

Religious persecution as a crime against humanity

Ending impunity

Lovell Fernandez¹

Abstract

Religious persecution manifests itself in various harmful ways. Traditional intervention strategies are useful but limited. The article explores the need to reinforce the combating of religious persecution with the increased use of international justice mechanisms. In particular, the article studies how the crime against humanity of persecution can be used to hold religious persecutors accountable under international criminal law.

Keywords Persecution, international criminal law, International Criminal Tribunal for the former Yugoslavia, crimes against humanity.

The word “persecution” immediately conjures up images of early Christians being torn apart by wild beasts before cheering crowds in Rome’s Colosseum. This happened during the reign of Emperor Diocletian, during which a two-decades-long massacre accounted for almost half of all martyrdoms in the early Church.² Throughout the last 2 000 years, persecution on religious grounds has manifested itself across the world until the present day. In July 2013 Amnesty International (AI) published a report which shows that Egypt’s Coptic Christians are subjected to unending “discrimination by the authorities and receive inadequate protection from the state from sectarian violence, when not targeted directly by security forces.”³ Many Coptic churches have been closed down or destroyed for allegedly failing to obtain official consent to operate. Another current example is the reign of terror conducted by Boko Haram, a Salafi-jihadi Muslim group operating mainly in north-eastern Nigeria and which is accused of killing numerous Christian worshippers

¹ Lovell Fernandez (* 1950) is professor of Law and Co-director of the South African-German Centre for Transnational Criminal Justice, University of the Western Cape, Bellville, South Africa. Article received: 18 July 2013; Accepted: 18 Sept. 2013. Address: UWC, Robert Sobukwe Road, Bellville 7535, South Africa, Tel. +27 21 959 3322, Fax +27 21959 3313, email: lfernandez@uwc.ac.za.

² D. MacCulloch *A history of Christianity* (2010, Penguin) 176.

³ Amnesty International, *Egypt: “There was no door on which I did not knock” - Coptic Christians caught in attacks and State’s failures*, 26 July 2013, available at: <http://www.refworld.org/docid/51f2615b4.html> (accessed 15 September 2013).

and assassinating Muslims opposed to it.⁴ In August 2013 the Office of the Prosecutor of the International Criminal Court (ICC) issued a report stating that from the available information, there is a reasonable basis to believe that since July 2009, Boko Haram has committed the crimes of (1) murder constituting a crime against humanity under article 7(1) (a) of the International Criminal Court (ICC) Statute and (2) persecution constituting a crime against humanity under article 7(1) (h) of the ICC Statute.⁵ At the time of writing, the Office of the Prosecutor has advanced the preliminary examination to establish whether the situation meets the criteria established by the ICC Statute to warrant an investigation by the ICC.⁶

This article studies religious persecution in relation to the emerging body of international criminal law, which penalizes the crime against humanity of persecution. It looks at how the campaign to uphold the right to freedom of religion or belief can be reinforced by resorting to international criminal law which, as Thomuschat puts it, “embodies the new quality of international law, which is no longer limited to the rules of true interstate matters, but reaches deep into the state’s domestic sphere.”⁷

1. Coming to grips with the meaning of persecution

In recent years, a vast body of literature on the topic of religious persecution has come into existence. However, in the absence of a universally accepted definition of religious persecution, the notion of persecution means different things to different people or groups against whom states implement discriminatory policies. It would be mistaken, as Tieszen points out, to think of persecution as a “strictly violent act that may end in martyrdom” or as “all forms of suffering”.⁸ For example, in 2007 a German family of Bissingen who had sought to home school their children on religious grounds were heavily fined and had their children forcibly placed in schools by the police. As a result, the family left Germany and applied for political asylum in the United States. Their application was granted by a United States Federal Immigration judge on the grounds that the “German government was persecuting them on account of their religious convictions.”⁹ In issuing his order, the judge went

⁴ See generally International Criminal Court (Office of the Prosecutor) *Situation in Nigeria – Article 5 Report*, 5 August 2013 available at www.icc-cpi.int/iccdocs/.../SAS%20-%20NGA%20-%20Public%20version.

⁵ *Ibid* 30.

⁶ *Ibid*.

⁷ C. Thomuschat “Das Statut von Rom für den Internationalen Strafgerichtshof” (1998) 73 *Die Friedens-Warte* 335 at 347 (Cited and translated by G. Werle *Principles of International Criminal Law* 2nd ed (2009, Asser Press) 111.

⁸ C.L. Tieszen “Towards redefining persecution” (2008) 1 *IJRF* 67 at 68.

