

INTERNATIONAL LAW COMMISSION

**THE PROBLEMATIC
FORMULATION OF
PERSECUTION UNDER
THE DRAFT
CONVENTION ON
CRIMES AGAINST
HUMANITY**

**AMNESTY
INTERNATIONAL**



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CONTENTS

I. INTRODUCTION	5
II. THE FORMULATION OF THE CRIME AGAINST HUMANITY OF PERSECUTION.....	6
1. THE 'CONNECTION REQUIREMENT' IN THE CRIME AGAINST HUMANITY OF PERSECUTION, AS PROVISIONALLY ADOPTED BY THE ILC.....	6
2. THE ABSENCE OF THE 'CONNECTION REQUIREMENT' IN MAJOR PRECEDENTS TO THE ROME STATUTE AND IN SUBSEQUENT TEXTS.....	6
3. THE ILC ATTEMPTS TO CODIFY CUSTOMARY INTERNATIONAL LAW ON PERSECUTION	7
4. CASE LAW ON PERSECUTION AS A CRIME AGAINST HUMANITY IN INTERNATIONAL CRIMINAL TRIBUNALS	8
5. NATIONAL LEGISLATION DEFINING PERSECUTION WITHOUT REQUESTING ANY ADDITIONAL CONNECTION	9
6. LEADING SCHOLARS AND COMMENTATORS' VIEWS	10
7. AMNESTY INTERNATIONAL POSITION ON THE FORMULATION OF THE CRIME AGAINST HUMANITY OF PERSECUTION	11
8. AN ADDITIONAL PROBLEM: THE MORE RESTRICTIVE FORMULATION OF PERSECUTION CONTAINED IN THE DRAFT CONVENTION VIS À VIS THE ROME STATUTE.....	11
III. CONCLUSIONS	12
IV. RECOMMENDATION TO THE ILC.....	13

I. INTRODUCTION

Since the International Law Commission (ILC) decided to include the subject 'crimes against humanity' into its long-term program of work in 2013 Amnesty International has been following the topic closely.¹ To that end, the organization has published so far five papers raising concerns and making recommendations on the First, Second and Third Reports by the Special Rapporteur on crimes against humanity, Sean D. Murphy,² as well as on the Draft articles on crimes against humanity provisionally adopted by the ILC on first reading in 2017.³ The Draft articles on crimes against humanity, which serve as the basis of a potential Convention on the matter,⁴ have been transmitted, through the Secretary-General, 'to Governments, international organizations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018'.⁵ It includes a set of 15 draft articles, a preamble, an annex and a commentary.

In this paper the organization calls the attention of the ILC on a very specific concern. It relates to one of the underlying crimes, the crime of persecution. The phrasing of the crime of persecution as a crime against humanity, as adopted in the Draft Convention, is not in accordance with customary international law (and nor, strictly speaking, but for different reasons, with the Rome Statute of the International Criminal Court, see below).⁶ Finally, the organization makes a recommendation to fix the problem.

¹ ILC, Report on the work of the sixty-fifth session (2013), UN Doc. A/68/10, § 169.

² Amnesty International, 'International Law Commission: Initial recommendations for a convention on crimes against humanity' (AI Index: IOR 40/1227/2015), April 2015; 'International Law Commission: Second report on crimes against humanity: positive aspects and concerns Initial recommendations for a convention on crimes against humanity' (AI Index: IOR 40/3606/2016), May 2016; 'International Law Commission: Commentary to the third report on crimes against humanity' (AI Index: IOR 40/5817/2017), April 2017; 'Amnesty International conditional support to the draft Articles on crimes against humanity adopted by the international law commission on first reading' (AI Index IOR 40/7328/2017), October 2017; and the '17-Point Program for a Convention on Crimes against Humanity' (AI Index: IOR 51/7914/2018), February 2018.

³ ILC, Report on the work of the sixty-ninth session (2017), UN Doc. A/72/10, 'Text of the draft articles on crimes against humanity adopted by the Commission on first reading', p.10.

⁴ ILC, First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/680, 17 Feb. 2015, § 2.

