

NOTE

PROTECTING RIGHTS “IN SMALL PLACES”: WHY DEPRIVING GIRLS OF THE RIGHT TO EDUCATION IS GENDER-BASED PERSECUTION AND A CRIME AGAINST HUMANITY

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For Afghanistan’s School Girls¹

Marwa Subhan

They send poison, and sometimes daggers.

They send fire, and sometimes hell.

For the girls of my homeland, They bring spring, but made of ashes.

ABSTRACT

In recent conflicts, armed groups have strategically used violent attacks to deprive girls of their fundamental right to education, targeting girls’ schools, teachers, and students in order to sow terror and reshape society to conform with discriminatory and dehumanizing ideologies. Such attacks by the Taliban in Afghanistan, Boko Haram in Nigeria, and more cause unique, severe, and long-term harms to girls’ health and well-being. Yet these harms have thus far gone unaddressed by international humanitarian law, to the detriment of some of the most vulnerable victims of modern conflicts.

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1. *Three Short Poems by Afghan Women to Inspire You*, FREE WOMEN WRITERS BLOG (Jan. 18, 2017), <https://www.freewomenwriters.org/three-short-poems-afghan-women-inspire/>.

This Note argues that tribunals such as the International Criminal Court (ICC) must recognize that attacks to intentionally deprive girls of their right to education are gender-based persecution, and that such attacks should be recognized as a new crime against humanity. Drawing on the Taliban’s attacks against girls’ education in Afghanistan as a case study, it is clear that such targeted violence has severe negative consequences for the ability of girls to access their fundamental right to education. Key precedents in international law, particularly from the International Criminal Tribunal for the former Yugoslavia, support the assertion that attacks on girls’ education are sufficient to constitute the crime of gender-based persecution and to be considered an independent crime against humanity. The severe and lifelong harms that result from depriving girls of the right to education satisfy the gravity of harm threshold and are unique enough to recognize this “new” crime against humanity. While the ICC has yet to open a formal investigation into the Taliban’s actions in Afghanistan, armed groups in other countries have and continue to wage similar discriminatory attacks on girls’ education. In such situations, the ICC and other tribunals should seek to hold the perpetrators accountable for gender-based persecution and the crime against humanity of depriving girls of the right to education.

I.	INTRODUCTION	950
II.	SUMMARY OF THE CASE PRESENTED AGAINST THE TALIBAN AND AFFILIATED ARMED GROUPS FOR THE CRIME AGAINST HUMANITY OF GENDER-BASED PERSECUTION	952
III.	INTERNATIONAL LAW PRECEDENTS TO ESTABLISHING THAT THE DEPRIVATION OF GIRLS’ EDUCATION IS GENDER-BASED PERSECUTION AND A CRIME AGAINST HUMANITY	956
	A. <i>Distinction and the Prohibition on Targeting Schools in International Humanitarian Law</i>	956
	B. <i>The Crime of Persecution in International Criminal Law</i>	957
	1. Definition of Persecution Used by the International Criminal Court	957
	2. Types of Crimes That Are Evidence of Persecution	958
	3. Limiting Principle of <i>Nullum Crimen Sine Lege</i>	959
	4. “Other Acts” Must Meet the Gravity of Harm Test for Persecution	960
	5. Fundamental Rights Whose Violation May Constitute Persecution	961
	6. Youth of Victims as an Aggravating Factor for Persecution	962
	C. <i>Persecution Under Refugee Law</i>	962
	D. <i>A General Absence of Gender-Based Persecution Charges at the ICC</i>	963

PROTECTING RIGHTS “IN SMALL PLACES”

IV.	ASSESSING THE GRAVITY OF HARM CAUSED BY DENYING GIRLS AND WOMEN THE RIGHT TO EDUCATION	965
A.	<i>Physical Harm</i>	967
1.	Lack of Education Can Have Severe Impacts on Women’s Health	968
2.	Intergenerational Health Effects	969
3.	Increased Risk of Becoming Victims of Violence	969
4.	Increased Risk of Forced Child Marriage and Attendant Harms	969
B.	<i>Economic Harm</i>	971
C.	<i>Political Harm and Deprivation of Public Agency</i>	972
D.	<i>Social Harm and Deprivation of Private Agency</i>	973
E.	<i>Depriving Girls the Right to Education Deserves Recognition as a New Crime Against Humanity Because of the Crime’s Distinct Harms</i>	973
V.	THE ICC SHOULD RECOGNIZE SEVERE DEPRIVATIONS THAT VIOLATE THE RIGHT TO EDUCATION FOR GIRLS AS CONSTITUTING A CRIME AGAINST HUMANITY AND A FORM OF GENDER-BASED PERSECUTION	975
A.	<i>Element 1—“The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.”</i>	976
1.	The Right to Education Is a Fundamental Right	976
2.	Attacks on Girls’ Education Perpetrated by Armed Groups Constitute a Severe Deprivation of the Right to Education	978
B.	<i>Element 4—“The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.”</i>	979
C.	<i>Elements 2 and 3—“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” and “[s]uch targeting was based on . . . gender.”</i>	981
D.	<i>Elements 5 and 6—“The conduct was committed as part of a widespread or systematic attack directed against a civilian population,” and “the perpetrator knew that the conduct was part of or intended the conduct to be part of” such an attack against civilians.</i>	981
VI.	ATTACKS ON GIRLS’ EDUCATION BEYOND AFGHANISTAN MAY ALSO CONSTITUTE CRIMES AGAINST HUMANITY AND GENDER-BASED PERSECUTION	982
A.	<i>Mali</i>	982

B. *Nigeria* 984
 C. *Iraq* 985
 VII. CONCLUSION 987

I. INTRODUCTION

On November 20, 2017, the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, submitted a formal request to open an investigation into war crimes and crimes against humanity committed in the course of the non-international armed conflict in Afghanistan from May 2003 to the present.² This case is one of the first times the Office of the Prosecutor (OTP) has sought charges of crimes against humanity of gender-based persecution, specifically for crimes committed by the Taliban and affiliated armed groups against women and girls.³ In the preliminary examination of the case, the OTP cited the Taliban’s ongoing campaign of violent attacks, terror, and intimidation aimed at preventing girls from accessing their fundamental right to education as evidence of persecution based on gender.⁴ While targeting civilian objects such as schools has long been recognized as a violation of the law of armed conflict,⁵ these charges of gender-based persecution presented an opportunity to refocus on the serious harm caused by “the intentional and severe deprivation of fundamental rights”⁶ exercised within such buildings.

Never before has depriving women and girls of their right to education been recognized as gender-based persecution and a crime against

2. Office of the Prosecutor of the International Criminal Court, *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorization to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, INT’L CRIM. CT. (Nov. 20, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>.

3. See Rosemary Grey, *Gender-based Persecution on the International Criminal Court’s Radar*, INTLAWGRRLS (Jan. 6, 2017), <https://ilg2.org/2017/01/06/gender-based-persecution-on-the-international-criminal-courts-radar/>.

4. Office of the Prosecutor of the International Criminal Court, *Public Redacted Version of “Request for Authorisation of an Investigation Pursuant to Article 15,”* ¶¶ 112-121, ICC-02/17-7-Conf-Exp (Nov. 20, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF [hereinafter *Request for Authorisation*].

5. Customary international humanitarian law has long recognized the principle of distinction in international and non-international armed conflicts. Distinction requires that parties to the conflict distinguish between civilians and combatants and prohibits attacks directed at civilians or civilian objects. INT’L COMM. OF THE RED CROSS, *Rule 1. The Principle of Distinction Between Civilians and Combatants*, CUSTOMARY IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 (database updated July 2019).

6. Rome Statute of the International Criminal Court art. 7(2)(g), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*].

humanity—but it should be. As the battlefields of modern conflicts change, international humanitarian law must adapt to recognize that, for many armed groups, attacking the rights of women and girls has become a tried-and-true strategy of war, where the intent is not just to sow immediate terror but to reshape society to align with a discriminatory and dehumanizing ideology. Attacks by armed groups to deprive girls of the fundamental right to education lead to unique, severe, and long-lasting harms that have gone unacknowledged by international humanitarian law. This must change.

It is unclear whether the ICC will approve a formal investigation into the situation in Afghanistan; in April 2019, the Pre-Trial Chamber ruled that pursuing an investigation into these and other crimes in Afghanistan “would not serve the interests of justice,” yet this decision has been appealed.⁷ Nevertheless, attacks on girls’ education are not unique to Afghanistan. In countries such as Mali, Nigeria, and Iraq, armed groups threaten and target girls’ school buildings, teachers, and students as part of widespread attacks on civilian populations. It is incumbent upon the international community to protect girls’ fundamental right to education and hold the perpetrators of such discriminatory violence to account.

As armed groups continue to deprive girls of the right to education as a tactic of conflict, the ICC will again have the opportunity to break new legal ground by recognizing that the gender-based denial of education is a crime against humanity and evidence of gender-based persecution, thereby expanding the scope of crimes against women and girls within the ICC’s jurisdiction. This Note addresses various issues around a future prosecution of gender-based persecution for denying women and girls the right to education, using the conflict in Afghanistan as a case study to illustrate the scope of the crime and the gravity of harm it

7. The Pre-Trial Chamber found that the Prosecutor had satisfied all the relevant jurisdiction and admissibility requirements to open an investigation into war crimes and crimes against humanity committed in Afghanistan, including the Taliban’s gender-based persecution of women and girls. However, it considered such an investigation would not serve the interests of justice on account of the low prospects for success, due to the time elapsed since the alleged crimes, the limited prospects of cooperation from relevant authorities, the significant resources required, and the Court’s limited ability to meet victim expectations. Pre-Trial Chamber II of the International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, ¶¶ 87-96, ICC-02/17 (Apr. 12, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF. This decision has been appealed by victims and the Prosecutor, and the Appeals Chamber of the ICC received oral arguments in December 2019. Press Release, Int’l Crim. Ct., Afghanistan: ICC Appeals Chamber Will Hear Oral Arguments on 4-6 December 2019 (Nov. 29, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=MA248>.

causes. Part II provides an overview of the scope of attacks on girls' education in Afghanistan by the Taliban and affiliated armed groups, and the impact such attacks have had on girls' access to education. Part III identifies key precedents in international law that support the claim that depriving girls of education is an independent crime against humanity and is sufficient to constitute gender-based persecution. Next, Part IV analyzes the severe and lifelong harms that result from depriving girls of the right to education and argues that the ICC should consider these harms grave enough to recognize this "new" crime against humanity. Part V addresses how deprivations of girls' right to education can satisfy the elements of gender-based persecution, drawing on the situation in Afghanistan as a case study. Finally, Part VI considers several other situations where armed groups have waged discriminatory attacks on girls' education and where the OTP should seek to hold the perpetrators accountable for gender-based persecution and the crime against humanity of depriving girls of the right to education.

II. SUMMARY OF THE CASE PRESENTED AGAINST THE TALIBAN AND AFFILIATED ARMED GROUPS FOR THE CRIME AGAINST HUMANITY OF GENDER-BASED PERSECUTION

In November 2017, the ICC OTP submitted its preliminary examination of the situation in Afghanistan to Pre-Trial Chambers to seek permission to open a formal investigation. Among the crimes alleged, the Prosecutor sought to investigate members of the Taliban and affiliated armed groups for various attacks against women and girls constituting gender-based persecution. The preliminary examination cited that there is a reasonable basis to believe that various forms of persecutory attacks were committed against civilian women and girls "by reason of their gender," and "as part of a widespread or systematic attack on the civilian population."⁸ Female politicians and government officials were frequent targets of such attacks.⁹ In addition, the Prosecutor argued, "[g]irls' education has come under sustained attack, thereby depriving thousands of girls of their right to education."¹⁰ The attacks have included: a "campaign of violence against schools" that has destroyed hundreds of educational buildings, particularly those dedicated to girls' education; "public announcements and night letters . . . issued to

8. The preliminary examination also noted it appeared some of the targeting of female politicians, public servants, and students was also motivated by the victims' political affiliations or beliefs. *Request for Authorisation*, *supra* note 4, ¶ 115.

