

Conceptualising “grievous religious persecution” as a response to impunity

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Abstract

Particular incidences of religious persecution are, because of their scale, severity, and discriminatory motivation, so heinous that they may be justifiably categorised as inhumane acts of crimes against humanity. Despite this proscription under international criminal law, religion-based persecution remains a serious human rights concern; yet the international criminal justice system appears reluctant to enforce prosecution measures. This paper argues that the continuing pattern of impunity for persecution stems primarily from definitional instability and legal vagueness. To address this problem, this paper formulates a comprehensive and nuanced conceptualisation of the definitional elements of crimes against humanity of religious persecution or, more simply, “grievous religious persecution.”

Keywords religious persecution, international criminal law, human rights, religious freedom, counteracting impunity, crimes against humanity, advocacy.

1. Introduction

Persecution takes place in virtually all parts of the globe and occurs under various political or ideological auspices, reaching varying degrees of intensity.² In recent years, we have seen several instances of mass-discriminatory atrocities committed against communities based on their religious beliefs. Some of these occurrences have justifiably generated a global moral outcry, while others have continued amidst deafening silence.

Though various commendable initiatives have sought to curb religious persecution, these responses may be inadequate or insufficient to properly address serious human rights atrocities. Consequently, it has been argued that as a potentially powerful tool to address the existing culture of impunity for religious persecution, “international prosecution systems, as provided by the International Criminal Court (ICC), are to be resorted to in pursuit of criminal accountability.”³

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² Bielefeldt, H., foreword in Nel, W. N. *Grievous Religious Persecution: A Conceptualisation of Crimes Against Humanity of Religious Persecution*. Religious Freedom Series Vol. 5. VKW: Bonn (2021), 13. Available at: <https://iirf.global/publications/books/grievous-religious-persecution/>.

³ Van Boven, T. *Racial and Religious Discrimination*. Max Planck Encyclopedia on Public International

Unfortunately, despite persecution's universal acceptance under customary international law,⁴ the ICC remains disinclined to enforce prosecutions thereof. Notwithstanding multiple reasonable explanations, this article endorses the argument that the lack of prosecutorial conviction for the crime of persecution stems *primarily* from "definitional instability and judicial unease, notable due to the fact that the crime itself so far falls short of a definitive and comprehensive definition."⁵ Therefore, to advocate for the more effective use of international criminal prosecution mechanisms, we first need to address this legal opacity.

Centred on the *Rome Statute* of the ICC as an institutional and legal framework,⁶ this article endeavours to decisively conceptualise the definitional elements of crimes against humanity of religious persecution or, more briefly, "grievous religious persecution."⁷ The fundamental aim of such a conceptualisation is to improve legal certainty and promote prosecutorial assurance for persecution so as to aid the fight to end impunity.

Apart from addressing the conceptual uncertainties of the crime of persecution, such a clarifying conceptualisation may have various positive effects on the phenomenon of persecution. Greater legal certainty will advance advocacy efforts on behalf of those who are persecuted not only by developing legal, political and diplomatic rhetoric, but also by offering a normative framework that provides greater credibility, objectivity and legal accuracy with which to publicise the plight of religiously persecuted communities.

Finally, such a conceptualisation may contribute to a truly universal framework, encouraging the domestic prohibition of persecution globally, and may serve to interpret the crime of persecution in the *Rome Statute* as well as the draft codification of the *Convention on the Prevention and Punishment of Crimes Against Humanity*.⁸

Law, Wolfrum, R. (ed), (2009), para. 22.

⁴ *Summary of Appeal Judgement (KAING Guek Eav)*, Case File 001/18-07-2007/ECCC/SC, Extraordinary Chambers in the Courts of Cambodia, 3 February 2012, para. 225.

⁵ Fournet, C. and Pégiorier, C. 'Only One Step Away from Genocide': *The Crime of Persecution in International Criminal Law*. *International Criminal Law Review*, Vol. 10, Issue 5 (2010), 713.

⁶ *Rome Statute of the International Criminal Court*, Doc. A/CONF.183/9 of 17 July 1998, in force 1 July 2002, Art. 7(2)(g) read together with Art. 7(1)(h) (*Rome Statute*).

⁷ "Grievous religious persecution" is a term of reference, coined by the writer, to refer to persecutory conduct that satisfies the intensity threshold for crimes against humanity of persecution in terms of the *Rome Statute*, while indicating a focus on religion as the specified discriminatory ground of persecution. The term also distinguishes extreme forms of religious persecution, constituting crimes against humanity, from other 'subsidiary' forms. See Nel, W. N. *International Criminal Accountability for Religious Persecution in Terms of the Rome Statute: A Taxonomy of Crimes against Humanity of Religious Persecution*, doctoral thesis, University of Pretoria (2019), 129-130. Available at: <http://hdl.handle.net/2263/72657>.

⁸ The International Law Commission's (ILC) proposal for a *Convention on the Prevention and Punish-*

The conceptualisation proposed in this article functions as a substantive synopsis of the legal preconditions for establishing the ICC’s subject-matter jurisdiction over conduct constituting grievous religious persecution. It comprises two parts: a systematic analysis of the unique definitional elements, and a proposed definition.

2. The substantive elements of “grievous religious persecution”

The *Rome Statute* defines persecution as follows:

[T]he intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively... against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.⁹

According to the conditions of applicability,¹⁰ persecution may amount to an enumerated inhumane act of crimes against humanity if: (1) the *chapeau* elements are satisfied, which establish the contextual framework,¹¹ and (2) particular definitional elements are fulfilled.

The *chapeau* elements (contextual circumstances) are applicable to all crimes against humanity and reflect the customary international law standard.¹² They are meant to “clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population.”¹³ In addition, the *Rome Statute*

ment of Crimes against Humanity. During October 2021, the Sixth Committee (Legal) of the United Nations debated the codification of the draft articles on crimes against humanity into a convention, available at: <https://sites.wustl.edu/crimesagainsthumanity/convention-text/>. The draft convention uses the exact same definition of “crimes against humanity” as appears in Article 7, including for the crime of persecution, except for three non-substantive contextual changes. See Para. 8 of the UN General Assembly, *First Report on Crimes against Humanity by Sean D. Murphy, Special Rapporteur, at the 67th session (4 May-5 June and 6 July-7 August 2015)*, 2015, A/CN.4/680 and Corr. 1. For more on the Crimes Against Humanity Initiative see: <https://sites.wustl.edu/crimesagainsthumanity/>.

⁹ Art. 7(2)(g), read with Art. 7(1)(h) of the *Rome Statute*.