⁵ ILC, *supra* note 3, Chapter IV, Crimes against Humanity, § 43.

⁶ Article 7(1)(h), Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90.

II. THE FORMULATION OF THE CRIME AGAINST HUMANITY OF PERSECUTION

1. THE 'CONNECTION REQUIREMENT' IN THE CRIME AGAINST HUMANITY OF PERSECUTION, AS PROVISIONALLY ADOPTED BY THE ILC

The ILC Special Rapporteur on crimes against humanity stated in his First Report (2015) that the most widely accepted formulation of crimes against humanity is that of Article 7 of the Rome Statute. For that reason, he explained that '[t]he proposed draft article uses the exact same definition of "crimes against humanity" as appears in article 7, except for three non-substantive changes that are necessary given the different context in which the definition is being used (such as replacing references to "Statute" with "present draft articles")'.⁷ Amnesty International agrees in general with such an approach as a starting point for defining crimes against humanity. However, the organization believes that whenever international treaties (such as the Enforced Disappearance Convention⁸) or customary law contain stronger definitions than those in the Rome Statute, these definitions should be preferred and incorporated into the Draft Convention. The crime against humanity of persecution is one of these examples.

Article 3(1)(h) of the Draft articles, following nearly verbatim Article 7(1)(h) of the Rome Statute, includes as a crime against humanity:

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 in connection with the crime of genocide or war crimes⁹

2. THE ABSENCE OF THE 'CONNECTION REQUIREMENT' IN MAJOR PRECEDENTS TO THE ROME STATUTE AND IN SUBSEQUENT TEXTS

Unlike Article 3(1)(h) of the Draft articles and Article 7(1)(h) of the Rome Statute, most of the major precedents to the latter, like the 1945 Control Council Law No.10,¹⁰ the 1993 Statute of the International Criminal Tribunal for the Former

⁷ ILC, First Report, *supra* note 4, 8.

⁸ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 Dec. 2006, entered into force 23 Dec. 2010), 2716 UNTS 3.

⁹ ILC, Report on the work of the sixty-ninth session (2017), UN Doc. A/72/10, Chapter IV, p.11.

¹⁰ Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against

Yugoslavia,¹¹ and the 1994 Statute of the International Criminal Tribunal for Rwanda,¹² do not require any additional link or specific connection with other crime under international law for the crime against humanity of persecution.

Likewise, subsequent instruments to the Rome Statute, like the Statute of the Special Court for Sierra Leone,¹³ the Law on the Extraordinary Chambers in the Courts of Cambodia,¹⁴ the Kosovo Law on Specialist Chambers and Specialist Prosecutor's Office,¹⁵ and the Statute of the African Court of Justice and Human Rights (as amended by the Malabo Protocol),¹⁶ do not require any additional connection with other crimes for the crime against humanity of persecution.

Scholars have explained that the 'connection requirement' added in the Rome Statute just for the crime of persecution is a *jurisdictional threshold* to restrict the competence of the International Criminal Court, because some delegations at the Rome Conference wanted 'to avoid a sweeping interpretation criminalizing all discriminatory practises'¹⁷ or 'considered the notion of persecution to be vague and potentially elastic'.¹⁸

3. THE ILC ATTEMPTS TO CODIFY CUSTOMARY INTERNATIONAL LAW ON PERSECUTION

In its first approach to the matter in 1950 the ILC - whose objective is '[t]he

peace and against humanity, done at Berlin, 20 December 1945, Article II(1)(c) ('(a) Crimes against Humanity. 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.').

¹¹ Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 5(h) ('Persecutions on political, racial and religious grounds.').

¹² Statute of the International Criminal Tribunal for Rwanda, Article 3(h) ('Persecutions on political, racial and religious grounds.').

¹³ Statute of the Special Court for Sierra Leone, established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, Article 2(h) ('Persecution on political, racial, ethnic or religious grounds;').

¹⁴ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 5 ('persecutions on political, racial, and religious grounds').

¹⁵ Law No.05/L-053, Article 13(h) ('persecution on political, racial, ethnic or religious grounds;'), 3 Aug. 2015.

