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''The Notion of Persecution in International Criminal Law and in International Refugee Law''

Dissertation

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Abbreviations

1951 Geneva Convention	1951 Convention Relating to the Status of Refugees
1967 Protocol	1967 Protocol Relating to the Status of Refugees
CAH	Crimes Against Humanity
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CJEU	Court of Justice of the European Union
ECHR	European Court of Human Rights
EXCOM	UNHCR Executive Committee
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICL	International Criminal Law
IRL	International Refugee Law
IHL	International Humanitarian Law
ICCPR	International Covenant on Civil and Political Rights
IMT	International Military Tribunal
London Charter	Charter of the International Military Tribunal
NMT	Nuremberg Military Tribunal

PSG	Particular Social Group
QD	Qualification Directive
Rome Statute	Rome Statute of the International Criminal Court
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

Contents

Abstract

The notion of persecution is mentioned and included in both international criminal law and in international refugee law, however it had not been given a legal definition until recently. The definition of persecution was only codified in 2002 with the adoption of the Rome Statute of the International Criminal Court. Many of the same acts are considered persecution under both international criminal law and international refugee law; international human rights law has been used at times by both branches of law to determine what constitutes persecution, albeit to differing degrees. Even though an intersection of both legal regimes has been noted regarding the Exclusion Clause 1F(A), the provisions of international criminal law cannot be transferred exactly when processing asylum claims because of the different purpose each legal regime serves. On another note there has been development in both international criminal and refugee law regarding the grounds of persecution and more specifically gender persecution nevertheless the international criminal court lacks jurisprudence on the specific crime even though gender persecution was codified explicitly in the Rome Statute only. On the other hand, gender persecution is not overtly mentioned in the 1951 Geneva Convention; nonetheless there is jurisprudence of gender-based persecution as well as the UNHCR guidelines concerning gender persecution proving the development of the notion in international refugee law.

Keywords: International Criminal Law, International Refugee Law, Persecution, Crimes Against Humanity, Refugee.

Introduction

Freedom from persecution is vital to the well-being of individuals in society and to their enjoyment of the rights to which they are entitled. Under international law, and more particularly under international criminal law, persecution is a crime against humanity. This was clearly established under the jurisdiction of the international military tribunals of Nuremberg and Tokyo and it was most recently reaffirmed in the Rome Statute. However, while the notion of persecution is often mentioned in several international conventions, it was only given a legal definition, in the Statute of the ICC that was adopted on July 1998 and entered into force on July 2002. On the other hand, Persecution is also one of the main reasons that individuals flee their country of origin. It is recognized by the 1951 Geneva Convention as the principal justification for qualifying an individual as a refugee. Nevertheless, fear of persecution is not only a valid reason for fleeing a country and requesting asylum in another, it is also the basis of the principle of non-refoulement, whereby States may not, under any circumstances, expel or return a person by force to a State where one fears persecution.

Persecution was first identified as a CAH after the 1915 Armenian massacres. Even though initially there were calls to try those responsible for the crimes against the Armenian population, no provision was made in the final peace negotiations for those responsible to be brought to justice. The Versailles Peace Conference created a Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties, and, even though no prosecutions resulted, language in the Commission's report did advance to some degree the development of the concept of CAH. However, during the Second World War, the Allied Powers decided that high-level German officials should be tried for crimes committed during the conflict not only against enemy combatants and civilians, but also for the massacres and other violent conduct against targeted groups within the German populace. But the latter crimes could not be considered criminal under the then applicable laws of war, which essentially protected only the population located in enemy territory. Thus, the London Charter establishing the IMT for the trial of major war criminals of

the European Axis included a provision on CAH. These CAH included persecution, but also murder, extermination, enslavement deportation and other inhumane acts[1].

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

The existence of refugees dates back to ancient times, however their internationally accepted legal definition was only developed in mid-20th century and is reflected in the 1951Convention relating to the Status of Refugees[2]. The mass expulsions and persecutions before, during and after the Second World War, have shaped the contours of international refugee law until today. In 1938, a few states[3] agreed on the Convention concerning the Status of Refugees coming from Germany. During the Second World War, the emerging United Nations founded two agencies tasked with the relief of the European refugees; the United Nations Relief and Rehabilitation Administration in 1943 and the International Refugee Organization in 1947 which preceded the Office of the UNHCR that was established in 1950. Nonetheless, the most decisive development was the adoption of the 1951 Geneva Convention whereas the refugee definition applied nowadays by most countries is based on; but just like the Convention refugee definition builds upon the experience and events which occurred between the First and Second World Wars and the immediate period after, in subsequent decades the interpretation of the refugee definition has progressively developed, on a regional level quite more than on an international one. A key aspect of the refugee definition is the notion of persecution. Although the term persecution is not

[1] Charter of the IMT art. 6, 59 Stat. 1546, 1547 (crimes against humanity are "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.").

[2] See 189 United Nations Treaty Series [UNTS] (1954), pp. 137-221;

[3] Belgium, Great Britain and Ireland, India, Denmark and Iceland, Spain, France, Norway and the Netherlands.

codified under IRL, it has evolved significantly by means of doctrine and case law, especially in European refugee law.

Therefore, the notion of persecution is mentioned in both ICL and in IRL. It is important to note that neither of the legal regimes operate in isolation, as they are complemented by other bodies of law, notably international human rights law and international humanitarian law. Therefore as a result, many of the same acts are considered persecution under both international criminal law and international refugee law; international human rights law has been used at times by both branches of law to define persecution . On the other hand, there are also important distinctions in the ways in which the concept has been applied, interpreted and developed under each legal regime. Nonetheless, despite the foundational differences between international criminal law and international refugee law, which are the similarities regarding the concept of persecution? To what extent is persecution perceived on a similar basis in international criminal law and in international refugee law? Does the chronological factor play an important role when interpreting and applying each legal regime? Is there indeed an intersection of ICL and IRL in the Exclusion Clause 1F of the Geneva Convention?

Part I of this paper will initially analyze the notion of persecution through the lens of the law and jurisprudence of the ICTY, the ICTR, and the ICC. Thereafter, the notion be will be examined from the scope of the 1951 Geneva Convention, the UNHCR guidelines and more particularly its development within European Refugee law framework. In Part II the Exclusion Clause of the 1951 Geneva Convention and the overlap as well as the differing ground principles of the two legal regimes will be examined as well as the agents of persecution and the expansion of grounds of persecution in regard to gender persecution.

Part I: The Formation of the Notion of Persecution in International and Regional Law

Chapter 1: International Criminal Law

1.1. The crime of Persecution in ICTY:

Even though persecution had been firmly established under international law as a CAH, it was not until the conflicts in the former Yugoslavia and the subsequent prosecutions by the

Tribunal that the substance of the crime was truly developed.[4] The crime of persecution, in the ICTY Statute and in other legal documents, exists only as a CAH. Many of the other crimes encompassed by CAH such as murder and torture could exist as war crimes in the ICTY Statute and as separate crimes in other legal documents. Therefore, for persecution to constitute a crime, the general elements of CAH must always be fulfilled. Crimes against humanity are defined in Article 5 of the ICTY statute, which reads:

'' 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:

1. (a) murder;
2. (b) extermination;
3. (c) enslavement;
4. (d) deportation;
5. (e) imprisonment;
6. (f) torture;
7. (g) rape;
8. (h) persecutions on political, racial and religious grounds;
9. (i) other inhumane acts[5].

The crime of persecution was addressed in the Tribunal's very first case; *Tadic*[6]. In the cases of *Tadic* and *Kupreškić* cases, the Trial Chamber recognized that while the crime of persecution was included in the Nuremberg Charter, it has never been comprehensively defined in international treaties. It had also mentioned that neither national nor international case law provides an authoritative single definition of what constitutes persecution.[7] Therefore, the discussion in the ICTY case-law on the scope of the crime had mainly revolved around the questions of whether the criminal conduct constitutes a single act or many acts, which acts can

[4] See Ken Roberts, Striving for Definition: The Law of Persecution from its Origins to the 1CTY, in The Dynamis of International Criminal Justice 257 (Hirad Abtahi & Gideon Boas eds., 2006).
[5] ICTY Statute, Article 5.
[6] Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment (May 7, 1997)
[7]The Prosecutor v Vlatko Kupreškić et al, Case No 95-16-T, Judgment, 14 January 2000, para 567.

constitute persecution, and to what extent, if any, the crime of persecution differs in nature from the other CAH.

1.1.1 Acts of Persecution and Mental Element

The Trial Chamber in *Tadić* defined the elements of the crime of persecution as the occurrence of a persecutory act or omission and a discriminatory basis for that act or omission on one of the listed grounds, specifically race, religion or politics. It further held that the persecutory act must be intended to cause and result in an infringement on an individual's enjoyment of a basic or fundamental right[8]. Furthermore, the Trial Chamber in the *Kupreškić* case recognized that the text of Article 5 provides very little guidance for an understanding of the crime, beyond that it has to be committed on discriminatory grounds.[9] In addition, it argued that the crime of persecution should be construed to conceptualize those CAH which are committed on discriminatory grounds, but which, for example, fall short of genocide an example of which would be ethnic cleansing.[10] The Trial Chamber further set out several conclusions with regard to the crime and how it should be defined. These included that persecution should not be defined narrowly but should be understood as a wide and particularly serious crime. Persecution also includes such acts that are enumerated in Article 5 but also other acts, involving attacks on political, social, and economic rights. Additionally, it is commonly used to describe a series of acts rather than a single act, acts of persecution usually form part of a policy or at least a pattern practice and must be regarded in their context although it would not be necessary to demonstrate that an accused had taken part in the formulation of such a policy or practice. Acts of persecution must not be considered in isolation as they may not, in and of themselves, be serious enough to constitute crimes against humanity. Instead, they must be examined in their context and weighted for their cumulative effect.[11] The Appeals Chamber, in its case-law has confirmed

[8] *Tadić* Trial Judgement, para 715 and 697 ("[W]hat is necessary is some form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights. Additionally, this discrimination must be on specific grounds, namely race, religion or politics. […] It is 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"). *See*, further, *Kupreškić et al.* Trial Judgement, para 616;

[9] Ibid para 570.

[10] Ibid, para 606.

[11] Ibid, para 615 and 625.

all of these general conclusions which, to a large extent, set the parameters for how the elements of the crime of persecution would be formulated. It was only after numerous cases dealing with crimes against humanity that the Appeals Chamber accepted the following definition of persecution:

‘’The crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law; and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.[12] ‘’

However, this definition does not identify which acts constitute persecution. The ICTY case law has set out that acts listed under the other sub-headings of Article 5 of the Statute or provided for elsewhere in the Statute, as well as acts not explicitly mentioned in the Statute, may qualify as underlying acts of persecution.[13] Moreover, concerning the question of whether the underlying act itself needs to constitute a crime in international law, the Appeals Chamber struggled to a definite conclusion. The *Krnojelac* Appeals Chamber stated that ‘the acts underlying the crime of persecution, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecution of gravity equal to the crimes listed under Article 5 of the Statute’.[14] The same phrase was repeated in the *Blaškić* appeal judgment.[15] The Appeals Chamber seems to imply that there are crimes of persecution that are of less gravity than the crimes listed in Article 5. Given that no such crimes, outside the scope of CAH, have ever been identified in international law what the Appeals Chamber might have meant was that there are underlying acts which are not grave enough to constitute persecution, thus, it does not state that the underlying act needs to constitute a crime. However, in the same judgment, the *Blaškić* Appeals Chamber did state that ‘it must be demonstrated that the acts underlying the crime of persecutions constituted a crime against humanity in customary international law at the

[12] The Prosecutor v Milorad Krnojelac, Case No IT-97-25-A, Judgment, 17 September 2003, para 185 (referring to The Prosecutor v Milorad Krnojelac, Case No IT-97-25-T, Judgment, 15 March 2002, para 431). See also The Prosecutor v Mitar Vasiljević, Case No IT-98-32-A, 25 February 2004, para 113; The Prosecutor v Tihomir Blaškić, Case No IT-95-14-A, Judgment, 29 July 2004, para 131.

[13] The Prosecutor v Milorad Krnojelac, Case No IT-97-25-A, Judgment, 17 September 2003, para 219; The Prosecutor v Radoslav Brđanin, Case No IT-99-36-A, Judgment, 3 April 2007, para 296; The Prosecutor v Duško Tadić, Case No IT-94-1-T, Judgment, 7 May 1997, para 700, 702–3; The Prosecutor v Vlatko Kupreškić et al, Case No 95-16-T, Judgment, 14 January 2000, para 605, 614.

[14] Ibid para 199, 221.

[15] The Prosecutor v Tihomir Blaškić, Case No IT-95-14-A, Judgment, 29 July 2004, para 135.

time the accused is alleged to have committed the offense'.[16] In a subsequent judgment of a different case, the Appeals Chamber expanded the possible legal basis to international treaty law as well, when stating that 'it must be demonstrated that the acts underlying the crime of persecutions constituted a crime against humanity in customary law or in international treaty law at the time the accused is alleged to have committed the offence'.[17] However, despite this clear statement, in later cases the Appeals Chamber has concluded that the underlying act need not constitute a crime in international law.[18]

The fact that the underlying act does not have to be one of the crimes in Article 5 of the Statute and that it does not have to be a crime under international law at all, would potentially widen the definition to such an extent that the criminal nature of the act could not reasonably have been foreseen by an alleged perpetrator[19]. However, the case law further determined that not every denial of a fundamental human right will be serious enough to constitute a CAH.[20] The underlying act, considered in isolation or in conjunction with other acts, must be of the same gravity as other crimes listed under Article 5 of the Statute.[21] This 'gravity' test originates from the *Kupreškić et al* trial judgment according to which acts of persecution must be of equal gravity or seriousness to the other acts enumerated in Article 5.[22] The Trial Chamber found support for this construction in the *Flick et al* case before the US Military Tribunal which had to examine whether Flick's acquiring of industrial property which had previously been owned or controlled by Jews could constitute crimes against humanity.[23] One of the reasons for answering

[16]Ibid para 139.
[17] The Prosecutor v Dario Kordić and Mario Čerkez, Case No 95-14/2-A, Judgment, 17 December 2004, para 103. It further stated that '[t]he acts underlying persecutions […] must constitute a criminal conduct of gravity equal to the crimes listed in Article 5 of the Statute'.
[18] The Prosecutor v Miroslav Kvočka *et al*, Case No IT-98-30/1, Judgment, 28 February 2005, para 323; *The* Prosecutor v Radoslav Brđanin, Case No IT-99-36-A, Judgment, 3 April 2007, para 296.
[19] Ken Roberts, 'Striving for Definition: The Law of Persecution from its Origins to the ICTY', in Hirad Abtahi and Gideon Boas (eds),
[20] The Prosecutor v Vlatko Kupreškić et al, Case No 95-16-T, Judgment, 14 January 2000, para 621; The Prosecutor v Milorad Krnojelac, Case No IT-97-25-T, Judgment, 15 March 2002, para 434; The Prosecutor v Momčilo Krajišnik, Case No IT-00-39-T, Judgment, 27 September 2006, para 735.
[21] The Prosecutor v Milorad Krnojelac, Case No IT-97-25-A, Judgment, 17 September 2003, para 199, 221; The Prosecutor v Tihomir Blaškić, Case No IT-95-14-A, Judgment, 29 July 2004, para 135; The Prosecutor v Dario Kordić and Mario Čerkez, Case No 95-14/2-A, Judgment, 17 December 2004, para 102, 671; The Prosecutor v Miroslav Kvočka et al, Case No IT-98-30/1, Judgment, 28 February 2005, para 321; The Prosecutor v Mladen Naletilić and Vinko Martinović, Case No IT-98-34-A, Judgment, 3 May 2006, para 574; The Prosecutor v Blagoje Simić et al, Case No IT-95-9, Judgment, 28 November 2006, para 177; The Prosecutor v Radoslav Brđanin, Case No IT-99-36-A, Judgment, 3 April 2007, para 296.
[22] The Prosecutor v Vlatko Kupreškić et al, Case No 95-16-T, Judgment, 14 January 2000, para 619, 621.
[23] Flick et al, Judgment, 1212.

this in the negative was, according to the American Tribunal, 'a proper construction of the section of Law No. 10 relating to CAH'. The Tribunal held that:

The 'atrocities and offenses' listed therein 'murder, extermination,' etc., are all offenses against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words 'other persecutions' must be deemed to include only such as affect the life and liberty of the oppressed peoples.[24]

It was in this reasoning that the *Kupreškić et al* Trial Chamber found support for implementing its gravity test. However, it should be noted that the American Tribunal incorrectly quoted Control Council Law No. 10 which does not contain the words 'other persecutions' but 'other inhumane acts.' The definition of crimes against humanity in that Law reads:

''Atrocities and offenses, 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''.[25]

It was therefore not an effort by the American Tribunal to clarify the concept of persecution but rather to set the limits for the crime of 'other inhumane acts'. Regardless of this unsteady legal basis for adopting the gravity test for persecution, the test has been reiterated and relied on as part of the definition of persecution in many subsequent cases before the ICTY. A very similar test has been set out in the case-law for other inhumane acts; acts must be of 'a similar seriousness to other enumerated CAH' in order to constitute other inhumane acts as crimes against humanity.[26] Therefore, it is not possible to consider the latter crime against humanity, when applying the gravity test for persecution as it would result in circle reasoning. In order to constitute persecution, an underlying act, considered in isolation or in conjunction with other acts, must be of the same gravity as the crimes of murder, extermination, enslavement, deportation, imprisonment, torture, or rape.

