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MASTER'S THESIS

Persecution: a crime against humanity in the Rome Statute of the International Criminal Court

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PERSECUTION:

A CRIME AGAINST HUMANITY

IN THE ROME STATUTE OF THE

INTERNATIONAL CRIMINAL COURT

Jessie Chella

August 2004

Certificate

This thesis is submitted to Bond University in fulfilment of the requirements for the Master of Laws research degree.

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

Signature……..…….……. Date……..

SUMMARY

This thesis analyzes the technical definition of the crime of persecution for the purpose of prosecutions at the International Criminal Court. The provisions on the crime of persecution are found in Article 7(1)(h) and Article 7(2)(g) of the Rome Statute and Article 7(1)(h) of the Elements of Crimes. Lack of clarity is a difficulty with these provisions. The writer analyzes the provisions by pooling together primary and secondary sources and drawing on the customary international law that has emerged from the *ad hoc* International Criminal Tribunals established between 1945 and 2003.

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LIST OF ACRONYMS AND ABBREVIATIONS

CCL 10	Control Council Law No. 10
CPA	Coalition of Provisional Authority
Draft Code	Draft Code of Offences Against the Peace and Security of Mankind
ECCC	Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea
ECCC Special Law	The 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
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute for the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Republic of Yugoslavia
ICTY Statute	Statute for the International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IST	Iraqi Special Tribunal for the Prosecution of Crimes Against Humanity
IST Statute	Iraqi Statute for the Iraqi Special Tribunal for the Prosecution of Crimes Against Humanity

Nuremberg Charter	Charter for the International Military Tribunal
Panels of Judges	Panels of Judges with Exclusive Jurisdiction Over Serious Criminal Offences Established within the District Courts in East Timor
Preparatory Commission	Preparatory Commission for the International Criminal Court
Regulation No. 2000/15	Regulation No. 2000/15 for the Panels of Judges with Exclusive Jurisdiction Over Serious Criminal Offences Established within the District Courts in East Timor
Rome Conference	Conference of Plenipotentiaries held in Rome from 15 June to 17 July 1998
SCSL	Sierra Leone Special Court
SCSL Statute	Statute of the Special Court for Sierra Leone
Tokyo Charter	Charter for the International Military Tribunal for the Far East
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN/Cambodia Agreement	The Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea
UNDP	United Nations Development Program
UNTAET	United Nations Transitional Administration for East Timor

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1946

19 January, Charter of the International Military Tribunal for the Far East

1993

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1994

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1998

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1999

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2000

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1965

21 December, International Convention on the Elimination of All Forms of Racial Discrimination

1967

7 November, Declaration on the Elimination of Discrimination Against Women

1966

16 December, International Covenant on Civil and Political Rights

16 December, International Covenant on Economic, Social and Cultural Rights

1973

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1976

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1978

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1979

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1981

25 November, Declaration on the Eliminations of All Forms of Intolerance and Discrimination Based on Religion and Belief

1991

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1992

18 December, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

1996

6 May-26 July, International Law Commission 1996 Draft Code of Offences Against the Peace and Security of Mankind

STYLISTIC GUIDELINES

The writer advises that the reader bear in mind the following stylistic guidelines when reading this thesis:

- The symbols * + # which appear in the text and footnotes of this thesis are used to differentiate the writer's own footnotes from those that appear in the Elements of Crimes drafted by the Preparatory Commission.
- The word "Judgment" is deliberately capitalized in this thesis to comply with the way in which the *ad hoc* Tribunals use the word.
- There are different spellings used for the word "Judgment". In the majority of instances:
    - The ICTY uses "Judgment";
    - The ICTR uses "Judgement";
    - The ICC and the Panels of Judges use both spellings.
- The writer uses the phrase "international judicial bodies" to collectively describe the combination of Panels of Judges, Extraordinary Chambers, Special Courts, and Special Tribunals etc.

1. INTRODUCTION

I. THE SCOPE OF THIS THESIS

Article 7 of the Rome Statute for the International Criminal Court (hereafter referred to as ICC) recognizes persecution as a crime against humanity. Article 7 defines 'crimes against humanity' as: "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." The statutory provision identifies 11 enumerated acts which can amount to crimes against humanity. Pursuant to Article 7(1)(h) these include: "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph (Article 7) or any crime within the jurisdiction of the Court." In addition, Article 7(2)(g) of the Rome Statute 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."

This is the first time the crime of persecution has been defined in an international instrument. The difficulty with the definition is that it is not clear. The drafters appear to have left some unanswered questions which the writer will attempt to address in this thesis. For example, how does one determine the severity of deprivation? By what means could deprivation be carried out – physical, mental, or emotional? What are fundamental rights? On what other grounds than those stipulated in Article 7(1)(h) of the Rome Statute can the crime of persecution be

committed? What does the phrase 'by reason of the identity of the group or collectivity' mean? What factors determine or distinguish a group or collectivity?[1]

In addition to the Rome Statute provisions pertaining to persecution, there are also the Elements of the crime of persecution. Delegates who attended the 1998 Rome Statute deliberations, commonly referred to as the Rome Conference, were in agreement that it was necessary for a Preparatory Commission to draft the Elements of Crimes for the crimes recognized by Rome Statute: genocide, crimes against humanity and war crimes.[2] There are 6 Elements that constitute the crime of persecution; these are stipulated in Article 7(1)(h) of the Elements of Crimes. They are:

Element 1	The perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights.
Element 2	The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
Element 3	Such targeting was based on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognised as impermissible under international law.
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.[+]
Element 5	The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
Element 6	The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

[1] See questions raised by Cherif M. Bassiouni in Cherif M. Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd ed) (The Hague: Kluwer Law International, 1999) at 330.

[2] Knut Dörmann, with contributions by Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003) at 1-2, 8.

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

[+] "It is understood that no additional mental element is necessary for this element other than that inherent in element 6."

The aim of this thesis is to analyze of the technical definitions of persecution found in these two significant international instruments, that is, the Rome Statute and the Elements of Crimes.

The ordinary meaning of the term 'persecution' differs from the technical meaning established in the Rome Statute and the Elements of Crimes. For example, Cherif M. Bassiouni, referring to definitions found in dictionaries from around the world, compiled the following definition of the terms 'persecute' or 'persecution':

> State action or policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator. [3]

Also, in discussions held at the International Law Commission (hereafter referred to as ILC) for the 1991 Draft Code of Offences Against the Peace and Security of Mankind (hereafter referred to as Draft Codes), the observation was made that the non-legal dictionary term 'to persecute' is: "to annoy with persistent or urgent approaches, to pester."[4]

There is no doubt that the term persecution in the context of crimes against humanity carries a different meaning. Of particular concern here, is the simple fact that crimes

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[3] Cherif M. Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd ed) (The Hague: Kluwer Law International, 1999) at 327. Bassiouni relied on: Arabic, Danish, Dutch, English, French, German, Greek, Hungarian, Italian, Japanese, Norwegian, Polish, Portuguese, Romanian, Russian, Spanish, Swedish, and Turkish sources. This definition of crimes of persecution was discussed in great detail in *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Opinion and Judgment, 7 May 1997 paragraph 695. The Tribunal commended Bassiouni's attempts to fill what the Tribunal referred to as definitional vacuum.

[4] See, discussion in *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 569.

against humanity are offences of extreme gravity; they are not in any way trivial crimes.[5] The crime of persecution is a serious offence, the punishment of which "on account of its distinctive features, has been found to justify a more severe penalty."[6] Therefore, the argument could be made, and rightly so, that in the context of a criminal trial it would be inapplicable to adopt a simple definition for the crime of persecution such as the non-legal definition discussed at the ILC.[7]

II. THE RELATIONSHIP BETWEEN THE ROME STATUTE, THE ELEMENTS OF CRIMES AND CUSTOMARY INTERNATIONAL LAW

Article 21(1)(a)-(c) of the Rome Statute establishes the applicable law to be used by the ICC:

> 1. 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;
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards (emphasis added).

[5] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 569.

[6] *Prosecutor v. Banović*, Case No. IT-02-65/1-S, ICTY Trial Judgment, 28 October 2003, paragraph 91, *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 785; *Prosecutor v. Todorović,* Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001, paragraph 113; *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, ICTY Sentencing Judgment, 27 February 2003, paragraph 27.

[7] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 569.

A. THE ROME STATUTE AND THE ELEMENTS OF CRIMES

Article 9(1) of the Rome Statute discusses the general relationship between the Rome Statute and the Elements of Crimes. According to this provision the purpose of the Elements is "to assist the Court in the interpretation and application of articles 6, 7, and 8." In addition, Article 9(3) of the Rome Statute states that "the Elements of Crimes and the amendments thereto shall be consistent with this Statute."

Paragraph 1 of the General Introduction to the Elements of Crimes stipulates that "pursuant to article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of the provisions of the Statute, including article 21 and the general principles set out in Part 3, are applicable to the Elements of Crimes."

The argument could be made, that as long as the Elements of Crimes do not contradict the Rome Statute, the two international instruments carry equal significance at the ICC. Article 21(1)(a) of the Rome Statute stipulates that "the Court shall apply: *in the first place*, this Statute, Elements of Crimes and its Rules of Procedure and Evidence" (emphasis added). However, the provisions articulated in Article 9(1) and Article 9(3) of the Rome Statute indicate that the Rome Statute is the primary instrument, and the Elements of Crimes assist in the interpretation and application of articles 6, 7, and 8 only as long as the Elements are consistent with the Statute.

The table below indicates that the provisions for the crime of persecution in Article 7 of the Rome Statute and Article 7(1)(h) of the Elements of Crimes are substantially

the same although there are some differences, discussed further in the thesis. For example, Element 1 of the Elements of the crime of persecution, compared to Article 7(2)(g) of the Rome Statute, does not expressly state that the deprivation of the fundamental rights should be intentional. A requirement for intention is inferred from the Rome Statute provisions. Another difference is that Element 2 of Article 7(1)(h) of the Elements of Crimes, in contrast with Article 7(2)(g) of the Rome Statute, uses the term 'targeting'.

Comparison of the Rome Statute (1998) and Preparatory Commission for the International Criminal Court Elements of Crimes (2000) relating to the crime of persecution

ARTICLE 7 OF THE ROME STATUTE (1998)	**ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES (2000)**
Chapeau to Article 7 …acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.	*Elements 5 & 6* (5) The conduct was committed as part of a widespread or systematic attack directed against a civilian population. (6) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
Article 7(1)(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.	*Elements 3 & 4* (3) Such targeting was based on political racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law. (4) The conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.[+]
Article 7(2)(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.	*Elements 1 & 2* (1) The perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights. (2) The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the groups or collectivity as such.

[+] "It is understood that no additional mental element is necessary for this element other than that inherent in element 6."

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

It may be noted that the discussion in this thesis will be organized around the Elements because these are set out in a systematic fashion.

B. CUSTOMARY INTERNATIONAL LAW

Pursuant to Article 21(1)(b) of the Rome Statute, the ICC shall apply "principles and rules of international law." It may be noted that the delegates at the Rome Conference referred to case law from the International Criminal Tribunal for the former Yugoslavia (hereafter referred to as ICTY) to assist in drafting the provisions of the Rome Statute.

Customary international law on persecution can be derived from the various international instruments that have prohibited crimes of persecution and judgments relating to these instruments. A significant number of Tribunals and Special Courts have been established since the Second World War. Created between 1993 and 2003, they include: the International Criminal Tribunal for Rwanda (hereafter referred to as ICTR), the ICTY, Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the East Timor District Courts (hereafter referred to as Panels of Judges), the Special Court for Sierra Leone (hereafter referred to as SCSL), Extraordinary Chambers within the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (hereafter referred to as ECCC), and the Iraqi Special Tribunal for the Prosecution of Crimes Against Humanity (hereafter referred to as IST). Prior to 1993, there were only two *ad hoc* Tribunals. These were created between 1945 and 1946: the International Military

Tribunal (hereafter referred to as IMT) and the International Military Tribunal for the Far East (hereafter referred to as IMTFE).

Customary international law emerging from the *ad hoc* Tribunals would be relevant to the ICC as it may be applicable to some problems of interpretation in the Rome Statute and the Elements of Crimes. As will be seen throughout this thesis, many of the terms used in the Rome Statute and the Elements of the crime of persecution are quite similar, and in some instances identical, to those used by the *ad hoc* Tribunals. For example, the provisions pertaining to the crime of persecution established in East Timor Regulation 2000/15 are identical to the Rome Statute provisions. Therefore, the East Timor case *Joni Marques et al*[8] was the first case to 'test' the Rome Statute definition of persecution.

III. WHAT IS THE WRITER'S INTEREST IN THIS TOPIC?

The writer's interest in this topic stemmed from a series of discussions held with academic advisers concerning the writer's frustration with the issue of widespread violations of human rights perpetrated by State sponsored insurgents. The Rome Statute provisions and the Elements of the crime of persecution provided an appropriate framework within which to discuss these issues. Upon closer examination of the statutory provisions pertaining to the crime of persecution the writer discovered that although a serious crime, persecution remains a somewhat peculiar, vague crime which has attracted little attention in international criminal law. The crime of

[8] *Prosecutor v. Joni Marques et al*, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001, hereafter referred to as the Los Palos case.

persecution was first prohibited in the Nuremberg Charter of 1945; it was prohibited in four subsequent international instruments,[9] but persecution was only defined approximately fifty years later in the Rome Statute of 1998. Furthermore, analysis of the world's major criminal justice systems indicates that the crime of persecution is not known[10] in domestic criminal law.

There are two distinctive features of the crime of persecution that captured this writer's attention. The first feature is the role that the crime plays at the ICC in comparison with its role at the majority of the *ad hoc* Tribunals. The second feature is the scope of the discriminatory grounds required for the crime.

Regarding the role of persecution at the ICC, crimes of persecution, pursuant to the Rome Statute and the Elements of Crimes, have a nexus requirement which appears to narrow the application of this crime. According to the second limb of Article 7(1)(h) of the Rome Statute, it must be shown that the persecution was committed "*in connection with* any act referred to in this paragraph (Article 7) or any crime within the jurisdiction of the Court"[11] (emphasis added). Element 4 of Article 7(1)(h) of the Elements of Crimes contains similar wording which parallels that found in Article 7(1)(h) of the Rome Statute.

[9] See, Control Council Law No. 10, Tokyo Charter, ICTY Statute and ICTR Statute.

[10] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 694. See also discussion in Cherif M. Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd ed) (The Hague: Kluwer Law International, 1999) at 327.

[11] Article 7(1)(h) of the Rome Statute, see also Element 4 of Article 7(1)(h) of the Elements of Crimes.

Historical analysis of statutory international instruments indicates that a nexus requirement for crimes of persecution has come and gone several times in the period from 1945 to 2003. It could be argued that, under Article 7(1)(h) of the Rome Statute and Element 4 of Article 7(1)(h) of the Elements of Crimes, the crime of persecution at the ICC is an ancillary crime as a result of the nexus requisite. In contrast, it would appear that the crime of persecution, pursuant to the *ad hoc* Tribunals is a separate and distinct crime in its own right.

Crimes of persecution have a nexus requirement pursuant to both the Nuremberg and Tokyo Charters. It is therefore interesting to note comments made by Cherif M. Bassiouni on these Charters which could be applied at the ICC. Bassiouni, having analyzed the Nuremberg and Tokyo Charters and the Control Council Law No. 10 (hereafter referred to as CCL 10), suggests that these provisions deal with persecution in two distinct ways. According to Bassiouni, the first method treats persecution as "a prerequisite legal element." Presumably he is referring here to a requirement for a connection with another crime. The second method treats persecution as though it were a specific crime in its own right. Bassiouni describes the second approach as problematic. He argues that not only is persecution not a crime in any of the world's major criminal systems, but also proposes it is not "an international crime *per se* unless it is the basis for the commission of other crimes" (emphasis appears in the text). Therefore, Bassiouni is of the view that there should be an identifiable "nexus between the discriminatory policy and existing international crime."[12]

[12] Cherif M. Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd ed) (The Hague: Kluwer Law International, 1999) at 327.

Regarding the discriminatory grounds required for the crime, pursuant to the Rome Statute and the Elements of Crimes, these include: "political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law."[13] These discriminatory grounds are a distinct feature that set persecution apart from other crimes against humanity.[14]

The argument could be made that when any crime against humanity is committed on discriminatory grounds, the statutory provision for crimes of persecution create an aggravated form of the original underlying crime. Kai Ambos and Steffen Wirth argue that "persecution can be an aggravated form of an enumerated inhumane act, if the act is committed with discriminatory intent."[15]

In addition, the Trial Chamber in *Prosecutor v. Kvočka et al* held, "acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent."[16] When the Chamber made this statement they referred to jurisprudence from the Second World War where such acts as: "denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on the basis of their religion," amounted to persecution.[17] Similarly, in the case of *Prosecutor v. Simić et al*, the Trial Chamber upheld the view that "persecutory act(s) or omission(s) may encompass physical and mental harm, infringements upon

[13] Article 7(1)(h) of the Rome Statute, see also Element 3 of Article 7(1)(h) of the Elements of Crimes.

[14] This is with exception to the provisions stipulated in the ICTR Statute and ECCC Special Law which stipulate a requirement of discrimination for all crimes against humanity.

[15] Kai Ambos and Steffen Wirth, "The Current Law on Crimes Against Humanity" (2002) 13(1) *Criminal Law Forum* 1 at 72.

[16] *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, 2 November 2001, paragraph 186.

[17] *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, 2 November 2001, paragraph 186.

individual freedom, *as well as acts which appear less serious, such as those targeting property,* provided that the victimized persons were specially selected or discriminated on political, racial, or religious grounds"[18] (emphasis added).

IV. AIMS AND ORGANIZATION OF THE THESIS

A. WRITING STYLE AND STRUCTURE ADOPTED IN THIS THESIS

The writer pooled together and summarized primary and secondary sources of information pertaining to crimes of persecution. The writer largely adopts a *descriptive* method to provide the reader with an overview of all the relevant information available regarding the Rome Statute negotiation process at the Rome Conference as well as the deliberations over the Elements of Crimes at the Preparatory Commission for the International Criminal Court. In addition, the writer also cites customary international law pertaining to the crime of persecution which has emerged from the *ad hoc* Tribunals established between 1945 and 2003.

The writer has chosen to structure the chapters in this thesis based on Article 7(1)(h) of the Elements of Crimes, rather than the Rome Statute simply because the 6 Elements of the crime of persecution are set out in a systematic fashion.

A simple way to understand the structure of the Elements is that the Elements can be said to deal with two distinct aspects of a crime. The first aspect is the *actus reus* of

[18] *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 50 upheld the views expressed in the *Blaškić* Judgment. See, *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 233.

the crime, that is, the prerequisites which when added together constitute the conduct in question that is prohibited. The second aspect is the *mens rea*, that is, the mental element, be it intent and/or knowledge, required for the crime.[19] Elements 1 – 5 of Article 7(1)(h) of the Elements of Crimes deal with the *actus reus* of the crime of persecution. Element 6 of Article 7(1)(h) of the Elements of Crimes deals with an aspect of the *mens rea* required for the crime of persecution. However, Element 6 does not deal with all aspects of *mens rea*.

A more detailed, and somewhat complicated, way to understand the structure of the Elements of Crimes is found in the Introduction to the Elements of Crimes. Paragraph 7 of the Introduction states that the Elements are listed according to principles such as the conduct, consequences, and circumstances associated with a particular crime. This is followed by the mental element and finally contextual circumstances are listed at the end.[20] However, analysis of the 6 Elements of the crime of persecution found in Article 7(1)(h) of the Elements of Crimes shows that they do not seem to adhere to the structure proposed by the Preparatory Commission in paragraph 7 of the Introduction to the Elements of Crimes. For example, according to the proposed structure, since Elements 5 and 6 deal with the contextual circumstances in which the crime of persecution is perpetrated, Element 4 should deal with the mental element required for the crime of persecution. Clearly, however,

[19] Maria Kelt and Herman von Hebel, "General Principles of Criminal Law and the Elements of Crimes" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 13-14.

[20] Paragraph 7 of the Introduction to the Elements of Crimes states:
The elements of crimes are generally structured in accordance with the following principles:
- As the elements of crimes focus on conduct, consequences and circumstances associated with each crime, they are generally listed in that order;
- When required a particular mental element is listed after the affected conduct, consequence or circumstance;
- Contextual circumstances are listed last.

Element 4 does not establish the mental element required for persecution. Hence, the writer has disregarded the structure proposed in paragraph 7 of the Introduction to the Elements of Crimes and simply structured the thesis in the manner indicated below.

B. BRIEF DESCRIPTION OF THE CHAPTERS IN THIS THESIS

In the following chapter, Chapter 2, the writer will trace the historical development of the term 'persecution'. In order to understand how the crime of persecution developed, one should be made aware of how persecution emerged as a crime against humanity. Thus, Chapter 2 provides an analysis of preliminary historic references to the concept of crimes against humanity. The writer also analyses the provisions on crimes of persecution established in: the Nuremberg and Tokyo Charters, CCL 10, the ICTY, and the ICTR. In discussing the historical development of crimes of persecution, the writer will also analyze cases that helped shape customary international law in the aftermath of the Nuremberg era, these include: *Barbie* and *Eichmann*, heard before French and Israeli Courts, respectively.

In Chapter 2, the writer will also analyze documents submitted by the ILC following a series of mandates by the UN General Assembly, commencing as early as the 1950's, to draft an international instrument with the view to establishing a permanent International Criminal Court. Thus, the writer discusses Draft Codes which were relied upon by delegates when the Rome Statute for the ICC was negotiated at the Rome Conference of 1998. In particular, the writer analyses the 1954, 1991 and 1996 Draft Codes. The writer will also briefly discuss international instruments, created since 1998, which contain provisions on crimes of persecution. These include:

Regulation 2000/15, ECCC Special Law, SCSL Statute, UN/Cambodia Agreement, and the IST Statute.

In Chapter 3, the writer will analyze Element 1 of Article 7(1)(h) of the Elements of Crimes which addresses the *kinds* of deprivations that amount to acts of persecution under the Rome Statute. Element 1 of Article 7(1)(h) of the Elements of Crimes states: "the perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights." In analyzing Element 1, the writer considers a number of issues, such as: who could be said to perpetrate crimes of persecution? What is 'severe deprivation'? What are fundamental rights?

In Chapter 4, the writer discusses Elements 2, 3, 4 and 5 of Article 7(1)(h) of the Elements of Crimes, which concern the *manner* of deprivations required for acts of persecution under the Rome Statute.

Element 2 of Article 7(1)(h) of the Elements of Crimes states: "the perpetrator targeted such person or persons by reason of the identity of a group or collectivity." One of the characteristics that makes persecution so unique and sets it apart from other crimes against humanity is the discriminatory basis on which the crime is committed. The writer considers issues such as: what acts are considered 'targeting'? Why are the persons targeted by reason of their identity? What differentiates a group or collectivity?

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

Element 3 of Article 7(1)(h) of the Elements of Crimes states: "such targeting was based on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law." The writer will analyze each of these impermissible grounds and discuss their significance.

Element 4 of Article 7(1)(h) of the Elements of Crimes states: "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.[+]" The writer will investigate this nexus requirement in greater detail and discuss how it affects the crime of persecution pursuant to the Rome Statute.

The final part of Chapter 4 examines Element 5 of Article 7(1)(h) of the Elements of Crimes which states: "the conduct was committed as part of a widespread or systematic attack directed against a civilian population." Crimes against humanity are distinct from ordinary crimes because they are committed as part of a widespread or systematic attack. The writer will discuss the terms 'widespread' and 'systematic', as well as evaluate the definition provided in the Rome Statute for the phrase 'attack directed against any civilian population'.

In Chapter 5, the writer examines the *mens rea* required for crimes of persecution. The writer discusses Article 30 of the Rome Statute which defines the terms 'intent' and 'knowledge'. In addition, the writer will also discuss the provisions of the

[+] "It is understood that no additional mental element is necessary for this element other than that inherent in element 6."

Elements of Crimes resulting from the Article 30 requirements. The chapter will also identify what effects Article 30 of the Rome Statute and the related provisions of the Elements of Crimes have on the crime of persecution, as well as compare the *mens rea* requirements established by the *ad hoc* Tribunals.

The final chapter, Chapter 6, will conclude the thesis by summarizing the arguments and provide concluding remarks on the law pertaining to crimes of persecution.

2. TRACING THE DEVELOPMENT OF INTERNATIONAL PROVISIONS PERTAINING TO THE CRIME AGAINST HUMANITY OF PERSECUTION

The previous chapter briefly outlined what the crime of persecution is and what role it plays in International Criminal Law. In this chapter, the writer will discuss in greater detail the progressive development of the crime against humanity of persecution. In order to illustrate this, the writer will trace the historic development of international provisions pertaining to crimes against humanity spanning from as early as 1868 to international instruments created as recently as 2003.

To understand how the crime of persecution developed, one needs to be aware of how persecution originated as a crime against humanity. Crimes against humanity are amongst the most serious crimes of concern to the international community. The phrase 'crimes against humanity' has come to acquire particular legal and moral significance.[21] A crime against humanity, simply described is, "a crime against 'humaneness' that offends certain general principles of law which becomes the concern of the international community. It has repercussions beyond international frontiers or exceeds in magnitude or savagery any limits tolerated by modern civilization."[22]

[21] David Luban, "A Theory of Crimes Against Humanity" (Winter, 2004) 29 *Yale Journal of International Law* 85 at 86.

[22] Egon Schwelb, "Crimes Against Humanity" (1946) 23 *British Yearbook of International Law* 178 at 195-7. Also discussed in Kriangsak Kittichaisaree, *International Criminal Law* (New York: Oxford University Press, 2001).

I. PRELIMINARY HISTORIC REFERENCES TO THE CONCEPT OF CRIMES AGAINST HUMANITY AND THE CRIME OF PERSECUTION

The concept of crimes against humanity, criticized by Darryl Robinson for its lack of order, has developed under customary international law in a manner best described as haphazard.[23] Crimes against humanity, as they are known today, emerged from expressions like 'the laws of humanity' which can be traced back as early as the 1860's.[24]

For example, the St. Petersburg Declaration of 1868 was proclaimed to limit the use of explosive or incendiary projectiles which were described as: "contrary to the laws of humanity."[25] This spirit of safeguarding humanity was reflected by the enthusiasm of the Parties' to the Declaration who were eager to reconcile the laws of humanity with those of war. This was evidenced by the Parties' agreement to draft even more instruments in the future which would maintain these principles.[26]

Again, we see reference to the concept of laws of humanity at the First Hague Peace Conference of 1899. The Conference adopted the Martens Clause which was later

[23] Darryl Robinson, "Developments in International Criminal Law: Defining 'Crimes Against Humanity' at the Rome Conference" (1999) 93 *American Journal of International Law* 43 at 44.

[24] Darryl Robinson, "Developments in International Criminal Law: Defining 'Crimes Against Humanity' at the Rome Conference" (1999) 93 *American Journal of International Law* 43 at 44.

[25] Declaration renouncing the use, in time of war, of projectiles under 400 grammes weight, reprinted in: A. Roberts and R. Guelff (eds), Documents on the Laws of War 30, 31 (2nd ed. 1989).

[26] Declaration renouncing the use, in time of war, of projectiles under 400 grammes weight, reprinted in: A. Roberts and R Guelff (eds), Documents on the Laws of War 30, 31 (2nd ed, 1989).

included as part of the preamble to the Hague Convention (IV) of 1907. It referred to "the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience."[27]

In later years, the Joint Declaration of France, Great Britain, and Russia, issued on 28 May 1915, denounced the massacre of Armenians in Turkey by the Ottoman Empire. The Declaration described the massacres as crimes against humanity and civilization.[28] The Declaration called for the highest levels of accountability with clear indications that the Turkish Government and its agents would be held responsible for their actions.[29] This was the first time that not only did the idea of crimes against humanity become a crime, but those who perpetrated the crimes, it was felt, were to be held responsible. It is also interesting to note that these massacres were initially referred to as acts of persecution.[30]

The Joint Declaration of 1915 was an important development in attempts to legislate crimes against humanity. Roger S. Clark argues that there were three crucial factors

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[27] 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, preamble paragraph 8, Miscellaneous, No. 6 (1908), Cmd. 4175, at 46. See commentary from Rodney Dixon, "Introduction/General Remarks: Crimes Against Humanity" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) at 121. Also, discussion in Cherif M. Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" (1997) 10 *Harvard Human Rights Journal* 11 at 16.

[28] See generally: United Nations War Crimes Commission, (1948) *History of the Nations War Crimes Commission and the Development of the Laws of War* 35.

[29] The Armenian Memorandum Presented by the Greek Delegation to the Commission of Fifteen on 14 March 1919. Quoted in Egon Schwelb, "Crimes Against Humanity" (1946) 23 *British Yearbook of International Law* 178 at 181.

[30] Egon Schwelb, "Crimes Against Humanity" (1946) 23 *British Yearbook of International Law* 178 at 181.

driving the drafters of the Declaration which ultimately shaped the development of crimes against humanity, namely:

(a) Their idea of crimes against humanity and civilization included killings of a minority ethnic group in a country by the group in political power.
(b) Although the complaining states were never able to deliver on their promise, they had in mind individual criminal responsibility for those responsible.
(c) The crimes involved were distinct from war crimes – they took place within Turkey itself and there was no serious effort by Britain, France, and Russia to link the killings directly to the then world-wide conflict in which Turkey was involved.[31]

In the aftermath of the First World War, some delegates at the Paris Peace Conference of 1919 were determined to create an international court. It was perceived that the purpose of the court, composed of Allied Judges, was to prosecute those perpetrators responsible for violating the laws and customs of war and the laws of humanity.[32] However, the proposal to establish an International Court was vehemently opposed. Countries such as America and Japan voiced their concerns about establishing a court of such magnitude empowered to prosecute individuals in an unprecedented manner that was unknown to the customary practice of nations.[33]

[31] Roger S. Clark, "Crimes Against Humanity" in George Ginsburgs and V. N. Kudriavtsev, *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990) at 178.

[32] Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (London: University of Carolina Press, 1998) at 1. See also Commission on the Responsibility of Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (1919 Paris Peace Commission Report), Versailles, Mar. 1919, Conference of Paris, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No.32, Annex. As quoted in Rodney Dixon, "Introduction/General Remarks: Crimes Against Humanity" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) at 122.

[33] Commission on the Responsibility of Authors of the War and on Enforcement of Penalties, "Report Presented to the Preliminary Peace Conference, March 29, 1919" (1920) 14 *American Journal of International Law* 95 at 145.

II. PROVISIONS RELATING TO THE CRIME OF PERSECUTION FROM INTERNATIONAL INSTRUMENTS CREATED IN THE AFTERMATH OF THE SECOND WORLD WAR

Following World War Two, there were 3 international instruments dealing with crimes against humanity, namely:

1. Article 6 of the Charter for the International Military Tribunal;
2. Article II of the Control Council Law No.10;
3. Article 5 of the Tokyo Charter for the International Military Tribunal for the Far East.

The first of these instruments, the Charter for the International Military Tribunal, was created in 1945. It was the first international instrument that used the expression 'crimes against humanity'. In all these 3 international instruments, 'crimes of persecution', summarized in the table below, were included. The Charter for the International Military Tribunal was also the first instrument that expressly prohibited crimes of persecution.

Comparison of international instruments created in the aftermath of World War Two relating to crimes of persecution

Terminology	**Rome Statute (1998)**	**Nuremberg Charter (1945)**	**CCL 10 (1945)**	**Tokyo Charter (1946)**
	Article 7(1)(h)	*Article 6(c)*	*Article II(1)(c)*	*Article 5(c)*
Description of the provision	Crimes against humanity	Crimes against humanity	Crimes against humanity. Atrocities and offences	Crimes against humanity
Perpetrator	-	Individuals or members of organizations	-	Individuals or members of organizations
Nexus to an armed conflict	-	-	-	-
Widespread or systematic attack directed against any civilian population,	Widespread or systematic attack directed against any civilian population	-	-	-
Persecution against group or collectivity	Persecution against any identifiable group or collectivity	-	-	-
Specific grounds of Persecution	Political, racial, national, ethnic, cultural, religious, gender or other grounds	Political, racial or religious grounds	Political, racial or religious grounds	Political or racial grounds
Nexus requirement	In connection with any acts in paragraph or crime within jurisdiction of the Court	In execution of or in connection with any crime within jurisdiction of the Tribunal	-	In execution of or in connection with any crime within jurisdiction of the Tribunal
Mens Rea	With knowledge of the attack	-	-	-

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Nuremberg Charter – Charter of the International Military Tribunal for the Trial of Major War Criminals, appended to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis
CCL 10 – Control Council Law No. 10
Tokyo Charter – Charter of the International Military Tribunal for the Far East

A. CHARTER FOR THE INTERNATIONAL MILITARY TRIBUNAL

The International Military Tribunal was created in the aftermath of the Second World War. The Nuremberg Charter of the IMT was signed on 8 August 1945 to try and punish major war criminals of the European Axis.[34]

[34] Article 1, Charter of the International Military Tribunal for the Trial of Major War Criminals, appended to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, *U.N.T.S,* Vol. 82, at 279.