¹⁰ Art. 7(2)(g) and Art. 7(1)(h) of the *Rome Statute*, read with the ICC, *Elements of Crimes*, 2011, Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010 (*ICC Elements of Crimes*).

¹¹ Cassese, A. et al., *International Criminal Law: Cases and Commentary*, Oxford University Press (2011), 179. The *chapeau* elements for crimes against humanity consist of (1) an attack, which is committed as part of a widespread or systematic practice, (2) directed against any civilian population, and (3) committed with knowledge of the attack. See Art. 7(1) of the *Rome Statute*.

¹² Brady, H. and Liss, R. *The Evolution of Persecution as a Crime Against Humanity, in Historical Origins of International Criminal Law*, Vol. 3, Bergsmo, M. et al. (eds). Torkel Opsahl Academic EPublisher, Brussels (2014), 541, fn 461.

¹³ ICC *Elements of Crimes* (2011), Introduction to Crimes against Humanity, para. 2. In relation to perse-

adds a further contextual circumstance, namely that the attack against the civilian population must be “pursuant to or in furtherance of a State or organizational policy to commit such attack” (the so-called policy element).¹⁴ The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Kupreškić* stated, “In reality, persecutory acts are often committed pursuant to a discriminatory policy or a widespread discriminatory practice,”¹⁵ and inevitably “the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy.”¹⁶ These *chapeau* elements will not be discussed further, instead the focus will be on the definitional elements of persecution.¹⁷

The definitional elements unique to the crime of persecution may be divided into three main categories (with further subdivisions): (1) the *actus reus* (material elements), (2) the *mens rea* (mental elements), and (3) the required threshold of severity.

2.1 The *actus reus* of religious persecution

Persecution’s material element (*actus reus*) captures the inherent consequence of the underlying persecutory conduct (act(s) or omission(s)), which prohibits the causation of a certain result, specifically *severe deprivation of fundamental right on a discriminatory basis*.¹⁸ Hence, persecution is probably best understood as a materially defined (result) crime.

These material elements of persecution will be unpacked in more detail under the following subdivisions:

1. The underlying persecutory acts which constitute the deprivation;
2. The required causal link between the discriminatory conduct and the deprivation of fundamental human rights; and
3. The connection requirement (jurisdictional element).

cution, Elements 5 and 6 of the *ICC Elements of Crimes* (2011), Article 7(1)(h) lists the following two *chapeau* elements: “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 a widespread or systematic attack directed against a civilian population.”

¹⁴ Art. 7(2)(a) of the *Rome Statute* and *ICC Elements of Crimes*, Art. 7, Crimes against humanity Introduction, para. 3.

¹⁵ *Prosecutor v Kupreškić et al.* (Trial Judgement), Case No. IT-95-16-T, 14 January 2000, 248.

¹⁶ *Prosecutor v Kayishema and Ruzindana* (Trial Judgement), Case No. ICTR-95-1-T, 21 May 1999, para. 124.

¹⁷ For a more detailed discussion of the *chapeau* elements, see Mettraux, G. *International Crimes and the Ad Hoc Tribunals*. Oxford University Press (2006); Cryer, R. et al. *An Introduction to International Criminal Law and Procedure*. Cambridge University Press (2007), 234-245; and Zgonec-Rozej, M. (principal author). *International Criminal Law Manual*. International Bar Association (2013), 135-141.

¹⁸ *Prosecutor v Milorad Krnojelac* (Appeal Judgement), Case No. ICTY-97-25-A, 17 September 2003, para. 185. A deprivation of fundamental rights *contrary to international law* implies that it must be generally considered impermissible under international law.

2.1.1 Underlying religious persecutory conduct

Persecutory conduct (acts of deprivation) is based on voluntary (will-controlled) conduct (act(s) or omission(s))¹⁹ which “*may take many forms* with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction” (emphasis added).²⁰ As such, a list of possible persecutory conduct is not comprehensive.²¹ From a legality perspective, this may be problematic. There is, however, “a limit to the acts which can constitute persecution,”²² which parameters are set by the severity threshold discussed below.

Persecutory conduct may be constituted by a *series of acts* (“evaluated not in isolation but in context, by looking at their cumulative effect”)²³ or by a *single inhumane act*.²⁴ The general characteristic of persecutory conduct, whether considered separately or cumulatively, is that its overall consequences “must offend humanity in such a way that they may be termed ‘inhumane’”²⁵ or offensive to humanity,²⁶ and the common element of discrimination with regard to the enjoyment of a basic or fundamental right must be present.²⁷ In other words, an actual discriminatory result (“discrimination in fact”)²⁸ is vital in understanding the prohibited consequences of persecution.

Interestingly, given that the disadvantage to a victim or victim group “is an obvious consequence of a severe form of discrimination,”²⁹ “it is not necessary to have

¹⁹ *Prosecutor v Dario Kordić and Mario Cerkez* (Trial Judgement), Case No. IT-95-14/2-T, 26 February 2001, para. 694; *Prosecutor v Tihomir Blaškić* (Trial Judgement), Case No. IT-95-14-T, ICTY, 3 March 2000, para. 556. A persecutory omission refers to the deliberate failure to take action in circumstances where there is a legal duty resting upon the *de facto* authority to perform a certain type of positive act – for example, if the state abdicates its responsibility to control social hostility discriminately directed at a certain religious community through the deliberate inaction of responsible office bearers.

²⁰ ILC, *Draft Code of Offences against the Peace and Security of Mankind with Commentaries 1996*, Yearbook of the International Law Commission, 1996, vol. II, Part Two, commentary on Art. 18, 46–48, hereinafter *ILC Draft Code* (1996). Available at: <http://www.legal-tools.org/doc/5e4532/>.

²¹ *Kordić and Cerkez* (Trial Judgement), para. 694. See also *Appeal Judgement (Kaing Guek Eav alias Duch)*, Case File 001/18-07-2007/ECCC/SC, Extraordinary Chambers in the Courts of Cambodia, 3 February 2012, para. 227, hereinafter *Duch* (Appeal Judgement).

²² *Prosecutor v Duško Tadić* (Trial Judgement), Case No. IT-94-1-T, ICTY, 7 May 1997, par. 707.

²³ *Kupreškić* (Trial Judgement), paras. 628–633. See also *Kordić and Cerkez* (Trial Judgement), para. 199; and *Prosecutor v Mitar Vasiljević* (Appeal Judgement), IT-98-32-A, ICTY, 25 February 2004, para. 113.

²⁴ Provided that there is “clear evidence of the discriminatory intent”; *Kupreškić* (Trial Judgement), para. 624 (emphasis added).

²⁵ *Kupreškić* (Trial Judgement), para. 622, reiterating para. 615.

