
A STUDY ON PERSECUTION AS A CRIME IN INTERNATIONAL CRIMINAL LAW IN THE CONTEMPORARY ERA

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ABSTRACT

“Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that.”

- Martin Luther King Jr.

Persecution has scarred the human history and is still a continuing phenomenon even in 21st century. Persecution is recognized as an international crime and the International Criminal Court has the jurisdiction to try these cases. Despite the global efforts to promote protect and preserve peace in international communities; prevent atrocities, but in the contemporary times, the various instances of persecution across the world have underscored the need to address this situation for a better tomorrow. From the systematic targeting of particular ethnic minorities to the suppression of religious freedoms and the brutal silencing of dissenting voices, the contemporary world is witness to complex and evolving patterns of oppression. The study deals with the analysis of concept of persecution in the international law and the kinds and forms of persecution that are in practice. The study also examines the historical context and evolution of persecution and how different tribunals had their approach in solving cases of persecutions. The study highlights the issues where actions which can be categorized as persecution are masked as other crimes to escape the severity and hinder the progress of international criminal law applicability.

The recent issues like displacement of Myanmar Rohingyas, persecution of Uyghurs in China, hate crimes committed against LGBTQIA+, are studied under this article. In India, though not a member of ICC, various crime which can be otherwise categorized as acts of persecution are rampant in India mainly- religious and ethnic conflict, caste based discrimination, etc. The study also explains the challenges in bringing these cases into limelight and because of political set up of countries around the world, many victims' stories are silenced and the saga of persecution continues until a strong stand is taken by the international community.

Keywords: Persecution, Crimes against Humanity, Rome Statute, ICC- International Criminal Court, Rohingyas, Uyghurs.

1. INTRODUCTION

International criminal law plays a pivotal role in preventing and addressing the most serious crimes committed against Humanity. Ever since the human civilization started, crimes also evolved and kept on expanding to different angles. Cybercrimes today were never a crime previously everyday new crimes are surfacing from different angles. But there are a few crimes which existed since ancient times and are being committed to this age and day. These are crimes like communal violence, slavery, racial discrimination, refugees restrictions, torture, etc. Such crimes are considered as crimes against humanity and are committed rampantly worldwide. With the development of international laws and treaties most of them to change of the fact they are not apparent anymore, but are still prevalent in certain jurisdictions. Whenever such crimes are committed, the International Criminal law operates to hold the individuals accountable for their actions, works to deter future crimes and promotes the human rights and rule of law on a global scale.

Crimes against humanity are serious violations of the human rights that are committed as a part of widespread or systematic attack directed against any civilian population, with knowledge of the attack. Crimes against humanity have been defined under various jurisdictions. The ICC Rome Statute defines the Crimes against humanity and enlists 12 categories of crimes as Crimes committed against humanity. Persecution is one such crime committed against the humanity and the basic morals. Persecution is a cruel act and a way of giving unfair treatment to a person or group especially based on their origin, religion, political beliefs or race. These crimes are serious violations of human rights and many international treaties and customary international law prohibits and condemns these crimes. Persecution has been tragic act and throughout the history across the world instances of persecution has been witnesses- like the religious conflicts (between Christians and Romans, as a part of political agendas countries attacked civilians of other countries- holocaust-Jews killed by the Hitler through concentration camps, few tribal people were attacked to end their clan, Rohingyas issues, persecution of LGBTQ+ individuals because of some social attitudes etc.

In this assignment, the researcher would analyze the concept of persecution- the elements, forms and case studies of instances of persecution in the realm of international criminal law.

2. CRIMES AGAINST HUMANITY

The crimes against humanity are the worst form of crimes committed on large population and this concept was first evolved from the Trail of the Major War Criminals held in Nuremburg 1945-46 after the catastrophic World War II. There was need to differentiate between crimes against humanities and war crimes and over the years the definition of what amounting to crimes against humanity and its scope were being enlarged. Under article 7 of the ICC Rome Statute various crimes against humanity have been defined. It is the International Criminal Court established under the Rome Statute which has the power to deal with the crimes committed against the humanity as these crimes could be committed in the context of international armed conflicts.

