role of Domestic Violence in the Consideration of Gender-Based Asylum Claims: In Re R-A-, An Antiquated Approach*, 70 U. CIN. L. REV. 315, 334-37 (2001); Karen Musalo, *Matter of R-A-: An Analysis of the Decision and its Implications*, 76 INTERPRETER RELEASES 1177, 1185-86 (1999) (critiquing specific cases decided in the United States). Two of these troubling cases are *In Re R-A-* and *Klawitter v. I.N.S.* In *In Re R-A-*, a woman who was subjected to intensive physical and psychological abuse by her Guatemalan army officer husband, and who the police failed to protect despite multiple

example of this flawed and decontextualized decision making is the U.S. case of *Campos-Guardado v. INS*, in which a woman, whose family members had been politically active in El Salvador, was forced to watch the murder of her male family members and then was raped, alongside other female family members, while one attacker chanted political slogans.¹²⁰ The court and board found that the attack was personally, not politically, motivated. The subsequently-drafted United States' "Considerations for Asylum Officers Adjudicating Claims From Women" essentially repudiated this finding, noting that the "court might reasonably have concluded that the chanting of political slogans during the rape indicated not merely that the attackers were politically motivated, but more specifically that they believed the petitioner to have contrary political views and that they punished her because of it."¹²¹ This same document states that the "appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm."¹²² The *Campos-Guardado* case and others have led refugee law policy and decision-makers to understand that sexual violence cannot be solely understood in terms of "personal" or "individual" characteristics of the specific men who are the perpetrators.¹²³ This misdirected focus fails to recognize that the violence is itself gendered and an expression of gender inequality. For this reason, the *Summary Conclusions on Gender-Related Persecution* stemming from the Global Consultations on International Protection state that "[t]he main problem facing women asylum seekers is the failure of decision makers to . . . recognize the political nature of seemingly private acts of harm to women."¹²⁴

complaints, was denied refugee status because the abuse she suffered resulted from personal circumstances involving a senseless and irrational man whose motives were unrelated to refugee law's persecutory grounds. 22 I. & N. Dec. 906, 915 (B.I.A. June 11, 1999). In *Klawitter v. I.N.S.*, the court upheld the Board of Immigration Appeals' denial of asylum to a Polish woman who claimed that a government official had sexually and physically harassed her while threatening to destroy her career. 970 F.2d 149 (6th Cir. 1992). The court explained that the official's actions were the result of his desire to be her "paramour," and therefore his "interest" was merely personal. *Id.* at 152.

120. 809 F.2d 285 (5th Cir. 1987).

121. U.S. GENDER CONSIDERATIONS, *supra* note 76, ¶ 11.

122. *Id.* ¶ 9.

123. *See id.* ("The appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm.")

124. Expert Roundtable Organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law, San Remo, Italy, Sept. 6-8, 2001, *Summary Conclusions: Gender-Related Persecution*, ¶ 4.

How do these developments in refugee law assist the ICC? They illustrate just how carefully the ICC must draw the boundaries between what is and what is not persecution. In deciding whether certain actions amount to gender-based persecution, the ICC's judges will also be deciding what amounts to persecution and what does not rise to the level of, or qualify as, persecution. Inherent within these decisions is an examination of what is to be considered "public" and what is to be considered "private," which can change from case to case.¹²⁵ If the ICC understands "gender," "public," and "private" in a properly comprehensive manner, learning from past mistakes and current more progressive approaches of refugee law,¹²⁶ then it will be unlikely to mischaracterize fundamental rights violations committed against women as personal matters.

3. *Determining Degrees of Discrimination.* Apart from providing illustrations of acts that can amount to gender-based fundamental violations of rights, refugee law is also instructive in distinguishing between degrees of discrimination, between what might be termed "lower-level" discrimination, and discrimination that amounts to a violation of fundamental rights and therefore persecution. The UNHCR Gender Guidelines state that, "[w]hile it is generally agreed that 'mere' discrimination may not, in the normal course, amount to persecution in and of itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution"¹²⁷ This assessment of the

125. The validity of the public/private dichotomy itself can and should be challenged, but, as Crawley notes, "[d]espite the problems which are inherent to any critique of the public/private dichotomy, this theoretical approach remains necessary because the assumption that underlies all law, including international refugee law, is that the public/private distinction *is* real." CRAWLEY, *supra* note 10, at 20. Refugee law commentators, such as Jenni Millbank, have noted that conceptions of public and private differ in cases involving specific aspects of gender identity, including cases involving lesbians and gay men. Jenni Millbank, *Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia*, 26 MELB. U. L. REV. 144 (2002); Jenni Millbank, *Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation*, 18 GEO. IMMIGR. L. J. 71, 73 (2003) [hereinafter Millbank, *Gender, Sex and Visibility*].

126. Not all refugee decision-makers have learned from past mistakes. For example, Musalo et al. noted that "[d]espite the patent 'political' character of rape in time of war, war-rape [refugee] cases, like gender-related cases in general, are vulnerable to a certain tendency to characterize human rights violations against women as a personal matter." KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 646 (2d ed. 2002). See also Crawley & Lester, *supra* note 76, at 35 ("[S]exual violence is still considered by many [refugee] decision-makers to be a private acts rather than an act of persecution.").

