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How Gender and the Right to
Culture have Influenced the
Development of Modern
International Criminal Law

A Study on the Crime of Gender-Based
Persecution under the Rome Statute of the
International Criminal Court

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Dedication

I dedicate this work with love to my parents, Don and Shelley Mackay, for their continuous support, faith and encouragement. Thank you sincerely for inspiring me to take the road less travelled – I believe it will make all the difference.

Preface

Essentially, this study has been undertaken to highlight the interrelationship between gender and culture; and the importance of, and substantial impact of cultural rights, upon legal developments within international criminal law.

This paper has been primarily prepared for academics, lawyers and gender experts with a special interest in humanitarian law, human rights law and international criminal law.

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Summary

Nearly a decade has passed since the adoption of the Rome Statute of the International Criminal Court (“Rome Statute”) on 17 July 1998. International criminal law has advanced considerably during this period, particularly with respect to the crime of gender-based persecution. This is despite the fact the International Criminal Court (“ICC”) has not yet observed its first trial concerning this crime. This momentous legal advancement primarily spurred from the establishment of ad hoc criminal tribunals in the 1990s, following the mass violations of human rights in the former Yugoslavia and Rwanda. Simultaneously, a vast cross fertilisation of principles between various international legal disciplines also played a substantial role in the expansion of international criminal law. Due to these developments gender-based persecution is now statutorily recognised as a crime against humanity under Article 7(1)(h) of the Rome Statute. This remarkable legal advancement should not be undermined.

The core theme of this thesis is the hypothesis that human rights law, international humanitarian law and international criminal law are irrefutably linked. This proposition is to be demonstrated by the interconnection, interrelation, impact and influence cultural rights have had on the inclusion, definition and implementation of gender-based persecution under the Rome Statute. The overall goal of the paper is to illustrate: (1) the symbiosis of different legal disciplines; (2) the interrelation between culture and gender; and (3) the influence of these two limbs on the development of international criminal law.

This paper will delve into the nature of culture and cultural rights with a brief reflection on the theory of cultural relativism. This paper will further discuss the present legal framework and protection mechanisms under human rights law and international humanitarian law for cultural rights. The interrelationship between gender and culture will be examined to reveal

the significant influence these concepts have had on the development of international criminal law. A historical overview of the crime of persecution will be undertaken to establish the appropriate grounding for the key component of this paper, that being, a study on the crime of gender-based persecution under the Rome Statute. Ultimately, this thesis will illustrate the social, cultural and legal importance of prosecuting gender-based persecution (as a crime against humanity) on an international level.

Abbreviations

ACHPR	1981 African Banjul Charter of Human and Peoples' Rights
Algiers Declaration	1976 Algiers Declaration of the Rights of Peoples
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
APII	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts
CAT	1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCL10	Control Council Law No. 10
CEDAW	1979 Convention on the Elimination of All Forms of Discrimination Against Women
CERD	1965 Convention on the Elimination of Racial Discrimination
CRC	1989 Convention on the Rights of the Child
CSR	1951 United Nations Convention Relating to the Status of Refugees
CSRP	1967 United Nations Protocol Relating to the Status of Refugees
Doc.	Document
ECOSOC	Economic and Social Council
GA	General Assembly

GC I	1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC II	1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea
GC III	1949 Geneva Convention Relative to the Treatment of Prisoners of War
GC IV	1949 Geneva Convention Relative to the Protection of Civilian Persons in Times of War
HRCCom.	Human Rights Committee
ICC	International Criminal Court
ICC Elements of Crimes	International Criminal Court Elements of Crimes
ICC Prep Commission	Preparatory Commission for the International Criminal Court
ICC Prep Committee	Preparatory Committee on the Establishment of an International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ Statute	International Court of Justice Statute
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg

IMTFE	International Military Tribunal for the Far East
Mtg.	Meeting
NGO	Non-Governmental Organisation
Nuremberg Charter	Charter of the International Military Tribunal of Nuremberg annexed to the London Agreement of 8 August 1945
OTP	Office of the Prosecutor at the International Criminal Court
Plen.	Plenipotentiaries
Res.	Resolution
Rome Conference	United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998)
Rome Statute	Rome Statute of the International Criminal Court
Tokyo Charter	The Charter of the International Military Tribunal for the Far East Annexed to the Special Proclamation by the Supreme Commander for the Allied Powers: Establishment of an International Military Tribunal for the Far East dated 19 January 1946.
Turku Declaration	1990 Declaration of Minimum Humanitarian Standards
UN	United Nations
UN Charter	Charter of the United Nations
UNDAW	United Nations Division for the Advancement of Women
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNHCR Guidelines	United Nations High Commissioner for Refugees Guidelines on the Protection of Refugee Women

UNHCR Handbook	United Nations High Commissioner for Refugees Handbook on Procedure and Criteria of Determination of Refugee Status
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNWCC	United Nations War Crimes Commission
WCGJ	Women's Caucus for Gender Justice in the International Criminal Court
Women's Initiatives	Women's Initiatives for Gender Justice
WWII	World War Two

1 Introduction

The crime of persecution is developing at a rapid pace. This canonical evolution is principally due to the progressive and reactive nature of the ad hoc criminal tribunals; in response to heinous atrocities committed by mankind, against one another, during World War II (“WWII”) and onwards.¹ In particular, gender-based persecution² is now formally codified under the Rome Statute of the International Criminal Court (“Rome Statute”).

The identification of gender-based persecution and the international acceptance and acknowledgement of same (as a crime against humanity) can be traced explicitly throughout history. The efforts of the pioneers who fought for the inclusion of “gender” under Article 7(1)(h) of the Rome Statute on 17 July 1998 are to be applauded. For the past sixty years, various jurisprudential lineages such as international humanitarian law, human rights law, refugee law and international criminal law have touched upon the notion of persecution. However, it is particularly evident in this last decade that legal commentary and social awareness of gender-based persecution has advanced considerably.

In this paper the significance of these developments will be studied. Gender-based persecution and codification thereof under the Rome Statute and its intertwined relationship with culture will be explored, examined and dissected. This paper will illustrate the social, cultural and legal importance of prosecuting gender-based persecution (as a crime against humanity) on an international level. In a nutshell, this study will establish and conclude that

¹ K. Askin, ‘Women and International Humanitarian Law’ in D. Koenig and K. Askin (eds.), *Women and International Human Rights Law*, Vol. 1 (Transnational Publishers, New York, 2000). pp.3-29.

² For the purpose of this thesis, the author has identified the crime in question as “gender-based” persecution rather than using the term “gender-related” persecution, which is frequently applied under refugee law. Essentially, this identifier has been chosen to reflect the terminology used in Article 7(1)(h) of the Rome Statute of the International Criminal Court. However, it should be noted that academics and jurists alike commonly interchange these phrases when referring to this particular crime.

the sociological interrelationship between culture and gender is undeniably influencing and decisively impacting upon the convergence of these four legal disciplines.

1.1 Hypothesis and Aims

It is imperative that a collective theoretical approach to the crime of gender-based persecution is undertaken by society, advocates of international criminal law and States. Further, to accurately appreciate the significance of this legal advancement the true nature of gender-based persecution must be respectively confronted and addressed. It is believed the preservation of fundamental human rights, particularly cultural rights, will consequently influence the development of gender and the important progression of social attitudes within society.

Furthermore, although the statutory inclusion of gender-based persecution is a major advancement for international criminal law it is necessary for an objective assessment of this watershed event to be undertaken. Hence, this paper will illustrate the apparent symbiosis that has occurred between various legal lineages, and successive influence of same, on the development of gender-based persecution under international law.

Extensive methodological efforts were undertaken to stress the overall goal of the thesis, that being to illustrate: (1) the symbiosis of different legal disciplines; (2) the interrelation between culture and gender; and (3) the influence of these two limbs on the development of international criminal law. Overall, by means of a critical legal analysis of gender-based persecution it is believed that by acknowledging such a link does exist; the impact and significant importance of same upon fundamental human rights and cultural development can be subsequently measured against gender progression in society.

1.2 Methodology

This study broadly reflects upon the development and promotion of international criminal law and the ever-increasing overlap international criminal law has had in modern times with other bodies of legal jurisprudence: namely, international human rights law, refugee law and international humanitarian law. To adequately illustrate this overlap both a theoretical and practical overview of gender-based persecution; with respect to implementation and prosecution (as a crime against humanity) under the Rome Statute, will be undertaken.

Further, by means of a critical legal and sociological analysis, this paper will focus on the interrelationship between culture and gender under international law and will further examine the role of the International Criminal Court (“ICC”) with regard to the development of gender-based persecution under the Rome Statute.³ This is primarily to highlight the overall impact, which culture and gender have had, on the advancement of international criminal law and interrelationship with international humanitarian law, human rights law and refugee law.

Rather than establishing a purely superficial evaluation concerning the individual prosecution of gender-based persecution at an international level; a field study was undertaken at the ICC from the 3rd December 2007 – 5th December 2007. Prior to the field study various academics, lawyers, gender experts and non-governmental organisations (“NGOs”) were contacted with a series of questions pertinent to the key issues of this study. The ICC was also supplied with an analogous set of questions to allow an overall comparison of responses. This qualitative approach was selected to increase the level of exploration able to be embarked upon with regard to the thesis topic. It was also chosen to emphasise and affirm the necessity of the study

³ For more background information regarding the critical legal analysis movement refer to R. Unger, *The Critical Legal Studies Movement*, (Harvard University Press, London, 1986).

by allowing a more methodical and objective perspective to unfold throughout the thesis.

On this point, it should be noted this paper has aimed not to delve into the feminist legal critique of the subject matter. This was essentially to innovate the academic literature prevalent within this field of law – the crucial element of study being “gender-based” persecution not “women/female-based” persecution.⁴

1.3 Structure and Layout

In order to demonstrate the hypothesis, aims and methodology of this study this paper is divided into three substantial chapters. The first substantive chapter will discuss the right to culture under human rights law and specifically its interrelationship with gender. This chapter will further address the significance of cultural rights and their connection with gender issues within society. It will elaborate on the many facets of cultural rights (and how they are socially and economically intertwined) and the importance of preserving such rights (via various international instruments) during both times of peace and armed conflict. This chapter will conclude the concepts of gender and culture are inexplicitly intertwined; and henceforth, these interrelated notions will unequivocally influence future judicial interpretations when the ICC judges are interpreting the definition of gender-based persecution.

The second substantive chapter of this paper will concentrate on the crime of persecution under international law. It will explore the historical development of persecution (as a crime against humanity) under international humanitarian law, human rights law, refugee law and international criminal law. Reference will be made to various important

⁴ For more background information regarding feminist perspectives on international law refer to H. Charlesworth, C. Chinkin and S. Wright, ‘Feminist Approaches to International Law’ (1991) 85 *American Journal of International Law* 613.

cases, statutes, tribunals and courts involved in the expansion of this crime. Further, to emphasise the highly radical and notable progress made up to and including the adoption of the Rome Statute on 17 July 1998 an overview of the constitutional structure of the ICC will be undertaken. This chapter will conclude that international criminal law has enormously benefited from a broad cross fertilisation of legal principles. This chapter will further stress the interpretation, application and success of the Rome Statute and its influence on the development of international criminal law rests with the ICC judges – not the State Parties to its mandate. Ultimately, this chapter will assert the advancement of international criminal law under the Rome Statute will set the necessary precedents required for international criminal deterrence.

The third substantive chapter of this paper will focus specifically on the crime of gender-based persecution under the Rome Statute. The key component of this chapter will be an analysis of gender-based persecution under Article 7(1)(h) of the Rome Statute. This chapter will further analyse and examine the practical implementation and prosecution of gender-based persecution at a grass roots level within the ICC. The results and findings of the field study to the ICC will be evaluated and the subsequent importance of this provision's inclusion in the Rome Statute will be speculated upon. Additionally, in an effort to stress the cyclic spirit of this paper; the significance of the codification of "gender" as a key component under Article 7(1)(h) of the Rome Statute and its relationship with culture will be explored, examined and dissected. This chapter will address the importance of prosecuting gender-based persecution and highlight the need to ameliorate the culture of impunity (particularly with respect to gender-based crimes) that currently exists under international criminal law. This chapter will conclude that the application of the ICC Rules of Procedure and Evidence and the ICC Elements of Crimes (in accordance with Article 7(1)(h) of the Rome Statute) will determine whether the prosecution of a specific case of gender-based persecution will prove fruitful or futile.

Ultimately, this paper will establish that a binary relationship has been cultivated from the convergence of these legal disciplines and from the interrelationship between culture and gender within society. Overall, this paper will conclude the prosecution of gender-based persecution is essential for maintaining international peace and security, upholding the values in the Preamble of the Rome Statute and for preserving, encouraging and supporting cultural development.

1.4 Delimitations

The primary aim of this study is to provide an in-depth awareness of current human rights issues pertinent to the Master Program in Human Rights and Intellectual Property Rights Law. The purpose of the thesis research is to enhance personal scholastic abilities through the practical application of analytical skills, relevant legal methods and advanced argumentation, which are required on both an international and national professional legal level.⁵ The scholastic aim is to independently, critically, and creatively identify legal problems and to plan and pursue qualified tasks within a given time period. The overall goal of this study is to contribute to the existing jurisprudential knowledge pool. However, despite these aspirations some realistic limitations, to the study topic, must be acknowledged.

The original study intention was to incorporate more issues pertaining to intellectual property. The aim was to link these intellectual property issues with the key thesis topic, that being, the interrelationship between culture and gender and corresponding persuasion of same on the development of international criminal law (via an assessment of gender-based persecution under the Rome Statute).

Numerous intellectual property issues, such as traditional knowledge and traditional cultural expressions, when considered under Chapter 2 (The

⁵ Note for professional reasons “quotations” have been referenced according to the *Australian Guide to Legal Citation*, 2nd Edition (Melbourne University Law Review Association Inc., Melbourne, 2002). This reference source can be accessed electronically at http://mulr.law.unimelb.edu.au/PDFs/aglc_dl.pdf.

Right to Culture and Subsequent Interrelationship with Gender under International Law) are intrinsically relevant. However, when such inherent issues are pragmatically considered, evaluated and measured against the overall thesis goal⁶ they have limited applicability and/or significance.

Hence, despite the vast amount of research that was undertaken regarding these issues a rational executive decision was made to eliminate them, largely, from the thesis paper. This action was undertaken to avoid any possible hijacking of the true passion of the thesis and potential detraction from the critical component, that being an analysis of gender-based persecution.

Furthermore, it was apparent from the research conducted that other human rights, such as the right to equality and the right to non-discrimination were duly relatable and suitable for analysis. Nonetheless, given the prevalence of such academic literature already amply referenced against persecution, a novel, liberal and more innovative approach was preferred for this study – thus in turn validating the selection of the right to culture. Overall, however, subject duration; time and paper-length were the main academic reasons for restricting the abundant possible scope of this hereto thesis paper.

⁶ That being, to illustrate: (1) the symbiosis of different legal disciplines; (2) the interrelation between culture and gender; and (3) the influence of these two limbs on the development of international criminal law.

2 The Right to Culture and Subsequent Interrelationship with Gender under International Law

Gender refers to the roles and responsibilities of men and women that are created in our families, our societies and our cultures. The concept of gender also includes the expectations held about the characteristics, aptitudes and likely behaviours of both women and men (femininity and masculinity). Gender roles and expectations are learned. They can change over time and they vary within and between cultures. Systems of social differentiation such as political status, class, ethnicity, physical and mental disability, age and more, modify gender roles.⁷

The basis of this paper is the hypothesis that human rights law, international humanitarian law and international criminal law are irrefutably linked. This proposition is to be exemplified by the interconnection, interrelation, impact and influence cultural rights have had on the inclusion, definition and implementation of gender-based persecution under the Rome Statute. Furthermore, although the root of this paper is in its discussion of gender-based persecution under international criminal law (Chapter 4); due to the progressive sociological and critical legal approach applied to the research an analysis of the right to culture and its interrelationship with gender under international law must initially be undertaken.

In this chapter, the right to culture and subsequent interrelationship with gender will be explored. This choice in focal point is influenced by the sociologically constructed definition of “gender” (above) by the United Nations Educational, Scientific and Cultural Organisation (“UNESCO”), and the relative definition of “gender” stipulated in Article 7(3) of the Rome Statute.⁸

⁷ UNESCO *Gender Mainstreaming Implementation Framework (GMIF) for 2002-2007*, Report by the UNESCO Section for Women and Gender Equality of the Bureau of Strategic Planning (September 2003).

⁸ Article 7(3) of the Rome Statute states: ‘For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society’.

It is perceptible that while not all of the components outlined in this chapter (regarding the right to culture) may directly relate to the prosecution of gender-based persecution under the Rome Statute it is nonetheless important to address them. It is believed the role of culture in the overall determination of cultural identity, sociological responsibilities and gender roles is dynamically affected by international crimes such as gender-based persecution. Culture is not a static concept; nor is gender; hence a broad understanding of both concepts is crucial before progressing deeper into the thesis. Moreover, it is believed a concise understanding and explanation of human rights under international law is imperative before the precise nature of gender-based persecution (as an abhorrent crime against humanity) can be truly apprehended.

2.1 Human Rights under International Law

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems to promote and protect all human rights and fundamental freedoms.⁹

The notion of “human rights” is a modern one, which at present is universally applicable in principle due to escalating social evolution and cultural advancement. Human rights are moral goods that aim to establish and guarantee the conditions necessary for the development of the human person.¹⁰ Primarily there are three fundamental human rights that exist: firstly, *freedom*; secondly, *equality*; and thirdly, *dignity* and each of these terms can be found in articles of utmost significance within the Universal Declaration of Human Rights (“UDHR”),¹¹ the United Nations Charter

⁹ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Vienna, 14-25 June 1993, A/CONF.157/23, para 5.

¹⁰ J. Donnelly, ‘Universal Human Rights in Theory and Practice’ (1989) in Henry J. Steiner and Philip Alston, *International Human Rights – Law Politics Morals*, 2nd Edition (Oxford University Press, Oxford, 2000).p599.

¹¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen. Mtg., UNDoc. A/RES/217A (III) (1948) (“UDHR”).

(“UN Charter”),¹² the International Covenant on Civil and Political Rights (“ICCPR”)¹³ and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)¹⁴.¹⁵ However, human rights should not be confused with the notion of human dignity, which is defined as ‘the particular cultural understandings of the inner moral worth of the human person and his or her proper political relations with society’.¹⁶ The codification of fundamental human rights within international legal instruments is a valuable source of reference for this paper. As de Than and Shorts eloquently exclaim ‘there is a clear, visible cross-pollination and cross referencing between international criminal law, international humanitarian law and international human rights law, the first and last of which are really different perspectives on the same problem’.¹⁷ Hence, it is believed a broader understanding of these lagniappe legal disciplines is vital before an analysis of gender-based persecution can be undertaken.

Human rights imply both duties and obligations for individuals and States. These legal obligations primarily come into force once a country has ratified a particular international instrument regarding same;¹⁸ however, they can

¹² *Charter of the United Nations*, opened for signature 26 June 1945 (entered into force 24 October 1945) (“UN Charter”).

¹³ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (“ICCPR”).

¹⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (“ICESCR”).

¹⁵ [emphasis added] Collectively these documents are labelled the International Bill of Rights. The Preamble of the UDHR states: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised’ and Article 1 of the UDHR proclaims that ‘all human beings are born free and equal in dignity and rights...’. This can be linked with the third objective of Article 1 of the UN Charter which declares its objective as ‘the achievement of international cooperation in solving problems of an economic, social, cultural or humanitarian character.’ And, can be additionally connected with the analogous Preambles of the ICESCR and ICCPR, which recognise the inherent dignity and of equal and inalienable rights of all members of the human family as being the foundation of freedom, justice and peace in the world...and that these rights derive from the inherent dignity of the human person.

¹⁶ Rhoda Howard, ‘Dignity, Community and Human Rights’ in Henry J. Steiner and Philip Alston, *International Human Rights – Law Politics Morals*, 2nd Edition (Oxford University Press, Oxford, 2000).p398.

¹⁷ C. de Than and E. Shorts (eds.), *International Criminal Law and Human Rights*, (Sweet and Maxwell Publishers Limited, London, 2003).p12.

¹⁸ For example, Article 2 of the ICESCR outlines the State obligations for all State Parties to the covenant with respect to economic, cultural and social rights. Refer to T. Burgenthal, *International Human Rights in a Nutshell*, (West Publishing Co, Minnesota, 1995).

also legally derive from custom.¹⁹ According to Aide the State obligations are essentially: (a) to *respect* the right by refraining from undertaking legal or policy measures that would violate its specific provisions; (b) to *protect* the right through legislature and other measures in order to prevent other parties from violating its provisions; and (c) to *fulfil* the right by implementing positive measures that enable and assist individuals and communities to enjoy the right.²⁰ Whereas, according to Dinstein individual responsibilities include:

The individual human being is manifestly the object of every legal system on this planet and consequently also of international law. [The individual] bears international rights and duties directly, without the interposition of the legal personality...[I]ndividual responsibility means subjection to criminal sanctions. When an individual human being contravenes an international duty binding him directly, he commits an international offence and risks his life, liberty and property. Hence, international human duties are inextricably linked to the development of international criminal law.²¹

Without these qualities the right becomes what is more frequently termed a “privilege” and as such does not achieve the requisite status.

Evans states ‘gender issues have figured importantly in the human rights movement over the last two decades’.²² He further states that education on cultural and stereotypical roles will significantly affect, influence and determine the future of human rights; and that government can and should influence prevailing ignorant views as part of their international obligations.²³ It is agreed that confronting certain conceptual obstacles or

¹⁹ According to Dixon, the traditional starting point for sources of international law is Article 38 of the International Court of Justice Statute. Briefly, this provision lists: (1) treaties; (2) custom; (3) general principles; and (4) judicial decisions as the key sources of international law. It should, however, be noted that only treaties and custom can create actual definite legal obligations for States; and, even this rule is subject to exceptions under customary international law. Refer to M. Dixon, *Textbook on International Law*, (Oxford University Press, Oxford, 2007).p23.

²⁰ A. Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in A. Eide et al. (eds.), *Economic, Social and Cultural Rights*, 2nd Edition (Kluwer Law International, The Hague, 2001).pp.9-28.[emphasis added].

²¹ Y. Dinstein, ‘International Criminal Law’ (1975) 5 *Israel Yearbook of Human Rights* 55, as reproduced in K. Askin, ‘Women and International Humanitarian Law’ in D. Koenig and K. Askin (eds.), *Women and International Human Rights Law*, Vol. 1 (Transnational Publishers, New York, 2000).p7.

²² M. Evans (ed.), *International Law*, 2nd Edition (Oxford University Press, Oxford, 2006).p778.

²³ *Ibid.*

inexplicable prejudices (with regard to gender-based persecution) usually requires addressing a pre-existing lack of education as well.

