

The Crime of Persecution in International Criminal Law

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Keywords: crimes against humanity; International Criminal Tribunal for the Former Yugoslavia; persecution.

Abstract: The conclusion of the ICTY's first trial offered the Trial Chamber an opportunity to expound upon the elements of the crime of persecution which, until this point, had been left undefined.

1. INTRODUCTION

On 7 May 1997 the first trial before the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹ concluded with a finding that Bosnian Serb Duško Tadić had committed, amongst other crimes, a crime against humanity through his participation in the persecution of non-Serbs.² Included in this finding was that Tadić had actively participated in:

1. the attack on a predominantly Bosnian Muslim town and its outlying villages;
2. the collection and forced transfer to detention camps of non-Serbs;
3. the killing of two Bosnian Muslim policemen;
4. the beating of scores of other non-Serbs both inside and outside the camps; and

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1. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (the ICTY) was established by the United Nations Security Council pursuant to Resolution 808 of 22 February 1993 and its Statute was adopted by means of Security Council Resolution 827 of 25 May 1993.
2. *Prosecutor v. Tadić*, Opinion and Judgment, No. IT-94-I-T, Tr.Ch. II, 7 May 1997.

5. the seizure, selection and transportation of non-Serbs to camps with the knowledge that a vast majority of those detained would be deported from the territory of Bosnia-Herzegovina.

This finding of persecution, including the only two murders for which Tadić was found guilty, was the basis for the longest sentence imposed by the Trial Chamber, that of 20 years.³ Similar importance was given to the finding of persecution by the Prosecutor in her post-sentencing press conference.⁴

The conviction of Duško Tadić for committing persecution, resulting from the first trial by the ICTY and thus the first by a truly international, as opposed to multilateral or national, criminal tribunal, provides an opportune moment to reflect upon the nature of this crime. Unlike the core crimes of murder and torture and their associated prohibitions, the Trial Chamber went into considerable detail concerning persecution. As such, this contribution will predominantly focus on the findings of the Trial Chamber and is intended to provide some elucidation as to these findings. Additionally, as a core crime under the rubric of, and thus a particular form of, crimes against humanity, any discussion of the elements of persecution necessarily entails some discussion of the elements common to all crimes against humanity, the so-called 'conditions of applicability'.⁵ Nevertheless, as part of a focus on the core crimes under the ICTY's Statute this is not the proper forum, nor is the space allocation adequate, to embark upon a discussion of the requirements for crimes against humanity in general. As such, the conditions of applicability of crimes against humanity are discussed only to the extent that they have a direct bearing on the nature of the core crime of persecution.

2. DEFINITION OF PERSECUTION

The statutory basis for the Trial Chamber's finding of persecution is Article 5 of the ICTY's Statute which grants the ICTY subject-matter jurisdiction over crimes against humanity, including the crime of persecution. It states:

[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;

3. Prosecutor v. Tadić, Sentencing Judgment, No. IT-94-1-T, Tr.Ch. II, 14 July 1997, para. 74.

4. See Statement by the Prosecutor's Office Following the Sentence of Duško Tadić, ICTY Press Brief of 14 July 1997.

5. Prosecutor v. Tadić, Opinion and Judgment, *supra* note 2, Section VI.D.2.

- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhuman acts.⁶

While in isolation the requirements of Article 5 of the Statute, and Article 5(h) in particular, seem clear, the term 'persecution', although relatively well-developed in terms of asylum and refugee law,⁷ has not been similarly well-defined with regard to its international criminal application. Thus the first task for the Trial Chamber arriving at its legal findings as to persecution as a crime against humanity was to formulate a definition for the crime, and from there extrapolate the elements of the offence. In order to do this, the Trial Chamber first examined the origins of the crime.