²⁶ *Duch* (Appeal Judgement), para. 257. See also Ambos, K. and Wirth, S. *The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000*. Crim LF, 13 (2002), 79.

²⁷ *Tadić* (Trial Judgement), para. 707. See also Cassese et al. (2011), 184.

²⁸ *Krnjelac* (Appeal Judgement) paras. 184–185. See also *Duch* (Appeal Judgement), para. 228; Byron, C. *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*. Manchester University Press (2009), 227.

²⁹ Triffterer, O. and Ambos, K. *Commentary on the Rome Statute of the International Criminal Court*:

a separate act of an inhumane nature to constitute persecution; the *discrimination itself makes the act inhumane*.³⁰ Consequently, “persecution does not necessarily require a physical element [harm].”³¹

Accordingly, persecutory conduct may be defined tersely, as a serious form of discriminatory conduct, to the extent that it may be termed inhumane or offensive to humanity.³² Nevertheless, we can distinguish between the two acknowledged categories of persecutory conduct, *viz.* “inhumane-type” and “other-type” conduct.³³

2.1.1.1 “Inhumane-type” conduct

“Inhumane-type” conduct refers to the commission of one or more of the inhumane acts of crimes against humanity enumerated in Article 7(1) of the *Rome Statute*,³⁴ including an inherently inhumane discriminatory policy, such as apartheid³⁵ or other forms of institutionalised discrimination.³⁶ In this form, “persecution essentially captures an aggravated form of the underlying crime.”³⁷ In other words, “*all of the inhumane acts . . . [of crimes against humanity] amount to severe deprivation[s] of fundamental rights and can constitute persecution,*”³⁸ provided that there is

Observers’ Notes, Article by Article. 2nd ed. Beck Publishers (2008), 257-258.

³⁰ *Tadić* (Trial Judgement), para. 697 (emphasis added). See also *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie, Court of Cassation (Criminal Chamber)*, 20 December 1985, 78 I.L.R. 125, 143.

³¹ *Tadić* (Trial Judgement), para. 707.

³² *Prosecutor v Blagoje Simić et al.* (Trial Judgement), IT-95-9-T, ICTY, 17 October 2003, para. 58. In *Tadić* (Trial Judgement), para. 704, the ICTY noted that persecutory conduct can range “from killing to a limitation on the type of professions open to the targeted group.”

³³ For a more detailed discussion regarding the distinguishable forms of persecutory conduct, see Nel (2021), 63.

³⁴ Ambos and Wirth (2002), 74.

³⁵ Articles 7(1)(j) and 7(2)(h) of the *Rome Statute*. Apartheid consists of “distinct and yet closely related criminal conduct which involves the denial of the human rights and fundamental freedoms of individuals based on an unjustifiable discriminatory criterion.” Art. 18 (f) of the *ILC Draft Code* (1996).

³⁶ Art 18 (crimes against humanity), distinguished between the inhumane acts of persecution and institutionalised discrimination as follows: “Whereas both categories of prohibited acts must be committed in a systematic manner or on a large scale to constitute a crime against humanity under article 18, the sixth category of prohibited acts [institutionalised discrimination] further requires that the discriminatory plan or policy has been institutionalized.” *ILC Draft Code* (1996) 49. The *Rome Statute* includes the crime of apartheid, but not institutionalised discrimination. It seems rational to conclude that since Art. 7(2)(a) requires that the attack against the civilian population be “pursuant to or in furtherance of a State or organizational policy to commit such attack,” the discriminatory plan or policy distinguishable above as institutionalised discrimination is in fact fully encapsulated as part of the crime of persecution.

³⁷ Brady and Liss (2014), 509. If the underlying persecutory conduct is based on an enumerated inhumane act or crime, the prosecution must prove the definitional elements of the underlying act.

³⁸ Ambos and Wirth (2002), 73 (emphasis added).

“clear evidence of the discriminatory intent.”³⁹ For example, the application for an arrest warrant against Laurent Koudou Gbagbo relied on separate charges of murder and rape as the underlying acts of persecution.⁴⁰

Inhumane-type acts are generally physical acts and inherently inhumane in nature, even if only one act is committed.⁴¹ Essentially, this means that a single discriminatory inhumane-type act by a perpetrator entails individual criminal responsibility,⁴² provided that there is “a sufficient nexus between the unlawful acts of the accused and the attack.”⁴³

2.1.1.2 “Other-type” conduct

“Other-type” conduct, meaning conduct other than enumerated inhumane acts of crimes against humanity,⁴⁴ may become persecutorial should it “seek[s] to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or constantly denied.”⁴⁵ Persecutory “other-type” conduct may “constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution... [unless] examined in their context and weighed for their cumulative effect”.⁴⁶

In *Kvočka*, the court concluded that “acts that are *not inherently criminal* may nonetheless become criminal and persecutorial if committed with discriminatory intent.”⁴⁷ For example, in the so-called *Media Case*,⁴⁸ hate speeches were

³⁹ *Kupreškić* (Trial Judgement), para. 624. See also *Tadić* (Trial Judgement), paras. 703-710.

⁴⁰ Situation in the Republic of Côte d'Ivoire, *Decision on the Confirmation of Charges against Laurent Gbagbo*, ICC-02/11-01/11-656-Red, 12 June 2014, Pre-Trial Chamber. Other relevant examples of such ICC cases include, among others, *Prosecutor v Muthaura et al.* (ICC PT. Ch. II, ICC-01/09-02/11-382-Red); *Prosecutor v Ruto et al.* (ICC PT. Ch. II, ICC-01/09-01/11-373); *Prosecutor v Charles Blé Goudé* (ICC-02/11-02/11-186); and *Prosecutor v Bosco Ntaganda* (ICC-01/04-02/06).

⁴¹ In such instances, the enumerated inhumane crimes forming the underlying acts of persecution must satisfy the unique *actus reus* and *mens rea* elements relevant to that specific underlying offence.

⁴² *Tadić* (Trial Judgement), para. 649.

⁴³ Triffterer and Ambos (2008), 176. See also the discussion regarding the reliable indicators of such a nexus.

⁴⁴ For a non-exhaustive list see Triffterer and Ambos (2008), 260-261.

⁴⁵ ILC, 1991 *Draft Code of Crimes against the Peace and the Security of Mankind*, Yearbook of the International Law Commission, 1991, Vol. II, Part One, document A/CN.4/435 and Add.I, 236, hereinafter *ILC Draft Code* (1991).

⁴⁶ *Kupreškić* (Trial Judgement), 248.