⁹ Cited by M.P. Donnelly “Religious freedom in education: Real pluralism and real democracy require

on to say that “this particular policy of persecuting homeschoolers is repellent to everything” that Americans believe.¹⁰ Another example of how persecution has been interpreted, is the fact that prior to a seminal judgement handed down by the Court of Justice of the European Union (CJEU) in 2012, there was a tendency amongst European courts to reject applications for asylum for religious reasons on the grounds that applicants could avoid persecution if they practised their religion privately and secretly in their home country. In its September 2012 ruling the CJEU rejected the narrow construction placed by national courts on religious freedom, according to which asylum was granted only in cases of extreme persecution, meaning that only where people’s affiliation to a religion exposed them to the risk of incurring physical harm. Instead, the CJEU held,¹¹ thus binding all courts in the European Union, that the curtailment of the right to manifest one’s religion in public justifies the granting of refugee status, if the competent authorities reasonably think that the applicant will on his return to his country of origin engage in religious practices that will expose him to a real risk of persecution, and the fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.¹²

2. Interventions on behalf of the persecuted

Resorting to the law to obtain relief against religious persecution is an avenue open only to those who can gain or are allowed access to the courts. The drawback here is that legal proceedings are expensive and can be protracted. Also, a persecuting state is most unlikely to grant legal aid to an indigent person who is the very target of its persecution policy. Christine Schirmacher writes that although Sharia law explicitly requires that an apostate be visited with the death penalty, in practice the sentence is rarely executed, though this cannot be ruled out in certain countries.¹³ A loyal Muslim who kills an apostate even before he repents or is tried by a court, will only very rarely be charged with murder himself, meaning that he may do so with impunity.¹⁴

Effective recourse to the law presupposes that accused persons or complainants will be guaranteed a fair hearing. This means, among other things, that the court is independent of political interference, that accused persons or complainants have a right to approach the courts and a right to appoint counsel of their choice, that they

real choices for parents” (2011) 4 *JRF* 61 at 62.

¹⁰ *Ibid.* 63.

¹¹ *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11), C-71/11 and C-99/11*, European Union: Court of Justice of the European Union, decision of 5 September 2012.

¹² At para 79.

¹³ “Defection from Islam in context: A disturbing human rights dilemma” (2010) 3 *JRF* 13 at 29.

¹⁴ *Ibid.* 30.

have a right to a public hearing, a right to call witnesses and to cross-examine the witnesses of the opposing party, a right to take a decision on appeal, and a right to have a judicial decision in their favour enforced by the law. In practice, Saudi Arabia, for example, adopted a Basic Law in 1992 which does not provide for freedom of religion, freedom of speech and expression, equality before the law, fair trial rights, the right to the physical inviolability of the person, and the right to freedom of association and assembly.¹⁵ These are precisely the rights that need to be asserted where the freedom to manifest one's faith is curtailed or penalised.

It is exasperating for the victim of religious persecution where the persecuting state theoretically subscribes to upholding international norms regarding the protection of religious minorities, and where such norms have been incorporated into law, but where in practice, judges interpret and apply such norms subject to the whims of the Executive. In his case studies from Pakistan, Saudi Arabia and Sudan,¹⁶ Eltayeb points out that until General Zia assumed power in Pakistan in the 1970s, Pakistani judges based their judgments on the country's 1956 and 1962 constitutions, embracing in their decisions international norms of freedom of religion as well as Islamic legal texts supporting the protection of religious minorities. However, with Zia's ascent to head of state, "an Islamization process has encroached on the independence of the judiciary and undermined its role in protecting the fundamental rights and freedoms of individuals, including the right to freedom of thought, conscience and religion or belief."¹⁷ The independence of the Sudanese judiciary, too, was similarly compromised in the early 1980s, following President Nimeiri's assumption of power.¹⁸ In both countries, the persecution intensified, namely the case of the apostate Ahmadiyya in Pakistan and the Republican Brothers in Sudan, showing how the judiciary could be manipulated to reach decisions in violation of constitutional norms.¹⁹

3. Interventions by United Nations bodies

At present, there are four treaty-based bodies charged with supervising the interpretation and application of the right to freedom of religion. They are: The UN Council for Human Rights; the Committee on the Elimination of Racial Discrimina-

¹⁵ See International Commission of Jurists' Submission to the UN Human Rights Council (2-13 February 2009) available at lib.ohchr.org/.../ICJ_SAU_UPR_S4_2009_TheInternationalCommission.

