

## **COMPLEMENTARITIES BETWEEN INTERNATIONAL REFUGEE LAW, INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW: A UNHCR PERSPECTIVE ON THE MEANING(S) OF PERSECUTION AND THE USE OF CRIMINAL EVIDENCE IN ASYLUM ADJUDICATIONS**

*Background Paper prepared for the Expert Meeting on Complementarities between  
International Refugee Law, International Criminal Law and International Human  
Rights Law, Arusha, 11-13 April 2011*

### **1. Introduction**

In the 60<sup>th</sup> anniversary year of the 1951 Convention relating to the Status of Refugees (1951 Convention), it is timely to reflect on the development and consolidation of international refugee law, not least in light of the growth in parallel, yet complementary, legal systems. How has international refugee law been influenced by and taken stock of broader international legal developments, specifically in the fields of international criminal law<sup>1</sup> and international human rights law?

International refugee law, international criminal law and international human rights law share common historical roots. The events of the Second World War, the ‘barbarous acts which ... outraged the conscience of mankind’,<sup>2</sup> led the international community to affirm, on the one hand, that those responsible for these crimes should not be left unpunished,<sup>3</sup> and on the other, that victims and those at risk of persecution should be protected.<sup>4</sup> The fundamental values underpinning these different streams of

---

<sup>1</sup> While it is acknowledged that international humanitarian law underpins and is relevant to the development of international criminal law [as well as international refugee law], this paper deals mostly with the jurisprudence of the relevant international criminal institutions. The inter-relationship between international humanitarian law and international refugee law was considered during the 50<sup>th</sup> anniversary events of the 1951 Convention, and culminated in a special issue of the 2001 *International Review of the Red Cross*, issue 843.

<sup>2</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), Preamble, Recital 2.

<sup>3</sup> The first of these post-war instruments was the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 227, 9 December 1948, entered into force 12 January 1951, which created the concept of grave breaches, and was followed by the 1949 Geneva Conventions (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 35, 12 August 1949, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 81, 12 August 1949, entered into force 21 October 1950; Geneva Convention relative to the Treatment of Prisoners of War 75 UNTS 135, 12 August 1949, entered into force 21 October 1950, and Geneva Convention relative to the Protection of Civilian Persons in Time of War 75 UNTS 287, 12 August 1949, entered into force 21 October 1950.

<sup>4</sup> See GA Res. 319 A (IV), 3 December 1949 establishing UNHCR, paras 1 and 2; Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951, entered into force 22 April 1954, Preamble, Recital 2.

international law are thus the same: the recognition of the inherent dignity and worth of the human person,<sup>5</sup> and the equal and inalienable rights of all human beings.<sup>6</sup>

Given these shared foundational principles, it might be assumed that these areas of law should, in principle, operate in a complementary manner, and that advances in one area should influence developments in another, to strengthen and consolidate the international normative order.

However, this is not necessarily the case. While these different international legal regimes may rely on similar concepts and terms in relevant treaties and international instruments, they were developed with distinct purposes and have a separate legal existence, which will in turn influence the manner in which these terms are interpreted and applied. Moreover, as each area of law has expanded and become more specialized, important trends in one area may have been overlooked, or considered irrelevant to the other, leading at times to discrepancies in the construction and implementation of key legal concepts.

The purpose of this background paper is to explore, from the perspective of international refugee law, the relationship between these three branches of international law. The paper focuses on two specific issues: the meanings of persecution and the use of evidence from criminal law proceedings in asylum cases. After a short introductory section on fragmentation of international law, the paper proceeds with an analysis of the concept persecution under international refugee law and international criminal respectively.. This part will highlight areas of divergence – such as discriminatory intent – and coherence – such as the range of acts that qualify as persecution under both regimes. The final section of the paper focuses on the use of criminal evidence in asylum proceedings, looking at three specific questions: international criminal evidence as country of origin information; the relevance of a failure on the part of countries to prosecute alleged war criminals on asylum claims; witness protection measures; and victim participation.

## **2. The Fragmentation and Specialization of International Law**

The question of whether the growth, since 1945, of international law and of increasingly specialised international legal regimes is generating normative conflict and fragmentation has been the subject of many debates and continues to feature prominently in scholarly discussions.<sup>7</sup> The issue was taken up by the International Law Commission (ILC) in 2002, and the Study Group established to examine this topic issued a consolidated report in 2006.<sup>8</sup>

---

<sup>5</sup> Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Preamble, Recital 2.

<sup>6</sup> Universal Declaration of Human Rights, note 2 above, Preamble, Recital 1.

<sup>7</sup> See e.g. A. Zimmermann & R. Hoffmann, *Unity and Diversity of International Law* (Berlin: Duncker & Humblot, 2006); K. Wellens & R. H. Vinaixa (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international*, (Brussels: Bruylant, 2006); P-M Dupuy, 'L'unité de l'ordre juridique international : cours général de droit international public', (2002) 297 *Recueil des cours*, 9-489; M. Koskenniemi & P. Leino, 'Fragmentation of International Law. Postmodern Anxieties?' (2002) 15 *Leiden Journal of International Law*, 553-579.

<sup>8</sup> UNGA Res. 57/21, 21 January 2003, para 2; International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of International Law Commission finalized by Marti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, paras 1 and 4. The Study Group had issued a Report each year

The report notes that:

*The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by “general international law” has become the field of operation for such specialist systems as “trade law”, “human rights law”, “environmental law”, “law of the sea”, “European law” and even such exotic and highly specialized knowledge as “investment law” or “international refugee law” etc. – each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.<sup>9</sup>*

While the report recognizes that international actors pursue different objectives and that ‘in conditions of social complexity, it is pointless to insist on formal unity’,<sup>10</sup> it nonetheless emphasizes that there is a ‘presumption of consistency’ that ought to apply in international law, and that normative conflicts should as far as possible be avoided or at least mitigated.<sup>11</sup> At the same time, the existence of so-called ‘self-contained’ or ‘special’ regimes in international law, which consist broadly of treaties or a set of treaties and related instruments with their own rules of regime-administration and, in some cases, their own principles of interpretation, does not mean that such regimes are completely isolated from general international law.<sup>12</sup> The same basic rules - for instance those enshrined in the 1969 Vienna Convention on the Law of Treaties, or those related to statehood, jurisdiction, state succession, or nationality - will equally apply in all ‘branches’ of international law.<sup>13</sup>

What is less clear is the extent to which specific branches of international law should draw from or adopt developments in other branches in the application and interpretation of their own rules. How authoritative are the findings of international criminal tribunals for the purpose of interpreting international refugee law, and conversely, should international criminal tribunals pay due regard to developments in international refugee law?

---

from 2002 to 2005: see UN Doc. A/CN.4/L.628, 1 August 2002; UN Doc. A/CN.4/L.644, 18 July 2003; UN Doc. A/CN.4/L.663, 28 July 2004.

<sup>9</sup> ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of International Law Commission, finalized by Martti Koskenniemi, note 8 above, para. 8.

<sup>10</sup> *Ibid.*, para. 16.

<sup>11</sup> *Ibid.*, paras 37-39.

<sup>12</sup> *Ibid.*, paras 157, 159. The Commission noted for instance, that ‘the principle of “dynamic” or teleological interpretation is much more deeply embedded in human rights law than in general international law.’, para. 130.