The notion of crimes against humanity, including persecution, in the technical sense and the imputation of individual criminal responsibility for their commission, was first recognized in the trials resulting from World War II.⁸ Article 6(c) of the Nuremberg Charter⁹ granted the International Military Tribunal (IMT) jurisdiction over crimes against humanity, including murder, extermination, enslavement, deportation, and persecution. The Trial Chamber embraced the generally accepted notion, maintained by the International Law Commission (ILC),¹⁰ that the Nuremberg Charter recognized two categories of crimes against humanity: those related to inhumane acts, known as crimes of the 'murder type' containing the first four crimes listed above; and persecution on political, racial, or religious grounds, known as crimes of the 'persecution type'.¹¹ The Trial Chamber, citing an expert in the field, noted that unlike crimes falling within the first category, crimes of the 'persecution type' are not necessarily contained in national pe-

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- 6. UN Doc. S/25704/Ann. (1993), reproduced in 32 ILM 1192 (1993); adopted by Security Council Resolution 827, UN Doc. S/Res/827 (1993), reproduced in *id.*, at 1203.
 - 7. See Office of the United Nations High Commissioner for Refugees, *The Handbook on Procedures and Criteria for Determining Refugee Status* (1992); see also G.S. Goodwin-Gill, *The Refugee in International Law* 66-68 (1996).
 - 8. See *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal in Jurisdiction*, No. 95-IT-AR72, 2 October 1995, para. 138; see also *Prosecutor v. Tadić, Opinion and Judgment*, *supra* note 2, para. 618.
 - 9. Annex to the 1945 Agreement for the Prosecution and Punishment of Major War Criminals (IMT), London, 82 UNTS 280 (1951).
 - 10. See *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, 1950 YILC, Vols. 3 & 4, at 28.
 - 11. *Prosecutor v. Tadić, Opinion and Judgment*, *supra* note 2, paras. 651 and 694.

nal codes.¹² As such, resort to national penal provisions would not prove useful in coming to a definition of the crime.

Despite the relative paucity of international and national provisions relating to persecution as a criminal offence, the Trial Chamber determined that what is required for persecution is “some form of discrimination that is intended to be and results in an infringement of an individuals’s fundamental rights”, and that, pursuant to Article 5(h) of the Statute, the discrimination must be on specific grounds, namely race, religion, or politics.¹³ Additionally, the Trial Chamber found that because the ‘persecution type’ is distinct from the ‘murder type’ of crimes against humanity, a separate act of an inhumane nature is not necessary to constitute persecution, rather it is the discrimination itself that makes the act inhumane.¹⁴ After examining the ILC’s Draft Code of Crimes Against the Peace and Security of Mankind (ILC Draft Code),¹⁵ the Trial Chamber further stipulated that:

[i]t is the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution, although the persecution must be on one of the listed grounds to constitute persecution under the Statute.¹⁶

After thus arriving at a suitable definition for the crime and the elements involved, the next question addressed was which acts violate the right to equality in a sufficiently serious way as to, if committed, contribute to a finding of persecution. It is in the discussion of this topic that the Trial Chamber makes its greatest contribution toward achieving some clarity in the law.

3. THE ACTS ENCOMPASSED BY THE CRIME OF PERSECUTION

3.1. Acts that are in and of themselves inhumane

Although unlike the ‘murder type’ of crimes against humanity the crime of persecution does not require a separate act of an inhumane nature, the Trial Chamber nevertheless began its examination of acts which are included

12. *Id.*, para. 694, citing H. Meyrowitz, *La Répression par les Tribunaux Allemands des Crimes Contre l’Humanité et de l’Appartenance à une Organisation Criminelle 250 (1960)* (unofficial translation).

13. *Prosecutor v. Tadić*, Opinion and Judgment, *supra* note 2, para. 697.

14. *Id.*, citing *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, 78 ILR 125 (1985).

15. Report of the International Law Commission on the Work of Its Forty-Eighth Session, UN Doc. GAOR A/51/10 (1996).

16. *Prosecutor v. Tadić*, Opinion and Judgment, *supra* note 2, para. 697.

within the rubric of persecution with acts that are sufficiently inhumane as to fall independently under the Statute. This discussion itself can be divided into two parts: the first concerning acts which fall independently under another article of the Statute, such as a violation of the laws and customs of war under Article 3, which also meet the requirements for persecution; and the second concerning acts which fall under another heading of Article 5, such as a murder charged as a crime against humanity.