The IMT, and later the International Military Tribunal for the Far East, were a critical step in what could be described as the "first proper expression of international criminal law and procedure."[35] Benjamin Ferencz, a Prosecutor in the *Einsatzgruppen* case, later acknowledged that: "at that time, there were no precedents whatsoever for the trials. We were simply trying to establish a rough kind of justice."[36] What made the Nuremberg Tribunal so significant was the simple fact that there was no precedent, law or legal infrastructure in place that had ever been established with the view to prosecute international crimes of such magnitude. Prior to the IMT, there had only ever been "sporadic instances in history where efforts had been made to bring individuals to account for what would be regarded today as international crimes."[37]

Hence, the Nuremberg Charter was the first international instrument to prohibit crimes against humanity in international criminal law.[38] This was a critical step because it was well established that the Nazi Regime had perpetrated the atrocities which were committed against the German Jews and minority groups. The difficulty had been that although customary international law, be it the laws of aggression or war crimes, provided for the protection of civilians in an international armed conflict, the same laws did not include the protection of civilians in circumstances where the

[35] Ilias Bantekas et al, *International Criminal Law* (London: Cavendish Publishing Limited, 2001) at 69.

[36] Benjamin Ferencz, "The Experience of Nuremberg" in Dinah Shelton (ed), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley: Transnational Publishers, Inc., 2000) at 5.

[37] Ilias Bantekas et al, *International Criminal Law* (London: Cavendish Publishing Limited, 2001) at 69. See also Howard Ball, *War Crimes and Justice: Contemporary World Issues Series* (California: ABC-CLIO, Inc., 2002) at xv.

[38] Cherif M. Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" (1997) 10 *Harvard Human Rights Journal* 11 at 26. See also B. V. A. Röling and Antonio Cassese (ed), *The Tokyo Trial and Beyond: Reflections of A Peacemonger* (Cambridge: Polity Press, 1993) at 1.

atrocities were carried out by a State against its own citizens. In essence, Article 6(c) was drafted into the Nuremberg Charter to prosecute those who had perpetrated the crimes committed on such a large scale against the German Jews and minority groups.[39]

The Nuremberg Charter provided the first comprehensive provisions in international criminal law for crimes of persecution. Article 6(c) of the Nuremberg Charter established a list of prohibited acts which amounted to crimes against humanity. These included crimes of persecution:

> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or *persecution 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 domestic law of the country where perpetrated (emphasis added).

One of the features of the definition of the crime of persecution was the specification of specific grounds on which the crime of persecution could be committed: political, racial or religious grounds.

Yet, the Nuremberg Trials have been widely criticized. The Trials are often referred to as victors' justice because they displayed overwhelming lack of neutrality,[40] supposedly applied *ex post facto* law,[41] and one could even argue that the Trials were

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[39] Ilias Bantekas et al, *International Criminal Law* (London: Cavendish Publishing Limited, 2001) at 74. See also Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1989) at paragraph 169.

[40] Wilbourn E. Benton and Georg Grimm (eds), *Nuremberg: German Views of the War Trials* (Dallas: Southern Methodist University Press, 1955) at 102-103.

[41] Herman von Hebel, "An International Criminal Court – A Historical Perspective" in Herman von Hebel et al (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: T. M. C. Asser Press, 1999) at 20.

a political act and not an exercise of law.[42] Despite this, the Trials were not entirely a complete disappointment. They were hailed for providing precedents which established the necessary judicial competence to adequately resolve crimes which involved human rights violations.[43] Of equal importance, one of the Tribunal's most profound achievements was the fact that the State and its functionaries were being held liable for crimes against humanity and other human rights abuses that occurred within national borders. Thus, the prohibition against such crimes was becoming firmly entrenched in international law.[44]

Both the International Criminal Tribunals for Rwanda and the former Yugoslavia have commended jurisprudence originating from the Nuremberg Trials for having provided significant legal precedents articulating the crime of persecution in great detail.[45]

The *Streicher* case, in particular, has been noted for signifying the severe gravity of crimes of persecution. Streicher was a publisher of an anti-Semitic weekly newspaper from 1923 to 1945. The Nuremberg Tribunal sentenced Streicher to death for his role

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[42] Richard Overy, "The Nuremberg Trials: International Law in the Making" in Philippe Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003) 1 at 7.

[43] Christopher C. Joyner, "Redressing Impunity for Human Rights Violations: the Universal Declaration and the Search for Accountability" (Summer, 1998) 26 *Denver Journal of International Law and Policy* 591 at 597.

[44] Roger S. Clark, "Nuremberg and Tokyo in Contemporary Perspective" in T. H. L. McCormack and G. J. Simpson, *Law of War Crimes: National and International Approaches* (The Hague: Kluwer Law International, 1997) at 179.

[45] *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, paragraph 19; *Prosecutor v. Nahimana et al,* Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, paragraph 981; *Prosecutor v. Kupreškić et al*, Case no. IT-95-16-T, ICTY Trial Judgment, 14 January 2000, paragraph 625, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 708.

in the persecution of the Jews. In the trial of *Julius Streicher* the Nuremberg Tribunal held:

> Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War crimes, as defined by the Charter, and constitutes a crime against humanity.[46]

B. CONTROL COUNCIL LAW NO. 10

The Control Council Law No. 10 was signed in Berlin on 20 December 1945 at the time of the Nuremberg Trials. It supposedly provided the authority to prosecute war criminals that fell outside the Nuremberg Tribunal jurisdiction.[47] What made this Law readily applicable was the fact that it was drafted on the inspiration of the Nuremberg Charter and authorized occupying authorities to carry out prosecutions of perpetrators held in their custody.[48]

Article II(1)(c) of the CCL 10 stipulates that its definition of crimes against humanity encompasses:

> Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any

[46] *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, paragraph 19, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 708; See also Judgment of the Military Tribunal For The Trial of German Major War Criminals, London, His Majesty's Stationery Office, 1951 "Streicher" at 102. Available at: www.nizkor.org/ftp.cgi?imt/tgmwc/judgment/j-defendants-streicher. Accessed 31 January 2004.

[47] Wilbourn E. Benton and Georg Grimm (eds), *Nuremberg: German Views of the War Trials* (Dallas: Southern Methodist University Press, 1955) at 149.

[48] Roger S. Clark, "Nuremberg and Tokyo in Contemporary Perspective" in T. H. L. McCormack and G. J. Simpson, *Law of War Crimes: National and International Approaches* (The Hague: Kluwer Law International, 1997) at 183.

> civilian population, or *persecutions on political, racial or religious grounds* whether or not in violation of the Domestic laws of the country where perpetrated… [49] (emphasis added).

Prior to the CCL 10, Article 6(c) of the Nuremberg Charter had established that the crime of persecution could be committed "on political, racial or religious grounds *in execution of or in connection* with any crime within the jurisdiction of the Tribunal" (emphasis added). CCL 10 omitted the nexus requirement, thus widening the scope within which to prosecute crimes of persecution. Documentary evidence shows that numerous Nazi soldiers were prosecuted under this specific category, including those who committed offences before the war broke out.[50]

The trial of *Josef Altstötter et al*, known as the *Justice* Trial, discussed the provisions stipulated in CCL 10 pertaining to crimes of persecution. The trial involved the prosecution by the United States Military Tribunal of former Judges, Prosecutors and officials of the German Reich Ministry of Justice. The Indictment charged the Accused with having "embraced the use of the judicial process as a powerful weapon for the persecution and extermination of all opponents of the Nazi regime regardless of nationality and for the persecution and extermination of races."[51]

The Tribunal held that persecution of Jews and Poles constituted persecution by way of utilizing a legal system to facilitate a discriminatory policy. The Tribunal

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[49] *Official Gazette of the Control Council for Germany,* No. 3, Berlin, 31 January 1946.

[50] Ilias Bantekas et al, *International Criminal Law* (London: Cavendish Publishing Limited, 2001) at 75.

[51] Indictment of the *Justice* Trial, NMT, Volume III, at 18, discussed in *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraphs 611-612. See also Matthew Lippman, "Crimes Against Humanity" (Spring, 1997), 17 *Boston College Third World Law Journal* 171 at 210-211.

identified that forms of persecution included excluding Jews from legal professions and passing decrees to that effect, disallowing intermarriages between Jews and Germans coupled with severe consequences in violation of such prohibitions, State confiscation of property belonging to Jews upon their death, etc.[52] Commenting on CCL 10, the Tribunal held, the provision was "directed against offenses and inhumane acts and persecution on political, racial, or religious grounds systematically organized and conducted by or with the approval of government."[53]

C. CHARTER FOR THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

Although South East Asia had endured wars of aggression instigated by Imperial Japan since 1928, the Second World War witnessed the expansion of Japanese aggression with the bombing of United States forces stationed at Pearl Harbour.[54]

In the aftermath of the Pearl Harbour bombing, the Unites States expressed its view that the international community required, "epochal proceedings designed to formulate and codify standards of international morality."[55] Consequently, the 'Big Four' victorious allies, namely, the United States, the United Kingdom, the Soviet Union, and France issued a statement historically known as the Potsdam Declaration

[52] *Trial of Josef Alstötter and Others*, NMT, Volume III, at 1063-64, discussed in *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraphs 611-612.

[53] Matthew Lippman, "Crimes Against Humanity" (Spring, 1997), 17 *Boston College Third World Law Journal* 171 at 211-212, discusses *Trial of Josef Alstötter and Others*.

[54] Ilias Bantekas et al, *International Criminal Law* (London: Cavendish Publishing Limited, 2001) at 78.

[55] General MacArthur proclamation text as quoted in Richard H. Minear, *Victor's Justice – The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971) at 166.

which paved the way for the International Military Tribunal for the Far East. The Allies declared, "we do not intend that the Japanese shall be enslaved as a race or destroyed as a nation but stern justice shall be meted out to war criminals including those who have visited cruelties upon our prisoners."[56]

Pursuant to Article 5(c) of the Tokyo Charter for the IMTFE,[57] the following are crimes against humanity, including 'persecutions':

> Murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or *persecutions on political or racial 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… (emphasis added).

III. ANALYSIS OF LEADING JUDGMENTS PERTAINING TO THE CRIME OF PERSECUTION THAT SHAPED INTERNATIONAL CUSTOMARY LAW IN THE AFTERMATH OF THE NUREMBERG ERA

In the period following the Nuremberg Trials there were a number of national cases, for example, *Barbie*[58] and *Eichmann*,[59] discussed below, which established significant legal precedents pertaining to crimes of persecution.

[56] Potsdam Declaration of 26 July 1945.

[57] Charter of the International Military Tribunal for the Far East (1946). Special Proclamation by the Supreme Commander for the Allied Powers, as amended 26 April, *T.I.A.S.* No. 1589.

[58] *Fédération Nationale des Déportés et Internés Résistants at Patriotes and Others v. Barbie*, Judgment of the Court of Cassation of 20 December, 78 *International Law Reports* 125 (1985).

[59] *Attorney General of Israel v. Adolf Eichmann,* Case No. 40/61, District Court of Jerusalem.

A. FÉDÉRATION NATIONALE DES DÉPORTÉS ET INTERNÉS RÉSISTANTS AT PATRIOTES AND OTHERS V. BARBIE

During the wartime occupation of France, the Accused, Klaus Barbie, was the Head of the Gestapo in Lyons from the period November 1942 to August 1944. Although he left France at the end of the war and sought refuge in Bolivia, he was extradited back to France in 1983. He was later convicted of 340 counts of the 17 charges of crimes against humanity and sentenced to life imprisonment.[60]

In the 1985 judgment, later confirmed on Appeal,[61] the Court defined crimes against humanity with reference to Article 6(c) of the Nuremberg Charter. It held crimes against humanity were:

> … inhumane acts and persecution committed in a systematic manner in the name of a State practicing a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition.[62]

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[60] *Fédération Nationale des Déportés et Internés Résistants at Patriotes and Others v. Barbie*, Judgment of the Court of Cassation of 20 December, 78 *International Law Reports,* 125 (1985) discussed in Antonio Cassese, "Crimes Against Humanity", in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford: Oxford University Press, 2002) see discussion at footnote 26 page 362. See also discussion in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, paragraphs 569-570.

[61] On Appeal, the Court of Cassation in its 1988 Judgment further explained that "… deportation or extermination of the civilian population during the war, or persecutions on political, racial or religious grounds, constituted not a distinct offence or an aggravating circumstance but rather an essential element of the crime against humanity, consisting of the fact that the acts charged were performed in a systematic manner in the name of the State practicing by those means a policy of ideological supremacy. See *Fédération Nationale des Déportés et Internés Résistants at Patriotes and Others v. Barbie*, Judgment of the Court of Cassation of 3 June 1988, 78 *International Law Reports*, at 332 and 336. Also discussed in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, paragraph 570. For in depth analysis of the case see Leila Sadat Wexler, "Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again" (1994) 32 *Columbia Journal of Transnational Law*, 289.

[62] *Fédération Nationale des Déportés et Internés Résistants at Patriotes and Others v. Barbie*, Judgment of the Court of Cassation of 20 December, 78 *International Law Reports,* 125 (1985) at 137, discussed in Antonio Cassese, "Crimes Against Humanity", in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford: Oxford University Press,

In addition, the Judgment of *Prosecutor v. Tadić* concurs with the views expressed by General M. Le Gunehec of the Court of Cassation in the *Barbie* case. Bearing in mind *Tadić* was the first ICTY case, the Trial Chamber held that General M. Le Gunehec's comments could be construed as a useful definition of the crime of persecution.[63] General M. Le Gunehec had argued that the kinds of crimes discussed in the case undermined the core of the fundamental rights of mankind such as: rights to equality and rights to hold one's own political or religious views. The General made the observation that the consequence of such crimes in some cases led to death, and in other cases led to what he described as, "the violation of the dignity of all men and women". The reason why such deaths or violations attacked the core of fundamental rights of mankind was because the victims were "victimized only because they belong to a group other than that of their persecutors, or do not accept their dominion."[64]

2002) see discussion at footnote 26 page 362. See also discussion in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, paragraphs 569-570.

[63] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 696, Report of Counsellor Le Gunehec, quoted in Antonio Cassese, "Klaus Barbie: The Exemplary Life of an Executioner" in Antonio Cassese, *Violence and Law in the Modern Age* (1988), Cassese suggests that although the statement by the General was offered in the context of crimes against humanity, the definition is one that discusses the 'persecution type' of crimes against humanity. See also reference in Micaela Frulli, "Are Crimes Against Humanity More Serious than War Crimes?" (2001), 12(2) *European Journal of International Law* 329, footnote 68 at 347.

[64] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 696, Report of Counsellor Le Gunehec, quoted in Antonio Cassese, "Klaus Barbie: The Exemplary Life of an Executioner" in Antonio Cassese, *Violence and Law in the Modern Age* (1988). See also reference in Micaela Frulli, "Are Crimes Against Humanity More Serious than War Crimes?" (2001) 12(2) *European Journal of International Law* 329, footnote 68 at 347.

B. ATTORNEY GENERAL OF ISRAEL V. ADOLF EICHMANN

Adolf Eichmann was the former Head of Jewish Affairs in the Office of the Reich Security. In *Attorney General of Israel v. Adolf Eichmann*, the Accused was convicted and sentenced to death by the District Court for persecuting Jews, Gypsies, and Slavs by way of murder, extermination, enslavement, starvation, and deportation. The Supreme Court later upheld the District Court decision.[65] Eichmann was charged pursuant to the Israeli Nazi and Nazi Collaborators (Punishment) Law. It is interesting to note that this provision incorporated Nuremberg Charter provisions on crimes against humanity.[66]

The Supreme Court held that "it was proved with unchallengeable certainty that he [Eichmann] took his place not only among those who were active, but also those who activated the implementation of the 'Final Solution', the total extermination of the Jews of Europe. The appellant was no petty killer in this undertaking, but took a leading part and had a central and decisive role."[67] The Court therefore, found

[65] *Attorney General of Israel v. Adolf Eichmann,* Case No. 40/61, District Court of Jerusalem, discussed in *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 602. See also Matthew Lippman, "Crimes Against Humanity" (Spring, 1997) 17 *Boston College Third World Law Journal* 171 at 240.

[66] Matthew Lippman, "Crimes Against Humanity" (Spring, 1997) 17 *Boston College Third World Law Journal* 171 at 240.

[67] *Attorney General of the Government of Israel v. Adolf Eichmann,* 36, International Law Reports, 277 Supreme Court, 1962, at 340 discussed in Matthew Lippman, "Crimes Against Humanity" (Spring, 1997), 17 *Boston College Third World Law Journal* 171 at 240. See also general discussion in Micaela Frulli, "Are Crimes Against Humanity More Serious than War Crimes?" (2001) 12(2) *European Journal of International Law* 329 at 348-349.

Eichmann guilty of the persecution of Jews on national, racial, religious and political grounds.[68]

IV. PROVISIONS RELATING TO THE CRIME OF PERSECUTION FROM INTERNATIONAL INSTRUMENTS CREATED PRIOR TO THE 1998 ROME STATUTE

Prior to the Rome Statute of 1998 there were 2 additional international instruments dealing with crimes against humanity. Created almost fifty years after the Second World War, they were:

1. Article 5 of the Statute for the International Criminal Tribunal for the former Yugoslavia;
2. Article 3 of the Statute for the International Criminal Tribunal for Rwanda.

These 2 international instruments included 'crimes of persecution', summarized in the table below.

[68] *Attorney General of the Government of Israel v. Adolf Eichmann,* 36, International Law Reports, 277 Supreme Court, 1962, at 340 discussed in *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 602.

Comparison of international instruments from *ad hoc* Tribunals created prior to the 1998 Rome Statute relating to crimes of persecution

Terminology	**Rome Statute (1998)** *Article 7(1)(h)*	**ICTY Statute (1993)** *Article 5(h)*	**ICTR Statute (1994)** *Article 3(g)*
Description of the provision	Crimes against humanity	Crimes against humanity	Crimes against humanity
Perpetrator	-	-	-
Nexus to an armed conflict	-	Committed in armed conflict, whether international or internal	-
Widespread or systematic attack directed against any civilian population,	Widespread or systematic attack directed against any civilian population	And directed against any civilian population	Widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds
Persecution against group or collectivity	Persecution against any identifiable group or collectivity	-	-
Specific grounds of Persecution	Political, racial, national, ethnic, cultural, religious, gender or other grounds	Political, racial and religious grounds	Political, racial and religious grounds
Nexus requirement	In connection with any acts in paragraph or crime within jurisdiction of the Court	-	-
Mens Rea	With knowledge of the attack	-	-

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ICTY – International Criminal Tribunal for the former Yugoslavia
ICTR – International Criminal Tribunal for Rwanda

A. STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA[69]

In 1993, the UN Security Council established an *ad hoc* Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. The jurisdiction of the Tribunal was enacted pursuant to Chapter VII of the UN Charter. The International Criminal Tribunal for the former Yugoslavia was established to bring about

[69] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Annex to *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* U.N. Doc. S/25704 & Add. 1 (1993).

accountability for the "widespread violations of international humanitarian law within the territory of the former Yugoslavia, including the practice of 'ethnic cleansing'...considered by the Security Council as a threat to international peace and security."[70]

Creating the Tribunal was indeed a major step towards international accountability for the atrocities. This was a gesture that represented collective humanitarian intervention initiated by the Security Council to prosecute perpetrators of massive human rights violations.[71] Theodor Meron, the current President of the ICTY, described the Tribunal as one of "cardinal importance" to the body of international humanitarian law. Meron made the observation that in comparison to the last four decades since the Nuremberg Tribunals, international humanitarian law has progressed at a rapid pace since the ICTY's inception and its prosecution of the atrocities that were committed in the former Yugoslavia.[72]

Crimes against humanity, and in particular crimes of persecution, were articulated in Article 5 of the ICTY Statute. Article 5 established that:

> The International Tribunal shall have power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (h) *persecutions on political, racial and religious grounds;* (emphasis added).

[70] Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press, 2001) at 22.

[71] John R. W. D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (New York: Transnational Publishers, 1998) at 3.

[72] Theodor Meron, "War Crimes Come of Age" (1998) 92 *American Journal of International Law* 462 at 462- 463.

Prosecutor v. Dusko Tadić was the very first case heard by the ICTY and also the first ICTY case to discuss the crime of persecution. The Accused was charged under Count 1 with persecution pursuant to Article 5(h) of the ICTY Statute. The Trial Chamber described persecution as: "the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution, although the discrimination must be on one of the listed grounds to constitute persecution under the Statute."[73] Pursuant to Article 5(h) of the ICTY Statute, the Chamber identified 2 elements which constitute the crime of persecution:

1. The occurrence of a persecutory act or omission; and
2. A discriminatory basis for that act or omission on one of the listed grounds, specifically race, religion or politics.[74]

Persecution itself was defined for the first time at the ICTY in *Prosecutor v. Kupreškić et al*.[75] Persecution was defined as: "a gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as other acts prohibited in Article 5."[76]

[73] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 697.

[74] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 715.

[75] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000.

[76] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 621.

B. STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA[77]

An alarming humanitarian crisis occurred over the period of April 1994 to July 1994 during which between half a million to a million civilians lost their lives in Rwanda[78] in what has been described as "one of the most appalling cases of genocide that the world had witnessed since World War II."[79]

The UN Security Council responded by enacting Chapter VII provisions of the UN Charter to set up a Rwandan *ad hoc* Tribunal. It was believed that setting up a Tribunal to prosecute those that were responsible for the crimes, which were committed in a period of approximately 90 days, would somehow "contribute to the process of national reconciliation, and to the restoration and maintenance of peace."[80]

The Statute for the International Criminal Tribunal for Rwanda, much like the ICTY Statute, included provisions for prosecuting the crime of persecution. A significant difference between the ICTY and ICTR Statutes is the requirement of discrimination

[77] Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Annex to Security Council Res. 955, U.N. SCOR, 49th Year, 1994 S C. Res. & Dec. at 15, U.N. Doc. S/INF/50 (1994).

[78] Herman von Hebel, "An International Criminal Court – A Historical Perspective" in Herman von Hebel et al (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: T. M. C. Asser Press, 1999) at 31. For detailed discussion see Romeo A. Dallaire, "The End of Innocence, Rwanda 1994" in Jonathan Moore (ed), *Hard Choices – Moral Dilemmas in Humanitarian Intervention* (Oxford: Rowman & Littlefield Publishers Inc, 1998) at 71.

[79] Paul Magnarella, *Justice in Africa: Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal* (Aldershot: Ashgate, 2000) at 41.

[80] Herman von Hebel, "An International Criminal Court – An Historical Perspective" in Herman von Hebel et al (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: TMC Asser Press, 1999) at 31.

for all crimes against humanity found in the chapeau of Article 3 of the ICTR Statute. The ICTR Statute provided that crimes against humanity could only be committed by widespread or systematic attacks on national, political, ethnic, racial or religious grounds. In addition to this, the Statute provided that the crime of persecution could only be committed on political, racial or religious grounds.

According to Article 3 of the ICTR Statute:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> (g) *persecutions on political, racial and religious grounds;* (emphasis added).

Prosecutor v. Ruggiu, later confirmed in *Prosecutor v. Nahimana et al,* was the first ICTR case that adopted a definition for the crime of persecution. The Accused was charged under Count 2 with the crime against humanity of persecution pursuant to Article 3(h) of the ICTR Statute; he was sentenced to 12 years imprisonment.[81] In its reasoning, the ICTR Trial Chamber adopted the ICTY definition of persecution, that is, "a gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as other acts prohibited in Article 5."[82]

[81] *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, paragraph 21; Confirmed in *Prosecutor v. Nahimana et al,* Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, paragraph 1072.

[82] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 621. See discussion of this definition in *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, paragraph 21, confirmed in *Prosecutor v. Nahimana et al,* Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, paragraph 1072.

V. PRELIMINARY CONSIDERATIONS IN DRAFTING THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

In the aftermath of the Second World War, it became evident to the world community that some form of legislated means was essential to prohibit and punish what was referred to as "the kind of behaviour in peacetime that leads to the mass destruction of human lives."[83] This recognition was an important development simply because it is now well established that what makes crimes against humanity distinct is the fact that they involve grave violations of human rights, perpetrated on a large scale. These grave large-scale violations are of concern because they are said to escalate into international crimes which ultimately threaten international peace and security.[84]

With the lessons learnt from the World War as a driving force, the UN General Assembly mandated the International Law Commission, as early as 1947, to prepare a Draft Code of Offences Against the Peace and Security of Mankind. Although the ILC began its work on the Draft Codes as early as 1954, the work was stalled due to differences of opinion, but recommenced in 1981. By 1990 the General Assembly mandate was more specific, requiring the ILC to investigate international criminal jurisdiction and draft a statute with the view to establishing a permanent international criminal trial mechanism. In 1994, the ILC submitted its Draft Statute for the ICC. Following this, the ILC continued its work on the Draft Codes, in particular, the 1996

[83] R. Lemkin, "Le genocide" *Revue Internationale De Droit Penal,* Paris, 1946, at 373.

[84] Iu A. Reshetov "Crimes against Humanity" in George Ginsburgs and V. N. Kudriavtsev, *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990) at 199.

Draft Code which is often referred to by *ad hoc* Tribunals. Each of these Draft Codes contains provisions on the crime of persecution.[85]

A. THE WORK OF THE ILC

1. 1954 Draft Code

Article 2(11) of the 1954 Draft Code provided that crimes against humanity encompass:

> Inhumane acts, such as: killing, extermination, enslavement, exile or *persecution, committed against any civilian population out of political, religious or cultural motives* by the authorities of any State or by private persons acting at the instigation of or in connivance of these authorities[86] (emphasis added).

This Draft Code was a progressive step in further establishing, in the post Nuremberg era, the crime against humanity of persecution. The ILC not only expanded the grounds on which the crime of persecution could be committed to include cultural motives but it also articulated the role that State authorities or persons acting at their instigation must have played in furthering the perpetration of this crime. Persecution committed on cultural grounds appears in the final text of Article 7(1)(h) of the Rome Statute and Element 3 of Article 7(1)(h) of the Elements of Crimes. Furthermore, the

[85] For further information on the negotiation and drafting process see the ILC website available at: www. un.org/law/ilc/convents.htm; Also see commentary on the 1996 Draft Code available at: www.un.org/law/ilc/texts/dccomfra.htm; the Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994, General Assembly Official Records, Forty Ninth Session Supplement No. 10 (A/49/10) available at: www.un.org/law/ilc/reporfra.htm; the ICC website general information on the Chronology of the ICC available at: www.icc-cpi.int/php/whatistheicc/chronology.php

[86] [1954] 2 Yearbook International Commission 150. Note that prior to announcing the Draft Code of Offences against the Peace and Security of Mankind, the International Law Commission acknowledged the Nuremberg Charter and in 1950 affirmed that according to the Nuremberg Principles, "Crimes against Humanity included: murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime." [U.N.G.A.O.R, 5th Session, Supp. No. 12, UN Doc. A/1316 (1950)].

Draft Code shows that by 1954 the crime of persecution was not only considered an international crime, but the perpetration of this crime breached the international peace and security of mankind.

2. 1991 Draft Code

Article 21 of the 1991 Draft Code, under the title systematic or mass violations of human rights, states:

> An individual who commits or orders the commission of any of the following violations of human rights: murder; torture; establishing or maintaining over persons a status of slavery, servitude or forced labour; *persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale;* or deportation of forcible transfer of population shall, on conviction thereof, be sentenced[87] (emphasis added).

The 1991 Draft Code is that the Draft established freedom from persecution as a human right. It also criminalized the violation of this right.[88] There were some concerned States who feared that the Draft provisions were too broad and had the potential to violate their sovereignty, so they did not wholeheartedly embrace the idea

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[87] The First Reading of the Draft Code of Offences Against the Peace and Security of Mankind, *Report of the International Law Commission On Its Forty-third Session,* U.N. GAOR, 46th Sess., Supp. No10, at 238, U.N. Doc A/46/10 (1991).

[88] Cherif Bassiouni presents an interesting argument to be discussed further in the next chapter within the context of severely depriving fundamental rights. Bassiouni points out that although there were significant legal instruments after 1945 that prohibited discrimination which lead to persecution, there were no official instruments that rendered such activities a criminal act except for the Apartheid Convention Article II(f) of which the crime of apartheid includes persecutions of organizations and persons, by depriving them of fundamental rights and freedoms on the basis of their opposition to apartheid. Bassiouni then goes on to list legal instruments that have called for non-discriminatory practices. They include the following: Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Social, Economic and Cultural Rights; Declaration on the Elimination of All Forms of Racial Discrimination; International Convention on the Elimination of Racial Discrimination; International Convention on the Suppression and Punishment of the Crime of Apartheid; Declaration on the Elimination of Discrimination against All Women; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Cherif M. Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn) (The Hague: Kluwer Law International, 1999) at 327-328.

of criminalizing human rights violations. Those opposing the Draft Code provisions argued the Code should only seek to criminalize human rights violations that were particularly serious, that is, ones that threatened the peace and security of mankind as a whole. Thus, to ease their concerns, the provision was drafted to indicate that the violations of human rights would have to be of such great magnitude, in terms of being widespread and systematic violations, so as to warrant serious international concern.[89]

Hence, we find the 1991 Draft Code provides that in order to constitute the crime of persecution, the acts must be carried out in a systematic manner or as part of the implementation of a large-scale policy. Machteld Boot has suggested that the term systematic refers, "to a constant practice or a methodical plan to carry out such violations," and mass scale shows, "the number of people affected by such violations or the entity that has been affected."[90]

3. 1996 Draft Code

Article 18(e) of the 1996 Draft Code states:

> A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group:

[89] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 466-467.

[90] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 466.

(e) *persecution on political, racial, religious or ethnic grounds;*[91] (emphasis added).

This definition of crimes against humanity was drawn from the Nuremberg Charter and influenced by the international law developments at the ICTY.[92]

The ILC, commenting on the provisions it drafted, stated that "the inhumane act of persecution 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 as recognized in the charter of the United Nations and the International Covenant on Civil and Political Rights."[93]

In addition, the ILC also explained that the expression 'instigated or directed by a Government or by any organization or group' was best illustrated in terms of what the alternative of the term meant. In considering the alternative meaning of the expression the ILC argued that instances of isolated criminal conduct perpetrated by individuals acting on their own agenda would not amount to crimes against humanity. The expression was inserted into the Draft Code with the intention of excluding cases where individuals committed inhumane acts to further their own criminal plans which

[91] The Second Reading of the Draft Code of Crimes against the Peace and Security of Mankind*, Report of the International Law Commission on Its Forty-eighth Session,* U.N. GAOR, 51st Sess., Supp. No. 10 at 9, U.N. Doc. A/51/10 (1996).

[92] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 467.

[93] International Law Commission Report, 1996 at paragraph 11, Commentary on Article 18, Crimes Against Humanity.

were independent of what the ILC described as the "encouragement or direction" provided by a Government, group or organization.[94]

The Commission also expanded the grounds on which the crime of persecution could be committed to include ethnic grounds. Persecution committed on ethnic grounds appears in the final text of Article 7(1)(h) of the Rome Statute and Element 3 of Article 7(1)(h) of the Elements of Crimes. However, social grounds were not included in the 1996 Draft Code.

VI. THE 1998 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

In 1998, representatives from 160 UN State members and members of specialized agencies, organizations and other entities attended the UN Conference of Plenipotentiaries. Commonly referred to as the Rome Conference, the deliberations were held in Rome from 15 June 1998 to 17 July 1998 in a bid to negotiate the establishment of an International Criminal Court.[95]

The Parties that attended the Rome Conference adopted the Rome Statute at the conclusion of the month-long proceedings. Article 5 of the Rome Statute empowers the ICC to exercise jurisdiction over 4 specific categories of crimes. These crimes are

[94] International Law Commission Report, 1996 at paragraph 5, Commentary on Article 18, Crimes Against Humanity.

[95] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Italy, 15 June – 17 July 1998. A/CONF.183/10*, 17 July 1998. Annex II lists 160 State Members, Annex III lists 31 Organisations and other entities represented at the Conference by an observer, Annex IV lists 135 Non-governmental Organisations represented at the Conference by an observer.

said to amount to crimes of most serious concern to the international community. They are: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

Article 7 of the Rome Statute is of particular concern to the subject discussed in this thesis. The provision prohibits the perpetration of crimes against humanity, including crimes of persecution. According to Article 7:

> 1. Crimes against Humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> > (h) *persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*; (emphasis added).

Persecution is defined in Article 7(2)(g) of the Rome Statute as: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

In addition to the Rome Statute, the Preparatory Commission for the ICC drafted Elements of Crimes for each of the Court's crimes. The Rome Statute is the first international criminal instrument that is complimented by a set of Elements of Crimes, the significance of which is discussed in the Introduction.

The Preparatory Commission for the ICC formulated 6 Elements for the crime of persecution. The Elements of Crimes relating to persecution are found in Article 7(1)(h) of the Elements of Crimes. These Elements will assist in the interpretation

and application of the statutory provisions on the crime of persecution found in Article 7(1)(h) and Article 7(2)(g) of the Rome Statute.