The following is the definition of crimes against humanity as stated under article 7, Rome Statute, 1998-

“Crimes against humanity means any of the following acts when committed as part of widespread or systematic attack directed against any civilian population with knowledge of the attack.”¹

It includes murder, extermination, enslavement, deportation, torture, rape and other sexual offences, apartheid, imprisonment, persecution, enforced disappearance of persons, and other such inhumane acts. Crimes against humanity are considered as a serious violations of international law context and committed in a systematic or widespread attack on vast civilian population these can be committed by non-state armed groups or paramilitary forces or as a part of state politics.

3. PERSECUTION

Persecution is the intentional and severe deprivation of fundamental rights based on a person's identity. It is an act contrary to the international law by reason of identity of the group or collectively. It is defined under article 7(2) (g) of the ICC Rome Statute, 1998.² It is one of the category of crimes against humanity and can be based on a person's or groups'

¹ The Rome Statute, 1998.

² Ibid.

- Race
- Religion
- Nationality
- Political opinion
- Membership of a social group
- Gender
- Ethnicity
- Culture

The ICTY and its sister institution ICTR have primarily developed the definitions for the persecution as one of the crimes against humanity. Currently, under the International community ICC is established as a permanent court to deal with persecution cases. If any individual or group commits the offence of persecution, such people or individual can be tried by the court for such offence.

Historical Context of Persecution Under International Law

The crime of persecution in the realm of international criminal law has a long and evolving history. We can witness such crimes being committed from ancient to the present day.

- During the ancient times, this has not been made into a legal concept but few group tried to protect their identity in the ancient civilizations.
- Eventually, religious persecutions based on groups' religion were rampant. Most of the Christians were persecuted for refusing to worship roman gods during the Roman Empire.
- The international crime of persecution has been first identified as a crime against humanity after the Armenian massacres of 1915.

Armenian Massacres, 1915: in this Massacre, large scale Armenians were killed during the

Ottoman Empire during the World War I. This Massacre has been defined as a worst form of crimes against humanity and civilization. For the first time, the idea to hold responsible those who perpetrated for the crime sprung out. This event is also referred to as Acts of Persecution. The Versailles Peace Conference created a Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties, 1919 established to address CAH including persecution. However, no charges of persecution were made but the report laid some groundwork for future developments.

After this Nuremberg Trials commenced and the outcome of this trial led to the emergence of a charter- Nuremberg Charter 1945. This Charter established that persecution on political, racial or religious grounds as a CAH. This recognized persecution as an international crime even when it is committed in peacetime. However, there was a limitation that makes hard to make a case of persecution that it must be committed in execution of or in connection with the war crimes. The scope of persecution was limited as an independent crime.³

- Post the Nuremberg there are many developments in this concept, **the Universal Declaration of Human Rights** (1948) stated that all individuals have right to be free from persecution.
- **1951 Refugee Convention:** This convention, was built on the concept of persecution, defined a refugee as someone with a well-founded fear of persecution for reasons of race, religion, nationality, social group, or political opinion.⁴ Persecution is one of the main reasons that individuals flee from their country.
- Then the **ICTY and the ICTR** tribunals established in the 1990's further developed the concept of persecution, expanded its scope, elements. They emphasized that persecution can occur in times of peace or war and can be committed by state or non-state actors.
- The concept of persecution in international law has evolved significantly over time, moving from a focus on specific groups to a broader protection of fundamental rights for all.

³ Chella Jessie, Persecution: a crime against humanity in the Rome Statute of the International Criminal Court, Bond University, (2004).

⁴ Dr. Yao Li, Persecution in International Criminal Law and International refugee Law, ZIS (2020).

All these developments highlight that the ongoing struggle to prevent and punish the heinous crime and to protect vulnerable groups from discrimination and violence.

3.1. PERSECUTION UNDER DIFFERENT TRIBUNALS

A. International Tribunal for the Former Yugoslavia

Persecution has been recognized as an international crime under the heading of crimes against humanity only after the former Yugoslavia Conflicts. During the prosecutions by the ICTY the contextual substance of that crime was developed. Under article 5 (h) persecution has been defined in the ICTY Statute, 1993. The concept of persecution was first discussed in *Tadic case*. In this judgment, the Trial Chamber stated that, while the persecution crime was included in the Nuremberg Charter, it has never been clearly defined in international criminal law, nor was it known in the world's major criminal justice systems.