[24] Ibid, 1215.
[25] Control Council Law No 10, Art II.
[26] The Prosecutor v Milomir Stakić, Case No IT-97-24-A, Judgment, 22 March 2006, para 317; The Prosecutor v Momčilo Krajišnik, Case No IT-00-39, Judgment, 17 March 2009, para 330–1.

Given that if only considered in isolation, the acts that would reach the same level of gravity as the mentioned crimes are obviously limited. The gravity test would therefore impose an important restriction on the scope of persecution. However, the words ‘’in conjunction with other acts’’ arguably do away with any such restriction. The term ‘’other acts’’ refers to other acts of which the crime of persecution consists.[27] The *Kvočka* Appeals Chamber concluded that ‘to apply the standard of gravity, the acts must not be considered in isolation, but in context, by looking at their cumulative effect’.[28] This statement appears to encompass and go beyond the ‘in conjunction’ standard.[29] When assessing whether a particular act is of the same gravity as the CAH of murder, extermination, etc, a Trial Chamber should not only consider other underlying acts but also the context in which it is committed, and the resulting cumulative effect. In this respect it should be recalled that, as mentioned above, persecution only exists as a CAH and, as such, it must be part of a widespread or systematic attack against a civilian population. That would therefore always be the context in which a possible underlying act of persecution will be committed. This, in turn, implies that the gravity of any act theoretically would rise to the required level for it to constitute persecution. However, there are no examples in the case-law of the ICTY of convictions of persecution solely for acts that in themselves are less grave than the other crimes against humanity[30]. Such convictions always encompass one or more of the other crimes against humanity, committed on discriminatory grounds. For example, in the *Brđanin* case, the Trial Chamber convicted the accused of persecution encompassing denials of the right to employment, the right to freedom of movements, and the right to proper judicial process *as well as*, inter alia, murder, torture, and deportation.[31] The Trial Chamber in *Kupreškić* argued that persecution should be defined 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 of the Statute[32].However, the criterion of a “gross or blatant” denial of a fundamental right follows from the requirement that

[27] The Prosecutor v Miroslav Kvočka et al, Case No IT-98-30/1-A, Judgment, 28 February 2005, para 321.
[28] Ibid.
[29] See The Prosecutor v Mladen Naletilić and Vinko Martinović, Case No IT-98-34-A, Judgment, 3 May 2006, para 574.
[30] Supra note 17.
[31] See The Prosecutor v Radoslav Brđanin, Case No IT-99-36-T, Judgment, 1 September 2004, para 1049–50, 1054, 1067, 1071, 1075.
[32] Kupreškić et al. Trial Judgement, para 621 and 627 “In sum, a charge of persecution must contain the following elements: (a) those elements required 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; (c) discriminatory grounds”.

persecutory acts or omissions be of gravity equal to the other crimes against humanity. It should not be read as a separate requirement[33].

The definition of persecution set out in the ICTY case-law, as described above, corresponds well with the conclusions regarding the crime of persecution set out by the *Kupreškić et al* Trial Chamber. Although persecution could be murder, torture, or any of the other crimes against humanity, committed on discriminatory grounds, that appears not to primarily be what is criminalized. After all, this is already criminalized as other CAH. Neither does the purpose of this crime appear to be that of criminalizing acts that per se are less grave than other crimes against humanity. The purpose rather seems to be to capture a series of acts, including one or more of the other crimes against humanity, which are connected, at least in part, by the fact that they are committed on discriminatory grounds. The crime of persecution aims at capturing the concrete range of acts of a discriminatory policy or pattern of behavior[34].

The crime of persecution is rather multifaceted from the perspective of *mens rea.* The mental element *(mens)* can be divided into two parts, knowledge and intent, which make it possible to ascertain responsibility *(rea)* for intent or negligence.[35]Furthermore, a fundamental distinction must be established between general intent and specific intent. The former follows the ordinary principles regulating crimi*nal mens rea* and concerns all the factual elements of the crime, such as the active or inactive conduct, as well as its circumstances and consequences.[36] The latter is a particular aim, the attainment of which is not necessary for the qualification of the crime or *dolus specialis.*[37] Within this framework, if discrimination is perceived as a factual element, general intent or negligence suffices for imputation; by contrast, if discrimination is perceived as a purely subjective element, *dolus specialis* is required.[38]

By assuming that persecution entails *dolus specialis*[39] it is easy to provide an example for drawing a distinction between general intent and discriminatory special intent. For instance, according to general intent, in order to attribute a murder, it is necessary to ascertain whether the

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[34] See Ken Roberts, 'Striving for Definition: The Law of Persecution from its Origins to the ICTY', in Hirad Abtahi and Gideon Boas (eds).

[35] See Cassese, International Criminal Law, Oxford, 2003, p. 162-164.

[36] Ibid*,* p. 162. See also ICTY, Trial Chamber, Prosecutor v. Vasiljevid, Case No. IT-98-32, Judgment of 29 November 2002, para. 247; ICTY, Trial Chamber, Prosecutor v. Kvodka and Others*,* Case No. IT- 98-30/1, Judgment of2 November 2001, para. 185.

[37] Supra note 34 p. 167.

[38] ICTY, Trial Chamber, Prosecutor v. Kordid and Cerkez*,* Case No. IT-95-14/2, Judgment of 26 February 2001, paras. 212.

[39] Cassese, "Crimes against Humanity", in CASSESE, GAETA and JONES (eds.), *The Rome Statute of the International Criminal Court. A Commentary,* Oxford, 2002, p. 364.

perpetrator was aware of the conduct that provoked the death of an individual and intended to behave in that way. Special intent entails additional knowledge and intent to discriminate one or more individuals.[40] As a consequence, if the perpetrator commits a murder with the special intent of discriminating against the victim, persecution exists. Special intent can certainly exist if general intent subsists.[41]" By contrast, it is impossible to theoretically reconcile *dolus specialis* with negligence and strict liability. Nevertheless, in practice it is not impossible to conceive of a perpetrator acting with a persecutory intent or *dolus speciali*, someone who wishes only to provoke physical injury, but negligently kills the targeted victim. General intent also concerns an attack within the framework of war, which is a factual element. In fact, according to the consistent case law of the ICTY, it is necessary that the persecutor knows that his conduct takes place within the context of a widespread and systematic attack against a civilian population in a time of armed conflict. In this regard, only probable knowledge is required, not effective knowledge.[42] Furthermore, from the viewpoint of the intent, the perpetrator is requested to "take the risk" that his acts are part of the attack.[43] However, according to a quasi-uniform interpretation, the contextual element does not need to be discriminatory,[44] so that when a discriminatory policy exists, the persecutor should not necessarily participate,[45] and in return a discriminatory context does not prove the discriminatory character of the underlying acts.[46] Exceptionally, in the *Kordid* case the ICTY excluded persecution when the criminal conduct is not part of a general discriminatory policy.[47]

1.2. Persecution in the light ICTR

The ICTR was established in 1994 for prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994. Article 3 of the ICTR Statute includes among crimes

[40] Prosecutor v. Blakid, Case No. IT-95-14, Judgment of 3 March 2000, paras. 235.
[41] ICTY, Trial Chamber, *Prosecutor v. Naletili6 andMartinovi6,* Case No. IT-98-34, Judgment of 31 March 2003, para.638.
[42] ICTY, Trial Chamber, Prosecutor v. Tadic, Case No. IT-94- 1, Judgment of 7 May 1997, paras. 659.
[43] ICTY, Appeals Chamber, Prosecutor v. Kunarac and Others, Case No. IT-96-23 and 23/1, Judgment of 12 June 2002, para. 102;
[44] Prosecutor v. Krnojelac, Case No. IT-97-25, Judgment of 15 March 2002, para. 59
[45] ICTY, Trial Chamber, Prosecutor v. Vasiljevid, Case No. IT-98-32, Judgment of 29 November 2002, para. 248.
[46] Ibid, para. 249.
[47] ICTY, Trial Chamber, Prosecutor v. Kordid and Cerkez, Case No. IT-95-14/2, Judgment of 26 February 2001, paras. 220.

against humanity "persecutions on political, racial and religious grounds".[48] Whereas the formulation of crimes in letters (a)-(i) is identical to that of the ICTY Statute, the chapeau of Article 3 of the ICTR Statute is different from Article 5 of the ICTY Statute. First, unlike Article 5 of the ICTY Statute, Article 3 of the ICTR Statute does not make any reference to the relationship between CAH and armed conflicts. However, in this regard it must be noted that, by virtue of Article I of its Statute, the ICTR has jurisdiction over "serious violations of international humanitarian law". Secondly, Article 3 of the ICTR Statute makes express reference to the fact that CAH are part of a "widespread or systematic attack" against a civilian population. This condition is based upon the context defined by the case law of the ICTY, whose Statute nevertheless does not expressly formulate such a requirement. Thirdly, the chapeau of Article 3 of the ICTR Statute mentions that CAH are motivated by the national, political, ethnic, racial or religious affiliation of the victim. Such a condition might be justified by the Rwandan context of CAH, but it narrows, or even suppresses, the difference between persecution and other CAH. Given the identity of crimes defined in letters (a)-(i) of Article 3[49] of the ICTR Statute and Article 5 of the ICTY Statute, the chapeau of Article 3 gives the impression to make explicit the minority interpretation according to which all CAH provided for in letters (a)-(i) are persecutory. As a result, non-persecutory CAH could exist only outside the Statute of the ICTR. Furthermore, Article 3 of the ICTR Statute literally defines the discriminatory element more broadly for CAH in broad-spectrum than in the specific case of persecution. In fact, the chapeau of Article 3 refers to the five criteria of national, political, ethnic, racial and religious affiliation, whereas letter (h) of the same Article, concerning persecution, mentions only political, racial and religious grounds. Nevertheless, this difference is not problematic in light of the interpretation provided by the case law of the ICTY and the ICTR, according to which the enumeration of the discriminatory grounds should not be considered exclusive.[50]

Finally, whereas the chapeau of Article 3 of the ICTR Statute enumerates the different forms of discrimination as alternative, via the conjunction "or", letter (h) of the same Article

[48] Article 3 ICTR Statute provides: "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".

[49] Ibid.

[50] The ICTR provided this interpretation in the case *Akayesu* about the crime of genocide, which is an extreme form of persecution. See ICTR, Trial Chamber, *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, Judgment of 2 September 1998, para. 516.

utilizes the cumulative conjunction "and". However, by sticking to the judicial interpretation provided by the ICTY with respect to Article 5(h) of the ICTY Statute, it could be maintained that the conjunction "and" be interpreted not only in the cumulative sense, but also in the alternative sense."

1.2.1 Actus Reus and Mens Rea in light of the ICTR Case Law

From an objective standpoint, the case law of the ICTR defines persecution as the breach of a fundamental right, in the vein of the interpretation provided by the ICTY. In the view of the ICTR, acts of persecution could be embodied in Article 3 of the Statute, other articles of the Statute, or outside the Statute.[51] In concreto, hate speech targeting a population because of ethnicity, or other discriminatory grounds, is considered to reach a sufficient level of gravity to constitute persecution.[52] As to the relationship between persecution and other crimes, the ICTR developed innovative jurisprudence with respect to the ICTY, by pointing out that persecution can exist cumulatively with other crimes or be engrossed by them, based on the gravity of the breach. Thus, discriminatory killing would be absorbed by extermination. By contrast, acts of propaganda leading to the extermination of civilians and inflicting lesser harm on other individuals would constitute persecution.[53]

However, with respect to the context of the breach, the ICTR requires that persecution takes place in the framework of a widespread or systematic attack against a civilian population, the same as any other CAH.[54] The attack must be in pursuit of a policy or a plan,[55] and the discriminatory character of the attack required by the chapeau of Article 3 ICTR Statute is considered a factual element, not a mental one."[56]

As regards to mens rea, discrimination is conceived of as an intentional subjective element rather than an objective one, which would make it possible to distinguish persecution from other crimes, especially from crimes against humanity.[57] In fact, with respect to all CAH, the ICTR

[51] ICTR, Trial Chamber, Prosecutor v. Semanza, Case No. ICTR-97-20, Judgment of 15 May 2003, paras. 347-350.
[52] ICTR, Trial Chamber, Nahimana and Others, Case No. ICTR-96-1 1, Judgment of 3 December 2003, para. 1072; Prosecutor v. Ruggiu, cit. supra note 58, para. 22.
[53] Ibid, para. 1080.
[54] Supra note 44, paras. 326.
[55] ICTR, Trial Chamber, Prosecutor v. Kayshema and Others, Case No. ICTR-95-lA, Judgment of21 May 1999, paras. 133-134.
[56] ICTR, Trial Chamber, Prosecutor v. Bagilishema, Case No. ICTR-95-1, Judgment of 7 June 2001, para. 81.
[57] Supra note 44, paras. 350.

specified that the knowledge of the existence of a discriminatory attack must as a minimum be constructive knowledge, based on the "should have known" standard; by contrast, intentionally assenting to the discriminatory character of the attack is not necessary for accusation.[58] Nevertheless, one could wonder what the difference is between persecution and other CAH when the intensity of mens rea is dolus in both cases. Thus, it is difficult to distinguish persecution from a murder perpetrated with knowledge of the discriminatory character of the attack and intentional participation.

1.2.2. Hate Speech as Persecution – ICTR

In ICL, the jurisprudence on hate speech as a form of persecution rests on Streicher, a case in which the IMT at Nuremberg convicted the defendant, Julius Streicher, on Count 4 CAH, holding that "in his speeches and articles ... he incited the German People to active persecution". It concluded that "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 CAH".[59] The primary evidence against Streicher was an article he wrote in the May 1939 issue of the pro-Nazi publication, Der Stürmer, which read: "The Jews in Russia must be killed. They must be exterminated root and branch".[60] The Streicher verdict also noted that his articles in Der Stürmer "termed the Jew as a germ and a pest, not a human being, but ''a parasite, an enemy, an evildoer, a disseminator of diseases who must be destroyed in the interest of mankind".[61] The Tribunal accordingly sentenced him to death.