<sup>13</sup> *Ibid.*, paras 174, 183.

The ILC noted that in some instances, such as through the inclusion of interpretative clauses addressing potential conflict with other instruments, parties have expressed ‘a willingness to envisage a "mutually supporting" role for their instruments’; another way, according to the Commission, to underscore the significance of ‘harmonizing interpretation’.<sup>14</sup> But such an approach has clear limitations, as ‘it cannot be assumed *a priori* that a similar readiness exists as between parties to treaties across regimes, treaties that seek to achieve physically incompatible solutions, or are inspired by very different (perhaps opposite) objectives’.<sup>15</sup> For the ILC, in such situations, ‘focus shifts from coordination to rights and obligations’.<sup>16</sup> It is not clear, however, how this would work in practice, given the relative functional independence between specific international legal regimes.

A more concrete recommendation is the ILC’s suggestion to rely on the principle of ‘systemic integration’ to help address the risk of normative conflict. This principle highlights the importance, in the operation of particular treaties or legal regimes, of taking into consideration the wider ‘normative environment’, namely, other special legal regimes, and not only general international law.<sup>17</sup> The following sections will provide examples to help assess the merits and challenges of such an approach.

### 3. The Meaning(s) of Persecution

Persecution is a core concept in both international refugee law and international criminal law, whose interpretation has been guided by international human rights law. The term is derived from the Latin verb ‘*persequi*’, which means ‘to follow with hostile intent’.<sup>18</sup> It is a constitutive element of the definition in Article 1(A)(2) of the 1951 Convention, which provides that a refugee is an individual who has a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.’<sup>19</sup> The definition is also restated in subsequent regional instruments on refugee protection.<sup>20</sup> The ‘right to seek

---

<sup>14</sup> *Ibid.*, para. 277; see also the discussion at paras 412 *et seq.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, para. 415.

<sup>18</sup> A. Zimmermann, Article 1.A(2), *The 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol, A Commentary*, (Oxford: Oxford University Press, 2011), 346.

<sup>19</sup> Art. 1.A(2) of the Convention relating to the Status of Refugees (‘CRSR’), 189 UNTS 150, 18 July 1951, entered into force 22 April 1954, reads: For the purposes of the present Convention, the term “refugee” shall apply to any person who:(...)(2) (...) owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. Persecution was also referred to in the Constitution of the International Refugee Organization, 18 UNTS 3, 15 December 1946, entered into force 20 August 1948, with respect to persons who had ‘objections to returning to their home country’, including ‘persecution or fear, based on reasonable grounds of persecution...’.

<sup>20</sup> See, Article I(1) of the Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Organisation of African Unity, OAU), 10 September 1969, entered into force 20 June 1974; Article 2(c) of Council Directive No. 83/2004/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 (hereafter, Qualification Directive). Note that Article II.b of the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and

and enjoy asylum from persecution in other countries' is also affirmed in a range of international human rights instruments, in which the concept of persecution is central.<sup>21</sup>

Likewise, persecution was included in the first definition of crimes against humanity contained in the London Agreement embodying the Charter for the International Military Tribunal,<sup>22</sup> and has been restated as a crime against humanity in the Statutes of the ICTY and ICTR,<sup>23</sup> as well as in the Statute of the ICC. It is also the crime that has been the most frequently included in indictments before the ICTY.<sup>24</sup>

In one of the first cases dealing with persecution as a crime against humanity, the ICTY judges dismissed the suggestion that refugee law could be used as a guide. They first noted that neither international refugee law nor human rights law had laid down a concrete definition of the term. They also considered that domestic refugee status determinations had been shown to be open-ended in practice, and had deemed a broad spectrum of activity to be forms of persecution, such as denying access to education or employment.<sup>25</sup> In their opinion, refugee status determination hinged on the applicant's subjective fear of being persecuted while criminal responsibility was, on the other hand, firmly rooted in the objective. In addition, the ICTY pointed to the intent of the persecutor as 'not relevant' for asylum applications, and further, that refugee law cast a far wider net as individual criminal responsibility.<sup>26</sup>

How has the term been defined in these respective areas of international law? To what extent are the interpretations compatible? And if they are divergent, is this necessarily problematic?

### *3.1 Persecution in International Refugee Law*

---

Panama, 22 November 1984 also refers to the refugee definition contained in Article 1.A of the Refugee Convention without reiterating it.

<sup>21</sup> See for example, Article 14(1) of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), ('Everyone has the right to seek and to enjoy in other countries asylum from persecution. '); Article 22(7) of the American Convention on Human Rights, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969), ('[e]very person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes '); Article 12(3) of the African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) ('[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions') and Article 18 of the Charter of Fundamental Rights of the European Union [2000] OJ C364/1 ('[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community').

<sup>22</sup> Article 6(c) of the London Charter of the International Military Tribunal (hereafter, 'IMT Charter'): 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

<sup>23</sup> Persecution is listed as a crime against humanity in Article 5(h) of the ICTY Statute and Article 3(h) of the ICTR Statute.

<sup>24</sup> J. Nilsson, 'Crimes Against Humanity', in: A. Cassese et al., *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 284, 287.

<sup>25</sup> *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, 14 January 2000, paras 587-588.

<sup>26</sup> *Ibid.*, para. 589.



Persecution is not defined in the 1951 Convention. At a minimum, the core content of persecution includes ‘the threat of deprivation of life or physical freedom’.<sup>27</sup> Relying on the *non-refoulement* obligation in Article 33(1),<sup>28</sup> UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* provides that:

*it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights--for the same reasons--would also constitute persecution.*<sup>29</sup>

In a later note on ‘Agents of Persecution’, UNHCR reiterated that: ‘the message conveyed in the Preamble to the Convention and universally understood is that persecution embraces all serious violations of human rights.’<sup>30</sup> The EU Qualification Directive is the only regional instrument that defines the term explicitly, although some national legislation also does so.<sup>31</sup> Article 9(1) of the Qualification Directive provides that the relevant acts must ‘be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights...’

Thus, it is well-accepted that any serious human rights violation is likely to constitute persecution for the purposes of the 1951 Convention, albeit whether serious interferences with economic, social or cultural rights would constitute persecution ‘remains very much a question of degree and proportion’,<sup>32</sup> and is discussed further below. It is worth noting too that any serious harm would suffice to establish persecution under international refugee law, regardless of whether it is also characterized as a human rights violation. Recognizing the fact that not all forms of harm have been accepted as human rights violations, UNHCR has stated: ‘[w]hile the analysis of persecution must be informed by human rights principles, it would narrow its scope unduly to define persecution solely on terms of existing codified human rights.’<sup>33</sup>

There has been a preference in international refugee law not to define the term, or to list exhaustively the types of acts that would constitute persecution. As noted by Goodwin-Gill and McAdam, ‘[p]ersecution is a concept only too readily filled by the latest example of one person’s inhumanity to another, and little purpose is served by

---

<sup>27</sup> G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3<sup>rd</sup> edn. (Oxford: OUP, 2007), 92, referring to A. Grahl-Madsen, *The Status of Refugees in International Law*, (vol. 1, Leiden: Sijthoff, 1966), 193.