The ICTY has played a pivotal role in developing the legal concept. It contributed by clarifying the elements of this crime, expanded its scope and helped to hold perpetrators accountable for their actions. ICTY jurisprudence laid the definition that- “the actus reus of the crime consists of an underlying act which discriminates in fact and must deny a fundamental human right laid down in international law. The mens rea of persecution is discrimination on one of the listed grounds (at the ICTY, these are political, racial and religious grounds).”

The ICTY has broadened the understanding of persecution beyond just physical violence. It recognized that other acts, such as discriminatory laws, denial of access to education or employment, and restrictions on cultural or religious practices, could also constitute persecution if they were committed with the required discriminatory intent and as part of a widespread or systematic attack.⁵

Another aspect which ICTY successfully clarified is that persecution can be a crime against humanity on its own, even if it is not committed in connection with other crimes, such as war crimes, whereas previously persecution can be prosecuted when war crimes happens.

⁵ Fausto Pocar, Persecution as a Crime under International Criminal Law, 2 JNSLP (2008).

This established guiding principles that-

- **Cumulative Effect:** The ICTY emphasized that individual acts of persecution should be considered together, and it is the cumulative effect of these acts that must reach the level of gravity of other crimes against humanity.
- **Context Matters:** The ICTY stressed the importance of considering the context in which the acts of persecution occurred, including the overall political and social situation.

In the case of *Prosecutor v. Kupreškić case*⁶, which was decided by the ICTY, where the case 6 Bosnian Croat individuals attacked Bosnian Muslims in the village of Ahmici, Bosnia and Herzegovina in April 1993. This attack killed over 100 Muslim who were civilians mostly women and children and many homes and mosques were destroyed. The accused people were charged for various counts of CAH – persecution, murder, and other inhumane acts. The Trial Chamber of ICTY convicted 5 of 6 offenders guilty of persecution. This judgement is significant because it affirmed that persecution can occur as a standalone crime against humanity, even without being linked to other crimes like war crimes. The Trial Chamber emphasized the cumulative nature of persecution, meaning that individual acts of discrimination and violence, when considered together, can constitute the crime of persecution. The Chamber also stressed the importance of considering the context in which the acts occurred, including the broader political and social climate. Later the Appeal chamber overturned the convictions of three accused.

In the case of the *Prosecutor v. Dusko Tadic*⁷, accused Dusko Tadic was a Bosnian Serb political leader who was accused with charges of war crimes and CAH that he committed against Bosnian Muslims and Croats in the Prijedor region of Bosnia and Herzegovina in 1992. He was charged with wide range of offences under CAH: persecution, deportation and other inhumane acts. The Trial chamber found him guilty and sentenced him to 20 years in prison. The Appeal Chamber also upheld the conviction for CAH and War crimes and increased the sentence to 25 years. Through this judgement, the chamber affirmed that an individual can be held accountable for committing an act for purely personal motives i.e., individual criminal

⁶ IT-95-16. ICTY.

⁷ IT-94-1-A, ICTY.

responsibility can be imposed. For the crime of persecution discriminatory intent is the key element.

B. International Criminal Tribunal for the Rwanda

ICTR is a sister institution established under the ICTR Statute to try and prosecute the cases of genocide mishap happened in Rwanda in 1994. Under Article 3 of the Statute deals with CAH and it has recognized persecution on political, racial and religious grounds. ICTR while dealing with the cases of genocide has made further development to the concept of persecution. ICTR has broadened the requirements for persecution to more than physical acts of violence.

ICTR has recognized other acts, such as hate speech, incitement to discrimination, and denial of access to basic necessities, could also constitute persecution if they were committed with the required discriminatory intent and as part of a widespread or systematic attack. ICTR has recognized gender based persecution, including sexual violence as a CAH. The ICTR, like the ICTY, emphasized the importance of considering the cumulative effect of individual acts of persecution. It stressed that it is the overall impact of these acts, rather than each act in isolation, that must reach the level of gravity of other crimes against humanity.

The ICTR prosecuted numerous individuals for the crime of persecution, holding them accountable for their role in the widespread or systematic attacks against the civilian population in Rwanda. It has further contributed to frame a definition in the Rome statute.

