

# When can the persecution of Christians be considered as genocide or a crime against humanity?

A hypothetical study on the use of international criminal law to counteract impunity for religious persecution

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## Abstract

The right to freedom of religion is an undeniable human right prescribed and protected by the rule of law, but persecution restricts the exercise of religious freedom. In countries where Christians are persecuted, the domestic legal system is usually prejudicial and incompetent, and victims are left unprotected. In counteracting the impunity for religious persecution in the domestic arena of countries of serious concern, international criminal law may be used to prosecute individuals responsible for severe acts of persecution of Christians by classifying these acts as either a “crime against humanity of religious persecution” or “genocide by religious persecution” in terms of the Rome Statute.

**Keywords** Genocide, crimes against humanity, International Criminal Court, combating impunity, international human rights, persecution of Christians, religious freedom.

## 1. Introduction

The right to freely adopt, change or manifest one’s religion or belief through worship, observance, practice, ceremonial acts, teaching or otherwise must be regarded as a right to which everyone is entitled. However, for some it is not a natural privilege they can freely enjoy, but rather something they must practice in secret or under jeopardy.

Religious persecution remains a human rights concern. Despite the recognition of religious freedom as a universal human right, religious groups are still being persecuted on a daily basis.<sup>2</sup> “In this past century alone, more Christians were

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<sup>2</sup> Reliable statistics on the number of those persecuted because of their religion or of those murdered

murdered for their faith than any other century in human history, an estimated 200 million.”<sup>3</sup> The nature of internal armed conflicts, such as the situation in Darfur, often blurs the line between ethnic and religious violence.

...religious intolerance are among the causes of violence, ethnic cleansing, and armed conflict, leading to genocidal policies and practices, and often serious violations of international humanitarian law... international prosecution systems, as provided by the ICC, are to be resorted to in the pursuit of criminal accountability.<sup>4</sup>

Advocates of religious freedom aspire to create awareness and enforce measures aimed at the prevention of the global human rights concern that is religious persecution, a concern which seems to be a muted topic in much of the international community. In view of the unimaginable human rights atrocities committed during the 20th century and the internationalized concern regarding global human rights violations, the international community must unify in a conscious determination to exhaust every remedy available to deter the recurrence of grave crimes.

This article aims to advocate a progressive method or process as a sanction-based solution to curb religious intolerance and impunity whereby religious persecution as a human rights concern may be protected and enforced. This article will attempt to define religious persecution and validate serious acts of religious persecution as a crime of serious concern to the international community, therefore necessitating the criminal prosecution of the individuals responsible for such acts as crimes against humanity of persecution and genocide by persecution in terms of the Rome Statute.<sup>5</sup>

## 2. Religious freedom as a fundamental human right

Human rights are generally understood as “inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being”.<sup>6</sup> Religious freedom may be categorized under civil and political rights which form part of the fundamental human rights. It was amongst the first to be recognized and is codified in international legal instruments.<sup>7</sup>

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for their faith are hard to produce. Cf. T. Johnston and T. Schirmmacher in Taylor/Reimer/van der Meer: *Sorrow and blood*, Pasadena 2012.

<sup>3</sup> Jeff King, President of International Christian Concern, at [www.persecution.org/about-us/the-problem](http://www.persecution.org/about-us/the-problem). Accessed on 03/04/2012.

<sup>4</sup> *Max Planck Encyclopedia on Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press (2011) par 22.

<sup>5</sup> *Rome Statute of the International Criminal Court*, Doc. A/CONF.183/9 of 17 July 1998 in force 1 July 2002 (2002).

<sup>6</sup> M. Sepúlveda et al, *Human Rights Reference book* (2004), 3.

<sup>7</sup> Universal Declaration of Human Rights (UDHR), adopted by General Assembly resolution 217 A (III) of 10 December 1948; the International Covenant on Economic, Social and Cultural Rights, General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976 (ICESCR); and the International Covenant on Civil and Political Rights (General Assembly resolution 2200A (XXI)

The persecution of Christians for the exercise of their religious beliefs, thoughts, practices, worship and teaching is a limitation on the right to freedom of religion, thought, expression and assembly.