<sup>28</sup> ‘No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

<sup>29</sup> UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, para. 51, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

<sup>30</sup> UNHCR, ‘Agents of Persecution – UNHCR Position’, 14 March 1995, available at: <http://www.unhcr.org/refworld/docid/3ae6b31da3.html>.

<sup>31</sup> For example, Australia’s Migration Act 1958, in subsection 2 of Section 91R outlines a number of instances which may be considered ‘serious harm’ for the purposes of the definition in subsection 1 therein.

<sup>32</sup> Goodwin-Gill and McAdam, note 27 above, 92

<sup>33</sup> UNHCR, ‘Manual on Mandate RSD: A Reference Tool for UNHCR Staff’, 1 October 2005, 25.

attempting to list all its known measures'.<sup>34</sup> UNHCR supports this view, noting that 'the interpretation of what constitutes persecution needs to be flexible, adaptable and sufficiently open to accommodate its changing forms. Furthermore, it will depend on the circumstances of each case ...'.<sup>35</sup> Moreover, it is difficult to define 'persecution' as a separate element of the definition of a 'refugee' in international refugee law, not least because it is part of a holistic assessment of the need for international protection: '[i]ndeed, to ignore the totality of the words that define a refugee for the purposes of the Convention [...] would be an error of law by virtue of a failure to construe the definition as a whole.'<sup>36</sup>

In this sense, Zimmermann notes that persecution has 'often been referred to as the severe violation of human rights accompanied by a failure of the State to protect the individual'.<sup>37</sup> Hathaway, too, has defined persecution as a 'violation of basic human rights demonstrative of a failure of state protection'<sup>38</sup> and 'the sustained or systematic failure of [S]tate protection in relation to one of the core entitlements which has been recognized by the international community'.<sup>39</sup> Some case law has captured this idea as: 'Persecution = Serious Harm + The Failure of State Protection.'<sup>40</sup> In asylum claims in which the state is the direct persecutor, it ought to be assumed that they lack the protection of their country of origin and thus the question of national protection becomes less relevant. However, the question of national protection arises more directly in cases where non-state actors are the direct persecutors. That said, it is important to keep in mind, as noted by Goodwin-Gill and McAdam, that:

*[t]he Convention definition begins with the refugee as someone with a well-founded fear of persecution, and only secondly, as someone who is unable or unwilling, by reason of such fear, to use or take advantage of the protection of their government. In our view, the Convention's first point of reference is the individual, particularly as a rights-holder, rather than the systems of government and its efficacy or intent in relation to protection, relevant as these elements are to the well-founded dimension.*<sup>41</sup>

### 3.2 Persecution under international criminal law

---

<sup>34</sup> Goodwin-Gill and McAdam, note 27 above, 93; UNHCR Handbook, note 29 above, para. 51. The absence of definition of persecution in the Refugee Convention was in fact intentional; see Zimmermann, note 18 above, 351.

<sup>35</sup> UNHCR, 'Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004)', available at: <http://www.unhcr.org/refworld/pdfid/4200d8354.pdf>

<sup>36</sup> Per Kirby J in *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14, Australia: High Court, 11 April 2002, para. 109, citing McHugh J in *Applicant A* (1997) 190 CLR 225 at 255- 256.

<sup>37</sup> Zimmermann, note 18 above, 345. This reference to 'severe human rights violations' is distinct from others, who use the terminology of 'serious human rights violations'.

<sup>38</sup> J. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991), 105.

<sup>39</sup> *Ibid*, 112.

<sup>40</sup> Lord Hoffman in *R v. Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629 at 653, attributing the source of the formula to the *Gender Guidelines for the Determination of Asylum Claims in the UK* (published by the Refugee Women's Legal Group in July 1998), at 5.

<sup>41</sup> Goodwin-Gill and McAdam, note 27 above, 10.

Persecution is a well-established crime under international law. It is listed as a crime against humanity in the ICC Statute, and defined as: ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.<sup>42</sup> The ICC Statute lays down a definition which is narrower but also broader in some ways. Article 7.2(g) 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’.<sup>43</sup> The Statute further clarifies that the relevant groups for which the crime applies are ‘any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.’<sup>44</sup>

This definition is not dissimilar to the elements elaborated in *Kupreškić* before the ICTY. While noting that there is no agreed definition of persecution as a crime against humanity within international law, the Tribunal identified three main elements:

- (i) *persecution did not necessarily require a physical element;*
- (ii) *victims of persecution need not be solely civilians for it to be classified as a crime against humanity;*
- (iii) *the persecutory acts must have been motivated by a discriminatory intent (based on political, racial or religious grounds).*<sup>45</sup>

There is thus a clear link between international human rights law and the crime of persecution.

However, as a crime against humanity, acts of persecution must take place within ‘a widespread or systematic attack directed against any civilian population, with knowledge of that attack’,<sup>46</sup> which is not a requirement under international refugee law.

### 3.3 Acts of persecution

---

<sup>42</sup> Article 7(2)(g) of the ICC Statute.

<sup>43</sup> See also Elements of Crimes, ICC-ASP/1/3, 11(part II-B, Adopted by the Assembly of States Parties, First session, New York, 9 September 2002..

<sup>44</sup> Article 7(1)(h) of the ICC Statute.

<sup>45</sup> *Prosecutor v Kupreškić et al*, Case No IT-95-16-T, Trial Judgment, 14 January 2000, paras 567-570.

<sup>46</sup> Art. 7(1) *chapeau* of the ICC Statute. Note that Article 5 of the ICTY Statute does not stipulate that the attack must be widespread or systematic, this is specified in the Secretary-General’s Report to the Security Council on the establishment of ICTY, see Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para. 48. For an analysis of the widespread or systematic requirement, see e.g. W. A. Schabas, *The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone*, (Cambridge: Cambridge University Press, 2006) 191-196. Note, however, that Article 7(2)(a) of the ICC Statute seems to have adopted a higher threshold by requiring that the criminal act be perpetrated in pursuit or furtherance of a state or organizational policy; see in this respect G. Acquaviva, ‘International Criminal Law and Forced Displacement’, Paper prepared for the ICTR-UNHCR Expert Meeting on Complementarities between International Refugee Law, International Criminal Law, and International Human Right Law, 13; P. Hwang, ‘Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court’ (1998) 22 *Fordham Intl Law Journal*, 457, 503..



There is much convergence between acts that have been held to constitute persecution under international refugee law and international criminal law, but there are also some distinctions. Under refugee law, persecution has included threats to life or fundamental freedoms, rape, sexual violence, physical violence, torture or inhuman treatment, disproportionate punishment, severe harassment, forced marriages, forced prostitution or human trafficking, forced sterilization, forced abortion, female genital mutilation, and domestic violence. In particular, international refugee law has been at the forefront of developments around gender-related persecution which, while not addressed explicitly in this paper, have interacted with developments in women's human rights<sup>47</sup> and the jurisprudence on gender crimes emanating from the ICTR and the ICTY.<sup>48</sup> Severe or cumulative deprivations of economic, social and cultural rights have also been considered in specific cases.