3 The Right to Culture

3.1.1 What is Culture?

Culture is a difficult concept to define under international law. According to the definition adopted at the UNESCO World Conference on Cultural Policies (Mexico, 1982) and regularly referenced by academics, culture is:

[t]he whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or a social group. It includes not only arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.²⁴

Stavenhagen expands upon this concept and categorises culture into three levels. He states:

At one level, culture can be identified with the accumulated material heritage of mankind, either as a whole or part of a particular group, including but not limited to monuments and artefacts. A second understanding of culture is that of a process of artistic and scientific creation. A third meaning, prominent in the discipline of anthropology, is to understand culture as the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups.²⁵

However, the most relevant definition of culture to this study is that by An-Na'im which asserts:

Culture is the source of the individual and communal world view: it provides both the individual and the community with the values and interests to be pursued in life as well as the legitimate means for pursuing them. It stipulates the norms and values that contribute to people's perception of their self-interest and the goals and methods of individual and collective struggles for power within a society and between societies. As such, *culture is a primary force in the socialisation of individuals and a major determination of the consciousness and experience of the community.*²⁶

²⁴ *Mexican City Declaration on Cultural Policies*, World Conference on Cultural Policies Mexico City, (26 July - 6 August 1982). UNESCO Document available electronically at http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf Visited 11 August 2007.

²⁵ R. Stavenhagen, 'Cultural Rights: A Social Science Perspective' in A. Eide et al. (eds.), *Economic, Social and Cultural Rights*, 2nd Edition (Kluwer Law International, The Hague, 2001), p290.

²⁶ A. An-Na'im, 'Towards a Cross-Cultural Approach in Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment' in A. An-Na'im (ed.), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus*, (University of Pennsylvania Press, Philadelphia, 1992), pp.19-43. [emphasis added].

It is believed this definition truly incorporates and visualises culture as both a social commodity and occasionally a hindrance – dynamic in nature but ultimately intertwined with the individual and the surrounding community. Further, it appreciates the intangible and tangible temperament that culture holds, which additionally influences its relationship with other societal concepts, such as gender.²⁷ Ultimately, the influence of culture on individual and community perceptions has seen the vast development of cultural rights under human rights law.²⁸ As will be demonstrated by this study, it is believed culture and its corresponding rights have inevitably influenced the development of modern international criminal law, particularly with regard to gender-based persecution.

3.1.2 What are Cultural Rights?

Essentially, cultural rights are the culmination of human rights attributed to one's cultural existence within a society.²⁹ Cultural rights extend to the knowledge, practices and expressions of a society, and are both intellectual and material in application.³⁰ Stavenhagen asserts 'individual cultural rights can, to some extent, coincide with collective cultural rights, but may also represent a challenge to them'.³¹ It is believed this statement effectively highlights the role of both the State and the individual in upholding such rights by means of relative obligations and duties.

3.1.2.1 Cultural Relativity

Cultural relativism is the notion that all cultures are of equal value. As an anthropological theory, cultural relativism argues the assessment of culture should be from a neutral and objective viewpoint. The reasoning behind this approach is so the assessor can: (a) understand the environmental

²⁷ L. Prott, 'Cultural Rights and People's Rights in International Law' in J. Crawford, *The Rights of Peoples*, (Oxford University Press, Oxford, 1988), p94.

²⁸ Eide, *supra* note 20.

²⁹ For further information on this area refer to P. Alston and G. Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156-229.

³⁰ For example, cultural rights can potentially expand to cover the right to education, which in turn protects traditional cultural expressions and traditional knowledge within a community.

³¹ Stavenhagen, *supra* note 25, at 300.

factors that shape a culture; (b) explain the psychological factors that frame the culture; and (c) explain the history of a local custom.³² Cultural relativism further holds that ‘all religious, ethical, aesthetic, and political beliefs are completely relative to the individual within a cultural identity’^{33, 34}.

3.1.2.1.1 Why is Cultural Relativism Significant to this Study?

The examination of cultural relativism is significant to this study because, as a theory, it contends that different cultures have different notions of human rights. Hence, any assessment of the interrelationship between the right to culture and gender within a sociological context (as dictated by the definition of gender under the Rome Statute)³⁵ and the influence of that interrelationship on the development of international criminal law could be potentially undermined and criticised within the context of cultural imperialism.³⁶

According to Cerna and Wallace ‘[c]ultural relativity is in direct conflict with the idea of an international system of human rights’.³⁷ Crawley further notes ‘there are fundamental problems with approaches which argue that human rights are not universal but should be viewed in relation to the cultures to which they are applied’.³⁸ Therefore, it is necessary to address these issues as part of the critical legal and sociological methodology being applied to this thesis paper. For that reason, as part of the thesis research

³² F. Boas, *Race, Language and Culture*, 2nd Edition (Macmillan Publishers, New York, 1948).

³³ J. Tilley, ‘Cultural Relativism’ (2000) 22(2) *Human Rights Quarterly* 501-547.

³⁴ For a further discussion on cultural relativism refer to H. Steiner and P. Alston, *International Human Rights – Law Politics Morals*, 2nd edition (Oxford University Press, Oxford, 2000).pp.324-402 or H. Steiner et al, *International Human Rights – Law Politics Morals*, 3rd edition (Oxford University Press, Oxford, 2008).pp.517-569 with pp.541-569 principally discussing gender and cultural relativism.

³⁵ *Supra*, note 8.

³⁶ C. Cerna, ‘Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts’ (1994) 16 *Human Rights Quarterly* 740.

³⁷ C. Cerna and J. Wallace, ‘Women and Culture’ in D. Koenig and K. Askin (eds.), *Women and International Human Rights Law*, Vol. 2 (Transnational Publishers, New York, 2000). p627.

³⁸ H. Crawley, *Refugees and Gender: Law and Process* (Jordan Publishing Limited, Bristol, 2001).p11.

(and to counter such theoretical arguments) academics, lawyers and gender experts were asked to consider: firstly, the fact that gender-based persecution often reflects deeper religious sentiments and the expression of cultural traditions; and were secondly questioned how important it was to distinguish persecution per se from these somewhat national ideals. The collaborated responses were that the term “persecution” (as defined in the Rome Statute) provides a “baseline” for measuring whether certain acts (singularly or combined) amount to a severe deprivation of fundamental rights (contrary to international law) to the level required of persecution. Oosterveld pertinently states:

...whether religious or cultural practices amount to, or contribute to, persecution will be evaluated in the light of whether they contravene international law...it will be important for the prosecution to demonstrate the continuities between “day-to-day” gender-based discrimination and the crime against humanity of gender-based persecution, so the judges can understand how the relevant religious or cultural practices rose to the level of, or formed part of the contribution to, gender-based persecution.³⁹

Askin provides a similar response and further states:

[the definition of ‘gender’ in the Statute]...CAN be interpreted to address the true nature of gender-based persecution, though again a restrictive definition makes a more progressive interpretation more difficult, but not impossible. This goes for the sociological and cultural context. Cultural contexts can work both for and against a survivor – if sexual violence is the norm, is that more heinous or less heinous – a prosecutor and defence attorney will make contrasting arguments not only as to the gravity of the offence, but also as to whether it’s a so-called ‘ordinary’ crime or a war crime/crime against humanity/persecution. The judges will have to balance the competing arguments.⁴⁰

Therefore, it is conceded different cultural realities could potentially influence overall sociological perceptions of gender. This could also consequently manipulate the definition of “gender” and interpretation of gender-based persecution under the Rome Statute. However, it is believed that if the judicial officers presiding over a case are proficiently knowledgeable and informed this potential abuse of justice would not, in reality, occur.

³⁹ Email response from V. Oosterveld dated 5 December 2007 to Question No.3 in Supplement B (on file with the author).

⁴⁰ Email response from K. Askin dated 30 November 2007 to Question No. 3 in Supplement B (on file with the author).

3.1.3 What is the Existing Framework for the Protection of Cultural Rights under International Human Rights Law?

Cultural rights are protected by a variety of international and regional instruments, UNESCO recommendations,⁴¹ declarations,⁴² and conventions^{43, 44}. The main international sources for the protection of cultural rights are Article 27 of the UDHR and Article 15 of the ICESCR.⁴⁵ Article 27 of the UDHR states:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The protection provided by Article 27 of the UDHR has been highly criticised by legal scholars.⁴⁶ In particular, Cerna and Wallace state the cultural rights identified in the UDHR are “broad and amorphous”.⁴⁷ Nonetheless, Article 15 of the ICESCR attempts to counter this criticism by incorporating into the definition of cultural rights: (a) the right to take part in cultural life; (b) the right to enjoy the benefits of scientific progress; (c) the right of the individual to benefit from the protection of moral and

⁴¹ For example, the UNESCO *Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms* (1974).

⁴² For example, the UNESCO *Declaration of the Principles of International Cultural Co-operation* (1966).

⁴³ For example, the UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972).

⁴⁴ For a brief overview of these instruments an excellent source is the Human Rights Education Association Library on Culture. Available electronically at <http://www.hrea.org/learn/guides/culture.html#instruments>>. Visited 18 September 2007.

⁴⁵ Additionally, Article 13(c) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”); Articles 29 and 31 of the 1989 Convention on the Rights of the Child (“CRC”) and Article 5(e)(vi) of the 1951 International Convention on the Elimination of all Forms of Racial Discrimination (“CERD”) are important international treaty sources. Relevant regional instrument sources include: Article 13 of the American Declaration on the Rights and Duties of Man; Article 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Articles 17 and 29 of the 1981 African Banjul Charter of Human and Peoples’ Rights (“ACHPR”); and Article 22 of the Charter of Fundamental Rights of the European Union.

⁴⁶ For a thorough criticism on the lack of implementation of cultural rights refer to J. Symonides, ‘Cultural Rights: A Neglected Category of Human Rights’ (1998) 50 *International Social Science Journal* 559-560.

⁴⁷ Cerna and Wallace, *supra* note 37, at 625.

material interests resulting from any scientific, literary or artistic production of which he is the author; and (d) the right to freedom from interference of the state in scientific or creative pursuits.⁴⁸

In addition, both the 1976 Algiers Declaration of the Rights of Peoples (“Algiers Declaration”)⁴⁹ and the 1981 African Banjul Charter on Human and Peoples’ Rights (“ACHPR”)⁵⁰ acknowledge the importance and expand the fortification of cultural rights. Additionally, it is in these two regional documents that the existing UDHR cultural rights have developed into “people’s rights” and the “right to a cultural identity”.⁵¹ However, Stavenhagen believes the relationship between cultural rights and human rights needs a broader approach than that currently applied by most academics.⁵² Hence, in line with Stavenhagen and the hypothesis of this paper that human rights law, international humanitarian law and international criminal law are irrefutably linked. And, with the purpose of this study being to establish the influence of the interrelationship between culture and gender on the development of modern international criminal law, the sociological definition of gender will also be examined in section 2.3 of this thesis paper.

⁴⁸ Note in totality Article 15 of the ICESCR states:

1. The States Parties to the present Covenant recognise the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognise the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

⁴⁹ 1976 *Algiers Declaration of the Rights of Peoples* dated 4 July 1976: Available electronically at http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm Visited 28 October 2007.

⁵⁰ 1981 *African Banjul Charter on Human and Peoples’ Rights* (“ACHPR”) adopted 27 June 1981. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available electronically at <http://www1.umn.edu/humanrts/instree/z1afchar.htm>. Visited 28 October 2007.

⁵¹ Prott, *supra* note 27, at 95.

⁵² Stavenhagen, *supra* note 25, at 85.

3.1.4 What is the Existing Framework for the Protection of Cultural Rights under International Humanitarian Law?

International humanitarian law is commonly referred to as the “laws of war”,⁵³ which attempt to monitor fortified conduct and lessen the casualties of war. The four Geneva Conventions of 1949 and two Additional Protocols of 1977 are the leading international instruments currently governing the laws of war.⁵⁴ According to Rosas and Sandvik-Nylund the interrelation between human rights law and humanitarian law has vastly improved the recognition and status of cultural rights during armed conflicts.⁵⁵ Article 3 common to the four Geneva Conventions of 1949 provides a moderately encompassing level of protection for internal armed conflict.⁵⁶ However, because the principles within common Article 3 now

⁵³ Also frequently termed *Jus in bello*. c.f. *Jus ad bellum*, which refers to the law on whether a war was initially legally engaged.

⁵⁴ The following four legal instruments will be referred to collectively as the “Geneva Conventions of 1949”. The full titles and individual abbreviations of the Geneva Conventions of 1949 are: (1) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1960) (“GC I”); (2) *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1960) (“GC II”); (3) *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1960) (“GC III”); and (4) *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1960) (“GC IV”). The following two legal instruments will be referred to collectively as the “Additional Protocols of 1977”. The full titles and individual abbreviations of the Additional Protocols of 1977 are: (1) *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978) (“AP I”); and (2) *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 6093 (entered into force 7 December 1978) (“AP II”).

⁵⁵ A. Rosas and M. Sandvik-Nyland, ‘Armed Conflicts’ in A. Eide et al. (eds.), *Economic, Social and Cultural Rights*, 2nd Edition (Kluwer Law International, The Hague, 2001).p408.

⁵⁶ Common Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on

form part of customary international law this article additionally applies to international armed conflict.⁵⁷ Moreover, the 1990 Declaration of Minimum Humanitarian Standards (also known as the Turku Declaration)⁵⁸ calls for “fundamental standards of humanity” (cultural rights inclusive) to be present during states of war.⁵⁹ Further, under human rights law, certain rights are non-derogable⁶⁰ and hence are still applicable during times of armed conflict. Additionally, certain crimes that are ordinarily prevalent in armed conflict (for example, genocide, torture, slavery and specifically rape, deportation, persecution, extermination, and murder – as crimes against humanity)⁶¹ have achieved *jus cogens* status.⁶² These peremptory norms

race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

⁵⁷ For a conclusive analysis of this customary law recognition refer to T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Clarendon Press, Oxford, 1989), p35.

⁵⁸ Reprinted in A. Eide, A. Rosas and T. Meron, ‘Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards’ (1995) 89(1) *The American Journal of International Law* 215-223; and referred to by D. Petrasek in ‘Moving Forward on the Development of Minimum Humanitarian Standards’ (1998) 92(3) *The American Journal of International Law* 557-563.

⁵⁹ D. Momtaz, ‘Minimum humanitarian rules applicable in periods of internal tension and strife’ (1998) No. 324 *International Review of the Red Cross* 455-462. Available electronically at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jjpg7?opendocument>. Visited 10 October 2007.

⁶⁰ For example, *erga omnes* obligations. These are duties of utmost importance, owed by a State to the international community, which are universally enforceable. Crimes of universal jurisdiction are justiciable by any State even if such acts do not violate municipal law in the State which they were committed. For a critical overview of universal jurisdiction and the international criminal court refer to B. Graefrath, ‘Universal Criminal Jurisdiction and an International Criminal Court’ (1990) 1 *European International Law Journal* 67.

⁶¹ For a brief illustration on how torture and rape have achieved *jus cogens* status under customary international law refer to the ICTY Trial Chambers judgment in *The Prosecutor v Furundžija*, Case No. IT-95-17/1 “Lašva Valley” Case. Trial Chambers Judgment dated 10 December 1998 (“*Furundžija*”).

supersede any contrary treaty or custom.⁶³ In accordance with the four Geneva Conventions of 1949 and AP I of 1977 humanitarian agencies *may* facilitate their services to the affected region and in turn facilitate the promotion and provision of cultural rights.⁶⁴ Koller resolutely states ‘international humanitarian law is not in opposition to human rights law, but rather explains the details of human rights law in the specific situation of armed conflict’.⁶⁵ There are also various rules relating to the protection of education, recreation, leisure and cultural property in times of armed conflict.⁶⁶ However, from a literary analysis it appears the implementation and enforcement of existing legal mechanisms is the greatest dilemma challenging the application of humanitarian law and human rights law during times of armed conflict.⁶⁷

⁶² K. Askin, ‘Women and International Humanitarian Law’ in D. Koenig and K. Askin (eds.), *Women and International Human Rights Law*, Vol. 1 (Transnational Publishers, New York, 2000), p44.

⁶³ *Ibid.* According to Askin, crimes which are *jus cogens* do not need a ‘nexus to war and do not require ratification of a treaty; they are crimes that can be prosecuted by any state on the basis of universal jurisdiction’.

⁶⁴ Under Article 81 of AP I, Article 18 of AP II and Article 3 common to the four Geneva Conventions of 1949 the ICRC *may* carry out humanitarian assistance to ensure the protection and assistance to victims of armed conflicts. [emphasis added].

⁶⁵ D. Koller, ‘The Moral Imperative: Toward a Human Rights-Based Law of War’ (2005) 46 *Harvard International Law Journal* 231 at footnote 154.

⁶⁶ For example: Article 50 and 94 of GC IV relates to the education of civilian internees and Article 4(3)(a) of AP II concerns the right of children to receive and education; Article 38 of GC III and Article 94 of GCIV relates to the recreation, study, sports and games of prisoners of war and civilian internees; Articles 34-37 of GC III and Articles 58,86 and 93 of GC IV relates to the right to freely exercise religion in times of armed conflict; Article 53 of AP I and Article 16 of AP II relate to the protection of cultural property; and lastly the *Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict* (opened for signature 14 May 1954 and entered into force 7 August 1956) exclusively relates to the protection of cultural property.

⁶⁷ Graefrath states:

[I]f states are to join together to particular values through norms of criminal law, punishable conduct must be defined and various methods for implementing penal provisions must be investigated and agreed upon...Therefore, an effective implementing mechanism for any code of crimes against the peace and security of mankind must be based on cooperation among states.

Graefrath, *supra* note 60, at 67-88. Refer also to the following recent sources for a comprehensive discussion on this point: C. Byron, ‘A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies’ (2007) 47 *Virginia Journal of International Law* 839; H. Krieger, ‘A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study’ (2006) 11 *Journal of Conflict and Security Law* 265; W. Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005) 16 *European Journal of International Law* 741; B. Feinstein, ‘The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel’s Security Barrier’ (2005) 4 *Northwestern University Journal of International Human Rights* 238; M. Dennis, ‘Application of Human

3.2 The Sociological Definition of Gender

Ironically, the tantamount difficulties faced by academics when trying to define culture correspondingly plagues the field of gender studies. In particular, this area of legal jurisprudence incessantly triggers heated debates and frequently generates a hullabaloo of controversy.⁶⁸ Hence it was no surprise that contention arose when drafting the gender-based provisions of the Rome Statute. These deliberations and the travaux préparatoires to the Rome Statute will be discussed in Chapter 4. However, as Raday succinctly states:

Gender is the social construct of sex....unlike sexual identity, which results from the differing physiological makeup of men and women, gender identity results from the norms of behaviour imposed on men and women by culture...⁶⁹

This definition is similar to the one contained in Article 7(3) of the Rome Statute and affirmed by UNESCO.⁷⁰ Oosterveld suggests the ICC can and should incorporate the definition of gender under refugee law into the field of international criminal law:

Gender refers to the relationship between men and women based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires social and cultural constructed meaning over time.⁷¹

This demonstrates that, to some extent, uniformity does exist between international criminal law, human rights law, refugee law and the academic

Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *American Journal of International Law* 11.

⁶⁸ C. Steins, 'Gender Issues' in R. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999).pp.357-389.

⁶⁹ F. Raday, 'Culture, Religion, and Gender' (2003) *International Journal of Constitutional Law* 663 at 669.

⁷⁰ *Supra* notes 7 & 8.

⁷¹ UNHCR, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Statute of Refugees*, UN Doc. HCR/GIP/02/01 (7 May 2002). ("UNHCR 2002 GRP Guidelines").

field.⁷² These definitions similarly identify gender as a “social construct” thus directly implying society’s undeviating influence on judicial perceptions when interpreting the term. Correspondingly, as Crawley emphasises ‘looking at gender as opposed to sex enables an approach which can accommodate specificity, diversity and heterogeneity’.⁷³ She further elaborates that ‘[with regard to persecution]...gender-based discrimination is often enforced through the law’, in addition to accepted social practices.⁷⁴ Brown and Grenfell assert the recognition under international law that ‘gender-based discrimination is a violation of the fundamental principles of non-discrimination would allow any court or tribunal with jurisdiction to try international crimes to prosecute [the offender/s]...for the crime of persecution without violating the principle of legality’.⁷⁵ Hence, with the notions of gender, gender identity and gender-based discrimination resulting from both social and cultural influences, it is imperative this interrelationship is explored further.

3.3 How is Gender Related to Culture?

Gender is a critical component of culture and is paradoxically influenced by culture. The division of gender roles within society inevitably influences the development of its cultural identity.⁷⁶ Hence, it is believed the physical patterns and behaviours of a community will ultimately sway the intellectual thought processes also governing that community. For example, gender relations are commonly observed in the legal field of intellectual property in which certain roles of an indigenous group are specifically dictated by

⁷² For a comprehensive collection of feminist thought on gender, culture and human rights refer to S. Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism* (Hart Publishing, Oregon, 2006).

⁷³ Crawley, *supra* note 38, at 9.

⁷⁴ *Id.* at 51.

⁷⁵ A. Widney Brown and L. Grenfell, ‘The International Crime of Gender-Based Persecution and the Taliban’ (2003) 4 *Melbourne Journal of International Law* 347 at 373.

⁷⁶ D. Halbert, ‘Feminist Interpretations of Intellectual Property’ (2006) 14(3) *American University Journal of Gender, Social Policy and the Law* 431-460. Available electronically at <http://www.wcl.american.edu/journal/genderlaw/14/halbert3.pdf?rd=1> Visited 20 October 2007.

gender.⁷⁷ Thus, such a dictation of roles will automatically affect the intellectual property created within that community.⁷⁸ This will, in turn, establish a community's overall identity. And, with respect to the overall goal of this thesis,⁷⁹ if members of a particular community were targeted and specifically persecuted against (on the basis of gender) during an armed conflict, it is believed the future cultural and social development of that community would be altered drastically.⁸⁰

However, gender-based persecution should not be confused with traditional cultural practices. Steiner et al highlight these concerns:

The potential for conflict in a large number of states between the objectives of several human rights treaties, on the one hand, and customary laws and practices as well as religious beliefs on the other, has become a salient contemporary concern...[t]o some extent, such problems stem from the increasing power and prominence in recent years of fundamentalist religious groups, many of which actively oppose the transformative impetus of the human rights movement with respect to traditional gender roles.⁸¹

It is important to address the impact of cultural practices on both men and women; however, it is believed positive customs should be encouraged and

⁷⁷B. Boateng, 'Walking the Tradition-Modernity Tightrope: Gender Contradictions in Textile Production and Intellectual Property Law in Ghana' (2007) 15(2) *American University Journal of Gender, Social Policy and the Law* 341-357. Available electronically at <http://www.wcl.american.edu/journal/genderlaw/15/2boateng.pdf?rd=1> Visited 7 December 2007; and V. Phillips, 'Commodification, Intellectual Property and the Quilters of Gee's Bend' (2007) 15(2) *American University Journal of Gender, Social Policy and the Law* 359-377. Available electronically at <http://www.wcl.american.edu/journal/genderlaw/15/2phillips.pdf?rd=1> Visited 7 December 2007.

⁷⁸D. Burk, 'Feminism and Dualism in Intellectual Property' (2007) 15(2) *American University Journal of Gender, Social Policy and the Law* 183-206. Available electronically at <http://www.wcl.american.edu/journal/genderlaw/15/2burk.pdf?rd=1> Visited 7 December 2007; and Boateng, *supra* note 77, at 341-357.

⁷⁹ That being, to illustrate: (1) the symbiosis of different legal disciplines; (2) the interrelation between culture and gender; and (3) the influence of these two limbs on the development of international criminal law.

⁸⁰ In accordance with the views of the Women's Initiatives for Gender Justice, Erb notes:

Gender violence is violence targeted at men or women because of their sex and/or socially constructed gender roles...Gender violence is also an element of sexual violence because, in addition to the sexual element, the violence is based on the gender-defined roles of the victims. *Women's bodies*, security or livelihood may be targeted because of their role of guardians of cultural traditions and because of their reproductive capacity.[emphasis added].