According to Article 7(1)(h) of the Elements of Crimes, the Elements of the crime of persecution are:

> Element 1: The perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights.
>
> Element 2: The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
>
> Element 3: Such targeting was based on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognised as impermissible under international law.
>
> 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.[+]
>
> Element 5: The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
>
> Element 6: The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

There are a number of differences, noted below, between the provisions in the Rome Statute on crimes against humanity and crimes of persecution and the provisions in international criminal instruments created prior to 1998. For instance:

1. The crime of persecution was given a statutory definition for the first time in Article 7(2)(g) of the Rome Statute.
2. The Preparatory Commission formulated a set of 6 Elements of the crime of persecution to assist in the interpretation and application of the Article 7(1)(h) and Article 7(2)(g) of the Rome Statute. The Elements of the crime of persecution are established in Article 7(1)(h) of the Elements of Crimes.

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[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

[+] "It is understood that no additional mental element is necessary for this element other than that inherent in element 6."

3. The concept of severely depriving a group or collectivity of fundamental rights is expressly stated in the Rome Statute unlike the other international instruments where the concepts have been inferred by the Trial Chambers.
4. The Rome Statute significantly widened the grounds on which persecution could be committed. Up until the 1998 Rome Statute, customary international law had established that persecution could be committed on political, racial, or religious grounds. Article 7(1)(h) of the Rome Statute, therefore, established that the crime of persecution is also committed on national, ethnic, cultural, gender, and other grounds recognized as impermissible under international law.
5. The CCL 10, ICTY, and ICTR do not have a nexus requirement established for crimes of persecution. However, this nexus requirement significantly narrowed the scope to prosecute crimes of persecution pursuant to the Rome Statute.
6. The Rome Statute, unlike the ICTR Statute, does not require discriminatory intent to be established for all crimes against humanity.
7. The Rome Statute, unlike the ICTY Statute, does not require a nexus to an armed conflict in order to prosecute crimes against humanity.

VII. INTERNATIONAL INSTRUMENTS PERTAINING TO THE CRIME OF PERSECUTION FORMULATED IN THE AFTERMATH OF THE 1998 ROME STATUTE

Following the Rome Statute of 1998 there have been 4 additional international judicial bodies created to date. These 4 international judicial bodies exercise jurisdiction to prosecute the perpetrators of crimes against humanity including the crime of persecution and other international crimes. They are: the Panels of Judges with Exclusive Jurisdiction Over Serious Criminal Offences Established within the District Courts in East Timor (2000); the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2001); the Special Court for Sierra Leone (2002); and the Iraqi Special Tribunal for the Prosecution of Crimes Against Humanity (2003).

These international judicial bodies have been established with the power to prosecute crimes of persecution, tabled below, pursuant to the following statutory provisions:

1. Section 5(1)(h) and 5(2)(f) of East Timor Regulation No. 2000/15 (2000);
2. Articles 3 and 5 of Chapter II of the 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 (2001);
3. Article 2(h) of the Statute of the Special Court for Sierra Leone (2002);
4. Article 9 of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (2003);
5. Article 12(a)(8) and 12(b)(6) of the Statute for the Iraqi Special Tribunal for the Prosecution of Crimes Against Humanity (2003).

Comparison of international instruments created in the aftermath of the 1998 Rome Statute relating to crimes of persecution

Terminology	**Rome Statute (1998)**	**East Timor Regulation No. 2000/15 (2000)**	**ECCC Special Law (Cambodia) (2001)**	**SCSL Statute (2002)**	**UN/Cambodia Agreement (2003)**	**IST Statute (2003)**
	Article 7(1)(h)	*Section 5(1)(h)*	*Article 5*	*Article 2(h)*	*Article 9*	*Article 12(a)(8)*
Armed conflict	-	-	-	-	-	-
Widespread or systematic attack directed against any civilian population,	Widespread or systematic attack directed against any civilian population	Widespread or systematic attack AND directed against any civilian population	Widespread or systematic attack directed against any civilian population on national, political, ethnical, racial or religious grounds	Widespread or systematic attack against any civilian population	Widespread or systematic attack directed against any civilian population	Widespread or systematic attack directed against any civilian population
Persecution against group or collectivity	Persecution against any identifiable group or collectivity	Persecution against any identifiable group or collectivity	-	-	Persecution against any identifiable group or collectivity	Persecution against any identifiable group or collectivity
Specific grounds	Political, racial, national, ethnic, cultural, religious, gender or other grounds	Political, racial, national, ethnic, cultural, religious, gender or other grounds	Political, racial and religious grounds	Political, racial, ethnic or religious grounds	Political, racial, national, ethnic, cultural, religious, gender or other grounds	Political, racial, national, ethnic, cultural, religious, gender or other grounds
Nexus	In connection with any acts in the paragraph or crime within the jurisdiction of the Court	In connection with any acts in the paragraph or crime within the jurisdiction of the Panel	-	-	In connection with any acts in the paragraph or crime within the jurisdiction of the Court	In connection with any acts in the paragraph or crime within the jurisdiction of the Tribunal
Mens rea	With knowledge of the attack	With knowledge of the attack	-	-	With knowledge of the attack	With knowledge of the attack

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Rome Statute – Rome Statute of the International Criminal Court

East Timor Regulation No. 2000/15 – Regulation No. 2000/15 on the Establishment of Panels of Judges with Exclusive Jurisdiction Over Serious Criminal Offences Established within the District Courts in East Timor

ECCC Special Law (Cambodia) – The 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

SCSL Statute – Statute of the Special Court for Sierra Leone

UN/Cambodia Agreement – Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea

IST Statute – The Statute of the Iraqi Special Tribunal for the Prosecution of Crimes Against Humanity

A. PANELS OF JUDGES WITH EXCLUSIVE JURISDICTION OVER SERIOUS CRIMINAL OFFENCES ESTABLISHED WITHIN THE EAST TIMOR DISTRICT COURTS

In 1975, East Timor was annexed as the 27th province of Indonesia, following independence from the colonial Portuguese government. In spite of a number of unsuccessful uprisings staged by Timorese revolutionary groups, it was not until June 1999 that the Indonesian government announced it would hold a referendum for the people of East Timor to determine their future. Up to 80% of the Timorese population voted for autonomy which resulted in a brutal campaign of violence perpetrated by pro-integration militias who favoured Indonesian rule. Following calls for international assistance, the United Nations Transitional Administration in East Timor (hereafter referred to as UNTAET) assisted with the move to transitional independence of East Timor once the Indonesian authorities withdrew. East Timor finally secured its independence on 20 May 2002.[96]

According to the Report of the UN Secretary General to the General Assembly regarding the situation of human rights in East Timor, it was evident that the attacks which took place in East Timor were triggered by the overwhelming vote supporting independence from Indonesia. The Report described the crimes which were committed in that territory, stating they included: "murder, torture, sexual violence, forcible transfer of populations and other persecution and inhumane acts, including

[96] East Timor Government homepage: www.gov-rdtl.org; United Nations Mission of Support in East Timor, background information: www.un.org/Depts/dpko/missions/unmiset/background/html.

destruction of property." Furthermore, the Report alleged that the crimes were committed in a widespread and/or systematic manner.[97]

Consequently, UNTAET issued Regulation No. 2000/11 on the Organization of Courts in East Timor, whereby Section 10(c) provided the Panels of Judges with exclusive jurisdiction for serious crimes. More specifically, the provision dealt with crimes against humanity, including the crime of persecution, perpetrated in East Timor between 1 January 1999 and 25 October 1999.

UNTAET Regulation No. 2000/15 on the Establishment of Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences, in particular Section 5(1)(h) established the following provisions regarding the crime of persecution:

> 5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:
>
> > (h) *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, 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 panels*; (emphasis added).

The crime of persecution was defined in Section 5(2)(f) as: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

[97] United Nations Report: Situation of Human Rights in East Timor, dated 10 December 1999. General Assembly document: A/54/660, paragraph 71. See also the Report from the Commission set up to Investigate Human Rights Violations in East Timor, "Executive Summary Report on the Investigation of Human Rights Violations in East Timor", dated 31 January 2000, available at: http://home.snafu.de/watchin/KPPHAMe.htm ; accessed on 5 February 2004.

It is clear from the wording of Sections 5(1)(h) and 5(2)(f) of Regulation 2000/15 that the provisions on the crime of persecution are identical to those stipulated in Article 7(1)(h) and 7(2)(g) of the Rome Statute.

The first case from the Panels of Judges to discuss the crime of persecution, *Prosecutor v. Joni Marques et al*, also observed that the wording of these two international provisions is identical. Furthermore, the Panel expressed its general satisfaction with the provisions pertaining to crimes of persecution found in both the Rome Statute and the East Timor Regulations.[98]

B. EXTRAORDINARY CHAMBERS WITHIN THE COURTS OF CAMBODIA

The Khmer Rouge in Cambodia, (then known as the Democratic Republic of Kampuchea), perpetrated serious human rights violations in the 1970's during which approximately one and half million people lost their lives. Approximately twenty-five years later, the UN and the Royal Government of Cambodia finalized negotiations to bring about accountability for the atrocities committed between 17 April 1975 and 6 January 1979. On 6 June 2003, the two authorities signed the "Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution of Crimes Committed during the Period of Democratic Kampuchea." The UN/Cambodia Agreement established Extraordinary Chambers in the Courts (ECCC) of Cambodia to prosecute crimes of genocide, crimes against humanity,

[98] *Prosecutor v. Joni Marques et al*, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at paragraphs 662-669.

grave breaches of the 1949 Geneva Conventions, and also crimes of homicide, torture and religious persecution pursuant to domestic Cambodian law.[99]

Prior to the Agreement signed between the Royal Government of Cambodia and the UN, the King of Cambodia had, on 10 August 2001, signed the "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea."

The two separate instruments, that is, the UN/Cambodia Agreement and the ECCC Special Law, both contain provisions that deal with crimes of persecution. However, the laws pertaining to crimes of persecution stipulated in these two instruments are not consistent. It is not surprising that there is some confusion as to which law will be applied by the ECCC when it shall eventually commence proceedings.[100]

For example, there is an inconsistency between Article 9 of the UN/Cambodia Agreement and Article 5 of the ECCC Special Law. Article 9 of the UN/Cambodia

[99] See The Council of Ministers Press and Communication Department from the Cambodian Government website, available at: www.camnet.com.kh/ocm/default.htm. In particular "Statement by the Cambodian Delegation to the United Nations Regarding the Establishment of Extraordinary Chambers within the Courts of Cambodia" available at: www.camnet.com.kh/ocm/government/government144.htm; accessed on 3 February 2004. Also "Remarks by His Excellency Sok An Senior Minister, Minister in Charge of the Office of the Council of Ministers Chairman of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders at the Signing Ceremony of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea," 6 June 2003, Chaktomuk Theatre, Phnom Penh, available at: www.camnet.com.kh/ocm/government/government152.htm; accessed on 3 February 2004. See also Suzannah Linton, "New Approaches to International Justice in Cambodia and East Timor" (March 2002) 84(845) *International Review of the Red Cross* 93 at 96.

[100] For further analysis on this issue see Sarah Williams, "The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?" in Colin Warbrick (ed), Current Developments: Public International Law (January 2004) 53(1) *International Comparative Law Quarterly* 227-245. Also, Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice" (2001) 12 *Criminal Law Forum* 185-246.

Agreement stipulates which crimes fall within the ECCC's jurisdiction. According to Article 9: "the subject matter jurisdiction of the Extraordinary Chambers shall be… crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court, and… such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001."

The difficulty with Article 9 of the UN/Cambodia Agreement is that when one turns to Chapter II of the Special Law, one finds a very different definition for crimes against humanity than the one established in the Rome Statute. According to Article 5 of the ECCC Special Law:

> Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial, or religious grounds, such as:
>
> --*persecutions on political, racial, and religious grounds*; (emphasis added).

The provisions under the ECCC Special Law are significantly different to those found in the 1998 Rome Statute for two reasons. Firstly, the chapeau to Article 5 of the ECCC Special Law establishes that there is a discriminatory intent element required for *all* crimes against humanity. Pursuant to Article 5 of the Law all crimes against humanity must be committed on national, political, ethnical, racial, or religious grounds. Secondly, Article 5 establishes that persecution is committed on political, racial, and religious grounds. In contrast, Article 7(1)(h) of the Rome Statute does two things: it provides a much wider stipulation of the grounds on which the crime of persecution could be committed and, at the same time, narrows the crime by referring to a nexus requirement which is not evident in the ECCC Special Law.

In addition, Article 3, pursuant to Chapter II of the ECCC Special Law, establishes that the ECCC shall have the power to prosecute crimes prohibited in the 1956 Penal Code of Cambodia that were perpetrated between 17 April 1975 and 6 January 1979. According to Article 3 of the Special Law this will include, *inter alia*, the crime of religious persecution which is prohibited in Articles 209 – 210 of the Penal Code. Furthermore, Article 3 of the ECCC Special Law, which came into power in August 2001, establishes that the statute of limitations for the 1956 Penal Code shall be extended to include the crimes committed during the Democratic Kampuchea period.[101]

There are a few difficulties with the provisions found in the UN/Cambodia Agreement, the ECCC Special Law, and the Penal Code. Suzannah Linton makes the observation that, first of all, Article 5 of the ECCC Special Law is "akin" to the ICTR provisions on crimes against humanity in that the discriminatory intent is required for all crimes against humanity and not specifically for persecution alone. Linton, commenting on the conflicting provisions, argues that one cannot comply with Article 9 of the UN/Cambodia Agreement provision to use the ICC definition of crimes against humanity because the ICC definition was "a progressive one that advanced the definitions used in both the ICTR Statute and that of its sister Tribunal, the ICTY." It is on this basis that Linton points out what she refers to as "the cardinal importance of human rights law" which is simply the common understanding that a person cannot be

[101] The difficulty with the Penal Code is that Article 3 clumsily extends the statutory limitation of the Code by an additional 20 years in order to cover the 17 April 1975 to 6 January 1979 period. Furthermore, according to the UN Group of Experts, "…sources on Cambodian law are extremely scarce. The primary source of criminal law prior to the Khmer Rouge period is the 1956 Code Pénal et Lois Pénales,… though it appears that no sources reliably and comprehensively update this law through 1975." See "Report of the Group or Experts for Cambodia" annexed to the Secretary General Report on Cambodia, U.N. Doc. A/53/850, S/199/231. See also Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice" (2001) 12 *Criminal Law Forum* 185 at 193-194.

tried, convicted and punished for conduct which was not criminal at the time the conduct was committed. Linton concludes that the error is probably typographic because Article 2 of the UN/Cambodia Agreement establishes that the ECCC Special Law has subject matter jurisdiction.[102]

C. SPECIAL COURT FOR SIERRA LEONE

Sierra Leone had experienced a decade of civil war dating back to 1991. In August 2000, the government of Sierra Leone invited the United Nations to establish a Special Court, created 16 January 2002, for the prosecution of violations of international humanitarian laws and Sierra Leonean laws committed in the territory since 1996.[103]

Article 2(h) of the SCSL Statute established that:

> 2. The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:
>
> (h) *Persecution on political, racial, ethnic or religious grounds*; (emphasis added).

Although the SCSL has recently commenced proceedings, it has not delivered any judgments pertaining to the crime of persecution as yet. Neither have any of the

[102] Suzannah Linton, "Comments on the Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea", *Searing for the Truth – Comment and Analysis*, Special English Edition, April 2003, Documentation Centre of Cambodia (DC-Cam) at 37-38. Available at: www.dccam.org

[103] Jelena Pejić, "Accountability for International Crimes: From Conjecture to Reality" (March 2002) 84(845) *International Review of the Red Cross* 13 at 19-20. Also United Nations Security Council, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915.

Accused indicted to date been charged with the crime against humanity of persecution.

D. IRAQI SPECIAL TRIBUNAL FOR THE PROSECUTION OF CRIMES AGAINST HUMANITY

Iraq, formerly under the rule of Saddam Hussein, was briefly governed by the Coalition Provisional Authority (hereafter referred to as the CPA) which established a Special Tribunal for the prosecution of crimes against humanity. The CPA came into power on 15 November 2003 by special agreement with the Iraqi Governing Council. In the aftermath of the American led campaign and military attack against the former Iraqi dictatorship, mass graves have been uncovered allegedly containing the bodies of up to one million Iraqis. The victims were primarily opponents or critics of the former Ba'ath regime.[104]

There have been some strong views expressed by academics concerning the Iraqi Special Tribunal and its Statute, recently described as suffering from 'legal schizophrenia'.[105] Much like the International Military Tribunal, the IST runs the risk of being dubbed 'victor's justice' because it is said to reproduce the very stigmatization and vengeance that was eminent at the IMT.[106] Michael P. Scharf, in

[104] For general information on the Coalition Provisional Authority "Mass Grave Strategic Plan" refer to the plan posted on the CPA website, available at: www.state.gov/g/drl/rls/27000pf.htm; accessed 3 February 2004.

[105] Yuval Shany, "Does One Size Fit All? Reading the Jurisdictional Provisions of the New Iraqi Special Tribunal Statute in the Light of the Statutes of International Criminal Tribunals" (2004) 2(2) *Journal of International Criminal Justice* 338 at 345.

[106] Danilo Zolo, "The Iraqi Special Tribunal: Back to the Nuremberg Paradigm?" (2004) 2(2) *Journal of International Criminal Justice* 313 at 316-318.

his lengthy critique of the IST has echoed the sentiment that the Tribunal borders on being categorized as victor's justice which he believes only serves to undermine the Tribunal's efforts. Scharf made the observation that "as currently structured, the IST risks being seen by both Iraqi's and outsiders as a puppet of the Occupying Power, and as a tool for vengeance by Saddam Hussein's enemies, rather than as the cornerstone of a new judicial system, committed to the rule of law."[107]

The IST Statute, modeled extensively upon the ICC Rome Statute, empowers the IST to prosecute crimes of persecution, amongst other stipulated crimes, committed since 17 July 1968. Article 12(a)(8) of the IST Statute established that:

> a. For the purposes of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> > 8. *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal*; (emphasis added).

The crime of persecution was defined in Article 12(b)(6) as: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

It is clear from the wording of Articles 12(a)(8) and 12(b)(6) of the IST Statute that the provisions on the crime of persecution are identical to those stipulated in Article 7(1)(h) and 7(2)(g) of the Rome Statute.

[107] Michael P. Scharf, "Is It International Enough? A Critique of the Iraqi Special Tribunal in light of the Goals of International Justice" (2004) 2(2) *Journal of International Criminal Justice* 330 at 330.

The IST has not yet commenced legal proceedings; therefore, to date there are no judgments pertaining to the crime of persecution.

3. ELEMENT 1 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES INDICATING THE KINDS OF DEPRIVATIONS THAT CONSTITUTE THE CRIME OF PERSECUTION

The previous chapter traced the historical development of the law pertaining to the crime of persecution from as early as 1899 leading up to the Rome Statute of 1998. The chapter also analyzed provisions on the crime of persecution established pursuant to instruments formulated by *ad hoc* Tribunals created in the aftermath of the International Criminal Court. The historical examination demonstrated that the crime of persecution had never been defined in any International Criminal Law instrument up until the Rome Statute provisions of 1998.

In this chapter, the writer discusses the kinds of deprivations that constitute the crime of persecution under the Rome Statute. The discussion will include an analysis of Element 1 of Article 7(1)(h) of the Elements of Crimes stipulated by the Preparatory Commission for the ICC. The writer will also compare Element 1 of the Elements of the crime of persecution with relevant parts of Article 7 of the Rome Statute as well as analyze customary international law laid down by *ad hoc* Tribunals pertaining to crimes of persecution.

I. ELEMENT 1 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES

Element 1 of Article 7(1)(h) of the Elements of Crimes, states:

> The perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights.

A. COMPARISON OF ELEMENT 1 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES AND ARTICLE 7(2)(G) OF THE ROME STATUTE

Element 1 of the crime of persecution parallels the wording of the Rome Statute definition of the crime of persecution found in Article 7(2)(g). Persecution is defined in Article 7(2)(g) as: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

Element 1 of Article 7(1)(h) of the Elements of Crimes differs slightly from Article 7(2)(g) of the Rome Statute. The wording found in the Article 7(2)(g) Rome Statute definition contains two additional requisites that must be established in order to prove crimes of persecution. These two additional requisites are intent, discussed below, and the requirement that the persecution is carried out by reason of the identity of the group or collectivity, discussed in the next chapter.

The first limb of the Rome Statute definition of the crime of persecution stipulates that the deprivation of the fundamental rights be not only severe but also intentional.

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

With the exception of Element 6 of Article 7(1)(h) of the Elements of Crimes, the Elements of the crime of persecution do not expressly stipulate any *mens rea* requirements.

Regarding the requisite of intent, stipulated in Article 7(2)(a) of the Rome Statute, this is defined in Article 30 of the Rome Statute. Article 30 establishes the mental element required for all the crimes that fall within the ICC's jurisdiction. According to Article 30(2), "a person has intent where: (a) in relation to conduct that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause or is aware that it will occur in the ordinary course of events."

Requiring that crimes of persecution must be committed with intent reflects customary international law. In the proceedings for *Prosecutor v. Dusko Tadić* the Trial Chamber established that, "what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual's fundamental right."[108] This position appears to have been adopted in other cases before the ICTY Trial Chambers, in particular: *Stakić, Krnojelac, Kvočka et al* and *Kordić and Čerkez*.[109]

[108] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Opinion and Judgment, 7 May 1997 paragraph 697.

[109] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 738, *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraph 431, *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, ICTY Trial Judgment, 2 November 2001, paragraph 200, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 212.

B. COMPARISON OF ELEMENT 1 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES, ARTICLE 7(2)(G) OF THE ROME STATUTE AND LEADING JURISPRUDENCE FROM *AD HOC* TRIBUNALS

There are three leading cases from *ad hoc* Tribunals which define crimes of persecution: *Joni Marques et al* from East Timor, *Kupreškić et al* from the ICTY and *Ruggiu* from the ICTR. The Judgments of all three cases were executed after the Rome Statute provisions of 1998. Two of the three cases, *Joni Marques et al* and *Kupreškić et al*, refer to the ICC Elements of Crimes and Rome statutory provisions on persecution in their reasoning. What makes these Judgments particularly significant is that the definitions of the crime of persecution formulated by the respective Tribunals are similar to the wording of Element 1 of Article 7(1)(h) of the Elements of Crimes and Article 7(2)(g) of the Rome Statute.

1. Los Palos case - East Timor Panels of Judges

Prosecutor v. Joni Marques et al, also known as the Los Palos case, [110] establishes a significant legal precedent for the ICC. The UNTAET Regulation No. 2000/15 provisions on the crime of persecution are exactly the same as those found in the Rome Statute.

[110] *Prosecutor v. Joni Marques et al*, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001, hereafter referred to as the Los Palos case.

UNTAET Regulation No. 2000/15 empowers the Panels of Judges with exclusive jurisdiction over serious criminal offences established within the East Timor District Courts to prosecute the perpetration of crimes of persecution. Persecution is defined in Section 5(2)(f) of Regulation 2000/15 as: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." It is clear that this definition of persecution is the same as that stipulated in Article 7(2)(g) of the Rome Statute. It is also similar to the wording found in Element 1 of Article 7(1)(h) of the Elements of Crime.

The Prosecution alleged in Count 4 of the Los Palos case indictment that between 8 and 30 September 1999 the Accused, recognized by the victims, belonged to 'Team Alpha' members of the Indonesian Military personnel. According to the indictment, the Accused "intentionally committed, aided, abetted or otherwise assisted in the severe deprivation of fundamental rights of persons by reasons of the identity of their group or collectivity in violation of Section 5(1)(h) of the UNTAET Regulation 2000/15."[111]

The Panel of Judges, assessing the evidence and testimonies, found four of the Accused guilty of the crime against humanity of persecution, ruling that the allegations listed in the indictment were proven beyond a reasonable doubt.[112] The Panel further found that the definitions of persecution laid down pursuant to the

[111] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at p. 9.

[112] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at paragraph 842. Although there were 10 Accused persons in this case, the Prosecution only charged 4 persons: Joni Marques, Alarico Fernandes, Paulo Da Costa, and Gonsalo Dos Santos, with the crime of persecution. All four were found guilty of persecution.

UNTAET Regulation and the Rome Statute were satisfactory, observing that these definitions were the same. The Panel also adopted the ICC Elements of Crimes.[113] The Los Palos case had involved widespread and systematic destruction of dwelling properties and the forced transfer of villagers from their homes. The Panel held that the conduct of the Accused amounted to unlawful displacement of villagers and deprivation of their fundamental rights.[114]

Aside from establishing a significant legal precedent for the ICC, a major criticism of the case is that although the Prosecution and Defense put forward lengthy legal arguments on the law of persecution, the Panel only discusses the applicable law in 3 of the 249 pages of the judgment. In doing so, the Panel fails to justify their conclusions and adds no further authorities or findings to our understanding of this area of law.[115]

2. Kupreškić et al case – ICTY

This case is significant for being the first case from the ICTY to define the crime of persecution. The wording of the definition formulated by the Trial Chamber is similar to that of Element 1 of Article 7(1)(h) of the Elements of Crimes and Article 7(2)(g) of the Rome Statute to the extent that persecution is recognized as the gross or blatant denial of fundamental rights.

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[113] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at paragraphs 662-669.

[114] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at paragraphs 801, 816 & 825.

[115] For detailed analysis and criticisms of the Los Palos case see Sylvia de Bertodano, "Current Developments in Internationalized Courts," (2003), 1 *Journal of International Criminal Justice* 226 at 232-234.

In *Prosecutor v. Kupreškić et al*, 6 Accused were charged under Count 1 with the crime of persecution pursuant to Article 5(h) of the Yugoslav Statute. The Prosecution alleged in the indictment that between the period October 1992 until April 1993, the Accused persecuted Bosnian Muslim inhabitants of the Ahmici-Šantici region with the aim of removing them from the village and surrounding area through systematic killing of the civilians, destruction of their homes and property and detention and expulsion of Bosnian Muslims from the Ahmici-Šantici region.[116]

In reaching its conclusions for a definition of the crime of persecution, the Chamber, having analyzed international and national case law, summarized the *actus reus* of persecution as entailing the following indicators:

> a) A narrow definition of persecution is not supported in customary international law. Persecution has been described by courts as a wide and particularly serious genus of crimes committed against the Jewish people and other groups by the Nazi regime.
>
> (b) In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.
>
> (c) Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights.
>
> (d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. In reality, persecutory acts are often committed pursuant to a discriminatory policy or a widespread discriminatory practice…
>
> (e) As a corollary to (d), discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public

[116] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 33.

> parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect.[117]

Having identified the *actus reus* of the crime of persecution, the Trial Chamber defined persecution as: "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5."[118] The wording of this definition is similar to that of Element 1 of Article 7(1)(h) of the Elements of Crimes and Article 7(2)(g) of the Rome Statute whereby persecution is recognized as the denial of fundamental rights. However, there are three major differences between the Article 7(2)(g) Rome Statute definition, Element 1 and the *Kupreškić et al* definition.[119] Firstly, the two ICC international instruments use the terms 'severe deprivation' in contrast with 'gross or blatant denial'. Secondly, the *Kupreškić et al* definition uses a 'same level of gravity' test which is not enumerated in the ICC international instruments. Thirdly, the *Kupreškić et al* definition refers to the concept of discriminatory grounds, whereas Rome Statute definition uses the phrase 'by reason of the identity of the group or collectivity' and Element 1 is silent on the issue of discriminatory intent.

With respect to charging an accused person with persecution, the Chamber determined that three elements must be present, namely: "(a) those elements required

[117] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 615.

[118] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 621.

[119] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 621.

for all crimes against humanity under the Statute; (b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5; and (c) discriminatory grounds."[120]

Applying the definition of persecution to the case, the Chamber stated that the deliberate and systematic killings of the Bosnian Muslims and the detention and expulsion of the same from their region constituted persecution as the gravity of the crimes qualify as murder etc crimes specifically noted in Article 5. Regarding the destruction of property this was said to constitute a gross or blatant denial of fundamental rights, that is, the destruction of a specific population's livelihood, which, when committed on discriminatory grounds amounted to persecution.[121]

3. Ruggiu case – ICTR

In *Prosecutor v. Ruggiu*, the Accused worked as a journalist and broadcaster at the RTLM. According to the Prosecutor's allegations set out in the indictment, "the RTLM propagated the Hutu extremist ideology, by systematically inciting ethnic hatred and violence against the entire Tutsi minority." The Accused was charged with persecution under Count 5 (later amended to Count 2) pursuant to Article 3(h) of the ICTR Statute.[122]

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[120] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 627

[121] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraphs 628-631.

[122] Indictment for *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, paragraphs 4.9 and 5. The indictment is available from ICTR website: www.ictr.org.

The Trial Chamber likened the gravity of the crimes committed by the Accused to those of Streicher, from the historic Nuremberg trials, asserting Ruggiu like his predecessor, "infected people's minds with ethnic hatred and persecution."[123]

The *Ruggiu* case is important because it is the first case from the ICTR to discuss and define the crime of persecution.[124] In doing so, the Chamber adopted the ICTY *Kupreškić et al* definition of persecution, that is, "a gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as other acts prohibited in Article 5."[125]

Applying the definition of persecution to the facts of the case the Chamber indicated:

> … when examining the acts of the persecution which have been admitted by the accused, it is possible to discern a common element. Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of a wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from society in which they live alongside the perpetrators, or eventually even from humanity itself.[126]

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[123] *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, paragraph 19.

[124] *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000.

[125] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 621, see discussion in *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, paragraph 21; confirmed in *Prosecutor v. Nahimana et al,* Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, paragraph 1072.

[126] *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgment, 1 June 2000, paragraph 22;

C. ANALYSIS OF ELEMENT 1 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES

1. The Perpetrator

a. Who is said to perpetrate crimes of persecution?

The chapeau of Article 7(1) of the Rome Statute establishes that in order to amount to a crime against humanity, which includes crimes of persecution, there must be a widespread or systematic attack directed against any civilian population. Article 7(2)(a) defines the phrase 'attack directed against any civilian population' as: "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

The Rome Statute is clear on the issue of who could be prosecuted for perpetrating crimes of persecution. Basically, any perpetrator could be prosecuted. The perpetrator does not have to be a State agent or organization at all. In essence, the ICC could prosecute anyone who committed crimes of persecution so long as it could be shown that, in accordance with Article 7(2)(a) of the Rome Statute, the perpetrator was acting pursuant to or in furtherance of a State or organizational *policy* to commit such attack.

Geoffrey Robertson makes the claim that crimes against humanity are unique from other ordinary crimes because they must be committed pursuant to the policy of a State or organization. Robertson states:

> The Rome Statute crystallizes the concept of crimes against humanity and distinguishes it from other crimes by reference to its genesis in the *policy* of a State or political organization. It is not defined by the gravity of the offence… what sets (the crime) apart both in wickedness and in the need for special measures of deterrence is the simple fact that it is an act of real brutality ordained by government - or at least by an organization exercising or asserting political power. It is not the mind of the torturer, but the fact that this individual is part of the apparatus of a state, which makes the crime so horrific and locates it in a different dimension from ordinary criminality.[127]

Jurisprudence from the *ad hoc* Tribunals also establishes that the involvement of a State agent is not necessary to constitute crimes against humanity, so long as the actions of the perpetrator stem from a policy or plan instigated or directed by a State, organization or other group.[128]

Furthermore, analysis of national laws and prosecutions in countries such as Canada, Australia and France reveals that State action is not necessary to determine the perpetration of crimes against humanity.[129]

b. Individual Criminal Responsibility

Ultimately, it is individuals who carry out the policies and operations of any legal entities.[130] The principle of individual criminal responsibility dates back to the International Military Tribunal judgment in which the Tribunal, with reference to

[127] Geoffrey Robertson QC, *Crimes Against Humanity: The Struggle for Global Justice* (2nd edn) (England: Penguin Books, 2002) at 361.

[128] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (London: Sweet and Maxwell, 2003) paragraph 5-008 at 95.

[129] Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997) at 66-67.

[130] Cherif M. Bassiouni, *Introduction to International Criminal Law* (Ardsley: Transnational Publishers, Inc, 2003) at 62.

Article 6 of the Nuremberg Charter, established that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[131]

i. Individual Criminal Responsibility pursuant to the Rome Statute

The ICC is empowered to prosecute individuals. According to Article 25(1) and (2) of the Rome Statute:

> (1) The Court shall have jurisdiction over natural persons;
> (2) A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment.

Article 25(3) establishes the circumstances in which a person shall be held individually responsible. According to subparagraphs (a) to (d) these include, *inter alia*, responsibility for: committing a crime, ordering, soliciting, or inducing the commission of a crime, or aiding, abetting or otherwise assisting in the commission of a crime.