3.1.1. Acts charged under a different article of the Statute

The Trial Chamber found support for the proposition that acts which constitute war crimes and other crimes under the Statute, and also fulfil the requirements for persecution, including the conditions of applicability for crimes against humanity, could additionally be charged as the latter offence. In support of this finding, the Trial Chamber considered the findings of the IMT¹⁷ and the indictments utilized by the IMT prosecutors,¹⁸ as well as various national cases, including those taken on the basis of Control Council Law No. 10,¹⁹ providing for a uniform legal basis on which to conduct prosecutions in occupied Germany, such as findings in the *Justice*,²⁰ *Ein-satzgruppen*,²¹ and *Pohl*²² cases, as well as the *Eichmann* case²³ decided in Israel, the *Barbie* case decided in France²⁴ and *Quinn v. Robinson*²⁵ decided in the United States. Thus acts which form the basis of a charge of war crimes can also form the basis for a charge of crime against humanity persecution.

3.1.2. Acts charged under a different heading of Article 5

It is this discussion, concerning whether acts charged as another form of crimes against humanity can also be included in a charge of persecution, that

17. Trial of the Major War Criminals Before the International Military Tribunal (1947), specifically that in its rulings on individual defendants, the IMT grouped war crimes and crimes against humanity together.

18. Indictment Number 1 contained charges of both war crimes and crimes against humanity and included the statement that “[t]he prosecution will rely upon the facts pleaded under Count Three [war crimes] as also constituting Crimes Against Humanity”. *Id.*, at 237.

19. Official Gazette of the Control Council for Germany 22 No. 3, Military Government Gazette, Germany, British Zone of Control 46 No. 5, Journal Officiel du Commandement en Chef Français en Allemagne No. 12 of 11 January 1946, Art. II(e).

20. Trial of Josef Alstötter and Others, VI Law Reports of Trials of War Criminals 39 (1949).

21. Trial of Otto Ohlendorf and Others, XV Law Reports of Trials of War Criminals 135 (1949).

22. Trial of Oswald Pohl and others, V Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 984 (1950).

23. Attorney General of Israel v. Eichmann, 36 ILR 5 (1968).

24. *Barbie*, *supra* note 14.

25. *Quinn v. Robinson*, 783 F.2d 776, at 799-801 (9th Cir. 1986).

is the most important of the Trial Chamber's entire discussion of this crime and one which will play an important role in clarifying the law, not only in relation to persecution but also to crimes against humanity in general. This is because in order for an act to constitute two distinct crimes, there must be separate elements of the offences.

The fundamental issue for discussion is whether all crimes against humanity, and not only persecution, require some form of discriminatory intent on the part of the perpetrator. An enormous schism in the jurisprudence and literature exists concerning this issue, with some believing that discriminatory intent is at the very heart of the prohibition against crimes against humanity, while others contend that it is absolutely irrelevant for all crimes against humanity except persecution. In its discussion of the conditions of applicability for crimes against humanity the Trial Chamber tackles this debate head on.²⁶

The Trial Chamber, returning to the original source of crimes against humanity, the Nuremberg Charter,²⁷ noted that no such requirement of discriminatory intent is contained in that document which, as previously stated, recognized two clear categories of crimes against humanity.²⁸ Additionally in its finding of defendant Von Schirach's guilt the IMT specifically designated crimes against humanity as "'murder, extermination, enslavement, deportation, and other inhumane acts' and 'persecutions on political, racial or religious grounds'"²⁹

Next the Trial Chamber examined Control Council Law No. 10,³⁰ and cases taken on the basis of it,³¹ and again found no support for the proposition that discriminatory intent is required for all crimes against humanity. Nor did it find any support in the Charter of the International Military Tribunal for the Far East.³² Additionally, the analysis of the Nuremberg Charter

26. Prosecutor v. Tadić, Opinion and Judgment, *supra* note 2, paras. 650-652.

27. See Nuremberg Charter, *supra* note 9.

28. Prosecutor v. Tadić, Opinion and Judgment, *supra* note 2, para. 51. The distinction between the two types of crimes against humanity, and the requirement of discriminatory intent only for the persecution type, was even more apparent before the Berlin Protocol of the London Charter of 1945, which replaced the semi-colon separating the two types in the English and French texts with a comma in order to bring them into line with the Russian text. Although this change made it apparent that the requirement of a link with war crimes or crimes against peace, as well as the inapplicability of the defence of conformity with national law, pertained to the murder type as well as the persecution type of crimes against humanity, the same cannot be said for the discriminatory intent.