Nearly five decades on, the ICTR picked up where the Nuremberg judgments left off, finding that hate speech could be the *actus reus* for CAH-persecution. The first case to do so was *Ruggiu*.[62] Georges Ruggiu, a Belgian citizen and the only white European to be convicted by the ICTR, was an announcer for *Radio Télévision Libredes Milles Collines* (RTLM), the extremist Hutu broadcast outlet that verbally attacked Tutsis moderate Hutus, and Belgians in the period leading up to and during the Rwandan genocide. The Tribunal described Ruggiu as playing "a

[58] ICTR, Trial Chamber, Prosecutor v. Niyitegeka, Case No. ICTR-96-14, Judgment of 16 May 2003, para. 442.
[59] International Military Tribunal (Nuremberg), (1947), para 295-96.
[60] Ibid para 295.
[61] Van Schaack and Slye 2010, p. 883.
[62] Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, 18–19, June 1, 2000.

crucial role in the incitement of ethnic hatred and violence" against both Tutsis and Belgian residents in Rwanda.[63] Ruggiu pled guilty to; inter alia, CAH-persecution.[64] In sentencing him, the Tribunal had occasion to review the Nuremberg jurisprudence regarding this offense. It began with the Streicher judgment[65], noting that the IMT in that case "held that the publisher of a private, anti-Semitic weekly newspaper '*Der Stürmer*' incited the German population to actively persecute the Jewish people."[66] The ICTR then concluded that "the *Streicher* Judgement is particularly relevant to the present case since the accused, like Streicher, infected peoples' minds with ethnic hatred and persecution."[67]

The ICTR Trial Chamber, by referring to the ICTY judgment in *Kupreskic*,[68] then set forth the specific elements of persecution: "(a) those elements required for all crimes against humanity under the ICTR 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."[69] With respect to element (a), the Chamber considered the *mens rea*, which it found to be the intent to commit the underlying offense, combined with the knowledge of the broader context in which that offense occurs[70]. The ICTR indicates persecution via speech can be committed without the speaker explicitly calling for violence. In citing *Streicher*, the ICTR also suggests that the crime was effectuated via the defendant's inciting the German population to "persecute" the Jewish people; nonetheless the crime of persecution does not necessarily include physical violence. This conclusion is bolstered by the ICTR's description of the crime as entailing Streicher's infecting "peoples' minds with ethnic hatred and persecution."[71] There can be no doubt of this conclusion when the ICTR describes the persecution in the *Ruggiu* case as consisting of radio broadcasts that singled out and attacked Tutsis and Belgians. In other words, the words themselves attacked the victims; they were not merely a medium through which to

[63] Raggiu, Case No. ICTR 97-32-I, Judgment and Sentence, para 50.
[64] Ibid para 42–45.
[65] United States v. Goering (Streicher)
[66] Ibid para 19.
[67] Ibid.
[68] Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, para 627, Jan. 14, 2000.
[69] *Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, para 21.
[70] Ibid 20
[71] *Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, para 19.

encourage others to perpetrate acts of violence independent from the words.[72] The effect of the words is a deprivation of rights, including liberty and humanity. Furthermore, based on the *chapeau*'s *mens rea* requirement, the perpetrator must speak the words knowing that they are "part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan." This means the speech is not an isolated instance of hatemongering, unconnected to physical violence or inhumane treatment; it must be linked to such violence or treatment. Thus, the speech cannot be considered as merely "bad speech" in a normal societal context. Given the *mens rea* requirements, it is inextricably linked to a massive or well-planned attack on civilians.

Another interesting case of the ICTR relating to hate speech as a crime of persecution was the *Media Case.* The specific case concerned the liability of defendants Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders and executives of RTLM, and Hassan Ngeze, founder and editor in chief of the extremist Hutu newspaper *Kangura*.[73] Among other offenses, each defendant was charged with the crime of persecution. In the judgment's relevant portion, the Trial Chamber began by considering the elements of persecution. It focused on *Kupreskic*'s requirement of a "gross or blatant denial of a fundamental right reaching the same level of gravity" as the other acts enumerated as "crimes against humanity under the Statute."[74] It then concluded that "hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute."[75] Significantly, the Chamber suggested that hate speech rises to the same level of gravity as the other enumerated CAH crimes in all circumstances and noted generally that hate speech is not protected speech under international law. It further cited the obligation of countries under the ICCPR and the CERD to prohibit advocacy that promotes and incites discrimination on grounds of race, nationality, or religion.[76]

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[72] A Trial Chamber of the ICTR later left no doubt about this interpretation. Prosecutor v. Nahimana (*Media Case*), Case No. ICTR 99-52-T, Judgment and Sentence, para 1072 (Dec. 3, 2003) "The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm."

[73] Media Case, Case No. ICTR 99-52-T, Judgment and Sentence, para 5–7, 123, 491, 494.

[74] Ibid. Quoting Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, para 627(Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000.

[75] Ibid

[76] Ibid para 1074

In its judgment, the Appeals Chamber clarified that "hate speech," infringing as it does the right to security and human dignity, may under certain circumstances amount to a persecutory act rising to the level of required gravity, either on its own or when taken in conjunction with other similar infringements.[77] In other words, hate speech targeting a population on one of the prohibited discriminatory grounds violates the right to respect for human dignity of the members of that group and thus constitutes "discrimination in fact." Hate speech, such as in the *Media Case*, which is accompanied by incitement to commit genocide and is part of a massive campaign of other discriminatory acts including acts of violence against property and persons, without any doubt does rise to the required level of gravity so as to amount to persecution.

According to the Chamber with was also consistent with the principles enunciated in the IMT's *Streicher* decision. In particular, the Chamber observed that the *Stürmer* editor in chief was convicted of persecution for anti-Semitic writings that significantly predated the extermination of Jews in the 1940s.[78] Yet they were understood, the Chamber added, "to be a . . . poison that infected the minds of the German people and conditioned them to follow the lead of National Socialists in persecuting the Jewish people."[79] Overall, then, based on these sources, the Chamber found that "hate speech that expresses ethnic or other forms of discrimination violates the norm of customary international law prohibiting discrimination."[80]

It is worth noting that much denigrating and inciting speech falls short of advocating genocide, yet it may still represent participation in the persecution of a protected group or in other words; a CAH. The crime of persecution concerns the denial of fundamental rights to persons because they belong to a specific group or collectivity.[81] The ICC has defined persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity",[82] while the ad hoc tribunals have defined it is "an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law or the

[77] Nahimana, Judgement 987.
[78] Ibid para 1073
[79] Ibid
[80] Ibid 1076
[81] The key provisions are ICC Statute, Article 7(1)(h), Article 7(2)(g), Elements of Crimes; ICTY Statute, Article 5(h); ICTR Statute, Article 3(h).
[82] 105. ICC Statute, Article 7(2)(g).

actus reus; and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics or the mens rea".[83]

Convictions for persecution have been secured for various acts committed with persecutory intent, ranging from murder and rape to the destruction of property and denial of employment.[84] It is well established at the ad hoc tribunals that "it is not necessary that these underlying acts of persecution amount to crimes in international law".[85] Rather, they must meet a gravity test which demands that "the underlying acts of persecution, whether considered in isolation or in conjunction with other acts, must be of gravity equal to the crimes listed under article 3 of the Statute".[86] More stringently, the ICC Statute applies a gravity threshold for the admissibility of any case in article 17(1)(d). However, On the other hand, the existence of stringent general requirements for CAH, such as the need for a widespread or systematic attack against the civilian population, warrants the conclusion that offensive or otherwise disagreeable speech will generally not form the basis for a conviction of this type. Only in extreme situations will some types of speech be considered underlying acts of persecution.

1.3. Persecution under the Regime of the ICC

By virtue of Article 12 of its Statute, the ICC tries crimes falling within the scope of its jurisdiction perpetrated on the territory of a State party or by nationals of a State party. The most relevant rule for the purpose of defining persecution is Article 7 of the ICC Statute, which enumerates more CAH than the Statutes of the ICTY and the ICTR.[87] Article 7(1) includes "persecution against any identifiable group or collectivity on political, racial, national, ethnic,

[83] ICTR, Trial Chamber, Nahimana and Others, Case No. ICTR-96-1 1, Judgment of 3 December 2003, para .985 The Prosecutor v Milorad Krnojelac, Case No IT-97-25-T, Judgment, 15 March 2002, para. 185

[84] ICTY, The Trial Chamber, *Prosecutor v. Radoslav Brdjanin Case no* IT-99-36-T Judgment of 28 November 2003.

[85] ICTR, Trial Chamber, *Nahimana and Others,* Case No. ICTR-96-1 1, Judgment of 3 December 2003, para. 326.

[86] Ibid, para. 296

[87] Article 7(1) 1CC Statute reads: "I. For the purpose of this Statute, 'crime against humanity' means any of the following acts when *committed as part ofa widespread or systematic attack directedagainst any civilianpopulation, with knowledge ofthe 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".

cultural, religious, gender [...] or other grounds that are universally recognized as impermissible under international law" perpetrated "in connection with" other crimes against humanity or "any other crime within the jurisdiction of the Court".

Article 7 of the ICC Statute has become a reference for further regulation of CAH and persecution. More specifically, Article 7(1)(h) of the ICC Statute extends the scope of discrimination within the framework of persecution, since the new criteria of cultural and gender discrimination are added alongside the usual grounds of political, racial, national, ethnical and religious discrimination. Furthermore, a general clause adds "other grounds that are universally recognized as impermissible under international law",[88] which makes explicit the interpretation of the *ad hoc* Tribunals, according to which the enumeration of discriminatory grounds is not exhaustive and gives broad interpretative power to the judge. If, on the one hand, the effort not to restrict the cases of persecution is positive, on the other hand, the "open" formulation of the offence is not fully respectful of the principle of legality.

From the standpoint of the victim, Article 7(l)(h) of the ICC Statute provides that the conduct must be directed against a "group" or "collectivity". Both words are employed for the first time in defining persecution[89] and must be considered thereto, which should entail the application of concurrent penalties. Additionally, as to the establishment of jurisdiction, it should be maintained that persecution can be perpetrated not only in wartime, but also in peacetime, which basically depends on the permanent character of the Court. Article 7(2)(g) of the ICC Statute points out that the conduct must be "severe" and directed against "fundamental rights", contrary to international law. Article 7(l)(h)(1) Elements of Crimes specifies that it must "severely deprive" one or more persons of "fundamental rights". Therefore, "substantial" gravity and "circumstantial" gravity are required. Specifically, in the case *Situation in Darfur (Sudan)* the Pre-Trial Chamber I of the ICC acknowledged that acts such as murder, rape, attack of the civilian population, affronts upon personal dignity, inhumane acts, pillaging, destruction of property, and forcible transfer of the population may amount to persecution.

In addition to the normal mental element relating to the conduct and the broader context, persecution requires a particular intent to target a person or group on prohibited grounds of

[88] The preparatory works mentioned discrimination on "social, economic and mental or physical disability grounds". See UN Doc. A/CONF.183/2/Add.1.

[89] Within the Statutes of the ICTY and ICTR the term "group" is used only to characterize genocide.

discrimination.[90] Tribunal jurisprudence indicates that a particular intent to discriminate is required, not simply a knowledge that one is acting in a discriminatory way.[91] With respect to the requirement in the ICC Statute of a 'connection' to other crimes or prohibited acts, this requirement is purely objective and no mental element is required. From the standpoint of *mens rea*, Article 7(2)(g) of the ICC Statute requests the persecutory denial of fundamental rights to be "intentional", but no further indications are given on general and special intent. Moreover, with regard to the circumstances of the breach, Article 7(1)(h)(5) Elements of Crimes requires persecution to be part of a "widespread or systematic attack directed against a civilian population" as well. Article 7(1)(h)(6) adds that the one must be aware of the attack or "intend" his conduct to be part of it. This is in conformity with *the chapeau* of Article 7 of the ICC Statute, by virtue of which all CAH, including persecution, must be part of a "widespread or systematic attack directed against any civilian population, with knowledge of the attack". From an objective standpoint, Article 7(2) of the ICC Statute and Article 7 Elements of Crimes define the attack, not necessarily in the military sense, as synonyms, since the Statute of the ICC and the Elements of Crimes employ them alternately. Article 7(2)(g) of the ICC Statute specifies that persecution must be perpetrated by reason of the identity of the group or the collectivity. While Article 7(1)(h) of the ICC Statute envisages the group as the target of persecution, Article 7(1)(h)(2) Elements of Crimes points out that the author must target either one or more persons because of their affiliation to the group, or the group as such. Therefore, based on the latter provision, it should be concluded that the "direct" victim can be the group, the individual, or the plurality of the individuals, along the lines of the interpretation provided by the ICTY in the *Naletilid and Blaski* cases. Under Article 7(1)(h)(4) Elements of Crimes, persecution must be committed "in connection" with any other crime provided for in Article 7 of the ICC Statute, or any other crime within the jurisdiction of the Court[92]. This connection, which was originally provided for in the Charter of the Nuremberg Tribunal, is necessary in order not to overextend the jurisdiction of the Court." First and foremost, therefore, persecution is an autonomous crime, clearly distinguished from other war crimes and CAH. Secondly, persecution does not absorb connected crimes, but is additional thereto, which should entail the application of concurrent penalties. Thirdly, as to the establishment of jurisdiction, it should be maintained that persecution

[90] ICC Elements, Art. 7(1)(h), element 3; Kordic´ ICTY T. Ch. 26.2.2001 para. 212.

[91] Krnojelac ICTY T. Ch. II 15.3.2002 para. 435;

[92] I.e. war crimes, Article 8, genocide, Article 5(d) and aggression Article 5 of the ICC Statute.

can be perpetrated not only in wartime, but also in peacetime, which basically depends on the permanent character of the Court.

Concerning the circumstances of the breach, Article 7(1)(h)(5) Elements of Crimes requires persecution to be part of a "widespread or systematic attack directed against a civilian population". Article 7(1)(h)(6) adds that the author must be aware of the attack or "intend" his conduct to be part of it. This is in conformity with *the chapeau* of Article 7 of the ICC Statute, by virtue of which all crimes against humanity, including persecution, must be part of a "widespread or systematic attack directed against any civilian population, with knowledge of the attack". From an objective standpoint, Article 7(2) of the ICC Statute and Article 7 Elements of Crimes define the attack, not necessarily in the military sense, as a "course of conduct" taking place "pursuant to or in furtherance of a State or organizational policy". Therefore, planning is required, though not necessarily on a discriminatory footing.' From a subjective viewpoint, both the ICC Statute[93] and the Elements of Crimes[94] require "knowledge" of the attack. Nevertheless, the Elements of Crimes add "or" the possibility that the author "intends" his conduct to be part of the attack. According to a scholarly interpretation, "knowledge" requires certainty, whereas another view is satisfied with probability.[95] Article 7 Elements of Crimes specifies that knowledge is not necessarily detailed but can be general. Under Article 7(1)(h) (6) Elements of Crimes, the use of the verb "intend" entails *dolus* as a criterion for imputation. However, this provision seems superfluous. In fact, the first part of the rule allows the perpetrator to be held accountable on the basis of the sole knowledge of the context "or", not "and" "intended", for conscious negligence,[96] so that a higher degree of *mens rea* as to the context necessarily implies liability.

There are a number of alterations between the provisions in the Rome Statute on CAH and crimes of persecution and the provisions in international criminal instruments created prior to 1998. For instance, the Rome Statute, unlike the ICTR Statute, does not require discriminatory intent to be established for all CAH. The Rome Statute, unlike the ICTY Statute, does not require a nexus to an armed conflict in order to prosecute CAH. The crime of persecution was given a statutory definition for the first time in Article 7(2)(g) of the Rome Statute. The Preparatory

[93] Article 7(1) of ICC Statute.
[94] Article 7(1)(h)(6) of Elements of Crime.
[95] Cassese, "Crimes against Humanity", in CASSESE, GAETA and JONES (eds.), *The Rome Statute of the International Criminal Court. A Commentary,* Oxford, 2002, p. 364.
[96] Ibid.

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. 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. 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. Finally, 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.

Chapter 2: International Refugee Law

This chapter tracks the notion and development of the notion of persecution in the light of international refugee law and mainly in European refugee law. Although the notion of persecution did not figure explicitly in interwar refugee instruments, it started to become more apparent at that time. Moreover, during the immediate period post 1945, the notion of persecution began to take a normative form as one of the 'valid objections' that would justify a refugee's resolve not to return to his or her country of origin, and hence a need for international protection; and that the 1951 Convention consolidated the importance of the notion of 'persecution' *vis-à-vis* the refugee definition.

2.1. Persecution according to The 1951 Geneva Convention, its 1967 Protocol and The UNHCR

The 1951 Geneva Convention is the centerpiece of international refugee protection today[97]. It is grounded in Article 14 of the Universal Declaration of Human Rights 1948; which

[97] United Nations General Assembly resolution 429(V) of 14 December 1950, available at http://www.unhcr.org/refworld/docid/3b00f08a27.html

recognizes the right of persons to seek asylum in other countries. Ever since the Convention entered into force on 22 April 1954, it has been subject to only one amendment in the form of the 1967 Protocol, which removed the geographic and temporal limits of the 1951 Geneva Convention[98]. Considering that the 1951 Convention was a product instrument post to the Second World War, its scope was initially limited to persons fleeing events occurring before 1 January 1951 within Europe. As a result, the amended made by the 1967 Protocol gave the Convention universal coverage and it has been further supplemented by the progressive development of international human rights law as well as regional law[99]. Although related to the Convention in this way, the Protocol is an independent instrument, accession to which is not limited to States parties to the Convention[100].