9. *Id.*

10. *Id.* at ¶ 343.

intimidate parents from sending their daughters to school”; and “threats and violence directed at teachers, administrators and students who refuse to abide by the Taliban’s rules.”¹¹ Such attacks stemmed from the Taliban’s longstanding policies and ideology¹² of preventing girls and women from studying and teaching and resulting in many stopping their education “due to the attendant climate of fear.”¹³

Available information indicates that the policies and attacks of the Taliban and affiliated armed groups against girls’ education have been successful at denying girls the right to education. While there are many factors that figure into falling education rates in conflict-affected countries,¹⁴ these attacks—which began long before Afghanistan became a party to the Rome Statute¹⁵—were intended to cause, and have in fact contributed to, the inequitable educational outcomes for girls and boys in Afghanistan. As of 2004, shortly after the ICC gained jurisdiction in Afghanistan, the gender disparity in education participation rates was clear: the gender parity ratio was estimated to be 56.1 in primary schools, 33.3 in secondary schools, and 28.0 in tertiary schools.¹⁶ Today, despite sustained efforts to improve girls’ access to education, the United Nations Children’s Fund (UNICEF) estimates that 55% of primary-school-age girls are not attending school in Afghanistan, while 46% of all Afghan primary-school-age children are not enrolled in school.¹⁷ Two-thirds of lower-secondary-school-level girls in Afghanistan are not attending school.¹⁸ Less than 20% of university and higher education

11. *Id.* at ¶ 119.

12. The Taliban sought to eradicate girls’ education long before the ICC’s jurisdiction began in 2003. When the Taliban ruled Afghanistan from 1996 to 2001, they prohibited girls from attending schools. See HUMAN RIGHTS WATCH, “I WON’T BE A DOCTOR AND ONE DAY YOU’LL BE SICK”: GIRLS’ ACCESS TO EDUCATION IN AFGHANISTAN 37 (2017), https://www.hrw.org/sites/default/files/report_pdf/afghanistan1017_web.pdf [hereinafter HUMAN RIGHTS WATCH].

13. *Request for Authorisation*, *supra* note 4, ¶ 116.

14. Other factors that contribute to these low educational outcomes include: poverty, gender discrimination, displacement, insecurity, unavailability of local teachers and schools, etc. U.N. Comm. on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: Initial report of States parties due in 1996: Initial report of States parties due in 1996: Afghanistan, ¶ 236, U.N. Doc. CRC/C/AFG/1 (Aug. 28, 2009).

15. See HUMAN RIGHTS WATCH, HUMANITY DENIED: SYSTEMATIC VIOLATIONS OF WOMEN’S RIGHTS IN AFGHANISTAN, (2001), <https://www.hrw.org/reports/2001/afghan3/afgwr1001.pdf>.

16. The gender parity ratio compares the number of girls to the number of boys in school. A gender parity ratio of 100 is perfect parity; a gender parity ratio less than 100 indicates a disparity in favor of boys. *Id.*

17. UNICEF, Twenty-five Million Children out of School in Conflict Zones (Apr. 24, 2017), https://www.unicef.org/media/media_95861.html.

18. *Id.*

students are female.¹⁹ Other estimates compiled by Human Rights Watch suggest that up to two-thirds of girls in Afghanistan are not currently in school.²⁰ Afghanistan's Ministry of Education reported that of the 3.5 million children currently not attending school, 75% are girls.²¹ Approximately one in five districts in Afghanistan do not have a single female teacher (eighty out of approximately 400 total districts).²² Since 2001, 130 school districts have not graduated a single female student from secondary school; only forty-eight districts have not graduated a single male student from secondary school.²³

It is also clear that girls' education remains under attack in Afghanistan. From 2013 to 2017, "a growing proportion of attacks in Afghanistan . . . targeted girls' schools, as well as female students and educators."²⁴ In January 2016, the Taliban attacked a girls' school in Nangarhar province with bombs, leaving a message in the schoolyard telling the community to stop sending its girls to school, and they continued to threaten the principal with night letters.²⁵ In October 2016, the Taliban burned a school for 500 girls in Jawzjan province, and the attackers threatened that the girls should not return.²⁶ In February 2017, six girls' schools were forced to close for ten days following threats from anti-government groups; when the schools reopened, only ten percent of students returned.²⁷ In 2018, attacks on schools in Afghanistan nearly tripled compared with the previous year; in total, 192 attacks were documented²⁸ with a growing proportion targeting

19. Catherine Powell, *Women and Girls in the Afghanistan Transition 5* (June 2014) (unpublished working paper) (on file with the Council on Foreign Relations), https://www.cfr.org/sites/default/files/report_pdf/Afghan_Women_Paper.pdf.

20. HUMAN RIGHTS WATCH, *supra* note 12, at 2.

21. *Education Under Attack 2018: Country Profiles—Afghanistan*, GLOBAL COALITION TO PROTECT EDUC. FROM ATTACK 1, http://protectingeducation.org/sites/default/files/documents/eua2018_afghanistan.pdf (last visited Sept. 29, 2019) [hereinafter GCPEA—*Afghanistan*].

22. U.N. Educ., Sci. & Cultural Org., *Global Education Monitoring Report Gender Review 2018*, at 11 (2018), <http://unesdoc.unesco.org/images/0026/002615/261593E.pdf> [hereinafter UNESCO Gender Review].

23. Mujib Mashal & Najim Rahim, *A New Push Is on for Afghan Schools, but the Numbers Are Grim*, N.Y. TIMES (Apr. 1, 2018), <https://www.nytimes.com/2018/04/01/world/asia/afghanistan-schools-taliban.html>.

24. GCPEA—*Afghanistan*, *supra* note 21, at 1.

25. HUMAN RIGHTS WATCH, *supra* note 12, at 68.

26. *Armed Men Burn Down Girls' School in North Afghanistan*, DAILY MAIL (Oct. 29, 2016), <http://www.dailymail.co.uk/wires/afp/article-3885362/Armed-men-burn-girls-school-north-Afghanistan.html>.

27. GCPEA—*Afghanistan*, *supra* note 21, at 6.

28. *Afghanistan Sees Three-fold Increase in Attacks on Schools in One Year*, Press Release, UNICEF (May 27, 2019), <https://www.unicef.org/press-releases/afghanistan-sees-three-fold-increase-attacks-schools-one-year-unicef>.

PROTECTING RIGHTS “IN SMALL PLACES”

girls’ schools.²⁹ On April 2, 2018—just one week into the Afghan school year—more than fifty secondary school girls were hospitalized with symptoms of poisoning after a suspected Taliban attack on their school in Helmand province.³⁰ On April 11, 2018, assailants burned a girls’ secondary school in Logar Province.³¹ On May 3, 2018, forty-five school-girls were poisoned by a gas attack in their classroom in Takhar province.³² In April 2019, armed men suspected of Taliban ties set fire to two girls’ schools in Farah Province, putting nearly 1,700 girls out of school;³³ another four girls’ schools in the province were attacked in the following weeks.³⁴ In August 2019, armed men believed to be Taliban militants set fire to a secondary school for 700 girls and destroyed 1,500 textbooks in Shakar Dara district near Kabul.³⁵ This is by no means an exhaustive list. There have been some indications in recent years that the Taliban leadership has softened its official policy against girls’ education; for example, Taliban representatives have reportedly expressed consent to girls’ education in single sex schools in peace negotiations with the U.S. and Afghan governments.³⁶ Despite this, the fact remains that the Taliban continues to attack and threaten girls’ education across the country.³⁷

29. Peter Beaumont, ‘Senseless’: Attacks on Schools Soar in Afghanistan – Report, THE GUARDIAN (May 28, 2019), <https://www.theguardian.com/global-development/2019/may/28/attacks-schools-soar-afghanistan-report-unicef>.

30. *More Than Fifty Afghan Schoolgirls Hospitalized for Suspected Poisoning*, RFE/RL’S RADIO FREE AFG. (Apr. 2, 2018), <https://www.rferl.org/a/afghanistan-poisoning-schoolgirls-taliban-education-helmand/29140115.html>.

31. There was no immediate claim of responsibility for the attack. Najim Rahim & Jawad Sukhanyar, *Attacks in Afghanistan Leave Dozens Dead and Two Schools Burned*, N.Y. TIMES (Apr. 15, 2018), <https://www.nytimes.com/2018/04/15/world/asia/afghanistan-attacks-schools.html>.

32. Fakhir Rizvi, *45 School Girls Hospitalised in Suspected Gas Attack in Afghanistan*, URDU POINT (May 3, 2018), <https://www.urdupoint.com/en/world/45-school-girls-hospitalised-in-suspected-gas-334295.html>.

33. Najim Rahim & David Zucchini, *Attacks on Girls’ Schools on the Rise as Taliban Make Gains*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/world/asia/taliban-girls-schools.html>.

34. Thomas Gibbons-Neff, *Attacks by Extremists on Afghan Schools Triple, Report Says*, N.Y. TIMES (May 27, 2019), <https://www.nytimes.com/2019/05/27/world/asia/afghanistan-attacks-schools-unicef.html>.

35. Sayed Sharif Amiri, *Girls School Torched in Kabul*, TOLONNEWS (Aug. 20, 2019), <https://www.tolonews.com/afghanistan/girls-school-torched-kabul>.

36. Eltaf Najafizada, *Afghan Girls Risk Lives in Secret Bid to Break Taliban’s Grip*, BLOOMBERG NEWS (July 31, 2019), <https://www.bloomberg.com/news/articles/2019-07-30/dreaming-of-graduation-afghan-girls-look-to-u-s-taliban-talks>.

37. In March 2011, the Taliban’s then-leader Mullah Mohammad Omar issued instructions that forbade attacks on schools and intimidation of school children. *Government Hails Taliban*

III. INTERNATIONAL LAW PRECEDENTS TO ESTABLISHING THAT THE DEPRIVATION OF GIRLS' EDUCATION IS GENDER-BASED PERSECUTION AND A CRIME AGAINST HUMANITY

Various precedents in international law have laid the foundation to establishing that the discriminatory denial of education to girls is a crime against humanity and a form of gender-based persecution. These include the prohibition against targeting civilian school buildings in international humanitarian law and the expanding conceptualization of the crime of persecution both in international criminal law and refugee law.

A. *Distinction and the Prohibition on Targeting Schools in International Humanitarian Law*

Civilian school buildings have long been protected from attack under the principle of distinction within international humanitarian law. Distinction requires that parties to a conflict “ensure respect for and protection of the civilian population and civilian objects” by limiting attacks to legitimate targets, namely combatants and military objectives.³⁸ Civilian objects are defined as ones that are “normally dedicated to civilian purposes,” including schools, places of worship, and dwellings.³⁹ Customary international law recognizes the principle of distinction applies to both international and non-international armed conflicts;⁴⁰ the International Criminal Tribunal for the former Yugoslavia referred to this protection of civilians as “the bedrock of modern humanitarian law.”⁴¹ In its definitions of crimes against humanity and war crimes, the Rome Statute codifies the principle of distinction for civilians and civilian objects in international and non-international armed conflicts.⁴² Under the Rome Statute, the intentional targeting of buildings dedicated to education is a war crime

Decree on Schools IRIN NEWS (Mar. 29, 2011), <http://www.irinnews.org/report/92312/afghanistan-government-hails-taliban-decree-schools>. In some districts, local leaders have been able to convince the Taliban to allow previously closed schools to reopen. Mashal & Rahim, *supra* note 23.

38. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

39. *Id.* art. 52.

40. Rule 7. *The Principle of Distinction between Civilian Objects and Military Objectives*, ICRC, CUSTOMARY IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7 (last visited Sept. 22, 2019).

41. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 521 (Int'l. Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

42. Rome Statute, *supra* note 6, arts. 7, 8.

that violates the laws and customs of both international and non-international armed conflicts.⁴³

The underlying reason for the principle of distinction is the protection of the civilian population; as civilians use buildings such as schools, those buildings also receive protection from attack. Yet schools are also a physical embodiment of the fundamental right to education and the location where civilians realize this right. An attack against a school is not only an attack on a civilian object, but also an attack against the right to education exercised by civilians therein.

B. *The Crime of Persecution in International Criminal Law*

In international criminal law, the purpose of recognizing the crime of persecution is to enable redress for “massive violations of human rights” committed against civilians during conflict.⁴⁴ First articulated by the International Military Tribunal at Nuremberg as a crime against humanity,⁴⁵ the definition of the crime of persecution has been expanded by subsequent international tribunals and the ICC in response to the ways in which civilians are targeted in conflicts.

The following sections outline some of the key legal developments in the interpretation and application of the crime of persecution, particularly drawing on case law from the International Criminal Tribunal for the former Yugoslavia (ICTY), which extensively used charges of persecution to address acts of ethnic cleansing.⁴⁶ Beginning with the current definition of persecution used by the ICC, the discussion addresses the key elements and interpretations of the crime of persecution, with particular focus on those elements that are critical for understanding why attacks against girls’ right to education constitute gender-based persecution.

1. Definition of Persecution Used by the International Criminal Court

Under the Rome Statute, persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to international

43. Rome Statute, *supra* note 6, art. 8(2)(b).

44. Jonas Nilsson, *The Crime of Persecution in the ICTY Case-law*, in *THE LEGACY OF THE INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA*, 219, 222 (Bert Swart, Alexander Zahar, & Göran Sluiter eds., 2011).

45. Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N. T.S. 279 [hereinafter Nuremberg Charter].

46. The ICTY has perhaps the most extensive experience applying the crime of persecution, trying dozens of cases involving persecution. Nilsson, *supra* note 44, at 219.

law by reason of the identity of the group or collectivity.”⁴⁷ It is evidenced by particular persecutory acts and/or “any crime within the jurisdiction of the Court” and must be committed with discriminatory intent 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.”⁴⁸ As the Rome Statute recognizes that persecution is a crime against humanity, persecution must also be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁴⁹

The Rome Statute’s definition of persecution was groundbreaking in expanding the scope of the crime, as the ICC was the first international tribunal to recognize that persecution can be committed on the basis of gender.⁵⁰ This approach is consistent with recommendations made in the *Kupreškić* case from the ICTY that the crime of persecution “should not be defined narrowly but should be understood as a wide and particularly serious crime.”⁵¹ According to *Kupreškić*, a “serious crime” constitutes a serious and grave infringement on human dignity and fundamental rights as defined in international customary or treaty law.⁵²

2. Types of Crimes That Are Evidence of Persecution

Persecution is perhaps unique amongst crimes recognized by the ICC in that it is triggered by the commission of other crimes within the ICC’s jurisdiction, when committed in a discriminatory manner against a recognized group or collectivity. Such other crimes are “evidence of

47. Rome Statute, *supra* note 6, art. 7(2)(g).

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

49. *Id.* art. 7(1).

50. The Nuremberg Charter, ICTY Statute, and ICTR Statute only recognize persecution as crimes committed on the discriminatory basis of race, religion, and political grounds. The ECCC Statute and Special Court for Sierra Leone also included ethnic grounds. Nuremberg Charter, *supra* note 45, art. 6(c); Statute of the Int’l. Crim. Trib. for the Former Yugoslavia art. 5(h), S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); Statute of the Int’l. Crim. Trib. for Rwanda, art. 3(h), S.C. Res. 955, U.N. SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 5, (2001) (Cambodia), as amended by NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation). Statute of the Special Court for Sierra Leone, art. 2(h), 2178 U.N.T.S. 138, 145; 97 AJIL 295; U.N. Doc. S/2002/246, appendix II.

51. Nilsson, *supra* note 44, at 229.

52. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶¶ 620-21 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

the [crime of] persecution”⁵³ and include the underlying crimes of murder, extermination, enslavement, deportation, imprisonment, torture, rape and other forms of sexual violence, enforced disappearance, and the crime of apartheid.⁵⁴ Any of these crimes committed with discriminatory intent against a qualifying targeted group or collectivity could constitute persecution.

However, the Rome Statute grants the ICC the flexibility to recognize new crimes against humanity that are not enumerated, but that could constitute crimes in their own right and, therefore, underlying acts to persecution when committed against a qualifying targeted group. Specifically, such other crimes must be “inhumane acts of a similar character [to enumerated crimes against humanity] intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁵⁵ Jurisprudence from the Subsequent Nuremberg Trials and the ICTY has asserted “acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent.”⁵⁶ The acts need not be covered by a court’s statute,⁵⁷ or even “be a crime specified anywhere in international criminal law: it may be a non-crime.”⁵⁸

3. Limiting Principle of *Nullum Crimen Sine Lege*

The legal principle of *nullum crimen sine lege* would caution against a too liberal application of the crime of persecution and require that acts constituting the crime be specified in treaty or customary international law.⁵⁹ The principle requires that the criminality of a particular act be both foreseeable and accessible to the perpetrator, yet it need not be articulated in “written legal text [or] explicit case law.”⁶⁰ In considering this principle, the ICTY determined that it did not have the power to

53. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Separate Opinion of Judge Shahabuddeen, ¶ 6 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003).

54. Rome Statute, *supra* note 6, art. 7(1)(a)-(j).

55. Rome Statute, *supra* note 6, art. 7(1)(k).

56. Krnojelac, Case No. IT-97-25-A ¶ 5, (citing Prosecutor v. Kvočka, IT-98-30/1-T, Judgment ¶ 186 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001)). In asserting this, the Kvočka Trial Chamber referred to the *Ministries Case*: United States v. von Weizsaecker, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. XIV.

57. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 617 (Int’l. Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

58. Krnojelac, Case No. IT-97-25-A ¶ 6.

59. Nilsson, *supra* note 44 at 221, 223.

60. *Id.* at 226-27.

create new law,⁶¹ yet the principle did not restrict “the progressive development of the law by the court.”⁶² However, the perpetrator “must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision.”⁶³ Attacks against girls’ education, particularly in the form of attacks against school buildings and violence or threats of violence against students, teachers, or others involved in education, constitutes conduct that is generally understood as criminal. Therefore, the principle of *nullum crimen sine lege* does not bar the development of the law to recognize that depriving girls of the right to education is an act constituting persecution, particularly when the right is firmly established in international law, as discussed in Part V.

4. “Other Acts” Must Meet the Gravity of Harm Test for Persecution

Not all discriminatory acts may rise to the level of gravity of persecution. To constitute persecution, an act or acts not articulated by statute should cumulatively meet “the same gravity as that of enumerated crimes.”⁶⁴ In the case of the ICC, such acts must meet the gravity of the crimes against humanity enumerated in Article 7 of the Rome Statute.⁶⁵

The standard of gravity applies whether the acts underlying persecution are considered “in isolation or in conjunction with other acts.”⁶⁶ As such, a single discriminatory act may not appear to satisfy the standard of gravity established by enumerated crimes when considered in

61. Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ¶ 38 (Int’l. Crim. Trib. for the Former Yugoslavia May 21, 2003).

62. Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 196 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002).

63. Prosecutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 34 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003).

64. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Separate Opinion of Judge Shahabuddeen, ¶ 6 (Int’l. Crim. Trib. for the Former Yugoslavia Sept. 17, 2003). The gravity of harm test originated in the ICTY’s *Kupreškić* case. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶¶ 619, 621 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

65. These include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, etc. Rome Statute, *supra* note 6, art. 7.

66. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶¶ 199, 221 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 135 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004).

isolation, yet when considered together with other discriminatory acts, it may support a claim of persecution.

Courts are not limited to considering the physical harm caused by acts constituting persecution when weighing the gravity of harm. In *Kupreškić*, the ICTY defined persecution to include not just physical or mental harm, but “other discriminatory acts, involving attacks on political, social and economic rights.”⁶⁷ For example, international tribunals have recognized that denying the right to education can be a component of persecution. The *Ministries Case* before the Military Tribunal at Nuremberg recognized that deprivations of the right to teach and to obtain education were part of the “step to step” persecution of Jews planned by the Third Reich.⁶⁸ Widespread attacks to deprive girls of the right to education result in the kind of serious, long-term physical, mental, political, social, and economic harms that satisfy the gravity of harm test, as discussed in Part IV—*Assessing the Gravity of Harm Caused by Denying Girls and Women the Right to Education*.

5. Fundamental Rights Whose Violation May Constitute Persecution

The crimes underlying persecution must cause “intentional and severe deprivation of *fundamental* rights.”⁶⁹ In defining fundamental rights, the ICC recognizes that “[n]ot every infringement of human rights is relevant.”⁷⁰ Such fundamental rights must be recognized in customary international law or treaty law.⁷¹ Fundamental rights may be derogable or non-derogable, and include “the right to life, the right not to be subjected to cruel, inhuman or degrading treatment, freedom of expression, freedom of assembly and association, and the right to private property.”⁷² The ICTY has also recognized that discriminatory

67. A. Widney Brown & Laura Grenfell, *The International Crime of Gender-based Persecution and the Taliban*, 4 MELB. J. OF INT’L L. 347, 359 (2003).

68. United States v. von Weizsaecker, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 314, 471 (1949).

69. Rome Statute, *supra* note 6, art. 7(2)(g) (emphasis added).

70. Situation in the Republic of Burundi, ICC-01/17-X-9-US-Exp, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi,” ¶ 132 (Oct. 25, 2017), <https://www.legal-tools.org/doc/8f2373/pdf/> [hereinafter Burundi Decision].

71. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003), *referring to* Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 431 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

72. Burundi Decision, *supra* note 70, ¶¶ 130-33.

violations of the rights to employment, to freedom of movement, and to judicial process may establish persecution.⁷³

6. Youth of Victims as an Aggravating Factor for Persecution

International tribunals have also recognized that committing the crime of persecution against youth victims may be “a factor that aggravates the gravity of the crime.”⁷⁴ In *Bralo*, the ICTY was willing to recognize youth as an aggravating factor for persecution as a crime against humanity when the specific crimes charged included rape, sexual assault, and murder.⁷⁵

The OTP’s *Policy on Children* recognizes that children are an “identifiable group or collectivity” and “targeting [them] on the basis of age or birth may be charged as persecution on ‘other grounds.’”⁷⁶ Children may also be targeted for persecution “on intersecting grounds, such as . . . gender.”⁷⁷ This intersectional approach to persecution allows for the understanding that attacks against girls’ education constitute persecution on the basis of both the victims’ gender and age and that their age is an aggravating factor in the crime.

C. Persecution Under Refugee Law

The OTP at the ICC has recognized there are “valuable precedents of law and practice about persecutions on the basis of gender in refugee law.”⁷⁸ In its policy on sexual and gender-based crimes, the OTP cites the United Nations High Commissioner for Refugees (UNHCR) guidelines on gender-related persecution, which state, “[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 and warrant international protection.”⁷⁹ The guidelines

73. See *Prosecutor v. Branin*, Case No. IT-99-36-T, Judgment, ¶¶ 1049-50, 1054, 1067, 1071, 1075 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

74. *Prosecutor v. Bralo*, Case No. IT-95-17-S, Sentencing Judgment, ¶ 31 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 7, 2005).