29. Nuremberg Judgment, *supra* note 17, at 319.

30. See Trial of Oswald Pohl and Others, *supra* note 22.

31. See Medical case, Vol. II Trials of War Criminals, *supra* note 22, at 181, 196-198.

32. Art. 5(c) Charter of the International Military Tribunal for the Far East, annexed to the Special Proclamation of the Supreme Commander for the Allied Powers Establishing an International Military Tribunal for the Far East, Tokyo, 19 January 1946, as amended by General Orders No. 20 of 26 April 1946.

and Judgment prepared by the United Nations shortly after the trial of the major war criminals specifically stated that the argument that the phrase “on political, racial or religious grounds” refers not only to persecution but to all crimes against humanity is unwarranted by the English wording and less so by the French.³³ Finally, the Trial Chamber pointed to the fact that this requirement is not contained in the article on crimes against humanity in the ILC Draft Code³⁴ nor, “significantly”, was discriminatory intent as an additional requirement for all crimes against humanity included in the ICTY’s Statute as it was in the Statute for the International Criminal Tribunal for Rwanda (ICTR).³⁵ Thus the Trial Chamber found that under customary international law discriminatory intent is only required for persecution and not for other forms of crimes against humanity.

What, then, was the Trial Chamber to do with all the statements to the contrary, including the Report of the Secretary-General³⁶ and statements of several Security Council members that they interpreted Article 5 as referring to acts taken on a discriminatory basis?³⁷ Considering that it was a criminal trial, and therefore doubts should be settled in favour of the accused, and the fact that the existence of such discriminatory intent was easily established in the case at hand, the Trial Chamber determined that the requirement of discriminatory intent for all crimes against humanity had been incorporated into Article 5 of the Statute. By doing so, while nevertheless stating that it found no basis for the inclusion of this requirement in customary international law, the Trial Chamber handed this issue on a proverbial silver platter for the Appeals Chamber to consider, and the Prosecutor has duly raised it as an object of appeal. In doing so, the Trial Chamber rendered an important service, for this is an issue with important ramifications not only for cases before the ICTY and the ICTR, the latter of which explicitly includes the requirement for all crimes against humanity in its Statute, as well as a potential permanent international criminal court and national courts applying these norms.

The factual repercussions of this issue are quite grave. For, if discriminatory intent is required for all crimes against humanity and not only persecution, the crime of persecution would only be applicable to crimes that are

33. Memorandum of the Secretary-General on the Charter and Judgment of the Nuremberg Tribunal 67 (1949).

34. See Report of the ILC, *supra* note 15.

35. UN Doc. S/RES/955 (1994), Art 3

36. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para. 48.

37. See Provisional Verbatim Record of the 3217th Meeting, UN Doc. S/PV.3217 (25 May 1993), at 11 (statement of France listing national, ethnic, racial, and religious grounds), at 16 (statement of the United States, listing national, political, ethnic, racial, gender and religious grounds), and at 45 (statement of the Russian Federation, listing national, political, ethnic, religious, or other grounds).

not in and of themselves sufficiently inhumane to constitute another crime contained under Article 5 of the Statute. Thus only acts not otherwise justifiable, if committed with discriminatory intent, would constitute persecution, and the Trial Chamber would not consider acts charged under other headings of Article 5 in its consideration of persecution. In this regard the Trial Chamber stated that:

[g]iven the fact [...] that the Nürnberg Charter clearly defined two types of crimes against humanity, of which only the persecution type requires discriminatory intent, there would seem to be no difficulty in attaching additional culpability to acts which fall within the 'inhumane act' category of crimes against humanity if motivated by discrimination. Nevertheless, because the Trial Chamber has incorporated the requirement included in the *Report of the Secretary-General* and in the interpretation of various Security Council members that discriminatory intent is required for all crimes against humanity, acts that are found to be crimes against humanity under other heads of Article 5 will not be included in the consideration of persecution as a separate offence under Article 5(h) of the Statute.³⁸

3.2. Acts not in and of themselves inhumane thus not enumerated elsewhere in the Statute

After discussing acts that are sufficiently inhumane to fall under the Statute independent of the charge of persecution, the Trial Chamber turned to consider whether other acts could also constitute persecution if the requirement of discriminatory intent, as well as the conditions of applicability for crimes against humanity, are met. In this regard the Trial Chamber concluded that indeed acts not in and of themselves inhumane could constitute persecution, and that "the crime of persecution encompasses acts of varying severity, from killing to a limitation on the type of professions open to the targeted group."³⁹ After an extensive examination of various portions of the Nuremberg Judgment,⁴⁰ as well as, secondarily, versions of the ILC Draft Code,⁴¹ the Trial Chamber found that

persecution can take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present, and persecution does not necessarily require a physical element.⁴²

38. Prosecutor v. Tadić, Opinion and Judgment, *supra* note 2, para. 702.

39. *Id.*, para. 704.

40. Nuremberg Judgment, *supra* note 17, at 180-181 and 247-249 generally. In regard to specific defendants: Bormann, *id.*, at 339-340; Frank, *id.*, at 297-298; Frick, *id.*, at 300; Funk and Seyss-Inquart, notes on Flick Trial, at 27.

41. ILC Draft Code, *supra* note 15.

42. Prosecutor v. Tadić, Opinion and Judgment, *supra* note 2, para. 707.

After examining, *inter alia*, additional case law of the IMT and cases tried on the basis of Control Council Law No. 10, the Trial Chamber concluded that

the crime of 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.⁴³

4. DISCRIMINATORY GROUNDS

In the final portion of its examination of the legal findings on the crime of persecution, the Trial Chamber considered the requirement that the discriminatory act be taken on the basis of one of the listed discriminatory grounds.

An anomaly of the codification of the prohibition against persecution in Article 5(h) of the Statute, as well as the Statute for the ICTR, is that it states the discriminatory grounds as such: "political, racial *and* religious".⁴⁴ The Trial Chamber, after noting that there are no definitive grounds in customary international law on which persecution must be based (although it is empowered by the Statute only to consider persecutions taken on the basis of race, religion and politics), finds that nevertheless it is a common feature that whatever grounds are listed are alternatives, "only one of which is sufficient to constitute persecution."⁴⁵ This is made explicit through the use of the word "or" separating the possible grounds,⁴⁶ as opposed to the use of "and" in the Statute, which seems to imply that all three grounds of discrimination must be present in order to constitute persecution under the Statute. The Trial Chamber, on the basis of a lack of any clear indication to deviate from custom or the Nuremberg Charter on which Article 5 is based, rejected this implication, finding that the use of the word "and" mostly likely results from an attempt on the part of the Statute's drafters to cumulatively define the ICTY's adjudicatory powers under Article 5.⁴⁷ Thus the existence of one of the three discriminatory grounds is sufficient for a finding of persecution under the Statute.

43. *Id.*, para. 710.

44. Art. 5(h) Statute, *supra* note 6 (emphasis added). See also Art. 3(h) Statute of the ICTR, *supra* note 32.

45. Prosecutor v. Tadić, Opinion and Judgement, *supra* note 2, para. 712.

46. See, e.g., Art. II Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948); Art. 6(c) Nuremberg Charter, *supra* note 9; Art. 5(c) Tokyo Charter, *supra* note 32; Art. 2(c) Control Council Law No. 10, *supra* note 22; Art. 18(e) 1996 I.L.C. Draft Code, *supra* note 34; and of the Principle IV(c) Nürnberg Principles, *supra* note 10.

47. Prosecutor v. Tadić, Opinion and Judgment, *supra* note 2, para. 713.

5. CONCLUSION

In its *Opinion and Judgment* in the *Tadić* case the Trial Chamber provides for the first time a detailed discussion of the definition of the crime of persecution as a crime against humanity under international criminal law and the various acts which it encompasses. Of particular importance in this regard is the Trial Chamber's discussion of the debate concerning the requirement of discriminatory intent for all crimes against humanity and the repercussions this would have on the crime of persecution. By framing the issue as it did the Trial Chamber indicated that this is an issue ripe for consideration by the Appeals Chamber, and one can hope that final clarity on this issue will soon emerge, the results of which should have effects far beyond the court rooms of the ICTY.