The 1951 Geneva Convention combines and strengthens previous international instruments regarding refugees, as it provides the most comprehensive codification of the rights of refugee at the international level. It endorses a single definition of the term refugee in Article 1 of the 1951 Convention which emphasizes on the protection of persons from political or other forms of persecution, in contrast to previous international refugee instrument which applied to specific groups of refugees. Furthermore, the 1951 Convention is a status and a rights-based instrument as it is underpinned by a number of fundamental principles of non-discrimination, non-penalization and *non-refoulement*[101], which guarantee the application of the provisions without discrimination regards to race, religion or nationality. Moreover, these principles have been also reinforced by the developments in international human rights law to also be applied without discrimination regarding sex, age, disability, sexuality or other prohibited grounds of discrimination. It further stipulates that, subject to specific exceptions, refugees should not be penalized for their illegal entry or stay and as a result recognizes that the seeking of asylum can require breaching immigration laws. It is also important to note that the 1951 Convention

[98] The Convention enabled States to make a declaration when becoming party, according to which the words "events occurring before 1 January 1951" are understood to mean "events occurring in Europe" prior to that date. This geographical limitation has been maintained by a very limited number of States, and with the adoption of the 1967 Protocol, has lost much of its significance. The Protocol of 1967 is attached to United Nations General Assembly resolution 2198 (XXI) of 16 December 1967, available at http://www.unhcr.org/refworld/docid/3b00f1cc50.html.

[99] for example, the African Union Convention governing the Specific Aspects of Refugee Problems in Africa 1969, adopted in Addis Adaba, 10 September 1969; the European Union Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Official Journal L 304 , 30/09/2004 P. 0012 – 0023. The Cartagena Declaration on Refugees, adopted at a colloquium held at Cartagena, Colombia, 19-22 November 1984, while non-binding, also sets out regional standards for refugees in Central America, Mexico and Panama.

[100] James C. Hathaway (2005), Cambridge: Cambridge University Press, pp. 936.

[101] Ibid.

includes a range of safeguards against of the expulsion of refugees which are based on the principle of *non-refoulement* that is so fundamental that no reservations or derogations can be made to it. This principle provides that no one shall expel or return (*''refouler''*) a refugee against one's will, under no circumstances, to a territory where one fears threats to life or freedom. Moreover, the 1951 Convention sets the basic minimum standards for the treatment of refugee as well as their rights, without prejudice to States granting more favorable treatment.

It is noteworthy that the 1951 Convention categorically excludes persons from the benefits of refugee status whom there are serious reasons to believe that has committed a war crime, a CAH or a serious non-political offence, or acts contrary to the purposes and principles of the United Nations prior to admission[102] in order to guarantee that serious criminals and terrorist do not benefit from international protection. Finally, the 1951 Geneva Convention does not apply to refugees[103] who receive protection or assistance of a United Nations agency other than UNHCR as well as to those who have a status equivalent to nationals in their country of asylum[104].

Although the risk of persecution is a key element to the refugee definition, "persecution" itself is not defined in the 1951 Geneva Convention. However, the message conveyed by the Preamble to the Convention and universally understood is that persecution embraces all serious violations of human rights. Moreover, articles 31 and 33 refer to those whose life or freedom "was" or "would be" threatened, so clearly it includes the threat of death, or the threat of torture, or cruel, inhuman or degrading treatment or punishment. For a comprehensive analysis the relation to developments within the broader field of human rights is required to the general notion[105]. Moreover, the term 'well-founded fear of persecution' contains the subjective element of 'fear' and the objective criterion of whether this fear is 'well-founded'.[106] The subjective element takes into account the individual's frame of mind, which is strongly influenced by one's personal and family background; his or her membership in a particular racial, religious, or political group; and his or her own interpretation of the situation and personal experience. These

[102] Article 1F of The Geneva Convention relating to the Status of Refugees.
[103] E.g. refugees from Palestine who fall under the auspices of UNRWA.
[104] Article 1E of The 1951 Convention relating to the Status of Refugees.

[105] 1984 Convention against Torture, article 7; 1966 International Covenant on Civil and Political Rights, article 3; 1950 European Convention on Human Rights, article 6; 1969 American Convention on Human Rights, article 5; 1981 African Charter of Human and Peoples' Rights.

[106] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/Eng/REV.2, para 38

factors must be taken into consideration when determining whether the applicant subjectively fears persecution.[107] The requirement that the fear must be well-founded complements the subjective element. It serves the purpose of evaluating whether the applicant's concern has an objective basis, and thus excludes those persons whose fears are obviously exaggerated or irrational.[10] In determining whether the applicant's fear is well-founded, States parties must take into account the personal and family background of the applicant, as well as his or her background, as well as influence.[108] The 1951 Convention states that the individual's application need not be based on that person's own personal experience, in other words, any persecution suffered by friends or relatives may justifiably raise a fear that the applicant may soon become a victim.[109] Additionally, past persecution is certainly a concrete indication that the applicant's fear is objectively well-founded. Therefore, in order to demonstrate the objective basis for an individual's fear of persecution in one's country of origin, the person may present evidence of the human rights violations occurring there for individuals with similar characteristics. Nonetheless, it has been highlighted by UNHCR that even though States parties are required to evaluate the applicants' personal circumstances, they may also take into account the general situation in the country of origin.[110]

Another main issue in the determination of refugee status is how to define what treatment qualifies as persecution. As previously mentioned, Article 33 of the 1951 Convention assists by providing that threats aimed at the individual's life or freedom on account of the five grounds enumerated in Article 1, constitute persecution. Furthermore, UNHCR suggests that ''other serious violations of human rights … would also constitute persecution''.[111] Accordingly, persecution includes arbitrary killing, detention, disappearance, and torture. In other words, any serious human rights violation under the Universal Declaration or the Human Rights Covenants, for example, may qualify as 'persecution'[112].Additionally, given the fact that neither the 1951 Geneva Convention nor the UNHCR, however, specify the minimum level of severity that a treatment or situation must achieve in order to qualify as persecution, as opposed to mere

[107] Ibid, para 41
[108] Ibid
[109] Supora note 80, para 43
[110] Ibid, para 42
[111] Ibid, para 45
[112] The 'core entitlements' would certainly include at minimum the non-derogable rights protected by Art 4 of the International Covenant on Civil and Political Rights, art 4, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, (1966) UN Doc A/6316, 999 UNTS 171, entered into force 23 March 1976.

harassment; consequently the States are the ones determining the difference between persecution and harassment. As a result, jurisprudence of the different countries lacks coherence and consistency[113] and that is the result of the elasticity of the definition of persecution, which depends upon the political will of States Parties implementing the Convention. Therefore, the complexity in defining the minimum level of severity which treatment must reach to qualify as persecution is similar to the task of defining a minimum level for inhuman or degrading treatment.

According to the Convention, it is required that the fear of persecution is grounded in the reasons of race, religion, nationality, membership of a particular social group, or political opinion. This gives an insight into the characteristics of individuals and groups which are considered relevant to refugee protection based on the principle of non-discrimination in the Universal Declaration of Human Rights as well as the subsequent human rights instruments. Moreover, persecution for the abovementioned grounds implies a violation of human rights of particular gravity; it may be the result of cumulative events or systemic mistreatment, but equally it could comprise a single act of torture[114]. More specifically, it is important to note that differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies however; persons who receive less favorable treatment as a result of such differences are not necessarily victims of persecution. It is only in specific circumstances that discrimination will amount to persecution; meaning in the case the measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned[115]. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of fear and insecurity as regards to their future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will definitely be more concrete where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved. It is extremely important to note that Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or

[113] Guy S Goodwin-Gill, *The Refugee in International Law*, 2007

[114] Hathaaway, J. 2005 The Rights of Refugees, Cambridge: Cambridge University Press.

[115] E.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.

punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim or potential victim of injustice, not a fugitive from justice. The above distinction may, however, occasionally be obscured. In the first place, a person guilty of a common law offence may be liable to excessive punishment, which may amount to persecution within the meaning of the definition. Additionally, penal prosecution for a reason mentioned in the definition[116] may amount to persecution. Secondly, there may be cases in which a person, besides fearing prosecution or punishment for a common law crime, may also have "well founded fear of persecution". In such cases the person concerned is a refugee. It may, however, be necessary to consider whether the crime in question is not of such a serious character as to bring the applicant within the scope of one of the exclusion clauses. In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards. More often, however, it may not be the law but its application that is discriminatory. Prosecution for an offence against public order such as for distribution of pamphlets could be a vehicle for the persecution of the individual on the grounds of the political content of the publication. In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a benchmark. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded.

Pursuant to its 1950 Statute, UNHCR has a role in the supervision of the application of the Refugee Convention. The UNHCR is mandated by the UN General Assembly to provide international protection to refugees and to supervise the application of treaties relating to refugees.[117] Its supervisory responsibility is also reflected in the preamble to and in article 35 of the 1951 Refugee Convention,[118] and article II of its 1967 Protocol. Moreover, in the exercise of its supervisory mandate, the UNHCR has published a Handbook and Guidelines on Procedures

[116] E.g., in respect of "illegal" religious instruction given to a child.
[117] UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), Annex, paragraph 8(a).
[118] Article 35.1 reads: "The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.[119] The UNHCR Guidelines on International Protection complement and update the UNHCR Handbook and should be read in combination with it. They provide authoritative guidance on substance and procedure relating to the 1951 Convention.

The 1951 Geneva Convention does not specify the different elements of the refugee definition, nor does it regulate the procedures necessary for Contracting States to implement its provisions. There is, therefore, no direction as to how refugee status or a risk of refoulement should be established in practice. In response to a call for guidance from different countries, the UNHCR elaborated a Handbook on Procedures with instructions on status determination and procedural guarantees, which has been complemented through Guidelines on international protection in several areas. The different elements of the refugee definition are discussed with the overall object and purpose of the 1951 Geneva Convention in mind, recommending a generous interpretation of the relevant concepts to ensure that international protection is accessible to those who need it

The 1951 Convention has proven to be a living and dynamic instrument, and its interpretation and application has continued to evolve through State practice, UNHCR EXCOM conclusions, academic literature and judicial decisions at national, regional and international levels. To capture this evolution and in line with its mandate, UNHCR has issued a series of legal positions on specific questions of international refugee law entitled "Guidelines on International Protection"[120]. They complement and update the Handbook and should be read in combination with it. Amongst other issues, they illustrate the potential of the 1951 Geneva Convention, together with regional instruments, to ensure international protection for persons fleeing a wide range of socio-political events, including armed conflict, which is often rooted in and/or conducted along lines of real or perceived racial, ethnic, religious, political, gender or social group discrimination[121]; persecution on the basis of sexual orientation or gender

[119] The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol, Reissued Geneva, December 2011, HCR/1P/4/ENG/REV. 3.
[120] See Goal 1, para 6, second point of the Agenda for Protection, endorsed by the Executive Committee of UNHCR's Programme and welcomed by the General Assembly: UN High Commissioner for Refugees (UNHCR), Agenda for Protection, October 2003, Third edition, available at: https://www. refworld.org/docid/4714a1bf2.htm
[121] Guidelines on International Protection No. 12

identity[122] ; and violence perpetrated by organized gangs, traffickers, and other non-State actors, against which the State is unable or unwilling to protect[123].

2.2 Persecution within the Framework European Refugee Law:

The fastest development of refugee law can be observed in the European Union Law and more specifically in Article 18 of Charter of Fundamental Rights of the European Union, which grants a right to asylum in respect to the 1951 Refugee Convention. Furthermore, the content of Article 78 Treaty[124] on the Functioning of the European Union[125] has also been reiterated. Moreover, the specific Article limits the scope of the right to asylum, because the provisions do not aim at exceeding the already existing international obligations of the Member States. However, the law of the European Union provides for precise and detailed rules applicable to refugees and asylum seekers. Articles 67 through 79 TFEU[126] provide for a common policy on visa, asylum, immigration, and other policies concerning the free circulation of persons. Nonetheless, the foundation of any entitlement to international protection is "the right to seek and to enjoy in other countries asylum from persecution" in article 14(1) of the Universal Declaration of Human Rights. However, the cornerstone of any legal regime relating to refugees is the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees. In addition to the Refugee Convention, national and EU asylum law must be compliant with international human rights[127] law, including obligations under UN human rights treaties, and, for Council of Europe Member States, the ECHR. For EU Member States, it must comply with the EU Charter of Fundamental Rights and must be implemented in a manner consistent with other EU primary law.

The EU has adopted relatively high standards of protection in relation to refugee qualification criteria,[128] harmonizing conditions broadly in line with international rules and

[122] Guidelines on International Protection No. 9
[123] Including Guidelines on International Protection No. 7 and No. 12
[124] Formerly Article 63 EC Treaty.
[125] Signed 13 December 2007, entered into force 1 December 2009] [2008] OJ C115/47
[126] Formerly Articles 61-69 EC Treaty.
[127] CJEU, Y and Z judgment, op. cit., fn. 33, para. 51; CJEU, X, Y and Z judgment, op. cit., fn. 20, para. 43. See also the CJEU's earlier formulation in CJEU, Abdulla and Others judgment, op. cit., fn. 336, para. 57 (which does not include the explicit reference to actors of persecution).
[128] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9.

guidelines with the adoption of the QD. The purpose of the Qualification Directive is to harmonies the criteria by which Member States define who qualifies as a refugee, as well as other forms of protection for persons who face serious risks in their country of origin. The initial objective of the Directive is to ensure that persons fleeing persecution are identified and have access to the same level of protection, regardless of the Member State where they lodge their asylum application.

2.2.1. Well-founded fear of Persecution

The phrase 'well-founded fear' indicates that there must be a valid objective basis for the applicant's fear of persecution. This element of the refugee definition deals with the risk or possibility of persecution occurring. The fear is considered well-founded if it is established that there is a 'reasonable' chance of its realization in future[129]. In order to make this determination, it is necessary to evaluate the applicant's statements in light of all the relevant circumstances of the case[130] and review circumstances existing in the person's country of origin and the conduct of actors of persecution. Therefore, establishing the well-founded fear is closely linked to the task of assessment of evidence and credibility governed primarily by Article 4 QD (recast). More specifically, the initial stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met[131]. Similarly to the Refugee Convention, the QD (recast) does not include any definition of the term well-founded fear neither does it stipulate the applicable standard of proof, as it closely follows the Refugee Convention definition[132] and refers specifically, to a third-country national who is outside the country of his/her nationality 'owing to a well-founded fear of being persecuted' for reasons of race, religion, nationality, political opinion or membership of a particular social group and is unable

[129] CJEU, Y and Z judgment, op. cit., fn. 33, para. 51; CJEU, X, Y and Z judgment, op. cit., fn. 20, para. 43
[130] Article 4(3) QD (recast)
[131] CJEU, judgment of 22 November 2012, case C-277/11, MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General, EU:C:2012:744, para. 64. This two-step approach has important consequences, as a different standard of proof may be applied to each step. While it is now widely accepted that the appropriate standard for the second step is 'reasonable fear' of future persecution (see Section 1.9.1.2 on the standard of proof, pp. 82), there is no accepted standard for the first step and and each country appears to apply its own standard of proof
[132] See Art. 1A(2) of the Refugee Convention.

or, 'owing to such fear', unwilling to avail himself of the 'protection' of that country[133]. According to the CJEU, to satisfy the above definition: ''The applicant must on account of circumstances existing in his country of origin and the conduct of actors of persecution, have a well-founded fear that he personally will be subject to persecution for at least one of the five reasons listed in the Qualification Directive and the Refugee... Convention[134]''. Therefore, illustrating the conditions above 'will indicate that the third country does not protect its national against acts of persecution'[135] and that those circumstances structure the basis why it is impossible for the person concerned, or why one reasonably refuses, to avail himself of the 'protection' of his country of origin within the meaning of Article 2(d) Recast, that concerns the terms of that country's ability to prevent or punish acts of persecution[136]. In order to better comprehend to the definition of 'refugee' outlined in Article 2(d) QD (recast), there are two additional provisions of the QD (recast) that are essential for comprehending the concept of 'well-founded fear'. Moreover, recital (36) QD (recast) addresses the well-founded fear of the family members of a refugee and Article 4(4) QD (recast) highlights the significance of past persecution. In this context, it is vital to emphasize that Article 4 (4) QD (recast) concerns both refugee status and subsidiary protection, whereas Article 2 (d) and recital (36) QD (recast) are applicable only to applicants for refugee status. Further guidance on the concept of well-founded fear was provided by the CJEU specifically in Y and Z[137], Abdulla[138] and X, Y and Z[139].

