Persecution as a Crime Under International Criminal Law

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INTRODUCTION

This article attempts to explore the origin and evolution of the concept of persecution as a crime against humanity in international law. In particular, I will focus on the latest jurisprudence on this matter and will try to highlight the major challenges ahead for tribunals – both domestic and international – when faced with charges of this kind.

Due to the sensitivity of the concept, a terminological remark is in order when discussing the issue of "crimes against humanity." The term "crimes," in the expression "crimes against humanity," clearly refers to the grave acts committed which require penal sanction. The meaning of the term "humanity," however, is not as straightforward. "Humanity" may be understood as referring to either all human beings – humankind – or to the characteristic of being "human" – humanness.[1] This is, in a sense, a fortuitous ambiguity, because crimes against "humanity" can then be interpreted to refer both to humankind and to the quality of being human. As such, crimes against humanity are currently considered to be particularly odious offenses because they constitute a serious attack on human dignity or a grave humiliation of one or more human beings. In order to fully understand these offenses, it is important to analyze their origin and development.

The idea that some elementary principles of humanity should be adhered to in all circumstances, even during armed conflicts, has surfaced in various periods throughout history. While international law has historically not addressed obligations of individuals, international crimes have signaled a gradual but steady shift from this traditional stance. Today, the Tribunal for the former Yugoslavia (ICTY) and its sister institution, the International Criminal Tribunal for Rwanda (ICTR), carry on the legacy of the historic Nuremberg trials following the Second World War by, among other things,

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1. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 101-103 (2nd ed. 2008); David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 86-93 (2004); *see also* LE CRIME CONTRE L'HUMANITÉ (Bruno Gravier & Jean-Marc Elchardus eds., 1996) (reflecting an interdisciplinary approach, particularly in the introduction to the volume and in the contribution by Mireille Delmas-Marty).

challenging impunity for genocide and large-scale persecution. In fact, as one commentator put it, "just as genocide has become the offence which represents what happened in Rwanda during 1994 so the crime against humanity of persecution has come to typify what happened in the territory of the former Yugoslavia."[2] Moreover, the international community is now endowed with another institution, the permanent International Criminal Court, based on the ICC Statute signed in Rome in 1998.[3] While important countries, such as the United States, Russia, China, India, Pakistan, and Israel, as well as most Arab states, have not yet ratified this treaty, it is important to consider its impact on the fight against persecution, a prime example of a crime against humanity.

I. HISTORICAL DEVELOPMENTS

Persecution was first identified as a crime against humanity after the Armenian massacres of 1915. Although initially there were calls to try those responsible for the appalling crimes against the Armenian population, no provision was made in the final peace negotiations for those responsible to be brought to justice. The Versailles Peace Conference created a Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties, and, even though no prosecutions resulted, language in the Commission's report did advance to some degree the development of the concept of crimes against humanity. The two American members of the panel objected to even that modest effort, arguing that "the laws and principles of humanity are not certain, varying with time, place, and circumstance, and accordingly, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity."[4] However, during the Second World War, the Allied Powers decided that high-level German officials should be tried for crimes committed during the conflict not only against enemy combatants and civilians, but also for the massacres and other violent conduct against targeted groups within the German populace. But the latter crimes could not be considered criminal under the then-applicable laws of war, which essentially protected only the population located in enemy territory. Thus, the London Charter establishing the International Military Tribunal for the trial of major war criminals of the European Axis included

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2. William J. Fenrick, *The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY*, 32 NETHERLANDS YEARBOOK OF INT'L L. 89, 89 (2001).

3. Rome Statute of the International Criminal Court, *entered into force* July 1, 2002, A/CONF.183/9, *available at* http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf.

4. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 36-37 (William S. Hein & Co. 2006) (1948) (quoting a Memorandum of Reservations dated Apr. 4, 1919).

a provision on crimes against humanity. These crimes against humanity included persecution, but also murder, extermination, enslavement, deportation, and other inhumane acts.[5]

The Nuremberg Charter therefore broke new ground, establishing persecution as a specific crime against humanity. The Nuremberg Charter, however, required that persecution be committed in association with a crime within the jurisdiction of the Nuremberg Tribunal. The practical consequence of this provision was that the Tribunal was effectively prevented from entering convictions for crimes against humanity not committed in association with the war itself. As a result, although the prosecutor tendered a significant amount of evidence about the pre-1939 persecution of Jews and other groups, no convictions were entered for these acts. Nonetheless, since crimes against humanity included crimes committed by Germans against other Germans within the boundaries of Germany, the Nuremberg Charter represented a turning point in international relations, albeit somewhat limited by the jurisdictional requirement just mentioned.

II. PERSECUTION IN ICTY JURISPRUDENCE

Even though persecution had been firmly established under international law as a crime against humanity, it was not until the conflicts in the former Yugoslavia and the subsequent prosecutions by the Tribunal that the substance of that crime was truly developed.[6] The crime of persecution was addressed in *Tadić*,[7] the Tribunal's very first case. In the judgment, the Trial Chamber recognized that, while the crime of persecution was included in the Nuremberg Charter, it had never been clearly defined in international criminal law, nor was it known in the world's major criminal justice systems.[8] The

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5. Charter of the International Military Tribunal art. 6, 59 Stat. 1546, 1547 (crimes against humanity are "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."), *available at* http://www.stephen-stratford.co.uk/imtcharter.htm#Article%206.

6. *See* Ken Roberts, *Striving for Definition: The Law of Persecution from its Origins to the ICTY*, *in* THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE 257 (Hirad Abtahi & Gideon Boas eds., 2006).

7. Prosecutor v. Tadić, Case No. IT-94-I-T, Opinion and Judgment (May 7, 1997), *available at* http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf. For a table that is useful in locating the opinions referred to in this article, see WILLIAM A. SCHABAS, THE UN INTERNATIONAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE x-xlv (2006).

8. *Tadić* ¶694 ; *see* Roberts, *supra* note 6, at 270.

Tribunal has further developed the elements of the offense, with the ICTR also making important contributions to the development of this crime.

Persecution is now defined as follows. The actus reus of the crime consists of an underlying act which discriminates in fact and must deny a fundamental human right laid down in international law. The mens rea of persecution is discrimination on one of the listed grounds (at the ICTY, these are political, racial and religious grounds).[9] There is little controversy about this latter aspect from a legal standpoint, although prosecuting authorities find it difficult to prove this element beyond a reasonable doubt.

Now, about fifteen years after their establishment, both Tribunals are in the process of drawing their proceedings to a close. All trials are scheduled to be completed by 2008-2009, with all appeals from trial judgments to be finished by 2011. The ICTY has indicted 161 persons, of which only two remain at large. To date, proceedings against 116 persons have been concluded, while 45 individuals are still involved in active proceedings. The Tribunal has considered the crime of persecution in most of these cases at both the trial and appellate levels. With each decision, further substance and clarity has been added to the contours of the crime. This improvement in understanding the crime of persecution and its various manifestations provides a significant contribution to the legal development of crimes against humanity in general. It will likely serve as an important source of guidance for both national and international courts in addressing this complex and heinous crime.

As you might imagine, one of the most complex issues in relation to persecution is identifying the underlying acts it encompasses. Although the ICTY Statute was modeled on the Nuremberg Charter, the restriction mentioned before – that persecution be committed in association with another crime reached by the Statute – has been explicitly rejected by the ICTY. The Tribunal instead clarified that the crime of persecution, thanks to its development in the fifty years between Nuremberg and the first ICTY cases, consists of the intentional, gross, or blatant denial, on discriminatory grounds, of a fundamental right laid down in international customary or treaty law.[10] That is, persecution is not limited to crimes enumerated within the Statute of the ICTY, but encompasses other acts in violation of a fundamental right, as

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9. Prosecutor v. Krnojelac, ICTY-97-25-A, Judgement ¶185 (Sept. 17, 2003), *available at* http://www.icty.org/x/cases/krnojelac/acjug/en/krn-aj030917e.pdf.

10. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement ¶621 (Jan. 14, 2000), *available at* http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf; Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment ¶434 (Mar. 15, 2002), *available at* http://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf; Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgement ¶323 (Feb. 28, 2005), *available at* http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf.

long as the persecutory acts reach the same level of gravity as other crimes against humanity – for example, murder, extermination, enslavement, deportation, imprisonment, and torture.[11] Thus, it has finally been recognized that persecution can consist of the deprivation of a wide variety of rights, including attacks on political, economic, and social rights, as well as acts of harassment, humiliation, and psychological abuse.

The importance of this expanded definition is clarified when considering situations such as the persecution of Jews and other groups in the 1930s, before the Second World War and exterminations began. If the underlying acts of persecution were only those acts that were also crimes under international law, the result would follow that many heinous discriminatory acts would not be considered persecution – a result at odds with contemporary awareness and basic humanitarian principles accepted at the international level.

Considering this example in detail, recall that on September 15, 1935, one of the infamous Nuremberg laws stripped German Jews of voting rights. On October 21, 1937, Himmler issued a decree providing for the arrest of German Jews who had emigrated abroad but had decided to come back to Germany. Between July and December 1938, legislative and executive provisions limited Jews' access to various professions, barred Jews from schools, and imposed a collective tax of a billion Deutschemarks on Jewish communities. These acts, and I am mentioning only a few examples among a multitude of outrages, were not punishable before the Nuremberg Tribunal because they were not connected to the war and had not been committed in connection with other crimes within its jurisdiction. Even those acts that were committed after the Second World War began, such as the gradual imposition from October 1939 onwards of the requirement to wear a yellow star, would not have been considered "serious" enough in that legal context. While, in and of itself, the requirement to wear an identifying symbol may not be considered such a serious violation of a fundamental human right so as to amount to a crime, in the specific circumstances, few would disagree that it was intended to provoke – even to facilitate and to instigate – discrimination against Jews by security officials and by the population at large. Nobody would deny, I think, that such conduct should be considered a persecutory act. Similarly, one must consider policies such as discriminatory employment dismissals, denial of public services, and denials of justice as persecutory acts, particularly when committed in conjunction with one another. These policies, I would add, are exactly the ones we have found to have been implemented in many regions of the former Yugoslavia in preparation for

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11. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement ¶135 (July 29, 2004), *available at* http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf.

ethnic cleansing there. They could even be considered typical warning signs that persecution through more serious criminal acts is likely to follow.

I strongly believe that, as the ICTY has stated, the guiding principle in determining whether an act, such as one of harassment or humiliation, may amount to persecution is not a function of its apparent cruelty, but of the discriminatory effect the act seeks to encourage within the general populace. This is undoubtedly true now, although it was not so at the time of the Nuremberg Tribunal, due to the early stage of the development of crimes against humanity in general and of the crime of persecution in particular.

III. HATE SPEECH AS PERSECUTION

I know that I will spark an animated debate with this example, but in relation to persecution and the concepts just outlined, it would be useful to consider the recent judgment by the ICTR Appeals Chamber in *Prosecutor v. Nahimana* (the "*Media Case*").[12] The defendants are two individuals who founded a private radio company in Rwanda, and the editor-in-chief of a newspaper. The three men were accused of participating in the 1994 genocide through the control they exerted over the media. After lengthy and complex proceedings, which involved a number of legal and factual issues I need not explore here, they were convicted for, inter alia, inciting or aiding and abetting genocide, committing persecution, and aiding and abetting extermination through radio broadcasts and newspaper articles originating from their media outlets.

In its judgment, the Appeals Chamber clarified that "hate speech," infringing as it does the right to security and human dignity, may under certain circumstances amount to a persecutory act rising to the level of required gravity, either on its own or when taken in conjunction with other similar infringements.[13] In other words, hate speech targeting a population on one of the prohibited discriminatory grounds violates the right to respect for human dignity of the members of that group and thus constitutes "discrimination in fact." Hate speech, such as in the *Media Case*, which is accompanied by incitement to commit genocide and is part of a massive campaign of other discriminatory acts – including acts of violence against property and persons – without any doubt does rise to the required level of gravity so as to amount to persecution. This legal finding is, in my view, firmly grounded in existing limitations on freedom of expression in

12. Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Judgement (Nov. 28, 2007).
13. *Nahimana*, Judgement ¶987.

international law.[14] It has been argued that this notion conflates hate speech with incitement to violent crimes and makes protected speech an element of the crime of persecution.[15] I disagree with such a view. With all due respect, I believe that this approach does not, among other things, take into account the lack of consensus at the international level about what protection should be given to abusive language when it infringes upon the right to human dignity, and it does not adequately address the power of propaganda to incite when it takes place in situations of extended discrimination with an ethnic component. Hate speech may, and in the *Media Case* it did, amount to an underlying act of persecution.[16]

On the other hand, the existence of stringent general requirements for crimes against humanity, such as the need for a widespread or systematic attack against the civilian population, warrants the conclusion that offensive or otherwise disagreeable speech will generally not form the basis for a conviction of this type. Only in extreme situations will some types of speech be considered underlying acts of persecution.

IV. INTERACTION BETWEEN PERSECUTION AND THE LAWS OF WAR

Another interesting facet of persecution that has been analyzed at length by the Trial Chambers and the Appeals Chamber of the ad hoc Yugoslavia and Rwanda Tribunals is the interaction between persecution and the laws and customs of war. This topic has not been analyzed much by scholars and commentators, but is in my opinion an extremely promising area of inquiry. I will touch upon only a few examples.

Considering, for instance, what acts belligerents are permitted by the laws of war to commit during an armed conflict, could an accused use this body of law as a defense in proceedings related to crimes against humanity occurring

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14. *See, e.g.*, Faurisson v. France, Communication No. 550/1993, UN DOC. CCPR/C/58/D/550/1993, at ¶9.6 (Human Rights Committee 1996), *available at* http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/4c47b59ea48f7343802566f200352fea?Opendocument ("To assess whether the restrictions placed on the author's freedom of expression by his criminal conviction were applied for the purposes provided for by the [International] Covenant [on Civil and Political Rights], the Committee begins by noting, as it did in its General Comment 10 that the rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of other persons or to those of the *community as a whole*. Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible under article 19, paragraph 3(a), of the Covenant.") (emphasis in original).

15. *Nahimana*, Partly Dissenting Opinion of Judge Theodor Meron ¶13.

16. *Nahimana*, Partly Dissenting Opinion of Judge Fausto Pocar ¶3.

during a war? In other words, could an individual accused of, inter alia, dismissing persons on a discriminatory basis as part of a systematic attack against the civilian population plead military necessity as a valid defense? Such a case has quite recently surfaced before the ICTY. In April 2007, the Appeals Chamber issued its judgment in the *Brđanin* case touching upon this question.[17] Radoslav Brđanin was a member of the Bosnian Serb leadership intent on creating a separate Bosnian Serb state, from which most non-Serb Bosnians would be permanently removed. He argued that Article 27 of the Fourth Geneva Convention allowed for the termination of employment of Bosnian Muslims and Croats for security reasons. Article 27 includes the statement that "the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."[18] Brđanin essentially averred that firing dozens of Bosnian Muslims amounted to a legitimate security measure in wartime. The Appeals Chamber upheld the dismissal of Brđanin's claim by the Trial Chamber, confirming that concerns of "control and security" cannot be considered outside of the context within which those terminations had taken place – in other words, they should be considered in light of the illegal plan to ethnically cleanse the territory claimed by the Bosnian Serb authorities. It was clear from the text of the decisions by local authorities that the real reason for the dismissals was the ethnicity of the individuals involved. The Appeals Chamber essentially explained that, when it is proven that a transfer was made on discriminatory grounds, authorities may not attempt to justify it by invoking control and security concerns. This is of course a very important statement, which makes it clear that acts in furtherance of persecutory policies may not be cloaked by seemingly lawful measures in order to avoid individual criminal responsibility. A truly independent judge in such circumstances will have to assess the real import of the measures and their intended outcome, as well as incidental effects on the victims, and come to a conclusion that does not necessarily bow in deference to the exercise of military or civilian executive power.

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17. Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgment (Apr. 3, 2007), *available at* http://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf.

18. Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *available at* http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5, at art. 27.