⁴⁷ *Prosecutor v Miroslav Kvočka et al.* (Trial Judgement), Case No. IT-98-30/1-T, 2 November 2001, para. 186. See also *Krnjelac* (Appeal Judgement), Separate Opinion of Judge Shahabuddeen, par 6. This position was followed in other ICTY cases, such as *Blagoje Simić et al.* (Trial Judgement), para. 50, and confirmed by the Appeal Court in *Prosecutor v Radoslav Brđjanin* (Appeal Judgement), Case No. IT-99-36-A ICTY, 3 April 2007, paras. 296-297. For a non-exhaustive list, see Triffterer and Ambos (2008), 260-261.

⁴⁸ *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* (Appeal Judgment), ICTR-99-52-A, 28 November 2007, 307-320.

accompanied by calls for genocide and took place in the context of a campaign of persecution against the Tutsi group. Considered cumulatively and in context, these broadcasted speeches themselves constituted “other-type” acts of persecution, equal in gravity to the other enumerated inhumane acts.

In short, underlying persecutory conduct includes sufficiently serious “inhumane-type” conduct or the substantially serious cumulative effect of a course of “other-type” (not inherently inhumane) conduct,⁴⁹ provided that it results in the severe deprivation of a fundamental human right on a discriminatory basis. Either way, the persecutory conduct (act of deprivation) must have been “intentional” but should not be construed so as to require the intention to deprive fundamental rights specifically.

2.1.2 Causation of a severe deprivation of a fundamental right (causation requirement)

The persecutory conduct, whether considered individually or cumulatively, must *result* in a deprivation of a fundamental right.⁵⁰ Inherently, this requires a causal nexus between the persecutor’s conduct and the deprivation (denial or infringement) of fundamental rights on a discriminatory basis.⁵¹ The ICTY articulated this causation requirement by stating that “what is necessary is some form of discrimination that is *intended* to be and *results* in an infringement of an individual’s fundamental rights.”⁵² Consequently, the causal link may emanate from any “violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right.”⁵³

The “intentional”⁵⁴ commission of persecutory conduct provides evidence of causation. This is because engaging in conduct purposefully with the awareness that a certain consequence will occur, or with the purpose of causing a prohibited consequence, provides *prima facie* proof of a causal link between the act and the consequences.⁵⁵

2.1.3 Connection requirement

In terms of the *Rome Statute*, the deprivation of fundamental rights must have been committed in connection with any of the enumerated inhumane *act* or any *crime* within the jurisdiction of the court.⁵⁶

⁴⁹ *Kupreškić* (Trial Judgement), para. 622, reiterating para. 615.

⁵⁰ Triffterer and Ambos (2008), 262.

⁵¹ Cassese, A. (ed), *The Oxford Companion to International Criminal Justice*. Oxford University Press (2009), 454.

⁵² *Tadić* (Trial Judgement), para. 697.

⁵³ *Tadić* (Trial Judgement), para. 697.

⁵⁴ Art. 7(2)(g) of the *Rome Statute*.

⁵⁵ The word “intentional” requires that the act of deprivation must have been committed intentionally but should not be construed to require that the perpetrator intended to deprive human rights specifically.

⁵⁶ Art. 7(1)(h) of the *Rome Statute*. See also Ambos and Wirth (2002), 71; Brady and Liss (2014), 543.

However, such a connection may not be required for all forms of persecutory conduct. Ambos and Wirth explain that the connection requirement establishes two types of persecution:

First, persecution may be an autonomous crime, if it is committed through conduct which is not enumerated among the inhumane acts but it is connected with an enumerated inhumane act. Second, persecution can be an aggravated form of an enumerated inhumane act, if the act is committed with discriminatory intent; a further connection to yet another inhumane act is not required.⁵⁷

The phrase “in connection with any [enumerated inhumane] *act*” should be construed as including any other acts of persecution.⁵⁸ As a result, “if the persecutory conduct is sufficiently widespread or systematic, *the persecutory acts themselves* can constitute the context element.”⁵⁹

The connection requirement was included to ensure that the potentially elastic concept of persecution did not criminalise “relatively trivial acts of discrimination . . . [that] do not form the basis for international criminal liability.”⁶⁰ In addition, the “perpetrator need not be aware that the connection exists.”⁶¹ Consequently, the connection requirement must be interpreted to merely *enforce the jurisdictional threshold* for crimes against humanity,⁶² i.e. an objective contextual link,⁶³ which may also serve to satisfy the “broader attack” requirement.⁶⁴ An objective contextual link entails a clear and obvious connection if the act or crime supports the purpose of the persecution or vice versa.

2.2 The *mens rea* of religious persecution

Persecution may be considered an aggravated crime against humanity, requiring a specific *mens rea* “[i]n addition to the normal mental element relating to the

⁵⁷ Ambos and Wirth (2002), 72.

⁵⁸ Triffterer and Ambos (2008), 221.

⁵⁹ Ambos and Wirth (2002), 72.

⁶⁰ Chertoff, E. *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*. Yale Law Journal (2017), 1109. See also Ambos and Wirth (2002), 73; Brady and Liss (2014), 543-544; Cryer et al. (2007), 260. Such a connection requirement is “not consonant with customary international law”; *Kupreškić* (Trial Judgement), 580. See also Ambos and Wirth (2002) 71. A nexus to an armed conflict is not required.

⁶¹ Ambos and Wirth (2002), 74.

⁶² Ambos and Wirth (2002), 74. “The connection between the act or crime and the persecutory conduct exists if the goal of the persecution is supported by the act or crime or if the persecution supports the commission of the act or crime. A causal link is not required.” Ambos & Wirth (2002), 87.

⁶³ Byron (2009), 234. See also Cryer et al. (2007), 260.

⁶⁴ The connection requirement confirms that persecution can be based on inhumane-type or other-type conduct and must thus be interpreted to be a merely jurisdictional requirement (objective conditions of punishability). Ambos and Wirth (2002), 74.

conduct and the broader context.”⁶⁵ Therefore, persecution’s mental element consists of (1) contextual knowledge, required for all crimes against humanity; (2) the intent to commit the underlying persecutory conduct; and (3) the intent to discriminate.⁶⁶

First, contextual knowledge, derived from the *chapeau* elements, requires that “[t]he perpetrator *knew* that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”⁶⁷ Knowledge of the broader attack within which persecutory acts were committed requires an awareness of the risk that the conduct can be objectively considered to form part of a broader attack.⁶⁸ Knowledge can be actual or inferred from the circumstances.⁶⁹ Second, intentional deprivation implies that the persecutory conduct must have been carried out intentionally or deliberately,⁷⁰ i.e. the perpetrator meant to engage in the underlying persecutory conduct.⁷¹ If the underlying persecutory conduct is based on the discrimination itself, this requirement becomes redundant as the intent to discriminate constitutes an existing mental element.