Article 27 of the Rome Statute establishes that a person shall be held criminally responsible for the perpetration of crimes regardless of what official position that person holds. Article 27(1) stipulates that "this Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility…" In addition, Article 27(2) establishes that the Court

[131] Nazi Conspiracy and Aggression, Opinion and Judgment of the IMT 66 (1947), for detailed discussion see Cherif M. Bassiouni, *Introduction to International Criminal Law* (Ardsley: Transnational Publishers Inc., 2003).

shall not be barred from exercising its jurisdiction over persons granted immunities or special procedural rules pursuant to any national or international laws.

Article 28 of the Rome Statute goes so far as to hold commanders and superiors criminally responsible for the actions of forces or subordinates under their effective control, so long as the commander or superior in question knew or should have known and failed to take the necessary or reasonable measures to prevent or repress the commission of the crimes in question.

ii. Individual Criminal Responsibility pursuant to customary international law

R v Bow Street Metropolitan Stipendiary Magistrates Court and Others, ex parte Pinochet Ugarte (No. 3),[132] referred to as *Pinochet III*, is a significant precedent in international law that reinforces the concept of individual criminal responsibility. The ruling makes it clear that former heads of state are not immune from prosecution of international crimes.[133] The *Pinochet III* ruling also sets a significant precedent in international law for the current trial of Slobodan Milošević, former leader of Yugoslavia. Milošević was indicted in 1999 by the ICTY where he is charged with persecution, on political, ethnic and racial grounds, amongst other crimes.[134]

[132] *R v Bow Street Metropolitan Stipendiary Magistrates Court and Others, ex parte Pinochet Ugarte (No. 3)* [1999] 2 All England Reports 97 (House of Lords).

[133] See *R v Bow Street Metropolitan Stipendiary Magistrates Court and Others, ex parte Pinochet Ugarte (No. 3)* [1999] 2 All England Reports 97 (House of Lords). For detailed discussion on the outcome of this case, see Reed Brody and Michael Ratner (eds) *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (The Hague: Kluwer Law International, 2000).

[134] See ICTY website for online information case sheet available at: www.icty.org

The *Pinochet III* Judgment has set a significant precedent in customary international law as one sees the likes of Hissein Habre, exiled former dictator of Chad, indicted in Senegalese courts for crimes against humanity committed during his tenure.[135] Also, the Royal Cambodian Government in collaboration with the UN has recently finalized agreements to set up the long awaited ECCC to prosecute surviving leaders of the Khmer Rouge for the mass abuses committed during their brief 1975 to 1978 reign.[136]

Regarding the responsibility of superiors, it is interesting to note the Judgment in *Prosecutor v. Hadžihasanović et al.*[137] The case involved a superior who assumed command on 1 April 1993, but failed to punish subordinates for crimes, the Prosecution alleged, committed in January 1993. The Trial Chamber agreed with the Prosecution. The Chamber ruled that under the doctrine of command responsibility, a commander may be found liable for crimes committed prior to the time at which the commander assumed command.[138] The Defence appealed and the Appeal Chamber,

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[135] For further details on the indictments of international leaders and the far reaching implications of the Pinochet III case see Reed Brody and Michael Ratner (eds) *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (The Hague: Kluwer Law International, 2000).

[136] See The Council of Ministers Press and Communication Department from the Cambodian Government website, available at: www.camnet.com.kh/ocm/default.htm. In particular "Statement by the Cambodian Delegation to the United Nations Regarding the Establishment of Extraordinary Chambers within the Courts of Cambodia" available at: www.camnet.com.kh/ocm/government/government144.htm; accessed on 3 February 2004. Also "Remarks by His Excellency Sok An Senior Minister, Minister in Charge of the Office of the Council of Ministers Chairman of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders at the Signing Ceremony of the Agreement between de United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea," 6 June 2003 Chaktomuk Theatre, Phnom Penh, available at: www.camnet.com.kh/ocm/government/government152.htm; accessed on 3 February 2004. See also Suzannah Linton, "New Approaches to International Justice in Cambodia and East Timor", (March 2002) 84(845) *International Review of the Red Cross* 93 at 96.

[137] *Prosecutor v. Hadžihasanović et al*, Case No. IT-01-47, ICTY Decision on Interlocutory Application Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16 July 2003, paragraphs 48, 51.

[138] See Daryl Mundis, "Current Developments at the ad hoc International Criminal Tribunals" (2003) 1 *Journal of International Criminal Justice* 520 at 525 discussing *Prosecutor v. Hadžihasanović et al*.

by a majority of three to two votes, overturned the Trial Chamber decision. The Appeal Chamber referred to Article 28(a)(1) of the Rome Statute. The Chamber relied on this provision and found that Article 28 did not extend to hold superiors criminally responsible for crimes committed by a subordinate prior to the superior's assumption of command over that subordinate.[139]

The Prosecutor's submissions in *Hadžihasanović et al*[140] were based on the *Kordić and Čerkez* Judgment which had previously adopted a much wider view of command responsibility.[141] The Trial Chamber in *Kordić and Čerkez* held, "the duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself."[142]

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[139] *Prosecutor v. Hadžihasanović et al*, Case No. IT-01-47, ICTY Decision on Interlocutory Application Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16 July 2003, paragraphs 48, 51. For in-depth discussion on this case see Christopher Greenwood, "Command Responsibility and the *Hadžihasanović et al* Decision" (2004) 2(1) *Journal of International Justice* 598 – 605.

[140] Prosecution's Brief Regarding Issues in the 'Joint Challenge to Jurisdiction Arising from the Amended Indictment', 10 May 2002, paragraph 62.

[141] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, ICTY Trial Judgment, 26 February 2001, paragraph 446.

[142] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, ICTY Trial Judgment, 26 February 2001, paragraph 446, cited in the Prosecution's Brief Regarding Issues in the 'Joint Challenge to Jurisdiction Arising from the Amended Indictment', 10 May 2002, paragraph 62.

2. Severely deprived

a. What does severely depriving one or more persons entail?

Although Element 1 of Article 7(1)(h) of the Elements of Crimes states: "the perpetrator severely deprived, contrary to international law,* one or more persons of fundamental rights," the provision fails to provide the meaning of the phrase 'severely deprived'.

In addition, Article 7(2)(g) of the Rome Statute 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." The definition of persecution found in Article 7(2)(g) also fails to indicate how to interpret the phrase 'severely deprived'.

Standard dictionaries provide a plain meaning for the word 'severe'; this is defined as: "harsh, extreme, serious, stern, methodical, strict, and austere."[143] To 'deprive' is defined as: "to divest, strip, bereave, and dispossess of a possession." [144]

Machteld Boot proposes that "the word 'severe' does not refer to the character of an act of persecution as such, but refers to the character of the deprivation of rights."[145]

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* "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

[143] Macquarie Dictionary and Thesaurus (New South Wales: Macquarie Library Pty Ltd, reprinted 1993), at 366, Collins Gem Dictionary and Thesaurus (Britain: HarperCollins Publishers, reprinted 1996) at 506.

[144] Oxford English Dictionary Vol III D-E (Oxford: Clarendon Press, reprinted 1969) at 221.

For example, this could include the widespread or systematic nature of the deprivation of the rights i.e. the methodic planning of the deprivation of rights or the large scale number of victims deprived of their rights. Similarly, "the term 'deprivation' already implies that more is needed than the mere nullifying or impairing the recognition, enjoyment or exercise of these fundamental rights." [146]

b. How do *ad hoc* Tribunals interpret 'severely deprived'?

In the proceedings for *Prosecutor v. Dusko Tadić* the Trial Chamber indicated that the deprivation of the fundamental right must be serious enough to justify the label of a crime of persecution. The Chamber held that it is "the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic right that constitutes persecution."[147]

The Trial Chamber in *Prosecutor v. Kupreškić et al* developed a level of gravity test which assesses the severity of the deprivation of rights to determine if they constitute crimes of persecution. According to the Chamber:

> Although the realm of human rights is dynamic and expensive, not every denial of a human right may constitute a crime against humanity. Accordingly, it can be said that at a minimum,

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[145] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 519. The Author refers to the *Prosecutor v. Krstić*, Case No. IT-98-33, ICTY Trial Judgment, 2 August 2001, paragraph 535 and *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000 paragraph 622.

[146] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 519. The Author refers to the *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 697.

[147] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 697.

> acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5. [148]

This 'same level of gravity' test has been adopted in leading cases from the ICTY[149] and also at the ICTR.[150]

The *Kordić and Čerkez* Judgment went one step further and added, "it recognizes that the 'same level of gravity' test may indeed result in the exclusion of some acts from the realm of criminal persecution, yet finds this to be a wholly valid result." [151] The Trial Chamber had relied on the *Prosecutor v. Kupreškić et al* reasoning that not all deprivation of rights amount to crimes against humanity.[152] However, the Chamber did emphasize that not only are crimes of persecution unique, but, when considering whether the acts satisfy the formulated gravity threshold, they must be evaluated in context as a crime of cumulative effect. Therefore, the Trial Chamber was of the opinion that the overall consequence of crimes of persecution must offend humanity so as to be termed 'inhumane'.[153]

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[148] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000 paragraphs 618-619.

[149] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 736, *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 635, *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraph 434, P*rosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 195.

[150] *Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, paragraph 1072, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 347, *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, paragraph 21.

[151] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 196.

[152] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 196, see also *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 618.

[153] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 199, see also *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 622, *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, ICTY Trial Judgment,

The Prosecutor, in the Los Palos case, relying on the customary international law recognized in *Kupreškić et al, Kordić and Čerkez, and Tadić*, argued that there are three levels of seriousness of discriminatory acts which may distinguish the gravity of crimes of persecution. These are:

a. Acts which are sufficiently serious to constitute persecution on their own even if only one act was committed;
b. Acts which are less serious but which, together with other acts, through their cumulative effect reach the necessary level of gravity; and
c. Acts which even cumulatively are not sufficiently serious to amount to persecution.[154]

The definitions of the crime of persecution pursuant to Article 7(2)(g) of the Rome Statute and Section 5(2)(f) of the East Timor Regulation 2000/15 are exactly the same. It remains to be seen whether the ICC will also adopt the 'three levels of seriousness' test found in the Los Palos case.

3. One or more persons

a. Negotiations at the Preparatory Commission

There was much debate from delegates at the Preparatory Commission over the specific wording of Element 1 of Article 7(1)(h) of the Elements of Crimes with

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2 November 2001, paragraph 185, *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraph 434.

[154] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at p. 32-33, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 199, *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000 paragraphs 56, 622, & 615, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 70. The three levels of seriousness of discriminatory acts are also discussed in Kai Ambos and Steffen Wirth, "The Current Law on Crimes Against Humanity" (2002) 13(1) *Criminal Law Forum* 1 at 76.

regard to who exactly could be severely deprived of their fundamental rights. The delegates were divided, the Canadian and German representatives preferred to adopt the phrase 'by reason of their membership in an identifiable group or collectivity' whereas the Arab States and the US preferred 'identifiable group or members of that group.' The debate continued as delegates conceded that depriving a group of fundamental rights inevitably resulted in depriving individual members of the group of their rights too. The debate remained unresolved until the second reading where US delegates suggested the Preparatory Commission refrain from identifying 'groups' in Element 1 and instead introduce the concept of groups or collectivities into Element 2 of Article 7(1)(h) of the Elements of Crimes. The delegates adopted the US proposal and drafted Element 1 as we see it today. [155]

b. Comparison of the Elements of Crimes and the Rome Statute

The resolution of the debate amongst delegates of the Preparatory Commission over the specific wording of Element 1 which sought to identify who exactly could be severely deprived of their fundamental rights is problematic. The delegates failed to maintain consistency between the Elements of Crimes and the Rome Statute. Element 1 of the crime of persecution refers to the severe deprivation of fundamental rights carried out against one or more persons. In contrast, Article 7(1)(h) of the Rome Statute refers to persecution against any identifiable group or collectivity. Similarly, Article 7(2)(g) of the Rome Statute refers to a group or collectivity; this terminology

[155] Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 96. See also the following Preparatory Commission documents: PCNICC/1999/WGEC/DP.36; PCNICC/1999/WGEC/DP.39; PCNICC/1999/DP.4/Add.1.

is supported in Element 2 of Article 7(1)(h) of the Elements of Crimes which also refers to the targeting of a group or collectivity. Reading through Article 7 of the Rome Statute as well as Elements 5 and 6 of Article 7(1)(h) of the Elements of Crimes, one finds phrases such as: 'widespread', 'systematic' and 'attacks directed against any civilian population'. These phrases provide a context that indicates these crimes must be perpetrated on a large scale. Therefore, the notion of a handful of victims described in Element 1 as 'one or more persons' falls short somehow and does not seem to reflect the Rome Statute provisions or the remaining Elements of the crime of persecution.

4. Contrary to International Law

Both Element 1 of Article 7(1)(h) of the Elements of Crimes and the Article 7(2)(g) Rome Statute definition of persecution established that the severe deprivation of the fundamental rights must be contrary to international law. The inclusion of the phrase 'contrary to international law' generated much debate amongst delegates at the Preparatory Commission. On the one hand, delegates felt the inclusion of the phrase was unnecessary as it restated the general nature of the unlawfulness of the crimes, a concept that was already stipulated throughout the Rome Statute and, more specifically in paragraph 6 of the General Introduction to the Elements of Crimes. On the other hand, delegates felt that it was necessary to explicitly adhere to statutory language and spell out the requirement that the severe deprivation of the fundamental

rights be contrary to international law. The debate was resolved by adding a footnote to the text of Element 1 instead.[156]

5. Fundamental rights

Article 7(2)(g) of the Rome Statute defines the crime of persecution as: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the group or collectivity." Element 1 of Article 7(1)(h) of the Elements of Crimes, which parallels the wording of Article 7(2)(g) of the Rome Statute, states: "the perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights." The Rome Statute and the Elements of Crimes do not define the phrase 'fundamental rights'. Neither do these instruments provide examples of what constitutes such rights.

There was much debate from delegates at the Preparatory Commission regarding the issue of fundamental rights and how they would be recognized in the context of Element 1 of the Elements of the crime of persecution. Some delegates were of the opinion that the concept of 'universal recognition' was to be applied to fundamental rights. However, this argument was opposed when it became apparent that the negotiators of the Rome Statute had already stipulated that universal recognition

[156] Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 96. The footnote to Element 1 of Article 7(1)(h) of the Elements of Crimes states: "this requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes." Paragraph 6 of the General Introduction to the Elements of Crimes stipulates that "the requirement of 'unlawfulness' found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the Elements of Crimes."

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

would be applied to the new grounds of persecution besides those enumerated in Article 7(1)(h) of the Statute. The debate was concluded by dealing with the concept of universal recognition in paragraph 1 of the Introduction to the Elements of Crimes of crimes against humanity, instead of placing the phrase 'universal recognition' as a specific requisite in the text of Element 1.[157]

Egyptian delegates at the Preparatory Commission made some valid statements worth mentioning regarding the need to clarify what the Commission considered as fundamental rights. The Egyptians wanted to ensure that States would not be held liable for failing to observe values or norms that were only recognized in some States or civilizations but not in others.[158] The delegates felt that it was crucial to clearly explain what fundamental rights were. They argued, "such fundamental rights should be those which are recognized and accepted on the universal level, that is to say, those rules applicable vis-à-vis the State, either because they constitute international custom as a source of international law or because the State has accepted them through its conventional obligations."[159]

[157] Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 96. See also the Preparatory Commission document PCNICC/2000/L.1/Rev.1/Add.2.

[158] Summary of Statements Made in Plenary in Connection with the Adoption of the Report of the Working Group on the Rules of Procedure and Evidence and the Report of the Working Group on Elements of Crime, Preparatory Commission document PCNICC/2000/INF/4, dated 13 July 2000 at p.3.

[159] Summary of Statements Made in Plenary in Connection with the Adoption of the Report of the Working Group on the Rules of Procedure and Evidence and the Report of the Working Group on Elements of Crimes, Preparatory Commission doc. PCNICC/2000/INF/4, dated 13 July 2000 at p.3.

a. Rights in general

In order to determine which rights are fundamental or not, it is the writer's opinion that one would first need to establish that there is in fact an identifiable right to begin with. The 1948 Universal Declaration of Human Rights (hereafter referred to as UDHR) is arguably the first international instrument that mandates global responsibility for human rights.[160] Although not binding as an enforceable instrument, the declaration has emerged as customary international law.[161]

The UDHR is profoundly significant because it paved the way for what is widely understood today as the International Bill of Rights.[162] This Bill consists of the UDHR, and two other important international legal instruments. These are: the International Covenant on Civil and Political Rights (hereafter referred to as ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereafter referred to as ICESCR).

i. Civil and Political Rights

Civil and political rights are established pursuant to the International Covenant on Civil and Political Rights. They include rights such as: the right of self-determination, the right to equality before courts and tribunals, the right to freedom of

[160] For more details see the United Nations Development Program (UNDP) *Human Development Report 2000* (New York: Oxford University Press, 2000).

[161] Christopher C. Joyner, "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability" (Summer, 1998) 26 *Denver Journal of International Law and Policy* 591 at 591. See also Asbjørn Eide and Allan Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd rev edn) (The Hague: Kluwer Law International, 2001) at 3.

[162] Douglass Cassel, "International Human Rights Law in Practice: Does International Human Rights Law Make a Difference?" (Spring 2001) 2 *Chicago Journal of International Law* 121 at 134-135.

expression, the right not to be imprisoned for the inability to fulfill a contractual obligation etc.

The ICCPR is significant in international law because it contains certain rights from which a State can never depart, regardless of the circumstances, be they internal or international in nature. These rights and freedoms are identified as non-derogable rights. These non-derogable rights represent the absolute minimum standard rights that should not be infringed or amended.[163] Non-derogable rights, tabled below, are found listed in Article 4(2) of the ICCPR which stipulates that "no derogation from Articles 6, 7, 8(1)(2), 11, 15, 16 and 18 may be made under this provision."

[163] Fausto Pocar, "Human Rights Under the International Covenant on Civil and Political Rights and Armed Conflicts" in Lal Chand Vohrah et al (eds) *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003) at 732-733. Also Françoise Bouchet-Saulnier edited and translated by Laura Brav, *The Practical Guide to Humanitarian Law* (New York: Rowman & Littlefield Publishers Inc, 2002), see generally the discussion and definitions on fundamental guarantees and non-derogable rights at 107 – 109. Also Sigrun I. Skogly, "Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?" (Spring, 2001) 5(1) *The International Journal of Human Rights* 58 at 66-67.

Non-derogable rights stipulated in the International Covenant on Civil and Political Rights

PROVISION	NON-DEROGABLE RIGHTS
Article 6	(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
Article 7	No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
Article 8	(1) No one shall be held in slavery; slavery and the slave-trade in all forms shall be prohibited. (2) No one shall be held in servitude.
Article 11	No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation
Article 15	No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed, if subsequent to the commission of the offence, provision is made by aw for the imposition of a lighter penalty, the offender shall benefit thereby. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.
Article 16	Everyone shall have the right to recognition everywhere as a person before the law.
Article 18	Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in a community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The State Parties to the present Covenant undertake to respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

ii. Economic, Social and Cultural Rights

Economic, social and cultural rights are established pursuant to the International Covenant on Economic, Social and Cultural Rights. They include rights such as: the right to social security, the right to the enjoyment of just and favourable conditions of work, the right to take part in a cultural life and enjoy arts and share in scientific advancements and its benefits etc.

The general view expressed by delegates at the 1993 World Conference on Human Rights was that "all human rights are universal, indivisible and interdependent and interrelated."[164] Yet, economic, social and cultural rights, dubbed programmatic

[164] World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc.A/CONF.157/23, Part I, paragraph 5, discussed in Asbjørn Eide and Allan Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Asbjørn Eide, Catarina Krause and Allan Rosas

rights, have traditionally been thought of as legally unenforceable.[165] Asbjørn Eide and Allan Rosas have observed that civil and political rights have gained more support and attention over the years than economic, social and cultural rights which have remained underdeveloped to a large extent.[166] There are two reasons why economic and social rights, in particular, have been described as underdeveloped. These rights are underdeveloped mainly because of the way the provisions are worded and the weakness of the monitoring mechanisms of the treaty provisions put in place by the international community.[167] The inadequacy of defining and enforcing poorly worded economic rights is raised by Philip Alston, who argues that "it is generally agreed that the major shortcoming of the existing international arrangements for the promotion of respect for economic rights is the vagueness of many of the rights as a formulated in the Covenant and the resulting lack in the clarity as to their normative implications."[168]

(eds), *Economic, Social and Cultural Rights: A Textbook* (2nd rev edn) (The Hague: Kluwer Law International, 2001) at 3-5.

[165] Sigrun I. Skogly, "Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?" (Spring, 2001) 5(1) *The International Journal of Human Rights* 58 at 67.

[166] Asbjørn Eide and Allan Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd rev edn) (The Hague: Kluwer Law International, 2001) at 3-5.

[167] Martin Scheinin, "Economic and Social Rights as Legal Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd rev edn) (The Hague: Kluwer Law International, 2001) 27 at 30.

[168] Philip Alston, "No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant" in A. Eide and J. Helgesen (eds), *The Future of Human Rights Protection in a Changing World* (Oslo: Norwegian University Press, 1991) at 86 quoted and discussed in Martin Scheinin, "Economic and Social Rights as Legal Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd rev edn) (The Hague: Kluwer Law International, 2001) 27 at 30-31.

b. Fundamental rights

i. Factors which could indicate fundamental rights

Once you have established that there is an identifiable right, then the next step would be to determine whether or not that right is in fact a fundamental right. It is this writer's opinion that the rights enumerated in the International Bill of Rights could be considered as fundamental rights.

It may be noted that there are numerous international instruments which recognize rights. For instance, Section 2 of Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor compiled a list of internationally recognized human rights standards. Section 2 provides:

> In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in:
>
> The Universal Declaration on Human Rights of 10 December 1948;
> The International Covenant on Civil and Political Rights of 16 December 1966 and its Protocols;
> The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;
> The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
> The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979,
> The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984;
> The International Covenant on the Rights of the Child of 20 November 1989.

However, the writer will restrict the discussion of fundamental rights to an analysis of the rights established under the International Bill of Rights. The discussion of these rights is by no means exhaustive, but provides examples as to which rights could be fundamental.

ii. How do *ad hoc* Tribunals interpret the phrase 'fundamental rights'?

To date, there are only three cases that have been heard by the Panels of Judges in East Timor which involve crimes of persecution. In the first case, the Los Palos Judgment failed to explain how the Panel interpreted the phrase 'fundamental rights'. The Panel merely stated its satisfaction with the definition of the crime of persecution stipulated under both the UNTAET Regulation and the Rome Statute and its Elements of Crimes. The Panel neglected to explain the concept of fundamental rights any further.[169] Similarly, in *Public Prosecutor v. Damiao Da Costa Nunes*, the Panel upheld the Los Palos case to adopt the ICC Elements of Crimes. However, the Panel failed, again, to define any of the terms used in Regulation 2000/15 or the ICC Elements of Crime.[170] Instead, the Panel described persecution as: "the violation of the right to equality in a serious manner that infringes on the enjoyment of a basic or fundamental right."[171] As for the third case, *Prosecutor v. Marcelino Soares*, this too fails to define the phrase 'fundamental rights'.[172]

[169] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001, paragraphs 662-669.

[170] *Public Prosecutor v. Damiao Da Costa Nunes*, Case No. 1/2003, Trial Judgement, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 10 December 2003, paragraph 73.

[171] *Public Prosecutor v. Damiao Da Costa Nunes*, Case No. 1/2003, Trial Judgement, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 10 December 2003, paragraph 74.

[172] *Prosecutor v. Marcelino Soares*, Case No. 11/2003, Trial Judgement, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2003.

To date, there are only 3 cases from the ICTR that discuss the crime of persecution, namely: *Nahimana et al, Semanza,* and *Ruggiu*.[173] Although two of the cases refer to the Rome Statute in their reasoning, all three cases fail to define fundamental rights.

There are over a dozen cases from the ICTY that have handed down judgments which deal with crimes of persecution. Most of these cases only provide examples of what kinds of severe deprivations of fundamental rights amount to persecution without actually defining the phrase 'fundamental rights'. Examples of these rights include: the inherent right to life, the right to be free from cruel, inhuman or degrading treatment or punishment, the right to property, etc.[174]

To date, it appears that only two cases from the ICTY, *Kupreškić et al*[175] and *Stakić*,[176] have discussed what constitutes fundamental rights. Although both cases declined to define the phrase 'fundamental rights', they both seemed to agree that providing such a definition would not only be immaterial but would also not serve the interests of justice in doing so.

In *Prosecutor v. Kupreškić et al* the Trial Chamber declined to define fundamental rights, stating instead that:

> The Trial Chamber does not see fit to identify which rights constitute fundamental rights for the purposes of persecution. The interests of justice would not be served by so doing, as the

[173] *Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000.

[174] See, *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Appeal Judgment, 29 July 2004, paragraphs 129-160 and the authorities cited in the Judgment.

[175] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-T, Trial Judgment, 14 January 2000.

[176] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003.

> explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights (*expressio unius est exclusio alterius*). This is not the approach taken to crimes against humanity in customary international law, where the category of "other inhumane acts" also allows courts flexibility to determine the cases before them, depending on the forms which attacks on humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits. [177]

The *Prosecutor v. Stakić* Judgment echoed similar sentiments. It too declined to define fundamental rights, stating instead:

> This Trial Chamber opines that it is immaterial to identify which rights may amount to fundamental rights for the purpose of persecution. Persecution can consist of the deprivation of a wide variety of rights, whether fundamental or not, derogable or not. [178]

In contrast, it should be noted that both Article 7(2)(g) of the Rome Statute and Element 1 of Article 7(1)(h) of the Elements of Crimes expressly stipulate that it is the severe deprivation of *fundamental* rights that constitutes the crime of persecution.

[177] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-T, Trial Judgment, 14 January 2000, paragraphs 622-623.

[178] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 773.

c. Examples of fundamental rights under the International Bill of Rights the deprivation of which could amount to crimes of persecution

Summary of some of the rights established pursuant to the International Covenants on Civil, Political, Economic, Social, Cultural Rights and the Universal Declaration of Human Rights

RIGHT	ICCPR	ICESCR	UDHR
Right of self determination to freely determine their political status and freely pursue their economic social and cultural development	✓	✓	
Rights exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status	✓	✓	✓
Right to gender equality for the enjoyment of rights set out in the covenants	✓	✓	
Right to life	✓		✓
No-one shall be subjected to torture, cruel, inhuman or degrading treatment	✓		✓
No-one shall be held in slavery	✓		✓
Right to liberty and security of person including right not to be subjected to arbitrary arrest, detention or exile	✓		✓
No-one shall be imprisoned for inability to fulfill a contractual obligation	✓		
Right to liberty of movement and freedom to choose residence	✓		✓
All persons shall be equal before the courts and tribunals. In determination of a criminal charge shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal	✓		✓
Right to recognition everywhere as a person before the law	✓		✓
Right to protection of law against interference with privacy, family, home or correspondence or attacks on honour and reputation	✓		✓
Right to freedom of thought, conscience and religion	✓		✓
Right to freedom of expression	✓		✓
Advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law	✓		
Right of peaceful assembly shall be recognized	✓		✓
Right to freedom of association	✓		
Widest possible protection and assistance should be afforded to the family	✓	✓	✓
Right to marriage and found a family without limitation due to race, nationality or religion	✓		✓
Every child shall have without discrimination… the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State	✓	✓	
Rights of a citizen	✓		
All persons equal before the law	✓		✓
Right of ethnic, religious or linguistic minorities to enjoy their own culture, profess or practice their own religion, or use own language	✓		
Right to work		✓	✓
Right to the enjoyment of just and favourable conditions of work		✓	✓
Right to equal pay for equal work without discrimination		✓	✓
Right to form and join trade unions		✓	
Right to social security		✓	✓
Right to adequate standard of living including adequate food, clothing and housing, and to the continuous improvement of living conditions		✓	✓
Motherhood and childhood are entitled to special care and assistance		✓	✓
Right to the enjoyment of the highest attainable standard of physical and mental health		✓	
Right to education		✓	✓
Right to take part in a cultural life and enjoy arts and share in scientific advancements and its benefits		✓	✓
Right to protection of moral and material interests in scientific, literary or artistic production of which the person is the author		✓	✓
Right to effective remedy by competent national tribunals for acts violating fundamental rights			✓
Everyone charged with a penal offence has the right to be presumed innocent until proved guilty	✓		✓
Right to seek and enjoy asylum in other countries from persecution			✓
Right to own property			✓
Right to take part in government of his country, directly or through freely chosen representatives	✓		✓
Right to rest and leisure			✓

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ICCPR – International Covenant on Civil and Political Rights
ICESCR – International Covenant on Economic, Social and Cultural Rights
UDHR – Universal Declaration of Human Rights

Persecution is defined in Article 7(2)(g) of the Rome Statute as: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." In addition, Element 1 of Article 7(1)(h) of the Elements of Crimes, states: "the perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights." Therefore, in order to satisfy the requirements of these provisions it must be shown that, firstly, the fundamental right of one or more persons was intentionally and severely deprived. Secondly, the deprivation of such right was contrary to international law. Thirdly, the deprivation of such right was carried out on discriminatory grounds, that is, by reason of the identity of the group or collectivity.

Furthermore, both Article 7(1)(h) of the Rome Statute and Element 4 of Article 7(1)(h) of the Elements of Crimes establish a nexus requirement for crimes of persecution, discussed in the Introduction in Chapter 1. It is necessary to establish that the crime of persecution was committed *in connection with* any act enumerated in Article 7 of the Rome Statute or in connection with any crime that falls within the ICC's jurisdiction.

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

Right to security and liberty of person including right not to be subjected to arbitrary arrest, detention or exile

The right to security and liberty of person is a fundamental right that is recognized in the International Bill of Rights. Both the ICCPR and UDHR recognize this right pursuant to Articles 9 and 3, respectively.

Could the deprivation of this fundamental right amount to a crime of persecution? It must be shown that one or more persons was intentionally and severely deprived of right to security and liberty of person, contrary to international law, and that this deprivation was carried out by reason of the identity of the group or collectivity. If this could be shown, then the requirements of Article 7(2)(g) of the Rome Statute and Element 1 of Article 7(1)(h) of the Elements of Crimes would be satisfied. Furthermore, as a result of the nexus requirement established for crimes of persecution the effect of the statutory provisions would aggravate the provision found in Article 7(1)(e) of the Rome Statute which prohibits imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, thus, satisfying the nexus requirement.

Jurisprudence from the ICTY,[179] ICTR,[180] and the Panels of Judges in East Timor[181] all establish that the prolonged routine imprisonment and confinement of civilians or

[179] *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 642, *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraph 438, *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, ICTY Trial Judgment, 2 November 2001, paragraphs 186, 189, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 302, *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 220, *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 629.

[180] *Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003 paragraph 1072, *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, paragraph 21.

the organized detention of civilians infringes upon their fundamental freedom. When carried out on discriminatory grounds this infringement amounts to the crime of persecution.

Right to life

The right to life is a fundamental right that is recognized in the International Bill of Rights. Both the ICCPR and UDHR recognize an inherent right to life pursuant to Articles 6 and 3, respectively.

Could the deprivation of this fundamental right amount to a crime of persecution? It must be shown that one or more persons was intentionally and severely deprived of right to life, contrary to international law, and that this deprivation was carried out by reason of the identity of the group or collectivity. If this could be shown, then the requirements of Article 7(2)(g) of the Rome Statute and Element 1 of Article 7(1)(h) of the Elements of Crimes would be satisfied. Furthermore, if this crime is committed in connection with, for example, murder under Article 7(1)(a) of the Rome Statute, then this could amount to persecution.

Prosecutor v. Blaškić, referring to Article 3 of the UDHR, held that the infringement of the right to life, if committed on discriminatory grounds, constituted persecution.[182]

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[181] *Prosecutor v. Marcelino Soares*, Case No. 11/2003, Trial Judgement, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2003, paragraphs 21-22, *Public Prosecutor v. Damiao Da Costa Nunes*, Case No. 1/2003, Trial Judgement, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 10 December 2003, paragraph 75.

[182] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 220.

The right to life has also been upheld as a fundamental right in numerous ICTR cases, including, *Nahimana et al*[183] and *Ruggiu*.[184]

Right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment

The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment is a fundamental right that is recognized in the International Bill of Rights. Both the ICCPR and UDHR recognize this right pursuant to Articles 7 and 5, respectively.

Could the deprivation of this fundamental right amount to a crime of persecution? It must be shown that one or more persons was intentionally and severely deprived of right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, contrary to international law, and that this deprivation was carried out by reason of the identity of the group or collectivity. If this could be shown, then the requirements of Article 7(2)(g) of the Rome Statute and Element 1 of Article 7(1)(h) of the Elements of Crimes would be satisfied. Furthermore, as a result of the nexus requirement established for crimes of persecution the effect of the statutory provisions would aggravate the provision found in Article 7(1)(e) of the Rome Statute which prohibits torture, thus, satisfying the nexus requirement.

[183] *Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, paragraph 1072.

[184] *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, paragraph 21.