N. Erb, 'Gender-based crimes under the draft statute of the Permanent International Criminal Court' (1998) 29 *Columbia Human Rights Law Review* 401 at 426.

⁸¹ H. Steiner et al, *International Human Rights – Law Politics Morals*, 3rd Edition (Oxford University Press, Oxford, 2008).p41.

disparaging rituals and harmful practices should be distinguished and abandoned.⁸²

A further important notion to address is that culture may inadvertently influence and negatively affect the direction of international criminal jurisprudence. Gender-based persecution may be muddled with “culture-based” persecution (also a constituent element under Article 7(1)(h) of the Rome Statute) resulting in the unfortunate loss of independence and identity of each separate crime within both the statutory and social framework. The occurrence of such legal injustice would also inevitably fail to highlight the severity and importance of addressing each crime individually. Ultimately, it is believed the interrelationship between gender and culture; and subsequent persuasion this has had and will have on the future development of modern international criminal law, should not be undermined.

3.4 Conclusion of Chapter

In conclusion, this chapter has examined the right to culture under human rights law and specifically its interrelationship with gender. It has explored the significance of cultural rights and addressed their overall connection with gender issues within society. This chapter has elaborated on the numerous facets of cultural rights and the importance of maintaining such rights during both times of peace and armed conflict. Reference has also been made to cultural relativism and existing protection mechanisms for cultural rights under both international humanitarian law and human rights law.

From the outset of this chapter the importance, interrelation and interdependency of culture on gender, within a sociological context, has been highlighted. Further, the synonymous impressions of gender on

⁸² The World Health Organisation asserted in 1996:

[It] is unacceptable that the international community remain passive in the name of a distorted vision of multiculturalism. Human behaviours and cultural values, however senseless or destructive they may appear from the personal and cultural standpoint of others, have meaning and fulfill a function for those who practice them. However, culture is not static, but it is in constant flux, adapting and reforming. People will change their behaviour when they understand the hazards and indignity of harmful practices and when they realise that it is possible to give up harmful practices without giving up meaningful aspects of their culture.

culture and cultural identity, and the subsequent influence cultural rights have had on the inclusion and definition of gender-based persecution under the Rome Statute, have been explored.

It is apparent the concepts of gender and culture are inexplicitly intertwined. It is evident both notions are interdependent for self-clarification, indivisible with regard to social interpretation and terminally interrelated with respect to their application under international human rights law, international humanitarian law and international criminal law. In turn, it is believed the interrelationship between gender and culture will unequivocally influence future judicial interpretation and the ensuing application of principles when the ICC judges are interpreting the definition of gender-based persecution. Likewise, it is believed the ultimate determination of the crime of gender-based persecution by the ICC judges could potentially influence and impact upon the cultural development and social identity of said targeted communities.

4 Persecution as a Crime against Humanity under International Law

Succinctly, under international law persecution requires an act or omission that discriminates against another person, committed with the intent to violate that person's enjoyment of fundamental rights, which ultimately results in an infringement of those rights.⁸³ The overall goal of this thesis is to illustrate: (1) the symbiosis of different legal disciplines; (2) the interrelation between culture and gender; and (3) the influence of these two limbs on the development of international criminal law. This chapter will demonstrate this goal via an analysis of the development of persecution (as a crime against humanity) under international law. It is believed a thorough understanding of persecution is mandatory before the crime of gender-based persecution can be truly appreciated. Additionally, such knowledge will inevitably impact upon the overall realisation of gender-related advancements; within the field of international criminal law, which have been made so far. As will be evidenced in Chapter 4 the inclusion of gender-based persecution, under Article 7(1)(h) of the Rome Statute, will be used as the central example to illustrate this theory. The role of culture within society (as previously discussed in Chapter 2) will also be linked with gender-based persecution thus reinforcing the binary cyclic theory of this study.

4.1 Crimes against Humanity

The gradual emergence of international rules on the punishment of individuals for crimes against humanity resulted from the increasing awareness that one should react to terrible and vicious acts by the most effective means possible: the prosecution and punishment of the perpetrators or planners of the crime.⁸⁴

⁸³ K. Kittichaisaree, *International Criminal Law*, (Oxford University Press, Oxford, 2001), p117.

⁸⁴ A. Cassese, 'Crimes against Humanity' in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, Oxford, 2002), p355.

The classification and clarification of crimes against humanity has evolved steadily over the past few decades. However, the concept of crimes against humanity first received international recognition in the St Petersburg Declaration of 1868,⁸⁵ which attempted to limit the use of explosive or incendiary projectiles that were “contrary to the laws of humanity”.⁸⁶ This legal notion was then unanimously agreed and expanded upon with the adoption of the Martens Clause⁸⁷ into the 1899 Hague Convention (II) with Respect to the Rules and Customs of War on Land,⁸⁸ at the First Hague Conference.⁸⁹ Thenceforth, in 1915 the expression “crimes against humanity” was first used in the Declaration of France, Great Britain and Russia to denounce the Armenian massacre by the Ottoman Empire in Turkey.⁹⁰ However, by and large it is mainly from WWII onwards that crimes against humanity have prominently and publicly surfaced in society. In 1996 the International Law Commission (“ILC”) formulated a definition for crimes against humanity in its Draft Code of Crimes against the Peace and Security of Mankind.⁹¹ This evolution of concepts has unsurprisingly led to the materialisation and precipitation of various international instruments, tribunals and courts equipped with the power to interpret, prosecute and punish individuals responsible for such abhorrent crimes.

⁸⁵ *Declaration Renouncing the Use, in Times of War, of Explosive Projectiles Under 400 Grams Weight*, reprinted in A. Roberts and R. Guelff (eds.), *Documents on the Laws of War*, 3rd Edition (Oxford University Press, Oxford, 2000).

⁸⁶ Cassese, *supra* note 84.

⁸⁷ Although universal acceptance regarding the interpretation of the Martens Clause appears to be lacking it is essentially a customary rule under humanitarian law that mandates for a minimum level of protection (for persons) based on the “principles of humanity” and “dictates of public conscience”. R. Ticehurst, ‘The Martens Clause and the Laws of Armed Conflict’ (1997) 317 *International Review of the Red Cross* 125-134.

⁸⁸ *Hague Convention (II) with Respect to the Rules and Customs of War on Land of 1899*, opened for signature 29 July 1899, [1901] ATS 131 (entered into force 4 September 1900). (“The 1899 Hague Convention”).

⁸⁹ M. Boot et al., ‘Article 7 – Crimes against Humanity’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (Nomos Verlagsgesellschaft Baden-Baden, Munich, 1999).p121.

⁹⁰ *Declaration of France, Great Britain and Russia*, 24 May 1915 quoted in E. Schwelb, ‘Crimes against Humanity’ (1946) 23 *British Yearbook of International Law* 178-181.

⁹¹ The ILC held in Article 18: ‘a crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group’: International Law Commission *Draft Code of Crimes against the Peace and Security of Mankind* Doc. No. A/CN.4/L.532 [and Corr.1 and 3] reproduced in the *Yearbook of the International Law Commission* (1996) Vol. 2.

4.1.1 Elements of Crimes against Humanity

Epigrammatically, under customary international law, a crime against humanity is: (a) one of a list of prohibited acts;⁹² (b) committed as part of a widespread or systematic attack; (c) pursuant to or in furtherance of a state or organisational policy; (d) directed against any civilian population; (e) with knowledge of the attack.⁹³ The elements of crimes against humanity differ depending on whether the prosecution is before the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”) or the ICC.⁹⁴ Therefore, it is agreed with the postulation of de Than and Shorts that the prosecution of crimes against humanity ‘should only be considered in light of their own special circumstances’.⁹⁵ However, contrary to the Statute of the ICTY there is currently no requirement for the existence of an armed conflict under customary law.⁹⁶

4.2 Persecution as a Crime against Humanity

Persecution is particularly abhorrent because it strikes at the very heart of humanity.⁹⁷ In the general sense the term “persecution” has a very broad meaning. According to de Than and Shorts persecution may be adjudged as ‘any serious interference with the freedom and well-being of a civilian population by such means as physical and mental harm, deportation, inhumane treatment and punishment, unlawful arrest and imprisonment, enslavement, torture, eradication and other serious factors which affect their

⁹² Common examples of such acts include: murder, extermination, enslavement, deportation, imprisonment, torture, rape and other inhumane acts.

⁹³ W. Fenrick, ‘Crimes in combat: the relationship between crimes against humanity and war crimes’ (5 March 2004) Guest Lecturer Series of the Office the Prosecutor, The International Criminal Court, The Hague. Available electronically at <http://www.icc-cpi.int/library/organs/otp/Fenrick.pdf> Visited 13 September 2007.

⁹⁴ de Than and Shorts, *supra* note 17, at 89.

⁹⁵ *Ibid.*

⁹⁶ Evans, *supra* note 22.

⁹⁷ D. Koenig and K. Askin, ‘International Criminal Law and the International Criminal Court Statute: Crimes against Women’ in D. Koenig and K. Askin (eds.), *Women and International Human Rights Law*, Vol. 1 (Transnational Publishers, New York, 2000).

living conditions’.⁹⁸ Whereas Bassiouni restrictively defines the term “persecute” and the act of “persecution” as:

State Action or Policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim’s beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.⁹⁹

As a crime against humanity, persecution violates and infringes upon the enjoyment of fundamental or basic rights.¹⁰⁰ Under human rights law such fundamental rights include the right to equality and the right to non-discrimination. However, under international humanitarian law and the more contemporary discipline of international criminal law; for discrimination to constitute persecution it must be extreme and deliberate.¹⁰¹ Due to the lack of statutory delineation prior to the enactment of the Rome Statute persecution *per se* is a problematic term to clarify.¹⁰² During recent deliberations, the ICTY Trial Chambers in particular have emphatically acknowledged this quandary.¹⁰³

⁹⁸ de Than and Shorts, *supra* note 17, at 106.

⁹⁹ M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd Edition (Martinus Nijhoff Publishers, London, 2002).p328. Note: this definition has been largely criticised due to its inclusion of ‘state policy’ as an element. Refer to the ILC *Report on the International Law Commission to the General Assembly on the Work of its 48th Session*, (1996) UN Doc. A/51/10 at 94 reproduced in the *Yearbook of the International Law Commission* (1996) Vol. 2.p47; *The Prosecutor v Tadić*, Case No. IT-94-I-T, Opinion and Judgment dated 7 May 1997. paras 653-654; and *The Prosecutor v Akayesu*, Case No. ICTR-96-4-T. Trial Chamber Judgment dated 2 September 1998 which states at paragraph 580:

The concept of “widespread” may be defined as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of “systematic” may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.

¹⁰⁰ *Tadić*, *ibid* at para 697.

¹⁰¹ Kittichaisaree, *supra* note 83, at 116.

¹⁰² [emphasis added].

¹⁰³ M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, (Interseta Publishers, Antwerpen, 2002).p285.

4.2.1 Elements of Persecution

Under international law, the rudiments to prosecute responsible persons for persecution are: (a) the elements required for all crimes against humanity;¹⁰⁴ (b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other crimes against humanity; and most importantly (c) discriminatory intent.¹⁰⁵

4.3 The Development of Persecution under International Law

4.3.1 International Humanitarian Law

For the purpose of this paper and in observance of the International Committee of the Red Cross (“ICRC”) definition, international humanitarian law is:

... a set of rules which seek, for humanitarian reasons, *to limit the effects of armed conflict*. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.

[It] is part of international law, which is the body of rules governing relations between States. International law is contained in agreements between States – treaties or conventions –, in customary rules, which consist of State practice considered by them as legally binding, and in general principles.

[It] applies to armed conflicts. It does not regulate whether a State may actually use force; this is governed by an important, but distinct, part of international law set out in the United Nations Charter.¹⁰⁶

Gasser posits international humanitarian law and human rights law are so intertwined that ‘we would be better off discovering what they have in common and how their priorities differ’ than trying to formulate crystal

¹⁰⁴ That being: (a) one of a list of prohibited acts; (b) committed as part of a widespread or systematic attack; (c) pursuant to or in furtherance of a state or organisational policy; (d) directed against any civilian population; (e) with knowledge of the attack. There is no requirement for the existence of an armed conflict. Fenrick, *supra* note 93.

¹⁰⁵ Boot, *supra* 89, at 117-172.

¹⁰⁶ ‘What is International Humanitarian Law?’ ICRC Fact Sheet dated 31 July 2004. Accessible electronically at <http://www.icrc.org/web/eng/siteeng0.nsf/html/humanitarian-law-factsheet> Visited 30 October 2007.

clear definitions of either.¹⁰⁷ Correspondingly, the purpose of this chapter is to establish that very postulation with an analysis of the development of persecution (as a crime against humanity) under international law.

4.3.1.1 The Lieber Code

The Lieber Code of 24 April 1863 was formulated by Francis Lieber to regulate the conduct of troops in the American Civil War.¹⁰⁸ It is considered, by gender experts, to be the ‘cornerstone upon which subsequent domestic war codes were based’.¹⁰⁹ This is predominantly because Article 44 of the Lieber Code listed rape (by a belligerent) as a war crime, for which death was also a potential punitive punishment under Article 47.¹¹⁰ Nevertheless, besides Article 44 there were unfortunately no other such gender-based provisions within the Lieber Code. Additionally, at this point in time persecution was not an established crime under customary international law.¹¹¹

¹⁰⁷ H-P. Gasser, *International Humanitarian Law: An Introduction*, (Paul Haupt Publishers, Berne, 1993), p19.

¹⁰⁸ Also known as the *Instructions for the Government of Armies of the United States in the Field*.

¹⁰⁹ Askin, *supra* note 62, at 50.

¹¹⁰ *Ibid.*

¹¹¹ However, it is believed, hypothetically, that persecution (as a crime against humanity) could now be construed under Articles 13 and 29 of the Lieber Code, which state:

Article 13 of the Lieber Code states:

Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is *derived from the common law of war*. Military offences under the statute law must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war.

The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.

Article 29 of the Lieber Code states:

Modern times are distinguished from earlier ages by the existence at one and the same time of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The *ultimate object of all modern war is a renewed state of peace*.

The *more vigorously wars are pursued the better it is for humanity*. Sharp wars are brief. [emphasis added].

4.3.1.2 The 1907 Hague Convention IV Respecting the Laws and Customs of War on Land (The 1907 Hague Convention)

Animated by the desire to serve, even in this extreme case, *the interests of humanity* and the ever progressive needs of civilisation...[u]ntil a more complete code of laws of war have been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, *from the laws of humanity*, and the dictates of the public conscience.¹¹²

As the Preamble of the 1907 Hague Convention states, the protection of civilisation during armed conflicts arises from “the laws of humanity” and “in the interests of humanity”. The 1907 Hague Convention and annexed Hague Regulations are a revision of the 1899 Hague Convention.¹¹³ Similarly, these instruments do not explicitly enumerate persecution or gender-based crimes. However, Article 46 of the Annex to the Convention Regulations Respecting the Laws and Customs of War on Land forbids violations of “family honour and rights”. Hence, when broadly interpreted, theoretically this provision could implicitly and effectively prohibit gender-based crimes. Nonetheless, according to Meron such a wide construction is not at present accepted, in practice, under international law.¹¹⁴

4.3.1.3 The International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE)

The Charter of the International Military Tribunal of Nuremberg (“Nuremberg Charter”) annexed to the London Agreement of 8 August 1945 was the first positive international instrument that explicitly prohibited crimes against humanity. Pursuant to the Nuremberg Charter the International Military Tribunal (“IMT”) was granted jurisdiction over crimes against peace, war crimes and crimes against humanity. Persecution

¹¹² Paragraphs 2 and 8, Preamble to the *Hague Convention (IV) Respecting the Rules and Customs of War on Land* of 1907, opened for signature 18 October 1907, [1910] ATS 8 (entered into force 26 January 1910) (“The 1907 Hague Convention”). [emphasis added].

¹¹³ The 1899 Hague Convention, *supra* note 88.

¹¹⁴ T. Meron, ‘Rape as a Crime under International Humanitarian Law’, (1993) 87 *American Journal of International Law* 424-425.

was proscribed (as a crime against humanity) under Article 6(c) of the Nuremberg Charter, which states:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

...

(c) **CRIMES AGAINST HUMANITY**: namely, 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.¹¹⁵

Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Similarly, analogous formulations of persecution were also stipulated under Article 5(c) of the Charter of the International Military Tribunal for the Far East (“Tokyo Charter”),¹¹⁶ and Article II(1)(c) of Control Council Law No. 10 (“CCL10”).¹¹⁷ In line with present jurisprudence, crimes against humanity were initially categorised into two distinct groups: (a) murder-based offences; and (b) persecution-based offences. Further, under both the Nuremberg and Tokyo Charters persecution was: firstly, limited to political, racial or religious grounds; and secondly, had to be in connection with a war crime or crime against the peace. However, the limited construction of this second limb was eventually abolished by CCL10. Lastly, another significant development (following the establishment of the IMT and

¹¹⁵ [emphasis added].

¹¹⁶ Annexed to the *Special Proclamation by the Supreme Commander for the Allied Powers: Establishment of an International Military Tribunal for the Far East* dated 19 January 1946, which states:

Article 5. Jurisdiction Over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organisations are charged with offences which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

...

(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial 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. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

¹¹⁷ Full title being: *Allied Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, dated 20 December 1945, published in the Military Government Gazette Germany, British Zone of Council, no. 5, p. 46, 11 January 1946 (“CCL10”).

IMTFE) was the separation of crimes against humanity from armed conflict by the United Nations War Crimes Commission (“UNWCC”).¹¹⁸

4.3.1.3.1 The Nuremberg Principles

The Nuremberg Principles¹¹⁹ limited the ambit of prosecution for crimes against humanity by requiring a nexus with any war crime or crime against the peace.¹²⁰ Nevertheless, CCL10, the UNWCC and the ad hoc tribunals of the 1990s have since jurisprudentially abandoned this strict legal requirement.

4.3.1.3.2 Control Council Law No. 10 (CCL10)

The Allied Control Council adopted CCL10 in 1945 in order to establish the jurisdiction of the military tribunals and to ensure consistency between the respective Allied Powers’ occupation zones.

Persecution was characterised as a crime against humanity under Article II(1)(c) of CCL10,¹²¹ which states:

1. Each of the following acts is recognised as a crime:

...

(c) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or *persecutions on political, racial or religious grounds* whether or not in violation of the domestic laws of the country where perpetrated.¹²²

¹¹⁸ As per the UNWCC:

[There exists] a system of international law under which individuals are responsible to the community of nations for the violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of peoples and individual persons, that is inhuman acts, constitute international crimes not only in times of war, but also in certain circumstances, in times of peace.

Refer to *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) reprinted in Widney Brown and Grenfell, *supra* note 75, at 353.

¹¹⁹ Under General Assembly Resolution 177 (II) paragraph (a), the ILC was directed to formulate the principles of law recognised in the Nuremberg Charter and in the judgment of the Tribunal. These principles are commonly titled the “Nuremberg Principles”. Seven principles in total were recognised.

¹²⁰ Principle VI, para 120. *Principles of International Law recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, with commentaries. Yearbook of the International Law Commission, 1950, Vol. II, pp. 374-378. Available electronically at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf

Visited 10 August 2007.

¹²¹ CCL10, *supra* note 117.

¹²² [emphasis added].

According to Erb this instrument was circuitously ‘fundamental to the development of international legal norms prohibiting gender-based violence’.¹²³ The provision also closely resembles Article 6(c) of the Nuremberg Charter and Article 5(c) of the Tokyo Charter except that it additionally identifies rape as a crime against humanity. The scope of this thesis is an analysis of gender-based persecution and not gender-violence per se. However, it should be noted that gender-violence (when sex-based) may also constitute gender-based persecution.¹²⁴ This is particularly evident when the victim is perpetrated against either: (a) *due to* their gender; or (b) *as a result of* their gender.¹²⁵ For example, in the Bosnian war the systematic rape of Bosnian women was a gender-specific form of persecution. Patel asserts this is because women were particularly susceptible to sexual violence in this war and the direct intent of the Serbs was to persecute Bosnian women, on the sole basis of their gender, with such violence.¹²⁶ This echelon of misogyny was the persecutor’s immediate and ultimate intent during the war.¹²⁷ Patel further argues the intent of the persecution was the destruction of the Bosnian society.¹²⁸ Therefore, it is palpable gender-based persecution can be due to one’s gender or a result of one’s sexual gender.

4.3.1.4 The Four Geneva Conventions of 1949 and Two Additional Protocols of 1977

The four Geneva Conventions of 12 August 1949 were established by the ICRC in response to the incomprehensible atrocities and inconceivable violations of fundamental human rights committed during WWII.¹²⁹ Ultimately, the four Geneva Conventions of 1949 were motivated to ensure the “protection of the human being” and to “safeguard the dignity of man”

¹²³ Erb, *supra* note 80, at 407.

¹²⁴ P. Sellers, ‘Emerging Jurisprudence on Crimes of Sexual Violence’ (1998) 13 (6) *American University International Law Review* 1523.

¹²⁵ [emphasis added]. Koenig and Askin, *supra* note 97, at 5.

¹²⁶ K. Patel, ‘Recognising the Rape of Bosnian Women as Gender-Based Persecution’ (1994) 60 *Brooklyn Law Review* 929 at 951.

¹²⁷ That being, the complete and utter degradation and humiliation of the Bosnian women.

¹²⁸ Patel, *supra* note 126, at 955.

¹²⁹ GC I, GC II, GC III & GC IV, *supra* note 54.

in situations of war.¹³⁰ On 8 June 1977, two Additional Protocols supplemented the Geneva Conventions of 1949.¹³¹ However, unlike the four Geneva Conventions of 1949 these Additional Protocols are still awaiting universal ratification.¹³²

When referring to the four Geneva Conventions of 1949 it is also important to distinguish whether the armed conflict is international or internal in character. This distinction is significant because the rules of law applicable to international armed conflict are more extensive and developed than the rules applicable to internal armed conflict.¹³³ The legal magnitude of this division was evidenced by the categorisation of the racial/ethnic conflict in Rwanda (as internal)¹³⁴ and the mainly ethnic conflict in the former Yugoslavian territory (as international)¹³⁵. Moreover, despite appeals

¹³⁰ Gasser, *supra* note 107, at 16.

¹³¹ AP I & AP II, *supra* note 54. A third Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the Adoption of an Additional Distinctive Emblem (“AP III”) was adopted on 8 December 2005. However, this Protocol is not inherently relevant to this topic and thus will not be analysed in the present paper.

¹³² To date GC I, GC II, GC III and GC IV have been ratified by 194 States. Whereas, in comparison, AP I has only been ratified by 167 States and AP II has only been ratified by 163 States.

¹³³ V. Morris and M. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 1 (Transnational Publishers, New York, 1995), p54.

¹³⁴ As evidenced by Article 4 of the ICTR Statute the Rwandan conflict was classified as an internal armed conflict: Article 4 (titled “Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II”) states:

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed *serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II* thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b) Collective punishments;
- c) Taking of hostages;
- d) Acts of terrorism;
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f) Pillage;
- g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
- h) Threats to commit any of the foregoing acts.