The QD is in fact the first international instrument which elaborates in detail on the concept of 'being persecuted' in the context of Article 1A of the Refugee Convention as, Article 1A does not specify which acts may constitute persecution. Attempts to define persecution had been unsuccessful due to the impossibility of enumerating, in advance, all the forms of ill-treatment which might legitimately entitle persons to benefit from the protection of a foreign State[140]. Consequently, it was left to States Parties to interpret this fundamental term

[133] See also CJEU, Y and Z judgment, op. cit., fn. 33, para. 50; CJEU, X, Y and Z judgment, op. cit., fn. 20, para. 42. See also the CJEU's earlier formulation in CJEU, Abdulla and Others judgment, op. cit., fn. 336, para. 56
[134] CJEU, Y and Z judgment, op. cit., fn. 33, para. 51; CJEU, X, Y, and Z judgment, op. cit., fn. 20, para. 43. See also the CJEU's earlier formulation in CJEU, Abdulla and Others judgment, op. cit., fn. 336, para. 57
[135] CJEU, Abdulla and Others judgment, op. cit., fn. 336, para. 58.
[136] Ibid, para. 59
[137] CJEU, Y and Z judgment, op. cit., fn. 33
[138] CJEU, Abdulla and Others judgment, op. cit., fn. 336
[139] CJEU, X, Y and Z judgment, op. cit., fn. 20.
[140] UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 1979 p. 14

which sometimes led to divergent jurisprudence[141]. The Directive is intended to remedy that by guiding the competent authorities of the Member States in the application of the Refugee Convention based on common concepts and criteria[142]. The criteria of Article 9(1) QD (recast) largely reflect common attempts to specify the term 'being persecuted' in Article 1A of the Refugee Convention in state practice. Whether human rights violations or other acts or accumulation of acts as defined in Article 9(1)QD (recast) constitute persecution has to be assessed under Article 4(3) QD (recast) on an individual basis taking into account all the relevant facts as they relate to the country of nationality or of former habitual residence at the time of taking a decision on the application, the relevant statements and documentation presented by the applicant, and the individual position and personal circumstances of the applicant[143].

It is clear from the reference to Article 1A(2) of the Refugee Convention that what is being attempted in Article 9(1) QD (recast) is a definition of the meaning of persecution within the meaning of Article 1A(2). In this context the provision sets out two alternative conditions for an act to amount to persecution. Common to these two alternatives is the requirement that the act be sufficiently serious or severe to be considered as an act of persecution. The threshold of sufficient seriousness can be crossed by the nature of one single act as a severe violation of basic human rights or alternatively by the repetition of such acts which, if committed as a single act, might not yet qualify as a severe violation. The difference between the second alternative of Article 9(1)(a)[144] and Article 9(1)(b)[145] is that the latter has a wider scope of application. More specifically, measures under Article 9(1)(b) need not be 'basic human rights violations' provided that they are sufficiently severe violations of human rights to affect an individual in a similar manner. As a result, in order to apply Article 9 in practice, no sharp distinction between Article 9(1)(a) and Article 9(1)(b) needs to be drawn, particularly if it is doubtful if an interference with individual rights amounts to a violation of 'basic' human rights. However, the decisive element of persecution is the severe effect of an act upon an individual's rights rather than the attribution of the violated rights to formal rankings[146]. Additionally, the CJEU does not

[141] See G.S. Goodwin-Gill, The Refugee in International Law (2nd edn, OUP, 1996) p. 62
[142] CJEU, X, Y and Z judgment, op. cit., fn. 20, paras. 39 and 51.
[143] See CJEU, judgment of 26 February 2015, case C-472/13, Andre Lawrence Shepherd v Bundesrepublik Deutschland, EU:C:2015:117, para. 25.
[144] Repeated acts
[145] Accumulation of various measures
[146] See CJEU, Y and Z judgment, op. cit., fn. 33, para. 66

draw a sharp distinction between the different forms of persecutory acts described in Article 9(1)(a) and Article 9(1)(b), as it just refers to the purpose of the Directive being to guide the competent authorities of Member States in the application of the Refugee Convention[147] and interprets the provisions of Article 9 as a definition of the elements which support the finding that acts constitute persecution within the meaning of Article 1A of the Refugee Convention[148].

Moreover, the purpose of Article 9(2) QD (recast) is to identify in-exhaustively those acts or measures which may, inter alia, potentially qualify as persecution. The non-exhaustive list of acts of persecution in Article 9(2) QD (recast) comprise acts of physical or mental violence, including acts of sexual violence, legal, administrative, police, or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner, prosecution or punishment which is disproportionate or discriminatory, denial of judicial redress resulting in a disproportionate or discriminatory punishment, prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion and finally acts of a gender-specific or child-specific nature. Also, regarding the wording of 'inter alia', it designates that the enumeration of acts of persecution is non-exhaustive thus; other types of acts could constitute acts of persecution. A likely example would be the arbitrary deprivation of nationality. For example, UK courts have long recognized that, in some circumstances, deprivation of nationality may amount to persecution, if the act of deprivation or revocation can be said to be a willful denial of nationality for a 'capricious or discriminatory reason' and, the denial is for a Refugee Convention reason[149]. The principal purpose of Article 9(2) is to assist in the identification of what type of acts potentially falls within the material scope of Article 9. The appearance on the list given in Article 9(2) relieves the decision-maker of the task of examining whether a type of act can potentially be persecutory. The list of acts does not negate the need for the examination in any specific case of whether one of the acts enumerated in Article 9(2) does fulfill the requirements of Article 9(1)(a) or (b).

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[147] Ibid para. 39.

[148] In the judgment X, Y and Z, the Court stated: 'It is clear from those provisions that for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva [Refugee] Convention, it must be sufficiently serious',ibid., para. 52.

[149] See EWCA (UK), JV (Tanzania) v Secretary of State for the Home Department, paras. 6 and 10; and EWCA (UK), Boban Lazarevic v Secretary of State for the Home Department, para 120. See also: Federal Administrative Court (Germany), BVerwG para 101; and National Asylum Court (France), judgment of 23 December 2010, M D, application no 09002572, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2010, 2011, pp. 33-36.

2.2.2. Grounds for Persecution:

The five different grounds for persecution in Articles 2(d) and 10 QD (recast) are race, religion, nationality, membership of a particular social group; and/or political opinion. However, neither the QD (recast) nor the Refugee Convention indicates any significance to the ordering in which they are listed; in other words, there is no hierarchy amongst the ground of persecution. Moreover, the reasons may overlap, such as where a political opponent belongs to a religious or national group which also attracts antagonism. Nonetheless, in the absence of being able to show at least one reason for persecution, an applicant cannot qualify as a refugee. For example, victims of famine or natural disaster will not have a viable claim for international protection without some additional factor present, as the required nexus with one of the Directive's reasons will be absent, as their claim is unlikely to arise from a threat of persecution. Similarly, with civilians who are at risk of truly indiscriminate violence arising in circumstances where there is no basis for persecution behind the harm, they fear also have no valid claim. Additionally, the critical focus must be on the actions of the persecutor. Therefore, when assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution[150]. Furthermore, Article 10 reflects the fundamental axiom of refugee law that, eventually, what matters when assessing the risk of 'being persecuted' on a relevant ground is not who or what people are but how they are perceived by the actors of persecution. Indeed, there may even be circumstances where claiming asylum itself[151] leads to the imputation of an adverse political opinion. Experience suggests that this will be rare in practice but equally that it cannot be ruled out[152]. Moreover, there is a requirement both for a reason for persecution, and for a connection between the reason and the persecution. Each element is qualified by the term 'in particular', indicating that these are relevant factors but not exhaustive ones[153].

[150] Article 10(d) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

[151] e.g. if such an action was viewed as striking a hostile posture to the government of the country of origin and thus constituting the holding of an opinion, thought or belief on a matter related to the potential actors of persecution

[152] For example, see the UNHCR Handbook, para. 83

[153] European Council, Asylum Working Party, Outcome of Proceedings, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need

2.2.3. The Nexus

Article 9(3) states there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts. In other words, the required nexus can be of two kinds as the reasons for persecution must either be connected to the acts of persecution or the absence of protection against such acts. Furthermore, the connection clarifies that acts of persecution as such do not qualify a person as a refugee unless they are committed for one of the reasons for persecution. There is general agreement that in order to establish the required causal link the acts do not need to be solely motivated by one of the five reasons. There may be other reasons why a persecutory act has been performed in addition to the motives of race, religion, nationality, membership of a particular social group or political opinion. The required connection under Article 9(3), like that under the Refugee Convention, is demonstrated if one of the reasons is a substantial contributing factor[154]. Thus, if one of the reasons for persecution is a substantial contributing factor, it does not have to be the only or primary one. To similar effect, although using the language of decisiveness, the Czech *Nejvyšší správní soud* in the Supreme Administrative Court stated that the plurality of motives of the authorities does not mean that the applicant does not meet the grounds of persecution and that he should be disqualified from refugee status. However, there is no need that race, religion, nationality, membership of a particular social group, political opinion or gender should be the only and exclusive grounds as to why the applicant is persecuted. It is essentially enough if one of them is the decisive ground to cause serious harm or to refuse protection[155]. Furthermore, an applicant may not be able to show subjective persecutory intentions on the part of the perpetrator particularly where persecution occurs as an element of a general policy of discrimination, which clearly falls into the scope of application of Article 9(3). The link to the persecutory consequences of an act or measures can be shown either by the subjective motivation of the persecutor or by the objective impact of the measure in question[156].

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international protection, 25 September 2002, EU Doc 12199/02 ASILE 45; and European Council, Asylum Working Party, Outcome of Proceedings (EU Doc 12620/02), op. cit., fn. 132, 'Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, Articles 1-10', in K. Hailbronner (ed.), European Immigration and Asylum Law: A Commentary (Hart, 2010) p. 1080.

[154] Hathaway, R.P.G. Haines, M. Kagan et al., 'The Michigan Guidelines on Nexus to a Convention Ground', Michigan Journal of International Law (2002) 211-221, para. 13.

[155] Supreme Administrative Court (Czech Republic), judgment of 30 September 2008, SN v Ministry of Interior, 5 Azs 66/2008-70

[156] Art. 9 Directive 2011/95, para. 57.

In the words of the UK House of Lords: 'The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason'[157]. When assessing the available evidence, it may be unrealistic to expect the persecutors to have clearly identified themselves or to have claimed responsibility for their actions whereas an appropriate inference may be drawn from the evidence as a whole[158].

Part II: Points of Convergences and Divergences of Persecution in International Criminal and Refugee Law

Chapter 1: Exclusion Clause; Intersection of ICL and IRL or Misalignment?

As mentioned above, the Convention strives to provide basic protection to some of the world's most vulnerable populations by creating rights for those who are unable to return to their country of origin due to a well-founded fear of being persecuted on the basis of one of five enumerated grounds.[159] The parties recognize the Refugee Convention as an instrument that 'sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope'.[160] It thus represents an international commitment for the provision of certain basic entitlements, and guarantees that where an individual's home state fails to protect these fundamental rights, asylum states will do so.[161]

However, not all individuals who meet the Convention's refugee definition are afforded protection. Article 1F stipulates that asylum seekers who have committed certain serious crimes, including war crimes and CAH and will be denied the benefits associated with being a Convention refugee. As a result, each time UNHCR or a resettlement country conducts an assessment to establish whether an individual will receive the benefits of refugee protection, it considers not only whether the refugee definition has been met[162], but also whether the

[157] See 'The Michigan Guidelines on Nexus to a Convention Ground', op. cit., fn. 238, para. 9
[158] Ibid, paras. 12 and 13
[159] Article 1 A(2)of 1951 Geneva Convention
[160] J C Hathaway, *The Rights of Refugees Under International Law* (CUP 2005) 13, citing 'Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', UN doe HCR/MMSP/2001/09, 13 Dec 2001, incorporated in Executive Committee of the High Commissioner's Program, 'Agenda for Protection', UN doe EC/52/SC/CRP9/Rev. 1, 26June 2002, Part II, Preamble, para 2.
[161] The precise scope of the rights that attach to recognition under the 1951 Refugee Convention are ill defined. james Hathaway notes that only the core duty of *non-refoulenent* has received much scholarly or judicial attention, a practice he argues needs to change to ensure that proper consideration is also given to other rights. Hathaway claims that this is particularly important given current trends towards state provision of less robust forms of protection.
[162]Generally termed an 'inclusion assessment'

commission of certain acts that prevent access to the protections which would otherwise be afforded[163]. Exclusion assessments are complicated and require application of not only refugee law, but also international humanitarian law, and criminal law. As a result, explicit reference in article IF to the familiar terms of 'war crimes' and 'crimes against humanity' makes jurisprudence deriving from international and domestic criminal courts particularly relevant to these determinations.

There are, however, significant challenges associated with transposing legal examinations and frameworks directly from one paradigm to another, and caution must be taken to ensure that underlying principles of fairness and justice are not compromised. This section evaluates the consequences of applying jurisprudence developed in the criminal context to exclusion assessments.

The Convention's reference to international crimes as mandatory grounds for denying refugee status yields a complex interaction between international criminal and refugee law. These two areas of law, while originating in the same historical moment, are rooted in fundamentally different purposes and principles. The importation of ICL into the determination of refugee status has critical implications for the personal rights of individuals seeking asylum. Furthermore, ICL and protection under the international refugee regime serve fundamentally different societal purposes; utilizing the former in the service of the latter reveals structural incompatibilities between the two legal systems. ICL tribunals sit in judgment of the perpetrators of wartime atrocities. They seek to administer retribution, incapacitate the perpetrators, hold them accountable for their actions, and deter similar conduct in the future.[164] These objectives constitute the essence of criminal law, domestic and international law.[165] In contrast with domestic criminal courts, international criminal tribunals have often articulated additional, broader goals such as the desire to produce a reliable historical record of the context of international crimes, to provide a venue for giving voice to victims, to propagate human rights values, and to achieve objectives related to peace and security, such as by stopping an ongoing conflict. Criminal justice has the dual objective of satisfying both private and collective interests by bridging the victim's private desire for "an eye for an eye" retribution with the "public need

[163] Generally termed an 'exclusion assessment'

[164] See Mirjan R. Damaska, What is the Point of International Criminal Justice? 83 Chi.-Kent L. Rev. 329, 331 (2008)

[165] See generally Albert W. Alschuler, The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next, 70 U. Chi. L. Rev. 1 (2003).

to prevent and repress any serious breach of public order and community values."[166] ICL is an component in the setting of conflict resolution and transitional justice, as societies emerge from a period of oppression and seek to reestablish stability, peace, and rule of law.[167] While criminal justice systems deprive wrongdoers of liberty, refugee systems protect the life and liberty of victims when their home countries have failed to do so. Refugee law allows individuals to escape from oppression and find stability, peace, and rule of law outside of his country of origin. IRL, established by the Convention and Protocol, created the foundations for international and domestic administrative regimes that would offer refuge to victims of the aforementioned international crimes. The Convention enabled a system of international protection to ensure the security, legal protection, and human dignity of individuals suffering from persecution. The Convention's exclusions coordinate the goals of these two legal regimes. Article 1F excludes from refugee status those considered to be undeserving of the protection that the status entails. As one Canadian judge explained, "those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees."[168] The provisions further ensure that serious criminals are not able to evade prosecution and punishment for their crimes by claiming asylum.[169] Article 1F thus preserves the political and ethical imperative to continue protecting refugees, as states parties cannot recognize as refugees persons in flight from legitimate domestic or international criminal prosecutions for serious crimes, or who were guilty of acts contrary to the purposes and principles of the United Nations.[170] Aligning refugee law with ICL thus strengthens its moral authority and political viability.[171] In so doing, Article 1F of the Convention brings the international criminal regime and refugee regime in service of one another. The existence of transnational accountability mechanisms for perpetrators of serious international crimes helps guarantee that these criminals will not take advantage of the protection offered by refugee law, while refugee law helps ensure that these criminals will not evade prosecution under those mechanisms. This symbiosis rests on an equilibrium between exclusion's dual purposes: to determine who is deserving of refugee protection on one hand, and to ensure international criminals do not evade prosecution on the

[166] Antonio Cassese, Reflections on International Criminal Justice, 9 J. Int'l. Crim. Just. 271, 271 (2011).
[167] Patrick Keenan, The Problem of Purpose in International Criminal Law, 37 Mich. J. Int'l L. 421, 422 (2016) (examining the purposes of international criminal law in the second decade of the International Criminal Court)
[168] Pushpanathan v. Canada, [1998] 1 S.C.R. 982, 984–85 (Can.)
[169] James C. Hathaway, The Law of Refugee Status 526 (2014).
[170] Ibid
[171] Ibid

other. As a result of the Convention's criminal purpose, Article 1F inevitably subsumes findings of guilt for criminal acts into an administrative determination of refugee status, the fundamental goal of which is to provide or deny protection, not to establish moral responsibility for the purposes of accountability, retribution, incapacitation, or deterrence. Nevertheless, when the facts of an individual's case raise a potential Article 1F issue, a quasi-criminal investigation and judgment become a mandatory component of the administrative adjudication. A criminal trial returns finding of guilt and attributes moral responsibility in order to achieve retribution, incapacitation, rehabilitation, and deterrence. A domestic immigration tribunal, however, does not make a finding of guilt beyond a reasonable doubt to attribute criminal responsibility for those several purposes. Instead, it finds "serious reasons for considering" an applicant may be guilty of Article 1F(a) crimes in order to deny an applicant refugee status and, accordingly, lawful presence in the country of refuge. However, the results, the deprivation of life and liberty, are arguably the same.[172] This interaction between criminal and refugee law in determining an asylum seeker's fate is also noteworthy given the important structural differences between the two bodies of law that offer different degrees of protection to individuals on trial or seeking asylum. Procedurally, criminal and immigration proceedings contrast in significant ways. While the focus of a criminal trial is on the defendant, victims can participate in the proceedings by testifying as witnesses,[173] and the proceedings are generally open to the public. Asylum adjudications, on the other hand, are often confidential in order to protect the identity of the respondent.[174] A closed-door Article 1F(a) case has none of the pedagogical effects or purposes of public criminal trials.[175]

[172] For an argument that asylum denial, or removal in general, should be considered a form of punishment, see Kevin R. Johnson, An Immigration Gideon for Lawful Permanent Residents, 122 Yale L.J. 2394, 2404–06 (2013).