There is at least one example of a legislative instrument that lists specific examples of persecutory acts, albeit non-exhaustive. Article 9.2 of the EU Qualifications Directive provides, for example:

*Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:*

- (a) acts of physical or mental violence, including acts of sexual violence;*
- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;*
- (c) prosecution or punishment, which is disproportionate or discriminatory;*
- (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;*
- (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);*
- (f) acts of a gender-specific or child-specific nature.*

International criminal law jurisprudence has also delved into the scope and nature of certain human rights violations to determine whether persecution had occurred. Contrary to the assumption made in the *Kupreškić* Trial Judgment, the *ad hoc* international criminal tribunals have adopted a relatively expansive interpretation of persecution. Persecutory acts as part of a widespread or systematic attack and perpetrated with the necessary discriminatory intent have included killing, threats to life, physical violence, arbitrary detention, rape, sexual assault, inhumane acts,

---

<sup>47</sup> See, A. Edwards, 'Age and gender dimensions in international refugee law', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: CUP, 2003), 46-80.

<sup>48</sup> For an overview of the leading developments in prosecuting gender crimes at the ICC, see K. D. Askin, 'A Decade of the Development of Gender Crimes in International Courts And Tribunals: 1993 to 2003', (2004) 11(3) *Hum. Rts. Brief* 16 and, more recently, N. Hayes. 'Creating a Definition of Rape in International Law: the Contribution of the International Criminal Tribunals', in S. Darcy and J. Powderly, *Judicial Creativity at the International Criminal Tribunals* (Oxford: OUP, 2010), 129-157.

inhuman treatment, humiliation and degradation, deportation and forcible transfers, destruction of property and religious and cultural institutions, denial of fundamental rights such as right to employment, proper judicial process and to proper medical care.<sup>49</sup> In *Nahimana et al.*, where the three accused were charged as a result of their involvement in the *Radio Télévision des Milles Collines* and in a radical Hutu newspaper, *Kangura*, the Trial and Appeals Chambers of ICTR examined whether hate speech could be considered as a violation of a fundamental right.<sup>50</sup>

### 3.4 Discrimination versus persecution

While persecution usually involves discrimination that results in harm to an individual, not all discrimination will amount to persecution.<sup>51</sup> UNHCR's *Handbook* states that discriminatory measures will constitute persecution if they 'lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities'.<sup>52</sup> It further notes that a claim to refugee status will be 'stronger where a person has been the victim of a number of discriminatory measures ... and where there is thus a cumulative element involved.'<sup>53</sup> The discriminatory element comes up in other elements of the refugee definition, namely, with respect to the requirement that the well-founded fear experienced by the claimant be for reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>54</sup>

### 3.4 Cumulative acts

Where a single act may not in itself amount to persecution, UNHCR has held that a number of measures may reach the required threshold of severity. UNHCR has also indicated that the general context may also be relevant to determining persecution, such as where there is a 'general atmosphere of insecurity',<sup>55</sup> or where the country is

---

<sup>49</sup> *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, paras 1029-1049; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgment, 3 April 2007, paras 290-297; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001, para. 616; *Prosecutor v. Nahimana and ors*, Case No. ICTR-99-52-T, Judgment, 3 December 2003; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgment, 31 March 2003, see Acquaviva, note 46 above.

<sup>50</sup> *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgment, 28 November 2007, paras 984-988.

<sup>51</sup> *Haji Ibrahim* (2000) 204 CLR 1, at 18-19 (Australian High Court).

<sup>52</sup> UNHCR Handbook, note 29 above, para. 54; see also UNHCR, 'Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06 28 April 2004', para. 17; see also Art. 9.2 of the Qualification Directive. For other definitions in domestic legislation, see Goodwin-Gill and McAdam, note 27 above, 91 et seq.; see also Zimmermann, note 18 above, 347, who considers that all human rights recognized in the UDHR and in international and regional human rights treaties should be considered, 347.

<sup>53</sup> UNHCR Handbook, note 29 above, para. 55. See also, para. 53 on cumulative grounds for refugee status.

<sup>54</sup> See e.g. *Islam v. Secretary of State for the Home Department* and *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*, UK House of Lords, [1999] 2 WLR 1015; [1999] INLR 144, where the Judges found that the Refugee Convention was not only concerned with persecution, but with persecution based on discrimination. This would seem to imply that the two elements – persecution and discrimination – are clearly distinct.

<sup>55</sup> UNHCR Handbook, note 29 above, para. 53: 'an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some

embroiled in an armed conflict. This approach has been endorsed in domestic jurisprudence<sup>56</sup> and also in the EU Qualification Directive, in which it is recognised that persecution may be found where there is ‘an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).’<sup>57</sup>

International criminal law has followed a similar approach. In *Blaškić*, the Trial Chamber regarded persecutory acts as including ‘acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind’.<sup>58</sup> While dismissing the corpus of refugee law for encompassing an overbroad understanding of persecution, the *Kupreškić* Trial Chamber noted that although individual discriminatory acts may not be inhumane, their cumulative effect may offend humanity in such a way that they could be deemed to be persecutory.<sup>59</sup> What is clear from these examples is that the tribunals also consider that the underlying act of the crime of persecution does not need to constitute itself a crime under international law, but must either on its own, or in conjunction with other acts, be of the same gravity as other crimes listed as crimes against humanity.<sup>60</sup>

### 3.5 Discriminatory intent

As noted in the ICTY judgment of *Kupreškić*, the issue of intent is one of the clear divergences between the interpretation of persecution under international refugee law and international criminal law respectively. In international refugee law, the intention of the persecutor is not necessarily required to establish the existence of a well-founded fear of persecution pursuant to Article 1(A)(2) of the 1951 Convention,<sup>61</sup> whereas it is a core element in the crime of persecution, without it the crime cannot be made out. It has been generally accepted that the denial of refugee status based on the absence of evidence that a policy specifically intended to violate human rights stems from an incorrect interpretation of the Convention.<sup>62</sup> In UNHCR’s view, the source of the feared harm is of little, if any, relevance to the finding of whether persecution has occurred, or is likely to occur.<sup>63</sup> In *Pitcherskaia*, the 9<sup>th</sup> Circuit Court in the US noted, for example, that there is no requirement for ‘an alien to provide evidence that his persecutor's motive was to inflict harm and suffering in an effort to punish’ and that

---

*cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”.*’ see also Zimmermann, note 18 above, 348-349, 353.

<sup>56</sup> *Refugee Appeal No. 71427/99*, [2000] N.Z.A.R 545, 570 (New Zealand Refugee Status Appeals Authority) paras 53, 74-78, available at: <http://www.refugee.org.nz/Casesearch/Fulltext/71427-99.htm> ; *Singh v. INS*, 134 F.3d 962 (US 9<sup>th</sup> Cir. C.A. 1998), 967-968; *Korblina v. INS*, 37 F.3d 1371, 1376 (US 9<sup>th</sup> Cir. 1994); *Pitcherskaia v. I.N.S.*, 118 F.3d 641 (US 9<sup>th</sup> Cir. 1997) paras 8-9.

<sup>57</sup> EU QD Art. 9(1)(b)

<sup>58</sup> *Prosecution v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, para. 227.

<sup>59</sup> *Prosecution v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000.