¹³⁵ With regard to the applicable law in the case of the former Yugoslavia, the Commission of Experts stated:

[T]he character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby [the Commission] *applies the law applicable to international armed conflicts* to the entirety of the armed conflicts in the territory of the former Yugoslavia.[emphasis added]

This finding is evidenced by Articles 2 and 3 of the ICTY Statute, which state:

Article 2

regarding the legality of the ad hoc criminal tribunals,¹³⁶ the ICTY Appeal Chambers and ICTR Trial Chambers both concluded the establishment of same was constitutionally valid and did not violate the principle of state sovereignty.¹³⁷

In line with the scope of this thesis, the four Geneva Conventions of 1949 and accompanying Protocols of 1977 prohibit any adverse discrimination based on sex.¹³⁸ Further, although gender-based crimes are not included as grave breaches under the four Geneva Conventions of 1949 such correlative protection does implicitly exist for women under Article 27 of GC IV, which states:

Women shall be especially protected *against any attack of their honour*, in particular against rape, enforced prostitution, or any other form of indecent assault.¹³⁹

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

The Commission of Experts also stated the relevant rules of international law to be applied are those relating the serious violations of international humanitarian law that give rise to individual criminal responsibility. Refer to Morris and Scharf, *supra* note 133, at 53-55.

¹³⁶ Refer to *The Prosecutor v Kanyabashi (Decision on the Defence Motion on Jurisdiction)*, Case No. ICTR-96-15-T dated 18 June 1997 (“*Kanyabashi*”); and *The Prosecutor v Tadić (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No. IT-94-1-AR72 dated 2 October 1995 (“*Tadić Defence Motion*”).

¹³⁷ For an in-depth analysis on these issues refer to V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, (Transnational Publishers, New York, 1998), pp75-117.

¹³⁸ For example, Article 12 GC I, Article 12 GC II, Article 14 GC III and Article 27 of GC IV.

¹³⁹ Paragraph 2, Article 27 GC IV. Note, however, under Article 4 of GC IV this protection does not apply to nationals of the state responsible for the violation.

For international armed conflicts this provision is supplemented under customary law by common Article 3,¹⁴⁰ and by Article 76(1) of AP I.¹⁴¹ With respect to non-international armed conflicts, Article 4(2)(e) of AP II is the relevant prohibitive provision in addition to the protection guaranteed by common Article 3.¹⁴² In relation to these provisions, Askin strongly states the demarcation of violent sex crimes ‘grossly mischaracterises the offence, diminishes the harm, perpetrates detrimental stereotypes and conceals the true nature of the crimes’.¹⁴³ However, judiciously speaking it is doubtful these provisions alone could explicitly proscribe gender-based crimes under international law.

Recognition of humanitarian protection for women and children is further established by the 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict.¹⁴⁴ Askin notes this is because the nature of crimes committed against women is frequently shifting.¹⁴⁵ Consequently, gender-based crimes are evolving into ‘sophisticated, multifaceted, and quite deliberate tactics aimed at destroying opposite factions mentally as well as or instead of, physically’.¹⁴⁶ However, no such analogous declaration currently exists for the protection of men in armed conflict.¹⁴⁷ Jones harshly criticises the minimal attention ascribed to serious

¹⁴⁰ Which protects against: ‘outrages upon personal dignity, in particular humiliating and degrading treatment’.

¹⁴¹ Which states: ‘women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault’.

¹⁴² Which formidably declares: ‘outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any other form of indecent assault’ are prohibited.

¹⁴³ Askin, *supra* note 62, at 55.

¹⁴⁴ Specifically Article 5 provides:

All forms of repression and *cruel and inhuman treatment of women and children*, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, *committed by belligerents* in the course of military operations or in occupied territories *shall be considered criminal*. [emphasis added]

Declaration on the Protection of Women and Children in Emergency and Armed Conflict, GA Res. 3318 (XXIX) of 14 December 1974.

Note: Declarations are not legally binding. They are merely indicative instruments, which reflect the morals of society, good faith of state parties and supposed intentions of governments.

¹⁴⁵ Askin, *supra* note 62, at 48.

¹⁴⁶ *Ibid.*

¹⁴⁷ S. Sivakumaran, ‘Sexual Violence against Men in Armed Conflict’ (2007) 18 *European Journal of International Law* 253.

war crimes against men. He particularly focuses on genocide and persecution in his studies and states:

[t]he gender variable has been “invisible or barely visible,” an “obfuscation” that may reflect the fact that it is non-combatant *males* who tend overwhelmingly to be the victims of gender-selective mass killing, and this remains a powerful taboo in the feminist-dominated discussion of gender.¹⁴⁸

Common Article 2 stipulates the four Geneva Conventions of 1949 are also to be implemented in “peacetime”. And, in 1968 the UN General Assembly adopted Resolution 2444 (XXIII) on the Respect for Human Rights in Periods of Armed Conflict. This resolution recognises the importance of fundamental human rights and maintenance of minimum standards of conduct in all armed conflicts.¹⁴⁹ This significant international attribution highlights that a clear interconnection, in practice, exists between human rights law and international humanitarian law. It also emphasises that international human rights law enhances, strengthens, and endorses international humanitarian law. However, most importantly it reinforces that international humanitarian law and international human rights law will simultaneously apply in times of armed conflict. It is believed the establishment of ad hoc criminal tribunals following the ethnic conflicts in Rwanda and the former Yugoslavia also evidences this theory.

4.3.1.4.1 Establishment of Ad Hoc Tribunals Following the Ethnic Conflicts in the Former Yugoslavia and Rwanda

In accordance with the thesis outline, the ITCY and ICTR will also be discussed under Section 3.3.4.1 from an international criminal law perspective. Nonetheless, it is equally important to briefly highlight the legal circumstances under which both of these ad hoc tribunals were established.

¹⁴⁸ A. Jones, ‘Gendercide and Genocide’ (2000) 2 *Journal of Genocide Research* 185.

¹⁴⁹ *Resolution on the Respect for Human Rights in Periods of Armed Conflict*, UN Doc. GA. Res. 244 (XXIII) of 19 December 1968. See also UN Doc. GA. Res. 2675 (XXV) of 9 December 1970.

4.3.1.4.1.1 The Legal Foundations of the International Criminal Tribunal for the Former Yugoslavia (ICTY)

On 22 February 1993 the United Nations Security Council (“UNSC”), acting under Chapter VII of the UN Charter, adopted Resolution 808.¹⁵⁰ In Resolution 808 the UNSC decided, in principle, to establish an international criminal tribunal ‘for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991’.¹⁵¹ On 25 May 1993 the UNSC further adopted Resolution 827, which ultimately established the ICTY and its corresponding Statute. These actions were mainly in response to the United Nations Secretary-General’s (“UNSG”) findings of gross violations and breaches of international humanitarian law committed in the former Yugoslavian territory during the period of armed conflict.¹⁵² Resolution 798 issued by the UNSC on 18 December 1992 was the first UNSC resolution in history to directly address war crimes against women.¹⁵³ It is believed this condemnation of the ‘massive, organised and systematic detention and rape of women’ was a remarkable and vital acknowledgment that gender-based crimes, and particularly persecution by means of rape, would not be tolerated by the international community.

4.3.1.4.1.2 The Legal Foundations of the International Criminal Tribunal for Rwanda (ICTR)

The ICTR and its respective Statute were also established by the UNSC acting under Chapter VII of the UN Charter. However, contrary to the establishment of the ICTY the ICTR was established at the request of the

¹⁵⁰ Morris and Scharf, *supra* note 133, at 32.

¹⁵¹ *Resolution 808 (1993)* UN Doc. S/RES/808 (1993) adopted by the Security Council on 22 February 1993 at its 3175th Mtg.; reprinted in V. Morris and M. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 2 (Transnational Publishers, New York, 1995), p157.

¹⁵² *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, Corr.1 and Add.1. Also of importance is Resolution 780, which was adopted by the UNSC on 6 October 1992 after much negotiation animosity. Resolution 780 and corresponding initial debates can be found in V. Morris and M. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 2 (Transnational Publishers, New York, 1995), pp 145-157.

¹⁵³ *Resolution 798 (1992)*, UN Doc. S/RES/798/1992 adopted by the Security Council on 18 December 1992 at its 3150th Mtg., para 2.

Rwandan Government.¹⁵⁴ Hence, on 8 November 1994 the UNSC, taking note of numerous reports indicating ‘genocide and other systematic, widespread and flagrant violations of international humanitarian law’,¹⁵⁵ adopted Resolution 955.¹⁵⁶ This resolution founded the ICTR and its respective Statute.

4.3.2 Human Rights Law

The most pertinent human rights linked to persecution are: firstly, the right to equality; and secondly, the right to non-discrimination.¹⁵⁷ Without delving too much into the concept of discrimination it is imperative that its significance is recognised in relation to persecution. International human rights law strictly forbids and condemns gender-based discrimination. Specifically, Articles 2(1), 3 and 26 of the ICCPR and Articles 2(2) and 3 of the ICESCR unequivocally prohibit discrimination based on sex.¹⁵⁸ Further, the Preamble of the UDHR affirms the ‘equal rights of men and women’.¹⁵⁹ Gardam eloquently articulates that war unfortunately ‘exacerbates the inequalities that exist in different forms and to varying degrees in all societies’.¹⁶⁰ Gardam states it would be misleading to represent the current body of human rights law as an adequate regime for

¹⁵⁴ Cassese states ‘Rwanda specifically requested the Security Council to act under Chapter VII of the United Nations Charter in establishing the Rwanda Tribunal in order to achieve the last objective’. A. Cassese, *International Criminal Law* (Oxford University Press, New York, 2003).p102.

¹⁵⁵ V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, (Transnational Publishers, New York, 1998).pp59-74 and 99-117.

¹⁵⁶ *Ibid.* Note: Rwanda did in fact vote against Resolution 955 due to an “impasse on several issues”. However, General Kagame had previously indicated Rwanda would cooperate fully with the tribunal if it was established and hence the assurance of cooperation led the way for the UNSC to create the ICTR (with 13 in favour, 1 opposition (Rwanda) and 1 absentee (China)).

¹⁵⁷ As previously stressed by the “Thesis Limitations” the right to equality and the right to non-discrimination, although relevant to the thesis subject matter, will not be discussed at length in this study. For a comprehensive academic analysis on these provisions refer to M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd Edition (N.P. Engel, Publisher, Arlington, 2005); and A. Eide et al. (eds.), *Economic, Social and Cultural Rights*, 2nd Edition (Kluwer Law International, The Hague, 2001).

¹⁵⁸ ICCPR, *supra* note 13; and ICESCR, *supra* note 14.

¹⁵⁹ UDHR, *supra* note 11.

¹⁶⁰ J. Gardam, ‘Women, human rights and international humanitarian law’ (1998) 324 *International Review of the Red Cross* 421-432. Available electronically at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jpg4?opendocument> Visited 17 August 2007.

women.¹⁶¹ However, she simultaneously notes that more progress has been achieved for women in the context of international human rights law rather than international humanitarian law.¹⁶² It is additionally believed this progress has substantially influenced the development of international criminal law, particularly with regard to increasing social awareness appertaining to gender-based crimes.

In addition to these ecumenical instruments, several United Nations (“UN”) conferences in the 1990s also contributed to the condemnation of gender-based crimes (particularly crimes against women) and further encouraged the prosecution of same on an international level.¹⁶³ Specifically, the World Conference on Human Rights (Vienna, 1993) and the Fourth World Conference on Women (Beijing, 1995) addressed the serious nature of gender-based crimes and highlighted these offences as unfathomable international crimes. Koenig and Askin state the documents emerging from and adopted after these conferences reflect ‘international consensus that gender-based crimes deserve prosecution and punishment’.¹⁶⁴

It is believed the Beijing Declaration and Platform for Action is a crucially significant and symbolic document addressing the needs of women during times of war – despite some moderate criticism for its soft law approach.¹⁶⁵

¹⁶¹ *Ibid.*

¹⁶² J. Gardam ‘Women and the law of armed conflict (1997) 46 *International and Comparative Law Quarterly* 74.

¹⁶³ *Vienna Declaration and Programme of Action*, *supra* note 9; and the *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, UN Docs A/CONF.157/23 (1995) and A/CONF.177/20/Add.1 (1995) (15 Sept. 1995). As a matter of personal interest Australia’s commitment to the Beijing Declaration and Platform for Action and strategies towards tackling gender-based persecution are outlined at http://ofw.facsia.gov.au/international/womens_human_rights/un_csw/csw_47_australias_achievements.htm Visited 20 December 2007.

¹⁶⁴ Koenig and Askin, *supra* note 97, at 11.

¹⁶⁵ W. van de Tol and W. Koekebakker, ‘Did the Beijing Platform for Action Accelerate Progress’ Dutch Beijing +10 NGO Report (Initiatiegroep Beijing +10 Nederland, Tijd voor Actie!, Amsterdam, 2005). English language summary of the NGO Report available electronically at www.beijing10.nl. Visited 7 December 2007; and N. Kabeer, *The Beijing Platform for Action and the Millennium Development Goals: Different processes, Different outcomes* Report by United Nations Division for the Advancement of Women dated 4 February 2005. Doc. No. EGM/BPFA-MD-MDG/2005/EP.11. Available electronically at <http://www.un.org/womenwatch/daw/egm/bpfamd2005/experts-papers/EGM-BPFA-MD-MDG-2005-EP.11.pdf> Visited 15 December 2007.

Askin accurately asserts ‘these documents reflect an awareness by the international community’ that gender-based violence during armed conflict could never be justified by military necessity.¹⁶⁶ Whereas Shameem states:

Both civil and political rights and economic, social and cultural rights are integral, indivisible and complementary parts of one coherent system of global human rights...*even where human rights treaties have not been ratified* or incorporated into domestic law, *they provide important guidance* to law-makers, public officials and the courts.¹⁶⁷

Hence, the importance and influence of soft law is apparent when determining the significance of human rights under international criminal law.¹⁶⁸

Méndez further declares it is necessary for human rights practitioners to learn about international humanitarian law and international criminal law.¹⁶⁹ As such, an acceptable level of consensus over what constitutes a fair trial may be achieved. Shameem pivotally reiterates this view and asserts the maintenance of international human rights standards will allow international criminal law judges to apply the law equally and uniformly, without “fudging” the law to protect only the powerful, popular and influential members of society.¹⁷⁰ He further states the test is whether we are able to be humane to the “least important and least attractive citizens” – that test being a test for civilisation as a whole.¹⁷¹ According to de Than and Shorts, international humanitarian law is an ‘amalgam of state responsibility and

¹⁶⁶ Askin further asserts that gender-based violence is an unequivocal and gross violation of human rights and this is appropriately reflected within the Beijing Declaration and Platform for Action. Askin, *supra* note 62, at 61.

¹⁶⁷ N. Shameem, ‘Jurisdictional Basis of Using International Human Rights Law’ Speech to the Institute of Justice and Applied Legal Studies (16 May 2006). Available electronically at http://www.iccwomen.org/publications/articles/docs/Paper_IJALS_May_06_2_.pdf Visited 20 October 2007. p4.[emphasis added]

¹⁶⁸ “Soft law” is a term used in international law to describe quasi-legal instruments, which do not have any legal or binding force. Examples include Declarations, Codes of Conduct, Statements of Principles, Guidelines, Action Plans and Communications. Non-binding soft law documents usually contain inspirational goals and aspirations. Note, however, the UDHR is an exception to the rule and should not be considered soft law because it essentially reflects customary international law.

¹⁶⁹ J. Méndez, ‘International Human Rights Law, International Humanitarian Law and International Criminal Law and Procedure: New Relationships’ in D. Shelton (ed.), *International crimes, peace, and human rights: the role of the International Criminal Court* (Transnational Publishers, New York, 2000) p67.

¹⁷⁰ Shameem, *supra* note 167, at 10.

¹⁷¹ *Ibid.*

individual criminal responsibility’ and hence the prosecution of individuals before a court of law for breaches of international humanitarian law is often extremely difficult or even impossible.¹⁷² However, it is believed the cumulative education of practitioners; jurists and judges alike will positively influence the further convergence of international humanitarian law and international human rights law with the field of international criminal law. This will ultimately promote the prosecution and punishment of such individuals for serious violations and breaches of international law.

4.3.3 Refugee Law

According to Méndez, international human rights law and international humanitarian law are ‘two of the three bodies of international law dedicated to the protection of the human person’.¹⁷³ He states the third protective branch is refugee law, which predominantly stems from the 1951 Convention on the Status of Refugees (“CSR”) and corresponding Protocol of 1967.¹⁷⁴

Gender-based persecution is a sensitive topic under refugee law. Legally, mere acts of persecution “no matter how heinous” are not grounds for asylum eligibility.¹⁷⁵ To succeed, a claim must be sufficiently founded under one or more of the enumerated categories.¹⁷⁶ Gender itself is not recognised as a legitimate criterion under the CSR. However, after several European discussions and recommendations,¹⁷⁷ the United Nations High Commissioner for Refugees (“UNHCR”) released its Guidelines on the

¹⁷² de Than and Shorts, *supra* note 17, at 12.

¹⁷³ Méndez, *supra* note 169, at 68.

¹⁷⁴ *United Nations Convention Relating to the Status of Refugees*, opened for signature 28 July 1951 (entered into force 22 April 1954) 189 UNTS 150 (“CSR”); and *Protocol Relating to the Status of Refugees*, opened for signature 16 December 1966 (entered into force 4 October 1967) 606 U.N.T.S. 267 (“CSR”).

¹⁷⁵ P. Warren, ‘Women Are Human: Gender-Based Persecution Is A Human Rights Violations Against Women’ (1994) 5 *Hastings Women’s Law Journal* 281 at 301.

¹⁷⁶ CSR Article 1.A(2). *Supra* note 174.

¹⁷⁷ Note in particular, the *Resolution on the Application of the 1951 Geneva Convention Relating to the Status of Refugees*: Eur. Parl.Doc. (COM 112) 5 (1984) adopted Eur.Parl.Deb (313) 299 (13 April 1984) highlighted in V. Oosterveld, ‘The Canadian Guidelines on Gender-Related Persecution: An Evaluation’ (1996) 8(4) *International Journal of Refugee Law* 469 at 573.

Protection of Refugee Women (“UNHCR Guidelines”) on 22 July 1991.¹⁷⁸ These guidelines aim to address the particular vulnerabilities of refugee women experiencing gender-based persecution in their country of origin. Nonetheless, it was the innovative Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (“Canadian GRP Guidelines”),¹⁷⁹ published on 8 March 1993 that truly addressed the critical issues pertaining to the gender-based persecution of refugee women.¹⁸⁰ Despite extensive criticism,¹⁸¹ the initial categorisation of women suffering from gender-based persecution was within the context of “membership of a particular social group” of the CSR.¹⁸² Cipriani states ‘this relegates gender-based persecution to a position less important than, for example, persecution based on politics or race’.¹⁸³ Nevertheless, the Canadian GRP Guidelines uniquely propose gender-based persecution may also entitle women to establish their refugee claim within the grounds of race, religion, nationality and/or political opinion.¹⁸⁴

¹⁷⁸ UNHCR, *Guidelines on the Protection of Refugee Women*, UN Doc. EC/SCP/67 (22 July 1991). (“UNHCR Guidelines”).

¹⁷⁹ Canada Immigration and Refugee Board (IRB), *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa, Immigration and Refugee Board, 8 March 1993) Available electronically at [http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp370-e.htm#C.%20Immigration%20and%20Refugee%20Board%20Guidelines\(txt\)](http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp370-e.htm#C.%20Immigration%20and%20Refugee%20Board%20Guidelines(txt)) Visited 11 January 2008.

¹⁸⁰ V. Oosterveld, ‘The Canadian Guidelines on Gender-Related Persecution: An Evaluation’ (1996) 8(4) *International Journal of Refugee Law* 469 at 575.

¹⁸¹ *Ibid* at 577 for a discussion with respect to these concerns. Oosterveld also addresses the practical limitations of implementing the UNHCR Guidelines given the fact they are not legally binding.

¹⁸² Refer to Article 1.(A)(2) for the definition of a refugee, which states:

Article 1

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:

...

(2) As a result of events occurring before 1 January 1951 and 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[emphasis added].

The UNHCR Guidelines state that women’s claims may derive from: (1) the social group of “family”; and (2) the social group of “gender”.

¹⁸³ L. Cipriani, ‘Gender and Persecution: Protecting Women under International Refugee Law’ (1993) 7 *Georgetown Immigration Law Journal* 511 at 548.

¹⁸⁴ Oosterveld, *supra* note 180, at 576.

Patel severely criticises the CSR and correlative domestic refugee laws for the unreasonable demands they place on claimants.¹⁸⁵ She states that by requiring an individual, who is claiming refugee status, to demonstrate “persecution or a legitimate fear of persecution” exists but not actually defining persecution itself within the respective legal instruments creates a capricious lacuna in the law and practical application thereof.¹⁸⁶ It is agreed the present situation regarding gender-based persecution (under refugee law) creates numerous difficulties for victims and lawyers alike. In addition to the critiques of refugee lawyers, feminist scholars particularly reprimand the current refugee definition for the severe gender barriers it entails.¹⁸⁷ According to Patel the feminist public verse private sphere debate ‘evokes a tension which plagues international human rights law’ eminently. Whilst Greatbatch strongly argues the existing refugee definition ‘delegitimises gender-based persecution’.¹⁸⁸ The UNHCR Guidelines on International Protection: Gender-Related Persecution of 7 May 2002 (“UNHCR 2002 GRP Guidelines”)¹⁸⁹ attempt to address these concerns by observing:

There is no doubt that rape and other forms of gender-related violence...are acts which inflict severe pain and suffering – both mental and physical – and which have been used as persecution, whether perpetrated by State or private actors.¹⁹⁰

For the purpose of this study it must also be acknowledged the definition of persecution under the UNHCR Handbook on Procedure and Criteria for Determining Refugee Status (“UNHCR Handbook”)¹⁹¹ is significantly different to the definition of persecution under international criminal law.¹⁹²

¹⁸⁵ Patel, *supra* note 126, at 931.

¹⁸⁶ *Ibid.*

¹⁸⁷ J. Greatbatch, ‘The Gender Difference: Feminist Critiques of Refugee Discourse’ (1989) 1 *International Journal of Refugee Law* 518 at 519.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Statute of Refugees*, *supra* note 71.

¹⁹⁰ *Ibid.*

¹⁹¹ UNHCR, *Handbook on Procedure and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/Rev.1 (1988) (“UNHCR Handbook”).

¹⁹² The UNHCR Handbook pinpoints four factors, which may each individually and independently constitute persecution: (1) a threat to life; (2) a threat to physical freedom; (3) the infliction of suffering or harm upon those who differ, in a way regarded as offensive; and (4) *other serious violations of human rights*. [emphasis added]. UNHCR Handbook, *ibid* at 14. Whereas international criminal law requires an act or omission that

However, the UNHCR Handbook does acknowledge that a serious violation of human rights would ultimately constitute persecution under the CSR.¹⁹³ Oosterveld claims that extensive academic commentary prevalent on refugee law could enormously assist the ICC judges when they are deliberating upon the crime of gender-based persecution.¹⁹⁴ Oosterveld supports this argument with a precise analysis of Article 21 of the Rome Statute.¹⁹⁵ She asserts:

[T]here is a close link between the development of international refugee law and international criminal law with respect to gendered aspects of persecution...Therefore, when *the ICC's judges* are determining the content of the elements of the crimes against humanity of gender-based persecution, they *should examine the principles or rules found within refugee law*.¹⁹⁶

Nonetheless, Oosterveld empirically cautions against violating the principle of legality when undertaking such a broad statutory interpretation.¹⁹⁷ Gender-based persecution against refugees (predominantly women and children) is also addressed in the Beijing Declaration and Platform for Action.¹⁹⁸ It is believed this pertinent acknowledgment that gender-based persecution filters throughout various legal lineages signifies the true extent of this crime and the subsequent importance of addressing it at a legal “grass roots” level. Hence, the aim of examining persecution under refugee law was to highlight the interconnection between these diverse legal fields and their assorted appreciation of similar issues.

discriminates against another person, committed with the intent to violate that person's enjoyment of fundamental rights, which ultimately results in an infringement of those rights. Kittichaisaree, *supra* note 83, at 117.