V. PERSECUTION IN THE ICC STATUTE

Article 7 of the ICC Statute lists as crimes against humanity, with minor variations, the acts enumerated in the 1996 Draft Code and in the ICTY and ICTR Statutes.[19] It explicitly defines persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."[20] The ICC Statute, however, defines some aspects of crimes against humanity, and therefore also of persecution, differently than the Statutes of the ad hoc Tribunals or customary international law. First, this provision only applies if the perpetrator engages in a course of conduct involving the multiple commission of covered acts while pursuing or furthering "a State or organizational policy to commit" an attack against a civilian population.[21] This places limits on existing customary international law. Second, the discriminatory grounds listed by the ICC Statute are not limited to political, racial, or religious grounds, but encompass also national, ethnic, cultural, gender, and "other grounds that are universally recognized as impermissible under international law."[22] This is an expansion of the law as stated in the ICTY and ICTR Statutes, and should be welcomed despite its vagueness and the possible difficulty in application.

The ICC Statute makes one further departure from existing international law, and one that is very relevant to the subject of this article. Persecution under the ICC Statute must be committed in connection with other acts or crimes within the jurisdiction of the ICC.[23] Thus, it would seem that Article 7 of the ICC Statute might signal a reversion to the idea, adopted in the Nuremberg Charter, that persecutory acts may only be punished if they are committed in connection with other acts or crimes within the Court's jurisdiction. Once again, policies of discrimination not specifically linked to war crimes, genocide, or other crimes against humanity might go unpunished. But will it be so? I think it will be interesting to see how the first cases before the ICC involving persecution are tried and adjudicated. While it is true that the Statute is a treaty and that State parties will consider its wording as binding in relation to the definition of crimes punishable under the Statute, I wonder whether Article 21 does not allow greater flexibility in the interpretation of the Statute in accordance with customary international law.

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19. *See* Rome Statute, *supra* note 3, at art. 7.
20. *Id.* art. 7(2)(g).
21. *Id.* art. 7(2)(a).
22. *Id.* art. 7(1)(h).
23. *Id.*

Article 21(1) of the ICC Statute provides that the Court shall apply:

> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict . . . .[24]

Subsection (b) no doubt requires judges to consider customary international law, which lacks the requirement of a link with other crimes for persecution, when assessing individual criminal responsibility of accused persons. While of course judges will not apply rules clearly inconsistent with the wording of the Statute, it has yet to be determined what the Statute means when it states that customary international law should be applied "where appropriate." This is particularly so in cases where international law takes the form of jus cogens – peremptory rules that are non-derogable by treaty or by "simple" custom. In such instances, the Court might decide that the ICC Statute has restricted the jurisdictional scope of the applicable law on crimes against humanity. However, the Court might rule to the contrary, finding that it is bound by the current developments in international customary law because it would be "appropriate" – within the meaning of Article 21 – to apply this law together with the Statute. Only practice will tell how the interaction will play out.

Another interesting issue is the exercise of the Court's jurisdiction vis-à-vis crimes committed in States that have not ratified the Statute. For example, the situation in Darfur is under investigation, after it was referred to the ICC by the Security Council,[25] but Sudan is not a party to the ICC treaty. In such circumstances, will the Court apply international law only as set out in the Statute, considering that the Statute is not binding on States like Sudan, or will the judges start applying customary international law, arguably applicable to all States and other subjects of international law, regardless of whether they have ratified the Statute? If the Court is to apply custom in relation to States like Sudan, will it apply it even when it is in contrast with the letter of the Statute – for example, in relation to the connection between persecution and other criminal acts? Once again, only practice will tell.

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24. *Id.* art. 21(1).

25. Security Council Resolution 1593 (2005), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement.

CONCLUSION

The current understanding of crimes against humanity is essentially a product of the activity of the ICTY and the ICTR in the past fifteen years. The ad hoc Tribunals have indeed clarified many previously contentious aspects of the concept of crimes against humanity in general, as well as the definition and application of various specific crimes, in particular persecution. These notions have, by now, undoubtedly become well established in customary international law and will be further applied and considered by international and domestic tribunals in the future.