Prosecutor v. Blaškić, referring to Article 5 of the UDHR, held that the infringement of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, if committed on discriminatory grounds, constituted persecution.[185]

Right not to held in slavery or in servitude

The right not to be held in slavery or in servitude is a fundamental right that is recognized in the International Bill of Rights. Both the ICCPR and UDHR recognize this right pursuant to Articles 8 and 4, respectively.

It may be noted that UNDP statistics estimate that approximately 1.2 million women and girls under the age of 18 are trafficked into prostitution through illicit transactions every year.[186]

Could the deprivation of this fundamental right amount to a crime of persecution? It must be shown that one or more persons was intentionally and severely deprived of right not to be held in slavery or in servitude, contrary to international law, and that this deprivation was carried out by reason of the identity of the group or collectivity. If this could be shown, then the requirements of Article 7(2)(g) of the Rome Statute and Element 1 of Article 7(1)(h) of the Elements of Crimes would be satisfied. Furthermore, as a result of the nexus requirement established for crimes of persecution the effect of the statutory provisions would aggravate the provision found

[185] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 220. See also *Prosecutor v. Marcelino Soares*, Case No. 11/2003, Trial Judgement, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2003, paragraph 21.

[186] United Nations Development Program (UNDP), *Human Development Report 2000*, (New York: Oxford University Press, 2000) at 4.

in Article 7(1)(g) of the Rome Statute which prohibits sexual slavery and enforced prostitution, or, Article 7(1)(c) of the Rome Statute which prohibits enslavement, defined in Article 7(2)(c) to include the trafficking of women and girls, thus, satisfying the nexus requirement.

The provisions articulated in Article 7(1)(c) and Article 7(1)(g) of the Rome Statute are of historic significance because the Statute "codified for the first time the crime of sexual slavery and established a new definition of enslavement which includes trafficking in persons."[187]

Prosecutor v. Blaškić, referring to Article 5 of the UDHR, the Trial Chamber held that the infringement of the right not to be held in slavery or servitude, if committed on discriminatory grounds, constituted persecution.[188]

Right to freedom of thought, conscience and religion including freedom to have or to adopt a religion

The right to freedom of thought, conscience and religion including freedom to have or to adopt a religion is a fundamental right that is recognized in the International Bill of Rights. Article 18 of both the ICCPR and the UDHR recognizes the right to freedom of thought, conscience and religion.

[187] Barbara Bedont, "Gender Specific Provisions in the Statute of the International Criminal Court" in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court: Volume 1* (Il Serente, 1999) 183 at 199.

[188] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 220.

Could the deprivation of this fundamental right amount to a crime of persecution? It must be shown that one or more persons was intentionally and severely deprived of right to freedom of thought, conscience and religion, contrary to international law, and that this deprivation was carried out by reason of the identity of the group or collectivity. If this could be shown, then the requirements of Article 7(2)(g) of the Rome Statute and Element 1 of Article 7(1)(h) of the Elements of Crimes would be satisfied. Furthermore, if this crime is committed in connection with, for example, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health under Article 7(1)(k) of the Rome Statute, then this could amount to persecution.

Right to liberty of movement and freedom to choose one's residence

The right to liberty of movement and the freedom to choose one's residence is a fundamental right that is recognized in the International Bill of Rights. Both the ICCPR and the UDHR recognize this right pursuant to Articles 12 and 13, respectively.

Could the deprivation of this fundamental right amount to a crime of persecution? It must be shown that one or more persons was intentionally and severely deprived of right to liberty of movement and the freedom to choose one's residence, contrary to international law, and that this deprivation was carried out by reason of the identity of the group or collectivity. If this could be shown, then the requirements of Article 7(2)(g) of the Rome Statute and Element 1 of Article 7(1)(h) of the Elements of Crimes would be satisfied. Furthermore, if this crime is committed in connection

with, for example, deportation or forcible transfer of population under Article 7(1)(d) of the Rome Statute, then this could amount to persecution.

Stakić [189] the Los Palos case, [190] *Kvočka et al* [191] and *Kordić and Čerkez,* [192] all held that the deportation or forcible transfer of a civilian population on discriminatory grounds violated a fundamental right and thus amounted to persecution.[193]

Right to adequate standard of living including adequate food, housing and health

Sigrun I. Skogly proposes that the violation of the right to food, the right to health and the right to housing infringe on economic and social rights inflicting suffering that fundamentally amounts to crimes against humanity. Skogly proposes that violation of the right to food amounting to a crime against humanity would be the "denial of access to food to particular individuals or groups." The violation of the right to the highest attainable standard of health amounts to a crime against humanity when "the State or other organizations would deliberately use mental or physical health deterioration in order to inflict serious harm on people." Regarding the violation of the right to housing, Skogly addresses this from the perspective of forced evictions

[189] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 769.

[190] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at paragraphs 757-841.

[191] *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, ICTY Trial Judgment, 2 November 2001, paragraph 186.

[192] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 205.

[193] See, *Krstić* explaining the differences between deportation and forced transfer. *Prosecutor v. Krstić*, Case No. IT-98-33, ICTY Trial Judgment, 2 August 2001, paragraphs 519, 521. This position has been confirmed in *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 670, *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraphs 474. However, see arguments in *Stakić* rejecting the notion that the definition of 'deportation' requires transfers across State borders. *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraphs 679, 684.

and suggests the core issue is in the outcome and determining whether the eviction can be categorized as a crime against humanity of other inhumane acts. However, the assessment of whether these violations amount to crimes against humanity of other inhumane acts, according to Skogly, should be made on a case-by-case basis in order to determine the gravity of the crime.[194]

The right to an adequate standard of living including adequate food, housing and health is a fundamental right that is recognised in the International Bill of Rights. The ICESCR recognizes the right to an adequate standard of living including adequate food, housing and health pursuant to Articles 11 and 12. This right is also established pursuant to Article 25 of the UDHR.

Could the deprivation of this fundamental right amount to a crime of persecution? It must be shown that one or more persons was intentionally and severely deprived of right to an adequate standard of living including adequate food, housing and health, contrary to international law, and that this deprivation was carried out by reason of the identity of the group or collectivity. If this could be shown, then the requirements of Article 7(2)(g) of the Rome Statute and Element 1 of Article 7(1)(h) of the Elements of Crimes would be satisfied. Furthermore, if this crime is committed in connection with, for example, extermination under Article 7(1)(b) of the Rome Statute, then this could amount to persecution. Extermination is defined under Article 7(2)(b) of the Statute as: "the intentional infliction of conditions of life, inter alia the deprivation of

[194] Sigrun I. Skogly, "Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?" (Spring, 2001) 5(1) *The International Journal of Human Rights* 58, discussed generally at 66-73.

access of food, medicine, calculated to bring about the destruction of part of a population."

Right to education

The right to education is a fundamental right that is recognized in the International Bill of Rights. Both the ICESCR and UDHR recognize the right to education pursuant to Articles 13 and 26, respectively.

Françoise Bouchet-Saulnier argues that the right to education is a fundamental or principal economic, social and cultural right.[195] Yet it is interesting to note that UNDP statistics indicate that up to 90 million children worldwide at primary school level alone do not attend school.[196]

Could the deprivation of this fundamental right amount to a crime of persecution? It must be shown that one or more persons was intentionally and severely deprived of right to education, contrary to international law, and that this deprivation was carried out by reason of the identity of the group or collectivity. If this could be shown, then the requirements of Article 7(2)(g) of the Rome Statute and Element 1 of Article 7(1)(h) of the Elements of Crimes would be satisfied. Furthermore, if this crime is committed in connection with, for example, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical

[195] For further references see generally Françoise Bouchet-Saulnier edited by and translated by Laura Brav, *The Practical Guide to Humanitarian Law,* (New York: Rowman & Littlefield Publishers, Inc, 2000) at 126.

[196] United Nations Development Program (UNDP), *Human Development Report 2000*, (New York: Oxford University Press, 2000) at 4.

health under Article 7(1)(k) of the Rome Statute, then this could amount to persecution.

Right to own property including the right not to be arbitrarily deprived of one's property

The right to own property including the right not to be arbitrarily deprived of one's property is a fundamental right that is recognized in the International Bill of Rights. This right is recognized pursuant to Article 17 of the UDHR.

Could the deprivation of this fundamental right amount to a crime of persecution? It must be shown that one or more persons was intentionally and severely deprived of right to own property including the right not to be arbitrarily deprived of one's property, contrary to international law, and that this deprivation was carried out by reason of the identity of the group or collectivity. If this could be shown, then the requirements of Article 7(2)(g) of the Rome Statute and Element 1 of Article 7(1)(h) of the Elements of Crimes would be satisfied. Furthermore, if this crime is committed in connection with, for example, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health under Article 7(1)(k) of the Rome Statute, then this could amount to persecution.

The wanton destruction or property, acts of plundering and looting if carried out on discriminatory grounds have been found to constitute the crime of persecution in *Stakić,*[197] *Naletilić and Martinović,*[198] *Kvočka et al,*[199] *Kordić and Čerkez,*[200]

[197] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 764.

Blaškić,[201] *Kupreškić et al*,[202] and *Tadić.*[203] According to *Kordić and Čerkez*[204] and *Blaškić*.[205] This includes the wanton destruction and damage to religious or educational institutions when carried out on discriminatory grounds.

The Trial Chamber in *Prosecutor v. Naletilić and Martinović* held, "plunder of personal belongings may rise to the level of persecution if the impact of such deprivation is serious enough. This is so if the property is indispensable and a vital asset to the owners."[206]

Prosecutor v Blaškić took the liberty of defining the phrase 'destruction of property'. The Chamber stated that 'destruction of property' means: "the destruction of towns, villages and other public or private property belonging to a given civilian population

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[198] *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 701.

[199] *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, ICTY Trial Judgment, 2 November 2001, paragraph 186.

[200] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 205.

[201] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraphs 227, 234.

[202] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 631.

[203] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraphs 707, 710.

[204] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 206.

[205] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 227.

[206] *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 699.

or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily."[207]

[207] *Prosecutor v. Blaškić*, Case No. IT-95-14-T, ICTY Trial Judgment, 3 March 2000 at paragraph 234. Confirmed in *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 102.

4. ELEMENTS 2, 3, 4, & 5 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES WHICH CONCERN THE MANNER OF DEPRIVATIONS REQUIRED FOR THE CRIME OF PERSECUTION

To reiterate briefly, the previous chapter analyzed Element 1 of Article 7(1)(h) of the Elements of Crimes which indicates the kinds of deprivations that constitute the crime of persecution under the Rome Statute. The analysis addressed the issue of a perpetrator who severely deprives, contrary to international law, one or more persons of their fundamental rights.

In this chapter the writer will discuss the manner of deprivations required for the crime of persecution under the Rome Statute. The discussion will include an analysis of Elements 2, 3, 4, and 5 of Article 7(1)(h) of the Elements of Crimes stipulated by the Preparatory Commission for the ICC. The writer will also compare each of these 4 Elements with the relevant Rome Statute provisions on the crime of persecution along with customary international law laid down by *ad hoc* Tribunals.

I. ELEMENT 2 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES

Element 2 of Article 7(1)(h) of the Elements of Crimes states:

> 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.

A. COMPARISON OF ELEMENT 2 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF THE CRIMES AND ARTICLE 7(2)(G) OF THE ROME STATUTE

Element 2 of the Elements of the crime of persecution states: "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." Element 2 parallels the wording found in the second limb of the Article 7(2)(g) Rome Statute definition of persecution. Persecution is defined in Article 7(2)(g) as: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." However, Element 2 of Article 7(1)(h) of the Elements of Crimes differs slightly from Article 7(2)(g) of the Rome Statute in that it specifically introduces the concept of targeting, discussed below.

B. ANALYSIS OF ELEMENT 2 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES

1. Perpetrator targeted such person/s

a. Reflections on what targeting of person/s entails

The idea of targeting in the context of Element 2 of the crime of persecution implies the notion of a perpetrator who engages in discriminatory behaviour that is aimed or directed at particular persons. When you speak of targeting particular persons, this

writer's mind conjures up images of secluding, segregating, directing and focusing all of one's attention and resources towards carrying out a particular plan or objective directed against such particular persons. One associates the idea of targeting with an individual who mulls, and probably schemes intricate and detailed plans of harmful intent towards particular victims. The term victim is used here to describe persons who are unable to protect themselves, persons rendered powerless by a perpetrator who is in a position to exert authority over them.

Cherif M. Bassiouni has described the practice of discrimination as the unjustifiable rejection of a particular group of people. This is achieved by manipulating the legal system so that the group is no longer able to claim the protection of criminal laws that are readily available to all other members of society. Furthermore, this could also include subjecting the group to discriminatory laws that all other members of society are exempted from. What makes this prejudicial practice intolerable is that the group which is set apart, based solely on their identity, suffers as a result of the harsh, unjustifiable or unlawful rejection.[208]

b. How do *ad hoc* Tribunals describe the targeting of person/s under customary international law?

Analysis of ICTR jurisprudence indicates that persecution, pursuant to the ICTR Statute, is distinct from other crimes against humanity. One distinction is the

[208] Cherif M Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1999) at 260.

discriminatory intent required for the perpetration of crimes of persecution; these crimes are perpetrated on racial, religious or political grounds. [209]

The ICTY also recognizes that the crime of persecution specifically requires the intention to discriminate.[210] The ICTY has said that it is this discriminatory intent that distinguishes persecution from all the other acts of crimes against humanity.[211]

The Trial Chamber in *Prosecutor v. Naletilić and Martinović* discussed this issue in great detail. Firstly, the Chamber upheld previous case law from the Tribunal which established that the elements of the crime of persecution include, *inter alia*: "the perpetrator commits a discriminatory act or omission", and "the perpetrator carries out the act or omission with the intent to discriminate on racial, religious or political grounds."[212]

Secondly, the Chamber clarified the issue of what discriminatory intent entails. In essence, the Chamber explained that the group is targeted because of a particular religious, political, or racial characteristic. More specifically, the Chamber explained that "a discriminatory basis exists where a person is *targeted* on the basis of religious,

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[209] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 350, *Prosecutor v. Nahimana et al,* Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, paragraph 1071.

[210] For example, *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-T, ICTY Trial Judgment, 14 January 2000, paragraph 607, see the cases referred to in the judgment.

[211] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-T, ICTY Trial Judgment, 14 January 2000, paragraph 607.

[212] *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 633. For detailed reference on which cases the *Naletilić and Martinović* Judgment upheld, see footnotes 1563 and 1566 of the Judgment.

political or racial considerations, i.e. for his or her membership in a certain victim group that is targeted by the perpetrator group"[213] (emphasis added).

In addition, the *Simić et al* Judgment has explained what constitutes a targeted group. They are described as: "the victimized persons… *specifically selected or discriminated* on political, racial, or religious grounds"[214] (emphasis added).

A number of cases from the ICTY have discussed the issue of discrimination in greater detail. For example, in *Prosecutor v. Kupreškić et al,* the Chamber indicated that discrimination is the targeting of persons for an attack in which the perpetrator distinguishes persons on discriminatory grounds to deprive them of the rights enjoyed by the rest of society. The perpetrator deprives the persons of their rights with the view to removing the persons from society and ultimately humanity itself. [215]

The *Blaškić* Judgment summarizes the issue succinctly. The Trial Chamber reasoned that it is due to the presence of such discriminatory grounds, be it, political, racial, or religious grounds, that what would otherwise be a simple crime is transformed into a grave criminal act that ultimately deprives a person of an elementary right. The Chamber specifically concluded:

> The underlying offence of persecution requires the existence of a *mens rea* from which it obtains its specificity. As set down in Article 5 of the Statute, it must be committed for specific reasons whether these be linked to political views, racial background or religious

[213] *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 636.

[214] *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 50.

[215] *Prosecutor v. Kupreškić et al,* Case No. IT-95-16-T, ICTY Trial Judgment, 14 January 2000, paragraph 634.

> convictions. It is the specific intent to cause injury to a human being because he belongs to a particular community or group, rather than the means employed to achieve it, that bestows on it its individual nature and gravity and which *justifies its being able to constitute criminal acts which might appear in themselves not to infringe directly upon the most elementary rights of a human being, for example, attacks on property* [216] (emphasis added).

In addition, the *Blaškić* Appeal Chamber held that it must be shown that the acts of persecution were of equal gravity or severity as the acts found in Article 5 of the ICTY Statute. The Chamber stated that "it is not enough that the underlying acts be perpetrated with a discriminatory intent."[217]

2. By reason of the identity of the group or collectivity

a. Group or collectivity

i. What is a group or collectivity?

Before determining the reason why an attack occurs, it is important to understand just whom the attack is directed against. Element 2 of the Elements of the crime of persecution refers to the targeting of person/s. However, such targeting must occur because of the reason of the identity of a group or collectivity.

In the mind of this writer, the terms 'group' or 'collectivity' imply a body of more than one person, identifiable on a specific basis. People that share common objectives, goals, and traditions etc. One has a sense of a body or people that actively

[216] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 235.

[217] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Appeal Judgment, 29 July 2004, paragraph 160.

maintain a specific identity that they assert or affiliate themselves with. Ultimately, this is what would distinguish one group or collectivity from another.

The natural meaning of the word 'group' denotes "a number of persons [or things] located close together, or considered or classed together."[218] 'Collectivity' simply means: "either a group or the community."[219]

Having articulated the natural meaning of the terms 'group' or 'collectivity', one could venture to suggest that these terms leave the reader to conclude that group and collectivity really refer to one and the same concept. However, in a circumstance where a number of minority ethnic groups are attacked, the sum of these groups would not be a 'group' but would preferably be referred to as a collectivity. In any event, for the purposes of this thesis the writer shall address the terms 'group' and 'collectivity' as distinct concepts for that is how they appear in the Elements of Crimes and the Rome Statute.

[218] The Oxford Concise Dictionary of Current English (8th edn, 1990) at 522. See discussion of this term in Machteld Boot and Christopher K Hall, "Persecution" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) at 147.

[219] Used in the French context: le public, l'esenblément des citoyens. Collins Robert French-English English-French Dictionary (3rd edn, 1993) at 154. See discussion of this term in Machteld Boot and Christopher K Hall, "Persecution" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) at 147.

ii. Negotiations at the Rome Conference and the Preparatory Commission

There is some discrepancy among experts in international criminal law as to why the negotiators of the Rome Statute adopted the terms, 'group' and 'collectivity', separately.

Observers' at the Rome Conference, Machteld Boot and Christopher K. Hall, criticized negotiators for their seeming contentment in concluding the so-called phrase debate, i.e., group versus collectivity, by stating the obvious: the ideology of distinguishing between group and collectivity remains uncertain.[220]

The negotiators at the Preparatory Commission were faced with a similar dilemma as to how they would describe the relation between the group or collectivity on the one hand and the concept of the targeting of one or more persons on the other. Georg Witschel and Weibke Rückert listed three options of phrases that were available to the negotiators:

1. "By reason of their belonging to an identifiable group or collectivity" - said to be too restrictive,
2. "By reason of their support for an identifiable group or collectivity" - said to be too vague, and
3. "By reason of their identification with a group or collectivity" - said to be too subjective.

Witschel and Rückert indicated that as a result of the unresolved debate amongst the negotiators, they opted to resolve matters by drafting Element 2 of the Elements of the

[220] Machteld Boot and Christopher K Hall, "Persecution" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) at 147.

crime of persecution to reflect Article 7(2)(g) of the Rome Statute as closely as possible and leave future case law to deal with any ambiguities.[221]

Negotiators at the Preparatory Commission concluded that "the group or collectivity as such can be the target of the crime, with the suffering of individual victims being a kind of unavoidable 'byproduct'."[222] Although this would seem somewhat cynical, Machteld Boot has made the observation that the phrase 'group or collectivity' when taken at face value seems to exclude crimes of persecution committed against individuals. Boot, relying on the *Tadić* Judgment, points out though that "persecution concerns the deprivation of fundamental rights and, in general, individuals are subjects of these rights."[223] He states that a single act committed against a single individual may indeed amount to persecution.[224] It should also be borne in mind that Element 1 of Article 7(1)(h) of the Elements of Crimes uses the phrase 'one or more persons' to describe the perpetration of acts which amount to the crime of persecution. Element 1 of the Elements of the crime of persecution states: "the perpetrator severely deprived, contrary to international law,[*] *one or more* persons of fundamental rights" (emphasis added).

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[221] Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 97.

[222] Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 97.

[223] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 523.

[224] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 523.

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

Machteld Boot's comments are consistent with customary international law. In particular, the *Kupreškić et al* Judgment discussed this issue and determined that a single act, i.e., murder, committed against a single individual as part of a widespread or systematic attack, if committed with discriminatory intent amounted to a crime of persecution.[225]

b. Why does the perpetrator target the person/s or the group or collectivity?

Element 2 of the Elements of the crime of persecution states: "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." Element 2 shows that the reason why a group or collectivity is targeted would be because of the *identity* of the group or collectivity.

To date, there appears to be both a broad and narrow interpretation of the phrase 'by reason of the group or collectivity'. This has led to conflicting views expressed in customary international law and discussions from leading academics.

The Prosecution in the East Timor Los Palos case analyzed the phrase 'by reason of the identity of the group or collectivity'. The Prosecution argued that, pursuant to the provisions of Section 5(2)(f) of Regulation No. 2000/15, the phrase referred to the persecution of a number of individuals who could be identified by common characteristics. The Prosecution specifically proposed that "persecution of a group is

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[225] *Prosecutor v. Kupreškić et al,* Case No. IT-95-16-T, ICTY Trial Judgment, 14 January 2000, paragraph 624.

understood as a multiplicity of individuals which share a common feature. Accordingly, persecution can be committed, for example, by reason of the victim's gender or the victims' common characteristics of their opposition to the government."[226]

The Prosecution then defined the phrase 'identity of the group or collectivity', and suggested it had to be interpreted in a broad manner. Therefore, the phrase 'identity of the group or collectivity' is described as: "the common feature according to which the victims were singled out by the perpetrators, whether that is 'on political, racial, national, ethnic, cultural, religious, gender grounds'".[227]

What makes the Prosecutor's arguments significant is that firstly, the definition of persecution found in Section 5(2)(f) of Regulation No. 2000/15 is worded exactly the same as the definition in Article 7(2)(g) of the Rome Statute. Secondly, although the Panel of Judges neither disputed nor concurred with the Prosecution, the Panel repeated the Prosecution's arguments in great detail in their judgment then simply stated that they were satisfied with the provisions pertaining to the crime of persecution stipulated in the Elements of Crimes and the Rome Statute. [228]

Kai Ambos and Steffen Wirth queried: could the phrase 'by reason of the identity of the group' imply that the crime of persecution is carried out only against a group that

[226] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at p. 33.

[227] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at p. 33.

[228] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at paragraphs 662-669.

has formed itself as such and thus is identifiable by a certain identity? Ambos and Wirth reject this line of reasoning as a narrow interpretation of the Rome Statute and the East Timor Regulation 2000/15 provisions. Instead, the Authors suggest that "persecution can be committed, for example, by reason of the victim's gender. Persecution of women, however, does not refer to a group in the narrow sense but rather to a group understood as a multiplicity of individuals which share a common feature." [229] The views expressed by Ambos and Wirth clearly reinforce the Prosecutor's arguments in the Los Palos case. Neither do the views of Ambos and Wirth narrow the writer's comments earlier with respect to the definition of a collectivity.

As for jurisprudence from the ICTY, the *Blaškić* Judgment put forward the proposition that the individual is not the target in crimes of persecution but rather the perpetrator targets the individual's membership to a particular group, be it a racial, religious or political group.[230]

The Trial Chamber in *Prosecutor v. Naletilić and Martinović* took the view that the group that is targeted need not necessarily be made up of persons who personally have a religious, racial or political characteristic of the group. The Chamber held that the group which is targeted may include persons, "defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group." The Chamber reasoned that it is the perpetrator who defines the victim group.

[229] Kai Ambos and Steffen Wirth, "The Current Law on Crimes Against Humanity" (2002) 13(1) *Criminal Law Forum* 1 at 77.

[230] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 235.

Ultimately, the targeted victims exert no influence or control on how they are defined by the perpetrator.[231]

In *Kvočka et al,* the Chamber ruled that the discrimination element was met if a person was targeted for abuse merely on the suspicion of belonging to a Muslim group, even if such suspicion was inaccurate.[232] However, the *Krnojelac* Judgment rejected this line of argument. The *Krnojelac* Chamber held, "the existence of a mistaken belief that the intended victim will be discriminated against, together with an intention to discriminate against that person because of that mistaken belief, may amount to the inchoate offence of *attempted* persecution, but no such crime falls within the jurisdiction of this Tribunal"[233] (italics emphasized in Judgment).

Of particular concern to the Chamber in the *Krnojelac* case was the point that failure to require "discrimination in fact" would result in a situation where a person could be convicted for persecution regardless of whether or not the persecution was carried out. The Chamber expressed the view that:

> Logic argues in favour of a requirement that the act be discriminatory in fact. Without such a requirement, an accused could be convicted of persecution without anyone actually having been persecuted… Although the Statute does not expressly require that the discrimination take place

[231] *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 636. The description of a targeted group is upheld in *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 49.

[232] *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, ICTY Trial Judgment, 2 November 2001, paragraph 195.

[233] *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, footnote 1292 referenced in paragraph 432. For an in-depth discussion of this discrepancy see Daryl A. Mundis, "Current Developments at the *ad hoc* International Criminal Tribunals" (2003) 1 *Journal of International Criminal Justice* 197 at 203. Also the *Naletilić and Martinović* Judgment criticised the interpretation adopted by the Trial Chamber in *Prosecutor v. Krnojelac* Judgment with regards to the decision expressed in *Kvočka et al* concerning the definition of a targeted group stating the Chamber had taken an overly narrow view which as a result ignored the specific nature of crimes of persecution. See *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, footnote 1572 referenced in paragraph 636.

> against a member of the targeted group, this is a necessary implication of the occurrence of an act or omission on a discriminatory basis.[234]

It should be noted, however, that Element 2 of Article 7(1)(h) of the Elements of Crimes and Article 7(2)(g) of the Rome Statute differ from customary international law on this point. Both the Elements of Crimes and Rome Statute provisions *expressly* require that the discrimination take place against a member of the targeted group.

II. ELEMENT 3 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES

Element 3 of Article 7(1)(h) of the Elements of Crimes states:

> Such targeting was based on political, racial, national, ethnic, cultural, religious, gender… or other grounds universally recognized as impermissible under international law.

A. COMPARISON OF ELEMENT 3 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES AND ARTICLE 7(1)(H) OF THE ROME STATUTE

The first limb of Article 7(1)(h) of the Rome Statute and Element 3 of the Elements of the crime of persecution contain similar provisions. Article 7(1)(h) of the Rome Statute establishes that the crime of persecution is an act that is perpetrated "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible

[234] *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraph 432.

under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court." These grounds, on which the crime of persecution could be committed, found in Article 7 of the Rome Statute, are repeated in Element 3 of the Elements of the crime of persecution.

B. COMPARISON OF ELEMENT 3 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES, ARTICLE 7(1)(H) OF THE ROME STATUTE AND INTERNATIONAL LEGAL INSTRUMENTS

The discriminatory grounds on which the crime of persecution could be perpetrated are much wider under the Rome Statute and the Elements of Crimes than those indicated in previous international legal instruments.

Drawing on customary international law, the ILC, in its Draft Codes prepared between 1954 until 1996, significantly widened the grounds on which the crime of persecution could be perpetrated.

Comparison of the Draft Codes prior to the establishment of the ICC indicating the grounds on which persecution could be perpetrated

Element 4 of Article 7(1)(h) of the Elements of Crimes & Article 7(1)(h) of the Rome Statute	**Article 2(11) of the 1954 Draft Code**	**Article 21 of the 1991 Draft Code**	**Article 18(e) of the 1996 Draft Code**
Political, racial, national, ethnic, cultural, religious, gender or other grounds recognized as impermissible under international law	Political, religious or cultural motives	Social, political, racial, religious or cultural grounds	Political, racial, religious or ethnic grounds

It is clear, as the table above indicates, that according to the ILC the grounds on which the crime of persecution could be perpetrated included: political, religious, cultural, social, racial, and ethnic grounds.

Other than the Draft Codes, between 1945 and 1998, analysis of international legal instruments spanning from the Nuremberg Charter to the ICTR Statute, tabled below, indicates that crimes of persecution could be committed on political, racial and religious grounds.

Comparison of international instruments prior to the 1998 Rome Statute indicating the grounds on which persecution could be perpetrated

Element 4 of Article 7(1)(h) of the Elements of Crimes & Article 7(1)(h) of the Rome Statute	**Article 6(c) of the Nuremberg Charter**	**Article II(c) of Control Council Law No. 10**	**Article 5(c) of the Tokyo Charter**	**Article 5(h) of the ICTY Statute**	**Article 3(g) of the ICTR Statute**
Political, racial, national, ethnic, cultural, religious, gender or other grounds	Political, racial or religious grounds	Political, racial or religious grounds	Political or racial grounds	Political, racial and religious grounds	Political, racial and religious grounds

It should be noted that the general chapeau concerning crimes against humanity pursuant to Article 3 of the ICTR Statute, seeks to prosecute those responsible for crimes "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."

The requirement of discrimination for all crimes against humanity under Article 3 of the ICTR Statute was criticized for exceeding the customary international law requirements established for crimes against humanity. Furthermore, the issue was raised as to whether the discriminatory grounds applied to the attack itself or the individual act, and whether the discriminatory grounds introduced an additional mental element.[235] The Trial Chamber in *Prosecutor v. Bagilishema* attempted to

[235] Simon Chesterman, "An Altogether Different Order: Defining the Elements of Crimes Against Humanity" (Spring/Summer 2000) 10 *Duke Journal of Comparative and International Law* 307 at 326.

clarify this point. The Chamber recognized that the requirement of discrimination for all crimes against humanity was unique to the ICTR Statute, but held the discriminatory grounds were to "be read as a characterization of the nature of the 'attack' rather than the of *mens rea* of the perpetrator."[236]

Comparison of international instruments created in the aftermath of the 1998 Rome Statute indicating the grounds on which persecution could be perpetrated

Element 4 of Article 7(1)(h) of the Elements of Crimes & Article 7(1)(h) of the Rome Statute	**Section 5(1)(h) of Regulation 2000/15 (2000)**	**Article 5 of the ECCC Special Law (2001)**	**Article 2(h) of the SCSL Statute (2002)**	**Article 9 of the UN/Cambodia Agreement (2003)**	**Article 12(a)(8) of the IST Statute (2003)**
Political, racial, national, ethnic, cultural, religious, gender or other grounds	Political, racial, national, ethnic, cultural, religious, gender or other grounds	Political, racial and religious grounds	Political, racial, ethnic, or religious grounds	Political, racial, national, ethnic, cultural, religious, gender or other grounds	Political, racial, national, ethnic, cultural, religious, gender or other grounds

Analysis of international statutory provisions on the crime of persecution created in the aftermath of the 1998 Rome Statute, tabled above, indicates that three of the five instruments have the exact same grounds as the Rome Statute. These grounds are enumerated in: Section 5(1)(h) of Eats Timor Regulation No. 2000/15, Article 9 of the UN/Cambodia Agreement, and Article 12(a)(8) of the Iraqi Statute, respectively.

Article 2(h) of the Sierra Leone Statute adopted a much narrower list of the grounds on which the crime of persecution could be committed, recognizing only political, racial, ethnic or religious grounds. The same could be said for the Special Law of the Extraordinary Chambers within the Cambodian Courts. However, much like the ICTR Statute, Article 5 of the ECCC Special Law further requires a discriminatory intent for all crimes against humanity. According to Article 5, in order to amount to

[236] *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgement, 7 June 2001, paragraph 81. See also detailed discussion of this issue in *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, paragraphs 130-132.

crimes against humanity the attack must be committed on national, political, ethnical, racial, or religious grounds.

In addition, there are a number of international instruments that prohibit discrimination carried out on similar grounds identified above. For example, Article 2 of the UDHR, the ICCPR and ICESCR all advocate for "rights without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national, or social origin, property, birth, or other status."

C. ANALYSIS OF ELEMENT 3 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES

1. Targeting based on political, racial, national, ethnic, cultural, religious, gender… or other grounds recognized as impermissible under international law

As indicated above, both Article 7(1)(h) of the Elements of Crimes and Article 7(1)(h) of the Rome Statute establish that the crime of persecution can be committed on "political, racial, national, ethnic, cultural, religious, gender… or other grounds recognized as impermissible under international law." The writer will analyze each of these grounds separately in the discussion that follows. It should be noted, however, that this discussion is by no means intended to be exhaustive, but rather an attempt to identify what these grounds are and whether they are significant at all.

a. Political grounds

i. What does this mean?

The natural meaning of the adjective 'political' is: "involving or characteristic of politics or parties or politicians."[237]

A wide interpretation of political persecution could be that the term 'political' is also understood to mean: "including public affairs issues such as environment and health."[238]

ii. Is this ground significant?