75. *Id.*

76. Office of the Prosecutor of the International Criminal Court, *Policy on Children*, ¶ 51 (Nov. 2016), https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF.

77. *Id.*

78. Office of the Prosecutor of the International Criminal Court, *Policy Paper on Sexual and Gender-based Crimes*, 19 n.34 (June 2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf>.

79. U.N. High Comm’r for Refugees, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of*

also support the idea that deprivation of education could be grounds for recognizing persecution: “if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on . . . access to available educational facilities.”⁸⁰

D. *A General Absence of Gender-Based Persecution Charges at the ICC*

While the ICC was the first international tribunal to recognize that persecution can be committed on the basis of gender, thus far it has very limited experience in prosecuting this crime. Aside from the request to open an investigation in Afghanistan, charges of gender-based persecution have only been pursued twice before. On March 27, 2018, the ICC’s Pre-Trial Chamber I approved an arrest warrant in the case of *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* for war crimes and crimes against humanity, including gender-based persecution, for the defendant’s participation “in the policy of forced marriages which victimized the female inhabitants of Timbuktu and led to repeated rapes and sexual enslavement of women and girls.”⁸¹ At the confirmation of charges hearing for Al Hassan in July 2019, the ICC Prosecutor pressed for approval of the charge of gender-based persecution for acts including targeted floggings and violence against women, inhumane imprisonment, sexual violence, forced marriage, and rape.⁸² In 2011, the ICC Prosecutor had also sought charges of gender-based persecution for “torture, rape, inhumane acts, and inhuman treatment” in the case of *Prosecutor v. Mbarushimana*,⁸³ however, the case did not proceed for evidentiary reasons.⁸⁴

Refugees, 14, HCR/GIP/02/01 (May 7, 2002), <http://www.unhcr.org/en-us/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html>.

80. *Id.*

81. Press Release, Int’l Crim. Ct., Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud Makes First Appearance Before the ICC (Apr. 4, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1377>.

82. Press Release, Int’l Crim. Ct., Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of the Confirmation of Charges Hearing in the Case Against Al Hassan (July 8, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=180708-otp-statement-al-hassan>.

83. Situation in the Democratic Republic of Congo, ICC-01/04-01/10-11-Red2, Public Redacted Version Prosecution’s Application Under Article 58, 17 (Aug. 20, 2010), https://www.icc-cpi.int/CourtRecords/CR2011_01367.PDF.

84. Emily E. Chertoff, *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*, 126 YALE L.J. 1050, 1054 (2017) https://www.yalelawjournal.org/note/prosecuting-gender-based-persecution-the-islamic-state-at-the-icc#_ftnref14.

It is unclear why the charge of gender-based persecution has thus far been so rare, as there have been other cases brought before the ICC where there were reasonable grounds to charge gender-based persecution. For example, in 2016, the ICC cited a widespread pattern of targeting civilian women and girls for sexual and gender-based crimes in announcing its decision of charges against Dominic Ongwen of Uganda, yet failed to acknowledge how these crimes constitute gender-based persecution and violate the fundamental right to education. The decision documented how Ongwen and others “pursued a common plan to abduct girls and women to serve as domestic servants, forced exclusive conjugal partners (forced wives) and sex slaves” over a three-year period.⁸⁵ The approved charges included the war crimes of torture, rape, and sexual slavery, and the crimes against humanity of forced marriage, torture, rape, sexual slavery, and enslavement.⁸⁶ Yet such widespread kidnapping of girls, many in primary school, for the purpose of sexual slavery and forced marriage was a missed opportunity for the ICC to recognize that such crimes are also a form of gender-based persecution and consequently deny girls the fundamental right to education.⁸⁷ Having the ICC recognize the impact of the Lord’s Resistance Army’s crimes on children’s education remains important to the victim communities. Legal representatives for the victims have sought to introduce evidence at Ongwen’s trial that shows how the various crimes committed by the Lord’s Resistance Army impacted children’s education in northern Uganda, through the destruction of school facilities and attacks and intimidation against teachers.⁸⁸

The lack of a gender-based persecution charge in Ongwen’s case and others before the ICC contravenes the OTP’s own policy on charging sexual and gender-based crimes. The policy states:

85. The Chamber considered acts between July, 1, 2002 and December, 31, 2005. Prosecutor v. Ongwen, ICC-02/04-01/15, Decision on the Confirmation of Charges Against Dominic Ongwen, ¶ 119 (Mar. 23, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02331.PDF.

86. *Id.* ¶ 124.

87. In 2003, girls in primary school were being abducted in northern Uganda by the Lord’s Resistance Army. At age fourteen or fifteen, many girls would become victims of forced marriage or sexual enslavement. However, children as young as nine are increasingly being kidnapped, as they “are easier to control and the younger girls are less likely to be infected with the HIV virus.” It is important to note that the LRA does not exclusively kidnap girls, and that boys are also deprived of their fundamental right to education when kidnapped by the LRA. *Stolen Children: Abduction and Recruitment in Northern Uganda*, HUM. RTS. WATCH (Mar. 28, 2003), <https://www.hrw.org/report/2003/03/28/stolen-children/abduction-and-recruitment-northern-uganda>.

88. Prosecutor v. Ongwen, ICC-02/04-01/15, Victims’ Requests for Leave to Present Evidence and to Present Victims’ Views and Concerns in Person, ¶ 31 (Feb. 2, 2018), <https://www.legal-tools.org/doc/1ef767/pdf/>.

PROTECTING RIGHTS “IN SMALL PLACES”

[T]he Office will bring charges for sexual and gender-based crimes explicitly as crimes *per se*, in addition to charging these acts as forms of other violence within the Court’s subject-matter jurisdiction, where the material elements are met, e.g. charging rape as torture, persecution, and genocide. The Office will seek to bring cumulative charges in order to reflect the severity and multi-faceted character of these crimes fairly, and to enunciate their range supported by evidence in each case.⁸⁹

The policy also asserts “the provision relating to persecution on the basis of gender . . . will be utilised to the fullest extent possible.”⁹⁰ So far, that does not appear to be the case.

Given the current status of the law and the dearth of previous cases involving gender-based persecution, the OTP should consider how various situations within the ICC’s jurisdiction may provide an opportunity to set long-overdue precedent on gender-based persecution. Such situations may also offer the opportunity to expand the scope of recognized crimes targeting women and girls in conflict beyond rape and various forms of sexual violence to include those that harm political, economic, and social rights. The OTP has recognized the importance of this approach, stating in its policy on sexual and gender-based crimes that, “[g]ender-based crimes are not always manifested as a form of sexual violence. These crimes include non-sexual attacks on women and girls, and men and boys, because of their gender, such as persecution on the grounds of gender.”⁹¹

In the following section, this Note argues why international criminal law should consider the deprivation of the right to education as not just evidence of gender-based persecution, but also as a crime against humanity in itself.

IV. ASSESSING THE GRAVITY OF HARM CAUSED BY DENYING GIRLS AND WOMEN THE RIGHT TO EDUCATION

Targeting girls and depriving them of the right to education on the basis of their gender should be recognized as a form of gender-based persecution by the ICC because of the gravity of lifelong harms that

89. Office of the Prosecutor of the International Criminal Court, *Policy Paper on Sexual and Gender-based Crimes*, ¶ 72 (June 2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf>.

90. *Id.* ¶ 67.

91. *Id.* ¶ 26.

follow from it, based on the test articulated in the ICTY's *Kupreškić* case.⁹² The gravity of harm test provides guidance when the crime to be considered is not enumerated by statute, but may be considered an “[o]ther inhumane [act] of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”—in other words, a non-enumerated crime against humanity.⁹³ The “other inhumane act” must result in harms that are equally serious and grave compared to enumerated crimes against humanity. The gravity or seriousness of an inhumane act is assessed based on “all the factual circumstances,” including “the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.”⁹⁴ The long-term suffering and effects on victims “may be relevant to the determination of the seriousness of the act.”⁹⁵ The crime of depriving girls the right to education satisfies this standard.

To fully appreciate the gravity of this crime, the ICC must consider the complex web of harm, abuse, and violence that traps its victims, and acknowledge that the effects of this crime are unveiled over years and decades, indeed shaping entire lives and subsequent generations. This crime is not just a deprivation of a single fundamental human right, but a wholesale effort to re-engineer society and to deny women and girls their human dignity and agency in all aspects of their lives.

Gender inequality in education is a global challenge, and its effects are well documented and understood. Today, gender disparities continue to exist in primary education in thirty-four percent of countries, in lower secondary education in fifty-five percent of countries, and in upper secondary education in seventy-five percent of countries.⁹⁶

Recent conflicts have had a severe negative impact on the ability of children—especially girls—to access their right to education. Between 2009 and 2012, more than seventy countries experienced attacks on education by armed groups and state military and security forces, including “bombing or burning schools or universities, or killing, injuring, kidnapping, or illegally arresting, detaining or torturing students,

92. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶¶ 620-21 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

93. Rome Statute, *supra* note 6, art. 7(1)(k).

94. Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 235 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002).

95. *Id.*

96. UNESCO Gender Review, *supra* note 22.

teachers, and academics.”⁹⁷ Among the countries most affected—Colombia, Sudan, Somalia, Syria, and Afghanistan—three have more than one million children out of school.⁹⁸ In fact, nearly “half of all out-of-school children live in conflict-affected countries.”⁹⁹ Girls and other groups that are already marginalized and vulnerable experience the greatest losses in accessing education during such times of emergency.¹⁰⁰ Countries with the greatest gender gaps in access to education also frequently face situations of war or insurgency.¹⁰¹ As of 2015, Afghanistan and South Sudan had the highest levels of gender disparity in primary education, with each having fewer than eighty girls enrolled for every 100 boys.¹⁰²

In many conflict-affected countries like Afghanistan, armed groups intentionally target attacks to deprive girls of their right to education, because they know it is perhaps the single most effective way to undermine the equality of girls and women in society. The following sections detail some of the known harms that result from depriving girls of the right to education, and make the case for why this crime has comparable gravity with other enumerated crimes against humanity. The analysis focuses on the physical, economic, political, and social harms that an individual victim often experiences, the detrimental impacts on her children and family, and negative consequences for women and girls collectively.¹⁰³

A. *Physical Harm*

Depriving girls the right to education is known to have detrimental impacts on health and well-being that persist for years and even generations. These harms to individuals and families can result from the gap

97. Global Coalition to Protect Education from Attack, *Education Under Attack* 8 (2014), http://protectingeducation.org/sites/default/files/documents/eua_2014_full_0.pdf.

98. Susan Nicolai, Sebastien Hine & Joseph Wales, *Education in Emergencies and Protracted Crises: Toward a Strengthened Response*, OVERSEAS DEV. INST. 19 (July 2015), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9714.pdf>.

99. U.N. Educ., Sci. & Cultural Org., *EFA Global Monitoring Report 2011: The Hidden Crisis: Armed Conflict and Education* 125 (2011), <http://unesdoc.unesco.org/images/0019/001907/190743e.pdf>.

100. *Id.*

101. *Id.* at 9.

102. UNESCO Gender Review, *supra* note 22.

103. Much research highlights how gender inequality in education has broader impacts on communities and countries, particularly in terms of its impact on GDP and levels of societal violence. However, as the crime of persecution is assessed in terms of the impact it has on the victim and victim group, the analysis of harm *infra* is likewise more limited in scope.

in knowledge that girls would have gained had they remained in school. Girls with less education are also more likely to become victims of violence, particularly intimate partner violence, and of child marriage, which triggers additional cycles of harm.