¹⁶ M.S.M. Eltayeb *A human rights approach to combating religious persecution* (2001, INTERSENTIA) 191.

¹⁷ *Ibid* 196. For more recent examples of harsh penalties imposed by Pakistani judges for alleged blasphemous conduct, see A. Buwalda and G. Yogarajah "No justice for minorities in Pakistan" (2011) 4 *JRF* 101 at 103-105.

¹⁸ Eltayeb note 16 above 196.

¹⁹ *Ibid* 197.

tion; the Committee on Economic, Social and Cultural Rights; and the Committee on the Rights of the Child. In practice, these bodies perform a salutary task but with limited success. This is due to the fact that the committees are comprised mostly of persons who are not necessarily appointed on the basis of their competence, but on the “lobbying effectiveness of the nominee’s country’s representative at the UN, bloc voting and general diplomatic bargaining”.²⁰ They meet only twice or thrice a year, and only for a few weeks, and are under-resourced and dependent on the UN for their budgets. They lack independent fact-finding and investigative capacity, hold no oral or public hearings and cannot cross-examine witnesses or experts. They further lack the authority to enforce their views which “states frequently ignore”; and they are not vested with powers to hold states accountable which fail or refuse to submit compliance reports.²¹

Besides the abovementioned committees, there is the office of the UN Special Rapporteur on freedom of religion or belief which was created in 1986 to look into violations of the 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.²² The Special Rapporteur performs a more hands-on job than the committees, for the work entails conducting actual country visits during which the incumbent speaks directly to victims, their families, human rights activists, representatives from faith groups, government, parliament and the courts.²³ The Special Rapporteur is able to respond speedily to a complaint, an allegation or an urgent appeal, regardless from whom it emanates, and does not have to wait until all the basic facts are at hand or until the complainant has first exhausted all the available national remedies. The Rapporteur first communicates with the responsible government confidentially through diplomatic channels, but after an average period of two months – except in urgent matters – the letters of complaint or appeal, including the reply or silence of the government concerned, are publicly made known to the UN Human Rights Council and are posted on the website of the Office of the UN High Commissioner for Human Rights.²⁴

The Special Rapporteur’s mandate is not treaty-based, which means complaints and appeals can be dealt with from victims of religious persecutions throughout the world, and not only from those in states that have ratified specific treaties and have accepted the optional complaints procedures or protocols. This flexible man-

²⁰ G. Robertson *Crimes against humanity* 3rd ed (2006, Penguin) 62-63.

²¹ *Ibid.*

²² Adopted by the UN General Assembly on 18 January 1982 [UN Doc.A/RES/36/55 (1981)].

²³ “Protecting and implementing the right to freedom of religion or belief: Interview with Heiner Bielefeld” available at <https://www.deutschland.de/en/topic/politics/global-issues-law> (accessed on 10 September 2013).

²⁴ *Ibid.*

date also enables the Special Rapporteur to respond to intra-religious persecutions, which are not covered by any of the UN treaties, but which in a wider context engage the right to freedom of thought, expression, religion or belief.²⁵

The Special Rapporteur is therefore better positioned to intervene more meaningfully and more expressively than the UN committees mentioned above. A drawback of the Rapporteur's work is that he visits a country only when it invites him, which reduces his oversight to spot checks. While the Rapporteur admittedly lacks judicial authority and, at best, can make only unenforceable recommendations, these drawbacks are compensated for by quick responses, face-to-face encounters with all parties concerned, constructive dialogue, and a high-level publicity of the situation. However, as in the case of all special rapporteurs, there is a need to create procedures that allow for a follow-up visit to the country in question. The present lack of such follow-up missions is a weakness.

For all their limitations, the bodies mentioned above perform a vital function. There is no one-size-fits-all method of combating religious persecution, for each situation calls for a particular response or combination of responses. One such response, to which the discussion now turns, is making more use of international criminal law to hold religious persecutors accountable at law.

4. Persecution as an international crime

4.1 Genesis and evolution of the crime

The term "crime against humanity" was first coined in 1915, following the massacre of Armenian Christians in Turkey. Britain, Russia and France issued a joint statement, threatening post-war retribution, and announcing that all those involved would be personally liable "for new crimes...against humanity and civilization."²⁶ However, nothing came of this, partly because the trials, in which only a few were convicted, were conducted in weak military courts which left no recorded judgments,²⁷ and partly because of the sudden post-war series of victories by Turkish armies under the command of Kemal Atatürk.²⁸ It was only after the persecution and genocide of another religious minority in the 1930s and 1940s, namely the European Jews, that crimes against humanity were first explicitly formulated in the Nuremberg Charter and punished as a crime by the Nuremberg Tribunal. Article 6 of the Charter defined crimes against humanity as acts committed against any civilian population, before or during the war, and included crimes such as murder, extermination, enslavement or political, racial *and religious persecutions*.