Third, discriminatory intent, which is the distinctive feature of persecution, necessitates an additional, higher standard of criminal intent, akin to *dolus specialis*.⁷² Because of its significance, this mental element is discussed in more detail below.

2.2.1 The mental element of discrimination

In *Krnjelac*, the Appeals Chamber reiterated that “persecution as a crime against humanity requires evidence of a specific intent to discriminate” on certain specified grounds.⁷³ In relation to the crime of persecution, discrimination relates to “the violation of the right to equality in some serious fashion.”⁷⁴ Importantly, the perpetrator’s state of mind (“will to discriminate”) is essential in this determination of discrimination.⁷⁵

⁶⁵ Cryer et al. (2007), 261. See also Fournet and Pégurier (2010), 716; *Kupreškić* (Trial Judgement), para. 620.

⁶⁶ *Prosecutor v Milomir Stakić* (Trial Judgement), Case No. IT-97-24-T, 31 July 2003, para. 738. See also Cassese et al. (2011), 184-188.

⁶⁷ Element 6 of the *ICC Elements of Crimes* (2011), Art. 7(1)(h), Crime against humanity of persecution.

⁶⁸ *Blaškić* (Trial Judgement), para. 220. See also Ambos and Wirth (2002), 86.

⁶⁹ Triffterer and Ambos (2008), 182.

⁷⁰ *Duch* (Appeal Judgement), paras. 226, 240, 267 and 278. See also Byron (2009), 234.

⁷¹ Art. 30(2)(a) of the *Rome Statute*.

⁷² Brady and Liss (2014), 553. See also Cassese (2009), 453.

⁷³ *Krnjelac* (Appeal Judgement), para. 184.

⁷⁴ *Tadić* (Trial Judgement), para. 697.

⁷⁵ *Krnjelac* (Appeal Judgement), para. 184-185.

Persecution’s unique mental element is “an indispensable legal ingredient of the offence”⁷⁶ and denotes a discriminatory victim selection. As such, it contains two important and interconnected features, namely the *intention to discriminate* on one or more of the *specified discriminatory grounds*.⁷⁷ These two features are discussed in the next two sub-sections.

2.2.1.1 Discriminatory intent

Discriminatory intent implies that the perpetrator targeted specific persons *because* (“by reason”) of their identity.⁷⁸ It is a form of *dolus specialis* (*dol spécial*),⁷⁹ requiring that the perpetrator committed the conduct for an ulterior purpose (aim), or in pursuit of a specific goal, which goes beyond the result of his conduct.⁸⁰ A persecutor’s ulterior purpose for persecution relates to “the discrimination they seek to instil within humankind.”⁸¹

In relation to a particular intent (deliberate will) to discriminate, the accused must consciously intend to discriminate. Awareness (“knowledge”) that one is acting in a discriminatory way is not sufficient;⁸² the discriminatory intent must relate to “the *specific act charged as persecution*.”⁸³ Furthermore, this discriminatory intent need not be the perpetrator’s primary intent with respect to the act but must nevertheless be a significant intent.⁸⁴

A discriminatory intent must be proved, either by way of direct evidence (direct discriminatory intent)⁸⁵ or, more commonly, by way of inferential reasoning (inferred discriminatory intent).⁸⁶

⁷⁶ *Kordić and Cerkez* (Trial Judgement), para. 212.

⁷⁷ *Kupreškić* (Trial Judgement), para. 620. See also Finnin, S. *Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*. ICLQ, Vol. 61, No. 2 (2012), 357.

⁷⁸ Brady and Liss (2014), 553.

⁷⁹ *Stakić* (Trial Judgement), para. 737.

⁸⁰ Finnin (2012), 356.

⁸¹ *Blaškić* (Trial Judgement), para. 227.

⁸² *Prosecutor v Milorad Krnojelac* (Trial Judgement), Case No. IT-97-25-T, 15 March 2002, par 435. See also Cryer et al. (2007), 261. In other words, “It is not sufficient that the act merely occurs within an attack which has a discriminatory aspect.” *Prosecutor v Mitar Vasiljević* (Trial Judgement), IT-98-32-T, 29 November 2002, para. 249.

⁸³ *Krnojelac* (Trial Judgement), para. 436 (emphasis added).

⁸⁴ *Krnojelac* (Trial Judgement), para. 435.

⁸⁵ Brady and Liss (2014), 536. For example, this may occur where an explicit or systematic policy of conscious and religious discrimination existed within a structured group, or in instances where a *de facto* authority subscribes to a deliberate policy of passive toleration consciously aimed at encouraging such religious discrimination and persecution. However, the existence of such a policy cannot be inferred solely from the absence of governmental or organizational action. *ICC Elements of Crimes*, Art. 7, Introduction, footnote 6.

⁸⁶ Brady and Liss (2014), 536. This does not mean that a discriminatory intent may be automatically

A discriminatory intent may be inferred from the surrounding circumstances that provide *prima facie* proof of an apparent pattern of discrimination.⁸⁷ However, a discriminatory intent “may only be inferred from the context if the circumstances surrounding the commission of the alleged acts substantiate the existence of such intent,”⁸⁸ and only to the extent that such inference is the only reasonable conclusion to be drawn.⁸⁹ A discriminatory intent may also be inferred from the persecutor’s active participation and association with either an explicit discriminatory policy by a *de facto* authority (discriminatory policy)⁹⁰ or an overt policy to persecute a particular group though evidence of a pattern of acts committed against a protected group.⁹¹

The intent to discriminate must be understood as a prohibition to single out either an identifiable group or collectivity (community) as such,⁹² or an individual member(s) of a group, “by reason of the identity of the group or collectivity.”⁹³ These aspects of identity are related to the impermissible discriminatory grounds.

2.2.1.2 Enumerated discriminatory grounds

As mentioned, the perpetrator must consciously intend to discriminately select victims based on specified listed grounds.⁹⁴ This implies that the “*decisive reason* to choose a particular victim must have been the impermissible ground.”⁹⁵ In other words, the fact that a chosen victim had a particular characteristic (identity) does

inferred directly from the general discriminatory nature of the persecutory conduct; *Krnjelac* (Appeal Judgement), para. 184, confirmed in *Prosecutor v Tihomir Blaškić* (Appeal Judgement), Case No. IT-95-14-A, 29 July 2004, para. 164, and *Prosecutor v Dario Kordić and Mario Cerkez* (Appeal Judgement), Case No. IT-95-14/2-A, ICTY, 17 December 2004, para. 110.