1. Lack of Education Can Have Severe Impacts on Women's Health

Infringing on girls' right to education impacts their and their families' health throughout their lives. Lower levels of education often result in women having less knowledge of reproductive and sexual health, putting them and their children at increased risk of disease, injury, and death. Studies have shown that girls with increased educational attainment have greater knowledge of HIV/AIDS, which is critical to preventing the spread of the life-threatening disease both to themselves and their future children.¹⁰⁴

Additionally, with fewer girls completing their education, fewer women are able to become healthcare professionals, often resulting in fewer trained midwives and obstetric and gynecological healthcare professionals. In Afghanistan, there were only 467 midwives in the entire country at the end of the Taliban's regime, a factor contributing to maternal and infant mortality rates that were among the highest in the world.¹⁰⁵ The lack of female healthcare professionals becomes even more concerning in situations where strong social norms dictate that women can only receive medical care from other women, and where family members may prevent a woman from visiting a male healthcare professional.¹⁰⁶ In certain regions, women with higher levels of education "are less likely to have to ask their husband's or family's permission to seek medical care."¹⁰⁷

104. Q. Wodon et al., The World Bank & the Int'l Ctr. for Research on Women, *Economic Impacts of Child Marriage: Women's Agency and Selected Other Impacts Brief*, at 4 (June 2017), <http://documents.worldbank.org/curated/en/232721498512588551/pdf/116833-BRI-P151842-PUBLIC-EICM-Brief-WomensDecisionMaking-PrintReady.pdf> [hereinafter *Women's Agency Brief*].

105. U.N. Population Fund, *Midwives Help Lower Afghanistan's Towering Maternal Death Rate* (Jan. 7, 2016), <https://www.unfpa.org/news/midwives-help-lower-afghanistans-towering-maternal-death-rate>.

106. Sarah Buckley & Asif Maroof, *Afghanistan: The Only Gynaecologist for Hundreds of Miles*, BBC NEWS, Mar. 5, 2017, <https://www.bbc.com/news/world-asia-38918509>.

107. WORLD BANK GROUP, VOICE AND AGENCY: EMPOWERING WOMEN AND GIRLS FOR SHARED PROSPERITY, at xxiii (2014), http://www.worldbank.org/content/dam/Worldbank/document/Gender/Voice_and_agency_LOWRES.pdf [hereinafter WORLD BANK GROUP].

2. Intergenerational Health Effects

Lack of education for girls and women has been shown to have negative impacts on their children and family. The level of education a mother has impacts her child’s nutrition and susceptibility to stunting, “even after taking into account other factors linked to better nutrition, such as household wealth, mother’s height, breast-feeding practices, water, and sanitation.”¹⁰⁸ A mother’s education level also plays a role in whether she vaccinates her children and seeks out health care services when necessary.¹⁰⁹

3. Increased Risk of Becoming Victims of Violence

Education can reduce the risk that women and girls will face violence, particularly domestic violence. Women who have completed secondary education have a thirty-six percent lower risk of intimate partner violence, compared to women with no education.¹¹⁰ A woman’s level of education is the strongest correlate of whether she can exercise sexual autonomy, meaning she reports having the power to “refuse sex, to ask [a] partner to use a condom, or both.”¹¹¹ Without that autonomy and power to say “no,” women and girls cannot give meaningful consent to sexual activity and are more likely to become victims of sexual violence at the hands of husbands, partners, and others.

4. Increased Risk of Forced Child Marriage and Attendant Harms

Depriving girls of the right to education can also play a significant role in whether a girl is forced into early marriage, a global challenge that comes with its own physical, economic, and social harms. The prevalence of child marriage is particularly acute in fragile and conflict-affected states; nine of the top ten countries with the highest rates of child marriage are recognized as fragile states by the Organization for Economic Co-operation and Development.¹¹² In Afghanistan, one-third of girls are married before age eighteen,¹¹³ and “girls who did not study are three times as likely to marry before age eighteen as girls who

108. *Id.* at 6.

109. *Id.* at 44.

110. *Id.* at 68.

111. *Id.* at 15, 62.

112. GAYLE TZEMACH LEMMON & LYNN S. ELHARAKE, CHILD BRIDES, GLOBAL CONSEQUENCES: HOW TO END CHILD MARRIAGE 30-31 (2014), <https://cfrd8-files.cfr.org/sites/default/files/pdf/2014/07/Child%20Brides%20Global%20Consequences.pdf>.

113. HUMAN RIGHTS WATCH, *supra* note 12, at 52.

completed secondary education or higher.”¹¹⁴ The crises created by conflict and the disintegration of familial and social support networks may prompt families to force their daughters into early marriage “either to preserve resources by offloading economic responsibility for their girl children or in an attempt to ensure their daughters’ safety from conflict-related sexual violence.”¹¹⁵

Analysis by the World Bank has found that “increasing girls’ education is one of the best ways to avoid child marriage.”¹¹⁶ Girls without education are “up to six times more likely to marry [by age 18] than girls who [have] received a secondary education.”¹¹⁷ Each additional year of education reduces the likelihood a girl will be married before the age of eighteen by 3.1 to 12.6 percentage points.¹¹⁸

Beyond the obvious abuse of the act of child marriage, forcing a girl into an early marriage generates its own cycle of harms and violence. According to the World Bank, child marriage “contributes to the perpetuation of poverty” and lowers a girl’s future earnings by nine percent.¹¹⁹ Girls who are married at age fifteen or younger face greater risks of intimate partner violence over the course of their lifetimes.¹²⁰ They are less likely to be able to exercise the agency to make decisions within their own homes and more likely to suffer reduced psychological well-being.¹²¹ Because “child brides are frequently unable to negotiate sexual relationships with their husbands and lack access to contraception,”¹²² child marriage dramatically increases the risks of a girl giving birth before reaching the age of eighteen.¹²³ In fact, “of the 16 million adolescent girls who give birth every year, approximately ninety percent

114. *Id.* at 53.

115. RACHEL VOGELSTEIN, ENDING CHILD MARRIAGE: HOW ELEVATING THE STATUS OF GIRLS ADVANCES U.S. FOREIGN POLICY OBJECTIVES 7 (Council on Foreign Relations Press May 2013).

116. Q. Wodon et al., The World Bank & the Int’l. Ctr. for Research on Women, *Economic Impacts of Child Marriage: Educational Attainment Brief*, at 4 (June 2017), <http://documents.worldbank.org/curated/en/295491498512413125/pdf/116831-BRI-P151842-PUBLIC-EICM-Brief-Educational-Attainment-PrintReady.pdf> [hereinafter *Educ. Attainment Brief*].

117. WORLD BANK GROUP, *supra* note 107, at 8.

118. *Educ. Attainment Brief*, *supra* note 116, at 5.

119. *Id.*

120. Q. Wodon et al., The World Bank & the Int’l. Ctr. for Research on Women, *Economic Impacts of Child Marriage: Women’s Health Brief 4* (June 2017), <http://documents.worldbank.org/curated/en/794581498512672050/pdf/116834-BRI-P151842-PUBLIC-EICM-Brief-WomensHealth-PrintReady.pdf> [hereinafter *Women’s Health Brief*].

121. *Women’s Agency Brief*, *supra* note 104, at 3.

122. VOGELSTEIN, *supra* note 115, at 13.

123. *Women’s Health Brief*, *supra* note 120, at 5.

PROTECTING RIGHTS “IN SMALL PLACES”

are married.”¹²⁴ The risks of injury and maternal mortality are heightened for girls whose bodies have not developed enough to sustain a healthy pregnancy; one study found that reducing child marriage for girls by ten percent could lead to a seventy percent decline in maternal mortality.¹²⁵ Children of mothers younger than eighteen are also more likely to die before age five and more likely to be stunted in growth.¹²⁶

B. *Economic Harm*

The economic harm associated with depriving girls of the right to education has profound effects on the lives of individual girls, their families, and their broader community that follow them for the rest of their lives. If a girl is deprived of an education at a young age, she may not have developed fundamental literacy and numeracy skills required for employment and managing her own finances. For example, in Afghanistan, only nineteen percent of adult women are literate, compared to forty-nine percent of adult men; likewise, only thirty-seven percent of adolescent girls are literate, compared to sixty-six percent of boys.¹²⁷

Lowered levels of education make it more difficult for women to find well-paying work and access sources of credit, often forcing them into the informal sector. In Afghanistan, years of educational inequality have left women with few employment opportunities: female unemployment in urban areas is four times higher than male unemployment; women make up nearly eighty percent of unpaid family workers; and on average, women engaged in non-farm work earn half of what men earn.¹²⁸ Such economic disparities put girls and women at greater risk of poverty and dependence on male breadwinners, rendering them vulnerable to abuse and exploitation. The long-term economic effects of depriving girls of education are striking: “investing in girls so that they would complete

124. VOGELSTEIN, *supra* note 115, at 13.

125. Press Release, UC San Diego Health, Higher Child Marriage Rates Associated with Higher Maternal and Infant Mortality (May 13, 2013), <https://health.ucsd.edu/news/releases/Pages/2013-05-13-high-rates-of-child-brides-and-maternal-and-infant-mortality.aspx>.

126. Q. Wodon et al., The World Bank & the Int’l. Ctr. for Research on Women, *Economic Impacts of Child Marriage: Child Health & Nutrition Brief*, at 5 (June 2017), <http://documents.worldbank.org/curated/en/840361498512863167/pdf/116836-BRI-P151842-PUBLIC-EICM-Brief-ChildHealth-PrintReady.pdf>.

127. HUMAN RIGHTS WATCH, *supra* note 12, at 8.

128. Powell, *supra* note 19, at 8.

education at the same rate as boys would lead to lifetime earnings increases . . . of between 54% to 68% of countries' GDP."¹²⁹

Women's economic status and control of financial resources also carry generational effects for their families. For example, female income has a twenty-times-greater effect on children's survival than male income.¹³⁰ Studies have found that women's income has a greater positive impact than men's income on children's growth and nutritional status, and that women's financial autonomy is significantly associated with childhood vaccination rates.¹³¹ Improved economic opportunities for women can also challenge discriminatory social norms that curtail girls' education.¹³² Women's education levels positively impact their children's educational attainment.¹³³

C. Political Harm and Deprivation of Public Agency

Denying girls and women the right to education undermines their standing as equal citizens in their societies and adversely impacts women's ability to actively participate in the decisions that shape their lives. The United Nations Security Council has urged the international community to ensure equal access to education for girls and boys in post-conflict settings, "given the vital role of education in the promotion of women's participation in post-conflict decision-making."¹³⁴

The lack of women's active participation in civic life and leadership that results from gender disparities in education further compounds the challenge of correcting inequality in the future. The presence of female leaders "influences the extent of emphasis placed on gender equality in policy and practice," and often changes government spending priorities in favor of education, health, and social welfare.¹³⁵ There may even be positive correlations between increasing female political representation and the probability that persons complete primary

129. This is equivalent to an increase in annual GDP growth rates of about 1.5 percent. WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT 2017, 28 (2017), http://www3.weforum.org/docs/WEF_GGGR_2017.pdf.

130. VALERIE M. HUDSON ET AL., SEX & WORLD PEACE 44 (2012).

131. *Gender Influences on Child Survival, Health and Nutrition: A Narrative Review* 18 (2011) https://www.unicef.org/Gender_Influences_on_Child_Survival_a_Narrative_review.pdf.

132. WORLD BANK GROUP, *supra* note 107, at 7.

133. Stephan Klasen, *Low Schooling for Girls, Slower Growth for All? Cross-Country Evidence on the Effect of Gender Inequality in Education on Economic Development*, 16 WORLD BANK ECON. REVIEW 345, 352 (2002).