In the case of the *Prosecutor v. Jean-Paul Akayesu*⁸, ICTR decision, Jean-Paul Akayesu was the Mayor of Taba in Rwanda during the 1994 genocide. He was accused of involving in the mass killings and other atrocities committed against Tutsi civilians. He was also accused of encouraging rapes of Tutsi women. He was charged with genocide, CAH- persecution, sexual violence, genocide. ICTR found Akayesu responsible for crimes. In the judgement, the chamber reaffirmed the principle of individual criminal responsibility for international law where Akayesu was in a position to prevent and failed to prevent or punish crimes.

Another decision of ICTR in the *Prosecutor v. Nahimana*⁹, (Media case) the defendants are two individuals who founded a private radio company in Rwanda, and the editor-in-chief of a

⁸ ICTR-96-4-T.

⁹ ICTR-99-52-A.

newspaper. The three men were accused of participating in the 1994 genocide through the control they exerted over the media. They were convicted for inciting aiding abetting genocide, committing persecution and aiding and abetting extermination through radio broadcasts and newspaper articles originating from their media outlets. “Hate speech, such as in the Media Case, which is accompanied by incitement to commit genocide and is part of a massive campaign of other discriminatory acts – including acts of violence against property and persons – without any doubt does rise to the required level of gravity so as to amount to persecution.”¹⁰

C. Rome Statute of the International Criminal Court, 1998

Article 7 (1)(h) of the Rome Statute defines persecution We can infer from the definition the legal elements required for persecution, that persecution is the intentional and severe deprivation of fundamental rights. These include-

- **Discrimination:** The perpetrator commits an act or omission that discriminates against a person or group based on their race, religion, nationality, political opinion, or social group membership
- **Infringement of fundamental rights:** The act or omission denies or infringes upon a fundamental right
- **Intention:** The perpetrator intentionally commits the act or omission to discriminate
- **Serious harm:** The act or omission causes serious harm, including a threat to life or freedom.

The Actus Reus and the mens rea are the-

Actus Reus (the prohibited act): Detailed examination of the various acts that can constitute persecution, includes: both the act or omission

- Physical violence (murder, extermination, torture, rape, etc.)
- Discriminatory acts (denial of fundamental rights, access to services, etc.)

¹⁰ Ibid.

- Denial or infringement of fundamental rights
- Political, religious, and cultural persecution.

Mens Rea (the required intent): Discussion of the specific intent required for persecution, namely discrimination on prohibited grounds (race, religion, national origin, etc.). Analysis of the intent to discriminate and its complexities.¹¹

Forms of Persecution

Persecution can take many forms, including:¹²

- **Physical violence:** Murder, extermination, torture, rape, and other forms of ill-treatment.
- **Discrimination:** Denial of access to education, employment, housing, healthcare, and other essential services.
- **Political persecution:** Suppression of political rights, arbitrary arrest and detention, and denial of due process.
- **Religious persecution:** Discrimination against religious groups, desecration of religious sites, and restrictions on religious practice.
- **Cultural persecution:** Suppression of cultural identity, destruction of cultural property, and prohibition of the use of minority languages.

4. CASE STUDIES

A. PERSECUTION OF MYANMAR ROHINGYAS

The Rohingyas are the Muslim ethnic minority group who have lived in Myanmar, primarily in Rakhine State, for centuries. They are distinct from the majority-Buddhist population of Myanmar. They have faced long-standing discrimination and have been denied citizenship under Myanmar law, rendering them stateless. These Rohingyas have been subjected to wide

¹¹ Article 30, Rome Statute, 1998.

¹² Crimes against Humanity, International Criminal Law and Practice Training Materials under ICTY.

range of violent crimes mass killings, torture, rape, systematic discrimination in accessing education, jobs, healthcare facilities, and were forced to displace from their homes. These are all various forms of CAH committed against them. Even today, these people are living in stateless which makes them further vulnerable.

To escape from their misery, hundreds of thousands of Rohingyas have started to flee to other neighbouring countries like Bangladesh, India, etc. Even in these nations these people were not welcomed and started living refugee lives.