127. UNHCR Gender Guidelines, *supra* note 3, ¶ 14.

distinction between discrimination and persecution must be made in a gender-sensitive manner. There are gendered differences with respect to the consideration of what amounts to discrimination and how to measure cumulative acts, as well as in evaluating the difference between “lower-level” or “mere” discrimination and persecutory discrimination.

Refugee law demonstrates that discrimination that is omnipresent within a country (or globally) should not be viewed as “lower-level” or “mere” discrimination even though its widespread nature makes it “ordinary.”¹²⁸ Discrimination does not need to be extraordinary in order to rise to the level of persecution. This consideration is crucial when considering gender-based persecution because discrimination on the basis of gender—including violence against women and discrimination against homosexuals—is, unfortunately, commonplace. As Audrey Macklin notes, “the ubiquity and frequency of gender-specific violence does not detract from its character as persecution.”¹²⁹

The Canadian Gender Guidelines address this issue in the context of violence against women by noting that “[t]he fact that violence, including sexual and domestic violence, against women is universal is irrelevant when determining whether rape, and other gender-specific crimes constitute forms of persecution.”¹³⁰ This

128. For example, see the UNHCR Gender Guidelines, which recognize that discriminatory state policy or practice (which is, by definition, widespread) can amount to persecution. *Id.* “Significant to gender-related claims is also an analysis of forms of discrimination by the State in failing to extend protection to individuals against certain types of harm. If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution.” *Id.* ¶ 15; *see also infra* note 130 and accompanying text (discussing the Canadian Gender Guidelines). Similarly, the UK Gender Guidelines state that “[t]he fact that violence against women is common and widespread in a particular society does not mean that it can not amount to persecution. Each case should be considered on its own merits against country information and not disregarded because such treatment is common and widespread.” UK GENDER GUIDELINES, *supra* note 76, at 2. The courts in New Zealand have recognized that widespread gender-based discrimination can amount to persecution, noting, “[d]iscrimination can affect gender-based groups to different degrees... various acts of discrimination, in their cumulative effect, can deny human dignity in key ways and should properly be recognized as persecution for the purposes of the Convention.” CRAWLEY, *supra* note 10, at 47 (citing New Zealand Refugee Status Appeals Authority, Appeal No. 2039/93 (Feb. 12, 1996)). The United Kingdom case of *Shah and Islam* takes a similar approach. *Islam v. Sec’y of State for the Home Dep’t; Islam v. Immigration Appeal Tribunal ex parte Shah; R. v. Sec’y of State for the Home Dep’t ex parte Shah* [1999] I.N.L.R. 144 (H.L.).

129. Macklin, *supra* note 105, at 237.

130. CANADIAN GENDER GUIDELINES, *supra* note 76, § (B). *See also* Rodger Haines, *Gender-Related Persecution*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S*

insight from refugee law is essential for the ICC's jurisprudence on the crime against humanity of gender-based persecution. Some commentators have expressed fear that the phrase "context of society" in the definition of "gender" in the Rome Statute of the ICC may narrow or prevent approaches that rely on the social construction of gender.¹³¹ They seem to fear that the ICC's Prosecutor and judges must *defer* to the case-specific context, by situating themselves within—and potentially accepting—a discriminatory framework in order to determine whether gender was the basis for persecution. This is not the case.¹³² The ICC does not need to *accept* the widespread nature of discrimination as reflective of a particular society and then only consider discrimination that distinguishes itself from the "ordinary." Under the Rome Statute, the examination of a specific society is done for several reasons, including, to understand how gender is constructed in that particular society, to understand the role that discrimination plays in maintaining that gender construct, to examine whether a particular victim fell within or outside of that gender construct and mode of discrimination, and to evaluate all of these considerations in light of international law¹³³ when determining whether particular acts amount to violations of fundamental rights.¹³⁴ The "context of society" is not only the domestic society, but also the international society.¹³⁵ The

GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, *supra* note 105, at 319, 333 ("Breaches of human rights cannot be ignored, discounted, or explained away on the basis of culture, tradition, or religion.")

131. Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 CAN. J. L. & JURIS. 281, 284; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion & Prot. of Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2000/45, Violence Against Women Perpetrated and/or Condoned by the State During Times of Armed Conflict (1997-2000)*, ¶ 19, U.N. Doc. E/CN.4/2001/73 (Jan. 23, 2001).

132. Oosterveld, *supra* note 5, at 75.

133. See Rome Statute, *supra* note 1, art. 21(3).

134. For a discussion of the factors ICC judges might consider with respect to the context of any given society, see Oosterveld, *supra* note 5, at 74-76.