Political persecution is prohibited in international criminal law in numerous statutory instruments[239] and a few other international instruments.[240]

It is this writer's opinion that the statutory provisions for political persecution are significant. There are a number of cases in customary international law where the prosecution of crimes of political persecution has provided a significant precedent. The circumstances in East Timor, following the vote for independence from Indonesia in the Popular Consultation of 30 August 1999, provide a good example of political

[237] See, Dictionary.com available at: http://dictionary.reference.com

[238] Machteld Boot and Christopher K Hall, "Persecution" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) at 148-149.

[239] See, Article 6(c) of the Nuremberg Charter, Article II(c) of CCL 10, Article 5(c) of the Tokyo Charter, Article 5(h) of the ICTY Statute, Article 3(g) of the ICTR Statute, Article 7(1)(h) of the Rome Statute, Section 5(1)(h) of Regulation 2000/15, Article 5 of the ECCC Special Law, Article 2(h) of the SCSL Statute, Article 9 of the UN/Cambodia Agreement, and Article 12(a)(8) of the IST Statute.

[240] See, Article 25 of the ICCPR, Article 21 of the UDHR.

persecution. In the case of the *Public Prosecutor v. Damiao Da Costa Nunes*, the Panel of Judges found that it was clear that the victim, Albino Nahak, was a pro-independence supporter. Furthermore, it was clear that he was arrested, abducted and, later tortured and killed for this simple reason alone. The Panel held that Accused's actions were discriminatory on political grounds and therefore amounted to persecution.[241]

b. Racial grounds

i. What does this mean?

The natural meaning of the noun 'race' is defined as: "a local geographic or global human population distinguished as a more or less distinct group by genetically transmitted physical characteristics."[242]

In a working definition proposed by the European Union, racial persecution occurs in circumstances "where the persecutor regards the victim of his persecution as belonging to a racial group other than his own, by reason of a real or supposed difference, and this forms the grounds for his action."[243]

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[241] *Public Prosecutor v. Damiao Da Costa Nunes*, Case No. 1/2003, Trial Judgement, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 10 December 2003, paragraph 75. For another example of political persecution see *Prosecutor v. Marcelino Soares*, Case No. 11/2003, Trial Judgement, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court.

[242] See, Dictionary.com available at: http://dictionary.reference.com

[243] European Union Draft Guidelines for the Application of the Criteria for Determining Refugee Status (November 1994) discussed in Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (London: Sweet and Maxwell, 2003) paragraph 1-048 at 33.

Also, it is now well established that the crime of apartheid is an extreme form of institutionalised racial discrimination. According to Article 7(2)(h) of the Rome Statute the crime of apartheid is an inhumane act that is "committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[244]

ii. Is this ground significant?

Racial persecution is prohibited in international criminal law in numerous statutory instruments[245] and a large number of other international instruments.[246]

It is this writer's opinion that the statutory provisions for racial persecution are significant. There are numerous cases from *ad hoc* Tribunals that have provided significant legal precedents for crimes of racial persecution. Throughout history, there have been countless instances of racial persecution. For example, the crimes committed against Jews by the Nazi Regime, as well as crimes committed by Serbians against Croatians, Bosnians etc., in the former Yugoslavia.

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[244] Note also Article 1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid.

[245] See, Article 6(c) of the Nuremberg Charter, Article II(c) of CCL 10, Article 5(c) of the Tokyo Charter, Article 5(h) of the ICTY Statute, Article 3(g) of the ICTR Statute, Article 7(1)(h) of the Rome Statute, Section 5(1)(h) of Regulation 2000/15, Article 5 of the ECCC Special Law, Article 2(h) of the SCSL Statute, Article 9 of the UN/Cambodia Agreement, and Article 12(a)(8) of the IST Statute.

[246] See, Article 1 and 2 of the United Nations Declaration on the Elimination of all Forms of Racial Discrimination, Article 5(b) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 20 of the ICCPR. See also the Declaration on Race and Racial Prejudice, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

c. National grounds

i. What does this mean?

Claire de Than and Edwin Shorts suggest, "any group which is defined as having full citizenship are seen as comprising a national group."[247] However, Machteld Boot and Christopher K. Hall, suggest persecution carried out on national grounds could be considered as a concept in much broader terms, independent of the idea of citizenship. The term 'national' is said to encompass all the attributes of a group that believe or assert themselves as a nation despite their members being dispersed and located in more than one State.[248]

ii. Is this ground significant?

National persecution is prohibited in international criminal law, but in fewer statutory instruments[249] and a handful of other international instruments[250] than any of the other grounds discussed in this Chapter. It is not defined in any international instrument.

Of particular concern here is that the Rome Statute was the first international criminal instrument to criminalize national persecution. Therefore, it is this writer's opinion

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[247] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (London: Sweet and Maxwell, 2003) paragraph 1-050 at 33.

[248] Machteld Boot and Christopher K. Hall, "Persecution" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) at 149.

[249] See, Article 7(1)(h) of the Rome Statute, Section 5(1)(h) of Regulation 2000/15, Article 9 of the UN/Cambodia Agreement, and Article 12(a)(8) of the IST Statute.

[250] See, Article 20 of the ICCPR. Also Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

that the statutory provisions for national persecution should have been articulated in a much clearer manner.

An example of an act of national persecution might be derived from the Japanese bombing of Pearl Harbour. If the bombing of Pearl Harbour had occurred today and it was proven that Japan sought to persecute only American nationals because they were American, then the argument could be made that pursuant to the Rome statutory provisions the Japanese could be prosecuted for crimes of national persecution.

Another example of national persecution is found in the ILC suggestion that the crime of persecution could encompass a prohibition on the use of a national language, even in private circumstances.[251]

d. Ethnic grounds

i. What does this mean?

Ethnic groups are defined as pertaining to "peoples who conceive of themselves as one kind by virtue of their common ancestry (real or imagined), who are united by emotional bond, a common culture and by concern with the preservation of their group."[252]

[251] Draft Report of the International Law Commission on the work of its Forty-third Session, U.N. Doc. A/CN.4/L.464/Add.4 (1991) Article 21, Commentary paragraph 9.

[252] R. Burkey, *Discrimination and Racial Relations, Report on the International Research Conference on Race Relations* (Colorado, 1970) at 2.

ii. Is this ground significant?

Ethnic persecution is prohibited in international criminal law in a number of statutory instruments[253] and other international instruments.[254]

One illustration of what could be perceived as ethnic persecution is evidenced by the Rwandan atrocities of 1994. Rwanda's ethnic problems can be traced back to the colonial days of Belgian rule. Belgian colonial powers openly and prejudicially favoured one ethnic race over the other, namely the minority Tutsi over the majority Hutu. The roots of ethnic intolerance gradually built up and were firmly entrenched by the time the ethnic atrocities began in 1994. The results were staggering. It is estimated that extremist Hutu killed up to 800,000 Tutsi and moderate Hutu in approximately 100 days.[255]

Bearing in mind the ICTR Statute establishes that the crime of persecution could be committed on *political, racial, or religious grounds*, it is interesting to observe the comments passed in the *Nahimana et al* Judgement. The ICTR Trial Chamber, in *Prosecutor v. Nahimana et al,* held:

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[253] See, Article 7(1)(h) of the Rome Statute, Section 5(1)(h) of Regulation 2000/15, Article 2(h) of the SCSL Statute, Article 9 of the UN/Cambodia Agreement, and Article 12(a)(8) of the IST Statute.

[254] See, the Universal Declaration on the Elimination of All Forms of Racial Discrimination, the UDHR, the ICCPR, and the ICESCR. See also the Declaration on Race and Racial Prejudice, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

[255] For further details on the Rwandan ordeal see: the historical analysis in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998. Also Helen Fein, "The Three P's of Genocide Prevention: With Application to a Genocide foretold – Rwanda" in Neal Riemer (ed), *Protection Against Genocide: Mission Impossible?* (London: Praeger Publishers, 2000) at 41-66; Paul J. Magnarella, *Justice in Africa: Rwanda's Genocide, its Courts, and the UN Criminal Tribunal* (Aldershot: Ashgate, 2000) at 22-27 & 41-57; Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), *Global War Crimes Tribunal Collection*, Volume 1: The Rwanda Tribunal, (GLA/Wolf Global Legal Publishers, 1997) 270.

> As the evidence indicates, in Rwanda the targets of attack were the Tutsi ethnic group and the so-called moderate Hutu political opponents who supported the Tutsi ethnic group. The Chambers considers that the group against which discriminatory attacks were perpetrated can be defined by its political component as well as its ethnic component. At times the political component predominated… RTLM, Kangura and CDR, as has been shown by the evidence, essentially merged political and ethnic identity, defining their political target on the basis of ethnicity and political positions relating to ethnicity. In these circumstances, the Chamber considers that the discriminatory intent of the Accused falls within the scope of the crime against humanity of persecution on political grounds of an ethnic character.[256]

e. Cultural grounds

i. What does this mean?

The noun 'culture' denotes: "customs, arts, social institutions, etc., of a particular group or people." [257] Therefore, in practical terms, one would think cultural persecution would be an attack on the very customs, arts, and social institutions of a particular group of people.

ii. Is this ground significant?

Cultural persecution is prohibited in international criminal law in a number of statutory instruments[258] and a handful of other international instruments.[259]

As early as 1991, the ILC proposed that forms of persecution could include the destruction of buildings, monuments, and books etc., that belong to a particular

[256] *Prosecutor v. Nahimana et al,* Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, paragraph 1071.

[257] Oxford's Advanced Learner's Dictionary of Current English (4th edn 1989) at 291.

[258] See, Article 7(1)(h) of the Rome Statute, Section 5(1)(h) of Regulation 2000/15, Article 9 of the UN/Cambodia Agreement, and Article 12(a)(8) of the IST Statute.

[259] See, for example, Article 1 and 15 of the ICESCR.

cultural group.[260] It is now well established in customary international law from the *ad hoc* Tribunals that the destruction and plundering of buildings or monuments, when perpetrated with the requisite discriminatory intent, amounts to crimes of persecution.[261] For example, the Trial Chamber in *Kordić and Čerkez* expressed the view that attacks of this nature, when committed with the necessary discriminatory intent, constitute an attack on the culture and its objects to the extent that it becomes an attack on the cultural identity of the group, and therefore amounts to persecution.[262]

f. Religious grounds

i. What does this mean?

The noun 'religion' is defined as: "belief in and reverence for a supernatural power or powers regarded as creator and governor of the universe."[263] The adjective 'religious' denotes a concern with "sacred matters or religion or the church."[264]

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[260] Draft Report of the International Law Commission on the work of its Forty-third Session, U.N. Doc. A/CN.4/L.464/Add.4 (1991) Article 21, Commentary paragraph 9.

[261] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 764, *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 701, *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, ICTY Trial Judgment, 2 November 2001, paragraph 186, *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraphs 227, 234, *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 631, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraphs 707, 710.

[262] See arguments presented in *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 207.

[263] See, Dictionary.com available at: http://dictionary.reference.com

[264] See, Dictionary.com available at: http://dictionary.reference.com

ii. Is this ground significant?

Religious persecution is prohibited in international criminal law in numerous statutory instruments[265] and other international instruments.[266]

The September 11 attacks carried out against the United States of America could, arguably, amount to religious persecution if it could be shown that the US was attacked because it was a Christian country. The international community, ushered vocally by the United States, asserts that the al-Qaida organization carried out these attacks in what is now commonly referred to as 'terror attacks.' If, for example, it could be shown that al-Qaida acted pursuant to an organizational policy to commit a widespread or systematic 'jihad' or holy war directed against the US civilian population, then this could constitute religious persecution. In any event, if the September 11 events really did ignite a holy war, then perhaps the prosecution of crimes of religious persecution will gain even greater significance in the years to come as the infamous 'terror attacks' are increasing around the world.

[265] See, Article 6(c) of the Nuremberg Charter, Article II(c) of CCL 10, Article 5(h) of the ICTY Statute, Article 3(g) of the ICTR Statute, Article 7(1)(h) of the Rome Statute, Section 5(1)(h) of Regulation 2000/15, Article 5 of the ECCC Special Law, Article 2(h) of the SCSL Statute, Article 9 of the UN/Cambodia Agreement, and Article 12(a)(8) of the IST Statute.

[266] See, Article 2(b) of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief. Also Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

g. Gender grounds

i. What does this mean?

Article 7(1)(h) of the Rome Statute establishes that persecution can be carried out on grounds of gender. Of all the grounds on which the crime of persecution could be perpetrated, gender is the only one that has been defined by the Rome Statute.

Article 7(3) of the Statute establishes that the term 'gender' refers to: "the two sexes, male and female, within the context of society." Article 7(3) of the Rome Statute does not take into account sexual orientation. The deliberations at the Rome Conference became so contentious that the issue of defining the term 'gender' to include sexual orientation was left for the ICC judges to determine at a later stage.[267] Clearly, this issue needs to be addressed. The shortcoming in this area of the law is discussed by Geoffrey Robertson, who describes the definition of gender, articulated in Article 7(3), as 'distasteful'. He argues that "persecution is a crime if directed against men as men, or women because they are female, but homosexuals and lesbians may still suffer the thumbscrew and the rack, the 'intentional and severe deprivation of fundamental rights' when this is 'within the context of society', i.e. approved by a gay-bashing government or culture."[268]

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[267] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 522.

[268] Geoffrey Robertson QC, *Crimes Against Humanity: The Struggle for Global Justice* (2nd edn) (England: Penguin Books, 2002) at 360-361.

ii. Is this ground significant?

Gender persecution is prohibited in international criminal law in a handful of statutory instruments[269] and a number of other international instruments.[270]

Specifically articulating provisions that protect the male gender pursuant to the provisions in the Rome Statute is a remarkable development as most international instruments generally prohibit the discrimination of women based solely on their identity as women.[271]

An example of how men would be discriminated against on gender grounds could include, for example, a perpetrator implementing a specific policy aimed at effectively eliminating men and male children so as to end the lineage of a specific group or collectivity from society. The events of *Prosecutor v. Krstić* that took place in Srebrenica and Potočari illustrate what could, arguably, have been gender persecution. It should be noted though that the Trial Chamber determined that these events were in fact ethnic persecution. The facts of the case established that Serb forces separated, transferred and killed thousands of mainly men and male children from groups of Bosnian Muslim refugees. The Trial Chamber described the events as 'catastrophic', and sympathized with the difficulties of the surviving women in re-

[269] See, Article 7(1)(h) of the Rome Statute, Section 5(1)(h) of Regulation 2000/15, Article 9 of the UN/Cambodia Agreement, and Article 12(a)(8) of the IST Statute.

[270] See, Declaration on the Elimination of Discrimination against Women, the Convention on the Elimination of All Forms of Discrimination against Women.

[271] See, Declaration on the Elimination of Discrimination against Women. Also the Convention on the Elimination of All Forms of Discrimination against Women.

establishing their lives in the aftermath of what the Tribunal referred to as the "elimination of virtually all the men."[272]

The Trial Chamber in *Prosecutor v. Nahimana et al* discussed the concept of gender persecution in the context of the Rwanda conflict and ruled:

> Tutsi women, in particular, were targeted for persecution. The portrayal of the Tutsi women as *femme fatal*, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM and *Kangura*. T*he Ten Commandments*, broadcast on RTLM and published in *Kangura*, vilified and endangered the women… By defining the Tutsi woman as an enemy in this way, RTLM and *Kangura* articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.[273]

h. Other grounds universally recognized as impermissible under international law

i. What does this mean?

The Rome Statute negotiators agreed that the concept of universal recognition would be applied to new grounds relating to the crime of persecution other than the grounds enumerated in Article 7(1)(h) of the Rome Statute.[274] Neither Element 3 of Article 7(1)(h) of the Elements of Crimes nor Article 7(1)(h) of the Statute contains an exhaustive list of the grounds on which persecution could be perpetrated. Instead, Article 7(1)(h) of the Rome Statute and Element 3 of Article 7(1)(h) of the Elements of Crimes state that persecution can be committed on: political, racial, national,

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[272] See factual analysis from *Prosecutor v. Krstić*, Case No. IT-98-33, ICTY Trial Judgment, 2 August 2001 paragraphs 11-96 and specifically conclusion reached in paragraph 91.

[273] *Prosecutor v. Nahimana et al*, Case No.ICTR-99-52-T, Trial Judgement, 3 December 2003, paragraph 1079.

[274] Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 96. See also the Preparatory Commission document PCNICC/2000/L.1/Rev.1/Add.2.

ethnic, cultural, religious, gender… or other grounds recognized as impermissible under international law.

There were numerous debates at the Rome Conference and the Preparatory Commission as to whether or not to include the phrase 'universally recognized' in Article 7(1)(h) of the Rome Statute and Element 3 of Article 7(1)(h) of the Elements of Crimes. On the one hand were delegates proposed that crimes of persecution could be perpetrated on grounds that were 'universally recognized under customary international law'. The majority of delegates argued that such requirements were impractical. The opposing delegates were of the view that the expression 'universally recognized under customary international law' imposed conditions that could not be met. The expression implied that *all the states* in the world were obliged to recognise whatever the ground was in order for it to be impermissible. The debate was resolved with the delegates adopting the expression 'universally recognized as impermissible under international law'.[275] Therefore, the expression 'universally recognized' found in the phrase 'universally recognized as impermissible under international law' simply means: "widely recognized."[276]

ii. Is this ground significant?

The expression 'universally recognized as impermissible under international law' could be interpreted broadly. For example, Article 2 of the ICCPR, ICESCR, and

[275] Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 96.

[276] Machteld Boot and Christopher K. Hall, "Persecution" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) at 150.

UDHR, established that when a State Party is enforcing the rights set out in the instruments, no distinction of any kind should be made on grounds "such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 2 of ICCPR, ICESCR, and UDHR (commonly referred to as the International Bill of Rights) established a much wider set of grounds than those enumerated in the Rome Statute. Article 2 of the respective provisions added: language, colour, social origin, property, and birth. Therefore, does the expression 'other grounds universally recognized as impermissible under international law' mean that the ICC can also prosecute crimes of persecution committed on grounds of language, colour, etc? Furthermore, how will the ICC deal with issues such as: mental or physical disability, economic or age related instances of discrimination.[277]

It is this writer's opinion that, pursuant to Article 7(1)(h) of the Rome Statute and Element 3 of Article 7(1)(h) of the Elements of Crimes, the ICC should prosecute crimes of most serious concern to the international community committed on grounds of language, colour, social origin, property, birth, as well as mental or physical disability, economic or age related instances of discrimination if they otherwise amount to crimes of persecution. It is clear that these grounds are established in international law, for example, pursuant to the International Bill of Rights. Therefore, the expression 'other grounds universally recognized as impermissible under international law' should include persecution committed on these grounds.

[277] For in-depth discussion of these grounds and the challenges that lie ahead for the ICC see Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 521-522.

III. ELEMENT 4 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES

Element 4 of Article 7(1)(h) of the Elements of Crimes states:

> 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.[+]

A. COMPARISON OF ELEMENT 4 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES AND ARTICLE 7(1)(H) OF THE ROME STATUTE

Element 4 of the Elements of the crime of persecution parallels the wording found in the second limb of Article 7(1)(h) of the Rome Statute. Article 7(1)(h) of the Rome Statute prohibits "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, *in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*" (emphasis added).

[+] "It is understood that no additional mental element is necessary for this element other than that inherent in element 6."

B. COMPARISON OF THE NEXUS REQUIREMENT IN ELEMENT 4 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES AND ARTICLE 7(1)(H) OF THE ROME STATUTE WITH OTHER INTERNATIONAL LEGAL INSTRUMENTS

Element 4 of the Elements of the crime of persecution, Article 7(1)(h) of the Rome Statute and, prior to the Rome Statute, Article 5(c) and Article 6(c) of the Nuremberg Charter, tabled below, are the only international legal instruments with a nexus requirement narrowing the scope of crimes of persecution. Article 3(g) of the ICTR Statute, Article 5(h) of the ICTY Statute, and Article II(1)(c) of CCL 10 do not have a nexus requisite for crimes of persecution.

Comparison of the nexus requirement in international legal instruments created prior to the 1998 Rome Statute

Element 4 of Article 7(1)(h) of the Elements of Crimes	**Article 7(1)(h) of the Rome Statute**	**Article 5(c) of the Tokyo Charter**	**Article 6(c) of the Nuremberg Charter**
… 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.[+]	… in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.	… in execution of or in connection with any crime within the jurisdiction of the Tribunal…	… in execution of or in connection with any crime within the jurisdiction of the Tribunal…

Analysis of international statutory provisions on the crime of persecution after the 1998 Rome Statute indicates that there are only 3 international legal instruments which stipulate a nexus requirement. These are: Article 12(a)(8) and 12(b)(6) of the IST Statute, Article 9 of the UN/Cambodia Agreement, and Section 5(1)(h) and 5(2)(f) of Regulation No. 2000/15. These provisions reflect the exact same wording found in the Rome Statute.

[+] "It is understood that no additional mental element is necessary for this element other than that inherent in element 6."

There are two international legal instruments formulated in the aftermath of the 1998 Rome Statute provisions that do not require a nexus requirement for crimes of persecution. These are: Article 2(h) of the SCSL Statute and Article 5 of the ECCC Special Law.

C. ANALYSIS OF ELEMENT 4 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES

1. What is this nexus requirement?

a. Acts connected to crimes of persecution

Delegates at the Rome Conference, after much deliberation, came to the agreement that persecution would be a crime only when connected to other crimes within the Court's jurisdiction. At the time of the Conference the general consensus indicated that a restrictive prerequisite for the crime of persecution was a necessary precaution. The delegates felt that persecution was a vague notion in itself with the potential to far outweigh the desired focus on the criminal aspect of the crime.[278]

Hence, a nexus requirement was introduced to highlight the criminal aspect of the crime of persecution.[279] The crime of persecution must be committed in connection

[278] Darryl Robinson, "Developments in International Criminal Law: Defining 'Crimes Against Humanity' at the Rome Conference" (1999) 93 *American Journal of International Law* 43 at 54.

[279] Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 95.

with any act enumerated in Article 7 of the Rome Statute, or the crime of persecution must be committed in connection with any other crime within the ICC's jurisdiction, that is, those crimes stipulated in Article 5 of the Rome Statute.

i. Acts of persecution charged in connection with *acts* under Article 7 of the Rome Statute

Element 4 of the Elements of the crime of persecution requires that in order to constitute persecution, "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"[+] (emphasis added). Also, Article 7(1)(h) of the Rome Statute, requires acts of persecution be "in connection with any *act* referred to in this paragraph or any crime within the jurisdiction of the Court" (emphasis added).

The crime of persecution can be committed in connection with any of the acts enumerated in Article 7 of the Rome Statute. According to Article 7(1) of the Statute these enumerated acts, are: Murder; Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; The crime of apartheid;

[+] "It is understood that no additional mental element is necessary for this element other than that inherent in element 6."

Other inhumane acts of similar character intentionally causing great suffering, serious injury to body or to mental or physical health.

These enumerated acts are defined in Article 7(2) and 7(3) of the Rome Statute.[280]

ii. Acts of persecution charged in connection with any other *crimes* under the Rome Statute

The crime of persecution can also be committed in connection with any of the *crimes* established in Article 5 of the Rome Statute. Article 5(1) of the provision lists all the crimes which fall within the Court's jurisdiction. These include: the crime of genocide, crimes against humanity, war crimes, and crimes of aggression.

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[280] Article 7(2) of the Rome Statute states:

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Article 7(3) of the Rome Statute states:

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

b. How does the nexus requirement affect the crime of persecution?

This nexus requirement differentiates the role of persecution between the ICC, on the one hand, and persecution at the international judicial bodies such as: the ICTY, ICTR, SCSL, and ECCC. The nexus requirement found in Element 4 of Article 7(1)(h) of the Elements of Crimes and Article 7(1)(h) of the Rome Statute differs from the statutory provisions on the crime of persecution found in most of the *ad hoc* Tribunals.[281]

The ICTY has rejected the notion of establishing a nexus requirement for crimes of persecution. The Trial Chamber in *Prosecutor v. Kupreškić et al* held that Article 7(1)(h) of the Rome Statute did not reflect customary international law, arguing that the Statute of the ICC was felt to indicate the *opinio juris* of the participating State Parties. The Judgment rejected the idea that the crime of persecution must be committed in connection with other crimes that fall within the jurisdiction of the Tribunal. It was the opinion of the Trial Chamber that the application of Article 7 of the Rome Statute is restricted by Article 10 of the Statute which states, "nothing in the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute" (emphasis appears in Judgment). Based on this, the Chamber reasoned that the "provision clearly conveys the idea that the framers of the Statute did not intend to affect,

[281] It should be borne in mind that the IST Statute, Regulation 2000/15, and the UN/Cambodia Agreement are worded exactly the same as the Rome Statute provisions on the crime of persecution. Also the Nuremberg and Tokyo Charters establish a nexus requirement for crimes of persecution.

amongst other things, *lex lata* as regards such matters as the definition of war crimes, crimes against humanity and genocide."[282]

Prosecutor v. Kordić and Čerkez upheld the approach taken in *Kupreškić et al*. However, the Trial Chamber made the observation that despite the Rome Statute limiting the scope of the crime of persecution with the nexus requirement, the reality though, was that the remainder of the provisions generally widened the scope of the crime. The Chamber held, "in practice, the list of acts which may potentially be characterised as persecution is extensive in view of the broad range of crimes listed thereunder."[283]

The nexus requirement recognizes that the crime of persecution is committed in connection with *any act* found in Article 7 of the Rome Statute; therefore, the argument could be made that this could include the very *act* of persecution itself.[284]

Another point to consider concerning the nexus requirement is made by Herman von Hebel and Darryl Robinson. Von Hebel and Robinson argue that the crime of persecution could be ascertained by proving a nexus with any act of murder, torture, rape, or other inhumane act. Because of the nexus requirement, the act, connected to the persecution, need not have been committed as a widespread or systematic attack. Von Hebel and Robinson were of the opinion that "the possibility of connection to

[282] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 580.

[283] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraphs 193, 197.

[284] See Machteld Boot and Christopher K. Hall, "Persecution" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) at 151.

any inhumane act ensures that persecution will not be a mere auxiliary offense or aggravating factor."[285]

Kai Ambos and Steffen Wirth propose that the nexus requirement established for crimes of persecution operates in two ways. Firstly, the crime of persecution, pursuant to the provisions established in Article 7 of the Rome Statute and Section 5 of the East Timor Regulation 2000/15,[286] is connected to what they term a "complete crime", that is, any *crime* within the jurisdiction of Court. Secondly, the same provisions establish persecution is connected to what they term "individual criminal acts", that is, any *act* referred to in the specified statutory provisions.[287]

Ambos and Wirth provide the following illustration to explain the nexus requirement:

> Consequently, the persecutory conduct must only be connected to a (single) murder and not to a murder which is part of a widespread or systematic attack consisting of other enumerated inhumane acts... In other words, a multiplicity of grave human rights violations (which are not, as such, enumerated among the inhumane acts), e.g., severe attacks on personal property, can be transformed into the crime of persecution by a single connected murder. [288]

The authors continue the illustration by arguing that if a murder, that is an inhumane act, is committed with discriminatory intent, then the persecutory murder is not required to be connected to another murder, because as they suggest, "the connection

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[285] Herman von Hebel and Darryl Robinson, "Crimes Within the Jurisdiction of the Court" in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) at 101-102.

[286] It must be borne in mind that the provisions established in Section 5(1)(h) of the East Timor Regulation 2000/15 are identical to those found in Article 7(1)(h) of the Rome Statute.

[287] Kai Ambos and Steffen Wirth, "The Current Law on Crimes Against Humanity" (2002) 13(1) *Criminal Law Forum* 1 at 71-72.

[288] Kai Ambos and Steffen Wirth, "The Current Law on Crimes Against Humanity" (2002) 13(1) *Criminal Law Forum* 1 at 72.

requirement would be met by the identity of the persecutory act (murder) and the connected act (murder)." [289]

Taking the above context of the nexus requirement into account the authors reach the conclusion that there are two types of persecution: persecution that is an autonomous crime or an aggravated form of original underlying act. Ambos and Wirth state that "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."[290]

IV. ELEMENT 5 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES

Element 5 of Article 7(1)(h) of the Elements of Crimes states:

> The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

[289] Kai Ambos and Steffen Wirth, "The Current Law on Crimes Against Humanity" (2002) 13(1) *Criminal Law Forum* 1 at 72. See also discussion in Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 525-526.

[290] Kai Ambos and Steffen Wirth, "The Current Law on Crimes Against Humanity" (2002) 13(1) *Criminal Law Forum* 1 at 72.

A. COMPARISON OF ELEMENT 5 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES AND ARTICLE 7 OF THE ROME STATUTE

Element 5 of the Elements of the crime of persecution parallels the general wording of the chapeau to crimes against humanity in Article 7 of the Rome Statute. The chapeau to Article 7 states, "for the purpose of this Statute, 'crime against humanity' means any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack…" Article 7(2)(a) of the Rome Statute defines the phrase 'attack directed against any civilian population' as: "a course of conduct involving the multiple commission of acts… against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

The provisions stipulated in Element 5 and the chapeau for Article 7 are consistent with customary international law to the extent that both provisions require that crimes against humanity must be perpetrated as part of a widespread or systematic attack directed against a civilian population. For example, *Prosecutor v. Blaškić* held, "a crime against humanity is made special by the methods employed in its perpetration (the widespread character) or by the context in which these methods must be framed (the systematic character) as well as by the status of the victims (*any* civilian populations)"[291] (italic emphasis and brackets appear in the Judgment).

[291] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 201.

B. COMPARISON OF ELEMENT 5 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES, ARTICLE 7 OF THE ROME STATUTE AND INTERNATIONAL LEGAL INSTRUMENTS

Analysis of international legal instruments prior to the 1998 Rome Statute reveals only one of these instruments, the ICTR Statute, specifically mentions the phrase 'widespread or systematic attacks' when describing crimes against humanity. However, the terms 'widespread' or 'systematic' appear in all international instruments created in the aftermath of the 1998 Rome Statute. These include: Article 12 of the IST Statute, Article 9 of the UN/Cambodia Agreement, Article 2 of the SCSL Statute, Article 5 of the ECCC Special Law, and Section 5 of Regulation No. 2000/15.

C. ANALYSIS OF ELEMENT 5 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES

It should be noted that the discussion of Element 5 which follows below, concerning the terms 'widespread' or 'systematic' and phrase 'attack directed against any civilian population', is not exclusive to crimes of persecution. These expressions have been interpreted and discussed extensively in the general context of crimes against humanity by academics and in leading judgments from *ad hoc* Tribunals.

1. Defining the terms 'widespread' or 'systematic'

a. Interpreting the 'widespread or systematic' provisions of Element 5 of the Elements of the crime of persecution and Article 7 of the Rome Statute

The 1996 ILC Draft Code adopted the expression 'systematic manner or on a large scale'. Regarding the concept of systematic manner, the ILC commentary clarified that the expression 'systematic manner' required that the conduct, be it repeated or continuous, was committed pursuant to a preconceived plan or policy. This requirement is what is said to distinguish crimes against humanity from ordinary crimes. The ILC made it clear that "the thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy." [292]

Similarly, the ILC explained that the phrase "on a large scale" denoted what the Commission referred to as: "the multiplicity of victims". The ILC was particularly concerned with excluding isolated inhumane acts which were perpetrated by persons operating out of their own initiative or inhumane acts which were directed against a single victim. The expression "large-scale" was of particular significance to the ILC because the Commission felt the terminology was sufficiently broad enough to cover, for example, situations that were the "result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."[293]

[292] International Law Commission Report, 1996 at paragraph 3, Commentary on Article 18: Crimes Against Humanity.

[293] International Law Commission Report, 1996 at paragraph 4, Commentary on Article 18: Crimes Against Humanity.

The terms widespread and systematic generated much debate at the Rome Conference negotiations. Delegates, drawing on case law from *ad hoc* Tribunals dating back to as early as the Nuremberg Trials, agreed that 'widespread' is described as: "requiring a large-scale action involving a substantial number of victims." 'Systematic' is described as: "requiring a high degree of orchestration and methodical planning." However, the source of contention was whether to adopt the tests as disjunctive, that is, widespread *or* systematic, or to adopt the terms as conjunctive tests, i.e., widespread *and* systematic. One the one hand, a group of States favoured the disjunctive test which they argued reflected customary international law. On the other hand, the remaining States and members of the Security Council advocated for the conjunctive test, criticizing the disjunctive test which they described as potentially over-inclusive.[294]

Leading academics, such as Rodney Dixon, agree that multiplicity and policy are elements required to show the widespread nature or systematic character of an attack. Dixon proposes that the level of occurrence is proven by a substantial number of incidents carried out in furtherance of a distinct policy. Having established multiplicity, and a policy, the evidence should show one of two things: either the attack was carried out on a widespread or massive scale, or the attack adhered to a systematic or regular pattern.[295]

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[294] Darryl Robinson, "Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience" in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court: Volume 1* (Il Serente, 1999) 139 at 152-153.

[295] Rodney Dixon, "Definitions of Crimes or their Elements" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) at 159.