²⁵ See Eltayeb note 16 above at 205.

²⁶ J.F. Willis *Prologue to Nuremberg* (1982, Greenwood Press) 26.

²⁷ Robertson note 20 above at 22.

²⁸ MacCulloch note 2 above at 924.

The Nuremberg trial itself set a colossal precedent in international law when in its judgment, the tribunal held in a famous passage that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”²⁹ This means that today international crimes can be committed by state officials as well as by private persons.³⁰

No further trials involving the prosecution of crimes against humanity were held during the Cold War period, which was marked by some of the most appalling atrocities perpetrated in wars and under tyrannical heads of state. It was not until the 1990s, after the tragic genocide that almost wiped out the Tutsi population of Rwanda, and the execution of 7 000 Muslims in Srebrenica, that the crime of religious persecution as a crime against humanity was tried by an international tribunal.

4.2 Persecution under the Statutes of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)

“Persecution” is included in Article 5 of the ICTY Statute and Article 3 of the ICTR Statute. The provisions permit the prosecution of persons for the “seizure or destruction or wilful damage done to institutions dedicated to religion” as a war crime,³¹ and as genocide when the acts are “committed with the intent to destroy, in whole or in part, . . . a religious group.”³² Both Statutes authorize the prosecution of people responsible for religious persecution as a crime against humanity.³³ However, as the formulations in both the ICTY and ICTR Statutes merely characterise “persecution” as a specific crime, without defining the term further, the task of elaborating the definition has been left largely to the ICTY and ICTR tribunals.

In one of the first cases tried by the ICTY, the *Tadić* case, in which the accused was charged with the crime of religious persecution as a crime against humanity, the Trial Chamber held that persecution “encompasses a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature, that violate an individual’s right to the equal enjoyment of his basic rights.”³⁴ Endorsing the view that

²⁹ IMT, Judgement of 1 October 1946, in *The Trial of German major war criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany* Part 22 (1950) 447.

³⁰ *Prosecutor v Kunarac et al* ICTY Case No. IT-96-23 and IT-96-23/1-T Judgement of 22 February 2001 at para 494. See also G. Mettraux *International crimes and the AD HOC tribunals* (2006, Oxford) 277; A. Bianchi “State responsibility and criminal liability of individuals” in A. Cassese (ed.) *The Oxford Companion to International Criminal Justice* (2009, Oxford) 16-17.

³¹ Art. 3 (d) ICTY Statute.

³² Ibid art. 4 (2) read with art. 4 (3); art. 2(2) read with art. 3 ICTR Statute.

³³ Art. 5(h) ICTY Statute; art. 3(h) ICTR Statute.

³⁴ *Prosecutor v Tadić* ICTY Case No. IT-94-I-T, Judgement of 7 May, 1997 at para 710.

persecution “can consist of the deprivation of a wide variety of rights” the ICTY Trial Chamber, in its judgement in *Prosecutor v Kupreški et al* stated furthermore, that persecutory acts need not be expressly prohibited in the ICTY Statute, and that it is irrelevant whether or not such acts are legal under national laws.³⁵ In the *Matri* trial, the ICTY Chamber defined persecution as a crime against humanity as an act or omission which (1) discriminates in fact and which denies or infringes upon fundamental rights as provided in international customary or treaty law and (2) was carried out deliberately with the intention to discriminate on political, racial or religious grounds.³⁶

What distinguishes persecution from other crimes against humanity is that in the case of persecution, the mental element of the crime must be the conscious intent to commit the underlying crime or act on a discriminatory basis.³⁷ The perpetrator must act with the specific intent to discriminate³⁸ on political, racial or religious grounds, and this intent must be aimed at a group, rather than an individual, as the mental element requirement “is the specific intent to cause injury to a human being because he belongs to a particular community or group.”³⁹

As regards the material elements (the conduct) of the crime, there is no exhaustive list of acts that may constitute persecution. The ICTY has expanded the definition of persecution to include other persecutory acts outside those specifically enumerated in the ICTY Statute. These other acts must be equivalent in gravity to the other crimes against humanity listed in Article 5 of the ICTY Statute,⁴⁰ namely murder, extermination, enslavement, deportation, imprisonment, torture, rape, and other inhumane acts. To meet the equal gravity test these other acts must constitute a denial or violation of a fundamental right laid down in international customary law⁴¹ and must be determined on a “fact-specific inquiry.”⁴²

³⁵ *Prosecutor v Kupreški et al* ICTY Case No. IT-95-16-A, Judgement of 14 January 2000 at para 614.