### 3. Nature and forms of religious persecution

Religious persecution is in essence the discrimination against a religious group and implies “any distinction, exclusion, restriction or preference which is based on... religion... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>8</sup>

The fundamental core elements of persecution are harm, severity, and legitimacy.<sup>9</sup>

**Harm** – The element of physical harm associated with persecution is the most widely understood and universally accepted form of harm and for our purposes is the most relevant. Numerous acts may constitute physical harm, these acts may include: torture, imprisonment, murder, extermination and other inhumane acts done against any civilian population.

**Severity of harm** – Harm can only amount to persecution when a certain degree or threshold of severity has been reached, however the degree or threshold of the severity of harm is a contentious issue.<sup>10</sup> Rempell suggests a continuous suffering model, whereby harm is not only assessed as isolated incidents, but also in terms of its cumulative effect. The continuous suffering model assesses the physical harm as well as the long term psychological harm that may be caused by acts of persecution.

**Legitimacy of harm** – The requirement of legality requires that there must be no justifiable reason why the persecutory harm may be inflicted on a person or group of persons.<sup>11</sup> However, “freedom of thought and religion is an absolute right that does not permit any limitation.”<sup>12</sup>

Religious persecution may take various forms:

**Communism and religious nationalism:** The constitutional order of communism places restrictions on certain human rights, including religious freedom, for example in Vietnam.

**Islamic extremism:** This form of persecution may be directly attributed to the state with the enforcement of Sharia law, for example in Mali, or may be attributed to Islamic extremist groups or organizations, such as Boko Haram in Nigeria. In Iran

of 16 December 1966, entry into force 23 March 1976)(ICCPR).

<sup>8</sup> *Ibid* (n 4) Max Planck Encyclopedia, 611.

<sup>9</sup> S. Rempell, Defining persecution (October 8, 2011). *Utah Law Review*, Vol. 2013, No. 1, 2013, 1.

<sup>10</sup> *Ibid* (n 9) Rempell, 29.

<sup>11</sup> “Even if harm reaches the requisite severity, an applicant cannot establish he or she was (or will be) persecuted if the inflicted harm is normatively justified or otherwise permissible.” *Ibid* (n 9) Rempell, 39.

<sup>12</sup> *Ibid* (n 6) Sep. Iveda, 203.

“... only Armenians and Assyrians can be Christian – ethnic Persians are by definition Muslim, and therefore ethnic Persian Christians are by definition apostates”.<sup>13</sup> In the island state of the Maldives “the Maldivian government views itself as the protector and defenders of Islam... all deviant religious convictions are strictly forbidden”<sup>14</sup> which leads to the prohibition on public Christian gatherings and imprisonment.

Religious persecution from a legal perspective is the systematic maltreatment of a person, entity or group due to their religious affiliation which may cause physical harm, psychological damage or a deprivation of human rights for which there is no justification and which has reached a certain degree or threshold of severity through varied sources of acts.

#### **4. Working definition – defining religious persecution in international criminal law**

The intricacy and politicisation of religious persecution creates great difficulty in defining persecution in the context of international criminal law. The varying forms of persecution are a further challenge in the demarcation of a working definition for religious persecution. In some instances the discrimination against Christians takes on specific forms based on governmental ideologies.

Tieszen provides a theological definition for the religious persecution of Christians:

Any unjust action of varying levels of hostility, directed at Christians of varying levels of commitment, resulting in varying levels of harm, which may not necessarily prevent or limit these Christians’ ability to practice their faith or appropriately propagate their faith as it is considered from the victim’s perspective, each motivation having religion, namely the identification of its victims as ‘Christian’, as its primary motivator.<sup>15</sup>

Having considered the severity, nature and forms of the persecution of Christians, the writer offers the following working definition of religious persecution for purposes of this hypothetical study:

Unjustified acts, which severely violate or deprive, a believer or believers of a specific religious group, of their fundamental human rights, through a systematic oppression or attack on the religious group and/or their religious beliefs or affiliations or lack thereof, with the specific intention to oppose or eliminate the religious group in whole or in part, because of the religious conviction of the group.