Steven R. Ratner and Jason S. Abrams also hold the same opinion that crimes against humanity are set apart by the distinguishing factor which is the pattern of occurrence. The aim, according to Ratner and Abrams, is to determine whether the crime is one that is abhorred for its large scale, that is, the large number of victims or systematic planning, that is, "directed against a specific 'population' and not merely random individuals."[296]

b. How do *ad hoc* Tribunals interpret the terms 'widespread' or 'systematic'?

The Panel of Judges in the East Timor Los Palos case discussed the terms 'widespread' or 'systematic'. The Panel defined 'widespread' confusingly, as: "an attack as the multiple commission of acts with the requirement of inhumane acts…" Systematic is defined as: "an attack 'carried out pursuant to a preconceived policy or plan'".[297]

The terms 'widespread' and 'systematic' do not appear in the ICTY Statute. According to *Prosecutor v. Dusko Tadić*, drawing on customary international law, the terms were implied. The Chamber found:

> It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian "population", and either a finding of widespreadness, which refers to the number of

[296] Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997) at 57.

[297] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at paragraphs 636-637. The Panel adopted the *Blaškić* interpretation of widespread and adopted the *Bagilishema* interpretation of systematic. See Judgment for further details.

victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement.[298]

Regarding what aspect of the crime is required to be widespread or systematic; the Appeal Chamber in *Kunarac et al* has made it clear that "only the attack, not the individual acts of the accused, must be widespread or systematic."[299]

Prosecutor v. Blaškić has defined the terms 'widespread' or 'systematic'. The Chamber held, "the widespread characteristic refers to the scale of the acts perpetrated and to the number of victims."[300] The systematic character of crimes against humanity is identified by the following 4 elements:

a. The existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
b. The perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
c. The preparation and use of significant public or private resources, whether military or other;
d. The implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[301]

In *Prosecutor v. Stakić* the Trial Chamber explained that 'systematic' referred to what the Chamber referred to as: "the organized nature of the acts of violence and the improbability of their random occurrence." The Chamber provided 4 elements that determine if an attack is either widespread or systematic, and listed the elements as:

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[298] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 648.

[299] *Prosecutor v. Kunarac et al*, Case No. IT-96-23/1, Appeal Judgment, 12 June 2002, paragraph 96 referring to *Prosecutor v. Kunarac et al*, Case No. IT-96-23/1, Trial Judgment, 22 February 2001, paragraph 431.

[300] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 206.

[301] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 203.

1. The consequences of the attack upon the targeted population;
2. The number of victims;
3. The nature of the acts; and
4. The possible participation of officials or authorities or any identifiable patterns of crimes.[302]

In addition, the Trial Chamber recognized that in assessing these 4 elements the "acts of the accused need only be a part of this attack."[303]

The ICTR has also discussed the terms 'widespread' or 'systematic'. Initially there was some discrepancy between the English and French versions of the ICTR Statute. The English Statute used the terms disjunctively, whereas the French version of the Statute used them conjunctively, i.e., *généralisée et systematique*.[304] The Trial Chamber in *Prosecutor v. Musema* clarified the Tribunal's position and held that customary international law favoured the disjunctive test. Thus the *Musema* Judgement adopted the English version of the Statute.[305]

According to the *Akayesu* Judgement, the term 'widespread' means: "massive, frequent, large scale action carried out collectively with considerable seriousness."[306]

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[302] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 625, upheld *Prosecutor v. Kunarac et al*, Case No. IT-96-23/1, Appeal Judgment, 12 June 2002, paragraph 95.

[303] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 625, upheld *Prosecutor v. Kunarac et al*, Case No. IT-96-23/1, Appeal Judgment, 12 June 2002, paragraph 96.

[304] Darryl Robinson, "Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience" in Flavia Lattanzi and William A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court: Volume 1* (Il Serente, 1999) 139 at 153. See also discussion in *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Trial Judgement, 27 January 2000, paragraphs 202-204, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 328, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgement, 1 December 2003, paragraphs 869-870.

[305] *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Trial Judgement, 27 January 2000, paragraph 203.

[306] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, paragraph 580.

'Systematic' denotes a plan that is "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."[307] The *Akayesu* definitions of widespread or systematic attacks were adopted in other ICTR cases, namely: *Kajelijeli*, *Semanza*, *Bagilishema*, and *Musema*.[308] *Prosecutor v. Kayishema and Ruzindana* not only adopted the *Akayesu* definitions, but it also explained why the ICTR requires crimes against humanity to be widespread or systematic. The Chamber held, "either of these conditions will serve to exclude isolated or random inhumane acts committed for purely personal reasons."[309]

Ultimately, the ICTR and ICTY have concluded that the criteria for identifying the terms 'widespread' or 'systematic' will overlap. The *Blaškić* Judgment, referring to case law from both the Tribunals, held:

> The fact still remains however that, in practice, these criteria will often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organization. The quantitative criterion is not objectively definable as witnessed by the fact that neither international texts nor international and national case-law set any threshold starting with which a crime against humanity is constituted.[310]

[307] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, paragraph 580.

[308] *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgement, 1 December 2003, paragraphs 871-872, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 329, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgement, 7 June 2001, paragraph 77, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Trial Judgement, 27 January 2000, paragraph 204.

[309] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, paragraph 123.

[310] *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 207. The conclusion reached in the *Blaškić* Judgment concerning the overlap in identifying the criteria for 'widespread or systematic' has been adopted by the ICTR in *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgement, 7 June 2001, paragraph 77.

2. Attack directed against any civilian population

Element 5 of Article 7(1)(h) of the Elements of Crimes states: "the conduct was committed as part of a widespread or systematic *attack directed against a civilian population*" (emphasis added).

Article 7(2)(a) of the Rome Statute specifically defines the phrase 'attack directed against any civilian population' as: "a course of conduct involving the multiple commission of acts referred to in paragraph 1 (of Article 7) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." In addition, paragraph 3 of Article 7 of the Elements of Crimes defines the phrase 'attack directed against a civilian population' as: "a course of conduct involving the multiple commission of acts referred to article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." It is clear that these two definitions are substantially the same. It may be noted that the Rome Statute refers to 'a' civilian population whereas the Elements refer to 'any' civilian population.

The discussion of the Article 7(2)(a) Rome Statute and paragraph 3 of the Introduction to the Elements of crimes against humanity definitions of an 'attack directed against any civilian population' can be divided into four components:

- The attack or course of conduct;
- Multiple commission of acts;
- Directed against any civilian population;
- Pursuant to or in furtherance of a State or organizational policy.

a. The attack or course of conduct

i. Negotiations at the Rome Conference and Preparatory Commission

Delegates at the Preparatory Commission, particularly the Arab States, debated over whether to include the Rome Statute Article 7(2)(a) definition of the phrase 'attack directed against any civilian population' as a separate Element in the Elements of Crimes. Instead of adopting the definition as a separate Element, the agreement was reached to repeat the definition in paragraph 3 of the Introduction to the Elements of crimes against humanity provisions.[311]

Regarding the phrase 'attack directed against a civilian population', paragraph 3 of the Introduction to the Elements of crimes against humanity further stipulates that "the acts need not constitute a military attack." Prior to this clarification, a group of delegates had proposed that the attack should either be a military attack or one carried out by violent means. There was confusion, amongst the Preparatory Commission delegates, between the concept of attack in the context of Article 8 which pertains to war crimes, and attack in the context of crimes against humanity pursuant to Article 7 of the Rome Statute. Delegates at the Rome Conference had faced a similar dilemma. They came to the conclusion that the term 'attack directed against any civilian population', when considered in the context of crimes against humanity, acquired its very own special meaning. It followed, therefore, that an 'attack', when spoken of in

[311] Darryl Robinson, "The Context of Crimes Against Humanity" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 73-74. See also Preparatory Commission document PCNICC/1999/WGEC/DP.39.

the context of crimes against humanity did not necessarily have to adopt the same meaning as attack in the context of war crimes.[312]

ii. Customary international law

The term 'attack' was defined by Chambers at the *ad hoc* Tribunals, discussed below. This jurisprudence can be relevant at the ICC to interpret the provisions found in paragraph 3 of the Introduction to the Elements of crimes against humanity and Article 7(2)(a) of the Rome Statute.

The *Stakić* Judgment described an attack as something that can "precede, outlast, or continue during the armed conflict, but need not be part of it." In addition, an attack "is not limited to the use of armed force; it encompasses any mistreatment of the civilian population."[313]

The ICTR has defined the term 'attack'. An attack is: "an unlawful act, event, or series of events of the kind listed in Article 3(a) through (i) of the Statute."[314] The Tribunal has further stipulated that "an 'attack' does not necessarily require the use of armed force; it could also involve other forms of inhumane mistreatment of the civilian population."[315]

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[312] Darryl Robinson, "The Context of Crimes Against Humanity" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 73-74.

[313] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 623.

[314] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 327 summarized ICTR case law on the point and upheld the original definition of an attack outlined in the Akayesu Judgement.

[315] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 327.

b. Multiple commission of acts

i. Negotiations at the 1998 Rome Conference

Delegates at the Rome Conference felt that the phrase 'course of conduct involving multiple commission of acts' found its context in the fact that this course of conduct was directed against any civilian population. This in itself suggested an element of massive scale.[316] The terminology 'multiple commission of acts' was preferred over the phrase 'commission of multiple acts'. This was because delegates were concerned the latter phrase was open to misinterpretation, and could be construed as requiring the commission of more than one type of inhumane act.[317]

ii. Customary international law

The negotiators had also relied on the case law from the ICTY *Tadić* Judgment. The *Tadić* Chamber was of the opinion that the prosecution of crimes should focus not on one particular act but on a course of conduct and, secondly, that use of the word 'population' was intended to "imply crimes of a collective nature and thus exclude single or isolated acts."[318] The purpose of these provisions is generally to exclude isolated or small-scale events that do not reach the necessary level of seriousness

[316] Darryl Robinson, "Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience" in Flavia Lattanzi and William A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court: Volume 1* (Il Serente, 1999) 139 at 155-156.

[317] Darryl Robinson, "Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience" in Flavia Lattanzi and William A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court: Volume 1* (Il Serente, 1999) 139 see footnote 83 at 156.

[318] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 471-472.

required for international adjudication.[319] *Tadić* supports the view that the international community is concerned with international crimes as opposed to random acts that could be prosecuted within the domestic jurisdiction.[320]

On the issue of whether crimes could be perpetrated as a series of acts or a single act, jurisprudence from the *ad hoc* Tribunals indicates that "a crime may be widespread or committed on a large-scale by 'the cumulative effect of a series of inhumane acts of the singular effect or an inhumane act of extraordinary magnitude'".[321] It should be noted that the *Simić et al, Krnojelac*, and *Kupreškić et al* judgments, in particular, have all determined that "although persecution relates to a series of acts, a single act may be sufficient."[322]

[319] Darryl Robinson, "Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience" in Flavia Lattanzi and William A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court: Volume 1* (Il Serente, 1999) 139 at 156.

[320] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, ICTY Appeals Judgment, 15 July 1999, paragraph 653. The Chamber held "the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population."

[321] *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 43, *Prosecutor v. Kunarac et al*, Case No. IT-96-23/1, Appeal Judgment, 12 June 2002, paragraph 96, where the Appeal Chamber ruled "a single or relatively limited number of acts on his or her (the accused) part would qualify as a crime against humanity, unless those acts may be said to be isolated or random." See also *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 206, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 649.

[322] *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 50, *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraph 433, *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 624.

c. Directed against any civilian population

i. Negotiations at the Rome Conference and Preparatory Commission

According to delegates at the Rome Conference, use of the term 'any' in the phrase 'any civilian population' indicated that the civilians did not have to be nationals of a specific foreign power. The phrase 'any civilian population' encompassed civilians of any nationality as well as stateless civilians.[323]

ii. Customary international law

The phrase 'directed against any civilian population' is discussed below. The discussion of jurisprudence from the *ad hoc* Tribunals that follows is significant because the terms used by the Tribunals and the ICC are substantially the same.

In the case of *Prosecutor v. Stakić* the Trial Chamber stated that the context of an attack is found in the phrase 'directed against any civilian population'. Therefore, it is important to show that the civilian population was the primary object of the attack.[324] According to the *Simić et al* Judgment, some of the factors that indicate the civilian population was the primary object of the attack include the method used in the attack,

[323] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 485. See *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 634.

[324] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgement, 31 July 2003, paragraph 624, see also ICTR position in *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 330 confirmed in *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 42.

the discriminatory nature of the attack, the number of victims and their status, the nature of the crimes carried out in the course of the attack, etc.[325]

The common view expressed in customary international law, such as the Geneva Conventions, is that the definition of 'civilian' includes "all persons who have taken no active part in hostilities, or are no longer doing so, including members of armed forces who have laid down their arms and persons placed *hors de combat* by sickness, wounds, detention or any other reason."[326] This definition of 'civilian' has been adopted by both the ICTY and ICTR.[327]

The ICTY in *Prosecutor v. Tadić* adopted a wide definition of 'civilian population'. The Chamber held: "the emphasis is thus not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population."[328]

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[325] *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 42.

[326] These are the prescribed categories of persons protected by Common Article 3 of the Geneva Conventions. Note the International Criminal Tribunal of Yugoslavia adopted the same definition of civilian in *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, ICTY Opinion and Judgment, 7 May 1997, paragraphs 637-638, see also *Prosecutor v. Kupreškić et al,* Case No. IT-95-16-T, ICTY Trial Judgment, 14 January 2000, paragraphs 547-548. The International Criminal Tribunal for Rwanda adopted the same definition of civilian in *Prosecutor v. Akayesu*, Case No. ICTR-96-T, Trial Judgement, 2 September 1998, paragraph 582.

[327] For example, see *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, ICTY Opinion and Judgment, 7 May 1997, paragraphs 637-638; *Prosecutor v. Kupreškić et al,* Case No. IT-95-16-T, ICTY Trial Judgment, 14 January 2000, paragraphs 547-548; *Prosecutor v. Akayesu*, Case No. ICTR-96-T, Trial Judgement, 2 September 1998, paragraph 582, and *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgement, 1 December 2003, paragraph 873.

[328] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 644, discussed in Antonio Cassese, "Crimes Against Humanity" in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1, (Oxford: Oxford University Press, 2002) 353 at 367.

Regarding the population component of the phrase 'directed against any civilian population', the Trial Chamber in *Prosecutor v. Stakić* was of the opinion that it is not necessary to show that the entire population in a geographic region were the object of the attack. It is sufficient to show that the civilian population was the target of the attack as opposed to an attack directed against a random number of individuals.[329]

d. Pursuant to or in furtherance of a State or organizational policy

i. Negotiations at the Rome Conference and Preparatory Commission

The 1996 ILC Draft Code refers to the concept of a policy or plan in describing the systematic manner by which crime against humanity are instigated or directed by a Government or by any organization or group. The ILC explained the reason for imposing this policy or plan requirement on crimes against humanity. The ILC commentary on the Draft Code reveals that the purpose of this requirement is to exclude any isolated random acts that had nothing to do with the broader plan or policy.[330]

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[329] *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 624 which upheld the reasoning in *Prosecutor v. Kunarac et al*, Case No. IT-96-23/1, Appeal Judgment, 12 June 2002, paragraph 90. Regarding the issue that a civilian population is not determined by the geographic territory or area, see ICTR judgements: *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgement, 7 June 2001, paragraph 80; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 330; and *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgement, 1 December 2003, paragraph 875.

[330] International Law Commission Report, 1996 at paragraph 3, Commentary on Article 18: Crimes Against Humanity.

The Rome Statute is the first international instrument that specifically articulates the requirement that an attack must be committed pursuant to a State or organizational policy.[331] Article 7(2)(a) of the Rome Statute defines the phrase 'attack directed against any civilian population' as: "a course of conduct involving the multiple commission of acts… against any civilian population, *pursuant to or in furtherance of a State or organizational policy* to commit such attack" (emphasis added).

It is interesting to note that Canadian delegates at the Rome Conference had proposed that the Article 7(2)(a) Statute definition of the phrase 'attack directed against any civilian population' refer to a State or organizational "policy to commit such *acts*". Concern was expressed by the Women's Caucus of the NGO Coalition for the Establishment of the ICC about the Canadian proposal. The concern was that, for example, if the phrase was 'policy to commit such act', then this could be construed as requiring that there had to be a policy to commit rape in order to prosecute a perpetrator for the crime against humanity of rape. Hence, the wording was altered to 'policy to commit such *attack*'.[332]

Negotiations at the Preparatory Commission on the issue of a State's action or inaction were the most controversial. On the one hand delegates were concerned that the ICC would infer a policy to encourage crimes where a State failed to act for purely innocent reasons. For example, a State's inaction could be attributed to "lack of

[331] Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes Against Humanity" (May 2000) 22(2) *Human Rights Quarterly* 335 at 368.

[332] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, vol 12, School of Human Rights Research Series (Antwerpen: Intersentia, 2002) at 479-480. See also Nicole Eva Erb, "Gender Based Crimes Under the Draft Statute for the Permanent International Criminal Court" (Spring, 1998) 29 *Columbia Human Rights Law Review* 401.

awareness of the crimes, or a collapse of authority, or other inability to respond." By the second reading the majority of delegates were concerned about a situation in which, through methods of inaction, it could be concluded that a State or organization deliberately encouraged crimes by failing to respond. The fear was that "terms like 'tolerate' or 'acquiescence' might lead the court to leap from the simple fact of inaction to an inference of a policy, without considering the circumstances surrounding the inaction (e.g., an inability to respond)."[333]

ii. Customary international law

Jurisprudence from the ICTY and the ICTR differs from the provisions recognized in Article 7(2)(a) of the Rome Statute and paragraph 3 of the Introduction to the Elements of crimes against humanity. According to these provisions, the phrase 'attack directed against any civilian population' is defined as: "a course of conduct involving the multiple commission of acts… against any civilian population, *pursuant to or in furtherance of a State or organizational policy* to commit such attack" (emphasis added).

In contrast, analysis of jurisprudence from the ICTY reveals that under customary international law there is no requirement to show that the acts which form the attack adhere to a policy or plan. However, for evidentiary purposes, a plan or policy may be relevant to prove that there was a widespread or systematic attack, as well as show

[333] Darryl Robinson, "The Context of Crimes Against Humanity" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 74-75. See also discussion in Mauro Politi, "Elements of Crimes", in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford: Oxford University Press, 2002) 443 at 464-465.

whether or not the actions of the accused were part of the attack.[334] The *Kunarac et al* Judgment further explained that the existence of a policy or plan did not constitute a separate legal element of the crime.[335]

As for analysis of jurisprudence from the ICTR, the *Akayesu* Judgement held: "there is no requirement that this policy must be formerly adopted as a policy of a state. There *must however* be some kind of preconceived plan or policy" [336] (italics emphasized). Also P*rosecutor v. Kajelijeli*, which confirmed prior ICTR and ICTY jurisprudence, held that, although a plan or policy may be evidentially relevant and show widespread or systematic attacks directed against a civilian population, the existence of a policy or plan does not formulate a separate legal element.[337]

[334] *Prosecutor v. Kupreškić* et al, Case No. IT-95-16-T, ICTY Trial Judgment, 14 January 2000, paragraph 551, footnote 811 quoting wide interpretations from *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, ICTY Appeals Judgment, 15 July 1999 paragraph 653, *Prosecutor v. Nikolić*, Case No. IT-94-2, ICTY Trial Judgment, Rule 61, 9 October 1995, paragraph 26, *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraph 58, *Prosecutor v. Kunarac et al*, Case No. IT-96-23/1, Appeal Judgment, 12 June 2002, paragraph 98, *Prosecutor v. Vasiljević*, Case No. IT-98-32, ICTY Trial Judgment, 29 November 2002, paragraph 36, *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 44.

[335] *Prosecutor v. Kunarac et al*, Case No. IT-96-23/1, Appeal Judgment, 12 June 2002, paragraph 98.

[336] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, paragraph 580.

[337] *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgement, 1 December 2003, paragraph 872. See also *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 329 and *Prosecutor v. Kunarac et al*, Case No. IT-96-23/1, Appeal Judgment, 12 June 2002, paragraph 98.

5. THE *MENS REA* REQUIRED FOR THE CRIME OF PERSECUTION

In this chapter the writer will discuss the *mens rea* required to establish the crime of persecution.

I. MENS REA PROVISIONS FOR ALL THE CRIMES THAT FALL WITHIN THE ICC'S JURISDICTION

A. ROME STATUTE PROVISIONS AND NEGOTIATIONS AT THE ROME CONFERENCE

The mental element for all crimes that fall within the ICC's jurisdiction is established in Article 30 of the Rome Statute. According to Article 30(1) of the Rome Statute, "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."

Article 30 is the first of its kind in any international instrument. Not only does it require 'intent' and 'knowledge', it also expressly defines the terms 'intent' and 'knowledge'. Analysis of the numerous statutory instruments created prior to the Rome Statute reveals that although these instruments contained provisions which

articulated the criminal responsibility of perpetrators, none of them ever actually defined the required *mens rea*.[338]

The specific definitions for the terms 'intent' and 'knowledge' are established pursuant to Article 30(2) and (3) of the Statute. The terms are defined in the following manner:

> (2) A person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to consequences, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> (3) 'Knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

The distinction between the terms 'intent' and 'knowledge' is simple. 'Intent' refers to "the intent to commit the underlying offence."[339] 'Knowledge' refers to "knowledge of the broader context in which that offence occurs."[340]

Article 30 of the Rome Statute addresses two aspects of the *mens rea* requirement. Firstly, the provision deals with the degree of the *mens rea*, that is, the required intensity of the intent or knowledge in the mind of the perpetrator. Secondly, the provision deals with the scope of the perpetrator's intent or knowledge, that is, the

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[338] Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, International and Comparative Criminal Law Series (Ardsley: Transnational Publishers Inc., 2002) at 208. See for example Nuremberg and Tokyo Charters, CCL 10, ICTY and ICTR Statutes.

[339] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraphs 556-557. It may be noted that the Trial Chamber analyses customary international law from the ICTY and ICTR to reach this distinction between the terms 'intent' and 'knowledge'.

[340] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraphs 556-557. It may be noted that the Trial Chamber analyses customary international law from the ICTY and ICTR to reach this distinction between the terms 'intent' and 'knowledge'.

analysis of the connection between the *mens rea* of the perpetrator and the material elements for the specific crime.[341]

One criticism of the Article 30 provision, according to Leila Nadya Sadat, is that it is "narrow in scope". Sadat argues that the consequence of the conveners at the Rome Conference adopting the phrase "unless otherwise provided" in Article 30(1) of the Statute, expressly excludes other forms of criminal culpability, such as negligence or recklessness.[342]

The phrase "unless otherwise provided", the Article 30 provision actually leaves open the possibility of including other mental elements which are specified elsewhere in the Rome Statute. For example, command responsibility for negligence.

Van Sliedregt states that the scope of Article 30 of the Rome Statute does not extend to include recklessness because of the gravity of the crimes.[343] Antonio Cassese is of the view that there are other forms of *mens rea* besides intent, for example, negligence and recklessness. Cassese argues that mere negligence in light of the gravity of

[341] Maria Kelt and Herman von Hebel, "General Principles of Criminal Law and the Elements of Crimes" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 28, 35.

[342] Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, International and Comparative Criminal Law Series (Ardsley: Transnational Publishers Inc., 2002) at 208-209.

[343] E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T. M. C. Asser Press, 2003) at 52.

crimes against humanity would indeed be insufficient.[344] Cassese discusses whether it would be appropriate to include recklessness, however, the discussion is not clear.[345]

B. ELEMENTS OF CRIMES AND NEGOTIATIONS AT THE PREPARATORY COMMISSION

Establishing a relationship between Article 30 of the Rome Statute and the Elements of Crimes was a major source of concern for the Preparatory Commission. Delegates were faced with three dilemmas: should a mental element be defined for every crime? Was Article 30 of the Rome Statute sufficient on its own? Should this decision be left up to the judges to decide for themselves?[346]

Consequently, the Preparatory Commission resolved the dilemma by drafting paragraphs 2 – 4 of the General Introduction to the Elements of Crime. These paragraphs achieved two goals: they incorporated the Commission's comments which it was hoped would clarify Article 30 of the Rome Statute and they also provided guidelines for the judges without necessarily creating additional Elements of Crimes.[347]

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[344] Antonio Cassese, "Crimes Against Humanity" in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford: Oxford University Press, 2002) at 364.

[345] Antonio Cassese, "Crimes Against Humanity" in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford: Oxford University Press, 2002) at 364-365.

[346] Knut Dörmann, with contributions by Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003) at 11.

[347] Mauro Politi, "Elements of Crime", in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford: Oxford University Press, 2002) at 460.

Paragraphs 2 – 4 of the General Introduction to the Elements of Crimes stipulate the following provisions concerning *mens rea*:

> 2. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.
> 3. Existence of intent and knowledge can be inferred from relevant facts and circumstances.
> 4. 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, unless otherwise indicated.

Paragraph 2 of the General Introduction is often referred to as the 'default rule'.[348] This default rule is significant because paragraph 2 explains how the mental element, articulated in Article 30 of the Rome Statute, shall be applied to the Elements of Crimes.[349] The default rule, in simple terms, means unless otherwise provided Article 30 of the Rome Statute will automatically apply to *all* the Elements of Crimes. Therefore, the implication is that the definitions of 'intent' and 'knowledge' provided in Article 30 are "applicable to any conduct, consequence or circumstance contained in the elements of crimes." Failure to apply the Article 30 provisions would mean that the perpetrator would not incur criminal responsibility.[350]

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[348] Maria Kelt and Herman von Hebel, "General Principles of Criminal Law and the Elements of Crimes" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 29-30.

[349] Knut Dörmann, with contributions by Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003) at 11.

[350] Maria Kelt and Herman von Hebel, "General Principles of Criminal Law and the Elements of Crimes" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 29.

Paragraph 3 came about as a result of the general feeling at the Preparatory Commission that the Elements of Crimes placed an "excessive burden" of proof on the Prosecutor.[351] Essentially, paragraph 3 states that the Prosecutor could infer the required *mens rea* from the relevant circumstances.

There were concerns amongst delegates at the Preparatory Commission regarding the specific wording of paragraph 4. If Article 30 was applied in a strict sense it would impose a heavy burden of proof on the Prosecutor. For example, the Prosecutor would have to show that the perpetrator had reached an accurate conclusion about the legal terms and made a value judgment that the consequences of his or her acts were 'severe' or 'grave'. Delegates felt that in order to show individual criminal responsibility it was not necessary that the perpetrator had legal knowledge of the terms or that the perpetrator had made a value judgment.[352] Hence, paragraph 4 was drafted as we read it today.

Paragraph 4 is particularly significant to crimes of persecution because Element 1 of Article 7(1)(h) of the Elements of Crimes does in fact use the term 'severe'. Element

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[351] Knut Dörmann, with contributions by Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003) at 12.

[352] Maria Kelt and Herman von Hebel, "General Principles of Criminal Law and the Elements of Crimes" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 35, the Authors stated it was sufficient if "the perpetrator was aware of the factual circumstances that formed the basis for a certain conclusion as to a legal circumstance or a certain value." See also Knut Dörmann, with contributions by Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003) at 12-13. Antonio Cassese argues that "the requisite mental element need not imply that the offender be cognizant of the legal definitions or legal implications of crimes against humanity. It is sufficient for him to be aware of the *factual conditions* brought about by his conduct or of the likely *factual consequence*s of his actions." (Italics appear in the text). See Antonio Cassese, "Crimes Against Humanity", in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford: Oxford University Press, 2002) at 365.

1 of the crime of persecution states: "the perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights." In addition, persecution is defined in Article 7(2)(g) of the Rome Statute as: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." Applying paragraph 4 of the General Introduction, it is not necessary for the Prosecution to show that the perpetrator made a value judgment with respect to the matter of severity.

In addition to the provisions found in paragraphs 2 – 4 of the General Introduction to the Elements of Crimes, paragraph 2 of the Introduction to the Elements for crimes against humanity states:

> The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such attack.

The majority of delegates at the Preparatory Commission were in agreement that the perpetrator must at least possess knowledge of the overall context of their acts, that is, the attack was widespread or systematic and directed against a civilian population.[353] Therefore, paragraph 2 refers to knowledge of the contextual elements, i.e., widespread or systematic nature of the attack. According to the provision, the

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

[353] Darryl Robinson, "The Elements of Crimes Against Humanity" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 64.

Prosecutor is not required to prove that the perpetrator knew *all* characteristics of the attack.[354] As for knowledge of the policy itself, the Prosecution would not have to prove that the perpetrator knew the *precise* details of the policy.[355]

II. THE EFFECT OF ARTICLE 30 OF THE ROME STATUTE AND THE PROVISIONS STIPULATED IN THE ELEMENTS OF CRIMES ON THE CRIME OF PERSECUTION

A. *MENS REA* FOR CRIMES OF PERSECUTION IN GENERAL

All the provisions discussed above are applicable to crimes of persecution. In keeping with the provisions stipulated in paragraph 2 of the General Introduction, the mental elements for crimes of persecution are found in the *mens rea* requirements resulting from Article 30 of the Rome Statute.[356]

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[354] See discussion in Darryl Robinson, "The Elements of Crimes Against Humanity" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 72-73.

[355] See discussion in Kai Ambos, "Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes" in Lal Chand Vohrah et al (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003) at 14.

[356] Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 97.

B. THE ADDITIONAL REQUIREMENT OF A DISCRIMINATORY BASIS

In addition to the provisions discussed above the crime of persecution has two further mental elements: (1) the discriminatory intent with which the crime is committed, and (2) the mental element found in Element 6 of Article 7(1)(h) of the Elements of Crimes, discussed further below.

Persecution is distinct from all other crimes against humanity because of the discriminatory basis by which the crime is committed. The victims are targeted by reason of their identity. The discriminatory grounds are found listed in Element 3 of the Elements Crimes and Article 7(1)(g) of the Rome Statute. They are: political, racial, national, ethnic, cultural, religious, gender… or other grounds universally recognized as impermissible under international law.

Antonio Cassese, discussing the discriminatory nature of crimes of persecution, states "the element of persecution amounts to an *aggravated criminal intent* (*dolus specialis*, '*dol spécial'*)" (emphasis appears in the text). Cassese is of the view that in order to amount to crimes of persecution "the intent must be to subject a person or group to discrimination, ill-treatment, or harassment so as to bring about great suffering or injury to that person or group on religious, political or other such grounds."[357]

[357] Antonio Cassese, "Crimes Against Humanity" in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford: Oxford University Press, 2002) at 364.

Customary international law from the *ad hoc* Tribunals supports the view that the "*mens rea* of persecution is the intent to discriminate forcibly against a group or members thereof by grossly and systematically violating their fundamental human rights."[358] The *Simić et al* Judgment held that the perpetrator must intend to discriminate. According to the Trial Chamber, "it is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate."[359] Regarding the discriminatory intent, the Trial Chamber in *Krnojelac* held, "the discriminatory intent must relate to the specific act charged as persecution rather than the attack in general, even though the latter may also in practice have a discriminatory aspect."[360]

C. WHAT *MENS REA* IS REQUIRED FOR ELEMENTS 1 – 6 OF ARTICLE 7(1)(H) OF THE ELEMENTS OF CRIMES?

Article 7(2)(g) of the Rome Statute 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." Element 1 of Article 7(1)(h) of the Elements of Crimes, which parallels the wording in Article 7(2)(g) of the Rome Statute, states:

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[358] Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001) at 120-121, see detailed discussion of case law dealing with this matter.

[359] *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 51. The Trial Chamber in *Krnojelac* took a broad approach and held "while the intent to discriminate need not be the primary intent with respect to the act, it must be a significant one." *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraph 435. See also *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, ICTY Trial Judgment, 2 November 2001, paragraphs 194-198.

[360] *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraph 436, reasoning upheld in *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 51.

"the perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights." One could argue that the intent requisite which appears in the Article 7(2)(g) definition of persecution must also be read into the Element 1 provision. As noted previously, the term 'intent' is defined in Article 30(2) of the Rome Statute. The perpetrator must intend to engage in the conduct, that is, the act of severely depriving, contrary to international law, one or more persons of their fundamental rights. Furthermore, the perpetrator must have meant to cause that consequence, that is, the severe deprivation of fundamental rights, or have been aware that such severe deprivation of fundamental rights would occur in the ordinary course of events.

Element 2 of Article 7(1)(h) of the Elements of Crimes states: "the perpetrator targeted such person or persons by reason of the identity of the a group or collectivity or targeted the group or collectivity as such." One could argue that the targeting of a group or collectivity requires the knowledge that a group or collectivity is being targeted by reason of their identity, referred to previously under the discussion of Antonio Cassese's view regarding the discriminatory nature of crimes of persecution. The perpetrator must be aware that a circumstance exists or a consequence will occur in the ordinary course of events as a result of his targeting the group or collectivity. Arguably, the resulting consequence that flows from the perpetrator's actions, referred to in Element 1 of the Elements of the crime of persecution, is the deprivation of fundamental rights contrary to international law.