¹⁹³ UNHCR Handbook, *supra* note 191.

¹⁹⁴ She states:

Refugee law could helpfully guide the ICC in three ways. First, the commentary provides insight into refugee decision-makers' approaches to persecution as a severe deprivation of rights and the meaning of targeting based on gender. Second, the commentary identifies domestic decisions that have deviated from internationally recognised norms and standards with respect to gender-based persecution. Finally, the commentators frame questions that the ICC should ask during its analysis of gender-based persecution.

¹⁹⁵ Briefly, Oosterveld states Article 21 requires the ICC to apply “general principles and rules of international law” when the Rome Statute, ICC Rules of Procedure and Evidence, Elements of Crimes and other sources of law within Article 21 have been exhausted.

¹⁹⁶ V. Oosterveld, ‘Gender, Persecution and the International Criminal Court: Refugee Law's Relevance to the Crime against Humanity of Gender-Based Persecution’ (2006) 17 *Duke Journal of Comparative and International Law* 49 at 51.[emphasis added]

¹⁹⁷ *Ibid.*

¹⁹⁸ *Beijing Declaration and Platform for Action*, *supra* note 163, at para 136.

4.3.4 International Criminal Law

International criminal law is a hybrid of international human rights law, international humanitarian law and national criminal law.¹⁹⁹ As a legal discipline, it is composed of various procedural and substantial rules on international criminal offences. In reality, such rules have been created to impose obligations on States so they do, in actuality, prosecute and punish individuals for international crimes.²⁰⁰

Charlesworth argues conflicts such as ‘the Holocaust, Rwanda, Bosnia and Kosovo’ have been instrumental to the enrichment and advancement of international criminal law.²⁰¹ She further contends the international community’s response to such conflicts has ultimately reinvigorated important international law disciplines such as international criminal law. This statement is exemplified by the adoption of the Rome Statute, which marked a major step forward in the promotion and advancement of international criminal law.

Individuals can now be prosecuted and punished for gender-based persecution and other serious international crimes before an international, independent and impartial judiciary.²⁰² And, despite earlier concerns the ICC would controversially interfere with or undermine national justice systems; the majority of academics are now embracing the “complementary”²⁰³ nature of the Court.²⁰⁴ Bassiouni identifies four factors

¹⁹⁹ Kittichaisaree, *supra* note 83 at 3.

²⁰⁰ Evans, *supra* note 22, at 719.

²⁰¹ H. Charlesworth, ‘International Law: A Discipline of Crisis’ (2002) 65 *Modern Law Review* 377.

²⁰² This is the doctrine of individual criminal responsibility. Under Articles 25(1) and 25(2) of the Rome Statute the ICC shall have jurisdiction over natural persons who commit a crime within the jurisdiction of the ICC. Those persons may also be punished in accordance with Article 25(3). Furthermore, under Article 25(4) no provision in the Rome Statute relating to individual criminal responsibility shall affect the responsibility of States under international law. For a more comprehensive analysis of this doctrine refer to A. Eser, ‘Individual Criminal Responsibility’ in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, Oxford, 2002), pp.767-821.

²⁰³ The principle of complementarity defines the relationship between the ICC and the national courts and ultimately determines which judicial body shall have jurisdiction in any given case. Under the Rome Statute both the Preamble and Article 1 refer to the

that link international crimes with a ‘policy of international criminalisation’.²⁰⁵ According to Bassiouni these four factors are:

1. The prohibited conduct affects a significant international interest (including threats to peace and security);
2. The prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community (including conduct shocking to the conscience of humanity);
3. The prohibited conduct involves more than one State (transnational implications) in its planning, preparation or commission either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries; and
4. The conduct bears upon an international protected interest which does not rise to the level required by (1) or (2) but which cannot be prevented or controlled without its international criminalisation.²⁰⁶

Hence, in addition to the development of persecution under international humanitarian law (specifically the IMT, IMTFE and CCL10), human rights law and refugee law, it is believed the establishment of the ICTY, ICTR and ICC has also invaluablely aided the advancement of persecution under international criminal law.

“complementary” nature of the ICC. For a more in-depth analysis of this concept refer to the following recent sources on the topic: M. Delmas-Marty, ‘Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC’ (2006) 4 *Journal of International Criminal Justice* 2; M. Frank, ‘Complementing complementarity’ (2006) 6(4) *International Criminal Law Review* 549-583; F. Gioia, ‘State Sovereignty, Jurisdiction and “Modern” International Law: The Principle of Complementarity in the International Criminal Court’ (2006) 19(4) *Leiden Journal of International Law* 1095; J. Turner, ‘Nationalising International Criminal Law’ (2005) 41 *Stanford Journal of International Law* 1; M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’ (2002) 23 *Michigan Journal of International Law* 869; M. El Zeidy, ‘The Ugandan Government Triggers the First Test of Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC’ (2005) 5(1) *International Criminal Law Review* 83; O. Héctor, ‘The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity and the Role of the Office of the Prosecutor’ (2005) 5(1) *International Criminal Law Review* 121; W. Burke-White, ‘Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo’ (2005) 18(3) *Leiden Journal of International Law* 557; E. Rojo, ‘The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From “No Peace without Justice” to “No Peace without Victor’s Justice”?’ (2005) 18(4) *Leiden Journal of International Law* 829; and B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, Oxford, 2004).

²⁰⁴ P. Kirsch, ‘Introduction’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (Nomos Verlagsgesellschaft Baden-Baden, Munich, 1999).p.XXIII.

²⁰⁵ P. Finnell, ‘Accountability under Human Rights Law and International Criminal Law for Atrocities Against Minority Groups Committed by Non-State Actors’ (2002).

<http://web.abo.fi/instut/imr/norfa/peter.pdf> Visited 10 August 2007.pp22-23.

²⁰⁶ *Ibid.*

4.3.4.1 The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)

It is evident from the research that the crime of persecution is universally recognised under international law. However, it appears a precise definition of the term is yet to be truly affirmed.²⁰⁷ The ad hoc tribunals have attempted to collectively resolve this issue by clarifying, in accordance with their statutes, a satisfactory definition of persecution.

Persecution is a crime against humanity under Article 5(h) of the International Criminal Tribunal for the Former Yugoslavia Statute (“ICTY Statute”),²⁰⁸ and Article 3(h) of the International Criminal Tribunal for Rwanda Statute (“ICTR Statute”).²⁰⁹ Further, the crime of persecution has been a prominent discussion point in several ICTY and ICTR cases. Most notably these are *Tadić*,²¹⁰ *Akayesu*,²¹¹ *Kupreškić*,²¹² *Blaskić*,²¹³ *Ruggiu*,²¹⁴

²⁰⁷ Widney Brown and Grenfell, *supra* note 75 at 358.

²⁰⁸ *Statute of the International Criminal Tribunal for Former Yugoslavia*, annexed to Resolution 872, SC Res 827, UNSCOR, 48th Sess, 3217th Mtg., UN Doc. S/RES/827 (1993). Article 5 states:

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

- a) murder;
- b) extermination;
- c) enslavement;
- d) deportation;
- e) imprisonment;
- f) torture;
- g) rape;
- h) *persecutions on political, racial and religious grounds*;
- i) other inhumane acts.

[emphasis added].

²⁰⁹ *Statute of the International Criminal Tribunal for Rwanda*, annexed to Resolution 966, SC Res 955, UN SCOR, 49th Sess, 3453rd Mtg., UN Doc. S/RES/955 (1994). Article 3 states:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation;
- e) Imprisonment;
- f) Torture;
- g) Rape;
- h) *Persecutions on political, racial and religious grounds*;
- i) Other inhumane acts.

[emphasis added].

²¹⁰ *Tadić*, *supra* note 99.

²¹¹ *Akayesu*, *supra* note 99.

Kordić and Čerkez,²¹⁵ *Krstić*,²¹⁶ *Kvočka*,²¹⁷ *Krnjelac*,²¹⁸ *Vasiljević*,²¹⁹ *Naletilić*,²²⁰ and *Nahimana*.²²¹

In *Tadić* the ICTY settled upon the definition formulated by Counsellor le Guehac in the *Barbie* case,²²² which described persecution as an offence ‘against the fundamental rights of mankind; the right to equality, without distinctions of race, colour or nationality, and the right to hold one’s own political and religious opinions’.²²³ The ICTY ultimately believed this definition was the most useful in defining persecution under Article 5(h) of the ICTY Statute.²²⁴ In the *Tadić* decision the tribunal also held that persecution could ‘encompass a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature, that violate an individual’s right

²¹² *The Prosecutor v Kupreškić et al.*, Case No. IT-95-16-T, "Lašva Valley" Case. Trial Chambers Judgment dated 14 January 2000. ("*Kupreškić*") Available electronically at <http://www.un.org/icty/kupreskic/trialc2/judgement/kup-tj000114e.pdf> Visited 7 July 2007.

²¹³ *The Prosecutor v Blaskić*, Case No. IT-95-14-T, "Lašva Valley" Case. Trial Chambers Judgment dated 3 March 2000. ("*Blaskić*") Available electronically at <http://www.un.org/icty/blaskic/trialc1/judgement/bla-tj000303e.pdf> Visited 7 July 2007.

²¹⁴ *The Prosecutor v Ruggiu*, Case No. ICTR-97-32-I. Trial Chambers Judgment dated 1 June 2000. ("*Ruggiu*").

²¹⁵ *The Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-T, "Lašva Valley" Case. Trial Chambers Judgment dated 26 February 2001. ("*Kordić and Čerkez*") Available electronically at <http://www.un.org/icty/kordic/trialc/judgement/kor-tj010226e.pdf> Visited 7 July 2007.

²¹⁶ *The Prosecutor v Krstić*, Case No. IT-98-33, "Srebrenica-Drina Corps" Case. Trial Chambers Judgment dated 2 August 2001 ("*Krstić*"). Available electronically at <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf> Visited 6 December 2007.

²¹⁷ *The Prosecutor v Kvočka et al.*, Case No. IT-98-30/1-T, "Omarska, Keraterm and Trnopolje Camps". Trial Chambers Judgment dated 2 November 2001. ("*Kvočka*") Available electronically at <http://www.un.org/icty/kvocka/trialc/judgement/kvo-tj011002e.pdf> Visited 7 July 2007.

²¹⁸ *The Prosecutor v Krnjelac*, Case No. IT-97-25 "Foča" Case. Trial Chambers Judgment dated 15 March 2002. ("*Krnjelac*") Available electronically at <http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e.pdf> Visited 10 November 2007.

²¹⁹ *The Prosecutor v Vasiljević*, Case No. IT-98-32 "Visegrad" Case. Trial Chambers Judgment dated 29 November 2002. ("*Vasiljević*") Available electronically at <http://www.un.org/icty/vasiljevic/trialc/judgement/vas021129.pdf> Visited 10 November 2007.

²²⁰ *The Prosecutor v Naletilić*, Case No. IT-98-34-T, Judgment and Sentence dated 31 March 2003. ("*Naletilić*") Available electronically at <http://www.un.org/icty/naletilic/trialc/judgement/nal-tj030331-e.pdf> Visited 7 July 2007.

²²¹ *The Prosecutor v Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence dated 3 December 2003. ("*Nahimana*").

²²² *Attorney General of Israel v. Adolf Eichmann*, (Conviction of Klaus Barbie for persecution ‘against innocent Jews’) ILR 5 (1968) ("*Eichmann*").pp.277-78.

²²³ *Tadić*, *supra* note 99, at para 696.

²²⁴ *Ibid.*

to the equal enjoyment of his basic rights'.²²⁵ Reiterating this position, in *Kupreškić* the ICTY decided not to restrict persecution to solely “physical acts”.²²⁶ Rather, they held ‘persecution can also involve a variety of other discriminatory acts, involving attacks on political, social and economic rights’.²²⁷ The tribunal also pronounced in *Kupreškić* ‘it would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law’.²²⁸ According to the Prosecution in the *Kupreskić* case:

[T]he crime of persecution has prominence [under customary international law], providing a basis for additional criminal liability in relation to all inhumane acts. [Were it not the case that crimes against humanity could comprise other crimes enumerated in the Statute], this would allow an accused to escape additional culpability for persecution merely by showing that the relevant act falls under another provision of the Statute or elsewhere in the indictment. *Persecution is one of the most serious crimes against humanity and an interpretation of the Statute which does not recognise it as such is not tenable.*²²⁹

However, the Defence team submitted persecution should not include acts which are legal under national laws, nor should it include acts not mentioned in the Statute ‘which, although not in and of themselves inhumane, are considered inhumane because of the discriminatory grounds on which they are taken’.²³⁰ The Defence team ultimately argued this line of reasoning would violate the principle of *nullum crimen sine lege*.²³¹ After an examination of persecution under customary international law,²³² the ICTY essentially held that a narrow interpretation of persecution (as

²²⁵ *Id* at para 710.[emphasis in original]

²²⁶ This stance was also accepted in *Vasiljević*, *supra* note 219, at para 246.

²²⁷ *Kupreškić*, *supra* note 212, at para 615.

²²⁸ *Id* at para 589.

²²⁹ *Id* at para 582.[emphasis added]

²³⁰ *Id* at para 585. Reiterating *Tadić*, *supra* note 99, at para 710.

²³¹ As per Article 22 of the Rome Statute *nullum crimen sine lege* is the basic principle of legality in which a person is not criminally liable unless his conduct constitutes a crime under the Statute. The ICTY in *Kupreškić* acknowledged that there was no universal or established definition of persecution under the corpus of international refugee law or human rights law. They further contented it would breach the principles of legality to use such a definition if it did exist in these fields. The reasoning was that because under international refugee law persecution tends to focus on the state of mind of the victim, rather than the actions of the perpetrator of the offence the higher threshold required under international criminal law could not be satisfied. *Kupreškić*, *supra* note 212, at paras 584,588-589.

²³² *Kupreškić*, *supra* note 212, at paras 591-605.

suggested by the Defence team) would be too restrictive and thence a lacuna would exist in the Statute.²³³ The ICTY further stated:

Although the *actus reus* of persecution may be identical to other crimes against humanity, what distinguishes the crime of persecution is that it is committed on discriminatory grounds. The Trial Chamber therefore accepts the submission of the Prosecution that “[p]ersecution, which can be used to charge the conduct of ethnic cleansing on discriminatory grounds is a serious crime in and of itself and describes conduct worthy of censure above and apart from non-discriminatory killings envisioned by Article 5”.²³⁴

This reasoning was affirmed by the *Kordić and Čerkez* case,²³⁵ which held:

[I]n order for the principle of legality not to be violated, acts in respect of which the accused are indicted under the heading of persecution must be found to constitute crimes under international law at the time of their commission.²³⁶

It should also be noted in *Kupreskić* the ICTY stated:

[I]n order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. Drawing upon the various provisions of these texts it proves possible to identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity... The Trial Chamber therefore defines persecution as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.²³⁷

However, the ICTY was ultimately reluctant to define what exactly “constitutes” a fundamental right and expressed this concern by asserting:

The interests of justice would not be served by so doing, as the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights (*expressio unius est exclusio alterius*). This is not the approach taken to crimes against humanity in customary international law, here the category of “other inhumane acts” also allows courts flexibility to determine the cases before them, depending on the forms which attacks on humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits.²³⁸

²³³ *Id* at para 606.

²³⁴ *Id* at para 607.

²³⁵ *Kordić and Čerkez*, *supra* note 215.

²³⁶ *Id* para 192.

²³⁷ *Kupreskić*, *supra* note 212, at para 623. [emphasis underlined in original].

²³⁸ *Ibid.* [original emphasis italicised and additional emphasis italicised and underlined].

Roberts asserts the subsequent judgment of *Kvočka* “diametrically opposed” the *Kupreškić* jurisprudence with regard to the *actus reas* component of persecution.²³⁹ However, this jurisprudential contradiction was recently noted and clarified in the *Krnojelac* and *Vasiljević* judgments, which both held:

The crime of persecution consists of an act or omission which:

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).²⁴⁰

Roberts also criticises the *Kvočka* judgment for blurring the distinction between persecution and other crimes, such as murder and torture.²⁴¹ However, from a thorough reading of this judgment it is believed the ICTY was merely attempting to address, clarify and compensate for possible loopholes in the jurisdiction of the tribunal. Unfortunately, in doing so, it is believed the tribunal’s ambiguous interpretation of persecution inadvertently raised legitimate academic concerns regarding the definition of persecution under international law.

Additionally, the recent judgments of *Nahimana* and *Krstić* are particularly relevant to the present study because they incorporate the concept of gender-based persecution. This is refreshing notwithstanding the fact neither the ICTY nor the ICTR were mandated to consider the offence of gender-based persecution – the ICC is the first and only international court with that colossal power. Gender-related crimes were first addressed in *Akayesu*, however this landmark ICTR verdict focused significantly more on rape and sexual violence as a form of genocide, rather than as a form of persecution. Askin states:

²³⁹ K. Roberts, ‘The Law of Persecution Before the International Criminal Tribunal for the Former Yugoslavia’ (2002) 15 *Leiden Journal of International Law* 623 at 626.

²⁴⁰ *Krnojelac*, *supra* note 218, at para 244: reproduced in A. Widney Brown and L. Grenfell, ‘The International Crime of Gender-Based Persecution and the Taliban’ (2003) 4 *Melbourne Journal of International Law* 347 at 360.

²⁴¹ Roberts, *supra* note 239 at 627.

The *Akayesu* Judgment formally recognised that gender-related crimes are systematically used as instruments of war and terror, and the impact of the crime is extensive and devastating, resulting in harm inflicted far beyond the immediate victim, extending to families, whole communities, associated groups and the public at large. *The significance of the law developed in this case is unparalleled.*²⁴²

Copelon continues this praise by asserting the *Akayesu* judgment is ‘part of a historic process of mainstreaming gender in international jurisprudence’.²⁴³ However, in *Nahimana*, the ICTR did address the relationship between gender identity and persecution via an analysis on the persecution of Tutsi women.²⁴⁴ The tribunal stated:

Tutsi women, in particular, were targeted for persecution. The portrayal of the Tutsi women as “femmes fatale”, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM and Kangura [and the Ten Commandments]...[B]y defining the Tutsi woman as an enemy in this way, RTLM and Kangura articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.²⁴⁵

Further, the ICTY in *Krstić* resolved that acts of sexual violence could constitute persecution. The tribunal undoubtedly held that when the sexual violence was committed, with the required discriminatory intent, on any enumerated ground stipulated in the ICTY Statute, it could amount to persecution.²⁴⁶

Contrary to the scope of its own Statute,²⁴⁷ in *Tadić* the ICTY supported the previous views of the UNWCC²⁴⁸ by reiterating:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflicts.

²⁴² K. Askin, ‘Gender Crimes Jurisprudence in the ICTR’ (2005) 3 *Journal of International Criminal Justice* 1007 at 1012. [emphasis added]. Askin further states in her chapter ‘Women’s Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC’ in D. Shelton (ed.), *International crimes, peace, and human rights: the role of the International Criminal Court* (Transnational Publishers, New York, 2000) on page 53 that the *Akayesu* judgment:

[w]ill undoubtedly play a vital role in the development of gender jurisprudence in international adjudicative bodies and one may hope its will serve to increase international awareness of the devastating impact gender or sex based crimes have on the victim, the victim’s family, associated groups(s), the local community, and society as a whole.

²⁴³ R. Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’ (2000) 46 *McGill Law Journal* 217 at 228.

²⁴⁴ *Nahimana*, *supra* note 221, at paras 1071-1079.

²⁴⁵ *Id* at para 1079.

²⁴⁶ *Krstić*, *supra* note 216, at paras 617-618.

²⁴⁷ The following aphorism conflicts with Article 5 of the ICTY.

²⁴⁸ *Supra* note 118.

Indeed...*customary international law may not require a connection between crimes against humanity and any conflict at all.*²⁴⁹

This legal advancement was upheld in *Kupreškić*.²⁵⁰ Such conflicting legal issues are not evident under ICTR case law because this judicial interpretation is consistent with the ICTR Statute.

According to Roberts ‘the steadily increasing jurisprudence of the ICTY and ICTR has resulted in the resolution of many issues of international criminal law’.²⁵¹ However, it is believed the somewhat heterogeneous mandate of the ICC should not be precipitously undermined. Just recently the ICC expressly moved away from the jurisprudence set by the ad hoc tribunals with regard to the gathering of witness evidence:

The *ICC Statute* has, through important advances, created a procedural framework which *differs markedly from the ad hoc tribunals*, such as, for example, in the requirement in the Statute that the prosecution should investigate exculpatory as well as incriminatory evidence, for which the Statute and Rules of the ad hoc tribunals do not provide. Also, the Statute seemingly permits greater intervention by the Bench, as well as introducing the unique element of victim participation. Therefore, *the Statute moves away from the procedural regime of the ad hoc tribunals*, introducing additional and novel elements to aid the process of establishing the truth. Thus, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules. Therefore, *while acknowledging the importance of considering the practice and jurisprudence at the ad hoc tribunals, the Chamber is not persuaded that the application of ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate.*²⁵²

It is believed the deviation by the ICC from jurisprudence already established under the ad hoc regimes heralds the birth of the Rome Statute as an independent branch of international criminal law. Nevertheless, whether such legal diversion is truly pivotal in the *advancement* of international criminal law remains to be seen.²⁵³ It is ultimately believed the impact of this decision cannot be underestimated. This is because it

²⁴⁹ *Tadić Defence Motion*, *supra* note 136, at para 141.

²⁵⁰ *Kupreškić*, *supra* note 212, at paras 573-581.

²⁵¹ Roberts, *supra* note 239, at 639.

²⁵² *The Prosecutor v. Thomas Lubanga Dyilo (Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial)*, Case No. ICC-01/04-01/06-1049. Trial Chambers judgment dated 30 November 2007. (“*Dyilo*”) Available electronically at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1049_English.pdf Visited 6 December 2007.[emphasis added]

²⁵³ [emphasis added].

illustrates the ability of the ICC to create its own jurisprudence and hence, this ability will inadvertently affect the actions of the court when initially considering the crime of gender-based persecution.

4.3.4.2 The International Criminal Court (ICC)

Courts play an indispensable role in ascertaining the existence and content of customary rules, interpreting and clarifying treaty provisions, and elaborating – according to general principles – legal categories and constructs indispensable for the application of international criminal rules. *The result is that the rapid development of substantive international criminal law is mainly due to judicial decisions.*²⁵⁴

The finalisation of the Rome Statute and establishment of the ICC was a lengthy and arduous process. In 1994 the ILC recommended to the United Nations General Assembly (“UNGA”) ‘that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of the international criminal court’.²⁵⁵ Essentially, the purpose of this meeting was to review, assess, debate and possibly adopt a statute for an international criminal court. There were many challenges (political, juridical and practical),²⁵⁶ and numerous conferences.²⁵⁷ However, after nearly five years of “roundtable” discussions and some impressive lobbying the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International

²⁵⁴ A. Cassese, ‘International Criminal Law’ in M. Evans (ed.), *International Law* 2nd Edition (Oxford University Press, Oxford, 2006).p723. [emphasis added]

²⁵⁵ A. Bos, ‘From the International Law Commission to the Rome Conference (1994-1998)’ in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, Oxford, 2002).p36.