¹⁶ Malabo Protocol, adopted by the twentieth-third Ordinary Session of the Assembly, Malabo, Equatorial Guinea, 27 June 2014, Article 28C(1)(h) ('Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law'). The Malabo Protocol has not yet entered into force.

¹⁷ H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', in R.S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute* (Kluwer Law International, The Hague 1999) 101.

¹⁸ K. Kittichaisaree, *International Criminal Law* (Oxford University Press, 2002) 121.

promotion of the progressive development of international law and its codification',¹⁹ and whilst adopting the Principles of International Law recognized in the 'Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal', defined crimes against humanity in general as requiring, a 'connection with any crime against peace or any war crime'.²⁰

Nevertheless, four years later, in the 1954 Draft Code of Offences against the Peace and Security of Mankind, the ILC dropped the link to other offenses entirely. It defined crimes against humanity without comprising the 'connection requirement' with crimes against peace or war crimes.²¹ In the Commentary to the 1954 Draft Code the ILC explained:

The Commission decided to enlarge the scope of the paragraph so as to make the punishment of the acts enumerated in the paragraph ['Inhuman acts such as murder, extermination, enslavement, deportation or persecutions'], independent of whether or not they are committed in connexion with other offences defined in the draft Code²²

Finally, the 1996 Draft Code of Crimes against the Peace and Security of Mankind includes 'persecution on political, racial, religious or ethnic grounds' as one of the crimes against humanity and without demanding any 'connection requirement'.²³

4. CASE LAW ON PERSECUTION AS A CRIME AGAINST HUMANITY IN INTERNATIONAL CRIMINAL TRIBUNALS

The International Criminal Tribunal for the former Yugoslavia (ICTY), in the

¹⁹ Article 1(1), Statute of the International Law Commission (adopted by the GA in res.174 (II) of 21 Nov. 1947, as amended by res.485 (V) of 12 Dec. 1950, 984 (X) of 3 Dec. 1955, 985 (X) of 3 Dec. 1955 and 36/39 of 18 Nov. 1981).

²⁰ Yearbook of the International Law Commission, 1950, vol. II, p.377 ('Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime').

²¹ Draft Code of Offences against the Peace and Security of Mankind (1954), Article 2(11). Text adopted by the International Law Commission at its Sixth Session, in 1954, and submitted to the General Assembly as a part of the Commission's report ('Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities').

²² Draft Code of Offences against the Peace and Security of Mankind with commentaries (1954), p.150.

²³ Draft Code of Crimes against the Peace and Security of Mankind, 1996, Article 18(e). Text adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 50). See, *Yearbook of the International Law Commission*, 1996, vol. II, Part Two.

Kupreškić case, affirmed that:

The Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal²⁴

And the Tribunal went on: 'A narrow definition of persecution is not supported in customary international law'.²⁵ A similar conclusion was reached in the *Kordić & Čerkez* case a year later.²⁶

In a similar sense, the Extraordinary Chambers in the Courts of Cambodia (ECCC) in the *Nuon Chea and Khieu Samphan* case rejected the argument that a link must exist between the acts of persecution and any other underlying offence within the jurisdiction of the ECCC. Contrary to the submission of the accused, the ECCC found that, in accordance with the principle of legality, the Chamber is required to apply the definition of persecution as a crime against humanity as it existed under customary international law in 1975, which contains no requirement that persecution be linked to another crime within the jurisdiction of that court.²⁷

5. NATIONAL LEGISLATION DEFINING PERSECUTION WITHOUT REQUESTING ANY ADDITIONAL CONNECTION

A number of states, while enacting legislation implementing the Rome Statute into national law, consider that no 'connection requirement' for the crime against humanity of persecution is necessary.

For example, the French *Code pénal* provides as a crime against humanity:

La persécution de tout groupe ou de toute collectivité identifiable pour des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste ou en fonction d'autres critères universellement reconnus comme inadmissibles en droit international²⁸

The German Code of Crimes against International Law punish the persecution of 'an identifiable group or collectivity by depriving such a group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognized as impermissible under the general rules of international law'.²⁹

²⁴ Judgment, *Kupreškić* (IT-95-16) "Lašva Valley", Trial Chamber, 14 January 2000, § 581.