[173] In cases before the International Criminal Court, victims have a statutory right to participate in the proceedings. International Criminal Court Office of the Prosecutor, Policy Paper on Victims' Participation, 3, U.N. Doc. RC/ST/V/M.1 (Apr. 12, 2010)

[174] While removal proceedings in U.S. Immigration Courts are open to the public, evidentiary hearings involving an application for asylum can be closed upon the respondent's express request. 8 C.F.R. para 1240.11(c)(3)(i) (2013). In Canada, admissibility hearing or detention review proceedings must be held in public unless they concern a claimant of refugee protection, in which case they must be held in private. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 166(c) (Can.)

[175] In contrast to international criminal trials, the private nature of an Article 1F(a) proceeding means that it is less likely to be perceived as a politicized "show" trial, where the outcome of the case may be influenced by larger political and symbolic concerns or by a display of "victor's justice." Since immigration proceedings are classified, they generate fewer political considerations among States and the international community than international criminal tribunals. However, Article 1F(a) cases ultimately generate bodies of case law in which the host country passes judgment on the culpability of individuals seeking refuge. Often, the criminal activity at issue was a product of a State's or a regime's sponsored or organized violence. Indirectly, then, refugee determinations may amount to political judgments or statements by one sovereign state about another.

Moreover, when the asylum-seeker is accused of Article 1F(a) crimes, there is no opportunity for victims to testify against their alleged persecutor. Consequently, there is little of the philosophical obligation that underlies international criminal proceedings to publicly acknowledge and memorialize the victims through the process of exacting retribution on their behalf. It is also significant that criminal and civil proceedings make use of different standards of proof. While immigration courts and tribunals assume a quasi-criminal character in making Article 1F(a) determinations, the standard of proof for the purposes of exclusion is universally understood to be lower than that in criminal trials. The Convention establishes the standard of proof under Article 1F(a) is "serious reasons for considering." Not only are civil standards generally lower than the "beyond a reasonable doubt" standard in criminal law, but in some jurisdictions, proving the elements of exclusion under Article 1F(a) is even lower than the civil standard,[176] despite guidance by UNHCR urging a restrictive interpretation due to the serious consequences of exclusion.[177] Courts in the United States have equated the standard for exclusion with the low threshold set in probable cause hearings. Canadian courts have interpreted "serious reasons for considering" to be lower than the civil standard of "balance of the probabilities."[178] A Canadian judge framed the standard for an Article 1F(a) finding as when "no properly instructed tribunal could fail to come to the conclusion that the appellant had been personally and knowingly involved in persecutorial acts."[179] The Supreme Court of Canada has explained that something less than a criminal burden of proof is appropriate in Article 1F(a) cases because immigration tribunals "do[ ] not make determinations of guilt." That Court referred to "serious reasons for considering" as a "unique evidentiary standard" that, while lower than both the criminal and civil standards, "does not . . . justify a relaxed application of fundamental criminal law principles" to make room for theories of liability that would be at odds

[176] Matthew Zagor, Persecutor or Persecuted: Exclusion Under Article 1F(A) and (B) of the Refugees Convention, 23 UNSW L. J. 164, 168 (2000). Zagor draws attention to the danger of cursory administrative decision-making given the seriousness of the consequences of a decision to exclude, and the low standard of proof set in most common law jurisdictions

[177] UNHCR, Background Note, supra note 28, 4 ("[A]s with any exception to human rights guaran- R tees, the exclusion clauses must always be interpreted restrictively and should be used with great caution . . . . [S]uch an approach is particularly warranted in view of the serious possible consequences of exclusion for the individual.").

[178] Moreno v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 298, 308 (Can. C.A.); Sivakumar v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 433, 445 (Can. C.A.); see also Interpretation of the Convention Refugee Definition in the Case Law, Immigr. & Refugee Bd. Can. (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/ RefDef.aspx#table

[179] Ramirez v. Canada (Minister of Employment and Immigration), 1992 CarswellNat 94F (Can. C.A.) "To convict the appellant of criminal liability for his actions would, of course, require an entirely different level of proof, but on the basis of the lower-than-civil-law standard established by the nations of the world, and by Canadian law for the admission of refugees, where there is a question of international crimes, I have no doubt that no properly instructed tribunal could fail to come to the conclusion that the appellant had been personally and knowingly involved in persecutorial acts."

with basic tenets of criminal law. Courts in the UK have similarly grappled with the standard of proof in exclusion cases and determined that the language of the Convention "implied something less than proof on either a criminal standard of beyond reasonable doubt or a civil standard of balance of probabilities." Rejecting a "rigid application" of the civil standard of proof, the Immigration Appeal Tribunal focuses on the "words of Art 1F, i.e. 'serious reasons for considering" in order to account for "the possibility that doubtful events may have taken place" under a "more rounded approach." At least one case from the UK Immigration Appeals Tribunal noted the oddity of applying a civil standard of proof to an essentially criminal finding. In parsing the standard for aiding and abetting liability under Article 1F, the Tribunal noted that "international criminal law and international humanitarian law . . . should be the principal sources of reference in dealing with such issues as complicity." After citing several sources of international criminal law, the Tribunal cautioned that "such reference will need to bear in mind the lower standard of proof applicable in Exclusion Clause cases." It did not, however, explain how adjudicators should reflect the different standard of proof in reconciling the authority of international criminal law with the nature of refugee status determinations. Exclusion proceedings thus apply substantive definitions of crimes, modes of commission, and defenses from ICL to a de facto determination of criminality using a lower standard of proof. Indeed, the ambiguity surrounding the standard of proof for essentially judicial determinations of guilt in a civil context made the Convention's drafters uneasy. They were troubled by the idea that administrative decision-makers applying Article 1F(a) would find themselves in the anomalous position of rendering essentially judicial judgments regarding the likelihood of criminal guilt.[180] The opinion in Ezokola v. Canada, the leading Canadian case on Article 1F(a) interpretation, illustrates this latent tension between the administrative and criminal qualities of refugee adjudication and between the refugee and criminal purposes of exclusion.[181] The Canadian Supreme Court simultaneously distinguished the case from an international criminal proceeding while relying heavily on foundational principles of criminal law. The Court first treated the refugee and criminal analyses as distinct: "Unlike international criminal tribunals, the Refugee

[180] Matthew Zagor, Persecutor or Persecuted: Exclusion Under Article 1F(A) and (B) of the Refugees Convention, 23 UNSW L. J. 164, 168 (2000). Zagor draws attention to the danger of cursory administrative decision-making given the seriousness of the consequences of a decision to exclude, and the low standard of proof set in most common law jurisdictions. Lord MacDonald, the United Kingdom delegate at the drafters' R convention, warned, "[I]t is dangerous to entrust such a power to the executive organs of a government." Id

[181] See generally Ezokola, 2013 SCC 40.

Protection Division does not determine guilt or innocence, but excludes, ab initio, those who are not bona fide refugees at the time of their claim for refugee status."[182] However, the inquiry into an asylum seeker's complicity with Article 1F(a) crimes turned on a finding of a culpable mental state, leading the Court to rely on criminal law: "A concept of complicity that leaves any room for guilt by associate or passive acquiescence violates two fundamental criminal law principles: the principle that criminal liability does not attach to omissions unless an individual is under a duty to act, and the principle that individuals can only be liable for their own culpable conduct."[183] In Ezokola, the Court stated its intention to "bring Canadian law in line with international criminal law, the humanitarian purposes of the Refugee Convention, and fundamental criminal law principles".[184] In so doing, the Court explicitly recognized their interconnectedness under Article 1F(a) and the centrality of criminal law in the Article 1F(a) analysis. The foregoing analysis has outlined the differences between ICL and refugee protection as they relate to the individuals subject to those respective legal proceedings. Beyond the individual level, ICL and refugee protection serve different societal functions that further shape their structural incompatibilities. Unlike international criminal trials, refugee cases do not seek to generate a historical record of past atrocities. Therefore, the nature of fact-finding and role of historical perspective differ between the two regimes. It is not the purpose of Article 1F(a) adjudication to encourage future generations to recognize and remember what happened in history. While they may do so inadvertently, immigration tribunals do not see the documentation of history as a primary objective. They are also incapable of generating a factual record of nearly the same breadth, depth, and accuracy as that which would be put together before an international criminal court.

Asylum proceedings tend to take place while the conflict that gave rise to allegations of Article 1F(a) crimes is still ongoing, meaning that adjudicators cannot rely on historical perspective to contextualize the specific experiences of any individual. In contrast, international criminal trials administer justice at the end of an armed conflict and usually focus on the crimes perpetrated by those who have lost at the military or political level.[185] Whereas a historian may take the stand as an expert witness in an international criminal trial to contextualize the charges

[182] Ibid 38.
[183] Ibid
[184] Ibid 38
[185] Antonio Cassese, Reflections on International Criminal Justice, 9 J. Int'l. Crim. Just. 271, 271 (2011).

against individual defendants,[186] in an immigration hearing the parties may rely on current country conditions reports and expert witnesses to try to situate the petitioner's story against the larger, ongoing social, political, economic, and cultural forces at play.[187] Both international criminal trials and individual refugee determinations contend with large political crises by means of individual responsibility.[188] Like international criminal trials, Article 1F(a) adjudication is directed at the particular actions of individual human beings instead of the State or organization whose policies, laws, and administration gave rise to the international crimes at issue. Toward the end of or many years after a conflict, international criminal law seeks to establish individual responsibility in the context of the global community's collective assignation of guilt, such as to the whole State, political party, or military organization.[189] Refugee law, which establishes who is eligible for and deserving of protection, operates on a much smaller historical and political scale. While expert historians or country conditions experts can help attribute blame to a government regime or larger socio-political forces, the goal of each legal system is to determine whether a particular individual deserves punishment or protection. The international criminal legal regime has received significant criticism for what some see as an unrealistic, impossible goal of finding and conserving the truth of a complex series of events involving the irregular action by major international players. Thus, criminal law may not be an adequate mechanism for comprehending large-scale international crimes, which take place against a background of "system criminality" where individual and collective responsibility is mixed[190]. If the search for individual responsibility is a challenge for ad hoc tribunals or permanent international criminal court, which is relatively more accustomed to dealing with the most complicated cases and have a relatively robust knowledge of a given conflict, then it is fair to say that immigration courts are less equipped to make similar determinations. Nonetheless, Article 1F(a) mandates that immigration courts adjudicating refugee status assume the mantle of an international criminal court. Understanding Article 1F(a) in consequence necessitates a careful reconsideration of how international criminal law has been and should be imported into the asylum determination process. Where exclusion under Article 1F(a) may be implicated, immigration tribunals must

[186] Richard Ashby Wilson, Writing History in International Criminal Trials 69–70 (2011)
[187] For an overview on the role experts play in helping the judiciary understand the complexities of asylum cases, see Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony (Benjamin N. Lawrance & Galya Ruffer eds., 2015)
[188] Marti Koskenniemi, Between Impunity and Show Trials, 6 Max Planck United Nations YB 1 (2002).
[189] Antonio Cassese, Reflections on International Criminal Justice, 9 J. Int'l. Crim. Just. 271, 271 (2011).
[190] Ibid

turn to various sources of international criminal law, including statutes and jurisprudence from a range of courts and jurisdictions.

For exclusion to be justified, it must be established, based on clear and reliable evidence, that the person concerned incurred individual responsibility for acts which fall within one of the three categories under Article 1F of the 1951 Convention. When assessing the applicability of exclusion from international refugee protection, asylum adjudicators often turn to ICL, international humanitarian law, international human rights law as well as general international law, both with regard to the definitions of the kinds of conduct which fall within the scope of Article 1F and the determination of individual responsibility. This is reflected in national jurisprudence as well as UNHCR's guidance on exclusion from international refugee protection.[191] Although asylum adjudicators considering exclusion must apply concepts developed in criminal law, there are important differences between an exclusion assessment and a criminal trial. The former is concerned with the person's eligibility for international refugee protection, rather than his or her innocence or guilt for a particular criminal act. Falling within Article 1F means that an individual does not qualify for refugee status and is, therefore, also not within the mandate of UNHCR. Most significantly, it means that he or she does not benefit from protection against refoulement under international refugee law. Exclusion from international refugee protection does not, however, affect the excluded person's entitlement to protection, including against refoulement, under relevant international human rights law provisions, where applicable, nor does it in any way detract from the universally recognized principle of presumption of innocence in criminal proceedings. Where criminal proceedings for international crimes or other serious crimes are pursued against an asylum-seeker or a refugee, the significance of the indictment and any subsequent acquittal on exclusion from international refugee protection needs to be examined considering all relevant circumstances. At the level of national courts, whether or not an indictment, or for that matter, a conviction, is sufficient to meet the "serious reasons for considering" threshold required under Article 1F must be assessed on a case by case basis, taking into consideration all relevant factors, including the possibility that criminal prosecution may be a form of persecution. Similarly, in considering whether an

[191] UNHCR, "Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees", 4 September 2003, HCR/GIP/03/05, available at: http://www.unhcr.org/refworld/docid/3f5857684.html.

acquittal by a national court would establish that there are no "serious reasons for considering" that the individual concerned is excludable, adjudicators would need to examine the grounds for acquittal as well as any other relevant circumstances. An indictment by an international criminal tribunal or court is, on the other hand, generally considered to meet the "serious reasons for considering" standard required under Article 1F of the 1951 Convention. If the person concerned is subsequently acquitted on substantive grounds, following an examination of the evidence supporting the charges, the indictment can no longer be relied upon to support a finding of "serious reasons for considering" that the person has committed the crimes for which he or she was charged. An acquittal by an international criminal tribunal or court does not mean, however, that the person concerned automatically qualifies for international refugee protection. It would still need to be established that he or she has a well-founded fear of being persecuted linked to a 1951 Convention ground. Moreover, exclusion may still apply, for example, in relation to crimes not covered by the original indictment. Procedurally, if the asylum determination was suspended pending the outcome of the criminal proceedings, it can be resumed following the acquittal. Likewise, where the person was previously excluded based on the indictment, the acquittal should be considered as a sufficient reason to reopen the asylum determination. If the indictment had been used to cancel or revoke previously granted refugee status, a reinstatement of refugee status may be called for. However, UNHCR's current guidelines on the interpretation and application of the exclusion clauses under Article 1F of the 1951 Refugee Convention do not expressly address the situation where an individual indicted by an international criminal tribunal or court is subsequently acquitted. It is important that the exclusion framework must include a mechanism that protects the object and purpose of the Refugee Convention generally, and Article 1(F)(a) particularly, by explicitly bearing in mind key structural and remedial differences between ICL and exclusion.