135. *Id.* at 76. The concern about "context of society" is also directly related to the issue of reconciling universal human rights (such as the prohibition of discrimination based on sex found in the U.N. Convention on the Elimination of all forms of Discrimination Against Women) with cultural (or in this case societal) relativism. There is a balance between respecting a culture or society (by approaching it in a non-ethnocentric manner) and respecting human rights. The phrase "context of society" has been misconstrued as tipping that balance solely to societal relativism. As Crawley notes in the refugee context, "[c]ulture' and 'tradition' cannot be used to defend human rights abuses because cultural values and cultural practices are as legitimately

fact that the international society condemns discrimination on the basis of sex¹³⁶ and violence against women¹³⁷ must be taken into account, not only when generally considering the meaning of gender, but also when deciding what amounts to persecution.¹³⁸ Refugee law provides a necessary precedent for this approach because it considers both the domestic and international social construction of gender.¹³⁹

B. The Perpetrator's Targeting was Based on Gender Grounds

A key element for the crime against humanity of gender-based persecution is that the perpetrator's targeting of the victim(s) was based on gender grounds.¹⁴⁰ In order to fully comprehend this element, the ICC's Prosecutor and judges must understand what gender is and how gender identity also includes identities based on sexual orientation or sexual "outlaw" status. In addition, they need to consider how gender is linked to intent so that certain acts can be correctly described as being "based on" gender, leaving other acts to be properly understood as based on grounds other than gender.

1. *Defining "Gender."* "Gender" in the Rome Statute is defined as referring "to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."¹⁴¹ While this definition is "peculiar and

subject to criticism from a human rights perspective as any other structural aspect of society. In this context, it is important to consider what is meant by 'culture' when it is used to defend violations of women's human rights Respect for international human rights law does not require that every culture use an identical approach, but it does require that human rights be defined and protected in a manner consonant with international principles." CRAWLEY, *supra* note 10, at 11-12.

136. See, e.g., Convention on the Elimination of All Forms of Discrimination against Women, Sept. 3, 1981, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights art. 2, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171.

137. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GOAR, 85th plen. mtg., U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

138. Under the Rome Statute, 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, *supra* note 1, art. 7(2)(g). An evaluation of fundamental rights would include an evaluation of fundamental human rights, such as those found in the Universal Declaration of Human Rights: the right to be free of discrimination and the right to life, liberty, and security of the person. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

139. Oosterveld, *supra* note 5, at 76.

140. *Elements of Crimes*, *supra* note 3, at 15.

141. Rome Statute, *supra* note 1, art. 7(3).

circular,”¹⁴² it was crafted to provide broad guidance to decision-makers so that they understand that gender is a construct built upon social understandings of what is expected of those of the male and female biological sex.¹⁴³ The exact contours of the numerous components and considerations in understanding “gender” are left to the ICC’s judges (and in some cases, the Prosecutor and Registrar), albeit with helpful markers throughout the Rome Statute to assist in this process.¹⁴⁴ The detailed definitions of the term “gender” used within the United Nations and its agencies also provide guidance as indicators of the current international understanding of the content of the term.¹⁴⁵ Thus, the definition of gender in the UNHCR’s Gender Guidelines can and should provide assistance to the ICC in evaluating and populating the content of the term:

Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.¹⁴⁶

This definition highlights two interrelated issues of importance to the ICC: first, that “gender” and “sex” are two different terms and therefore have different meanings, and second, that gender identities are changeable social and cultural constructions of identity, status, roles, and responsibilities.¹⁴⁷

The use of the term “gender” in the Rome Statute was deliberate. Delegates considered and rejected using the term “sex” instead of “gender.”¹⁴⁸ Thus, it would be wrong for the ICC to confuse gender with sex, as the result would be an incorrectly narrow understanding of gender-based persecution. The ICC can learn from mistakes made within the refugee law context. Crawley has noted that the terms “gender” and “sex” have tended to be used interchangeably in refugee law, with the unfortunate result that the

142. Copelon, *supra* note 2, at 236.

143. Oosterveld, *supra* note 5, at 72-73. Some commentators have critiqued the Rome Statute’s reliance on the term “sex” to define “gender” because such an approach does not take into account theories that define “gender” without reference to “sex” and therefore loses certain subversive possibilities. *See, e.g.*, Cossman, *supra* note 131, at 284.

144. Oosterveld, *supra* note 5, at 81-82.

145. *Id.* at 66-71, 82.

146. UNHCR Gender Guidelines, *supra* note 3, ¶ 3.

147. *See id.*

148. Steains, *supra* note 2, at 373-74; *see* Oosterveld, *supra* note 5, at 58-66.

word “gender” has simply been understood to mean “woman.”¹⁴⁹ Thomas Spijkerboer has also noted that “gender” and “woman” are often conflated in refugee literature and statistics.¹⁵⁰ The collapsing of “gender” into “woman” leads to confusion about what is meant by “gender-related persecution,” and to a lack of understanding about the relationship between the form of the harm suffered or feared and the required grounds.¹⁵¹ It also tends to homogenize women as a category, overlooking critical differences between women within and between particular countries and contexts.¹⁵²