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

Element 3 of Article 7(1)(h) of the Elements of Crimes states: "Such targeting was based on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law." According to Georg Witschel and Weibke Rückert, it is clear that Element 3 does not require a specific mental element because this could be ascertained objectively from the facts and circumstances.[361] However, it is this writer's opinion that the perpetrator must have intended to discriminate against a group or collectivity on the grounds previously articulated above under the discussion of Antonio Cassese's view regarding the discriminatory nature of crimes of persecution. The perpetrator must have intended to engage in conduct that was discriminatory, that is, discriminate against a specific group or collectivity. The perpetrator must have meant to cause the consequence or was aware that it would occur in the ordinary course of events, that is, discriminating against a group or collectivity would result in the deprivation of their fundamental rights contrary to international law.

Element 4 of Article 7(1)(h) of the Elements of Crimes establishes the nexus requirement for crimes of persecution. Element 4 states: "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."[+]

There are two issues to be considered regarding the *mens rea* surrounding Element 4. Firstly, there is a footnote to Element 4 which states: "it is understood that no

[361] Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 97.

[+] "It is understood that no additional mental element is necessary for this element other than that inherent in element 6."

additional mental element is necessary for this element other than that inherent in element 6." Element 6, discussed in detail below, requires that the perpetrator has knowledge of the overall context of the widespread or systematic attack that is directed against any civilian population.[362] Secondly, according to Kai Ambos and Steffen Wirth, this nexus requirement established for crimes of persecution pursuant to both the Rome Statute and East Timor Regulation 2000/15 is said to be a jurisdictional requirement.[363] Thus, Ambos and Wirth argue that it is not necessary for the perpetrator to know about the nexus requirement. The requirement enables the court to exercise its jurisdiction to prosecute only those crimes of persecution "which are of an elevated objective dangerousness."[364]

According to paragraph 2 of the Introduction to the Elements for crimes against humanity the context for each crime against humanity is described in the last two elements of each crime. It follows, therefore, that Elements 5 and 6 of Article 7(1)(h) of the Elements of Crimes describe the context of crimes of persecution. In addition, paragraph 2 of the Introduction to the Elements for crimes against humanity stipulates that with regard to the last element, in this case Element 6, it is not necessary to show proof that the perpetrator knew "all characteristics of the attack or the precise details of the plan or policy of the State or organization."

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[362] See discussion these Elements in Georg Witschel and Weibke Rückert, "Article 7(1)(h) – Crime Against Humanity of Persecution" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc, 2001) at 97.

[363] It must be borne in mind that Element 4 of Article 7(1)(h) of the Elements of Crimes parallels the wording found in Article 7(1)(h) of the Rome Statute. Furthermore, the provisions established in Section 5(1)(h) of the East Timor Regulation 2000/15 are identical to those found in Article 7(1)(h) of the Rome Statute.

[364] Kai Ambos and Steffen Wirth, "The Current Law on Crimes Against Humanity" (2002) 13(1) *Criminal Law Forum* 1 at 72-74.

Element 5 of Article 7(1)(h) of the Elements of Crimes states: "the conduct was committed as part of a widespread or systematic attack directed against a civilian population." Arguably, Element 6 establishes the *mens rea* required for Element 5. Element 6 of Article 7(1)(h) of the Elements of Crimes states: "The perpetrator knew or intended that the conduct was part of or intended to be part of a widespread or systematic attack directed against a civilian population."

The *mens rea* established in Element 6 of Article 7(1)(h) of the Elements of Crimes reflects similar wording found in the chapeau to Article 7 of the Rome Statute. Essentially, the provision establishes that crimes against humanity must be committed with knowledge. The chapeau simply describes crimes against humanity as: "acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

The Rome Statute is the first international criminal instrument to expressly state that a perpetrator must have knowledge of the widespread or systematic attack directed against any civilian population. In drafting the Rome Statute provisions, the negotiators were aware that a requirement for knowledge of such an attack could be inferred from customary international law. Also, Article 30 of the Rome Statute expressly established the mental element required for all crimes that fall within the ICC's jurisdiction. Yet, despite this, delegates at the Rome Conference strongly expressed the view that knowledge of the attack had to be expressly stated in the Article 7 provisions in order to exclude any ambiguity on the matter.[365]

[365] Darryl Robinson, "The Elements of Crimes Against Humanity" in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers Inc., 2001) at 64.

The terms 'intent' and 'knowledge' which appear in Element 6 of Article 7(1)(h) of the Elements of Crimes are defined in Article 30(2) and (3) of the Rome Statute, discussed above.

The *mens rea* provision found in Article 30 of the Rome Statute is, however, ambiguous when read in conjunction with Element 6 of Article 7(1)(h) of the Elements of Crimes and Article 7 of the Rome Statute.

Firstly, the provision does not clearly state what the knowledge of the perpetrator is supposed to relate to. The perpetrator's knowledge could relate to any of the following possibilities: "the existence of an attack against the civilian population? The nature of this attack (widespread or systematic)? Or, the political and ideological principles of the attack that render it systematic?"[366] Regarding these questions, it may be noted that Paragraph 2 of the Introduction to the Elements for crimes against humanity requires that the perpetrator had knowledge of the *context* of the attack, that is, the widespread or systematic nature of the attack directed against any civilian population.

Secondly, there is some confusion when Article 30 of the Rome Statute is read together with the chapeau to Article 7 and the Article 7(2)(a) definition of 'attack directed against any civilian population'. One is left wondering, for example, what exactly is the perpetrator required to know concerning the attack. Also, is the

[366] Kai Ambos, "Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes" in Lal Chand Vohrah et al (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003) at 27.

perpetrator required to know that the attack is pursuant to a state or organizational policy to commit such attack?[367]

Ultimately, the perpetrator does not need to be aware of the precise details of the policy. However, s/he must be aware of the overall context of the attack, that is, knowledge of their own role in the widespread or systematic attack directed against any civilian population.[368] In any event, the perpetrator's knowledge could be inferred from the facts and circumstances surrounding the perpetrator's conduct.[369]

The second limb of Element 6 of Article 7(1)(h) of the Elements of Crimes states that the perpetrator must have known "the conduct was part of or intended to be part of a widespread or systematic attack directed against a civilian population."

Why is it so important that the perpetrator has knowledge of the widespread or systematic attack directed against the civilian population? Simply because failure of such knowledge, be it actual or constructive, renders the crime an ordinary crime. Article 7(1) of the Rome Statute describes crimes against humanity as widespread or systematic attacks directed against any civilian population with knowledge of the

[367] Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes Against Humanity" (May 2000) 22(2) *Human Rights Quarterly* 335 at 379-380. DeGuzman argues the Article 30 "requirement of *intent* and knowledge… does not apply to the *chapeau* of elements of crimes against humanity since the *chapeau* states that knowledge alone is sufficient."

[368] Paragraph 2 of the Introduction to the Elements for crimes against humanity. See also, Kai Ambos, "Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes" in Lal Chand Vohrah et al (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003) at 14. Also, Cherif M Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd rev edn) (The Hague: Kluwer Law International, 1999) at 264.

[369] Paragraph 2 of the Introduction to the Elements for crimes against humanity. See also Cherif M Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd rev edn) (The Hague: Kluwer Law International, 1999) at 264.

attack. Thus, knowledge of the widespread or systematic nature of the attack directed against a civilian population is required in order to establish the perpetration of crimes against humanity. In addition, knowledge of the context of the widespread or systematic attack restricts the application of these international legal principles from ordinary isolated random acts or crime waves that do not amount to crimes against humanity.[370]

III. HOW HAVE AD HOC TRIBUNALS ADDRESSED THE ISSUE OF MENS REA?

Concerning the perpetrator's knowledge of the context of an attack the Panel of Judges, in the East Timor Los Palos case, took into account the views laid down by both the ICTR and ICTY. The Panel concluded that the perpetrator must have knowledge of the attack in the sense that the perpetrator should at least be aware of how the attack took place. This involves knowledge of the actual act, that is, the nature, gravity, etc, and knowledge of the context, that is, the widespread or systematic nature of the attack. According to the Panel, the perpetrator, and/or his/her aiders or abettors, having knowingly partaken in the risk of implementing the context of that attack, satisfies the *mens rea* requirements. The Panel further found that "the perpetrator needs only to be aware of the risk of the existence of an attack and the risk of the existence of some circumstances of the attack, regardless of his or her knowledge about the details." As for the perpetrator's knowledge of his/her actions forming part of an attack in furtherance or pursuance of a policy, the Panel held that the perpetrator needs to be aware of such policy. The perpetrator was to have

[370] Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001) at 91, 93.

knowledge of the policy to the extent that the perpetrator was "taking the risk that he may be performing his conduct in the context of a policy upheld by a State or organization."[371]

The ICTR Trial Chamber in *Prosecutor v. Kayishema and Ruzindana* referred to ICTY jurisprudence and Article 7 of the Rome Statute in its reasoning. The Chamber held that the perpetrator must have grasped the overall context of his actions in the perpetration of crimes against humanity. In doing so, it must be shown that the perpetrator was fully aware of the broader context of the attack in the sense that he knew that his actions formed part of a widespread or systematic attack which was in fact directed against a civilian population and in furtherance of a policy or plan. According to the Chamber this was the same view expressed at the ICTY and also in Article 7 of the Rome Statute for the ICC. The Chamber was of the opinion that "part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof." Therefore, it was necessary for the Prosecution to show 'actual' or 'constructive' knowledge of the broader context of the attack which, the Chamber noted, is what differentiates crimes against humanity from isolated random acts.[372]

[371] Los Palos case, Case No. 09/2000, Trial Judgment, Special Panel for Serious Crimes, East Timorese Transitional Administration, Dili District Court, 11 December 2001 at paragraphs 640-642.

[372] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, paragraphs 133-134.

The reasoning in the *Kayishema and Ruzindana* Judgement was upheld in later cases heard before the ICTR Chambers;[373] however, it was simplified in *Prosecutor v. Semanza* where the Trial Chamber summarized the ICTR position and stated "the accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian population."[374] In addition, the Chamber noted, "the accused need not necessarily share the purpose or goals behind the broader attack."[375]

The ICTY Chambers have also discussed the *mens rea* requirements. Jurisprudence from the ICTY indicates the perpetrator must have knowledge of the attack directed against a civilian population and knowledge that his or her acts form part of a policy of widespread or systematic attacks.[376]

Prosecutor v. Kupreškić et al stated that the *mens rea* requirements for crimes against humanity were difficult and controversial to determine. The Trial Chamber did two things. Firstly, it held that the *mens rea* requirements comprised two components, namely, "the intent to commit the underlying offence," and as well as "knowledge of

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[373] See *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgement, 7 June 2001, paragraph 81, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Trial Judgement, 27 January 2000, paragraph 206.

[374] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 332. *Prosecutor v. Kajelijeli* described this summary as "the clearest statement of the Mental Element of Crimes Against Humanity so far", and upheld the statement, see *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgement, 1 December 2003, paragraph 880.

[375] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, paragraph 332.

[376] *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 37, *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 621, *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 232, *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Judgment, 15 March 2002, paragraph 59, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, ICTY Trial Judgment, 26 February 2001, paragraph 185, *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Judgment, 3 March 2000, paragraph 247.

the broader context in which that offence occurs." Secondly, it adopted the ICTR position in the *Kayishema and Ruzindana* Judgement.[377]

The Trial Chamber in *Kupreškić et al* also made the observation that "a discriminatory animus is not an essential ingredient of the *mens rea* of crimes against humanity. Nor are the motives (as distinct from the intent) of the accused, as such, of special pertinence."[378] Prior to this Judgment, the issue that all crimes against humanity were believed to be committed with discriminatory intent had been problematic under customary international law; however, the *Tadić* Appeal Judgment resolved this confusion. The Appeal Chamber rejected the mistaken belief that all crimes against humanity required a discriminatory intent but verified this was with the *exception* of crimes of persecution.[379]

In summary, the jurisprudence laid down by the *ad hoc* Tribunals has established significant precedents for the ICC. Of particular significance is the precedent set by the Panel of Judges in the East Timor Los Palos case. This case is significant for two reasons. Firstly, the provision for the crime of persecution, established in East Timor Regulation 2000/15, is identical to the provisions for persecution established pursuant to the Rome Statute. Secondly, Los Palos case, discussed above, summarizes the jurisprudence laid down by both the ICTR and ICTY. Briefly, the perpetrator must

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[377] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraphs 556-557, the reasoning of two components, 'intent and knowledge' upheld in *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34-T, ICTY Trial Judgment, 31 March 2003, paragraph 237.

[378] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 557.

[379] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Appeal Judgment, 15 July 1999, paragraphs 273-305.

have knowledge of the context of the attack, i.e. the widespread or systematic nature of the attack.

6. CONCLUSION

I. THE DEFINITION OF THE CRIME OF PERSECUTION UNDER THE ROME STATUTE AND THE ELEMENTS OF CRIMES

The aim of this thesis was to analyze the technical definition of persecution found in Article 7(1)(h) and Article 7(2)(g) of the Rome Statute and Article 7(1)(h) of the Elements of Crimes. The discussion in this thesis showed that the Rome Conference deliberations, which resulted in the formulation of the Rome Statute, were a "political compromise or diplomatic expediency."[380] These deliberations resulted in a technical definition of persecution that was unclear in some respects. The Statute definition was supplemented by Article 7(1)(h) of the Elements of Crimes, which provided 6 Elements required for the crime of persecution. However, the Elements of Crimes were not clear either.[381]

The Introduction in Chapter 1 of this thesis indicated that Article 7(1)(h) of the Elements of Crimes paralleled the wording of Article 7(1)(h) and Article 7(2)(g) of the Rome Statute. The discussion showed that the provisions on the crime of persecution recognized in these two international instruments are substantially the same though few differences were noted.

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[380] The Hon. David Hunt, AO "The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges" (2004) 2(1) *Journal of International Criminal Justice* 56 at 58.

[381] Haveman, Roelof, *et al* (eds), Supranational *Criminal Law: a System Sui Generis* (Antwerp: Intersentia, 2003) Series Supranational Criminal Law: Capita Selecta, vol. 1 at 60-61.

II. BRIEF SUMMARY OF TERMS USED TO DEFINE THE CRIME OF PERSECUTION

In Chapter 3, the writer analyzed Element 1 of Article 7(1)(h) of the Elements of Crimes which addresses the *kinds* of deprivations that amounted to acts of persecution under the Rome Statute. Element 1 of Article 7(1)(h) of the Elements of Crimes states: "the perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights."

To reiterate briefly, the discussion of who could perpetrate crimes of persecution showed that any perpetrator could be prosecuted if it was shown that the perpetrator was individually responsible and liable for punishment. In addition, the provisions in the Rome Statute require that the perpetrator acted in pursuance or in furtherance of a State or organizational policy to commit such attack. Analysis of the phrase 'severely deprived', suggested harsh, extreme, serious etc, dispossession of a fundamental right. It was noted that the phrase 'one or more persons' in Element 1 did not reflect the provisions in the Rome Statute and the remaining Elements of the crime of persecution which used terminology such as 'group' or 'collectivity'. The phrase 'contrary to international law' depicts the nature of the severe deprivation of fundamental rights. Regarding the issue of what constitutes fundamental rights, analysis of the Rome Statute deliberations, and the negotiations at the Preparatory Commission as well as judgments under customary international law showed that

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

none of these sources defined the phrase 'fundamental rights'. The writer opined that fundamental rights were the kinds of rights expressed in the International Bill of Rights.

In Chapter 4, the writer discussed Elements 2, 3, 4 and 5 of Article 7(1)(h) of the Elements of Crimes, which concern the *manner* of deprivations required for acts of persecution under the Rome Statute.

Element 2 of Article 7(1)(h) of the Elements of Crimes states: "the perpetrator targeted such person or persons by reason of the identity of a group or collectivity." Analysis of the concept of targeting suggested that it meant the act of distinguishing a person on discriminatory grounds. The phrase 'by reason of the identity of the group or collectivity' described the reason why the victim was targeted, i.e. because the victim belonged to or could be identified with a particular group or collectivity. Regarding the query posed in the Introduction in Chapter 1 of this thesis as to what differentiates the terms 'group' or 'collectivity', the illustration was given in Chapter 4 that a sum of ethnic groups would not be referred to as a group but rather a collectivity.

Element 3 of Article 7(1)(h) of the Elements of Crimes states: "such targeting was based on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law." The discussion of Element 3 as well as Article 7(1)(h) of the Rome Statute showed that these provisions widened the grounds on which persecution could be committed. Up until the 1998 Rome Statute, customary international law had established that

persecution could be committed on political, racial or religious grounds. In the Introduction in Chapter 1 the writer posed the question: on what other grounds than those stipulated in Article 7(1)(h) of the Rome Statute can the crime of persecution be committed? This issue was addressed in Chapter 4 under the discussion of the phrase 'other grounds that are universally recognized as impermissible under international law'. The observation was made that the International Bill of Rights prohibited conduct that was perpetrated on a number of discriminatory grounds which were not articulated in Article 7(1)(h) of the Rome Statute or Element 3. For example, grounds such as: social origin, birth, colour etc. It was concluded that, because the Rome Statute and the Elements of Crimes use the phrase 'other grounds that are universally recognized as impermissible under international law' in their provisions, this meant the ICC could include the grounds stipulated in the International Bill of Rights as they were universally recognized as impermissible under international law.

Element 4 of Article 7(1)(h) of the Elements of Crimes states: "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.[+]" This provision concerned the nexus requirement, summarized in detail in Part III, below.

The final part of Chapter 4 examined Element 5 of Article 7(1)(h) of the Elements of Crimes which states: "the conduct was committed as part of a widespread or systematic attack directed against a civilian population." Analysis of the term 'widespread' indicated that it refers to the large-scale nature of the crime or the

[+] "It is understood that no additional mental element is necessary for this element other than that inherent in element 6."

substantial number of victims involved. The term 'systematic' refers to the degree of methodical planning involved in the perpetration of the crime. The phrase 'attack directed against a civilian population' is defined in Article 7(2)(g) of the Rome Statute as: "a course of conduct involving the multiple commission of acts… against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." Analysis of the terms used in the Article 7(2)(a) definition showed that it was not necessary that the act constituting an attack comprised a military attack. Jurisprudence from the *ad hoc* Tribunals indicates that an attack could also include the mistreatment of the civilian population. The phrase 'multiple commission of acts' denoted crimes committed on a massive scale. This feature was said to distinguish crimes against humanity from random isolated acts that could be prosecuted by national courts. Analysis of the phrase 'directed against any civilian population' revealed that this implies a multiple number of victims that were attacked on a large scale. Finally, Article 7(2)(a) of the Rome Statute provides that it must be shown that the attack was carried out in pursuance or in furtherance of a State or organizational policy. The policy could also be implemented by the deliberate failure of a State or organization to take action, thus consciously aimed at encouraging such attack.

In Chapter 5, the writer examined the *mens rea* required for crimes of persecution. The writer discussed Article 30 of the Rome Statute which establishes the mental element required for crimes falling within the ICC's jurisdiction. Analysis of Article 30 indicated that, to show 'intent', it must be proven that the person meant to engage in the conduct and meant to cause that consequence or was aware that it would occur in the ordinary course of events. The term 'knowledge' means awareness that a

circumstance exists or a consequence will occur in the ordinary course of events. Analysis of the provisions in the Elements of Crimes which resulted from the Article 30 requirements showed that existence of intent and knowledge could be inferred from the relevant facts and circumstances. In addition, it was concluded that it is not necessary to show that the perpetrator made a value judgment as to the severity of the crime. The Chapter also identified the effect that Article 30 of the Rome Statute and the related provisions of the Elements of Crimes had on the crime of persecution. It was noted that crimes of persecution require an additional mental element of a discriminatory basis by which the crime was committed.

III. SUMMARY OF THE ROLE OF THIS CRIME AT THE ICC

In the Introduction in Chapter 1, the writer made the observation that the crime of persecution was an ancillary crime at the ICC. The issue was explored further in Chapter 4 when the writer discussed the nexus requirement recognized in Article 7(1)(h) of the Rome Statute and Element 4 of Article 7(1)(h) of the Elements of Crimes. These provisions state that the crime of persecution must be committed *in connection with* any act found in Article 7 of the Rome Statute or in connection with any crime that fell within the ICC's jurisdiction.

Analysis of these provisions suggested that there were two roles that this ancillary crime could play at the ICC. Firstly, persecution could be an aggravated form of an original underlying act. For example, if a perpetrator tortured a victim because the victim belonged to a particular ethnic group this would amount to ethnic persecution. The statutory provisions for the crime of persecution would aggravate the act of

torture which is prohibited under Article 7 of the Rome Statute. Hence, a further connection to another act would not be required. Secondly, persecution could be an autonomous crime that was connected to any act found under Article 7 of the Rome Statute or connected to any crime that fall's within the ICC's jurisdiction. For example, if a perpetrator destroyed religious institutions and monuments etc. with the objective of forcibly removing or transferring a particular religious group then this would amount to religious persecution. In this instance, the religious persecution was committed in connection with an act that would be prohibited under Article 7 of the Rome Statute, that is, the deportation or forcible transfer of population.[382] However, the crime of persecution "will not be a mere auxiliary offense or aggravating factor."[383]

IV. THE SIGNIFICANCE OF FORMULATING A CLEAR DEFINITION OF THE CRIME OF PERSECUTION IN THE FUTURE

In conclusion, there are a number of reasons why the scope of the crime of persecution must be clearly defined in the future. Firstly, crimes of persecution should not be considered as a 'catch-all' crime.[384] In the case of *Prosecutor v. Simić et al* the Trial Chamber reasoned that, "the principle of legality requires that the Prosecution must identify and prove the particular acts amounting to persecution

[382] See discussion in Kai Ambos and Steffen Wirth, "The Current Law on Crimes Against Humanity" (2002) 13(1) *Criminal Law Forum* 1 at 72.

[383] Herman von Hebel and Darryl Robinson, "Crimes Within the Jurisdiction of the Court" in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) at 101-102.

[384] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (London: Sweet and Maxwell, 2003) paragraphs 5-021, 5-022 at 106-107.

rather than charge persecution in general."[385] In addition, the Trial Chamber in *Prosecutor v. Kupreškić et al* was of the opinion that "in order for persecution to amount to a crime against humanity it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty. There must be clearly defined limits on the types of acts which qualify as persecution" (emphasis appears in the Judgment).[386]

Secondly, the crime of persecution must be articulated clearly so as to satisfy the cardinal principle of human rights law that a person cannot be tried, convicted and punished for conduct that was not criminal at the time the conduct was committed.[387]

[385] *Prosecutor v. Simić et al*, Case No. IT-95-9-T, ICTY Trial Judgment, 17 October 2003, paragraph 50, which confirmed the *Stakić* judgment where the Trial Chamber held "in charging persecutions, the Prosecutor must plead with precision the particular acts amounting to persecutions." *Prosecutor v. Stakić*, Case No. IT-97-24, ICTY Trial Judgment, 31 July 2003, paragraph 735.

[386] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, ICTY Trial Judgment, 14 January 2000, paragraph 618.

[387] Suzannah Linton, "Comments on the Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea", *Searing for the Truth – Comment and Analysis*, Special English Edition, April 2003, Documentation Centre of Cambodia (DC-Cam) at 37-38. Available at: www.dccam.org

APPENDIX 1 – LEGISLATION

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL IN AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS (LONDON AGREEMENT) (1945)

Article 6

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution 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 domestic law of the country where perpetrated.

CONTROL COUNCIL LAW NO. 10, PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND CRIMES AGAINST HUMANITY (1945)

Article II

1. Each of the following acts is recognized as a crime:

c) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (1946)

Article 5

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political 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.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1993)

Article 5

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1994)

Article 3

Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts.

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1998)

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with

respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, 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;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.

REGULATION NO. 2000/11 ON THE ORGANIZATION OF COURTS IN EAST TIMOR (2000)

Section 10

Exclusive Jurisdiction for Serious Crimes

10.1 The District Court in Dili shall have exclusive jurisdiction over the following serious criminal offences:

(a) Genocide

(b) War crimes

(c) Crimes against humanity

(d) Murder

(e) Sexual offences

(f) Torture

REGULATION NO. 2000/15 ON THE ESTABLISHMENT OF PANELS WITH EXCLUSIVE JURISDICTION OVER SERIOUS CRIMINAL OFFENCES (2000)

Section 5

Crimes Against Humanity

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, 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 panels;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

5.2 For the purposes of Section 5.1 of the present regulation:
(f) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

ELEMENTS OF CRIMES FOR THE INTERNATIONAL CRIMINAL COURT (2000)

Article 7

Crimes against humanity

Introduction (General Chapeau)

1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element

indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. Attack directed against a civilian population in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that policy to commit such attack requires that the State or organization actively promote or encourage such an attack against a civilian population.[#]

Article 7(1)(h)

Crime against humanity of persecution

Elements

1. The perpetrator severely deprived, contrary to international law,[*] one or more persons of fundamental rights.

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.[+]

5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

[#] "A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such policy cannot be inferred solely from the absence of a governmental or organizational action."

[*] "This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes."

[+] "It is understood that no additional mental element is necessary for this Element other than that inherent in Element 6."

LAW ON THE ESTABLISHMENT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF THE DEMOCRATIC KAMPUCHEA (2002)

Chapter II - Competence

Article 3

The Extraordinary Chambers shall the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code of Cambodia, and which were committed during the period from 17 April 1975 to 6 January 1979:

--Homicide (Article 501, 503, 504, 505, 506, 507, and 508)

--Torture (Article 500)

--Religious Persecution (Articles 209 and 210)

The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 20 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.

Article 5

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979. Crimes against humanity, which have no statute if limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

--murder;

--extermination;

--enslavement;

--deportation;

--imprisonment;

--torture;

--rape;

--persecutions on political, racial, and religious grounds;

--other inhumane acts.

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE (2002)

Article 2

Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

a. Murder;

b. Extermination;

c. Enslavement;

d. Deportation;

e. Imprisonment;

f. Torture;

g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

h. Persecution on political, racial, ethnic or religious grounds;

i. Other inhumane acts.

AGREEMENT BETWEEN THE UNITED NATIONS AND THE ROYAL GOVERNMENT OF CAMBODIA CONCERNING THE PROSECUTION UNDER CAMBODIAN LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA (2003)

Article 9

Crimes falling within the jurisdiction of the Extraordinary Chambers

The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions

and such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.

STATUTE OF THE IRAQI SPECIAL TRIBUNAL FOR CRIMES AGAINST HUMANITY (2003)

Article 12

a) For the purposes of this Statute, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal;

b) For the purposes of paragraph a):
6. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

APPENDIX 2 – LIST OF MEMBER STATES THAT SIGNED AND RATIFIED THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

As of 11 June 2004, 93 Member States have ratified the Rome Statute for the International Criminal Court

Member State	**Signed**	**Ratified**
Afghanistan	-	10 February 2003
Albania	18 July 1998	31 January 2003
Algeria	28 December 2000	-
Andorra	18 July 1998	30 April 2001
Angola	7 October 1998	-
Antigua & Barbuda	23 October 1998	18 June 2001
Argentina	8 January 1999	8 February 2001
Armenia	1 October 1999	-
Australia	9 December 1998	1 July 2002
Austria	7 October 1998	28 December 2000
Bahamas	29 December 2000	-
Bahrain	11 December 2000	-
Bangladesh	16 September 1999	-
Barbados	8 September 2000	10 December 2002
Belgium	10 September 1998	28 June 2000
Belize	5 April 2000	5 April 2000
Benin	24 September 1999	22 January 2002
Bolivia	17 July 1998	27 June 2002
Bosnia-Herzegovina	17 July 2000	11 April 2002
Botswana	8 September 2000	8 September 2000
Brazil	7 February 2000	20 June 2002
Bulgaria	11 February 1999	11 April 2002
Burkina Faso	30 November 1998	16 April 2004
Burundi	13 January 1999	-
Cambodia	23 October 2000	11 April 2002

Cameroon	17 July 1998	-
Canada	18 December 1998	7 July 2000
Cape Verde	28 December 2000	-
Central African Republic	7 December 1999	3 October 2001
Chad	20 October 1999	-
Chile	11 September 1998	-
Colombia	10 December 1998	5 August 2002
Comoros	22 September 2000	-
Congo	17 July 1998	-
Congo (Democratic Republic of)	8 September 2000	11 April 2002
Costa Rica	7 October 1998	7 June 2001
Côte d'Ivoire	30 November 1998	-
Croatia	12 October 1998	21 May 2001
Cyprus	15 October 1998	7 March 2002
Czech Republic	13 April 1999	-
Denmark	25 September 1998	21 June 2001
Djibouti	7 October 1998	5 November 2002
Dominica	-	12 February 2001
Dominican Republic	8 September 2000	-
Ecuador	7 October 1998	5 February 2002
Egypt	26 December 2000	-
Eritrea	7 October 1998	-
Estonia	27 December 1999	30 January 2002
Fiji	29 November 1999	29 November 1999
Finland	7 October 1998	29 December 2000
France	18 July 1998	9 June 2000
Gabon	22 December 1998	20 September 2000
Gambia	4 December 1998	28 June 2002
Georgia	18 July 1998	5 September 2003
Germany	10 December 1998	11 December 2000
Ghana	18 July 1998	20 December 1999
Greece	18 July 1998	15 May 2002
Guinea	7 September 2000	14 July 2003
Guinea-Bissau	12 September 2000	-

Guyana	28 December 2000	-
Haiti	26 February 1999	-
Honduras	7 October 1998	1 July 2002
Hungary	15 January 1999	30 November 2001
Iceland	26 August 1998	25 May 2000
Iran (Islamic Republic of)	31 December 2000	-
Iraq	-	-
Ireland	7 October 1998	11 April 2002
Israel	31 December 2000	-
Italy	18 July 1998	26 July 1999
Jamaica	8 September 2000	-
Jordan	7 October 1998	11 April 2002
Kenya	11 August 1999	-
Korea (Republic of)	8 March 2000	13 November 2002
Kuwait	8 September 2000	-
Kyrgyzstan	8 December 1998	-
Latvia	22 April 1999	28 June 2002
Lesotho	30 November 1998	6 September 2000
Liberia	17 July 1998	-
Liechtenstein	18 July 1998	2 October 2001
Lithuania	10 December 1998	12 May 2003
Luxembourg	13 October 1998	8 September 2000
Macedonia (The Former Yugoslav Republic of)	7 October 1998	6 March 2002
Madagascar	18 July 1998	8 September 2000
Malawi	2 March 1999	19 September 2002
Mali	17 July 1998	16 August 2000
Malta	17 July 1998	29 November 2002
Marshall Islands	6 September 2000	7 December 2000
Mauritius	11 November 1998	5 March 2002
Mexico	7 September 2000	-
Moldova (Republic of)	8 September 2000	-
Monaco	18 July 1998	-
Mongolia	29 December 2000	11 April 2002
Morocco	8 September 2000	-

Mozambique	28 December 2000	-
Namibia	27 October 1998	25 June 2002
Nauru	13 December 2000	12 November 2001
Netherlands	18 July 1998	17 July 2001
New Zealand	7 October 1998	7 September 2000
Niger	17 July 1998	11 April 2002
Nigeria	1 June 2000	27 September 2001
Norway	28 August 1998	16 February 2000
Oman	20 December 2000	-
Panama	18 July 1998	21 March 2002
Paraguay	7 October 1998	14 May 2001
Peru	7 December 2000	10 November 2001
Philippines	28 December 2000	-
Poland	9 April 1999	12 November 2001
Portugal	7 October 1998	5 February 2002
Romania	7 July 1999	11 April 2002
Russian Federation	13 September 2000	-
Saint Lucia	27 August 1999	-
Saint Vincent and the Grenadines	-	3 December 2002
Samoa	17 July 1998	16 September 2002
San Marino	18 July 1998	13 May 1999
Sao Tome and Principe	28 December 2000	-
Senegal	18 July 1998	2 February 1999
Seychelles	28 December 2000	-
Sierra Leone	17 October 1998	15 September 2000
Slovakia	23 December 1998	11 April 2002
Slovenia	7 October 1998	31 December 2001
Solomon Islands	3 December 1998	-
South Africa	17 July 1998	27 November 2000
Spain	18 July 1998	24 October 2000
Sudan	8 September 20000	-
Sweden	7 October 1998	28 June 2001
Switzerland	18 July 1998	12 October 2001
Syrian Arab Republic	29 November 2000	-

Tajikistan	30 November 1998	5 May 2000
Tanzania	29 December 2000	20 August 2002
Thailand	2 October 2000	-
Timor-Leste	-	6 September 2002
Trinidad and Tobago	23 March 1999	6 April 1999
Uganda	17 March 1999	14 June 2002
Ukraine	20 January 20000	-
United Arab Emirates	27 November 2000	-
United Kingdom of Great Britain and Northern Ireland	30 November 1998	4 October 2001
United States of America	31 December 2000	-
Uruguay	19 December 2000	28 June 2002
Uzbekistan	29 December 2000	-
Venezuela	14 October 1998	7 June 2000
Yemen	28 December 2000	-
Yugoslavia (The Federal Republic of)	19 December 2000	6 September 2001
Zambia	17 July 1998	13 November 2002
Zimbabwe	17 July 1998	-

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