The main issue is that even when such persecution are been done but there has been limited effort to make the perpetrators accountable. In 2019 ICC opened an investigation into these crimes against Rohingyas in Bangladesh. The reason is that Myanmar was not a member to the ICC and thus ICC cannot investigate into these crimes. In 2021 Myanmar accepted the ICC jurisdiction however no ICC member state has referred this situation to the ICC Prosecutor.¹³

Currently, many Rohingyas who crossed their borders came fled to other countries are not given refugee status like India but it does allow them to stay temporarily and provides services through UNHCR. This issue where openly grave human right violations are taking place and it is the need of the hour to address this crime and find a long-term solution apart from punishing the responsible people.

B. PERSECUTION OF UYGHURS IN CHINA

The Uyghurs are Muslim Turkic ethnic group who live primarily in the Xinjiang Uyghur Autonomous Region (XUAR) of China. The Chinese government has been accused of widespread human rights abuses against Uyghurs and other Turkic Muslim minorities in Xinjiang¹⁴

- Mass detention: Over a million Uyghurs have been arbitrarily detained in internment camps, where they are subjected to political indoctrination, forced labor, and other abuses.

¹³ Myanmar Rohingyas: What you need to know about the crisis, BBC News (23 January 2020). Available at: <https://www.bbc.com/news/world-asia-41566561>. (last accessed: 12-3-2025).

¹⁴ Lindsay Maizland, China's Repression of Uyghurs in Xinjiang, Council on Foreign Relations, (2022). Available at: <https://www.cfr.org/backgrounder/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights>. (Last accessed: 12-3-2025).

- Forced labor: Uyghurs are being forced to work in factories and fields, often in the cotton industry.
- Forced sterilization and birth control: Uyghur women have been subjected to forced sterilization, abortion, and other forms of birth control.
- Suppression of culture and religion: Uyghur cultural and religious practices are being suppressed, with mosques destroyed and religious leaders imprisoned.
- Surveillance: Uyghurs are subjected to pervasive surveillance, including facial recognition technology and intrusive monitoring of their daily lives.

When questioned these about these alleged actions, the Chinese government claimed that these were a part of internment camps for vocational training centres started to combat extremism and poverty. What happens in those camps is kept confidential and many restrictions were imposed in these regions. Many nations worldwide condemned the Chinese government actions as they constitute serious human rights violations- genocide and CAH.

However to try and prosecute officials responsible under international criminal law, China is not a member of ICC thus Tribunal cannot them.

Other such instances include-

- LGBTQ+ people face persecution from many countries like Russia, India, US they are often subjected to arbitrary detentions, discrimination, torture, honour killings etc.¹⁵
- Most indigenous communities face discrimination, subjected to land dispossessions, violence due to their ethnicity and distinct cultures.

5. SUGGESTIONS

Where such wide-scale serious violations of human rights are taken place, often the countries where such crimes are committed are hiding under the sleeve of not a member state to ICC statute. When there are not a member they cannot be tried under the ICC jurisdiction. Thus

¹⁵ LGBTQI+ Persecution: The Global Genocide of Gay People, Genocide Watch, March 2023. Available at: <https://www.genocidewatch.com/single-post/lgbtqi-persecution-the-global-genocide-of-gay-people>.

researcher suggests that to not let such State escape, international community may apply the customary international law regardless of their ratification to the statute. This can put end to many such CAH.

6. CONCLUSION: THE ONGOING STRUGGLE AGAINST PERSECUTION

The jurisprudent and the contextual aspect of the crime of Persecution in the international law has been developed over a period time and the concept today is expanded to cover various forms of persecution. After ICTY and the ICTR rulings, it is now a settled principle that individual criminal responsibility can be levied to hold individuals responsible for persecution. The context of persecution shall be understood from overall political, social, religious situations.

ICTY ICTR and the ICC are striving to address these crimes and punish the accountable persons. However, the challenge is that most of the cases do not see the limelight or unnoticed or even if they reach the court the case fails most of the times because short of evidence and the threshold to prove the guilty are high on prosecution.

It is high time that the International community must come together to decide a satisfactory long term solution to fight against these crimes. The offenders may be punished but at the same time victim parties must also be looked after i.e., steps to restore them to their rightful situation must be provided.