The ICC must avoid the improper equation of “gender” with “woman.” If the ICC understood gender-based persecution as simply persecution of women, this would both overinclude and underinclude acts in the “gender” category, potentially distorting both prosecutions and convictions for this crime. Individuals have multiple, cross-cutting identities related to their age, religion, profession, socio-economic status, legal status, family status, political beliefs, and sexual orientation, among other characteristics. Overinclusion within the ground of “gender” can occur if a woman is targeted for persecution because of any of these non-sex-focused grounds, but because she happens to be a female instead of a male victim, the crime is categorized only as gender-based persecution.¹⁵³ Conversely, underinclusion can occur if crimes against men who are targeted because of their gender are not charged as gender-based persecution, but are categorized as falling within the other enumerated grounds or are charged as other crimes against humanity.¹⁵⁴

The problems of both outcomes are clear. In the refugee context, this results in the creation of a “male experience” of persecution and a “female model,” with the female model overemphasizing sexual violence at the expense of other forms of

149. CRAWLEY, *supra* note 10, at 6-7. This is not only an issue in refugee law. Hilary Charlesworth has stated that “U.N. gender mainstreaming policies assume that ‘gender’ is a synonym for women.” Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1, 14 (2005).

150. SPIJKERBOER, *supra* note 10, at 194-95.

151. CRAWLEY, *supra* note 10, at 7.

152. *Id.* at 8.

153. Of course, sex might be an important factor in how these other identities are created, which is related to the fact that these identities are influenced by the social construction of gender.

154. As Charlesworth notes in the human rights context, this “leaves both the roles of men and male gender identities unexamined, as though they were somehow natural and immutable.” Charlesworth, *supra* note 149, at 15.

repression experienced by women.¹⁵⁵ Crawley notes, “Looking at gender as opposed to sex enables an approach which can accommodate specificity, diversity and heterogeneity. It also ensures that the asylum claims of women are not routinely dismissed as culturally relative and therefore outside the mechanisms for protection available under the Refugee Convention.”¹⁵⁶ The same analysis applies to the ICC: a focus which is squarely on gender, and not only on women, allows for a truer understanding of how the importance of gender identities will vary from case to case and how these identities vary between and within cultures and across time. This nuanced understanding of gender will allow for a better understanding of the violation of fundamental rights, and how targeting may differ between men and women within society.

2. *Sexual Orientation and Gender.* Another important lesson to be learned from the refugee law context is that sexual orientation or status as a sexual “outlaw”¹⁵⁷ has gendered elements.¹⁵⁸ The UNHCR Gender Guidelines make this explicit:

A claimant’s sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse or severe or cumulative discrimination.¹⁵⁹

155. CRAWLEY, *supra* note 10, at 8.

156. *Id.* at 9.

157. Brenda Cossman uses this term in her critique of international law’s “limited understanding of sex, gender and sexual identity” to include “fringe dwellers, those whose lives have been lived beyond the margins of the international arena” such as “the queer subject, the drag queen, the bull dyke, the cross dresser, the transsexual, the transgendered, the sex worker, the S/M dominatrix.” Cossman, *supra* note 131, at 289.

158. Volker Türk & Frances Nicholson, *Refugee Protection in International Law: An Overall Perspective*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, *supra* note 105, at 3, 21. Edwards notes that the links between sexual orientation and gender-based persecution are still being developed. Edwards, *supra* note 105, at 47.

159. UNHCR Gender Guidelines, *supra* note 3, ¶ 16. Crawley notes that sexual orientation cases should not be confused with cases involving transsexuals, for example, but recognizes that case law tends to confuse or conflate the two. CRAWLEY, *supra* note 10, at 163 n.1. The UNHCR Gender Guidelines do not clearly make the distinction. See UNHCR Gender Guidelines, *supra* note 3, ¶ 16.

This Guideline indicates that the concept of “gender” must be interpreted to include those who do not conform to socially-constructed gender roles through non-sexual forms of expression, such as transvestites. Domestic refugee decisions have also recognized that persecution based on sexual orientation or transsexuality is intimately related to the socially-constructed understanding of “maleness” and “femaleness.”¹⁶⁰ In the context of sexual orientation, at least one refugee law commentator has highlighted that it is important for decision-makers to differentiate between lesbian and gay male experiences,¹⁶¹ which reiterates the point that gender is multilayered and, in every case, must be understood as such.

It is important that the ICC’s Prosecutor and judges understand how sexual orientation or sexual “outlaw” status and gender overlap and intersect when considering the definition of “gender” in the crime against humanity of gender-based persecution. Some academic commentators have mistakenly concluded that the definition of “gender” in the Rome Statute excludes considerations of sexual orientation or sexual “outlaws.”¹⁶² In fact, the Rome Statute text effectively leaves the term “gender” open for the ICC to interpret and apply to the circumstances before it, as appropriate.¹⁶³ It would be

160. Crawley describes a case in which a Russian woman who was a lesbian was subjected to various forms of discrimination. The Canadian Refugee Determination Division found that the claimant’s sexual orientation and ethnicity increased her vulnerability to rape and physical assault by marginalizing her economically and socially: “Taking into account the claimant’s sexual orientation, her ethnic identity and her identity as a woman, the Canadian authorities determined that there was a reasonable chance of her being persecuted if she returned to Russia.” CRAWLEY, *supra* note 10, at 166. Crawley also cites the case of a female-to-male transsexual from Lebanon, in which the claimant was granted refugee status because “Lebanon is a highly traditional and patriarchal society where deviation from well-defined gender roles is not tolerated.” *Id.* at 168.