<sup>13</sup> Open Doors website: <http://tiny.cc/opendoorsiran>. Accessed 06/06/2012.

<sup>14</sup> Open Doors website: <http://tiny.cc/opendoorsmaldives>. Accessed 06/06/2012.

<sup>15</sup> C.L. Tieszen, *Towards Redefining Persecution* (2008), 168.

## 5. Internationalization of persecution of Christians

The principles of public international law provide for the protection and enforcement of human rights as is illustrated by the International Bill of Human Rights.<sup>16</sup> There are also numerous human rights conventions and institutions creating a wide range of mechanisms for monitoring compliance with and the protection of human rights at an international level, such as the United Nations Human Rights Committee, as well as at the regional level.<sup>17</sup> Finally, the International Criminal Court (ICC) is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community,<sup>18</sup> crimes which by their very commission are serious and obvious infringements of fundamental human rights on a considerable level.

Despite the recognition of the right to religious freedom at the international level and the obligation on all states in terms of customary international law<sup>19</sup> to protect religious freedom, the implementation of human rights is inconsistent. For example, the ideologies of atheistic states and Islamic sentiments restrict or even criminalize Christian activities. As a result, advocating on behalf of persecuted religious minorities may require a more severe proscription for the infringement of religious freedom. Consequently, it could be argued that the infringement of religious freedom is not adequately enforced by the individual state at a national level, and may therefore require the enforcement of effective penal sanctions against the perpetrators or authors of these human rights violations on an international level.

There are factual indications that several situations and investigations currently before the international criminal court regarding specific cases of genocide and crimes against humanity may have substantial elements of religious persecution, such as the situations in Sudan,<sup>20</sup> Nigeria<sup>21</sup> and Mali.<sup>22</sup> However, religious persecution is not the primary reason for the prosecution or investigation into these situations by the prosecutor of the ICC.

<sup>16</sup> Article 18 of the UDHR & article 18 of the ICCPR.

<sup>17</sup> African Commission on Human and Peoples' Rights; the European Court of Human Rights; and the Inter-American Court and Commission of Human Rights.

<sup>18</sup> Article 5 of the *Rome Statute*.

<sup>19</sup> Charter of the United Nations and Statute of the International Court Of Justice, San Francisco, 24 October 1945. ICJ Statute defines customary international law in Article 38(1)(b) as "...as evidence of a general practice accepted as law".

<sup>20</sup> "The regime's leaders are mainly radical Islamist and the ruling National Congress Party a means to further an Islamic agenda. Incidents against Christians include faith related killings, damaging Christian properties, detention and forced marriage as well as arrests, deportations and raids on church offices." <http://tiny.cc/opendoorssudan>. Accessed 15/01/2014.

<sup>21</sup> Refer to p. 11.

<sup>22</sup> Refer to p. 9.

## 6. The persecution of Christians as crimes against humanity and genocide

### 6.1 Crimes against humanity

Article 7 of the Rome Statute defines “crimes against humanity” as acts “...committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

The Rome Statute Explanatory Memorandum states that crimes against humanity:

...are particularly odious offenses in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human being... part either of a government policy or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority... and will reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice.<sup>23</sup>

### 6.2 Important characteristics of crimes against humanity in general

An attack may be identified as crimes against humanity if it comprises the following essential characteristics:

“The attack” – An “attack” may be described as a course of conduct involving the commission of acts of violence, which need not be very large in scale to meet the requirements of severity.<sup>24</sup>

“Committed as part of a widespread or systematic attack” – The acts or crimes must be committed, either on a *widespread*<sup>25</sup> scale, and/or *systematically*,<sup>26</sup> to warrant the charge.<sup>27</sup> The motive or reason is not a material element of the crime.<sup>28</sup>

“Directed against any civilian population” – The acts or crimes committed may focus on any civilian group and a specific discriminatory intent need not be proven, except in the case of persecution.<sup>29</sup>

<sup>23</sup> G. Horton, *Dying Alive – A Legal Assessment of Human Rights Violations in Burma*, April 2005, co-funded by The Netherlands Ministry for Development Co-Operation. Par 12.52.