⁸⁷ *Prosecutor v Laurent Koudou Gbagbo* (ICC) Case No ICC-02/11-01/11, public redacted version of “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo” (30 November 2011) (*Gbagbo Arrest Warrant*), para. 204. See also *Prosecutor v Ahmad Harun and Al Kushayb, Decision on the Prosecution Application under Article 58(7) of the Statute*, 27 April 2007 (ICC-02/05-01/07-1), 74.

⁸⁸ *Krnjelac* (Appeal Judgement) (2003), para. 184. However, such an inferred discriminatory intent may be rebutted by evidence that the accused acted for other reasons or motives.

⁸⁹ *Krnjelac* (Appeal Judgement) (2003), paras. 186 and 202. The context may include the systematic nature of the crimes committed against a specific identity, as well as the general discriminatory attitude of the perpetrator as seen through his behaviour. *Prosecutor v Miroslav Kvočka et al.* (Appeal Judgement), Case No. IT-98-30/1-A, 28 February 2005, para. 460.

⁹⁰ Chertoff (2017), 1107.

⁹¹ *Harun and Al Kushayb* (ICC-02/05-01/07-1), 74-75; *Gbagbo Arrest Warrant*, para. 204.

⁹² Brady and Liss (2014), 550-553. The terms “group” and “collectivity” appear interchangeably; however, a group seems to imply a single or specific entity, whereas a collectivity may include a cumulative set of attacks on a number of groups.

⁹³ Art. 7(1)(h), read together with Art. 7(2)(g) of the *Rome Statute*.

⁹⁴ Brady and Liss (2014), 553.

⁹⁵ Ambos and Wirth (2002), 82 (emphasis added).

not automatically amount to persecution, unless such a victim was deliberately, consciously, and decisively targeted “by reason of” that aspect of his or her identity.⁹⁶ Note that “by reason of” should not be construed as limited only to actual membership in the group,⁹⁷ but may include victims targeted because of their close affiliations, association or affinity with the victim group.⁹⁸

The persecution must target an “identifiable” group or collectivity.⁹⁹ Identifiability in this context implies that the identity of the victim or victim group is sufficiently discernible on one or more of the listed grounds. Identifiability is perceptive, rather than descriptive. In other words, the victim or victim group must “be ‘identifiable’, either based on objective criteria or in the mind of the accused.”¹⁰⁰ Such a subjective identification may occur in one of two ways:

The group or collectivity might therefore also be identifiable by the accused, both as a group or collectivity by virtue of objective criteria, and as a group or collectivity not being the same as the group or collectivity the accused belongs to himself or herself.¹⁰¹

This means that the identity of the victim or victim group may be defined either in a positive manner (“specific discriminatory intent”), or in a negative manner (“antithetical discriminatory intent”).¹⁰² In the former case, the victim is chosen by reason of his or her perceived identity. For example, a person may be targeted because he or she is (or is perceived to be) a Buddhist or orthodox Christian. In the latter case, the victim is chosen by reason of *not* being in the same group as the one to which the accused belongs. For example, a person may be targeted because he or she is not (or is perceived not to be) an atheist or Sunni Muslim.

Importantly, the victims must be identifiable based on one or more of the discriminatory grounds (identity elements) listed in Article 7(1)(h) of the *Rome Statute*.¹⁰³ The listed grounds of identity comprise “fundamental features of hu-

⁹⁶ Ambos and Wirth (2002), 82.

⁹⁷ In *Duch* (Appeal Judgement), the SCC found that the required discriminatory intent is lacking when the perpetrator subjectively erred as to the victim’s membership in the targeted group. Such a restricted view does not seem consonant with the *Rome Statute*; see Nel (2019), 129–130.

⁹⁸ Byron (2009), 230. See also *Prosecutor v Mladen Naletilic aka “Tuta,” Vinko Martinovic aka “Stela”* (Trial Judgement), IT-98-34 T, 31 March 2003, para. 636; Brady and Liss (2014), 430; Acquaviva, G. and Pocar, F. *Crimes against Humanity*. The Max Planck Encyclopedia of Public International Law. Wolfrum, R. (ed). (2011), para. 17.

⁹⁹ Art. 7(1)(h) of the *Rome Statute*.

¹⁰⁰ Triffterer and Ambos (2008), 217.

¹⁰¹ Triffterer and Ambos (2008), 217.

¹⁰² *Tadic* (Trial Judgement), para. 714; *Blaškić* (Trial Judgement), para. 236; *Kvočka* (Trial Judgement), para. 195.

¹⁰³ This expansive list of discriminatory grounds includes political, racial, national, ethnic, cultural, religious and gender grounds, as well as “other grounds that are universally recognised as impermissible under international law.” A detailed discussion of the listed discriminatory grounds falls outside the

mankind, of ‘humanness.’”¹⁰⁴ Moreover, these grounds are not mutually exclusive; “under customary international law the bases for persecution are alternatives and it is sufficient if one discriminatory basis is present.”¹⁰⁵

The remainder of this discussion will focus on persecution “by reason of” the religious identity of the victim.

2.2.1.3 Religious discriminatory intent

Religious discriminatory intent refers to the conscious intent to discriminate against the victim or victim group, “by reason of” their actual or perceived religious identity, or lack thereof, for motives peculiar to the perpetrator.¹⁰⁶ If it is established that the victims were discriminately targeted by reason of their religious identity, such a discriminatory ground (identifying factor) will determine the ground of persecution. In other words, religious persecution is contextualised as such, if religion is “the common feature according to which the victims were singled out by the perpetrators.”¹⁰⁷ The question is whether the victim’s actual or perceived religious identity was the decisive (not necessarily exclusive)¹⁰⁸ factor by reason of which he or she was discriminately targeted.¹⁰⁹

Significantly, “religion” in international human rights law, is best understood in the context of the right to freedom of thought, conscience and religion or belief, guaranteed as a fundamental right.¹¹⁰ In this context, religion is an umbrella term, not limited to traditional notions of faith, but which may include other deep or profound existential views derived from the inner self. Such an expansive interpretation of religion and religious identity is similarly applicable to the conceptualisation of

scope of this paper. See Brady and Liss (2014), 551-552; Triffterer and Ambos (2008), 219-220; Byron (2009), 231-234.

¹⁰⁴ Brady and Liss (2014), 554.

¹⁰⁵ *Tadić* (Trial Judgement), para. 712.

¹⁰⁶ Although the root causes of religious persecution are often anti-religious or religiously motivated, a persecutor’s motivations are *sui generis* in each case and may be complex, manifold and interrelated. For a discussion of the motivational triggers of religious persecution, see Bielefeldt, H. *Freedom of Religion or Belief: Thematic Reports of the UN Special Rapporteur 2010-2016*. Religious Freedom Series of the International Institute for Religious Freedom, Vol. 3, 2nd and extended edition, Bonn (2017); and Bielefeldt, H., Ghanea, N. & Wiener, M. *Freedom of Religion or Belief: An International Law Commentary*. Oxford University Press (2016).