³⁶ *Prosecutor v Matri* ICTY Case No. IT-95-14-T, Judgement of 12 June 2007 at para 113. See also *Prosecutor v Kupreški et al* note 35 above at para 621; *Prosecutor v Krnojelac* ICTY Case No. IT-97-25-T, Judgement of 15 March 2002 at para 431; *Prosecutor v Tadi* note 34 above at para 707.

³⁷ *Prosecutor v Kupreški et al* note 35 above at para 607; *Prosecutor v Staki* ICTY Case No. IT-97-24-A, Judgement of 22 March 2006 at para 323; *Prosecutor v Simi et al* ICTY Case No. IT- 95-9-A, Judgement of 28 November 2006 at para 86.

³⁸ *Prosecutor v Blaški* ICTY Case No. IT-95-14-A, Judgement of 29 July 2004 at para 164; *Prosecutor v Staki* note 37 above at para 328; *Prosecutor v Kordi and erkez* ICTY Case No. IT-95-14/2-A, Judgement of 17 December 2004 at para 111.

³⁹ *Prosecutor v Kordi and erkez* note 38 above at para 111; *Prosecutor v Matri* note 36 above at Para 120.

⁴⁰ Mettraux note 30 above at 178; *Prosecutor v Krnojelac* note 36 above at para 435. *Prosecutor v Krnojelac* note 36 above at para 221.

⁴¹ *Prosecutor v Kordi and erkez* note 38 above at para 103; *Prosecutor v Blaški* note 38 above at para 139.

⁴² *Prosecutor v Staniši and upljanin* ICTY Case No. IT-08-91-T, Judgement of 27 March 2013 at para 70;

Both the ICTR and ICTY Tribunals have identified, among others, the following acts as persecution: participation in attacks on civilians, including indiscriminate attacks on cities, towns, and villages; as well as the seizure, collection, segregation, and forced transfer of civilians to camps; calling-out of civilians; beatings; forms of sexual assault; such attacks on property as would constitute a destruction of the livelihood of a certain population; destruction or wilful damage to religious and cultural buildings; or the destruction and plunder of property where this is serious enough, either by reason of its magnitude or because of the value of the stolen property or the nature and extent of the destruction; unlawful detention of civilians, and serious bodily and mental harm.⁴³ The withdrawal of voting rights may be regarded as persecution,⁴⁴ and under certain circumstances, “hate speech” can also constitute persecution.⁴⁵

The conduct is discriminatory when the victim is targeted because of his or her membership, or imputed membership,⁴⁶ in a group defined by the perpetrator on a political, racial or religious basis.⁴⁷

Generally, the acts underlying persecution need not be considered a crime under international law;⁴⁸ in fact, they need not be inherently criminal, though they may become criminal and persecutory if committed with discriminatory intent.⁴⁹ Furthermore, a single omission may suffice to constitute persecution, as long as it was deliberately intended to discriminate. But it is not enough that there be discriminatory intent. The act or omission must have discriminatory consequences, which means it must be shown that the victim was in fact persecuted.⁵⁰ This requirement exists to avoid someone being found guilty without anyone having been actually

Prosecutor v Branimir ICTY Case No. IT-99-36-A, Judgement of 19 March 2004 at para 295.

⁴³ Mettraux note 30 above at 184; Cassese note 30 above at 454.

⁴⁴ Werle note 7 above at 256.

⁴⁵ *Prosecutor v Nahimana et al* ICTR Case No. ICTR-99-52-T, Judgement of 3 December 2003 at paras 1072-1084. The Appeals Chamber in the *Nahimana* case held that speech that incites violence against a population group on any discriminatory grounds constitutes actual discrimination, but that hate speech alone does not constitute a violation of fundamental rights; a speech by itself cannot directly kill members of a group, imprison or physically injure them. *Prosecutor v Nahimana et al* ICTR Case No. ICTR-99-52-A, Judgement of 28 November 2007 at para 986.

⁴⁶ *Prosecutor v Krmeljelic* ICTY Case No. IT-97-25-A, Judgement of 17 September 2003 at para 185.

⁴⁷ *Prosecutor v Stanišić and upljanin* note 42 above at para 68; *Prosecutor v Kordić and Erkec* note 38 above at para 68; *Prosecutor v Vasiljević* ICTY Case No. IT-98-32-A, Judgement of 25 February 2004 at para 113.

⁴⁸ *Kvočka et al v Prosecutor* ICTY Case No. IT-98-30/1-A, Judgement of 28 February 2005 at para 323.

⁴⁹ *Prosecutor v Kvočka et al* ICTY Case No. IT-98-30/1-T, Judgement of 2 November 2001 at para 186. See also *Tadić* case note 34 above at para 710.

⁵⁰ *Prosecutor v Vasiljević* ICTY Case No. IT-98-32-A, Judgement of 25 February 2004 at para 245; *Prosecutor v Krmeljelic* ICTY Case No. IT-97-25-A, Judgement of September 2003 at para 432.

persecuted.⁵¹ There are cases where the destruction of the property of the persecuted person in itself may not have as severe an effect on the victim as to amount to a crime against humanity, for example, burning the victims' car, unless this results in the loss of "an indispensable and vital asset to the owner."⁵² Similarly, destroying a cultural heritage site or places of religious worship may qualify as persecution where such acts have serious adverse effects on a strongly religious population.⁵³

These varied interpretations that the UN ad hoc tribunals have read into the meaning of persecution constitute a useful platform from which to start placing religious persecution more affirmatively within the ambit of international criminal justice. Many of the discriminatory and restrictive practices applied against minority (but also majority) religious groups or sub-groups, and the dire consequences for those affected by them, are real and eminently contemporary.⁵⁴ Research shows that countries that prohibit blasphemy, apostasy or defamation of religion tend to have more restrictions on religion.⁵⁵ This has been found to be strikingly so in North Africa and in the Middle East, where governments "were twice as likely as governments worldwide to resort to physical force when dealing with religious groups."⁵⁶ Instances of such force included killings, physical abuse, imprisonment, displacement from home, or destruction of religious property.⁵⁷ According to Grim, Europe's worryingly increasing social hostility to the growing Muslim immigrant population also harbours the potential to fuel governments to impose religious restrictions.⁵⁸ This, in turn, could have the effect of feeding into a circle of social violence against religious groups, as happened in Nazi Germany and as is happening at present in Iraq.⁵⁹

As a preliminary conclusion we can say that persecution sits, as one writer puts it, "very much at the core of crimes against humanity."⁶⁰ The ICTY's jurisprudence, in particular, has contributed immensely to the development of our understanding

⁵¹ See G. Acquaviva *Forced displacement and international crimes* (2011, UNHCR, PPLA/2011/05) available at www.unhcr.org/4e0346344.pdf (accessed 10 September 2013).

⁵² *Prosecutor v Kupreški* note 35 above at para 631.

⁵³ *Prosecutor v Kordić and Kerkez* note 38 above at para 207.

⁵⁴ See, for example European Parliament recommendation to the Council of 13 June 2013 on the draft EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief [2013/2082(INI)] P7_TA-PROV(2013) 0279; B.J. Grim "Rising restrictions on religion: context, statistics and implications" (2012) 5 *IJRF* 17 at 23- 25.

⁵⁵ See B.J. Grim note 54 above at 25. *IJRF* 17 at 25.

⁵⁶ *Ibid.* 27.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* 32.

⁵⁹ *Ibid.* 32.

⁶⁰ W.A. Schabas *The International Criminal Court: A commentary on the Rome Statute* (2010, Oxford) 175.

of persecution as a crime against humanity. In fact, persecution has often been the “most analyzed specific act”⁶¹ in the jurisprudence of international criminal judicial bodies. But with the ICTY and ICTR now winding up the last cases before them in order to close shop for good, international crimes are now a matter of the ICC which came into existence in 2002. The discussion will therefore turn to the crime of humanity of persecution under the ICC Statute, and will expound briefly on some of the aspects of persecution which have not been dealt with above.

4.3 Persecution as a crime against humanity under the International Criminal Court Statute

Article 7(1) of the ICC Statute defines a crime against humanity as comprising those crimes listed in the definition that are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. One of the listed crimes is “persecution against any identifiable group or collectivity on...religious...grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any other crime within the jurisdiction of the Court.”

This means that the acts of persecution must be connected to any of the other ten categories of acts enumerated in Article 7 (1), including but not limited to murder, forcible transfer, imprisonment, torture, persecution, enforced disappearance, and crimes of sexual violence – or to the crime of genocide (Article 6) and war crimes (Article 8).

The ICC Statute defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”⁶² The perpetrator must engage in a course of conduct involving multiple acts which are “part of a widespread or systematic attack against any civilian population...pursuant to or in furtherance of a State or organizational policy to commit such an attack”.⁶³

The criterion “widespread” can be derived from the number of victims or from the geographic area over which the attack extends. A single act, too, can be a widespread attack, if it affects many civilians, for it “is the attack that must be widespread or systematic and not the acts of the perpetrator.”⁶⁴ The word “systematic” refers to the organized nature of the acts and the overall action, the reason being to avoid making isolated acts punishable as crimes against humanity. But it is not

⁶¹ M.C. Bassiouni *Crimes against humanity* (2011, Cambridge) 405.

⁶² Art. 7(2) (g).

⁶³ Art. 7(1) and 7(2) (a).

⁶⁴ C. de Than and E. Shorts *International Criminal Law and Human Rights* (2003, Sweet and Maxwell) 92.

necessary that there be a plan or a policy, although the existence of one would help to prove the systematic nature of the attack.⁶⁵

4.4 The status of the perpetrator

Some states make no bones about the government's resolute determination to restrict and severely weaken the exercising of religious freedom. Such states usually have dragnet laws that criminalize almost any conduct of a minority religious group. The law is enforced rigorously and mercilessly, and the criminal justice apparatus works in such a way that the accused has no chances at all of being acquitted, either because judges have a wide margin of discretion in interpreting a vaguely defined law,⁶⁶ or because the accused person has only a limited right to legal representation or to call witnesses. For example, in Pakistan, which has broadly defined anti-blasphemy laws, only Muslims may be attorneys and witnesses, and accused persons have no legal claim against those who falsely accuse them of blasphemy.⁶⁷

In cases where state officials carry out the persecutory acts, with the state looking away and declining to protect the individual or to prosecute those responsible, there can be little doubt that the state endorses such conduct, which gives effect to a state's persecutory policy.⁶⁸ But what liability is incurred where the persecutory act is carried out by a private person without authorization by the government, or by a criminal gang, a guerrilla group or a terrorist organization? It does not matter whether or not the perpetrator is a state official or a member of an organization, for any person implementing or acting in support of the policy of the state or organization can be held liable for the crime of persecution.⁶⁹ A striking historical example "is the denunciation of a single Jew to the Gestapo, which was part of the process of excluding German Jews from cultural and economic life in the Third Reich."⁷⁰ It is not even necessary that the perpetrator use physical force, for the word "attack" covers any mistreatment of the targeted civilian population,⁷¹ and may include non-violent conduct, such as internment, discrimination or deportation.⁷² As to other non-state actors, the prevailing view is that if the policy element is taken into account, it is not necessary that the organization responsible for the persecutory

⁶⁵ *Prosecutor v Kunarac et al* note 30 above at para 98; *Prosecutor v Krsti* ICTY Case No. IT-98-33-A, Judgement of 19 April 2004 para 225.

⁶⁶ See T. Arora "India's defiance of religious freedom" (2012) 5 *IJRF* 59 at 63-64.

⁶⁷ A. Buwalda and G. Yogarajah "No justice for minorities in Pakistan" (2011) 4 *IJRF* 101 at 102.

⁶⁸ Werle note 7 above at 302.

⁶⁹ *Ibid.*

⁷⁰ *Ibid* 297.

⁷¹ Mettraux note 30 above at 157; K Ambos *Internationales Strafrecht* (2006, C H Beck) 212; Werle note 7 above at 297.

⁷² De Than and Shorts note 64 above at 91.

policy controls or governs a particular geographic area; all that is required is that the group of people, regardless of whether or not they are an organization, have the capacity to commit a widespread or systematic attack on a civilian population.⁷³ This view was recently upheld by the Trial Chamber of the ICC in the *Kenya* case when it laid down that the criterion of what constitutes an organisation is not “the formal nature of a group and the level of organisation”, but whether the group “has the capability to perform acts which infringe on basic human values.”⁷⁴

5. Ending impunity – bringing the culprits to book

The campaign against religious persecution needs to be conducted on several fronts. These range from exercising religious tolerance, expressing solidarity with the persecuted, engaging in inter-religious dialogue, or through to education. All these initiatives make ample sense, but need to be harnessed in tandem with each other, and more importantly, need to be reinforced with active, affirmative conduct. Tolerance, for example, requires more than the mere show of broad-mindedness or the capacity to endure; it requires, as Diana Eck has put it, to be translated in a plural society to mean “nurturing of constructive dialogue, revealing both common understandings and real differences.”⁷⁵ Helmut Schmidt, when he was then Chancellor of the Federal Republic of Germany, emphasized this point in an address to Protestants in the former German Democratic Republic, when he said that “he who stands for tolerance must desire and seek dialogue with the other.”⁷⁶ The critical role education can play in combating religious prejudices has been stressed repeatedly.⁷⁷

But the literature on the topic of religious persecution has largely skirted the issue of bringing the perpetrators to book. Thomas Schirrmacher and Thomas K. Johnson have rightly pointed to the need to resort to legal justice. They argue that, while mediation, arbitration and reconciliation must always be prioritised before resorting to the law, “reason demands that we be clear that going to court can be a responsible choice for Christians.”⁷⁸ Kuzmic is even more explicit when he calls on Christians “wherever and whenever possible” to “engage in political advocacy and the pursuit of international justice.”⁷⁹ It is, therefore, submitted that the campaign

⁷³ Ambos note 71 above at 215; Werle note 7 above 301.

⁷⁴ Kenya ICC-01/09 Pre-Trial Chamber, Decision of 31 March 2010 at para 95.

⁷⁵ Cited by Donnelly note 7 above at 63.

⁷⁶ H. Schmidt *Religion in der Verantwortung: Gefährdungen des Friedens im Zeitalter der Globalisierung* (2012, Ullstein) 106. See also E/CN.4/1994/79 at para 98 on the importance of intra-religious dialogue.

⁷⁷ See A/HRC/22/51 (December 2012) 18-21.

⁷⁸ “May Christians go to court?” (2011) 4 *IJRF* 17 at 20.

⁷⁹ Cited by C.L.Tieszen “Agonizing for you: Christian responses to religious persecution” (2009) 2 *IJRF* 87

for the right to religious freedom needs to be supported by strategies aimed at bringing the organs of international criminal justice to become more aware of how religious persecution manifests itself in its various guises. We need to go beyond the level of entreating persecuting governments to tolerate or to refrain from punishing people who are exercising their right to freedom of religion or belief. Freedom of religion is part of customary international law,⁸⁰ which is not only a source of international criminal law, but also part of it.⁸¹ It is therefore binding on all states and individuals alike.⁸² Individuals can no longer hide behind the shield of state sovereignty, claiming personal immunity, for international criminal law ascribes criminal responsibility to the individual person, including an incumbent head of state.⁸³

Making religious persecution a more urgent issue of international criminal justice is bound to cause outrage amongst those known for their persecutory acts, but this does not derogate from the necessity to make it such an issue.⁸⁴ The fact that the genesis and evolution of crimes against humanity is largely traceable to the 20th century persecution of religious minorities, should serve to reinforce the validity and legitimacy of the campaign against religious persecution. Introducing the criminal justice element more explicitly and volubly into the promotion of the right to religious freedom or belief is likely to spawn a new vanguard of legal scholarship on this topic which, in turn, will help the courts to elaborate the contours of the crime. It is therefore crucial that this theme become part of the agenda at international conferences, seminars and workshops dedicated to international criminal justice.⁸⁵

6. Conclusion

Religious persecution is a matter of constant concern which continues to manifest itself in the present day. Traditional ways of intervening on behalf of the victims of religious persecution are estimable and useful, but remain limited in their effectiveness. The advent of international criminal law and the creation of international criminal tribunals to try persons accused of committing international crimes, of which the crime against humanity of persecution is one, reaffirms the international community's push to hold individuals accountable, for crimes are committed by people and not states. The ICTY in particular has played a hugely important role in

at 95.

⁸⁰ K.Thames "Mechanisms for religious freedom advocacy" (2011) 4 *IJRF* 115 at 116.

⁸¹ *Prosecutor v Furundžija* ICTY Case No. IT-95-17/1-T, Judgement of 10 December 1998 at para 227; Mettraux note 27 above 270.

⁸² Cassese note 27 above at 91.

⁸³ See Werle note 7 above at 40.

⁸⁴ Thames note 80 above at 117.

⁸⁵ See Thames note 80 above at 116-118.

elaborating the definition of the crime of “persecution”, thereby setting legal precedents in the area of religious persecution upon which the ICC can draw in the future. The preliminary examination presently being undertaken by the ICC’s Office of the Prosecutor with regard to the situation in Nigeria underscores the need to make more meaningful use of international criminal law to bring persecutors to book. However, the organs of international criminal justice do not react instinctively to situations; they depend on information that is brought to light through the work of NGOs, human rights activists, scholarly writings, the public media and on the voices of those who speak out vociferously against religious persecutory acts so that they are brought fully within the ambit and the grasp of international criminal justice.