²⁵⁶ P. Kirsch and D. Robinson, ‘Reaching Agreement at the Rome Conference’ in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, Oxford, 2002).pp.67-91.

²⁵⁷ For a brilliant and substantive analysis of these conferences refer to: J. Crawford, ‘The Work of the International Law Commission’ in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, Oxford, 2002).pp.23-33; Bos, *supra* note 255, at 35-65; P. Kirsch and V. Oosterveld, ‘The Post-Rome Conference Preparatory Commission’ in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, Oxford, 2002).pp.93-95; R. Lee (ed.), *The International Criminal Court –The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999); W. Pace and M. Theiroff, ‘Participation of Non-Governmental Organisations’ in R. Lee (ed.), *The International Criminal Court –The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999).pp.391-398; and L. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (Kluwer Law International, The Hague, 1997).

Criminal Court (“Rome Conference”) adopted the Rome Statute on 17 July 1998.²⁵⁸ The Rome Statute currently has 139 signatories and 105 parties.²⁵⁹

In essence, the Rome Statute prescribes a two-fold philosophy; firstly, international delinquents are prosecuted to protect society from serious violations of humanity,²⁶⁰ and secondly, the rights of the accused person are safeguarded from arbitrary prosecution and punishment.²⁶¹ However, it is believed this philosophy must be maintained in cohesion with existing fundamental principles of criminal law, such as *nullum crimen sine lege*²⁶² and *nulla poena sine lege*,²⁶³ and in accordance with the general principles of law legislated for in Part III of the Statute.²⁶⁴ The ICC has four organs: (1) the Presidency; (2) the Judicial Divisions section composing of an Appeals Division, a Trial Division and a Pre-Trial Division; (3) the Office of the Prosecutor (“OTP”); and (4) the Registry.²⁶⁵ Ultimately, the Rome Statute is a mechanism by which the criminal prosecution of individuals for “serious crimes of international concern” can occur.²⁶⁶ The need for such a mechanism was predominantly in response to “virtually universal” demand

²⁵⁸ Note: The ICC does not have retroactive jurisdiction and therefore will not apply to crimes committed before 1 July 2002 (i.e. when the official Statute entered into force). Refer also to W. Pace and J. Schense, ‘The Role of Non-Governmental Organisations’ in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, Oxford, 2002), pp105-143 for a discussion on the immense lobbying efforts of NGOs.

²⁵⁹ Refer to

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>

Visited 29 December 2007 and <http://www.icc-cpi.int/about/atagance/establishment.html>

Visited 29 December 2007.

²⁶⁰ This is dually reflected in the Preamble and Article 1 of the Rome Statute, which affirm the most serious crimes of concern to the international community as a whole must not go unpunished.

²⁶¹ A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, Oxford, 2002), pp1051-1083

²⁶² *Supra* note 231. This is the basic principle of legality – i.e. a person is not criminally liable unless their conduct amounts to a crime under the Statute.

²⁶³ That is the principle of “no punishment without a pre-existing law” and prohibits retrospective application of the Statute. Refer to Article 23 of the Rome Statute.

²⁶⁴ W. Schabas, ‘General Principles of Criminal Law in the International Criminal Court Statute (Part III)’ (1998) 6(4) *European Journal of Crime, Criminal Law and Criminal Justice* 84-112.

²⁶⁵ Refer to Article 34 of the Rome Statute and the ICC website for a brief overview of the structure of the court: <http://www.icc-cpi.int/about/atagance/structure.html> Visited 29 November 2007.

²⁶⁶ Articles 1, 5 and 25 of the Rome Statute. Also refer to W. Schabas, *An Introduction to the International Criminal Court*, 2nd Edition (Cambridge University Press, Cambridge, 2004) and A. Eser, *supra* note 202.

by States for a permanent, international, judicial body following the serious violations of law and inconceivable atrocities committed by individuals against mankind in the preceding six decades.²⁶⁷ The Rome Statute is a treaty binding on all of its State Parties, which cedes the ICC with international legal personality²⁶⁸ and temporal jurisdiction,²⁶⁹ in accordance with the rule of complementarity.²⁷⁰ The complementary nature of the Rome Statute has encouraged many countries to domestically implement the crimes stipulated therein (including the crime of gender-based persecution) and corresponding primary jurisdiction mechanisms into domestic legislation.²⁷¹ The UNSC may refer cases to the ICC²⁷², defer the commencement or proceeding of an investigation or prosecution²⁷³ (and possibly exert political pressure with regard to amendments),²⁷⁴ but apart from these exceptions the ICC is meant to exist as an independently functioning legal body from the United Nations.²⁷⁵

²⁶⁷ Academics argue the incapability of the ad hoc tribunals to continuously address such violations (and other such disadvantages with their application) is another reason why a permanent body was established. Refer to Cassese, *supra* note 154.

²⁶⁸ Article 4(1) of the Rome Statute.

²⁶⁹ Article 11 of the Rome Statute.

²⁷⁰ Refer to the Preamble, Article 1 and Article 21(1)(c). *Supra* note 203 and M. Delmas-Marty, 'The ICC and the Interaction of International and National Legal Systems' in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, Oxford, 2002).pp1915-1929

²⁷¹ For example, Australia has enacted legislation to ensure its courts have primary jurisdiction over the crimes contained in the Rome Statute into its *International Criminal Court Act 27 of 2002 (Cth)*; the UK in its *International Criminal Court Act, 2001*; and Canada in its *Crimes against Humanity and War Crimes Act, 2000*.

²⁷² Refer to Article 13(b) of the Rome Statute, which empowers the UNSC to refer cases to the ICC when acting under Chapter VII of the UN Charter. The ICC may also "trigger" its jurisdiction with respect to a crime if: (1) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14 (Article 13(a)); and (2) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15 (Article 13(b)). For more information refer to A. Zimmerman, 'Jurisdiction, Admissibility and Applicable Law' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft Baden-Baden, Munich, 1999).pp97-106; E. Wilmshurst, 'Jurisdiction of the Court' in R. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999).pp127-141.

²⁷³ Refer to Article 16 of the Rome Statute, which allows the UNSC (by way of a resolution adopted under Chapter VII of the UN Charter) to suspend ICC investigations/prosecutions for a period of 12 months.

²⁷⁴ Article 121 of the Rome Statute.

²⁷⁵ Lee, *supra* note 257.

Crimes within the jurisdiction of the ICC are stated in Article 5 of the Rome Statute.²⁷⁶ Hence, unless an individual is indicted upon one of these set crimes,²⁷⁷ the ICC may not exercise its jurisdiction under the Rome Statute nor under customary international law.²⁷⁸ According to Kreß the definitions for genocide, crimes against humanity and war crimes (articulated within Articles 6, 7 and 8 of the Rome Statute respectively and the ICC Elements of Crimes),²⁷⁹ are comprehensive and unequivocal.²⁸⁰ Blanchet furthermore asserts these definitions are “innovative” and “all-inclusive” tangible adaptations of definitions expressed in brother treaties and recognised under customary international law.²⁸¹ Additionally, Article 10 of the Rome Statute is important because it expressly considers the possibility of the ICC influencing alternate rules of international law.²⁸² However, it is ultimately predicted these comprehensive provisions will progressively transform the

²⁷⁶ Article 5 states:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the condition under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provision of the Charter of the United Nations.

²⁷⁷ That is: Genocide (Article 6), Crimes against Humanity (Article 7), War Crimes (Article 8) and Crimes of Aggression (when defined and adopted in accordance with Articles 122 and 123).

²⁷⁸ D. McGoldrick, D. and C. Warbrick, ‘Current developments in Public International Law’ (1995) 44 *International and Comparative Law Quarterly* 466-479.

²⁷⁹ Article 9 of the Rome Statute states:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6,7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crime may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority;
 - (c) The prosecutor
 Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties
3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

²⁸⁰ C. Kreß, ‘Universal Jurisdiction over International Crimes and the Institut de Droit International’ (2006) 4 *Journal of International Criminal Justice* 561-585.

²⁸¹ C. Blanchet, ‘Some troubling elements in the treaty language of the Rome Statute of the International Criminal Court’ (2003) 24 *Michigan Journal of International Law* 647.

²⁸² Article 10 states: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this statute.”

development of international criminal law; and not divide it as Fletcher and Ohlin suggest.²⁸³

Despite the hierarchical denotation of applicable sources of law in Article 21,²⁸⁴ it is believed the Rome Statute has dually attempted to codify these serious crimes by stipulating simultaneous definitions within the ICC Elements of Crimes.²⁸⁵ It is presumed from an examination of the draft commentary and analysis of the resulting Statute that States were scrupulously reluctant to transfer any unnecessary or gratuitous power to the Court.²⁸⁶ According to Cassese et al, the ICC drafters intended the Rome Statute to place itself at the “pinnacle of the pyramid” (of laws

²⁸³ G. Fletcher and J. Ohlin, ‘The ICC – Two Courts in One’ (2006) 4 *Journal of International Criminal Justice* 428-433.

²⁸⁴ Article 21 states:

1. The Court shall apply:

- (a) In the *first place*, this Statute, *Elements of Crimes* and its *Rules of Procedure and Evidence*;
- (b) In the *second place*, where appropriate, *applicable treaties and the principles and rules of international law*, including the *established principles of the international law of armed conflict*;
- (c) Failing that, *general principles of law derived by the Court from national laws of legal systems of the world* including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law *and internationally recognized norms and standards*.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. [emphasis added].

For example, under Article 21(1)(b) established principles of the international laws of armed conflict would include widely ratified treaties such as the *Convention for the Prevention and Punishment of the Crime of Genocide* (1948), The four Geneva Conventions of 1949 and the 1907 Hague Convention. As per McAuliffe de Guzman ‘the inclusion of Article 21(2) in the ICC Statute points to an evolution in the attitude of the world community in this area...In enabling judges to take into account their priori holdings Article 21(2) contributes to the development of a consistent and predictable body of international criminal law. This consistency and predictability, in turn serves the principle of legality.’ US Reference Paper: Elements of Offences for the International Criminal Court, submitted to Preparatory Committee, 27 March 1998, quoted M. McAuliffe de Guzman, ‘Article 21 – Applicable Law’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (Nomos Verlagsgesellschaft Baden-Baden, Munich, 1999).p445. Also with regard to judicial decisions and a thorough discussion on precedent refer to Kupreškić, para 540. Article 21(3) refers to the application of international instruments such as the UDHR, ICCPR and ICESCR.

²⁸⁵ Lee, *supra* note 257.

²⁸⁶ This is essentially a reflection of the principle of sovereignty as discussed in H. Jescheck, ‘The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute’ (2004) 2 *Journal of International Criminal Justice* 3-55. Refer also to L. Green, ‘Enforcement of International Humanitarian Law and the Threats to National Sovereignty’ (2003) 8(1) *Journal of Conflict and Security Law* 101-131.

applicable).²⁸⁷ Nonetheless, von Hebel and Robinson pronounce a compromise was reached and the ICC Elements of Crimes were forthwith stipulated under Article 9 of the Rome Statute to ‘assist the Court in the interpretation and application of articles 6, 7 and 8’.²⁸⁸ It is ultimately believed the constitution of the Rome Statute is quite stubborn in appositeness. According to Hunt this statutory inflexibility is due to initial political, diplomatic and practical pressures at the Rome Conference.²⁸⁹ He sardonically contends:

It is perhaps ironic that the drafters of the ICC Statute having based the Court’s Statute and its Elements of Crimes upon the body of law established by international judges, seek to deny to the judges of the ICC the opportunity to develop the law, preferring to impose upon them a more mechanical and narrow functions.²⁹⁰

This view was previously asserted by Cassese who stated the Rome Statute ‘seems to evince a certain mistrust in the Judges’.²⁹¹ Nevertheless, despite these somewhat constitutional constrictions the Rome Statute has still been hailed as a pioneering quintessence of international criminal law.²⁹²

4.3.4.2.1 Persecution as a Crime against Humanity under Article 7(1)(h) of the Rome Statute

The chapeau to Article 7 of the Rome Statute establishes a broad definition for crimes against humanity under international criminal law.²⁹³ Dixon states the chapeau ‘*captures the essence* of such crimes, namely that they are acts which occur during a widespread or systematic attack on a civilian population in either times of war or peace’.²⁹⁴ For the purpose of this study,

²⁸⁷ Cassese et al. *supra* note 261, at 1051-1083.

²⁸⁸ H. von Hebel and D. Robinson, ‘Crimes within the Jurisdiction of the Court’ in R. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999).p87.

²⁸⁹ D. Hunt, ‘The International Criminal Court – High Hopes, ‘Creative Ambiguity’ and an Unfortunate Mistrust in International Judges’ (2004) 2 *Journal of International Criminal Justice* 56-70.

²⁹⁰ *Ibid.*

²⁹¹ A. Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) 10 *European Journal of International Law* 144 at 163.

²⁹² Blanchet, *supra* note 286, at 647.

²⁹³ The chapeau of Article 7(1) states:

For the purpose of this Statute, “crimes against humanity” means any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

²⁹⁴ Boot et al., *supra* note 89 at 122.[emphasis added]

the crime of persecution (in particular gender-based persecution) falls within Article 7(1)(h) of the Rome Statute.²⁹⁵

Due to the expanded list of discriminatory grounds enumerated under Article 7(1)(h) of the Rome Statute the current definition of persecution clearly has a broader meaning than that previously established under customary international law.²⁹⁶ Persecution is further defined under Article 7(2)(g) of the Rome Statute, which specifies:

“Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

Hence, under modern international criminal law persecution essentially involves the deprivation of fundamental rights *contrary to international law*.²⁹⁷ In line with Chapter 2 of this paper, certain fundamental rights stipulated in the ICCPR cannot be subject to State reservations.²⁹⁸ This is because they represent customary international law, and ‘*a fortiori*...have the character of peremptory norms’.²⁹⁹ In General Comment 24 the Human Rights Committee (“HRCCom.”) expressly denies States the right to make reservations to the following actions:

...a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhumane or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious based hatred, to deny to persons of

²⁹⁵ Article 7(1)(h) of the Rome Statute includes:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court.[... as a crime against humanity.]

[emphasis added]. It is essentially believed this list is not exhaustive. However, the threshold of proving “universal international recognition” may be incredibly difficult in practice. Refer to D. Robinson, ‘Defining “Crimes against Humanity” at the Rome Conference’ (1999) 93(1) *American Journal of International Law* 43-56; and Cassese et al., *supra* note 154, at 468 for a discussion on this controversial wording.

²⁹⁶ Cassese, *supra* note 84 at 376.

²⁹⁷ [emphasis added]

²⁹⁸ For example, under Article 4 of the ICCPR no derogation can be made from Articles 6 (right to life), 7 (prohibition on torture), 8(1) (prohibition on slavery), 8(2) (prohibition on servitude), 11 (prohibition of detention for debt), 15 (prohibition of retroactive criminal laws), 16 (recognition of legal personality) and 18 (freedom of thought, conscience, religion and belief) in time of public emergency. Refer to Nowak, *supra* note 157.

²⁹⁹ *General Comment No. 24* dated 11 November 1994 (adopted by the Human Rights Committee under Article 40, paragraph 4 of the ICCPR). UN Doc. CPR/C/21/Rev.1/Add.6.

marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion or use their own language...³⁰⁰

Therefore, it is agreed with scholastic opinion that any intentional or severe deprivation of these fundamental rights will also be a criminal offence within the ambit of Article 7 of the Rome Statute.³⁰¹

4.3.4.2.1.1 The ICC Elements of Crimes

Six core elements are required to prove the offence of persecution. These elements were initially outlined by the Preparatory Commission for the ICC (“ICC Prep Commission”) in its Finalised Draft Text of the Elements of Crimes,³⁰² and subsequently adopted by the State parties to the Rome Statute in the final ICC Elements of Crimes:

1. The perpetrator severely *deprived*, contrary to international law,³⁰³ one or more *persons of fundamental rights*.
2. The perpetrator *targeted* such person or persons *by reason of the identity* of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was *based on* political, racial, national, ethnic, cultural, religious, *gender as defined in article 7, paragraph 3, of the Statute*, or other grounds that are universally recognised as impermissible under international law.
4. The conduct was *committed in connection with* any act referred to in article 7, paragraph 1, of the Statute or *any crime within the jurisdiction of the Court*.³⁰⁴
5. The conduct was committed as part of a *widespread or systematic attack* directed against a civilian population.
6. The *perpetrator knew* that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

According to von Hebel and Robinson the chapeau to Article 7 of the Rome Statute designates an overall “threshold test” for which certain acts constitute crimes against humanity.³⁰⁵ This threshold test has been consistently plagued with controversy and evidently more so during the preparatory negotiations to the Rome Statute.³⁰⁶ The key disagreements at

³⁰⁰ *Ibid.*

³⁰¹ Boot, *supra* note 103, at 518.

³⁰² *Report of the Preparatory Commission for the International Criminal Court: Addendum – Part II: Finalised Draft Text of the Elements of Crimes*, UN Doc. PCNICC/2000/1/Add.2 (2 November 2000).

³⁰³ This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes, which states: ‘[T]he requirement of “unlawfulness” found in the Statute or in any other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes’.

³⁰⁴ It is understood that no additional mental element is necessary for this element other than that inherent in element 6.

³⁰⁵ von Hebel and Robinson, *supra* note 287, at p91.

³⁰⁶ *Id* at 91-92.

the Rome Conference concerned: (1) whether such crimes required a nexus with armed conflict; (2) whether the commission of such crimes needed the presence of a discriminatory element; and (3) whether the threshold test should be applied conjunctively (for example, widespread *and* systematic) or disjunctively (for example, widespread *or* systematic).³⁰⁷ Fortunately, the ICC Elements of Crimes have now clarified the modern legal criteria regarding crimes against humanity (and persecution specifically). Hence, it is ultimately believed the ICC judges have a suitable mechanism for interpreting the Rome Statute in accordance with the individual circumstances surrounding any given case. It is further believed the comprehensive (and somewhat stringent) nature of the ICC Elements of Crimes (especially with respect to the offence of persecution, above) will amply guide the ICC judges in their deliberations. However, this prediction is yet to be observed because there have been no cases before the ICC Trial Division pertaining to persecution.³⁰⁸

4.3.4.2.2 Interesting Gender Specific Provisions of the Rome Statute

In addition to the various enumerated gender-based crimes within the jurisdiction of the ICC,³⁰⁹ the Rome Statute also provides for gender mainstreaming within its constitution.³¹⁰ Steins pivotally declares the Rome Statute contains ‘two further clusters of important gender-specific

³⁰⁷ *Ibid.*

³⁰⁸ Note, however: the ICC currently has in its Pre-Trial Chamber I the case of *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* Case No. ICC-02/05-01/07 regarding serious international crimes committed in Darfur, Sudan. The situation in Darfur, Sudan was referred to the ICC by the U.N.S.C in Resolution 1593, which was adopted on the 31st March at the UNSC’s 5158th Mtg. Ahmad Harun and Ali-Kushayb (warrants outstanding) are both awaiting charge for persecution under 7(1)(h) in addition to other war crimes and crimes against humanity before the ICC. Provided there are no legal hiccups, it is believed this case may be the first ICC case in which persecution, as a crime against humanity under the Rome Statute, will be analysed. Until then only predictions can be made as to how the ICC judges will incorporate the Elements of Crimes into their interpretation of the Rome Statute.

³⁰⁹ For example Article 7(g) of the Rome Statute provides that:

[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other forms of sexual violence of comparable gravity’ constitute crimes against humanity when committed with knowledge as part of a widespread or systematic attack against a civilian population.

³¹⁰ For an overview of the concept of gender mainstreaming within the UN system refer to UNESCO *Gender Mainstreaming Implementation Framework*, *supra* note 7.

provisions’.³¹¹ These are: (1) structural provisions concerning the employment of women, and particularly staff with expertise in gender issues under Part IV of the Rome Statute;³¹² and (2) procedural provisions concerning the application of appropriate prosecution and investigation methods employed in gender violence cases under Part V and VI of the Rome Statute.³¹³ ³¹⁴ On this point, Sellers and Okuizumi state:

[I]n addition to substantive, procedural and evidentiary laws and rules which fully recognise sexual assaults as an international crime, *it is also imperative that the permanent court include sufficient numbers of qualified women.* A gender-balanced organisational structure would be better able to incorporate sexual assaults into the work of the international criminal court. *Gender parity* among the judges, prosecutors, [translators] and investigators *will also facilitate great sensitivity to the concerns of both female and male victims of sexual assault crimes,* and thereby encourage such victims to come forward under difficult circumstances.³¹⁵

Askin agrees with Sellers and Okuizumi and declares ‘the presence of women in decision-making positions provides invaluable contributions to law, society, and the legitimacy as well as the functioning of the Tribunals’.³¹⁶ Compelling statutory language is also used in these provisions with the mandate of “shall” rather than “may” being chosen by the delegates of the Rome Conference.³¹⁷ It is believed the employment of this strong language evidences the commitment of the ICC to gender mainstreaming. It is further believed this powerful language strengthens and guarantees a more equitable and principled approach to gender-based

³¹¹ Steins, *supra* note 68 at 357.

³¹² For example, Articles 36(8)(a)(iii), 42(9) and 43(6) of the Rome Statute.

³¹³ For example, Articles 54(1)(b), 57(3)(c), 64(2), 64(7) and 68 of the Rome Statute.

³¹⁴ Steins, *supra* note 68 at 357.

³¹⁵ P. Sellers and K. Okuizumi, ‘International Protection of Sexual Assaults, (1997) 7 *Transnational Law and Contemporary Problems* 45, 80 quoted in D. Koenig and K. Askin, ‘International Criminal Law and the International Criminal Court Statute: Crimes against Women’ in D. Koenig and K. Askin (eds.), *Women and International Human Rights Law*, Vol. 1 (Transnational Publishers, New York, 2000).p13.[emphasis added].

³¹⁶ Askin, *supra* note 242 at 48.

³¹⁷ For example, Article 42(9) of the Rome Statute states: ‘The Prosecutor *shall* appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence against children’. Additionally, Article 43(6) states: ‘The Registrar *shall* set up a Victims and Witnesses Unit within the Registry...[T]he Unit *shall* include staff with expertise in trauma, including trauma related to crimes of sexual violence’. .[emphasis added]. Article 36(8)(a)(iii) further stipulates there will be ‘a fair representation of female and male judges’ in the composition of the Court with Article 36(8)(b) emphasising the need to include judges with ‘legal expertise on specific issues, including but not limited to violence against women and children’. Askin states the ‘presence of both sexes incorporates a wider range of knowledge, experience, and perspective into all aspects of the Tribunal’s work than would occur if the panel of judges were limited to men only’. *Ibid.*

crimes. Steins asserts the inclusion of gender provisions in the Rome Statute ‘clearly did not occur in a vacuum’.³¹⁸ Rather, it is believed such developments transpired in the wake of important advancements under international humanitarian law and human rights law.³¹⁹ It is further believed these advancements were consequently made in response to gross violations of fundamental rights and horrifying acts of gender-violence committed during the former Yugoslavian and Rwandan conflicts of the 1990s.