¹⁰⁷ Ambos and Wirth (2002), 77.

¹⁰⁸ Tieszen, C. L. *Towards Redefining Persecution*. Religious Freedom Series: Suffering, Persecution and Martyrdom. Vol. 2 (2010), 164.

¹⁰⁹ Brady and Liss (2014), 550.

¹¹⁰ Most notably, Art. 18 of the UN General Assembly’s *Universal Declaration of Human Rights*, 10 December 1948, Resolution 217 A (III) (UDHR), and Art. 18 of the UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 (ICCPR) with its two Optional Protocols.

religious persecution. Consequently, religious persecution is not limited to persecution on the basis of religion *per se* but includes any deep existential world views.¹¹¹

2.3 The threshold of severity for persecution

Persecution must reach a certain threshold of gravity before it constitutes crimes against humanity.¹¹² This gravity threshold is two-fold and includes (1) the contextual threshold applicable to all crimes against humanity¹¹³ and (2) the intensity threshold for persecution, *viz.* the persecution must result in the *severe* deprivation of a *fundamental* right.¹¹⁴ The latter relates to the material effect of the persecution¹¹⁵ and denotes two distinct features that are discussed below.

2.3.1 Intensity threshold

Not every denial or infringement of a human right is sufficient to qualify as grievous persecution.¹¹⁶ The crux in analysing the intensity threshold lies in determining whether or not the persecutory conduct, whether considered individually or cumulatively and in context, resulted in a *severe* (gross or blatant) deprivation of *fundamental* rights.¹¹⁷

2.3.1.1 Fundamental human rights

Persecution must result in the deprivation of a fundamental right. On one hand, “fundamental” has been interpreted as referring to the basic rights¹¹⁸ laid down in international customary law or treaty law,¹¹⁹ such as those found in the *International Bill of Rights*.¹²⁰ Consequently, it may be “possible to identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity.”¹²¹ Undoubtedly included in this category are the fundamental

¹¹¹ For a more detailed discussion, see Nel (2021), 107-150.

¹¹² The ICC’s jurisdiction is limited to “unimaginable atrocities that deeply shock the conscience of humanity,” per the Preamble of the *Rome Statute*.

¹¹³ The contextual threshold of severity requires that either the persecution itself was carried out in a systematic manner or on a mass scale, or that the persecutory conduct formed part of a broader attack of a widespread or systematic nature.

¹¹⁴ Ambos and Wirth (2002), 74.

¹¹⁵ Triffterer and Ambos (2008), 257.

¹¹⁶ Ambos and Wirth (2002), 74.

¹¹⁷ *Duch* (Appeal Judgement), para. 257. This threshold is similar to the “gross or blatant denial of fundamental rights” standard required by the *ad hoc* tribunals. See Brady and Liss (2014), 545.

¹¹⁸ *ILC Draft Code* (1991), 236.

¹¹⁹ *Blaškić* (Appeal Judgement), paras. 139 and 129.

¹²⁰ This includes the *UDHR* (1948), *ICCPR* (1966), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR, 1966).

¹²¹ Such an interpretation is in “full accordance with the purpose of crimes against humanity, the protec-

right to freedom of religion or belief and the principle of equality on the basis of religion,¹²² which is particularly relevant in situations of religious persecution.¹²³ However, persecution is not rigidly limited to deprivations of fundamental rights only; “[p]ersecution can consist of the deprivation of a wide variety of rights, whether *fundamental or not*, derogable or not.”¹²⁴ In spite of this, the range of rights that may be included is not limitless; though “the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.”¹²⁵

On the other hand, the ICTY in *Kupreškić* noted that in “applying the maxim *ejusdem generis*, it holds that a human rights violation must be at least as grave as one of the other, more concrete enumerated inhumane acts.”¹²⁶ In this way, the tribunal provided for a second possible interpretation of “fundamental” to account for the “ever-changing” forms and “particular ingenuity” with which persecution may be committed in future.¹²⁷

2.3.1.2 Severe deprivation

The nature and gravity of the deprivation must be *severe* (substantial), similar to “gross or blatant denials of fundamental human rights.”¹²⁸ Severity “does not refer to the character of the act of persecution as such. . . . It refers to the character of the deprivation of fundamental rights which could be explained as a requirement of severity of the discrimination.”¹²⁹ In other words, regardless of the nature or form of the persecutory conduct, the overall discriminatory consequence on fundamental rights must offend humanity in such a way that it may be termed inhumane.¹³⁰ It is not necessary that the perpetrator intended to *severely* deprive victims of their fundamental rights.¹³¹

tion of human rights, and also with article 7(1)(g) of the *Rome Statute*.” *Kupreškić* (Trial Judgement), para. 621.

¹²² Art. 3 of the UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UNGA Res 36/55, 73rd plenary meeting, 25 November 1981 (*Religious Discrimination Declaration*): “[D]iscrimination between human beings based on grounds of religion or belief constitutes an affront to human dignity ... and shall be condemned as a violation of human rights and fundamental freedoms.”

¹²³ Although religious persecution is often understood as and equated with the denial of any of the rights of religious freedom, this is not a definitional prerequisite.

¹²⁴ *Stakić* (Trial Judgement), para. 773 (emphasis added).

¹²⁵ *Kupreškić* (Trial Judgement), para. 618.

¹²⁶ *Kupreškić* (Trial Judgement), para. 620.

¹²⁷ *Kupreškić* (Trial Judgement), para. 623.

¹²⁸ Cassese et al. (2011), 187. See *Kupreškić* (Trial Judgement), para. 621; *Blaškić* (Appeal Judgement), para. 135; and *Kvočka* (Appeal Judgement), para. 323.

¹²⁹ Triffterer & Ambos (2008), 257.

¹³⁰ Cassese et al. (2011), para. 622.

¹³¹ ICC *Elements of Crimes* (2011), General Introduction, para. 4 notes, “With respect to mental elements associated with elements involving value judgement, such as those using the terms ‘inhumane’ or ‘severe,’ it is not necessary that the perpetrator personally completed a particular value judgement,

Evidently, the exact parameters of “severe” and “fundamental” remain flexible.¹³² Ultimately, it will be the ICC’s responsibility to interpret these two distinct features of the intensity threshold for persecution on a case-by-case basis.