²⁵ *Ibid.*, § 615.

²⁶ Judgment, *Kordić & Čerkez* (IT-95-14/2), Trial Chamber, 26 February 2001, § 197.

²⁷ Extraordinary Chambers in the Courts of Cambodia, *Nuon Chea and Khieu Samphan* case, 002/19-09-2007/ECCC/TC, Trial Chamber, 7 August 2014, §§ 431-432.

²⁸ France, Code pénal, Article 212-1(8).

²⁹ Germany, Code of Crimes against International Law, 2002, Section 7(10).

Burkina Faso,³⁰ Burundi,³¹ Congo (Republic of),³² Canada,³³ Czech Republic,³⁴ Ecuador,³⁵ Estonia,³⁶ Finland,³⁷ Georgia,³⁸ Hungary,³⁹ Korea (Republic of),⁴⁰ Lithuania,⁴¹ Montenegro,⁴² Panama,⁴³ Portugal,⁴⁴ Serbia,⁴⁵ and Spain,⁴⁶ are other examples of states which do not request a connection for persecution as a crime against humanity. These legislations further confirm that there is no connection requirement in customary international law.

6. LEADING SCHOLARS AND COMMENTATORS' VIEWS

Leading scholars and commentators have stated that, for the crime against humanity of persecution, no additional link or connection is required under customary international law. For example, Professor Antonio Cassese was of the following view:

Article 7 is less liberal than customary international law with regard to one element of the definition of persecution. Under Article 7(1)(h), in order to fall under the jurisdiction of the ICC, must be perpetrated 'in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court'. It would seem that under customary international law, no such link is required

Professor Cassese went on saying: 'In addition to adding a requirement not provided for in general international law, Article 7 uses the phrase "in connection with" which is unclear and susceptible to many interpretations.'⁴⁷ Professor Gerhard Werle holds a similar view. He explained:

³⁰ Burkina Faso, Code pénal (2018), Article 422-1.

³¹ Burundi, Loi N°1/004 du 8 mai 2003, portant la répression du crime de génocide, des crimes contre l'humanité et des crimes de guerre, Article 3(h).

³² Republic of Congo, Loi N°8-98 du 31 octobre 1998, Article 6(h).

³³ Canada, Crimes Against Humanity and War Crimes Act, 2000, S.4(3) and 6(3).

³⁴ Czech Republic, Criminal Code, Sec 401 (1) (e).

³⁵ Ecuador, Código Orgánico Integral Penal, Artículo 86.

³⁶ Estonia, Penal Code, § 89(1).

³⁷ Finland, Criminal Code, Chapter 11 (War Crimes and Crimes against Humanity), Section 3(5).

³⁸ Georgia, Criminal Code, Article 408.

³⁹ Hungary, Act C of 2012 on the Criminal Code, Section 143(h).

⁴⁰ Republic of Korea, Act on the punishment of crimes within the jurisdiction of the International Criminal Court, Article 9(7) (December 21, 2007, Act 8719).

⁴¹ Lithuania, Criminal Code, Article 100.

⁴² Montenegro, Criminal Code, Article 427.

⁴³ Código Penal de Panamá, 2007, Artículo 432(10).

⁴⁴ Portugal, Lei No.31/2004 de 22 de julho adapta a legislação penal portuguesa ao Estatuto do Tribunal Penal Internacional, Artigo 5(h).

⁴⁵ Serbia, Criminal Code, Article 371 (Crimes against Humanity).

⁴⁶ Spain, Código Penal, Artículo 607 bis (1)(1°).

⁴⁷ A. Cassese, 'Crimes against Humanity', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.) (OUP, Oxford 2009) 376.