4.3.4.2.3 The Role of Non-Governmental Organisations (NGOs)

The fruit of NGO involvement in the process of the establishment of the Court is the Rome Statute which, while not without its imperfections, reflects the most fundamental concerns of civil society, and exceeds the expectations of even the most optimistic observers going into the Rome Conference.³²⁰

Non-Governmental Organisations (“NGOs”) played a substantial role in the drafting of the Rome Statute and the establishment of the ICC. In particular, the Women’s Caucus for Gender Justice in the International Criminal Court (“WCGJ”), now titled the Women’s Initiatives for Gender Justice (“Women’s Initiatives”),³²¹ was a key motivator for the eventual inclusion of gender-based crimes (as war crimes and crimes against humanity) within the jurisdiction of the Rome Statute.³²² Furthermore, the WCGJ was also responsible for the enumeration of several gender-specific non-crime related provisions within the Rome Statute.³²³ Erb states the WCGJ’s efforts in

³¹⁸ Steins, *supra* note 68 at 358.

³¹⁹ B. Bedont and K. Martinez, ‘Ending Impunity for Gender Crimes under the International Criminal Court’ (1999) 6(1) *The Brown Journal of World Affairs* 65-85.

³²⁰ Approximately 236 NGOs were accredited to participate in the Rome Conference: W. Pace and M. Theiroff, ‘Participation of Non-Governmental Organisations’ in Lee, *supra* note 257, at 391-392.

³²¹ The Women’s Initiatives is composed of women from all around the world who have expertise in gender issues. For more information on this association visit the organisation’s website at <http://www.iccwomen.org> Visited 10 July 2007.

³²² Pace and Schense state:

The Rome Statute does not serve as a testament to the power and political will of a single State or even a handful of influential States. Rather the opposite is true: the contributions to the creation of the ICC are almost innumerable...[N]on-governmental organisations (NGOs) made substantive contributions to efforts to create the International Criminal Court even before the establishment of the Coalition for an International Criminal Court...

Pace and Schense, *supra* note 258, at 107-108.

³²³ Refer to Section 3.3.4.2.2 of this paper for an overview of these interesting gender-specific provisions.

early February 1997 and powerful persuasion techniques throughout the final Preparatory Committee on the Establishment of an International Criminal Court (“ICC Prep Committee”) session of March-April 1998 resulted in the infusion of gender-specific concerns into the consolidated text of the ICC statute.³²⁴ For example, the WCGJ held numerous meetings informing delegates about gender issues³²⁵ and the precise meanings of certain terms such as gender,³²⁶ gender violence,³²⁷ and sexual violence.³²⁸ Erb further contends the impact of the WCGJ on the ICC treaty negotiations was extensive, particularly with respect to: (1) ensuring equal gender representation among prosecutors, judges and staff; (2) creating the position of Legal Advisor on Gender; and (3) establishing the Victims and Witnesses Unit and the Gender and Children Unit within the framework of the ICC. The Women’s Initiatives are still operating from the Hague and have just released a Gender Report on the ICC.³²⁹ This report outlines the present

³²⁴ According to Erb the ICC Prep Committee met six times between March 1996 and April 1998, and they have since met a further four times. The tenth and final session of the ICC Prep Committee was held July 1-12, 2002. The work of the ICC Prep Committee before the establishment of the Rome Statute has been divided into six sessions: (1) ICC Prep Committee 1 (March 20-April 12, 1996); (2) ICC Prep Committee 2 (August 12-30, 1996); (3) ICC Prep Committee 3 (February 11-21, 1997); (4) ICC Prep Committee 4 (August 4-15, 1997); (5) ICC Prep Committee 5 (December 1-12, 1997); and (6) ICC Prep Committee 6 (March 16-April 3, 1998). It is believed the ninth ICC Prep Committee session was the most crucial session for WCGJ gender issues. Erb, *supra* note 80 at 425.

³²⁵ Such as: (1) the importance of incorporating gender experts at every level of the ICC to ensure the effective investigation and prosecution of gender-based crimes and protection of victims; and (2) achieving gender balance in the composition of the ICC.

³²⁶ According to the WCGJ “gender” refers to:

[t]he *socially constructed differences* between men and women and the unequal power relationships that result. Gender indicates that the differences between men and women are not essential or inevitable products of biological sex difference. [emphasis added]

Women’s Initiatives for Gender Justice, ‘What is Gender?’ Background Paper.

³²⁷ According to the WCGJ “gender violence” includes:

[v]iolence that is targeted at men or women because of their sex and/or their socially constructed gender roles. Gender violence disproportionately affects the members of one sex more than another. The recent conflicts in the former Yugoslavia and Rwanda have seen many examples of gender violence. For example, the forcible recruitment of young boys into the army who are put through violent indoctrination, and then made to perform suicidal missions in order to prove their masculinity, and the killing of pregnant women by the slashing of their wombs and removal of their foetuses.

Now re-printed for the WIGJ in the Women’s Initiatives for Gender Justice, ‘What is Gender?’ Background Paper.

³²⁸ According to the WCGJ “sexual violence” includes:

[v]iolence which includes a sexual element, such as rape, enforced prostitution, sexual slavery, or sexual mutilation. Gender violence is usually manifested in a form of sexual violence, but can also include non-sexual physical or psychological attacks on women, men and children.

Now re-printed for the WIGJ in the Women’s Initiatives for Gender Justice, ‘What is Gender?’ Background Paper.

³²⁹ WIGJ ‘Gender Report Card on the International Criminal Court’ dated November 2007. Available electronically at

ICC situation with respect to gender equity, geographical equity and gender expertise. The report demands the appointment of a Gender Legal Adviser to the OTP as a matter of urgency,³³⁰ and also recommends the immediate employment of lawyers with specific legal expertise in sexual and gender violence.³³¹

4.4 Conclusion of Chapter

In conclusion, this chapter has examined the crime of persecution under international law. It has explored the historical development of persecution (as a crime against humanity) under international humanitarian law, human rights law, refugee law and international criminal law. Reference has also been extensively made to the various cases, statutes, tribunals and courts, which were involved in the expansion of the crime of persecution. Furthermore, a constitutional overview of the ICC was undertaken, with an additional analysis on the role of NGOs in the creation of the Rome Statute. Special focus was also attributed to the supplementary inclusion of other interesting gender-specific provisions within the Rome Statute.

It is evident from the analysis that the Rome Statute is a precise codification of the rules and principles of law that have been agreed upon by its parties in relation to serious crimes of international concern. It is further believed the drafters of the Rome Statute were intent on simplifying the provisions relating to the capabilities and overall jurisdiction of the ICC. This is evidenced by the wording and apparent “pecking-order” of sources in Article 21 of the Rome Statute.

The enumeration of the crime of gender-based persecution within the Rome Statute followed numerous advancements under international humanitarian law, human rights law, refugee law and particularly from the jurisprudence of the ad hoc criminal tribunals. Hence, despite any negative impressions

http://www.iccwomen.org/publications/resources/docs/Gender_Report_Card_2007.pdf

Visited 7 December 2007.

³³⁰ *Ibid* at 17.

³³¹ *Ibid* at 19.

articulated by this paper it is ultimately believed international criminal law has enormously benefited from the broad cross fertilisation of legal principles between these various corpuses of international law.

However, it is cautioned that the Rome Statute and encompassing ICC Elements of Crimes could possibly hinder the development of international criminal law, particularly with regard to gender-based persecution. This is due to: (1) meticulous and stubborn provisions and definitions contained within its constitution; (2) susceptibility to political interference and amendment by States; and (3) inexperience resulting from its birth as the sole, permanent, international court responsible for individual criminal prosecution. Despite the relative and extensive foreseeability of the drafters in composing the Rome Statute it would be romantic to suggest they mandated for all spontaneous acts of serious international concern with regard to gender-based persecution. Essentially, the interpretation, application and success of the Rome Statute and its influence on the development of international criminal law rests with the ICC judges – not the State Parties to its mandate. Idealistically, it is believed this will substantially strengthen the development of international criminal law as a whole and will further set the necessary precedents required to deter persons from committing crimes against the international peace and security of mankind in the imminent future.

5 Gender-Based Persecution: A Minor Field Study

The overall goal of this thesis is to illustrate: (1) the symbiosis of different legal disciplines; (2) the interrelation between culture and gender; and (3) the influence of these two limbs on the development of international criminal law. The intention of this chapter is to demonstrate this proposition via an analysis of gender-based persecution under the Rome Statute. In essence, it is believed the interrelationship between gender and culture; and interconnection between these diverse corpuses of international law, has substantially influenced the advancement of modern international criminal law. It is further believed this advancement is particularly evidenced by the inclusion of the crime of gender-based persecution into the Rome Statute. Ultimately, this chapter will illustrate the social, cultural and legal importance of prosecuting gender-based persecution (as a crime against humanity) on an international scale.

5.1 Gender-Based Persecution under the Rome Statute

*By adding the ground of gender to the crime of persecution, the Rome Statute represents an important step towards ensuring that gender-based persecution (which involves the intentional and severe deprivation of fundamental rights by reason of the victim's gender) receives greater [international] attention in the future.*³³²

The initial Draft Statute prepared by the ILC in 1994 was devoid of any reference to gender issues.³³³ This was unsurprising – mainly because the document itself preceded the UN conferences of 1993 and 1994,³³⁴ and was

³³² Steins, *supra* note 68 at 371.

³³³ *Draft Statute for an International Criminal Court* prepared by the International Law Commission, Report of the International Law Commission on its 46th Sess. 2 May-22 July 1994, UNGA Official Records, 49th Sess. Supp. No. 10, A/49/10(1994) (the “ILC Draft Statute”).

³³⁴ *Vienna Declaration and Programme of Action*, *supra* note 9; and *Beijing Declaration and Platform for Action*, *supra* note 163.

drafted before the full scope of the atrocities committed in the former Yugoslavia and Rwanda had been realised. On this point, Copelon states such devastating conflicts have been penitently positive for ‘the broader movement to end the historical invisibility of gender-violence as a humanitarian and human rights violation’.³³⁵ Erb advances this notion by stating:

The development of international law addressing gender-based crimes during the twentieth century demonstrates a clear progression from an atmosphere of unspoken tolerance, in which rape and sexual assault were considered inevitable by-products, to a climate approaching zero-tolerance, in which gender-based violence is gradually becoming understood as a discrete criminal category requiring special recognition under international humanitarian law.³³⁶

Fortunately, the justiciable efforts of the WCGJ from 1994-1998 (particularly with respect to the crime of gender-based persecution), as discussed in Chapter 3, were positively rewarded when the Rome Statute was adopted. Steins declares ‘by the time of the Rome Conference...the momentum had built to the point where most delegations accepted the necessity of including certain gender references in the statute’.³³⁷ According to Askin the inclusion and recognition of “gender” as a prosecutable form of persecution is long overdue.³³⁸ She further states the distinction between “sex” and “gender” is vital for gender-based crimes to be adequately addressed by the ICC judges.³³⁹

In Chapter 3, the ICTY case of *Krstić* was highlighted with respect to gender-based crimes. The tribunal stated in *Krstić* that sexual violence, when committed with the required level of discriminatory intent, on any enumerated ground stipulated in the ICTY Statute; could constitute

³³⁵ R. Copelon, ‘Surfacing Gender: Reconceptualising Crimes against Women in Time of War’ in A. Stiglmyer (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina* (University of Nebraska Press, Lincoln NE, 1994).p207.

³³⁶ Erb, *supra* note 80 at 424.

³³⁷ Steins, *supra* note 68, at 361.

³³⁸ Askin, *supra* note 242, at 60.

³³⁹ Askin refers to the UN usage of these terms as stipulated in U.N. Commission on Human Rights *Resolution 1996/48* UN Doc. E/EN.4/1997/40, Report of the Secretary-General, ‘Integrating the Human Rights of Women Throughout the United Nations System’ dated 20 December 1996: Askin, *Ibid*.

persecution.³⁴⁰ Hence, although the case of *Krstić* before the ICTY primarily concerned the crime of genocide it is relevant to this chapter (and the overall study) for its sociological construction and analysis of the term “gender”. It is believed the significance of the ICTY’s gender construction in *Krstić*, which concerned the systematic massacre of “military-aged men”, is amplified by the fact the tribunal considered: (1) the patriarchal nature of the Bosnian Muslim society, (2) the plausible loss of social status and actual sequential loss of identity of the Bosnian women; and (3) the potential implications with respect to future procreation for the community.³⁴¹ It is thus evident from this case that “male-based” persecution can have extensive social, cultural and economic impacts – particularly on communities with strict traditional and/or religious values.³⁴² Oosterveld additionally notes:

While *Krstić* was a case considering the crime of genocide, if “gender” was no more than “sex” under the ICC’s crimes against humanity, then similar factual circumstances might result in the ICC overlooking that the surviving women were victims of persecution as much as the dead men were, because a socio-cultural analysis is key to exposing this fact.³⁴³

Despite the timely applause for the novel legal advancement of including gender-based persecution within the jurisdiction of the ICC, the term “gender” under Article 7(3) of the Rome Statute has simultaneously received widespread criticism.³⁴⁴ Robertson in particular expresses dismay with respect to the limited and “distasteful” construction of the provision and titles it ‘the most ridiculous clause in any international treaty ever devised’.³⁴⁵ He argues transsexuals, homosexuals and lesbians may still “suffer the thumbscrew”; and persecution, “within the context of society”, would seemingly be allowed against them under Article 7(3) of the Rome

³⁴⁰ *Krstić*, *supra* note 216, at paras 617-618.

³⁴¹ *Ibid* at paras 91 and 596.

³⁴² *Ibid* at paras 90, 93 and 595 in particular.

³⁴³ V. Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ (2005) 18 *Harvard Human Rights Journal* 55 at 72. Available electronically at www.law.harvard.edu/students/orgs/hrj/iss18/oosterveld.shtml Visited 17 August 2007.

³⁴⁴ *Supra* note 8.

³⁴⁵ G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 2nd Edition (Penguin Books, London, 2002).p360.

Statute.³⁴⁶ Likewise, Askin admits the statutory definition of “gender” under the Rome Statute ‘represents a strange and unsatisfactory compromise reached between progressive States supporting women’s rights and conservative States which often deny women’s rights’.³⁴⁷ Boot pronounces sociological dimensions between men and women should also be taken into account.³⁴⁸ He further asserts that to forestall any such implications being raised in connection with Article 7(3) (and thus also in connection with the crime of persecution) a distinction between the two sexes “in the context of society” should be initially determined by the ICC judges before hearing a case of gender-based persecution.³⁴⁹

It is essentially believed the ICC judges have been left with the final decision as to whether the term “gender” actually does encompass sexual orientation. Oosterveld resourcefully suggests the ICC judges should evaluate the phrase “within the context of society”, via a set of signifiers,³⁵⁰ in accordance with prior UN sociological contexts and akin with Article 21 of the Rome Statute. Ultimately, it is predicted this ruling could enormously influence the advancement of gender issues under international criminal law and subsequently under other related corpuses of international law.

Boot and Hall additionally state:

Although the term “gender” has a specific meaning under the Rome Statute...persecution on gender grounds *as the term is generally understood in other international instruments and U.N. usage may still fall within the jurisdiction of the Court* to the extent that such discrimination would be based on “other grounds that are universally recognised as impermissible under international law” or involved “other inhumane acts within the meaning of paragraph 1(k).³⁵¹

³⁴⁶ *Ibid* at 361.

³⁴⁷ Askin, *supra* note 242, at 61.

³⁴⁸ Boot, *supra* note 103, at 522.

³⁴⁹ *Ibid*.

³⁵⁰ She elaborates that these signifiers should be in the same “socially constructed” context as those within established UN definitions such as:

[r]oles (including the relationship between and among men’s and women’s roles...[in society]...), attitudes, values, attributes, expectations, status, opportunities, socialisation, processes, responsibilities assigned, rights, resources, and power, as determined and/or expected within by race, class, sexual orientation, poverty level, ethnic group, age, and other factors.

Oosterveld, *supra* 342, at 75.

³⁵¹ Boot et al., *supra* note 89, at 150.[emphasis added]

It is believed this suggestion by Boot and Hall with respect to gender-based persecution is considerably flawed. This is primarily because it fails to take into account the hierarchical nature of Article 21 of the Rome Statute, which requires the ICC judges to consider first and foremost the ICC Statute, its Elements of Crimes and thenceforth its Rules of Procedure and Evidence.³⁵² For example, in 1997 a report by the Expert Group of the United Nations Division for the Advancement of Women (“UNDAW”) defined gender-based persecution as:

[s]evere discrimination and harassment, particularly, but not exclusively, in armed conflict or in an atmosphere of insecurity may constitute persecution. It is considered that severe restrictions on women’s enjoyment of their human rights, including with respect to education, employment, and freedom of movement, such as forced seclusion, meet the definition of persecution for the purposes of the Refugee Convention in those cases where women experience such restrictions as profound violations of their dignity, autonomy and status as human beings... [t]orture, whether perpetrated during armed conflict or otherwise, constitutes persecution for the purposes of the Refugee...[s]erious violations of human rights meet the definition of persecution whether they are perpetrated against one or many people.³⁵³

It is believed this definition disproportionately addresses the persecution of women rather than adequately addressing gender-based persecution as a whole. Further, as a legal definition it is limited in application under international criminal law by the refugee law context within which it is framed.³⁵⁴ Principally, the ICC judges would not be able to use this definition ‘as generally understood in other international instruments and U.N. usage’ because it does not adequately or impartially address the criminal elements of gender-based persecution under the Rome Statute. Hence, it is believed any positive guidance or gender-neutral outlook the definition may have offered the ICC judges (when deliberating upon the crime of gender-based persecution) has in actual fact substantially vaporised.

³⁵² *Supra* note 283.

³⁵³ UNDAW, Department of Economic and Social Affairs, *Gender-Based Persecution*, UN Doc. EGM/GBP/1997/Report (1997) Para.41. Available electronically at <http://www.un.org/documents/ecosoc/cn6/1998/armedcon/egmgbp1997-rep.htm> Visited 15 August 2007.paras.41-44.

³⁵⁴ *Kupreškić, supra* 212, at para 589.

5.2 The Importance of Prosecuting Gender-Based Persecution

Vigilance in prosecution is essential, particularly with regard to gender-based persecution. This is because a culture of impunity unfortunately exists with respect to gender-based crimes.³⁵⁵ Askin believes that where there is widespread impunity (particularly with respect to gender-based persecution in situations of armed conflict) the incentive to reduce the prevalence of such crimes is almost non-existent. She contends the key solution is to reverse the stigma currently placed on the victims with respect to sexual-violence and place it ‘squarely on the shoulders of the perpetrators...thus the survivors aren’t shamed or spoiled, but perpetrators are cowardly and weak’.³⁵⁶ It is fervently believed the prevalence of such impunity should be immediately addressed and ultimately ameliorated.³⁵⁷

Criminal prosecution has substantial social, cultural and legal implications – the failure to prosecute offenders for gender-based persecution (on an international level) will candidly signify to the international community that such crimes are trivial and superfluous. Furthermore, it is believed a global tolerance of such crimes will essentially fail to address these auxiliary implications. Askin states:

The courts are increasingly interpreting knowledge in a way that places greater burden on officials to prevent crimes that are widely known, and if they don’t take adequate measures to do so, they are presumed – when the crimes are notorious and committed over a long time and widely known/reported – to be implicit or explicit approval or encouragement.³⁵⁸

Copelon, however, states that despite the significant role of prosecution within criminal proceedings, prosecution alone ‘will not automatically change misogynist or sexist laws’.³⁵⁹ Ultimately, it is believed the role of the ICC in acknowledging, addressing and eradicating this legal liability

³⁵⁵ Bedont and Martinez, *supra* note 318, at 65-85.

³⁵⁶ *Supra* note 40.

³⁵⁷ D. McGoldrick, ‘The permanent International Criminal Court: an end to the culture of impunity?’ (1999) *Criminal Law Review* 627-655.

³⁵⁸ *Supra* note 40.

³⁵⁹ Copelon, *supra* note 243, at 239.

will be crucial to the development of modern international criminal law and particularly with respect to successfully prosecuting the crime of gender-based persecution.

In addition to the mental, emotional and psychological harm victims of gender-based persecution may endure, they are concurrently susceptible to social and economic harm.³⁶⁰ Prosecution for the crime of gender-based persecution at the ICC must address all of these cultural, social and economic impacts and must equally focus its attention on the persecution of *both* men and women.³⁶¹ Askin passionately pronounces the prosecution and punishment of offenders for gender-based crimes is ‘no longer merely a question of international law, but one of international integrity’.³⁶² Whereas Kirsch realistically states:

The ICC will not put an end to the atrocities which continue to shock the conscience of humanity. However, with support, it can help deter some of the worst crimes and help uphold stability and the rule of law.³⁶³

If gender-based persecution of men is not addressed at an equal level to that of women (or worse still if the offence is categorised or downgraded as another crime against humanity) it is believed the prosecution and conviction for same at the ICC will consequently fail to adequately, objectively or substantially address the core element of this crime – that being “gender-based” persecution, not “women/female” based persecution. It is critically agreed with Oosterveld that the ICC *must not* avoid the improper equation of “gender” with “woman” for this could potentially result in the distorted over-inclusion and/or under-inclusion of acts in the “gender” category.³⁶⁴

³⁶⁰ Subsequent to a discussion on prior law the ICTY in *Blaskić* held ‘the crime of “persecution” encompasses acts...which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community’. *Blaskić*, *supra* note 213, at para 233. *Krstić*, *supra* note 216.

³⁶¹ [emphasis added].

³⁶² Askin, *supra* note 1, at 87.

³⁶³ Kirsch, *supra* note 204.

³⁶⁴ [emphasis added]. For a comprehensive explanation of “over-inclusion” and “under-inclusion” with a comparison against the current refugee law situation refer to: Oosterveld, *supra* note 196, at 78.

On this point Oosterveld further states:

If the International Criminal Court did focus, in a nuanced and sustained manner, [specifically] on the prosecution of gender-based persecution, and if these prosecutions were publicised, then this could possibly contribute to deterrence. Widespread knowledge of the meaning of gender-based persecution and the fact of conviction are crucial for deterrence: if the ICC's work is not well known to potential perpetrators and their potential supporters, then deterrence is much less of a possibility.³⁶⁵

It was argued in Chapter 2 that “gender” as a category of persecution *must not* be subsumed with other persecutory categories such as culture – or any other identified and enumerated grounds.³⁶⁶ Rather, it is stringently believed an extensive examination of all persecutory grounds, when charged, *must* be undertaken by the ICC to ensure each individual category is satisfactorily addressed on its own merits in both a sociological and legal context. Oosterveld similarly notes the ready acceptance of “intersectionality” in refugee law should become the norm within the ICC’s approach to persecutory categories.³⁶⁷ This is essentially to ensure that, in any given case, the potential distortion of persecutory grounds is inherently limited in breadth. Oosterveld further suggests the ICC prosecutors could approach ‘intersectionality by identifying interlinked grounds of persecution in indictments, and the ICC’s judges could consider persecution without delinking these grounds’.³⁶⁸ It is ultimately believed this analytical legal reasoning similarly supports and advances the arguments put forth in Chapter 2.