<sup>24</sup> G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, (2006), 156.

<sup>25</sup> Widespread refers to the large-scale nature of the attack and the number of victims – International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, par. 94.

<sup>26</sup> “A systematic attack means an attack carried out pursuant to a preconceived policy or plan” – International Criminal Tribunal for Rwanda (ICTR): *Prosecutor v. Clement Kayishema*, Case No. ICTR-95-1-T, 21 May 1999, par 123.

<sup>27</sup> *Ibid* (n 24) Mettraux, 171.

<sup>28</sup> “Crimes against humanity are distinguishable from genocide in that they do not require an intent to ‘destroy in whole or in part’, but only target a given group and carry out a policy of ‘widespread or systematic’ violations.” M. Cherif Bassiouni, *Crimes Against Humanity*. <http://tiny.cc/crimesofwar>. Accessed 27/02/2013.

<sup>29</sup> *Ibid* (n 23) Horton, par 12.52.

“With knowledge of the attack” (mental element) – The acts or crimes must be carried out with a level of direct intent (*dolus eventualis*), whereby the perpetrators’ foremost intention is not the attack itself, but he foresees the necessity of the attack in order to attain his objective. Article 30 of the Rome Statute requires that the material elements of the crime are committed with intent and knowledge.

### 6.3 Crimes against humanity of persecution

The Rome Statute lists a number of specific acts or omissions<sup>30</sup> which constitute crimes against humanity if committed as part of a widespread or systematic attack. Article 7(1) read together with Article 7(1)(h) and Article 7(2)(g) of the Rome Statute defines crime against humanity of persecution as acts;

... the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively... against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court, ... committed as part of a widespread or systematic attack.

In the *Bogosora* case the court stated that:

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 (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).<sup>31</sup>

In defining the objective element (*actus reus*) of persecution, the Tribunal for Yugoslavia<sup>32</sup> has laid down a severity or gravity test whereby an act of persecution may constitute a crime against humanity: A gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other crimes against humanity enumerated in Article 7 of the Statute.

A persecutory act that reaches the same level of gravity as the other acts of crimes against humanity, provides us with a framework of fundamental human

<sup>30</sup> State or organizational action can, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. *The Elements of Crimes – Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010* (ICC publication, RC/11).

<sup>31</sup> ICTR: *Prosecutor v Théoneste Bagosora*, Case No. ICTR-98-41-T, 18 December 2008 par 2208.

<sup>32</sup> ICTY, in the case of the *Prosecutor v Kupreški et al.* Case No. IT-95-16, 14 January 2000.

rights which, if infringed upon in terms of the elements of persecution, may be classified as crimes against humanity, they include amongst others: the right to life; right to be free from arbitrary arrest, detention or exile; the right to freedom of belief and opinion; the right to freedom of peaceful assembly; the right to equality and the right to be free from discrimination; the right to freedom of thought, conscience and religion; and the right to manifest a religion or belief in teaching, practice, worship and observance. If any listed act, such as murder or torture, was committed with knowledge of the attack and directed with the intention to discriminate against an identifiable group based on political, racial, national, ethnic, cultural, religious, gender or other grounds, the acts go beyond mere crime against humanity of murder or torture, and constitute also crimes against humanity of persecution.

The elements of crimes against humanity of persecution in terms of the Rome Statute may be summarized as:

The perpetrator severely deprived contrary to international law one or more persons of fundamental rights... targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such... targeting was based on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law.

The conduct was committed in connection with any act referred to in Article 7 paragraph 1<sup>33</sup>, of the Statute or any crime within the jurisdiction of the Court. . .

The perpetrator knew that the conduct was part of or intended the conduct to be part of widespread or systematic attack directed against a civilian population”<sup>34</sup> in order to weaken or destroy the specified group.<sup>35</sup>

#### 6.4 Situations of crimes against humanity of persecution in the contemporary international criminal justice system

Mali – On the 18th of July 2012 the Government of Mali referred the situation in Mali as from January 2012 to the Prosecutor.<sup>36</sup> During the internal armed conflict various atrocities were committed including murder, rape, mutilation, cruel treatment and

<sup>33</sup> Art 7(1) – Murder; Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

<sup>34</sup> *Ibid* (n 23) Horton, par 11.57.