134. S.C. Res. 1889 ¶ 11 (Oct. 5, 2009).

135. UNESCO Gender Review, *supra* note 22.

PROTECTING RIGHTS “IN SMALL PLACES”

education.¹³⁶ For example, an Indian constitutional amendment to establish quotas for women in village leadership positions effectively closed the gender gap in adolescent education in villages that had women leaders for ten years; researchers found the long-term presence of female leaders in the village as a result of the quota system raised the aspirations that parents had for their daughters and that girls had for themselves.¹³⁷ Accordingly, depriving girls of education and closing avenues to their full participation in society can have a chilling effect on the educational attainment of future generations of girls.

D. *Social Harm and Deprivation of Private Agency*

Denying girls the right to education also comes with a high social cost as it skews equitable relations between girls and boys, and women and men, reinforcing lifelong discrimination against women and control over their lives. It negatively impacts women’s and girls’ agency, reducing their “capacity to make decisions about [their] own [lives] and act on them . . . free of violence, retribution, or fear.”¹³⁸ In a study by the World Bank, sixty-five percent of women with a primary education or less lacked control over household resources, believed gender-based violence can be justified, and were married before age eighteen; only five percent of women with a secondary education or higher experience all three of these agency deprivations.¹³⁹ Deprivations in women’s agency can also restrict their ability to participate in communal life; for example, more than forty percent of women without an education “have no say in decisions about visits to friends and family, compared with 17% of those with a higher education.”¹⁴⁰

E. *Depriving Girls the Right to Education Deserves Recognition as a New Crime Against Humanity Because of the Crime’s Distinct Harms*

The cumulative and compounding effects of depriving girls their right to education are serious and long-lasting. They constitute a

136. *Id.*

137. Lori Beaman, Esther Duflo, Rohini Pande, & Petia Topalova, *Female Leadership Raises Aspirations and Educational Attainment for Girls: A Policy Experiment in India*, GENDER ACTION PORTAL (2012), <http://gap.hks.harvard.edu/female-leadership-raises-aspirations-and-educational-attainment-girls-policy-experiment-india>.

138. WORLD BANK GROUP, *supra* note 107, at XV.

139. Ninety percent of women with a primary education or less and eighteen percent of women with secondary education or higher experience had one of the listed deprivations of agency. *Id.* at XIX-XX.

140. *Id.* at 5.

distinct series of harms that strike at the very core of human dignity and agency and that haunt girls and women, leaving them vulnerable to violence, exploitation, discrimination, poverty, premature death, and countless other harms throughout their lives. The discriminatory nature of the crime sets it apart from a general attack against children's education; the specific targeting of girls' education renders them second-class citizens who must bear the physical, economic, political, and social burdens of inferiority. No other recognized crime against humanity can fully capture the actual gravity and scope of the harm caused by this crime. For this reason, the ICC should recognize that depriving girls of their right to education is an "other inhumane act" that is a crime against humanity and a basis for bringing charges of gender-based persecution.

In identifying other "new" crimes against humanity, international tribunals have looked to a crime's unique harms as a reason to recognize it as distinct from other similar crimes against humanity. For example, the Special Court in Sierra Leone was the first to recognize "forced marriage" as a separate crime against humanity from "sexual slavery."¹⁴¹ While the crime of forced marriage may include similar elements to the crime of sexual slavery, the Special Court acknowledged that it is a unique "inhumane act" because forced marriage imposes a "conjugal association" and duties on the victim and caused the women to suffer long-term social stigma for this association.¹⁴² While the two crimes have elements of sexual violence in common, the Special Court found it important to recognize the distinct harms caused by forced marriage and to acknowledge it is a separate crime against humanity.

Likewise, attacks meant to deprive girls of the right to education may take the form of other crimes against humanity, but the ICC should acknowledge this is a distinct crime against humanity because of the underlying discriminatory intent of the perpetrator and the unique character of the harms that result from such deprivations. As a crime against humanity, the deprivation of girls' right to education can also be the basis of gender-based persecution. In the following section, the specific elements of the crime of persecution adopted by the ICC are considered to demonstrate how the crime of depriving girls the right to

141. "Forced Marriage" Conviction a First, IRIN NEWS (Feb. 26, 2009), <http://www.irinnews.org/report/83160/sierra-leone-%E2%80%9Cforced-marriage%E2%80%9D-conviction-first>.

142. Josepha Close, *Forced Marriage as an Independent Crime Against Humanity in the ICC Decision Confirming the Charges Against Dominic Ongwen*, AN INT'L L. BLOG (June 20, 2016, 11:01 AM), <https://aninternationallawblog.wordpress.com/2016/06/20/forced-marriage-as-an-independent-crime-against-humanity-in-the-icc-decision-confirming-the-charges-against-dominic-ongwen/>.

PROTECTING RIGHTS “IN SMALL PLACES”

education satisfies each of the required elements, using the Taliban and other armed groups’ actions in Afghanistan as an example.

V. THE ICC SHOULD RECOGNIZE SEVERE DEPRIVATIONS THAT VIOLATE THE
RIGHT TO EDUCATION FOR GIRLS AS CONSTITUTING A CRIME AGAINST
HUMANITY AND A FORM OF GENDER-BASED PERSECUTION

In modern conflicts, targeted “attacks against girls’ education [have] become a strategic weapon of war”¹⁴³ and should be recognized by the ICC as such. The following section outlines why depriving girls of their right to education can constitute the crime against humanity of gender-based persecution, particularly within the context of the conflict in Afghanistan. It considers the elements of the crime against humanity of persecution as established by the ICC,¹⁴⁴ and how depriving girls the right to education satisfies these elements.

First, Elements 1 and 4 of the crime of persecution are addressed as the most critical for establishing that deprivation of the right to education on the basis of gender constitutes gender-based persecution. Element 1 requires the severe deprivation of a fundamental right, and the analysis explains why the ICC should recognize the right to education is a fundamental right and what may constitute a severe deprivation of that right. Under Element 4, the conduct must be a crime within the ICC’s jurisdiction, and the discussion argues that the ICC should recognize depriving girls of the right to education is an inhumane act under Article 7 that brings comparable suffering and harm to its victims as other crimes against humanity. A broad interpretation of what actions constitute this crime is encouraged, focusing on the discriminatory intent.

Finally, the remaining elements are addressed, with a brief discussion of how actions to target girls satisfy the intentional targeting on the impermissible ground of gender required by Elements 2 and 3, how such actions are part of widespread or systematic attacks against civilians required by Element 5, and how the perpetrators had the knowledge of and intent to commit such attacks required by Element 6.

143. Rangita de Silva de Alwis, *Girls’ Education as a “Justice” Issue: Redefining Attacks against Girls’ Education as a Tactic of Terror*, GLOB. AFF. BLOG (July 28, 2016), <https://www.law.upenn.edu/live/news/6373-girls-education-as-a-justice-issue-redefining/news/international-blog.php>.

144. ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INT’L CRIM. CT., ELEMENTS OF CRIMES OF THE INTERNATIONAL CRIMINAL COURT, art. 7(1)(h), ICC-ASP/1/3/ at 108, U.N. DOC. PCNICC/2000/1/Add.2 (2000) [hereinafter ELEMENTS OF CRIMES].

A. *Element 1*—“*The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.*”¹⁴⁵

1. The Right to Education Is a Fundamental Right

The first element of the crime of persecution requires the severe deprivation of a *fundamental* right. No definitive list of fundamental rights exists, but the right must be recognized by treaty law or customary international law.¹⁴⁶ The OTP considers that Article 21(3) of the Rome Statute “mandates that the application and interpretation of the Statute be consistent with internationally recognized human rights” and that in its work, it would “take into account the evolution of internationally recognized human rights.”¹⁴⁷ Thus, the recognition of new fundamental rights by the international community should be given effect by the ICC.

International law has firmly established the fundamental right to education without discrimination on the basis of sex, both in treaty and customary international law.¹⁴⁸ No derogation from this right is permitted in times of war, conflict, or other emergency.¹⁴⁹ The right was first articulated in 1948 by the Universal Declaration of Human Rights: “[e]veryone has the right to education.”¹⁵⁰ The right has been expressed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which establishes the “foundation of the legal right to education” in Articles 13 and 14;¹⁵¹ Afghanistan acceded to the ICESCR in 1983.¹⁵² The rights to education and nondiscrimination in education

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

146. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003), *referring to* Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 431 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

147. Office of the Prosecutor of the International Criminal Court, Policy Paper on Sexual and Gender-based Crimes, ¶ 26, (June 2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf>.

148. Other rights may be implicated in attacks and threats against school children, such as the right to life, right to security, etc. However, this paper solely focuses on the fundamental right to education.

149. PETER HYLL LARSON, RIGHT TO EDUCATION PROJECT, THE RIGHT TO EDUCATION FOR CHILDREN IN VIOLENT CONFLICT 4 (2010), <http://unesdoc.unesco.org/images/0019/001912/191225e.pdf>.

150. Afghanistan adopted the UDHR in 1948. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. DOC. A/810 art. 26 (Dec. 10, 1948).

151. UNESCO Gender Review, *supra* note 22.

152. The Democratic Republic of Afghanistan only made one declaration in acceding to the ICESCR pertaining to the process by which countries may join the Covenant. U.N. TREATY DEPOSITARY, INT’L COVENANT ON ECON., SOCIAL & CULTURAL RIGHTS, <https://treaties.un.org/>

PROTECTING RIGHTS “IN SMALL PLACES”

are further articulated in: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁵³ which Afghanistan ratified in 2003 without reservation;¹⁵⁴ the Convention on the Rights of the Child (CRC),¹⁵⁵ which Afghanistan ratified in 1994;¹⁵⁶ and the Convention against Discrimination in Education (CADE), which prohibits sex discrimination in the quality and access to education¹⁵⁷ and which Afghanistan accepted without reservation in 2010.¹⁵⁸ The vast majority of states have chosen to become parties to these instruments, signaling growing global consensus on the right to education without discrimination.¹⁵⁹ The right to education has also been articulated in regional human rights instruments.¹⁶⁰ In addition, evidence of

Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (accessed May 12, 2018).

153. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women, art. 10, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

154. U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations on the combined initial and second periodic reports of Afghanistan* 1, 23 July 2013, CEDAW/C/AFG/CO/1-2, <http://www.refworld.org/docid/51ff5ac94.html>.

155. G.A. Res. 44/25, annex, Convention on the Rights of the Child arts. 2, 28, 44, U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

156. In signing the CRC, the Government of the Republic of Afghanistan reserved “the right to express . . . reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shari’a and the local legislation in effect.” U.N. TREATY DEPOSITORY, CONVENTION ON THE RIGHTS OF THE CHILD, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (accessed May 12, 2018).

157. Convention Against Discrimination in Education art. 1, 429 U.N.T.S. 93 (*entered into force* May 22, 1962).

158. UNESCO, LEGAL INSTRUMENTS, CONVENTION AGAINST DISCRIMINATION IN EDUCATION, <http://www.unesco.org/eri/la/convention.asp?language=E&KO=12949> [hereinafter UNESCO CADE]

159. The ICESCR has 170 state parties. U.N. TREATY DEPOSITORY, INT’L COVENANT ON ECON., SOCIAL & CULTURAL RIGHTS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en. The CEDAW has 189 state parties. U.N. TREATY DEPOSITORY, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en. The CRC has 196 state parties. U.N. TREATY DEPOSITORY, CONVENTION ON THE RIGHTS OF THE CHILD, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en. The CADE has 104 state parties. UNESCO CADE, *supra* note 158.