The requirement of a connection was intended to take account of the concerns about the breadth of the crime of persecution. With this accessory design, the ICC Statute lags behind customary international law, since the crime of persecution, like crimes against humanity, has developed into an independent crime⁴⁸

Other distinguished scholars and commentators have reached the same conclusion.⁴⁹

7. AMNESTY INTERNATIONAL POSITION ON THE FORMULATION OF THE CRIME AGAINST HUMANITY OF PERSECUTION

Amnesty International considers that persecution is a separate crime against humanity, independent of the other crimes and, therefore, may be committed even in the absence of other crimes,⁵⁰ as long as the acts of the accused is part of a pattern of widespread or systematic crimes directed against a civilian population.⁵¹ The organization rejects the notion that persecution as a crime against humanity must be committed in connection with other crimes under international law.

8. AN ADDITIONAL PROBLEM: THE MORE RESTRICTIVE FORMULATION OF PERSECUTION CONTAINED IN THE DRAFT CONVENTION VIS À VIS THE ROME STATUTE

Formulations of the crime against humanity of persecution under the Rome Statute and under the Draft Convention differ. Article 7(1)(h) of the Rome Statute declares the following conduct a crime against humanity, when committed as part of a widespread or systematic attack against any civilian population:

⁴⁸ G. Werhle, *Principles of International Criminal Law* (TMC Asser Press, The Hague, 2009), 332;

⁴⁹ P. Currat, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale*, (Bruylant, L.G.D.J., Schulthess, 2006), 456 ('Cette exigence du Statut de la Cour pénale internationale s'éloigne de l'état actuel du droit international coutumier, qui n'exige plus un tel lien'); Y. Jurovics, 'Article 7 Crimes contre l'humanité', in J. Fernandez et X. Pacreau, *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article* (Pedone, Paris 2012) 448 ('Cette exigence d'une corrélation avec un autre crime peut sembler dépassée. Elle constitue même certainement une restriction par rapport au droit international coutumier'); J.R.W.D. Jones and S. Powles, *International Criminal Practise*, third ed. (OUP, Oxford 2003) 216 ('The definition of "persecution" in the Rome Statute, which maintains the hitherto defunct requirement at Nuremberg that "persecution-type" crimes against humanity must be committed in connection with another act or crime under the Statute, has been held to be "more restrictive than is necessary under customary international law (Kordić and Čerkez Trial Judgment, para.197)').

⁵⁰ Amnesty International, 'The International Criminal Court: Making the Right Choices', Part I, p.45 (AI Index: IOR 40/01/1997), January 1997).

⁵¹ Judgment, *Duško Tadić* (IT-94-1-A), AC, 15 July 1999, § 248.

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

Draft Article 3(1)(h) of the Draft Convention on crimes against humanity contains the same formulation, but the final words diverging:

in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes

Consequently, the new formulation, as provisionally adopted by the ILC on first reading, restricts persecution to certain acts committed in connection with any 'act referred to in this paragraph',⁵² a crime against humanity, genocide or war crimes, and excluding any connection with the crime of aggression, unlike Article 7(1)(h) of the Rome Statute.

In sum, acts amounting to persecution under the Rome Statute, shall not necessarily be criminal under the Draft Convention on crimes against humanity and shall, therefore, restrict in some cases the application of international criminal law and the access to justice, truth and reparation for victims.

III. CONCLUSIONS

Customary international law does not require any 'connection' to other prohibited acts for the crime against humanity of persecution, which is solely a jurisdictional threshold for the purposes of the Rome Statute. As explained by several commentators it was a compromise clause among governmental delegations participating in the Rome Conference in 1998. And may not be found among the major precedents to the Statute, even those by the ILC itself, nor in subsequent instruments.

Amnesty International reiterates that definitions of crimes in the Draft Convention should be as broad as the definitions in the Rome Statute, but whenever international treaties or customary law contains stronger definitions, these definitions should be incorporated.

⁵² As a leading commentator explained any 'act referred to in this paragraph' would include any other act of persecution, see C.K. Hall, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Second ed. (C.H. Beck, München 2008), article 7, margin 72.

IV. RECOMMENDATION TO THE ILC

Amnesty International recommends the ILC to remove the expression ‘in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes’ from Draft article 3(1)(h) and codify the formulation of the crime of persecution as provided by customary international law.

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