1.1 Foundational Principles: Material and Temporal Scope

There are many obvious differences between exclusions under Article 1(F)(a) and findings of liability under international criminal law. For example, it is obvious that these two systems vary in the structure and expertise of their decision-making bodies, in the nature of their proceedings, and in the consequences of a positive finding. While it is well beyond the scope of

this essay to asses and evaluate all the implications of these differences, understanding certain key distinctions is critical to ensure that exclusion decisions are principled and pragmatic. Thus, these differences lead to particular challenges for creating an exclusion paradigm that both fulfills the Refugee Convention's mandate that exclusion relies on international criminal law and ensures that Article 1(F)(a) is applied in a way that respects the provision's underlying objectives.

In particular, signatories to the Rome Statute have agreed that modern international criminal law aims to protect "peace, security, and the well-being of the world."[192] The purposes underlying this system are broad and ambitious, and include establishing that individuals have core duties based on the fundamental values of the international community, regardless of the norms in their individual nations and states.[193] The system thus tries and punishes international criminals with the goals of retribution and both general and specific deterrence.[194] The normative emphasis should not be understated. Indeed, ICL is intended to contribute to the prevention of future human rights violations by ending impunity for the worst offenders and sending a message that the international community will not tolerate such atrocious conduct. It also serves to counter denials of systemic human rights violations in a high-profile forum, providing an important truth-seeking mechanism. In conclusion, most decisions rendered by the ICL system aims to produce a normative message that extends far beyond the particular criminal accused. Exclusion decisions, in contrast, are focused on maintaining the integrity of the asylum system by considering the individual responsibility of thousands of refugee claimants. While there is undoubtedly some normative value in denying access to the Convention to those responsible for international crimes, prevention and punishment are not the primary objectives of individual decisions under Article 1(F)(a). Indeed, the majority of exclusion decisions are made by the UNHCR or lower-level state administrative bodies, and many outcomes are not even available to the public as a result of privacy concerns. This sets a significant limitation on their role as

[192] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 There are currently 122 state parties to the Statute. The first prosecution of the ICC took place in 2009 against Thomas Lubanga Dyilo.

[193] See, e.g., Antonio Cassese, International Criminal Law 3 (2nd ed. 2008); Gerhard Werle, Principles of International Criminal Law (2014).

[194] See generally Robert Cryer, ET Al., An introduction to International Criminal law and Procedure 26 28 (2nd ed.2010). General deterrence is aimed at discouraging people generally from committing crimes, while specific deterrence is aimed at dissuading a particular offender from committing crimes again in the future.

precedents and reinforces the notion that the normative and deterrent value of individual exclusion decisions is extremely limited.

The articulation of nullum crimen nulla poena sine lege is found in human rights treaties, as a basic right that the courts can not infringe. The Universal Declaration of Human Rights articulates the prohibition of retroactive laws in penal proceedings in Article 11(2), as follows:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 the penal offence was committed."

More specifically, it embraces unequivocally both national and international law; whilst the latter comprises also of unwritten customary norms and general principles. Further, subsequent instruments also lay out the nullum crimen principle, but indicate that rules can be applied even if not part of national or written law at the time of the offence, if they are part of general principles of international law. Defining what constitutes as a general principle of international is left for the interpretation of the penal court. Article 15(1) of the ICCPR sets outgeneral prohibition of retroactive punishment,[195] but the second paragraph of that Article incorporates general principles of law recognized by the ''community of nations'' which can be applied in courts without breaching the nullum crimen principle.[196] Likewise, The European Convention on Human Rights contains a nearly identical clause[197] which slightly differs from that of Article 15 of the ICCPR. The difference is demonstrated in the first paragraph of Article 7 ECHR, which stops short of mentioning that the offender will benefit if a lighter penalty has been introduced since the commission of the offence. Furthermore, Article 15(2) ICCPR and 7(2) ECHR indicate that even if a state has not codified certain principle of international law or it is not explicitly included in the applicable law of an international court, no violation of nullum crimen occurs if the conduct in question was criminal under that general principle at the time it

[195] "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 law for the imposition of the lighter penalty, the offender shall benefit thereby."

[196] "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.

[197] Article 7 : No punishment without law

took place. This is also analogous to the wording of the Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, setting up the ICTY, stating that the court must apply norms that are "beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise".[198] If ICL is to adhere to the principles of criminal law, say opposed to principles human rights law or general international law, the principles of legality cannot be overlooked. ICL, especially with the emerging importance of the ICC and ICL in general, should be exemplary and provide a model for national courts, not least in enshrining the principles of legality.[199] ICL, in spite of deriving many principles from human rights law, also can function as a counterforce to human rights liberalism. The courts must weigh the different options and outcomes when the positive law does not provide solutions. On the one hand, in order to remain in the realm of rule of law, law cannot be simply created, nor directly transposed, for example, from human rights norms into substantive criminal law.[200] On the other, too rigid fixation with exclusive positive law and overlooking human rights liberalism altogether results in a stalemate situation in the progress of international criminal law. Nevertheless, the progress arising through international rule-making and judicial decisions should stay within the system of law, because otherwise international law is reduced into any other social norm, losing its normative eminence. Consequently, if a distinction is not being reserved between those rules of international conduct which have the status of law and those which do not, international law cannot survive as a distinct normative system at all." This is not to argue in favor of judicial restraint, which would halt the development of law, or to make it completely dependent on the inter-state agreements, hence falling back to the state-centric international legal order. Human rights norms may be given a broad and liberal interpretation in order to achieve their objects and purposes, in international criminal law there are countervailing rights of suspects that are protected through principles

[198] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, 3 May 1993 ,available at http://www.un.org/icty/legaldoc-e/index-t.htm,para.34.

[199] Darryl Robinson,The Identity Crisis of International Criminal Law", 21 Leiden Journal of International Law(2008)925.

[200] For example, the definition of torture in human rights law and in international criminal law is not identical: see Prosecutor v. Kunarac, IT-93-23-T & IT-96-23/1-T, ICTY Trial Chamber, 22 February 2001, paras. 482 and 496.

requiring that the law be strictly construed and that ambiguity be resolved in favor of the accused.

In addition to the difference concerning the material scope, there is also the temporal factor that plays a significant role while applying both ICL and IRL. Temporal jurisdiction is more restrictive in ICL. The ICTY had jurisdiction over crimes committed since 1 January 1991; it had concurrent temporal jurisdiction, unlike the ICTR, as the conflicts in the Former Social Federal Republic of Yugoslavia were still ongoing at the time. The ICTR had jurisdiction over crimes committed during the period of 1 January to 31 December 1994. Likewise, the ICC does not have jurisdiction over offences committed before the entry into force of the Statute on 1 July 2002. States were unwilling to allow the ICC to deal with past practices. If a State becomes a party to the Statute after its entry into force, the Court may exercise jurisdiction only with respect to crimes committed after the Statute has entered into force for that State[201]; the State may, however, make a declaration under Article 12(3) to fill this temporal gap. Crimes committed before 1 July 2002 may not be tried by the ICC under any circumstance.[202] Conversely, the 1951 Convention despite being originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe; The 1967 Protocol removed these limitations and thus gave the Convention universal coverage.

Chapter 2: Agents of Persecution

The concept of Agents of Persecution is an element in the determination of refugee asylum claims as well as in the determination if the crime of persecution has been committed. In ICL, as the definition of CAH outlined in the ICTY and ICTR Statutes and the Rome Statute; an explicit policy requirement for the purposes of CAH is required. Article 7 specifies that a crime against humanity refers to a list of underlying prohibited acts such as murder, extermination, torture, rape, apartheid, deportation or forcible transfer of a population, among others, "when committed as part of a widespread or systematic attack directed against any civilian population, with

[201] Article 11 of Rome Statute

[202] Even if the Security Council were minded to refer a situation to the ICC in which the alleged crimes were committed before the entry into force of the Statute, the Court would not be able to exercise its jurisdiction, since it is a creature of the Statute, not of the Security Council, and although the Council's resolutions may override the treaty obligations of States (Art. 103 of the Charter), they cannot change the powers of an independent organization.

knowledge of the attack." This part of the provision endorses the mass crime prevention rationale of crimes against humanity that is evident from prior ILC iterations. Article 7(2)(a) then captures the contextual element, explicitly clarifying that an 'attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph I against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. Therefore, in order to find that a crime against humanity has been committed, there is a threshold requirement that the acts must have been carried out 'pursuant to or in furtherance of a State or organizational policy'[203]. The use of the word 'organizational' in this Article raises questions about what type of groups may be considered perpetrators of such crimes. However, it can be implemented by any organization that is capable of committing widespread or systematic attacks against a civilian population[204]. Whether the group is capable of committing such an attack would be examined with certain non-required criteria in mind, and the understanding that the policy need not be formal or, for that matter, emanate from the State or entities belonging to it.[205] In a way, this view tends to assert the primacy of the mass crime rationale for the textual definition of the offense. Furthermore, recent cases before the ICC raise the question of on behalf of which entities crimes against humanity can be committed. Interpreting the ''organizational policy'' requirement in its context, this article argues that in principle crimes against humanity can be committed pursuant to or in furtherance of a policy of any organization that has the capacity to orchestrate a widespread or systematic attack against a civilian population. It is shown that this does not broaden the scope of the crime indefinitely but that concrete requirements defining such entities are found in the contextual elements of CAH. Thus, CAH have also considerably expanded since Nuremberg to encapsulate various forms of criminality committed in a widespread or systematic scale by both State officials and private individuals, in both times of peace and war. These developments provide legal basis to sanction most atrocities committed today. Criminal responsibility for such atrocities attaches to all individuals equally, whether they are State or non-State actors.

The actors of persecution was also an issue posed in whether the recognition of refugee status under the 1951 Convention and/or 1967 Protocol is justified only if direct or indirect

[203] Article 7(2)(a) of the Rome Statute.
[204] Ruto Decision, Case No. ICC-01/09-01/11, para 20
[205] Ibid

involvement by the State of the country of origin is indicated by way of its having facilitated, aided, condoned, or tolerated the acts of persecution threatened or perpetrated upon the applicant. In the Convention it is not indicated that the authors of that instrument intended to require that a well-founded fear of persecution must emanate from the government or those perceived to be acting in its interest. Clearly, the spirit and purposes of the Convention would be contravened and the system for the international protection of refugees would be rendered ineffective if it were to be held that an asylum seeker should be denied needed protection unless a Stale could be held accountable for the violation of his/her fundamental human rights by a non-governmental actor. On the specific issue at stake, UNHCR's position is that recognition of refugee status under the Convention is also justified where persecution is perpetrated by non-governmental entities, for example, irregular forces or the local populace, towards an individual on account of the grounds enumerated in the 1951 Convention, under circumstances indicating that the State was unwilling or unable to offer effective protection against the threatened persecution. Hence, persecution can be perpetrated by "the local populace" or "sizeable fractions of the population" as well as by the "authorities of the country". "Sizeable fractions of the population" embraces any non-governmental group such as a guerilla organization, "death squads, anti- as well as pro-government paramilitary groups, etc''[206]. The fact must be acknowledged that in today's world, serious violations of human rights and threats to life, liberty and security of person that constitute persecution are not perpetrated solely by agents of the State. Persecution that does not involve State complicity is still, nonetheless, persecution. However, in the case of persecution that does not emanate from the State, it must be evidenced that the State was either unwilling or unable to provide protection. In certain political contexts, such as civil war, anarchy or breakdown of law and order in the whole or parts of the territory, the constituted State authority may have hardly any control over the agents of persecution. The need for protection that individuals may require against the serious violation of their human rights in such a context is, nonetheless, consistent with the terms of the 1951 Convention.

[206] See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979) para 65.

Chapter 3: New Dimensions: Persecution on the Grounds of Gender

3.1. Crime of Gender Based Persecution

For a long time, the issues of sexual orientation and gender identity have been restrained from entering the legal arena as being regarded as too radical. Today, these issues warrant consideration in the context of ICL. The CAH of gender-based persecution was first codified in the 1998 Rome Statute of the ICC.[207] The recognition of this specific form of persecution has been hailed as a significant advance in the field of international criminal law. The CAH of racially, politically, or religiously based persecution has been explored by international tribunals and academic commentators, but the newly identified gender-based persecution has not been analyzed in the same depth.

The Statute is the first ICL instrument that explicitly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as distinct types of war crimes.[208] It also expands the list of sexual and gender-based crimes constituting crimes against humanity to include not only rape, but also other forms of sexual violence, as well as persecution on the basis of gender. It is the first international instrument expressly to include various forms of sexual and gender-based crimes as underlying acts of CAH or war crimes committed during international and non-international armed conflicts. In addition, the Statute authorizes the Court to exercise jurisdiction over sexual and gender-based crimes if they constitute acts of genocide or other underlying acts of crimes against humanity or war crimes.[209] In the case of genocide, these crimes could be an integral part of the pattern of destruction inflicted upon targeted groups; thus further steps need to be taken to ensure a consistent approach in giving full effect to these provisions enunciated within the Statute, the Elements, and the Rules. The inclusion of article 21(3) in the Statute is particularly important, as it mandates that the application and interpretation of the Statute be consistent with internationally recognized human rights, and without any adverse distinction founded, inter alia, on gender or

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

[208] The statutes of the ICTY and ICTR include only rape as a crime against humanity. The ICTR Statute includes rape and enforced prostitution as a form of the war crime of outrages upon person dignity. While the ICTY Statute includes no explicit reference to sexual violence as a war crime, acts of rape and other acts of sexual violence have been mostly prosecuted as a form of the war crime of outrages upon personal dignity.

[209] For example, rape as a form of torture.

‚other status'. Therefore it should be taken into account the evolution of internationally recognized[210] human rights.[211]While cases and commentary on the more established grounds can and will assist the ICC in examining gender-based persecution, especially with respect to the intersection of gender with race, political opinion, and religion, the ICC should also look outside of ICL for guidance. IRL has acknowledged gender-related forms of persecution since 1985.[212] It has been said that this influenced the drafters of the Rome Statute to include gender within the list of persecutory grounds in the crimes against humanity provision.[213] Consequently, there is a close link between the development of IRL and ICL with respect to gendered aspects of persecution. This link is helpful because international and domestic refugee law[214] has explored certain elements of gender-related persecution that are still unexplored in ICL. Therefore, when the ICC's judges are determining the content of the elements of the crime CAH of gender-based persecution, they should examine principles or rules found within refugee law.[215] This is not to argue that a definition of gender-related persecution found within IRL should be directly transferred to the CAH of gender-based persecution, as also stated in the *Kupreškić* decision of

[210] Article 21(3) Rome Statute: The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

[211] See the CEDAW, General recommendation No. 30, noting that, ‚International criminal law, including, in particular, the definitions of gender-based violence, in particular sexual violence must also be interpreted consistently with the Convention and other internationally recognized human rights instruments without adverse distinction as to gender.' CEDAW, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, 18 October 2013, para. 23. See also, for example, the efforts of the UN Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR) to put an end to violence and discrimination on the basis of sexual orientation or gender identity: The Free & Equal Initiative of the OHCHR at https://www.unfe.org/ and statement of 26 September 2013 by the High Commissioner for Human Rights, Navanethem Pillay, and several world leaders to end violence and discrimination against LGBT persons at https://www.unfe.org/en/actions/ministerial-meeting.

[212] The UNHCR EXCOM issued a conclusion in 1985 which "[r]ecognized that States, in the exercise of their sovereignty, were free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they lived may be considered as a 'particular social group' within the meaning of Article 1 A (2), of the Geneva Convention."

[213] *See* Valerie Oosterveld, The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?