2.4 Religious persecution taxonomy checklist

The conceptualisation of the definitional elements of “grievous persecution” set out above can be summarised and presented as a flowchart (see p. 103 following). This checklist poses a series of sequential polar questions with the intention of establishing whether each of the definitional requirements has been met. Such a checklist may be of great practical use for those working with persecuted communities to ascertain whether such a situation might factually constitute grievous religious persecution.

3. Proposed definition of “grievous religious persecution”

A universally accepted definition of persecution does not exist and has even been described as “elusive” and “protean.”¹³³ However, based on the conceptualisation outlined above, the following definition of the crime of grievous religious persecution is recommended:

The deliberate and unjustifiable persecutory conduct by a persecutor based on an explicit or implied policy of conscious and intentional discrimination against a particular civilian group, decisively targeted by reason of their religious identity (or lack thereof), which resulted in the severe deprivation of the fundamental human rights of those persecuted, is connected to any jurisdictionally relevant inhumane act or core crime, and knowingly forms part of a widespread or systematic attack.

4. Conclusion

The crime of persecution is evidence of mass or systematic inhumanity on the greatest scale¹³⁴ and has been identified as an enumerated inhumane act of crimes against humanity under customary international law.¹³⁵ As a result, international criminal prosecution mechanisms constitute a justifiable and appropriate way to pursue criminal accountability and thus a potentially powerful tool in countering impunity for grievous persecution.¹³⁶

unless otherwise indicated.”

¹³² For a more detailed discussion of which rights are fundamental in nature and what constitutes a severe deprivation of such rights, see Nel (2019), 135-141.

¹³³ Rempell, S. *Defining Persecution*. Utah Law Review, Vol. 2013, No. 1, 3.

¹³⁴ *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*. International Military Tribunal (IMT), Judgment of 1 October 1946, 247.

¹³⁵ *Summary of Appeal Judgement (KAING Guek Eav)*, para. 225.

¹³⁶ Van Boven (2009), para. 22.

However, despite the extensive acceptance and great prominence in human rights discourse of this problem,¹³⁷ religious discrimination and persecution remain a major human rights issue of national and international concern.¹³⁸ In large part, this may be because the crime of persecution is plagued by definitional instability and legal vagueness.

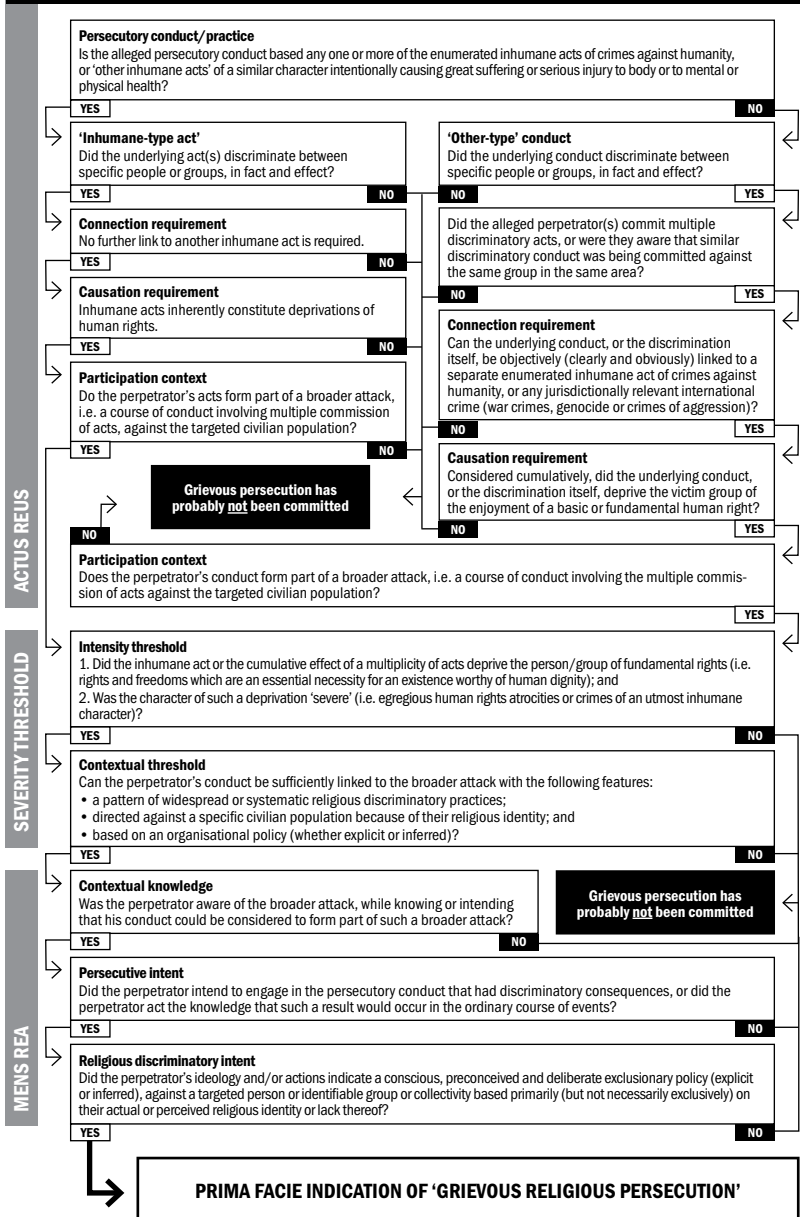
In speaking to this legal obstacle and to attain greater legal certainty regarding the scope and application of persecution in international criminal justice, this paper has addressed the conceptual uncertainties of persecution by way of a proposed conceptualisation within the context of the *Rome Statute*. The taxonomy comprised two parts: a systematic analysis of the unique definitional elements of “grievous religious persecution” and an attendant definition. This conceptualisation may be used as a functional ‘law-based barometer’ to assess factual evidence of contemporary situations of alleged religious persecution, in order to ascertain whether such situations could be designated as crimes against humanity.

Ultimately, the aim of this conceptualisation is to improve the enforceability of prosecution mechanisms so as to address the existing impunity for “grievous religious persecution.” It may also enhance diplomatic and legal advocacy efforts and encourage further proscriptions of the crime of persecution at the national, regional and international levels. Without accountability, there can be no lasting peace and no restorative justice for those persecuted, and we would be no closer to religious pluralism.

¹³⁷ Kupreškić (Trial Judgement), 597.

¹³⁸ Van Boven (2009), para. 22.

CHECKLIST TO DETERMINE ‘GRIEVOUS RELIGIOUS PERSECUTION’



Werner Nicolaas Nel

Grievous Religious Persecution:

A Conceptualisation of Crimes against
Humanity of Religious Persecution

shall be equal before the law

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