160. Such regional instruments include: the African Charter on Human and Peoples’ Rights (Article 17), Organization of African Unity, African Charter on Human and Peoples’ Rights (“Banjul Charter”), June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); the American Declaration on the Rights and Duties of Man (Article 12), Inter-American Commission on Human Rights, American Declaration of the Rights and Duties of Man, May 2, 1948; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Article 13), Organization of American States, Additional Protocol to

widespread incorporation of the right to education and non-discrimination in education in states' domestic laws and practice suggests that the right to education is recognized as customary international law.¹⁶¹ Therefore, during the period of time under the ICC's review of crimes in Afghanistan (2003 to present), the right to education and non-discrimination in education had been firmly established in international law, and embraced by the government of Afghanistan.

Based on the status of international law, the ICC should recognize the right to education without discrimination is a fundamental right. In previous persecution cases, international tribunals have found a wide variety of rights to be fundamental, including: the rights to life; to be free from cruel, inhuman, or degrading treatment; to own property; and to judicial process; as well as the freedoms of expression, of assembly, and of association.¹⁶² Not only is the right to education firmly established in international law, it is foundational to a person's ability to exercise and enjoy all of the aforementioned rights, particularly as illustrated in *Part IV—Assessing the Gravity of Harm Caused by Denying Girls and Women the Right to Education*, by the severe and lifelong impacts that result from depriving girls of the right to education.

2. Attacks on Girls' Education Perpetrated by Armed Groups Constitute a Severe Deprivation of the Right to Education

The ICC should recognize that the attacks by armed groups on girls' education are a severe deprivation of the right to education, based on the scope, scale, and duration of the attacks. In Afghanistan, for example, attacks on girls' education at all grade levels have occurred across the entire country for more than two decades. Millions of girls have never attended school; even more have only done so briefly.¹⁶³ The Taliban and other armed groups have bombed and set fire to schools, poisoned and attacked female students and their teachers, and for

the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), November 16, 1999, A-52; and the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 2), Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9.

161. Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right*, 11 HARV. BLACKLETTER L. J. 37, 44-50 (1994) (discussing examples of the right to education in domestic laws and practices).

162. Situation in the Republic of Burundi, ICC-01/17-X-9-US-Exp, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi," ¶ 132 (Oct. 25, 2017), <https://www.legal-tools.org/doc/8f2373/pdf/>.

163. HUMAN RIGHTS WATCH, *supra* note 12, at 5.

PROTECTING RIGHTS “IN SMALL PLACES”

years advanced policies that limited or completely forbade girls’ education.¹⁶⁴ For countless girls and women in Afghanistan, the actions of the Taliban and other armed groups constitute a severe deprivation of their fundamental right to education.

B. *Element 4*—“The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.”¹⁶⁵

The next critical element to establish that deprivation of the right to education constitutes persecution as a crime against humanity is that the ICC must have jurisdiction over the crime committed. As discussed in *Part III—International Law Precedents to Establishing that the Deprivation of Girls’ Education Is Gender-Based Persecution and a Crime Against Humanity*, the crime of persecution is evidenced through the commission of other crimes recognized under Article 7 of the Rome Statute. In addition to the enumerated crimes, Article 7 gives the ICC the flexibility to recognize “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental and physical health.”¹⁶⁶

The ICC should recognize that the very act of depriving a girl of her education—however it is achieved—is *the* crime that is an “other inhumane [act]” under Article 7(1)(k).¹⁶⁷ International tribunals have used a gravity of harm test when considering whether other inhumane acts may constitute persecution: the acts “must be of equal gravity or seriousness” to acts enumerated as crimes against humanity (here, in the Rome Statute).¹⁶⁸ They must “intentionally [cause] great suffering, or serious injury to body or to mental or physical health.”¹⁶⁹ Harms that are physical, mental, political, social, and economic in nature may all be considered.¹⁷⁰ As discussed in *Part IV—Assessing the Gravity of Harm Caused by Denying Girls and Women the Right to Education*, depriving girls of the right to education leads to each of these harms, which have serious adverse effects that may last entire lifetimes and even continue into

164. See HUMAN RIGHTS WATCH, *supra* note 12; *More Than 50 Afghan Schoolgirls Hospitalized for Suspected Poisoning*, RADIO FREE AFG. (Apr. 2, 2018), <https://www.rferl.org/a/afghanistan-poisoning-schoolgirls-taliban-education-helmand/29140115.html>.

165. ELEMENTS OF CRIMES, *supra* note 144, art. 7(1)(h)(4).

166. Rome Statute, *supra* note 6, art. 7(1)(k).

167. *Id.*

168. Nilsson, *supra* note 44, at 231.

169. Rome Statute, *supra* note 6, art. 7(1)(k).

170. Brown & Grenfell, *supra* note 67.

the next generation. The suffering caused by depriving girls of the right to education should be considered comparable in gravity to other enumerated crimes.

The persecutory act of depriving a girl of education can be accomplished in many ways, and the ICC should not restrict its understanding of the crime to the specific ways in which perpetrators achieve their discriminatory intent. Instead, the ICC should consider the knowledge and intent behind the perpetrators' actions, and whether they were taken with the objective of interfering with, or depriving girls of, the right to education. This approach will enable the ICC to consider the context in which the persecution took place and the full range of actions the perpetrators took to achieve their persecutory ends.

If the ICC were instead to take a more limited approach and narrowly define the forms of conduct it recognizes as gender-based persecution for depriving girls of their right to education, it could very quickly find its definitions irrelevant. For example, the ICC could choose to only recognize physical attacks on girls' school buildings as acts of gender-based persecution. This would align with long-standing traditions in international humanitarian law. However, in many places, students do not actually attend school in school buildings. In fact, in Afghanistan, more than 7,000 schools lack buildings, with classes being taught outdoors or in temporary rented facilities.¹⁷¹

More importantly, perhaps, is that perpetrators can adapt and realize their discriminatory intent of depriving girls of their right to education through less costly and dangerous means than a direct attack on school facilities. Kidnapping or throwing acid on girls as they walk to school, sending threatening letters to parents, harassing teachers, and intimidating local leaders into closing a school have been just as effective at preventing girls from going to school as directly attacking a school building. No matter the means, the outcome is the same. Therefore, the ICC should take an open approach and establish that depriving girls of their right to education is an "other inhumane act" under Article 7(1)(k) that also constitutes gender-based persecution.

171. Mashal & Rahim, *supra* note 23.

PROTECTING RIGHTS “IN SMALL PLACES”

C. *Elements 2 and 3*—“*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*” and “[s]uch targeting was based on . . . gender.”¹⁷²

Elements 2 and 3 of the crime of persecution require that the criminal acts target a particular individual or group on the basis of their identity—here, their gender. The Rome Statute recognizes persecution can be committed on the basis of “gender,” which is defined as “the two sexes, male and female, within the context of society.”¹⁷³ The Taliban and other armed groups have targeted attacks against girls and girls’ education by reason of their gender. For years, they prohibited girls’ education in the areas they controlled, including the entirety of the country from 1996 to 2001.¹⁷⁴ In the years since, the Taliban and other armed groups have continued to target girls, girls’ schools, and teachers and administrators of these schools, and still prohibit or limit girls’ access to education in areas under their control. Public announcements and night letters have been sent to parents specifically threatening them not to send their daughters to school.¹⁷⁵ Messages left following attacks against girls’ schools warn the community to stop sending its girls to school.¹⁷⁶ Thus, it is clear that girls have been targeted based on their female gender, satisfying Elements 2 and 3.

D. *Elements 5 and 6*—“*The conduct was committed as part of a widespread or systematic attack directed against a civilian population,*”¹⁷⁷ and “*the perpetrator knew that the conduct was part of or intended the conduct to be part of*” such an attack against civilians.¹⁷⁸

Element 5 requires that the criminal conduct be part of a widespread or systematic attack against civilian populations. It is clear that any attack on girls’ education would presumably be an attack against a civilian population; children who do not take active part in the conflict are always considered civilians under international humanitarian law, and even receive special protection against assault under Additional

172. ELEMENTS OF CRIMES, *supra* note 144, art. 7(1)(h)(2)-(3).

173. Rome Statute, *supra* note 6, art. 7(3).

174. HUMAN RIGHTS WATCH, *supra* note 12, at 37.

175. *Request for Authorisation*, *supra* note 4, ¶ 119.

176. HUMAN RIGHTS WATCH *supra* note 12, at 68.

177. ELEMENTS OF CRIMES, *supra* note 144, art. 7(1)(h)(5).

178. *Id.* art. 7(1)(h)(6).

Protocol I.¹⁷⁹ The nature of the attacks, committed over a period of years, across the entire country, and under the Taliban's stated opposition to girls' education suggests that such attacks could likely satisfy both "widespread" and "systematic" elements.

Finally, under Element 6, the perpetrator must know or intend his conduct to be part of such an attack. The perpetrators' knowledge, intent, or both, may be "inferred from relevant facts and circumstances."¹⁸⁰ When considering cases involving crimes of gender-based deprivation of education, the ICC should determine whether the perpetrator committed the actions knowing or intending the conduct to have the effect of depriving girls of their right to education, or whether the perpetrator should have reasonably known his conduct would have that effect. Based on the information available, it seems reasonable that many if not most of the perpetrators of the attacks against girls' education in Afghanistan did know or should have known their actions were an attack against a civilian population.¹⁸¹

VI. ATTACKS ON GIRLS' EDUCATION BEYOND AFGHANISTAN MAY ALSO CONSTITUTE CRIMES AGAINST HUMANITY AND GENDER-BASED PERSECUTION

The ICC currently has a number of cases and situations under preliminary examination where parties to the conflict have attacked girls and sought to deprive them of their right to education. In addition to the situation in Uganda discussed in *Part II*, the following situations present possible cases where the OTP could consider bringing charges of gender-based persecution and crimes against humanity on the grounds of deprivations of girls' right to education.

A. Mali

In July 2019, the ICC Prosecutor formally sought to charge Malian national Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud with "gender-based persecution" for his role in imposing the dictates of the armed groups Ansar Dine and Al-Qaeda in the Islamic Maghreb on the

179. Advisory Service on Int'l Humanitarian Law, Int'l. Com. of the Red Cross, Legal Protection of Children in Armed Conflict, (Feb. 2003), <https://www.icrc.org/en/document/legal-protection-children-armed-conflict-factsheet>.

180. ELEMENTS OF CRIMES, *supra* note 144, art. 7(1)(h)(6).

181. Office of the Prosecutor of the International Criminal Court, *Report on Preliminary Examination Activities 2017*, ¶¶ 247-48 (Dec. 4, 2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Afghanistan_ENG.pdf.

people of Timbuktu.¹⁸² This is the first time this crime has been brought before the ICC or any international tribunal.¹⁸³ In the Prosecutor’s statement at the opening of the confirmation of charges hearing on July 8, 2019, she cited evidence of gender-based persecution against women and girls that included a system of sexual violence whereby women and girls were “forced into marriage, confined against their will, and repeatedly sexually assaulted and raped by one or more members of these armed groups,” among other persecutory crimes.¹⁸⁴ The Pre-Trial Chamber approved the charge of gender-based persecution against Al Hassan on September 30, 2019.¹⁸⁵

Since 2012, the conflict in Mali has “disproportionately harmed girls’ access to education and helped worsen the overall situation of women and girls.”¹⁸⁶ In Mali, “girls have been targeted for sexual and other forms of violence in schools for failing to adhere to strict dress codes imposed by armed groups.”¹⁸⁷ These attacks against girls, including the crimes allegedly perpetrated by Al Hassan, are a deprivation of girls’ right to education. As the charge of gender-based persecution has been approved by the Pre-Trial Chamber, the Prosecutor should include deprivation of girls’ right to education as part of the evidence of gender-based persecution brought at trial, because policies of forced marriage and sexual enslavement of girls also deny them the ability to exercise their right to education. As the OTP considers bringing future cases relating to the situation in Mali, it should ensure that deprivations of

182. Press Release, Int’l Crim. Ct., Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of the Confirmation of Charges Hearing in the Case Against Al Hassan (July 8, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=180708-otp-statement-al-hassan>. The redacted version of the Document Containing the Charges is publicly available in French. Office of the Prosecutor of the International Criminal Court, ICC-01/12-01/18-335-Conf-Corr, *Affaire le Procureur c. Al Hassan Ag Abdoul Aziz Ag Mohamed* [Redacted Public Version of the “Amended and Corrected Version of the Document Containing the Charges Against Mr. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahoud], (July 2, 2019) https://www.icc-cpi.int/CourtRecords/CR2019_03499.PDF.