[214] Binding international refugee law is the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 2554, as updated by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 8791. These treaties do not directly address gender-related persecution. Rather, gender-related persecution has been addressed through a combination of non-binding UNHCR issued documents and Conclusions of the UNHCR ExCom. Important standards on gender-related persecution include the 2002 UNHCR Gender Guidelines

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

ICTY which strongly cautions against such a direct transfer.[216] Rather, the ICC should evaluate how refugee law approaches to gender-related persecution can shed considerable light on ICL's relatively undeveloped understanding of gender-based persecution. Even if the ICC decides that certain aspects of refugee law relating to gender-related persecution do not amount to the level of principles and rules of international law or general principles of domestic law, they may still help guide the ICC toward a full understanding of gender-based persecution. Even though it makes sense that refugee law and human rights law cannot be used to define persecution, such law can surely be used to assist in interpretation where there is an absence of ICL jurisprudence. However, this should not classify IRL as focusing on the state of mind of the refugee claimant when it in fact considers both the subjective and the objective elements of a refugee claim. Unlike the characterization found in the *Kupreškić* case, the refugee determination process is inherently objective, as it "was intended to restrict the scope of protection to persons who can demonstrate a present or prospective risk of persecution, irrespective of the extent or nature of mistreatment, if any, that they have suffered in the past, which highlights that there are important differences between the underlying requirements for a refugee determination and a determination of guilt or innocence within ICL.

Finally, in 2019, in the case of Prosecutor v. Al Hassan, Prosecutor Bensouda sought confirmation of the first charge of gender-based persecution at the ICC. Given that no previous international tribunal had jurisdiction to prosecute the crime of persecution on gender grounds, thus is an important first step towards developing the jurisprudence on gender-based persecution in ICL.

3.2. Gender Based Persecution through the lens of Refugee Law

The 1951 Geneva Convention was drafted at a time when there was reference to women, gender, and issues of sexual inequality. Gender is not a separate ground for protection under the Convention, and while gender claims can proceed under any of the enumerated grounds, they most frequently proceed under membership in a PSG. Gender-related asylum claims stem from harms such as female genital mutilation that are directed solely or nearly exclusively at a specific gender or harms such as repressive social norms that restrict women's freedom; inflicted because

[216] Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, para 589 (Jan. 14, 2000).

of gender. Gender refers to the "relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time."[217] Both women and men can suffer gender-based persecution, but women are disproportionately affected. Common types of gender-based persecution include rape and other forms of sexual violence, domestic violence, coercive family planning policies that target women, forced marriage, female genital cutting, human trafficking, and honor killing.[218] Because gender-based refugee claims differ in some ways from traditional asylum claims, they have historically faced significant challenges.[219] As early as the 1980s, the UNHCR and other UN bodies began to recognize the gaps in protection for women fleeing gender-based persecution and the unique issues involved in their cases.[220] The UNHCR EXCOM first issued formal recommendations regarding expansion of the refugee definition to include individuals who have experienced. For example, the non-discrimination provision in the Refugee Convention does not refer to sex or gender.[221] UNHCR's response to the absence of women from mainstream IRL instruments was to develop gender-specific criteria and guidelines, albeit much later and further to the recognition of women's rights within international human rights law. UNHCR policy in response to the needs of refugee women and girls has shifted from a focus on women as a "vulnerable" group that is associated with children. This was followed by a move from women as a vulnerable group per se to the identification of risk factors exposing women and girls to certain threats. By 1997, the UNHCR adopted a two-pronged approach whereby targeted actions to address the specific needs and rights of women were run in parallel with the integration of women's rights in mainstream instruments.

[217] UN High Commissioner for Refugees, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, para. 3, HCR/GIP/02/01 (May 7, 2002) ; see also Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), Department of Economic and Social Affairs of the UN, Concepts and Definitions, http://www.un.org/womenwatch/osagi/conceptsandefinitions.htm.

[218] Ibid

[219] Karen Musalo, A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims, Refugee Survey Quarterly, Vol. 29, No. 2 (2010).

[220] See Alice Edwards, Overview of International Standards and Policy on Gender Violence and Refugees: Progress, Gaps and Continuing Challenges for NGO Advocacy and Campaigning.

[221] Article 3 of the 1951 Geneva Convention states that "the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin".

More specifically, one of the enumerated grounds in Article 1A(2) of the Refugees Convention is "membership of a PSG". This ground is not defined in the Convention itself and has been depicted as the ground with the least clarity of the five grounds. Increasingly refugee claimants that fear persecution by non-state actors have invoked it. [222] Contracting states have recognized women, families, tribes, homosexuals and occupational groups as constituting as particular social groups for the purposes of the Refugee convention. [223] These cases have developed and broadened the scope of the convention, providing protection to individuals who were perhaps not thought of as individuals included in the refugee problem during the drafting of the Convention. Therefore, as a result, gender-related claims are often associated with the Convention ground of membership in a PSG, but they commonly have other dimensions to them as well such as a woman that is motivated to flee because she does not conform to her social role in a Muslim society[224]. The gender dimension to her claim is perhaps most easily included in the ground of her membership in a particular social group, but that does not mean that she does not rest her case on any other grounds. The category of social groups in the Convention is an open-ended one not excluding beforehand other groups to be considered than those already recognized. There is no concrete list of what groups fall within this category and the UNHCR advises that the term "membership of a PSG" should be read in an "evolutionary manner", bearing in mind fluctuations in social circumstances of societies and the evolving international human rights norms. [225] This category should not render the other grounds superfluous and that the text required that limitation should be involved in the term "PSG". [226] One limit already established for the scope of the ground of "membership of a PSG" by the UNHCR is that the group cannot be defined exclusively by the fact that it is targeted for persecution. [227] This means that if there is nothing in common with the members of the group that the persecution itself, so that without the threat of persecution its members could not be an identifiable group, this would not be a social group for the purpose of the Convention. It would lead to the circular reasoning that one is persecuted on the ground of being persecuted, which makes the ground of "social

[222] UNHCR, 2002a: para 20.
[223] Ibid para 1.
[224] E.g. dress-code or marital status as governed by sharia law, is making a political claim that is also related to the Islam religion
[225] Ibid para 3
[226] See for example Lord Steyn's reasoning in R v Immigration Appeal Tribunal, Ex parte Shah and Islam (1999) 2 AC 629, at pp. 643
[227] UNHCR, 2002a: para 2.

group" encompass everyone suffering persecution. [228] The UNHCR has proposed to the House of Lords in the U.K. that the meaning of a "PSG" would encompass individuals who "believe in or are perceived to believe in values and standard which are at odds with the social mores of the society in which they live". [229] A common understanding of a "PSG" can be that of a number of persons with a similar background, habits or social status that form a group on those grounds. [230] The group may be persecuted because of different grounds also giving a ground for the persecution of race, religion or political opinion. The group may not conform to the government's policies and be persecuted because of that, but merely being a member of a particular social group does not automatically give a substantive claim to a refugee status. [231] In an EXCOM Conclusion from 1985 it was recognized that states, in the exercise of their sovereignty could interpret "a social group" as to include women who face harsh or inhuman treatment for having transgressed social mores of their community. [232]PSG especially reflects the changing nature of persecution and its agency. States, nowadays, apply this ground to a range of groups in need of protection, where the government is unable or unwilling to meet its responsibilities to its citizens. Such groups include those defined by gender, sexual orientation, procreation, age, family, and socioeconomic status.

The QD 2011/95/EU6 (Recast) outlines standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. While the previous Directive did not clearly adopt a gender-sensitive point of view when addressing reasons for persecution[233], this Directive reflects a certain evolution with regards to the interpretation of the Geneva Convention, especially when considering the persecution ground 'membership of a PSG'[234].Moreover, the Directive claims that for the purposes of defining a PSG, issues arising from an applicant's gender, including gender identity

[228] This is also supported in case law, e.g. R v Immigration Appeal Tribunal, Ex parte Shah and Islam (1999) 2 AC 629, at pp. 639 and 656.
[229] R v Immigration Appeal Tribunal, Ex parte Shah and Islam (1999) 2 AC 629, at 644.
[230] UNHCR, 1992: para 77.
[231] Ibid para 79.
[232] Executive Committee Conclusion no. 39 "Refugees, Women and International Protection" (XXXVI).
[233] Article 10 of Qualification Directive (2004/83/EC5).
[234] Article 10(d) of Qualification Directive 2011/95/EU6 (Recast) indicates that gender-related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.

and sexual orientation, which may be related to certain legal traditions and customs, resulting in, for example, genital mutilation, forced sterilization or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution. The Asylum Procedure Directive (Recast)[235] includes a number of substantive changes that had to be made to the Council Directive[236]. Similarly, the new Procedure Directive focuses on common procedures for granting and withdrawing international protection. In comparison to the previous Directive of 2005, it is clear that an effort has been made to integrate gender into the Directive. It definitely recognizes that certain applicants may be in need of special procedural guarantees and mentions gender, sexual orientation and gender identity as a potential case. Those applicants should be identified and provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection. The Directive also seeks to ensure substantive equality between female and male applicants, and therefore urges examination procedures to be gender-sensitive. In particular, personal interviews should be organized in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution[237]. Moreover, it further stated that wherever possible, member states shall provide for the interview to be conducted by a person of the same sex if the Facilitating disclosure of gender-related persecutions in European asylum procedures applicant so requests, unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner[238]. The complexity of gender-related claims should be properly well-thought-out in procedures based on the concept of 'safe third country', the concept of 'safe country of origin' or the notion of subsequent applications[239].

[235] Asylum Procedure Directive 2013/32/EU (Recast).

[236] Council Directive 2005/85/EC

[237] Article 15(a)(b) of Asylum Procedure Directive 2013/32/EU (Recast) refers to deals with requirements for personal interviews and indicates that member states shall ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability.

[238] Article 15 (b) of Asylum Procedure Directive 2013/32/EU (Recast).

[239] Article.10.3(d) of Asylum Procedure Directive 2013/32/EU (Recast) concerns the requirements for the examination of applications and specifies that the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues.

Finally, it is important to note that a series of non-persecutory acts can collectively provide evidence of a well-founded fear of being persecuted in the future. Although persecution in IRL must be interpreted and understood in connection with the other elements of the refugee definition in Article 41(A)(2) of the 1951 Refugee Convention, persecution is a concept in its own right and should not be conflated with the notion of surrogacy or the absence or failure of state protection. As a basis for refugee status under the 1951 Geneva Convention, discrimination has been a central feature of claims relating to gender-related persecution, not least by the link to one or more of the Convention grounds, which are proscribed forms of discrimination. It is well accepted that gender-related forms of persecution fall within the 1951 Geneva Convention, and that gender can properly be within the ambit of the "social group" category. Forms of gender-related violence can also take the form of political or religious acts, even when committed by non-state actors. Notions of equality should be contextualized, relying on analyses of disadvantage, power, hierarchy, or deprivations of rights, rather than the strict comparator-based discrimination approach.

Conclusion

Many of the same acts are considered persecution under both international criminal law and international refugee law, albeit to differing degrees. That said, there are also important distinctions in the ways in which the concept has been applied and interpreted under each legal regime. In particular, the differing purposes of each branch of law need to be borne in mind. The purpose of IRL is the protection of one fleeing from persecution or fear of persecution. While, the objective of ICL is retribution, deterrence as well as reformation of the offender and the conduction of fair trials. The time factor is another distinctive difference; as it plays a significant role within the two legal regimes. International criminal courts and tribunals must concern themselves with prosecution of harm committed in the past for the purposes of criminal prosecution. This is rooted in the principle of legality which is reflected in both Article 22 of the Rome Stature, nullum crimen sine lege and in Article 23, nulla poena sine lege. However in IRL, persecution does not necessarily have been committed in the past, it can be in fear of being committed.

In addition, persecution is only one element in the 1951 Geneva Convention refugee definition and is part of an assessment as to whether an individual is in need of international protection from prospective harm. The refugee definition requires that the fear of being persecuted be linked to one or more of the Convention grounds, namely race, religion, nationality, membership of a particular social group or political opinion. Moreover, in refugee claims based on the persecutory conduct of non-state actors, status is granted on the basis of the state's inability or unwillingness to protect; no specific discriminatory intent is required. The additional elements to establish the crime of persecution as a CAH under ICL, primarily the requirements of discriminatory intent and that the crime be part of a widespread or systematic attack against a civilian population, which are not required for a finding that a particular kind of harm amounts to persecution under IRL. Such an interpretation would undermine the international protection objectives of the 1951 Refugee Convention, as this could be construed as meaning that persons would fall outside the Convention definition even if they nonetheless face serious threats to their life or freedoms, broadly defined. The actus reus of persecution under ICL requires that the act or acts that constitute discrimination in fact violating fundamental human rights and that its consequences for the victims be at least as serious as the effects of other crimes. However, certain human rights violations have been found to meet the threshold for persecution as a CAH even if they do not as such constitute international crimes, including denial of freedom of movement, denial of employment, denial of access to the judicial process, denial of equal access to public services, and sometimes even hate speech.

For the purposes of determining refugee status, the existence of violations of IHL can be informative but not determinative of whether conduct amounts to persecution within the meaning of the 1951 Convention. An applicant cannot be expected to establish that there has been the commission of either an IHL violation or an international crime in order for a decision-maker to reach a finding that a particular kind of harm constitutes persecution.[240] Nor are the criteria for the CAH of persecution, as defined in ICL,[241] applicable to refugee status determination. As mentioned previously, nternational criminal courts are mainly concerned with harm committed in

[240] For example, the requirements of discriminatory intent and that the crime be part of a widespread or systematic attack against a civilian population in international criminal law are not required by international refugee law, see UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, paras. 13-21, http://www.refworld.org/docid/4e1729d52.html. .

[241] Article 7 (1)(H) *Rome Statute of the International Criminal Court* (1 July 2002) 2187 UNTS 3, ("Rome Statute ICC"), http://www.refworld.org/docid/3ae6b3a84.html.

the past for the purposes of criminal prosecution, as their mandate does not cover the broader humanitarian purpose of providing international protection to civilians. Relying on IHL or ICL in their strictest sense to determine refugee status could undermine the international protection objectives of the 1951 Geneva Convention, and leave outside its protection persons who face serious threats to their life or freedom.[242] Moreover, even if certain conduct is not prohibited under IHL or ICL, it does not change the fact that for IRL purposes, such conduct may constitute persecution.[243] Almost every international crime would be a violation of human rights law, but the converse does not apply. It is important to note that unlike ICL, the Geneva Convention and IRL in general is not about repressing crimes of persecution. The requirement of accuracy, which stays at the forefront in criminal law, is conspicuously absent here. Refugee status is meant to cater to the needs of persons who are placed in an intolerable position in their countries of origin, and the ways and manners through which intolerable life is inflicted upon hated minorities may always change. In more operations terms, indeterminacy is interpreted by UNHCR as a strong indication in favor of an evolutionary, context-sensitive application of the term. To some extent, the advantages by indeterminacy are reflected and have materialized in the Convention's practice of application; the notion of persecution has expanded to include forms of harms that were not present to the Convention's drafters such as gender-based violence and sexual orientation. Thus, indeterminacy has allowed the concept to evolve in the response to both the changing nature and notion of persecution as well as to the shifting sensibilities and standards of societies. Nonetheless, the indeterminacy of the notion of persecution entails a drawback in the application of IRL; as a result, inconsistency has been noted across different countries. The open-endedness of the refugee definition on these crucial points make it vulnerable to restrictive interpretations or even to manipulation. On the other hand the strict and definite definition of the crimes of persecution must be articulated clearly so as to satisfy the cardinal principle of human rights law;

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[242] see UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, paras. 13-21, http://www.refworld.org/docid/4e1729d52.html. .

[243] Such conduct may, for example, amount to serious human rights violations. International human rights law does not cease to apply during situations of armed conflict, save in part through the effect of provisions for derogation of the kind to be found, for example, in Article 4 ICCPR, note 34 above. See, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, para. 15l; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004, para. 106, http://www.refworld.org/docid/414ad9a719.html; and UN HRC, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 11, http://www.refworld.org/docid/478b26ae2.html. See also, *AF (Syria)*, [2012] NZIPT 800388, New Zealand: Immigration and Protection Tribunal, 20 December 2012, paras. 45 to 49, http://www.refworld.org/docid/54c127434.html.

that a person cannot be tried, convicted and punished for conduct that was not criminal at the time the conduct was committed. The principle of legality requires that the Prosecution must identify and prove the particular acts amounting to persecution rather than charge persecution in general; in order for persecution to amount to CAH, it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty and therefore it must be clearly have defined limits on the types of act which qualify as persecution. Nonetheless, despite all these foundational principles differences of the principle of legality and non-refoulment between ICL and IRL, findings of facts by judges in one of these areas of international law may establish a pattern of evidence, which can be relevant in the other especially in areas where one lacks jurisprudence.

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