<sup>60</sup> *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, paras 184-193

<sup>61</sup> See e.g., *Canas-Segovia v. I.N.S.*, 902 F.2d 717 (9<sup>th</sup> Cir. 1990) 726-727; *RRT Case No. 061020474*, [2007] RRTA 25, Australia: Refugee Review Tribunal, 7 February 2007 (available at: <http://www.unhcr.org/refworld/docid/47a707d82.html>); Goodwin-Gill and McAdam, note 27 above, 101; Zimmermann, note 18 above, 349.

<sup>62</sup> Zimmermann, note 18 above, 349 referring to German jurisprudence.

<sup>63</sup> UNHCR, ‘Note on Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees’, April 2001, para. 19.

[i]t is the characteristic of the victim (membership in a group, religious or political belief, racial characteristic, etc.), not that of the persecutor, which is the relevant factor.’<sup>64</sup>

In comparison, persecution as a crime against humanity is characterized by a specific *mens rea*, i.e. the intent to discriminate. Under the ICTY and ICTR Statutes, such discrimination must be based on political, racial or religious grounds,<sup>65</sup> while as mentioned above, the grounds of persecution under the ICC Statute have been enlarged and also include national, ethnic, cultural, and gender. In the jurisprudence of the international criminal tribunals, even if the claimant or victim is not actually part of a specific group, what matters is the intent of the author to discriminate.<sup>66</sup> This jurisprudence would seem to mean that discrimination is no longer seen as a necessary element of the *actus reus* of the crime.<sup>67</sup>

### 3.6 Individualized v. Collective Nature of Persecution<sup>68</sup>

To be considered as a crime against humanity, persecution must be part of a large-scale or systematic attack, excluding thereby sporadic or isolated acts.<sup>69</sup> This conforms with the historical origins of the concept, created as a reaction to the collective atrocities committed by the Nazi regime. The ICC Elements of Crimes Commentary indicates that ‘[t]he perpetrator targeted such person or persons by reason of the identity of a group or collectivity or target the group or collectivity as such.’<sup>70</sup>

In international refugee law, persecution does not necessarily need to be part of a large-scale or systematic attack, although a pattern of persecution or systematic human rights violations against a particular group would be evidence that the threshold of risk may have been met. To the contrary, state practice and jurisprudence in the application of Article 1(A)(2) of the 1951 Convention has tended to adopt an individualized approach, particularly in the Western world.<sup>71</sup> Jurisprudence is mixed as the extent to which an individual needs to have been ‘singled out’ or ‘individually targeted’.<sup>72</sup> Yet, there is broad consensus amongst legal scholars that when government policies or general measures of a discriminatory nature are imposed on certain groups or where these groups are directly targeted in an internal armed conflict or by communal violence, members of that group may be regarded as having a well-

<sup>64</sup> *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 643 (9th Cir. 1997).

<sup>65</sup> Article 5 of the ICTY Statute; Article 3 of the ICTR Statute

<sup>66</sup> See *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, para. 196.

<sup>67</sup> *Ibid.*

<sup>68</sup> Note that this sub-part does not deal with the issue of laws of general application and the relationship to the establishment of persecution.

<sup>69</sup> Note that this does not mean that the act(s) with which the accused is charged must be widespread or systematic, what is required is a nexus between the act(s) of the accused and a widespread or systematic attack, and the knowledge by the accused of the attack and of the nexus between his own act(s), see W. A. Schabas, *The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), 194-195.

<sup>70</sup> Elements of Crimes, ICC-ASP/1/3, 11(part II-B, Adopted by the Assembly of States Parties, First session, New York, 9 September 2002, 11.

<sup>71</sup> See V. Türk, ‘Protection Gaps in Europe? Persons fleeing the indiscriminate effects of generalized violence’, 18 January 2011, 5, available at: <http://www.unhcr.org/4d3703839.html>

<sup>72</sup> UNHCR, Note on Interpreting Article 1 of the 1951 Convention, note 63 above, para. 20.

founded fear of being persecuted on account of one or more of the Convention ground.<sup>73</sup> As stated by Hathaway, ‘the historical framework of the Convention makes clear that it was designed to protect persons within large groups whose fear of persecution is generalized not merely those who are at risk of particularized violence’.<sup>74</sup>

UNHCR has for long espoused such views. In a recent speech, the Director of the Division of International Protection reasserted that ‘[i]n armed conflict or violent situations, whole communities may be exposed to persecution for 1951 Convention reasons, and there is no requirement that an individual suffers a form or degree of harm which is different [or higher] to others with the same profile’.<sup>75</sup> While a widespread or systematic attack is not a requirement to establish persecution as a basis for refugee status, the main obstacle to a positive finding of status in such situations is the link to one or more of the Convention grounds, *i.e.*, that the fear of persecution was ‘for reasons of race, religion, nationality, membership of a particular social or political opinion’.<sup>76</sup>

### 3.7 Conclusion

While there are undeniably distinct requirements applying to persecution under international refugee law and international criminal law, there are nonetheless important commonalities, not least the references to fundamental human rights and the consideration of an accumulation of acts as constituting persecution. The reason international refugee law and international criminal law have adopted and developed broadly similar interpretations of persecution is easy to explain: they both largely rely on international human rights law, whose normative framework provides the conceptual underpinnings necessary to understand and define the contours of persecution. The 1951 Convention expressly refers to human rights in its Preamble<sup>77</sup> and international human rights law has since then been consistently recognized by UNHCR, academic experts and State authorities as the obvious point of departure in defining persecution.<sup>78</sup> UNHCR’s doctrinal work and in particular, its guidelines on international protection are informed by the latest developments in international

---

<sup>73</sup> Goodwin-Gill and McAdam, note 27 above, 129; Grahl-Madsen, note 27 above, 213; J.-F. Durieux and A. Hurwitz, *How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees* (2004) 47 *German Yearbook of International Law* 105, 119.

<sup>74</sup> Hathaway, note 38 above, 95.

<sup>75</sup> Türk, note 71 above, 6. Although its interpretation is not based as such on the concept of persecution, it is also worth noting that in its recent case-law, the European Court of Human Rights considered that exceptionally, in cases where an applicant alleges that he or she is a member of group systematically exposed to a practice of ill-treatment, the Court [considers] that the protection of Article 3 of the Convention enters into play when the applicant establishes [...] that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned’ and that ‘it might render the protection offered by that provision [article 3] illusory if in addition to the fact that he belongs to the Ashraf – which the Government have not disputed [sic] – the applicant is required to show the existence of further special distinguishing features’, *Salah Sheekh v. The Netherlands*, App. No. 1948/04, Judgment of 11 January 2007, para. 135.

<sup>76</sup> On this point, see further, UNHCR, ‘Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’, 7 May 2002, HCR/GIP/02/02, available at: <http://www.unhcr.org/refworld/docid/3d36f23f4.html>

<sup>77</sup> CRSR, note 19 above, Preamble, Recital 1.