183. Rosemary Grey, *Gender-based Crimes: A Monumental Day for the ICC*, INTLAWGRRLS (July 8, 2019), <https://ilg2.org/2019/07/08/gender-based-crimes-a-monumental-day-for-the-icc/>.

184. Press Release, Int’l Crim. Ct., *supra* note 182.

185. Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, Case Update, <https://www.icc-cpi.int/mali/al-hassan> (last accessed Jan. 10, 2020).

186. GLOBAL COALITION TO PROTECT EDUCATION FROM ATTACK, EDUCATION UNDER ATTACK 2018: COUNTRY PROFILES – MALI 1 (2018) http://protectingeducation.org/sites/default/files/documents/eua2018_mali.pdf.

187. SAVE THE CHILDREN, ATTACKS ON EDUCATION: THE IMPACT OF CONFLICT AND GRAVE VIOLATIONS ON CHILDREN’S FUTURES 8 (2013), http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Save_the_Children_Attacks_on_Education_2013.pdf.

the right to education are included as evidence of gender-based persecution where applicable.

B. *Nigeria*

In northeastern Nigeria, Boko Haram—whose very name means “Western education is forbidden”—has for years waged a campaign of attacks on schools and students, particularly targeting girls’ education.¹⁸⁸ In 2014, Boko Haram kidnapped 276 girls from their schools in Chibok, an act which garnered global outcries in the #BringBackOurGirls campaign.¹⁸⁹ Despite international pressure, 112 girls have not been released five years later and reports from those who were released or escaped indicate they have suffered additional violence from Boko Haram.¹⁹⁰ The “Chibok girls” are among 7,000 women and girls abducted by Boko Haram in recent years, many of whom have become victims of forced marriage, sex slavery, and/or forced pregnancy.¹⁹¹ More recently, in February 2018, Boko Haram kidnapped 113 girls from the Government Girls’ Science Technical College in Yobe State; 107 of the girls were later released.¹⁹² The armed group is also believed to be responsible for the death of more than 2,295 teachers and the destruction of more than 1,400 schools in northeastern Nigeria.¹⁹³ The attacks are reported to have had a chilling effect on girls’ education across the region, with schools in numerous places closed entirely.¹⁹⁴

Boko Haram’s attacks against girls and their right to education should be understood as evidence of gender-based persecution,

188. GLOBAL COALITION TO PROTECT EDUCATION FROM ATTACK, EDUCATION UNDER ATTACK 2018: COUNTRY PROFILES – NIGERIA I (2018) http://protectingeducation.org/sites/default/files/documents/eua2018_nigeria.pdf [hereinafter GCPEA – NIGERIA].

189. Dionne Searcey, *Kidnapped as Schoolgirls by Boko Haram: Here They Are Now*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/interactive/2018/04/11/world/africa/nigeria-boko-haram-girls.html>.

190. *See id.*; Fidelis Mbah, *Nigeria’s Chibok Schoolgirls: Five Years On, 112 Still Missing*, AL JAZEERA (Apr. 14, 2019), <https://www.aljazeera.com/news/2019/04/nigeria-chibok-school-girls-years-112-missing-190413192517739.html>.

191. Hilary Matfess, *Three Years Later, a Look at the #BringBackOurGirls Catch-22*, DAILY BEAST (Apr. 14, 2017), <https://www.thedailybeast.com/three-years-later-a-look-at-the-bringbackourgirls-catch-22>.

192. Office of the Prosecutor of the International Criminal Court, *Report on Preliminary Examination Activities 2018*, ¶ 228, (Dec. 5, 2018), <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>.

193. *Id.*

194. Clarissa Herrmann, *Chibok Girls Still Undereducated, Unsafe Five Years After Abductions*, DEUTSCHE WELLE (Apr. 13, 2019), <https://www.dw.com/en/chibok-girls-still-undereducated-unsafe-five-years-after-abductions/a-48314902>.

PROTECTING RIGHTS “IN SMALL PLACES”

particularly when the intent of such attacks is to kidnap and force the girls into marriage and/or sexual slavery. While forced marriage and sexual slavery have been recognized as independent crimes against humanity, the deprivation of girls’ right to education precipitated by these attacks and kidnappings are based on a discriminatory and persecutory intent, and should be recognized as gender-based persecution.

In its report on the status of the preliminary examination of the situation in Nigeria, the OTP has indicated it is looking to bring cases related to gender-based persecution against Boko Haram and that it intends to “pay special attention to allegations of [sexual and gender-based crimes] and crimes committed against children.”¹⁹⁵ In its preliminary examination of the situation in Nigeria, the ICC’s OTP found a reasonable basis to believe Boko Haram has committed the war crime of “intentionally directing attacks against buildings dedicated to education.”¹⁹⁶ It also found a reasonable basis to believe Boko Haram had committed the crime against humanity of gender-based persecution, citing such acts as “the targeting of females including of student girls for attending public schools,” among other acts including murder, abduction, rape, sexual violence, forced marriage, and sexual slavery.¹⁹⁷ As the preliminary examination into the situation in Nigeria continues, the OTP should give special attention to these crimes to affirm that such attacks against schools and access to education are serious violations of international humanitarian law and to hold Boko Haram accountable.

C. Iraq

In Iraq, the Islamic State (IS) has targeted attacks on girls, kidnapping and forcing them into marriages or sexual slavery.¹⁹⁸ Attacks of

195. The Office of the Prosecutor of the International Criminal Court, *Report on Preliminary Examination Activities 2017*, ¶¶ 212, 228, (Dec. 4, 2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf.

196. Office of the Prosecutor of the International Criminal Court, *Report on Preliminary Examination Activities 2018*, ¶ 222, (Dec. 5, 2018), <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>.

197. *Id.* ¶ 225. The OTP also recognized there was a reasonable basis to believe Boko Haram had committed crimes of gender-based persecution against *males*, citing “the targeting of males including student boys by means of forced conscription to fight for the group.” *Id.*

198. See Hum. Rts. Council, “*They Came to Destroy*”: *ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016), https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf; HUM. RTS. WATCH, IRAQ: FORCED MARRIAGE, CONVERSION FOR YEZIDIS (Oct. 11, 2014) <https://www.hrw.org/news/2014/10/11/iraq-forced-marriage-conversion-yezidis>.

this kind are already recognized as crimes against humanity under the Rome Statute, and would also constitute gender-based persecution. They should also be recognized as *de facto* deprivations of the girls' right to education where the perpetrators either knew, or should have known, that abducting and imprisoning girls would result in the deprivation of their fundamental right to education. Women in Islamic State-controlled areas have also reported the group's discriminatory education policies, such as "bann[ing] girls from attending school"¹⁹⁹ and forbidding girls age fifteen and older from attending school.²⁰⁰ These policies should also be considered as evidence of gender-based persecution.

Human rights advocates have petitioned the ICC to open a preliminary examination focusing on the gender-based persecution committed by IS.²⁰¹ They have cited the enforcement of gendered regulations, targeted sexual violence and rape, sexual enslavement and forced marriage of young girls and women, torture, and murder as evidence of such gender-based persecution.²⁰² However, as Iraq is not a state party to the Rome Statute, such a prosecution would only be possible if brought against foreign fighters who were nationals of a state party or with the consent of the Government of Iraq.²⁰³ Whether these crimes are ultimately tried by the ICC or by Iraqi courts or other foreign courts with support from the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (UNITAD), IS fighters should face charges of gender-based persecution, with deprivations of girls' right to education included as evidence of such persecution.²⁰⁴

199. HUMAN RIGHTS WATCH, WORLD REPORT 2017, 342 (2017) https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf.

200. GLOBAL COALITION TO PROTECT EDUCATION FROM ATTACK, EDUCATION UNDER ATTACK 2018: COUNTRY PROFILES – IRAQ 1 (2018) http://protectingeducation.org/sites/default/files/documents/eua2018_iraq.pdf.

201. THE HUMAN RIGHTS & GENDER JUSTICE CLINIC OF THE CITY UNIVERSITY OF NEW YORK (CUNY) SCHOOL OF LAW ET AL., COMMUNICATIONS TO THE ICC PROSECUTOR PURSUANT TO ARTICLE 15 OF THE ROME STATUTE REQUESTING A PRELIMINARY EXAMINATION INTO THE SITUATION OF: GENDER-BASED PERSECUTION AND TORTURE AS CRIMES AGAINST HUMANITY AND WAR CRIMES COMMITTED BY THE ISLAMIC STATE OF IRAQ AND THE LEVANT (ISIL) IN IRAQ (Nov. 8, 2017), <https://www.madre.org/sites/default/files/PDFs/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq%20PDF.pdf>.

202. *Id.*

203. Rome Statute, *supra* note 6.

204. James Reinl, *U.N.'s Islamic State Probe Unit Kicks into Gear*, INTER PRESS SERVICE, July 16, 2019, <http://www.ipsnews.net/2019/07/u-n-s-islamic-state-probe-unit-kicks-gear/>. For additional information on the work of UNITAD, see First Report of the Special Adviser and Head of the

VII. CONCLUSION

One of the greatest and most tragic legacies of modern conflicts is the targeted attacks against girls’ education that have forever changed the lives of millions of girls. Depriving girls of their fundamental right to education is a crime of discriminatory intent that renders girls and women inferior to boys and men in their societies. It leads to a cycle of grave harms that continue to adversely impact women’s and girls’ physical health and economic, political, and social well-being long after the cessation of hostilities. While international humanitarian law protects school buildings from attack, it is time the law recognizes that the right to education exercised in those buildings must be protected too.

Because targeted, discriminatory attacks that deny girls their right to education result in unique and distinct harms, the ICC should recognize the deprivation of girls’ right to education is an inhumane act and a crime against humanity. The crime is also sufficiently grave to support charges of gender-based persecution against armed groups in Mali, Nigeria, Iraq, and elsewhere who adopt similar strategies.

It is worth remembering, after all, that the purpose of prosecuting crimes against humanity and crimes of persecution is to address mass violations of human rights.²⁰⁵ Attacks to deprive girls of the right to education by threat or use of force are an assault on all their rights—to life, to security, to health, to work, to equality, to dignity, and to their future. Where else do these human rights begin but “in small places,” in “the world of the individual person; the neighborhood [she] lives in; the school or college [she] attends.”²⁰⁶ They begin in the classroom amongst her friends, in the pages of her book, and in the pencil in her hand.

United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ Islamic State in Iraq and the Levant, U.N. Doc. S/2018/1031 (Nov. 16, 2018), https://www.un.org/sc/ctc/wp-content/uploads/2018/11/N1837464_EN.pdf.

205. Nilsson, *supra* note 44, at 219.

206. Eleanor Roosevelt, The Great Question, Address at the United Nations (Mar. 27, 1958).