5.2.1 Field Study and Auxiliary Research

To illustrate the binary cyclic theory of the study gender experts, lawyers, academics, NGOs and the ICC Gender and Children Unit were questioned

³⁶⁵ *Supra* note 39.

³⁶⁶ For example, political, racial, national, ethnic, cultural, religious or other impermissible grounds.

³⁶⁷ Oosterveld, *supra* note 196, at 86.

³⁶⁸ *Ibid.*

about various issues concerning the prosecution of gender-based persecution under the Rome Statute.³⁶⁹

Essentially, these questions examined: (1) the jurisdiction of the ICC when determining the existence of gender-based persecution; (2) whether the “singling out” and defining of “gender” under Article 7(3) of the Rome Statute would leave the prosecution and conviction of gender-based persecution in a more fragile position than that of other prosecutable forms of persecution; (3) the overall adaptability, in both a sociological and cultural context, of the definition of gender under Article 7(3) of the Rome Statute; (4) the importance of distinguishing persecution per se from somewhat national ideals, religious sentiments and/or expressions of cultural traditions; (5) the catering of the ICC mandate to balance current social perspectives surrounding gender-based persecution; (6) any possible political, diplomatic and ethical complications that may prove problematic when initiating and prosecuting gender-based persecution before the ICC; (7) the importance of incorporating a policy of gender mainstreaming within the ICC to break the culture of impunity regarding gender-based crimes; and lastly, (8) the interrelationship between the right to culture and gender under international law and how same has ultimately affected the development of modern international criminal law by the inclusion of gender-based persecution under the Rome Statute.

Overall, although the results were rewarding they were by and large unsurprising with respect to the context of this thesis topic. It was, however, particularly interesting to note the simultaneous consensus of opinion between gender experts and lawyers alike. For example, Oosterveld and Askin both discuss the possible setbacks that might prevail if the definition of gender under Article 7(3) of the Rome Statute is interpreted restrictively, without reference to the social construction of term “gender” (in contrast with the term “sex”) on an international, regional and domestic

³⁶⁹ A copy of these questions can be found in Supplement A and Supplement B of this paper.

level, by inexperienced judges and/or without reference to gender-sensitive issues.³⁷⁰

Grenfell focuses her interests on the intersection between culture and gender.³⁷¹ She states with co-author Widney Brown that ‘governments around the world regularly invoke religion and culture to justify and rationalise systematic gender-based discrimination.’³⁷² However, Oosterveld emphasises this potential scenario may be remedied beforehand with gender-sensitive judicial education, and at the time of the case through prosecution briefs and case presentation.³⁷³ Oosterveld further illustrates that the *lack of a definition* for ‘political’, ‘racial’, ‘national’, ‘ethnic’, ‘cultural’, ‘religious’ or ‘other grounds universally recognised as impermissible under international law’ may prove even more difficult than the *actual presence* of a definition for ‘gender’.³⁷⁴ Whereas Askin highlights that although the statutory leeway of the ICC judges in interpreting the language of the Rome Statute is restrictive it will principally be in a way that is fair to both the defendant and the victims.³⁷⁵

In comparison, some academics, for example Merry, highlight the importance of recognising the sociological dimensions of implementation and encourage focusing on such dimensions, particularly with respect to gender issues.³⁷⁶ In response to a question on State complicity verse diplomatic, political and ethical complications concerning the prosecution of crimes against humanity at the ICC, Askin states:

[A]s the joint criminal enterprise theory of prosecution is increasingly used, there are good judgments that note that even if, for instance, an attack was originally designed to displace a population, when attack after attack results in, for instance, murder and rape as well as displacement, then these crimes eventually become an intended part of an attack if sufficient measures are not undertaken to prevent them.³⁷⁷

³⁷⁰ *Supra* notes 39 and 40.

³⁷¹ Email response from L. Grenfell dated 26 October 2007 (on file with author).

³⁷² Widney Brown and Grenfell, *supra* note 75 at 347-375.

³⁷³ *Supra* note 39.

³⁷⁴ *Ibid.* [emphasis added].

³⁷⁵ *Supra* note 40.

³⁷⁶ Email response from S. Merry dated 27 October 2007 (on file with author).

³⁷⁷ *Supra* note 40.

Whereas, in comparison, Oosterveld posed a more reflective and subjective response:

The answer to this question depends on the situation being considered: for example, does the situation involve a still-powerful government or does it involve a failed state or a rebel group? Is the type of gender-based persecution obvious (like widespread, public rape) or more subtle (like the imposition of certain legal constraints)? Does the gender-based persecution look shockingly different from “day-to-day” oppression of women, or is it directly related to “day-to-day” women’s oppression? How easy or difficult is it for the ICC to obtain evidence of the gender-based persecution? The ICC’s ability to initiate and prosecute gender-based persecution in a particular situation will depend on the answers (and combination of answers) to these questions.

Oosterveld furthermore suggests that under international criminal law victims of gender-based persecution may suffer the same anxieties as refugee claimants under international refugee law.³⁷⁸ Hence, the ICC should realistically acknowledge such persons require sensitive and professional handling. She further submits it would be beneficial for the ICC to recognise and implement the UNHCR Guidelines in their due legal practice.³⁷⁹ For example, when ICC experts are deducing evidence from witnesses or victims of gender-based persecution such experts should legally persuade the ICC judges to permit victim testimonies or impact statements via affidavits or videotapes (during the trial proceedings). It is fundamentally believed the ICC judges and prosecutors will collectively constitute an integral and innovative force in the development of the crime of gender-based persecution under modern international criminal law. Whether this force *positively* acknowledges and advances the crime of gender-based persecution under international law is another question.³⁸⁰ This is essentially because the ICC will have to overcome many new and “un-chartered” challenges before a reliable prediction as to the successful prosecution of this crime can be made.

³⁷⁸ Oosterveld, *supra* note 80 at 579.

³⁷⁹ UNHCR Guidelines, *supra* note 178.

³⁸⁰ [emphasis added].

5.2.2 Challenges and Strategies of the ICC

As the Preamble to the Rome Statute recognises, ‘unimaginable atrocities that deeply shock the conscience of humanity’ are grave crimes, which can ultimately ‘threaten the peace, security and well-being of the world’.³⁸¹ Therefore, as discussed in Chapter 3 the UNSC, ‘determined to put an end to impunity for the perpetrators of these crimes’,³⁸² established the ICC with jurisdiction over the most serious crimes of international concern. Nonetheless, the ICC is similarly not immune to the practical impediments that regularly encroach upon domestic judicial institutions. In particular, ensuring satisfactory practical implementation and enforcement of the law is a common challenge frequently faced by juridical bodies. However, Bevers³⁸³ states the key challenges for the ICC, specifically, are:

1. Operating at an efficient and cost effective level while still respecting, ensuring and upholding the highest standards of justice.
2. Tackling and targeting the main war criminals for the most serious crimes committed in armed conflict around the world.
3. Prioritising the indictment to adequately reflect the seriousness of crimes committed. Primarily, this is to be assessed with respect to the level of overall violence observed in any given armed conflict.
4. Encouraging States who are protecting war criminals and perpetrators to recognise the jurisdiction of the ICC.
5. The lack of an ICC army or police body to bypass diplomatic obstacles and domestic bureaucracies.
6. Division of local communities over the nature of the offences and the identity of the true perpetrators during any given conflict.

³⁸¹ Preamble, *Rome Statute, of the International Criminal Court*, opened for signature 17 July 1998, [2002] ATS 15 (entered into force 1 July 2002) (“Rome Statute”) at paras 2 and 3.

³⁸² *Ibid* at paras 5 and 8.

³⁸³ Han Bevers is a Senior Legal Advisor at the ICC. Mr. Bevers was interviewed by the author, in person and via email, from December 2007 – January 2008. The statements attributed to Mr. Bevers are collectively sourced from these interviews.

Nevertheless, he positively contends the ICC has several strategies for counteracting these challenges.³⁸⁴ These strategies include: (1) maintaining a small and flexible office; (2) focusing the attention of the ICC staff on the gravest situations (that being, the instances of armed conflict that have *actually* threatened international peace and security);³⁸⁵ (3) conducting short investigations with focused charges against the war criminals who held the greatest responsibility during the armed conflict; and (4) respecting the interests of the victims.³⁸⁶

Beverly additionally responds to the criticism relayed by this paper that by focusing on those criminals who bear the greatest responsibility for the most serious crimes an “impunity gap” (with respect to other crimes, such as gender-based persecution) may be created. Drawing upon the previous views of Askin,³⁸⁷ Beverly agrees wholeheartedly and states:

It is important to break the cycle of impunity for several reasons. Nothing can remedy the suffering of victims of rape, forced sterilization/pregnancy, sexual enslavement and other sexual violence and therefore preventing the commission of those crimes is imperative.

³⁸⁴ *Supra* note 382. In particular, Beverly stresses the OTP Gender and Children Unit generally focus their attention on comprehensive and methodical prosecution models. He states:

A successful prosecution is based on a thorough investigation during which the relevant evidence required to establish the elements of crimes are collected and preserved. Measures taken by the OTP Gender and Children Unit, in that respect, include:

- Incorporating gender-based crimes into the initial analysis of a situation;
- Incorporating strategy for collection of gender-based information into the collection plan;
- Providing specialised training for investigators – building the expertise required in interviewing these vulnerable persons (who are generally fragile because of the trauma they have experienced);
- Collaborating with NGOs in the field who may be able to provide relevant information;
- Ensuring Psycho-social Pre-Interview preparation of victims;
- Addressing specific security concerns;
- Consulting with the Victims and Witnesses Unit in putting in place Initial Response System for witnesses; and
- Providing funds/means for emergency contact in case the security of a witness is threatened.

³⁸⁵ [emphasis added].

³⁸⁶ In particular, Mr. Beverly highlighted the present ICC mechanisms in place that deal with the interests of the victims. For example, in addition to the Gender and Children Unit the ICC has a Victims and Witnesses Unit, which concentrates on the participation and reparation of victims in criminal proceedings. The ICC also has a Trust Fund for Victims devoted to advocating and assisting the most vulnerable victims of genocide, crimes against humanity and war crimes. Under Part IV of the Rome Statute there are several provisions that explicitly cater to the interests of victims and witnesses in trial proceedings – for example Articles 68 and 75. For a more extensive examination of the role of victims under international criminal law refer to I. Bottiglieri, *Redress for Victims of Crimes Under International Law*, (Martinus Nijhoff Publishers, Leiden, 2004) – particularly pages 212-247.

³⁸⁷ i.e. concerning social stigmas and auxiliary economic and cultural impacts of gender-based persecution. *Supra* note 40.

One way this can be done is through the deterrent effect successful prosecutions will have on present and future warlords.

Though attitudes are now changing, *societies generally take an unfavourable view of victims of gender-based violence*, and invariably their suffering is worsened by the shame and guilt thrust on them.

Gender-based crimes should no longer be regarded as "inevitable by-products" of war because in most of the recent conflict situations, they are planned and ordered and executed in accordance with the policy of the armed group. The crimes over which the ICC has jurisdiction including gender-based crimes are "the most serious crimes of concern to the international community" (Article 5 (1)). Though widespread in conflict situations, these crimes most often go unpunished; no circumstance justifies them and as such they are unacceptable.

*These crimes extract an enormous toll on not just the individual victim but on the community as well ranging from victims contracting STDs to lost productivity and its impact on the country's economy. The harmful effects hinder development, progress, gender equality and peace.*³⁸⁸

He further contends:

It would have been extremely sad if the Statute for the ICC, the first permanent international criminal tribunal, had not explicitly criminalised such behaviour and this in effect would have meant tacit acceptance of that type of criminal conduct and a signal for the continuation of impunity. Therefore the Rome Statute is a step in the right direction.³⁸⁹

Bevens advocates that provided the national authorities and the international community work collaboratively with the ICC, addressing the culture of impunity should not be an issue. This assertion affirms the objectives of the Preamble to the Rome Statute, which states 'that the most serious crimes of concern to the international *must not go unpunished*'.³⁹⁰ Further, it is believed this statement emphasises the necessity of effectively prosecuting such crimes (by taking appropriate measures) at the national level and via enhanced international cooperation.³⁹¹

5.3 Conclusion of Chapter

In conclusion, this chapter has examined the crime of gender-based persecution under the Rome Statute. It has critically analysed the statutory definition of gender-based persecution and has further explored the

³⁸⁸ *Supra* note 382.

³⁸⁹ *Supra* note 382.

³⁹⁰ *Supra* note 380. Rome Statute Preamble at para 4.

³⁹¹ Thus, also in accordance with the values and objectives of the Rome Statute.

constitutional framework for the successful prosecution of same. The *importance* of prosecuting gender-based persecution under international criminal law has been highlighted, and simultaneously justified, by the results of the field study to the ICC and additional auxiliary thesis research.

It is ultimately believed the ICC will be instrumental in upholding the principles and rules of international criminal law and in promoting an overall culture of accountability for serious crimes of international concern. It is further believed the prosecution of offenders (on an international level) is essential for maintaining international peace and security, upholding the values in the Preamble of the Rome Statute and for preserving, encouraging and supporting cultural development. This is particularly the case concerning the crime of gender-based persecution because “gender” (as the key element to the crime) faces numerous pre-existing sociological and cultural obstacles. Nevertheless, it is believed judicial acknowledgement of such obstacles by the ICC will highlight the present practical impediments faced by communities with respect to culture and gender. It is also predicted the decisions of the ICC will further recognise the intrinsic nature and interrelationship between culture, gender and international crime. Thus, it is strongly asserted that redress for gender-based persecution via an impartial, independent and international legal system would prove highly beneficial for those affected communities.

From the field study and auxiliary research it is evident there is wide academic consensus with respect to the existence of an adverse culture of impunity, particularly concerning gender-based crimes. This essentially highlights the need for the crime of gender-based persecution to be recognised and prosecuted on an international criminal law level and within an international criminal law context. Such research also illustrates the prevalence of traditional cultural practices and religious beliefs surrounding (although not necessarily resulting in) the crime of gender-based persecution. The ICC judges should not be wary of such practices but rather educated and knowledgeable about the existence of same. The persecutory

element of “discriminatory intent” requires an extremely high threshold before the offence of persecution occurs and prosecution thereof is necessary. Hence, such customs should not be feared unless they discriminate and thus persecute, on the basis of gender, to this significantly high threshold – whereby prosecution by the ICC OTP is then a valid course of action. Furthermore, it would be ignorant of the ICC to neglect legal developments already made (with respect to gender-based persecution) in other corpuses of law – such as refugee law and human rights law. Caution, nonetheless, is required by the ICC so as not to breach the principle of legality. Nevertheless, it is ultimately agreed with Oosterveld that the ICC would be wise to reflect upon existing jurisprudence (in these fields) when deliberating upon the crime of gender-based persecution.

However, as noted previously in Chapter 3 there are also various procedural requirements in the Rome Statute pertaining to the prosecution of gender-based persecution. Hence, it is ultimately believed the application of the ICC Rules of Procedure and Evidence and the ICC Elements of Crimes to the crime of gender-based persecution under Article 7(1)(h) of the Rome Statute will determine whether the prosecution of a specific case of gender-based persecution will prove fruitful or futile.

6 Thesis Conclusion

The inclusion of gender-based persecution (as a crime against humanity) under Article 7(1)(h) of the Rome Statute is a significant milestone for gender experts, NGOs and international criminal lawyers alike. For the past sixty years, various jurisprudential lineages such as international humanitarian law, human rights law, refugee law and international criminal law have touched upon the notion of persecution. By means of a collective theoretical and practical, critical legal and sociological analysis, this study has focused on the interrelationship between culture and gender under international law and how this interrelationship has influenced the development of modern international criminal law. In particular, this paper has extensively examined the role of judicial bodies, such as the ICTY, ICTR and ICC, with regard to the advancement of gender-based persecution (as a crime against humanity). This qualitative approach was selected to increase the level of exploration able to be embarked upon with regard to the thesis topic. This paper has essentially maintained distance from the feminist critique movement in order to innovate the academic literature prevalent within this field of law – the crucial element of this study being “gender-based” persecution not “women/female-based” persecution. In conclusion, these extensive methodological efforts were ultimately undertaken to stress the overall goal of the thesis, that being an illustration of: (1) the symbiosis of different legal disciplines; (2) the interrelation between culture and gender; and (3) the influence of these two limbs on the development of international criminal law.

At first instance, Chapter 2 explored the right to culture under human rights law and specifically its interrelationship with gender. This chapter further discussed the significance and influence of cultural rights on gender; and the present legal framework and protection mechanisms, currently existing under human rights law and international humanitarian law, for cultural rights. The theory of cultural relativism was briefly reflected upon to

deflect possible criticisms concerning the contextual application of gender-based persecution to the analysis. In essence, Chapter 2 concluded the concepts of gender and culture are inexplicitly intertwined. Henceforth, this chapter decisively stressed these interrelated notions would unequivocally influence future judicial interpretations when the ICC judges are interpreting the definition of gender-based persecution.

Following on, Chapter 3 explored the historical development of persecution (as a crime against humanity) under international humanitarian law, human rights law, refugee law and international criminal law. This chapter referred to various cases, statutes, tribunals and courts that were involved in the legal expansion of the crime of gender-based persecution; and concluded that international criminal law has enormously benefited from this broad cross fertilisation of legal principles. By means of a thorough legal analysis this chapter emphasised that the interpretation, application and success of the Rome Statute; and its influence on the development of international criminal law, ultimately rests with the ICC judges – not the State Parties to its mandate. In conclusion, Chapter 3 optimistically predicted that the advancement of international criminal law under the Rome Statute would set the necessary precedents required for international criminal deterrence.

Lastly, Chapter 4 focused specifically on the application, interpretation and prosecution of gender-based persecution under Article 7(1)(h) of the Rome Statute. This chapter further analysed and examined the practical impediments to the implementation and prosecution of gender-based persecution under the Rome Statute. Chapter 4 additionally addressed the importance of prosecuting gender-based persecution at an international level and highlighted the need to ameliorate the culture of impunity (particularly with respect to gender-based crimes) that currently exists under international criminal law. Moreover, attention was drawn to the practical challenges and key strategies of the ICC OTP in ensuring the successful prosecution of gender-based persecution would not be hindered. Essentially, Chapter 4 concluded that the application of the ICC Rules of Procedure and Evidence

and the ICC Elements of Crimes (in accordance with Article 7(1)(h) of the Rome Statute) would determine whether the prosecution of a specific case of gender-based persecution would prove fruitful or futile.

In conclusion, this paper has explicitly illustrated the social, cultural and legal importance of prosecuting gender-based persecution (as a crime against humanity) on an international level. This study has established that the sociological interrelationship between culture and gender is undeniably influencing and decisively impacting upon the convergence of international humanitarian law, human rights law, refugee law and international criminal law. It is further asserted this paper has logically demonstrated the symbiosis that has occurred between these various legal lineages; and the successive influence of same, on the development of gender-based persecution under international law. Despite relative delimitations, it is contended this paper has substantially established that a binary cyclic relationship has been cultivated from the convergence of these legal disciplines and from the interrelationship between culture and gender within society. Overall, it is believed the prosecution of gender-based persecution (as a crime against humanity) is essential for maintaining international peace and security, upholding the values in the Preamble of the Rome Statute and for preserving, encouraging and supporting cultural development.

Supplement A

Questions directed to Mr. Hans Bevers, Senior Legal Adviser at the ICC

OTP regarding thesis topic.

1. International Criminal Tribunals (and particularly the ICTY) have rejected the notion that persecution must be linked to crimes found elsewhere in the governing Statute. However, the Rome Statute requires such a link under Article 7(1) (h). Is it believed the International Criminal Court (ICC) will follow the jurisprudence already settled by the Tribunals under international criminal law or will the ICC re-define the scope of this provision so that a new branch of precedent is created?
2. “Gender” is the only term singled out and defined under Article 7 of the Rome Statute. Will this inevitably leave the prosecution and conviction of gender-based persecution in a more fragile position than that of other prosecutable forms of persecution?
3. How adaptable do you believe the definition of “gender” under the Rome Statute is in both a sociological and cultural context? And further, do you believe this particular definition will satisfactorily address the veritable nature of gender-based persecution?
4. Gender-based persecution often reflects a deeper religious sentiment and/or the expression of cultural traditions. How important is it to distinguish persecution per se from these somewhat national ideals?
5. Do you believe a more nuanced and sustained attention to the role of gender under the ICC (and relative definition of gender-based persecution) would help prevent the occurrence or deter the existence of such persecution in situations of armed conflict?
6. It is enormously evident from the literature that there is a far greater level of attention devoted to gender-based crimes against women than men. Will the ICC aim to address, define, identify and clarify that persecution of men also exists and in doing so cater its mandate to balance the current social perspective surrounding this crime?
7. Crimes against humanity as a whole have traditionally implied a certain degree of state knowledge and/or involvement with regard to the “wide and systematic attack on civilians” element. Hence, how problematic do you believe political, diplomatic and ethical complications (in relation to gender issues) will be on the initiation and prosecution of gender-based persecution before the ICC?

8. By the explicit inclusion of gender-based persecution in the Rome Statute do you believe the culture of impunity, which has so frequently accompanied gender-based crimes in the past, will be adequately ameliorated? Or will greater vigilance be required in the prosecution and adjudication of such crimes?
9. How important is it, in the opinion of the Victims and Witnesses Unit and the view of the Gender Legal Expert, to break the cycle of impunity regarding such egregious gender-based crimes?
10. Lastly, enumeration of gender-based crimes is a major step forward but the inclusion of same does not automatically afford protection to the victims – what is being done at the ICC to ensure the successful future prosecution of these crimes and to consequently improve the status and reparation of victims?

Note: Questions 1-8 were also directed to the Coalition of the International Criminal Court (CICC) for their input. I was informed by Maaïke Matelski (representative of the CICC) these questions were too specific for the CICC to address at this point in time.³⁹² I was kindly referred to contact Brigid Inder (Executive Director, Women's Initiatives for Gender Justice) with regard to these questions. Ms Inder provided a preliminary response to the questions but was unfortunately unavailable for a more comprehensive interview by the time of publication.³⁹³

³⁹² Email response from M. Matelski dated 21 December 2007 (on file with author).

³⁹³ Email response from B. Inder dated 21 December 2007 (on file with author).

Supplement B

Questions directed to numerous gender experts, lawyers and academics regarding thesis topic.

1. “Gender” is the only term singled out and defined under Article 7 of the Rome Statute. Do you believe this will inevitably leave the prosecution and conviction of gender-based persecution in a more fragile position than that of other prosecutable forms of persecution?
2. How adaptable do you believe the definition of “gender” under the Rome Statute is in both a sociological and cultural context? And further, do you believe this particular definition will satisfactorily address the veritable nature of gender-based persecution?
3. Gender-based persecution often reflects a deeper religious sentiment and/or the expression of cultural traditions. How important is it to distinguish persecution per se from these somewhat national ideals?
4. Do you believe a more nuanced and sustained attention to the role of gender under the ICC Statute (and relative definition of gender-based persecution) would help prevent the occurrence or deter the existence of such persecution in situations of armed conflict?
5. Crimes against humanity as a whole have traditionally implied a certain degree of state knowledge and/or involvement with regard to the “wide and systematic attack on civilians” element. Hence, how problematic do you believe political, diplomatic and ethical complications (in relation to gender issues) will be on the initiation and prosecution of gender-based persecution before the ICC?

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