<sup>78</sup> Zimmermann, note 16 above, 347.



human rights law which carry important weight in interpreting the Refugee Convention, and in particular the refugee definition.<sup>79</sup>

#### **4. Use of evidence from criminal law proceedings in asylum adjudication**

The evidence produced and gathered in connection with international criminal proceedings could have an important value for adjudicators of asylum applications, in particular in relation to establishing credibility and providing objective country of origin information.<sup>80</sup>

##### *4.1 International criminal evidence as a provider of country of origin information*

UNHCR has previously stated that while asylum determinations are to be made on an individual case-by-case basis, '[t]he applicant's statements cannot (...) be considered in the abstract, and must be viewed in the context of the relevant background situation (...) [K]nowledge of conditions in the applicant's country of origin – while not a primary objective – is an important element in assessing the applicant's credibility.'<sup>81</sup> Moreover, it is generally accepted that the test of establishing a well-founded fear of being persecuted has both subjective and objective dimensions.<sup>82</sup> Objective information concerning the applicant's country of origin is thus essential to assessing an applicant's well-founded fear of being persecuted. Objective country of origin information is relevant to virtually all aspects of refugee status determination,

---

<sup>79</sup> For example, the Guidelines on child-asylum claims fully integrate the latest developments in human rights doctrine, granting far greater consideration than before, for instance, to violations of socio-economic rights experienced by children. See UNHCR, 'Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/09/08, 22 December 2009, paras 14, 34-36, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>; see also UNHCR, 'Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity', 21 November 2008, para. 10, which notes that '[d]evelopments in international human rights can help decision-makers determine the persecutory nature of the various forms of harm that a person may experience on account of his or her sexual orientation', available at: <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf>.

<sup>80</sup> This information is also relevant to the application of the exclusion clauses, but these are not examined in this paper. UNHCR, 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', 4 September 2003, available at: <http://www.unhcr.org/refworld/docid/3f5857d24.html>, para. 58, considers that a presumption of individual responsibility applies to senior officials of repressive regimes, which have faced international condemnation for gross of systematic human rights abuses. This standard of proof based solely on seniority in a given regime falls in sharp contrast to the presumption of innocence (and its derivatives, the right to silence and the prosecutorial burden of proof) under international criminal law, where even the most notorious leaders are presumed innocent until otherwise proven. Interestingly, the Note makes express reference to international human rights bodies, but not to international criminal institutions. This Background Paper does not discuss the potential application of findings by international criminal tribunals to the exclusion clause, but rather focuses on the use of evidence in refugee status determinations.

<sup>81</sup> UNHCR Handbook, note 29 above, para. 42.

<sup>82</sup> UNHCR Handbook, note 29 above, paras 37-45; See further Hathaway, note 38 above, 67 and by the same author, 'Is There A Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear?' (2004-2005) *Mich. J. Int'l L.* 505; G. Noll, 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive' (2006) 12(2) *European Public Law* 295, and M. Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 *Georgetown Immigration L. J.* 367.

including the existence of a well-founded fear of being persecuted, the Convention grounds, the availability and reasonableness of internal flight or relocation alternatives,<sup>83</sup> or whether the applicant is unable or unwilling to avail her or himself of the protection of his or her country of origin.

Nonetheless, as international criminal court proceedings usually take several years to conclude, and as the test for refugee status is prospective in orientation,<sup>84</sup> the extent to which it can be relied upon is necessarily limited. Evidence from criminal proceedings would, for example, recount only past events and circumstances. Where a conflict is ongoing, however, it may be more relevant to establish a current need for international protection.<sup>85</sup> The establishment of international criminal tribunals or referrals by the Security Council may also attest to the fact that serious gross violations of human rights have occurred or are ongoing.<sup>86</sup>

UNHCR has laid down a number of criteria or 'reliability indicators' for asylum adjudicators when evaluating a particular source of country of origin information. Adjudicators are asked to assess:

- (i) Who produced the information and for *what purposes* (taking into account such considerations as the subject-matter competence, mandate and the philosophy of the information producer);
- (ii) Whether the information producer is independent and impartial (veracity/objectivity);
- (iii) Whether the information producer has established knowledge (reputation);
- (iv) Whether the information produced is couched in a suitable tone (objective rather than subjective perspective, no overstatements, etc.);
- (v) Whether a scientific methodology has been applied and whether the process has been transparent, or whether the source is overtly judgmental.<sup>87</sup>
- (vi) Observational capacity or proximity (primary nature of the source).<sup>88</sup>

---

<sup>83</sup> UNHCR, 'Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees', 23 July 2003, HCR/GIP/03/04, available at:

<http://www.unhcr.org/refworld/docid/3f2791a44.html>; UNHCR Handbook, note 29 above, para. 91.

<sup>84</sup> The last two subsections of the 'cessation clause', Article 1C of the CRSR, are based on the consideration that international protection is no longer justified on account of changes in the country where persecution was feared, because the reasons for a person becoming a refugee have ceased to exist. See further, UNHCR Handbook, note 29 above paras 134-139.

<sup>85</sup> See, for example, UNSC Res. 1970 (2011), 26 February 2011 referred the situation in Libya to the ICC as a response to ongoing 'gross and systematic violation (*sic*) of human rights, including the repression of peaceful demonstrators', while the President of Uganda referred the situation concerning the Lord's Resistance Army, ICC-20040129-44, 29 January 2004, while fighting was ongoing.

<sup>86</sup> UNSC Res. 955 (1994), 8 November 1994, which established the ICTR notes the UNSC's 'grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda', while UNSC Res. 827 (1993) establishing the ICTY expresses the UNSC's 'grave alarm' at, *inter alia*, 'reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory.'

<sup>87</sup> UNHCR, 'Country of Origin Information: Towards Enhanced International Cooperation', February 2004, available at: <http://www.unhcr.org/refworld/docid/403b2522a.html>, para. 26.

<sup>88</sup> UNHCR, 'Country of Origin Information: Towards Enhanced International Cooperation', February 2004, available at: <http://www.unhcr.org/refworld/docid/403b2522a.html>, para. 26.

Criminal law proceedings, including witness testimony as well as expert testimony, would be assessed along these same indicators for the purposes of an asylum claim.

International criminal procedure has different criteria when assessing reliability of witness testimony versus expert testimony. In relation to the former, factors such as proximity to the events described, corroboration of the evidence, and an acknowledgement that the passage of time and the trauma possibly suffered may give rise to some inconsistencies are central to an assessment of reliability.<sup>89</sup> In relation to the latter, broadly similar criteria is applied to UNHCR's reliability indicators when assessing the reliability of expert witness statements or testimony. Four primary criteria are laid down:<sup>90</sup> 1) that the witness is indeed an expert;<sup>91</sup> 2) that the statement or report is reliable;<sup>92</sup> 3) that the statement or report is relevant and of probative value,<sup>93</sup> and 4) that the contents of that report or statement fall within the ambit of the witness' accepted expertise.<sup>94</sup> As with UNHCR's indicators, the impartiality of the expert must not be in doubt in any way; the Appeals Chamber of the ICTY has ruled that expert witness evidence was not probative because an appearance of bias attached

---

<sup>89</sup> See further, R. Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' (2008) 19(4) *IJRL* 609, at 615-616.

<sup>90</sup> *Prosecutor v. Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, para. 6; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee, 8 July 2005, paras 16-17.