161. Millbank, *Gender, Sex and Visibility*, *supra* note 125, at 83.

162. See Cossman, *supra* note 131, at 284; Stephanie Farrior, *The Rights of Women in International Human Rights Law Textbooks: Segregation, Integration, or Omission?*, 12 COLUM. J. GENDER & L. 587, 589 (2003); Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. PUB. L. 317, 340, 351 (2002). See also Charlesworth and Philips, who fear that the definition of “gender” in the Rome Statute deliberately reflects the concerns of conservative states that the reference to “gender” might be understood to include “sexual orientation.” Hilary Charlesworth, *The Gender of International Law, Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law*, 93 AM. SOC’Y INT’L L. PROC. 206, 207 (1999); Ruth B. Philips, *Too Close to Home?: International Criminal Law, War Crimes and Family Violence*, 24 T. JEFFERSON L. REV. 229, 233 n.14 (2002). For an elaborated explanation of why this assumption is mistaken, see Oosterveld, *supra* note 5, at 76-78.

163. Steains, *supra* note 2, at 374.

difficult to imagine that the ICC would refuse to consider persecution on the basis of sexual orientation or sexual “outlaw” status through the lens of gender, given the underlying linkages between gender identity and this form of oppression. As Rhonda Copelon has convincingly argued, it is “dubious to argue that any ambiguity [in the Rome Statute’s definition of “gender”] should be resolved in favor of discrimination” on the basis of sexual identity.¹⁶⁴ The UNHCR Gender Guidelines and domestic refugee decisions support this conclusion.¹⁶⁵

3. *Defining “Based On.”* Under the Rome Statute, the perpetrator’s targeting must be based on particular prohibited grounds, which include gender.¹⁶⁶ This determination requires an evaluation of how the ground of gender is causally connected to the perpetrator’s targeting. Refugee law has grappled with how to define that causal connection, offering an analysis that can assist the ICC.¹⁶⁷ Yet, before analyzing how refugee law approaches this causal connection, it is important to ask if anything first turns on the differences in the causal language used in refugee law, the Rome Statute, and the ICC’s Elements of Crimes. Refugee law uses the phrase “for reasons of,” the Rome Statute simply says “on,” and the Elements state that the targeting must be “based on” specific grounds.¹⁶⁸ It appears that these differences in terminology do not reflect a consequential difference in meaning. The phrase “for reasons of” is meant to define marginalization by reference to norms of non-discrimination: it links the claimant’s socio-political situation with her resulting marginalization.¹⁶⁹ The use of “on” in the Rome Statute reflects the precedent set by the International Military Tribunals.¹⁷⁰ Finally, the use of “based on” in the Elements appears to be more related to the need to use a descriptor prior to “on” in order to be grammatically correct rather than any substantive

164. Copelon, *supra* note 2, at 237.

165. *Supra* text accompanying note 159.

166. Rome Statute, *supra* note 1, art. 7(1)(h) (using the term “on”). *Cf. Elements of Crimes*, *supra* note 3, at 15 (using the phrase “based on”).

167. *See, e.g.,* CRAWLEY, *supra* note 10, at 7-8; Macklin, *supra* note 105, at 258-59; Randall, *supra* note 89, at 303-04; Roberts, *supra* note 105, at 164.

168. *Elements of Crimes*, *supra* note 3, at 15; Rome Statute, *supra* note 1, art. 7(1)(h); Refugee Convention, *supra* note 6, art. 1(A)(2).

169. HATHAWAY, LAW, *supra* note 8, at 136-37.

170. *See* discussion *supra* Part I.

reasoning.¹⁷¹ While the UNHCR Gender Guidelines use the term “gender-related,” it is clear from those Guidelines that the term “related” is meant to have the same meaning as the Refugee Convention’s “for reasons of.”¹⁷² Thus, the terms “for reasons of,” “related,” “on,” and “based on” all have a similar meaning.

Gender identities, which are multifaceted and overlap with numerous other identities, can result in multiple motivations for targeting within refugee law.¹⁷³ Roberts notes that it is sometimes difficult to identify gendered motivations, so these motivations are unfortunately often ignored when other motivations can more easily be identified and causally connected to intent.¹⁷⁴ Audrey Macklin has proposed a way to distinguish how gender, motivation, and intent are, and are not, causally connected in the refugee law context. According to Macklin, decision-makers must distinguish, for example, between persecution that takes gender-specific forms and persecution *because of* gender: “[t]he idea of women being persecuted *as* women is not the same as women being persecuted *because* they are women. The former addresses forms of persecution that are gender-specific. . . . [The latter] addresses a causal relationship between gender and persecution.”¹⁷⁵

Macklin provides the following example: “one may be persecuted as a woman (e.g., raped) for reasons unrelated to gender

171. *Elements of Crimes*, *supra* note 3, at 15. Other phrases were used in the original proposals that were the focus of negotiations over the elements of persecution. The U.S. proposal used “motivated by.” *Proposal submitted by the United States of America, Draft Elements of Crimes*, at 7, U.N. Doc. PCNICC/1999/DP.4/Add.1 (Feb. 4, 1999). The Canadian/German proposal used “committed on.” *Proposal submitted by Canada and Germany on article 7*, at 8, U.N. Doc. PCNICC/1999/WGEC/DP.36 (Nov. 23, 1999). The proposal of a number of Arab States also used “motivated by.” *Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity*, at 4, U.N. Doc. PCNICC/1999/WGEC/DP.39 (Dec. 3, 1999). The drafters of the Elements of Crimes avoided language in third element of the definition of persecution, which would have already been covered by article 30 of the Rome Statute; consequently the drafters settled on using “based on,” which was uncontroversial. Witschel & Rückert, *supra* note 30, at 97; *see also Elements of Crimes*, *supra* note 3, at 15; Rome Statute, *supra* note 1, art. 30. Similarly, the use of “by reason of” in the second element of the definition of persecution (in the Elements of Crimes) simply reproduced the wording of the definition of persecution in the Rome Statute. *Elements of Crimes*, *supra* note 3, at 15; Rome Statute, *supra* note 1, art. 7(2)(g).

172. *See* UNHCR Gender Guidelines, *supra* note 3, ¶ 4.

173. Roberts, *supra* note 105, at 188.

174. *Id.*; *see also* Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 435 (Sep. 17, 2003) (“While the intent to discriminate need not be the primary intent . . . , it must be a significant one.”).

175. Macklin, *supra* note 105, at 258-59. *See also* CRAWLEY, *supra* note 10, at 6-9.

(e.g., membership in an opposition political party),¹⁷⁶ not persecuted as a woman but still *because* of gender (e.g., flogged for refusing to wear a veil), and persecuted *as* and *because* one is a woman (e.g., genital mutilation).¹⁷⁷ She concludes that, even though all three of these cases present examples of gendered persecution, it does not follow that each of them ought to be framed as persecution on grounds of gender.¹⁷⁸ She would categorize “the first claimant as one who fears persecution on the basis of political opinion, not gender.”¹⁷⁹ Roberts uses different terminology to make a similar point: “gender-specific harm” refers “to harm that is unique to, or more commonly befalls, members of one sex,” and “‘gender-related persecution’ refers to a causal relationship between the persecution and the reason for the persecution.”¹⁸⁰ However, Roberts would expand Macklin’s categorization of women persecuted as women to include both persecution that uses gender-specific means and persecution that has gender-specific outcomes.¹⁸¹

Macklin stresses these analytical distinctions for two reasons. First, it is important to identify clearly the relationship between gender, the violations, and persecution since “[g]ender-related violations do not necessarily constitute persecution *because* of gender.”¹⁸² Second, it is important to avoid the twin extremes of collapsing [all] persecution of women into . . . ‘persecution on grounds of gender’ . . . [or] submerging the gender component entirely under other [grounds].”¹⁸³ The former extreme reinforces “women’s marginalization by implying that only men have political opinions, only men are activated by religion, only men have racial presence,” while the latter extreme erases women’s gender-specific experience.¹⁸⁴

176. See also CRAWLEY, *supra* note 10, at 8. Crawley, following Macklin’s approach, gives this example: “if a man’s genitals are subjected to electric shocks, he is certainly being tortured in a gender-specific way, but it does not follow that he is being persecuted because of his gender.” *Id.*

177. Macklin, *supra* note 105, at 259.

178. *Id.*

179. *Id.* This approach is also found in less sophisticated forms. E.g., CANADIAN GENDER GUIDELINES, *supra* note 76, at 2 (“Obviously, not all claims brought forward by women are specifically gender-related.”).

180. Roberts, *supra* note 105, at 164 n.31.

181. *Id.*

182. Macklin, *supra* note 105, at 259.

183. *Id.* Note that this problem is intimately related to the conflation of “gender” and “women” within refugee law discussed above. *Id.*

184. *Id.*

Macklin's analysis is somewhat applicable to the work of the ICC, but for different reasons than it is applicable in the refugee context. Under the Refugee Convention, the causal link required is that the persecution be "for reasons of" the listed grounds, which do not include gender.¹⁸⁵ The causal link between gender and persecution is therefore accomplished through the listed grounds, and "the Convention ground must be a relevant contributing factor, though it need not be . . . the sole, or dominant, cause."¹⁸⁶ As the UNHCR's Gender Guidelines note, "in many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground."¹⁸⁷ Macklin's distinction is meant to show that the causal link between gender and persecution need be pursued only in those cases where the persecution occurs because of gender. In the cases involving persecution as a woman (or as a man), the causal link is between the stated ground itself and persecution, and the decision-maker need not establish the additional nexus to gender.

Unlike the Refugee Convention, the Rome Statute includes gender as a discrete prohibited persecutory ground.¹⁸⁸ Therefore, the need to "read" gender through the lens of other listed grounds is not necessary. Even so, Macklin's analysis does have some relevance to the work of the ICC: the causal link between gender and persecution should be pursued by the ICC in cases where persecution occurs because of gender. It might be more appropriate to pursue other grounds when the persecution is gender-specific, but not because of gender.¹⁸⁹ However, a crucial note of caution is needed with respect

185. Refugee Convention, *supra* note 6, art. 1(A)(2). See also HATHAWAY, LAW, *supra* note 8, at 137 (describing this causal link by noting "refugee law requires that there be a nexus between who the claimant is or what she believes and the risk of serious harm in her home state").

186. UNHCR Gender Guidelines, *supra* note 3, ¶ 20.

187. *Id.*

188. See generally Rome Statute, *supra* note 1.

189. Macklin notes that for this reason, in the refugee context, it is important to recognize rape as torture. Macklin, *supra* note 105, at 259. The case law of the International Criminal Tribunals is very helpful in this regard, having already recognized that rape can amount to torture. See, e.g., Prosecutor v. Kunarac, Case No. IT-96-23-T, Judgment (Feb. 22, 2001); Prosecutor v. Kunarac, Case No. IT-96-23-A, Judgment, ¶¶ 149-51 (June 12, 2002). If the gender-specific act was that of "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization," or any other comparable form of sexual violence, then a charge could be brought for those specific crimes against humanity under article 7(1)(g) of the Rome Statute. Rome Statute, *supra* note 1, art. 7.

to Macklin's approach. While Macklin's approach can provide conceptual clarity with respect to the causal link between gender and persecutory targeting, in reality it may be very difficult to neatly divide cases into persecution because of gender versus gender-specific persecution. The difference between the two is not always clear, and they can be inextricably intertwined and almost impossible to separate.

In addition, it is arguable that rape or sexual violence committed against a woman always has an underlying persecutory intent, even if there is an overlying political, religious, or other intent.¹⁹⁰ Roberts avers to this by providing the following example:

If a woman who was vaginally raped would have been persecuted in another way had she been a man, then the crime may be gender-specific, but it may not amount to gender-related persecution. However, if that woman would not have been subjected to persecution had she been a man, then the persecution may be gender-related. It is also arguable that the sexual nature of the violence perpetrated against women represents an expression of hatred against women. After all, if the motivation for harm were gender-neutral, why would the harm take a gender-specific form?¹⁹¹

Thus, some might take the position that certain violations, such as rape, can never be divided between persecution because of gender and persecution as a woman (or a man), since the perpetrator's persecutory intent must inherently be guided by gender-based discrimination and therefore will never be gender-neutral.¹⁹² Even so, there may be times when Macklin's categorization will help the ICC's Prosecutor decide whether a charge of gender-based persecution or a charge of persecution based on other grounds is more clearly *provable* (as opposed to applicable) in a given case. The nuanced analysis required in establishing the causal link between gender and the perpetrator's targeting demonstrates that the ICC's Prosecutor and judges must spend time building a *case-specific* understanding of the social construction of gender.

Macklin's point that it is important to avoid subsuming all persecution of women into "persecution on grounds of gender," as well as to avoid submerging the gender component entirely under

190. *E.g.*, CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 180-91 (2006). While Mackinnon discusses rape in the context of genocide, her analysis also clearly extends to gender-based persecution. *See id.*

191. Roberts, *supra* note 105, at 189.

192. This overlap between Macklin's categories stems from the fact that gender intersects with and is inseparable from an individual's other identities. *See id.*

other grounds, is also applicable to the work of the ICC. The temptation will be for the Prosecutor to include “gender” as a ground if the persecuted group or collectivity involves women. If the Prosecutor has evidence that the persecution involved persecution because of gender, then it is appropriate to include gender as grounds in the indictment. However, if the evidence demonstrates that the persecution was not based on gender (although keeping in mind that certain acts, such as rape, are viewed by some as always demonstrating evidence of gender-based persecution), then other persecutory grounds might be more appropriate (or, at least, more straightforward to prove).

Since gender is listed as a discrete category in the Rome Statute’s list of persecutory grounds,¹⁹³ it is less likely to be improperly subsumed into other categories than in refugee law. However, it is possible that without a proper analysis of the intersections between political, racial, national, ethnic, cultural, religious, or other impermissible grounds and gender, the gendered aspects of these grounds can be overlooked.¹⁹⁴ As Macklin notes, the “easy acceptance of ‘intersectionality’ in refugee law minimizes the danger of distorting the presentation of a woman’s claim in the name of facilitating success in the hearing room.”¹⁹⁵ This ready acceptance of intersectionality should also become the norm within the ICC’s approach to persecutory grounds in order to avoid distorting the grounds of persecution in any given case. As is done in refugee law, a particular person’s experience could be simultaneously analyzed under more than one ground: “For example, a claim for refugee status based on transgression of social or religious norms may be analyzed in terms of religion, political opinion or membership of a particular social group.”¹⁹⁶ The ICC’s Prosecutor could similarly approach intersectionality by identifying interlinked grounds of persecution in indictments, and the ICC’s judges could consider persecution without necessarily delinking these grounds.

193. Rome Statute, *supra* note 1, art. 7.

194. For example, the UNHCR Gender Guidelines state that there is an overlap between a person’s gender, religious, and political identities: “While religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion.” UNHCR Gender Guidelines, *supra* note 3, ¶ 26.

195. Macklin, *supra* note 105, at 263.

196. UNHCR Gender Guidelines, *supra* note 3, ¶ 23.

CONCLUSION

The crime against humanity of gender-based persecution, codified in the Rome Statute, does not have any precedent in international criminal law. When the ICC first examines gender-based persecution, it should also explore refugee law—the only other area of international law that has considered this type of persecution. Given that refugee law has now accumulated a relatively substantial body of law and analysis on this type of persecution,¹⁹⁷ it would be short-sighted for international criminal lawyers to ignore lessons learned in this area.

The first, and most obvious, lesson learned from refugee law is that violations of fundamental rights in the context of gender-based persecution can be wide-ranging, from sexual violence and trafficking to violence in the family; in the community, by the state, or in civil war; discrimination in the home, at work, in civil and political rights, or in economic, social, and cultural rights; and discrimination or violence based on transgression of social and cultural mores. These violations may be subtle and may only amount to persecution after many have accumulated, or the violations may amount to persecution through one egregious act. The violations may also not look like the non-gendered violations that are assessed by the ICC's Prosecutor and judges, even in the same case. The violations may be linked to ubiquitous discrimination, and the ICC must not be misled by the widespread nature of such discrimination into believing that such discrimination is somehow "ordinary," as opposed to "extraordinary" persecution. The ICC's Prosecutor and judges must be attuned to how the fundamental violations that lead to gender-based persecution may involve acts that seem "private" or personal but are in fact "public," such as violations that include targeting women who believe in gender equality, targeting homosexuals or transsexuals because they do not conform to societal constructions of "maleness" and "femaleness," or targeting men or boys because perpetrators characterize them as potential combatants.

The second crucial lesson learned from refugee law is that gender identity is complex. Gender is a relational concept. It refers to the relationship between women and men based on socially constructed identities, roles, and responsibilities assigned to a particular sex. The social constructions of "maleness" or "femaleness"—and therefore

197. For entire books on this topic, see CRAWLEY, *supra* note 10, and SPIJKERBOER, *supra* note 10.

the relations between men and women—can change over time and from culture to culture. The meaning of “gender” is context-specific. “Gender” and “sex” are different concepts, and gender-based persecution is not the same as sex-based persecution. Refugee decision-makers have sometimes equated the term “gender” with that of “sex,” or more often, with “women.” This conflation has led to confusion over what gender-related persecution means in refugee law by leaving out analyses of persecution based on social construction of “maleness,” and persecution of women that is in fact based on other grounds, such as political opinion. In addition, this conflation obscures consideration of sexual orientation or sexual “outlaw” status as one aspect of gender identity because it skews the focus toward issues of the biological (female) sex. The ICC must be alert to avoiding the collapsing of “gender” and other terms in order to refrain from overinclusion or underinclusion of crimes within gender-based persecution.

The third area in which international refugee law can assist the ICC in its consideration of gender-based persecution is with respect to the causal connection between gender and the perpetrator’s targeting. Refugee law commentators such as Macklin, Roberts, and Crawley have highlighted the need for conceptual clarity as to what amounts to gender-related persecution in refugee law. Macklin, in particular, has identified the difference between persecution *because of* gender and persecution of a woman (or man) *as a* woman (or man). This distinction can be helpful with respect to the crime against humanity of gender-based persecution because it can assist, insofar as it is possible to separate these intertwined concepts, the ICC’s Prosecutor with ensuring that acts are charged under the most applicable grounds of persecution. However, there is some consideration that certain acts, such as rape, might always be viewed as gender-based persecution, even if they also overlap with other types of persecution.

It must be noted that, while these are lessons learned within refugee law, they are not lessons universally respected within domestic refugee decisions or in the courts that review these administrative decisions. This fact does not invalidate the principles set out in the UNHCR’s Gender Guidelines, nor does it negate the positive developments found in domestic policy and decisions. The ICC should not be deterred from seeking guidance from refugee law on gender-based persecution by the inconsistency within domestic refugee law.

The International Criminal Court will be the first international criminal justice institution to prosecute the crime against humanity of gender-based persecution. It will undoubtedly use previous international criminal law analysis regarding other grounds of persecution, such as political, racial, or religious grounds, to assist in determining what amounts to gender-based persecution, but this will not provide all of the answers. As the only other area of international law that has examined persecution on gender grounds, international refugee law provides some essential insights and distinctions that can guide the ICC in this area. Ignoring the expertise accumulated within international refugee law would be a serious mistake.