<sup>35</sup> *Ibid* (n 23) Horton, 24. As long as the attack is part of a widespread or systematic policy, the reasons or aims of the policy are secondary.

<sup>36</sup> Referral letter by the Government of Mali. <http://tiny.cc/lettermali>. Accessed 23/01/2013.



torture, amongst others. There is also evidence of intentional attacks directed against religious buildings.<sup>37</sup> Because these acts were perpetrated during the internal armed conflict, the ICC has preferred to classify these acts as war crimes, although crimes against humanity or genocide are not discarded in the indictment.<sup>38</sup> Reports from NGO's concerned with the persecution of the Christian church suggest that Christians are being condemned by the war crime atrocities.<sup>39</sup> <sup>40</sup> Despite an international French military intervention in Mali in January 2013, Christians still fear an Islamist advance on the southern parts of Mali.<sup>41</sup> Preliminary research indicates that the enforcement of Sharia law on Christians in Mali is a clear violation of the right to religious freedom.

An explicit State policy of widespread and systematic attacks does not exist, however a wide practice of atrocities tolerated or condoned by an organizational group or a *de facto* authority is definitely applicable therefore constituting an omission by the Malian government.

“Burmanization” policy – The Republic of the Union of Myanmar / Burma has been classified as the leading country of particular concern regarding the restriction or violation of religious freedom, by the United States Commission on International Religious Freedom.<sup>42</sup> The Burmese Military Regime is regarded as a government that have engaged in or tolerated “particularly severe” violations of religious freedom.<sup>43</sup> The USCIRF annual report of 2013 suggests a universal denial of religious freedom including, “religious freedom violations against ethnic minority Christian . . . communities, with serious abuses against mainly Christian civilians during military interventions in Kachin State.”<sup>44</sup>

Horton considers the conduct by Junta in Burma / Myanmar to validate its classification as either genocide or crimes against humanity. “Burmanization”, as it is referred to, is a policy of religious and cultural destruction. Horton concludes that

<sup>37</sup> Report on the Situation in Mali. Par 109 – 113. <http://tiny.cc/reportmali>. Accessed 23/01/2013.

<sup>38</sup> “The information is insufficient to conclude that these alleged acts were committed in the context of a widespread or systematic attack against the civilian population and in furtherance of a State or organizational policy. This assessment may be revisited in the future.” – Report on the Situation in Mali, *Ibid* (n 40) Par 132.

<sup>39</sup> World Watch Monitor – “Hope in Mali rises with international military intervention” (15 January 2013). <http://tiny.cc/worldwatchlist>. Accessed 23/01/2013.

<sup>40</sup> Human Rights Watch – “Mali: War Crimes by Northern Rebels” (30 April 2012). <http://tiny.cc/humanrightswatch>. Accessed 23/01/2013.

<sup>41</sup> *Ibid* (n 39) World Watch Monitor.

<sup>42</sup> Annual Report of the U.S. Commission on International Religious Freedom, April 2013 (Covering January 31, 2012 – January 31, 2013), 6.

<sup>43</sup> International Religious Freedom Act of 1998 (IRFA) defines “particularly severe” violations as ones that are “systematic, ongoing, and egregious, including acts such as torture, prolonged detention without charges, disappearances, or other flagrant denial[s] of the right to life, liberty, or the security of persons.”

<sup>44</sup> *Ibid* (n 42) Annual Report of the U.S. Commission on International Religious Freedom, 6.

the atrocities committed in Burma justify its classification as crimes against humanity of persecution inflicted against religious minorities in an apparent attempt to “make life physically unsustainable for victims over the long term.”<sup>45</sup>

Nigeria – After analyses of alleged crimes, including: killings, abductions, rape and sexual violence, committed in Central Nigeria since mid-2004, the office of the prosecutor opened a preliminary examination of the situation in Nigeria. The ICC has unfortunately failed to address the “systematic persecution, discrimination and marginalization of Christians in the Northern States of Nigeria.”<sup>46</sup>

“Christians of Northern origins have been the subject of targeted killings, burning and bombings of their churches and property along with other forms of discrimination and marginalization.”<sup>47</sup>

It is unfortunate to note that the ICC is reluctant to define a conflict or actions emanating from religious connotations as religious persecution.<sup>48</sup> In the recent Preliminary Examination Report of the Office of the Prosecutor to the Assembly of States Parties<sup>49</sup> regarding Nigeria, the report clearly states that the mischaracterization:

“...conceals the source of the violence by implying that the primary reason violent ‘clashes’ have occurred in Nigeria is due to divisions between ‘indigene’ and ‘settler’ communities and ethnic differences, rather than any other causes such as the religiously motivated attacks of Boko Haram.”<sup>50</sup>

The lack of conviction in defining violent “clashes” in the northern states of Nigeria as religious persecution, trivializes the persecution of Christians in Nigeria.

## 6.5 Classifying acts as crimes against humanity of religious persecution

The writer contends that the following elements should be applied in order to ascertain whether a specific situation or a range of actions could be classified as crimes against humanity of religious persecution:

A course of conduct or omissions;

- that is of a widespread or systematic nature;
- directed against a protected group as a response to their religious beliefs or affiliations or lack thereof;

<sup>45</sup> *Ibid* (n 23) Horton, 24.

<sup>46</sup> U. Danfulani, “Ethno-religious crises in northern Nigeria as self-determination movements or religious fundamentalism: The impact of violent conflicts on Religious Freedom” Paper presented at the International Consultation on Religious Freedom Research on 16 March 2013.

<sup>47</sup> *Ibid* (n 46) Danfulani.

<sup>48</sup> “Jubilee Campaign Engages the International Criminal Court at The Hague”. <http://tiny.cc/jubileecampaign>. Accessed 06/06/2012.

<sup>49</sup> <http://tiny.cc/otpreport>. Accessed 06/06/2012.

<sup>50</sup> *Ibid* (n 48) Jubilee Campaign.

- regulated or enforced through a State or organizational policy or of a wide practice of atrocities tolerated or condoned by a government or a *de facto* authority actively promoting or encouraging such an attack against the religious group;
- with the specific intent to deprive the members of the religious group of their fundamental human rights because of their membership of the religious group;
- while the perpetrator/s knew or should have known that the conduct was part of or intended the conduct to be part of the widespread or systematic attack directed against the religious group; and
- reaching the level of seriousness of a large scale of gross or blatant denials of fundamental human rights in connection with other instances of religious persecution or other crimes of serious concern.

## 6.6 Genocide

The term “genocide” was coined by Polish lawyer Raphael Lemkin during World War II to label the crimes committed by Nazi Germany against the European Jews during the Holocaust.<sup>51</sup> “The criminalization of genocide seeks to protect certain groups’ right to exist.”<sup>52</sup>

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide was the first international legal instrument that defined genocide:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

The Genocide Convention has become part of customary international law, a peremptory norm,<sup>53</sup> as well as an obligation *erga omnes*.<sup>54</sup> The Convention makes the prevention and punishment of genocide binding on all states<sup>55</sup> and places an obli-

<sup>51</sup> G. Werle, *Principles of International Criminal Law* (2005), 190.

<sup>52</sup> *Ibid* (n 51) Werle, par 566.

<sup>53</sup> K. Kittichaisaree. *International Criminal Law* (2001), 67.

<sup>54</sup> *Case concerning the Barcelona Traction, Light and Power Company, Ltd* (Belgium v Spain) of 1970, ICJ Reports 3 at 32. Obligations *erga omnes* refers to obligations owed by all states towards the international community.

<sup>55</sup> *Case concerning the Barcelona Traction, Light and Power Company, Ltd* (Belgium v Spain) of 1962, ICJ

gation on states to enact “the necessary legislation to give effect to the provisions of the present Convention and... to provide effective penalties for persons guilty of genocide.”<sup>56</sup> States are further compelled to prosecute persons charged with genocide by a competent domestic tribunal of that state in the territory of which the act was committed, or alternatively if the state is unwilling or unable to prosecute at a national level, the state must refer the matter to an international penal tribunal that may have jurisdiction.<sup>57</sup>

### 6.7 Important characteristics of genocide

An act may be identified as genocide if it comprises the following essential characteristics:

Genocidal acts – Either acts or omissions<sup>58</sup> may constitute genocidal acts.<sup>59</sup> Genocidal acts include “*acts against the physical or psychological integrity of the group or its existence or biological continuity.*”<sup>60</sup>

Mental element of genocide (*mens rea*) – What is required is a “physiological nexus between the physical result and the mental state of the perpetrator.”<sup>61</sup> The perpetrator must, at the time of committing acts constituting genocide, be aware of the wider intention of such an attack. The perpetrator is also required to realize that the individual is part of such a group and that the group is protected under the Genocide Convention.

Motive or purpose of the genocidal acts – Genocide requires the specific intent to destroy or attempt to destroy the group or a part of it.<sup>62</sup> The distinctive characteristic which separates the crime of genocide from the other core crimes is the specific intent (*dolus specialis*) of genocide, which is to destroy all or part of a group.<sup>63</sup>

Destruction of a group *in whole or in part* – In considering the meaning of “*in part*” the ICTY stated that: “The part must be a substantial part of that group... the part targeted must be significant enough to have an impact on the group as a whole.»<sup>64</sup>

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Reports.

<sup>56</sup> Article 5 of the *Genocide Convention*.

<sup>57</sup> Art 6 of the *Genocide Convention*.

<sup>58</sup> ICTR: *Prosecutor v Kambanda*, Case No. ICTR-97-23-S, ICTR T.Ch., 4 Sept 1998, par 39. The court found that Kambanda, as Prime Minister of Rwanda, had failed to take action to stop the Rwandan genocidal massacres.

<sup>59</sup> *Ibid* (n 53) Kittichaisaree, 71.

<sup>60</sup> *Ibid* (n 51) Werle, 190.

<sup>61</sup> *Ibid* (n 53) Kittichaisaree, 72.

<sup>62</sup> *Ibid* (n 51) Werle, par 565.

<sup>63</sup> *What is Genocide?* Website of the Faculty of Law, McGill University. <http://tiny.cc/whatisgenocide>. Accessed 01/03/2013.

<sup>64</sup> ICTY: *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T, 2 August 2001.

Protected groups – The Convention criminalizes acts of genocide against certain protected groups based on nationality, ethnicity, race or religious characteristics. The perpetrator must know or perceive the individual to be a member of such a group.

### 6.8 Genocide by religious persecution

Genocide by religious persecution can be regarded as the intentional large-scale discriminate violation of the fundamental right of existence of members belonging to or affiliated with a specific religious group. Advocates of religious freedom refer to this phenomenon as martyrdom.

If one is martyred, it is because they were persecuted in such a way as to result in death... a martyr's experience preceding his or her death is understood as religious persecution. It is the actual death of an individual that qualifies them as a martyr... one cannot experience martyrdom apart from his experience of (religious) persecution.<sup>65</sup>

Martyrdom is a specific form of religious persecution and may be categorised as genocide if the perpetrator has the specific intention to destroy, in whole or in part, an identifiable religious group. If this proposition is accepted we may refer to this form of genocide as genocide by religious persecution. The nature of genocide is inherently discriminatory in nature based on, amongst other grounds, religion. To therefore infer that genocide committed against a specific religious group with the intention to destroy that group is a specific form of religious persecution, is justified. Genocide by religious persecution can be validly distinguished from crimes against humanity of religious persecution depending on the intention of the perpetrator and reliant on the conduct which violated the fundamental right.

### 6.9 Situations of genocide by persecution in the international criminal justice system

The Bosnian Genocide case is a prime example of genocide by persecution, whereby the large scale killing of Bosnian Muslims formed the basis for the prosecution of the leadership of the Bosnian-Serb Army. The ICTY judged that the 1995 Srebrenica massacre was genocide.<sup>66</sup>

<sup>65</sup> C.L. Tieszen, *Re-examining Religious Persecution* (2008), 33.