<sup>91</sup> In assessing this, the Tribunal will have regard to the witness' curriculum vitae, any articles he or she has authored, and other available information: *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Expert Witnesses for the Defence, 24 January 2003, para. 17; *Prosecutor v. Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, para. 7; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Admissibility of Expert Report of Kosta Cavovski, 1 March 2006, pp. 2-3. The ICTR has defined an expert as 'Anyone with specific and relevant information on and/or knowledge of the matter brought before the Tribunal. Such specific information or knowledge which qualifies an individual to appear as an expert witness may have been acquired through training or actual studies, special aptitudes, experience or some reputation in the field or through any other means considered by the party calling the witness to give testimony as being necessary and sufficient to qualify him as an expert witness.' (ICTR, 'Guidelines on the Remuneration of Expert Witnesses appearing before the International Criminal Tribunal for Rwanda', 1 January 1995, available at:

[http://69.94.11.53/ENGLISH/basicdocs/remuneration/remuneration\\_07.pdf](http://69.94.11.53/ENGLISH/basicdocs/remuneration/remuneration_07.pdf).) See also, *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Decision on Prosecution Request for Leave to Call an Additional Expert Witness, 10 June 2005. In the ICC regime, a list of experts is maintained by the Registrar, under Regulation 44 of the Regulations of the Court.

<sup>92</sup> *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgment, 28 November 2007, para. 199; *Prosecutor v. Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, para. 7, citing *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 February 2003. In *Popović* the Trial Chamber held that before admitting the expert's evidence, it would have to determine whether there was transparency in the methods and sources used by the expert witness, including the established or assumed facts on which the expert witness had relied, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 19 September 2007.

<sup>93</sup> *Prosecutor v. Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, para. 10.

<sup>94</sup> *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-T, Decision on Report of Prosecution Expert Klaus Reinhardt, 11 February 2004, p. 4.

to it.<sup>95</sup> Thus, the expert witness statements which have been given weight as proof of a relevant historical, political or other context by international criminal tribunals have already been tested against the same criteria which refugee status assessors need to test country of origin sources, and could thus serve as a pre-tested source of information, as well as being perhaps of greater reliability than some of the sources currently used.<sup>96</sup>

#### 4.2 *Inability or unwillingness to prosecute individuals in asylum proceedings*

In order for a case to be deemed admissible before the ICC under the principle of complementarity,<sup>97</sup> it must be shown that the state in question is either unable or unwilling genuinely to investigate or prosecute the case in their domestic legal system.<sup>98</sup> The lack of functionality of the state's legal system or a state's unwillingness to ensure that those responsible for gross violations of human rights are brought to justice could be a relevant factor to consider whether an asylum-seeker has a well-founded fear of persecution, or to confirm that they are unable or unwilling to avail themselves of the protection of their country of origin.

'Inability' to prosecute in the context of the Rome Statute is measured by asking 'whether, due to a total or substantial collapse or unavailability of its national judicial system', the [s]tate would be unable to bring the accused into custody or to gather evidence or otherwise carry out criminal proceedings against the accused.<sup>99</sup> The determination of a 'total or substantial collapse' of a country's judicial system will obviously be highly pertinent to a determination of whether an asylum seeker was 'unable' to avail of the protection of that state, with a collapsed judicial system generally being indicative of a wider collapse of the structures of a state.<sup>100</sup>

<sup>95</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 19 September 2007, para. 22; see also, *Prosecutor v. Bošković & Tarčulovski*, Case No. IT-04-82-T, Decision on Motion to Exclude the Prosecution's Proposed Evidence of Expert Bezruchenko and his Report, 17 May 2007, paras 8 and 12. The ICTR, too, laid out an impartiality requirement in Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 9 March 1998.

<sup>96</sup> According to the International Association of Refugee Law Judges, background country materials or country of origin information may derive from diverse sources, including reference works; reports or papers by international bodies (such as UNHCR and the UN Human Rights Committee), international NGOs (e.g. Amnesty International reports, Human Rights Watch reports, International Crisis Group (ICG) reports), national bodies (e.g. the U S State Department Reports, the Danish Immigration Service reports, the United Kingdom Country of Origin Reports, news and media clippings and databases, legal materials and cross-checking other refugee claims. ('Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist: Paper for 7th Biennial IARLJ World Conference, Mexico City, 6-9 November 2006', COI-CG Working Party, (2009) 21 *IJRL* 149, para. 8.)

<sup>97</sup> This section does not deal with referrals by the Security Council.

<sup>98</sup> Articles 17(1)(a) and (b) of the ICC Statute provide that a case shall be deemed inadmissible if: '(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution [or] (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute'.

<sup>99</sup> Article 17(3) of the ICC Statute.

<sup>100</sup> J.K. Kleffner, *Complementarity in the ICC Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008), 154 citing N.L. Wallace-Bruce, 'Of Collapsed, Dysfunctional, and Disoriented States: Challenges to International Law' (2000) 47 *Netherlands International Law Review* 53 at 61.

‘Unwillingness’, in comparison, generally refers to prosecutions in national jurisdictions which are flawed by reason of a lack of impartiality or independence, by the fact that the domestic prosecutions are/were not consistent with a means of bringing the accused person to justice, by the use of those prosecutions to shield individual accused persons, or by an unjustified delay in proceedings,<sup>101</sup> or by a mere failure to prosecute. The absence of or ineffective prosecutions show human rights concerns in the country of origin that could add to possible justifications for granting refugee status to a particular asylum-seeker.<sup>102</sup>

In addition, for a case to be deemed admissible before the ICC, the case must be of sufficient gravity to warrant the Court’s attention.<sup>103</sup> This criterion must also be used by the ICC’s Office of the Prosecutor when initiating investigations into situations and cases<sup>104</sup> though the Rome Statute is silent on how exactly such gravity is to be measured.<sup>105</sup> The Office of the Prosecutor has posited that an assessment of gravity when deciding whether to investigate a situation will require a quantitative (looking at the number of victims of the crimes)<sup>106</sup> and a qualitative (looking at the nature, impact and manner of commission of the crimes)<sup>107</sup> analysis. A positive assessment of gravity whether by the Prosecutor in initiating an investigation, or by the Court in determining that a case is admissible, could further have some bearing on an assessment of the objective circumstances in the country of origin, as well as an individual’s fear of persecution or unwillingness to avail oneself of that state’s protection.

#### 4.3 Individual refugee status determinations: witness protection measures

In assessing whether it would be appropriate to order protection measures such as concealing a witness’ identity, allowing testimony via video-link, or even facilitating the relocation of the witness and his/her family, international criminal tribunals need to carry out an assessment of the individualized and ongoing threat to the witness.<sup>108</sup> The standard of assessment which has been applied by the tribunals is rather high, and

<sup>101</sup> Article 17(2) of the ICC Statute.

<sup>102</sup> L. Arbour and M. Bergsmo, ‘Conspicuous Absence of Jurisdictional Overreach’ in H. A. M. von Hebel *et al.* (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (Leiden: Kluwer, 1999), at 139.

<sup>103</sup> Article 17(1)(d) of the ICC Statute.

<sup>104</sup> Articles 53(1)(b) and 53(2)(b) of the ICC Statute.

<sup>105</sup> A. M. Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’, (2003) 97 *AJIL* 520, at 530.

<sup>106</sup> ICC Office of the Prosecutor, *OTP response to communications received concerning Iraq*, 9 February 2006, available at: [http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

<sup>107</sup> J.A. Goldston, ‘More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court’ (2010) 8 *JICJ* 383, at 395, citing ICC Office of the Prosecutor, Draft Policy Paper, *Criteria for the Selection of Situations and Cases*, June 2006.