<sup>66</sup> ICTY: *Prosecutor v. Radislav Krstic* – Appeals Chamber – Judgment – IT-98-33 (2004) ICTY 7 (19 April 2004).

By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica... and deliberately and methodically killed them solely on the basis of their identity.<sup>67</sup>

In Côte d'Ivoire a civil war broke out after the 2010 presidential election. The result of the election was that the opposition leader Alassane Ouattara had defeated the incumbent president Laurent Gbagbo. However Gbagbo refused to relinquish power which resulted in post-election violence during which more than 3 000 persons died. Atrocities were committed both by the Ivorian army and the Forces Nouvelles de Côte d'Ivoire loyal to Gbagbo. On 3 October 2011 the pre-trial chamber of the ICC authorized an investigation into the violence in Côte d'Ivoire. The prosecutor of the ICC is investigating the role played by members of Ouattara's government.

The crimes that took place in Côte d'Ivoire... may be qualified as genocidal massacres, ... the assaults were often directed at specific ethnic or religious communities... the attacks were the result of an organizational policy of Laurent Gbagbo and his forces. The murders, rapes, persecutions and other inhuman acts were committed with the intent to partially destroy ethnical, religious and national groups.<sup>68</sup>

### 6.10 Classifying acts as genocide by religious persecution

Genocide in the context of genocide by killing; genocide by causing serious bodily or mental harm; genocide by deliberately inflicting conditions of life calculated to bring about physical destruction; genocide by imposing measures intended to prevent births; and genocide by forcibly transferring children, may all be classified as specific forms of genocide by religious persecution if the genocidal acts are directed at, and intended to, destroy the existence of a specific religious group.

The writer contends that the following elements should be applied in order to ascertain whether a specific situation or a range of actions should be classified as genocide by religious persecution:

The deliberate and systematic repudiation of fundamental human rights;

- by a course of discriminate genocidal attacks or omissions;
- against the physical or psychological integrity;
- or the existence, or biological, or social continuity;

<sup>67</sup> ICTY: "Address by ICTY President Theodor Meron, at Potocari Memorial Cemetery", The Hague, 23 June 2004.

<sup>68</sup> *Genocide Watch: Côte d'Ivoire*. [www.genocidewatch.org/cotedivoire.html](http://www.genocidewatch.org/cotedivoire.html). Accessed on 05/03/2013.

- of a protected group as a response to their religious beliefs or affiliations or lack thereof;
- with the specific intent to destroy or attempt to destroy the essential foundations of the life;
- of the entire religious group or a substantial part thereof;
- as part of a coordinated plan tolerated or condoned by a government or a factual authority actively promoting or encouraging such an attack against the religious group;
- while the perpetrator/s, at the time of committing acts constituting genocide, was aware or should have been aware of the wider intention of such an attack against members of the religious group based solely on the martyrs' membership to the religious group.

## 7. Conclusion

Combining relevant acts of religious persecution with the requirements for the prosecution of acts classified as core crimes under the Rome Statute results in a barometer for classifying severe acts of religious persecutions as crimes against humanity of persecution or genocide by persecution. With this classification directive, contemporary case studies of religious persecution may be evaluated in order to ascertain whether or not such religious persecution could be validated as crimes that shock the conscience of humankind, thus necessitating the criminalization and prosecution of such acts at a national level or if domestic courts are incompetent or unwilling to do so at an international level.

The international community has created effective mechanisms for the protection of human rights as well as the restriction of impunity. The prosecution of the authors or initiators under international criminal law may be used as a mechanism to effectively safeguard religious freedom by prosecuting severe acts of religious intolerance. Classifying and effectively prosecuting acts of religious persecution as crimes against humanity and genocide may serve the purpose of conserving the right to manifest one's freedom of religion or belief as a universally protected right, and not just a privilege bequeathed on some.

Whilst there is still comprehensive research and a thorough analysis of relevant case studies required to validate specific situations of religious persecution as crimes against humanity of persecution and genocide by persecution, it should be clear that the criminalization of religious persecution in this way will elevate the crime of religious persecution and confirm its inclusion as part of the international core crimes.