<sup>108</sup> See, for example, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecution’s Motion for Special Protective Measures for Prosecution Witnesses and Others, 6 May 2009, paras 15-17; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 42; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996, para. 25; *Prosecutor v. Nteziryayo*, Case No. ICTR-97-29-T, Decision on the Defence Motion for Protective Measures for Witnesses, 18 September 2001, para. 6; *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-S, 2 November 2009, Decision on Defence’s Motion for Protective Measures, para. 4.



thus individualized determinations of threats to a witness' security ought to be viewed with solemnity by refugee status adjudicators.

The threat must comprise of an objective element along with the witness' own subjective fear of risk or threat to his or her security.<sup>109</sup> In the *Lukić* case, the ICTY Trial Chamber laid down a number of factors for objectively assessing the alleged threat faced by a witness.<sup>110</sup> These included: in-depth details of any specific threats that may have been made to the witness or his or her family, including the dates and circumstances of such threats; whether the witness still resides in the area where the alleged events occurred, and any family or business connection with or need to return to the area.<sup>111</sup> The Chamber ultimately considered that the applicant's vague submissions indicating a general fear of repercussions were not sufficient to grant protective measures.<sup>112</sup> Further, the Chamber may ask whether the witness testimony may antagonise persons who reside in the specific territory; whether there exists an unstable security situation in that territory which is particularly unfavourable to witnesses who appear before the Tribunal, and whether the witness or his or her family life or work in that territory, have property in that territory, or have concrete plans to return to live in the territory.<sup>113</sup> The third of these benchmarks presupposes that the witness and his family will be staying in the territory, in which case he or she would not be seeking asylum in another state, but in the event that the protective measures were insufficient to protect his or her identity, or if the situation was to worsen in that state, the first two determinations would be highly relevant to the adjudicator of his or her asylum application.

#### 4.4 Individual refugee status determinations: victim participation

The definition of who is and is not a 'victim' and the procedural status attached to such a determination varies between the international criminal tribunals. At the ICTR, ICTY and SCSL, a victim was defined as a person against whom a crime falling within the jurisdiction of the Tribunal had been committed,<sup>114</sup> and those victims could only participate in the proceedings as witnesses. The ICC Statute, on the other hand, has adopted a definition akin to that contained in the Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>115</sup> and victims can participate in proceedings before the ICC either in their own right or as witnesses, or both. At the ECCC, a victim is defined as a natural person (...) that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC.<sup>116</sup> Victims may participate as *partie civile*, and may be represented by their own legal representatives,

---

<sup>109</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-PT, Decision on Motion for Clarification and Motions for Protective Measures, 13 October 2003, para. 23.

<sup>110</sup> *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Order on Milan Lukić's Request for Protective Measures, 23 July 2008.

<sup>111</sup> *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Order on Milan Lukić's Request for Protective Measures, 23 July 2008, 4.

<sup>112</sup> *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Order on Milan Lukić's Request for Protective Measures, 23 July 2008, 4.

<sup>113</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Transcript of 30 May 2007, 9257.

<sup>114</sup> Rules 2A of the ICTY, SCSL and ICTR RPE.

<sup>115</sup> UNGA Res. 40/34 of 29 November 1985, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

<sup>116</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.4), promulgated on 11 September 2009 and entered into force on 21 September 2009, Glossary. ('ECCC Internal Rules')

provided that they have demonstrated that they have suffered injury of some sort ‘upon which a claim of collective and moral reparation might be based’ as a direct consequence of a crime alleged against the charged person.<sup>117</sup> In the first case before the ECCC, 90 victims participated as civil parties, but the final judgment and sentence handed down in this case later determined that the accused could be considered responsible for the harm caused to only four of these civil parties.<sup>118</sup> A further 60 civil parties had proved the existence of immediate victims of S-21 or S-24 and either close kinship or particular bonds of affection or dependency in relation to these victims, while the other civil parties had either not convinced the Chamber to the required standard that they were victims of crimes committed by the accused, or, in the case of indirect victims participating in proceedings, had not sufficiently shown the existence of familial bonds.<sup>119</sup>

The ICC Statute neither sets down a standard of proof applicable for assessing applications for victim participation nor a particular method for assessing applications. Indeed, at the Pre-Trial stage of proceedings, it has been noted that it will not be necessary ‘to make a definite determination of the harm suffered by the victims, as this will be determined subsequently, where appropriate, by the Trial Chamber in the context of a case’; determination of a single instance of harm will suffice to establish the status of victim at the pre-trial stage.<sup>120</sup>

Thus, while a legal determination of victimhood in an international criminal tribunal may add credence to an asylum application, a ruling that the victim has suffered harm may not *ipso facto* equate to a well-founded fear of being persecuted on the part of that victim, compared to, for example, a determination that a witness’ life is under threat and he or she is in need of protective measures. As with the background country information which international criminal jurisprudence can provide, the asylum adjudicator will obviously have to consider and evaluate additional information included in the application in conjunction with such a determination of harm before making a final decision. Likewise, while the fact that the ‘harm’ relative to a determination of victim status occurred in the past may not rule out a determination of a ‘well-founded fear of persecution’ on the part of the asylum seeker, it may not be sufficient either to show a future risk of harm. Nonetheless, it has been expressly recognized that past persecution may be so egregious that time and changes in political or other circumstances may not be sufficient to justify repatriation to the country of origin.<sup>121</sup>

In sum, the activities of international criminal institutions generate ample information about the situation in a given country, and in some cases even, about the risk incurred by some witnesses and victims, which may of great relevance to asylum adjudicators. The fact that this information has been scrutinized and assessed in a criminal

---

<sup>117</sup> Rule 23bis of the ECCC Internal Rules, *ibid*.

<sup>118</sup> *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010, paras 645-650.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Situation in the DRC*, Case No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, para. 82.

<sup>121</sup> UNHCR Handbook, note 29 above, para. 136; J.C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 942, citing *Lal v. Immigration and Naturalization Service*, 255 F 3d 998 (US Court of Appeal, 9<sup>th</sup> circuit, 3 July 2001).

proceeding provides an additional degree of reliability which may not necessarily or always be present with respect to other information used for compiling country of origin information.

## 5. Conclusion

UNHCR, as the primary supervisory institution of international refugee law, has regularly drawn from and relied on protection-oriented developments in other areas of international law, not least those in international human rights law, international humanitarian law and international criminal law. While international refugee law is composed of ‘specialized and ... autonomous rules’ and is a ‘specialist system’,<sup>122</sup> it nonetheless shares the general founding principles of the United Nations to promote fundamental human rights.<sup>123</sup> Thus to a large extent, the development of international refugee law conforms to the ‘systemic integration’ approach advocated by the ILC, while at the same time pushing beyond the boundaries of codified human rights, where necessary, to give effect to the object and purpose of the 1951 Convention. Contrary to the judgment in *Kupreškić*, there is now considerable similarity in the types of acts that constitute persecution under each branch of international law, and while there remain important distinctions – around discriminatory intent, for example – they do not make the regimes necessarily incompatible, nor in conflict.

---

<sup>122</sup> International Law Commission, note 9 above, para. 8.

<sup>123</sup> Article 2 of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI.