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Does The Phrase "On Political, Racial, Or Religious Grounds" In Article 3(H) Of The Ictr Statute And 5(H) Of The Icty Statute Foreclose Conviction Based On Persecution Against Ethnic Or National Minorities?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE ICTR

ISSUE: DOES THE PHRASE "ON POLITICAL, RACIAL, OR RELIGIOUS GROUNDS" IN ARTICLE 3(h) OF THE ICTR STATUTE AND 5(h) OF THE ICTY STATUTE FORECLOSE CONVICTION BASED ON PERSECUTION AGAINST ETHNIC OR NATIONAL MINORITIES?

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B. S.C. Res. 935, U.N. SCOR, 3400th mtg., U.N. Doc. S/RES/935 (1994).

I. Introduction and Summary of Conclusions[*]

A. Issues

This memorandum addresses the crime against humanity of persecution under the statutes of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") and whether the wording of these statutes prevents conviction for persecution of ethnic and national minorities. Section III of this memorandum addresses the precedents within the tribunals and how these have affected the interpretation of the Statutes. Section IV of this memorandum examines the effect of concurrent jurisdiction and universal jurisdiction on the ability to obtain a conviction for persecution. Section V of this memorandum discusses the practical realities of the Tribunals regarding the overlap of definitions of minorities and the way convictions for persecution have been obtained in past trials before the Tribunals. Section VI of this memorandum discusses the ability of the Tribunal to apply any treaties to which Rwanda was a party.

B. Summary of Conclusions

(1) Precedents From the Appeals Chambers of the Tribunals Allow the Crime of Persecution to be Stretched to Include Ethnic and National Minorities.

The crime of persecution requires a discriminatory intent similar to that required by the crime of genocide under the statutes of the ICTR and ICTY. Although the Statutes criminalize genocide based only on racial, religious, ethnic, or national grounds, the trial

[*] ISSUE: Does the phrase "on political, racial, or religious grounds" in Article 3(h) of the ICTR statute and 5(h) of the ICTY statute foreclose conviction based on persecution against ethnic or national minorities?

chamber in the *Akayesu* case held that the genocide portion of the statute should be interpreted as protecting any stable and permanent group.[1] The Statute must be interpreted in this way in order to respect the intention of the drafters of the statute.

Similarly, the Appeals chamber of the ICTY reasoned that "it is the substance of relations between the parties, not their legal characterization, which is controlling"[2] for Grave Breaches of the Geneva Conventions. The court found that it does not matter if perpetrators and victims are both technically of the same nationality, the court could find that the victims were "protected persons".

Given the similarities in the discriminatory intent required for both genocide and persecution, the court should apply the standards demonstrated in these precedents to future cases involving persecution.

(2) Based on Both Concurrent Jurisdiction and Universal Jurisdiction, the Tribunal Could Allow the National Courts to Bring the Charges for Persecution.

The ICTR has concurrent jurisdiction with the national courts of Rwanda although primary jurisdiction remains within the ICTR. However, it is allowable under the statute for the ICTR to surrender a prisoner to the national courts for prosecution if the prosecutor wishes to allow it. The only requirement is that a defendant cannot be prosecuted for the same offense in both courts. A problem could develop if the

[1] *Prosecutor v. Akayesu, (Case no. ICTR-96-4-T), Judgment,* 37 I.L.M. 1399, 1573. (In the first international prosecution for the crime of Genocide). [Reproduced in the accompanying notebook at Tab 10.]

[2] Kelly D. Askin, *Judgments Rendered in 1999 By the International Criminal Tribunals for the Former Yugoslavia and for Rwanda: Tadic; Aleksovski; Jelisic; Ruzindana & Kayishema; Serushago; Rutaganda,* 6 ILSA J. INT'L & COMP. L. 485, 491 (2000). (Discussing the interpretation of nationality for Grave Breaches of the Geneva Conventions in the *Tadic* case). [Reproduced in the accompanying notebook at Tab 35.]

underlying offense of the persecution consisted of one or more of the offenses that the defendant is charged with in the ICTR.

The national laws of the country in question are possibly an obstacle to the national courts asserting jurisdiction over a case involving persecution. The national courts cannot normally take jurisdiction for acts which were not violations of the law of the nation. However, if the violation is subject to universal jurisdiction, as crimes against humanity often are, the national court of Rwanda could take jurisdiction over the criminal acts. However, the individual acts that comprise the persecution may not be subject to universal jurisdiction.

(3) Given the Unclear Definitions of the Protected Groups Under the Crime of Persecution, the Courts Have Consistently Convicted for Persecution of Groups Which Are Arguably Ethnic or National.

In examining the past judgments of both the ICTY and ICTR, it is clear that despite the Tribunals' difficulty in clearly defining the protected groups as listed under persecution in their corresponding statutes, they have been willing to bring convictions for groups that could be seen as ethnic or national by defining them as a group which falls under the language of the statute.

This can be seen in cases in which the ICTY convicts for the persecution of Bosnian Croats by Bosnian Serbs by referring to them as racial groups and a conviction of a Hutu for the persecution of Tutsis and Belgians on racial grounds. In the case of the Bosnian Croats and the Tutsis, the Tribunals suggest the interchangeability of these definitions by referring to the victims as members of ethnic groups throughout the judgment, until reaching the judgment on the charge of persecution, at which time they

refer to the charge as being on racial grounds. Furthermore, the history of Rwanda makes it quite possible that the persecution of Belgians had occurred due to the nature of Belgium's involvement in the country, rather than for racial reasons. This precedent makes it seem likely that the distinctions between various groups are merely academic in nature and those members of an unprotected group will almost always fall under a protected group as well.

(4) The Tribunal is Able to Apply the Law of Any Treaties to Which Rwanda Was a Party.

The International Tribunal may apply the law of any treaties that were binding upon the conflicting parties at the time of the act in question. This would allow conviction in the Tribunal for the acts which would constitute persecution if the charges were being brought under the Statute.

II. Factual Background

The tensions between the Hutu and Tutsi "ethnic" groups date back to the 1500's, when the Tutsis first arrived in the region now known as Rwanda.[3] In this setting, a common culture and language developed. The distinction between the Hutu and Tutsi was developed as a socio-economic distinction which allowed some mobility between the groups. This mobility could be performed through the acquisition of cattle. By the early 20th century, "a Hutu was classified as anyone with fewer than ten cows."[4] The break

[3] Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, COLUM. HUM. RTS. L. REV. 177, 179 (1995). [Reproduced in the accompanying notebook at Tab 50.]

[4] *Id.*

down of the population of Rwanda was approximately 85% of the country Hutu, and 14% Tutsi with the remaining portion of the population consisting of Twa.

In 1916, Belgium occupied Rwanda as a result of the campaign against Germany during World War I. In administering Rwanda, the Belgians made use of the existing social structure, which consisted of the minority Tutsis as a ruling class. The Belgians reinforced the distinctions between the two groups, which had previously been much weaker, thereby destroying their flexibility.[5] In this way, the Belgians in effect created an "ethnic group". During the years of 1945-61, Belgium began to support a greater degree of power-sharing within Rwanda, believing that minority rule within the country was unsustainable.[6] As the Hutus gained greater political power, Rwanda saw an increase in violence against the Tutsis, which led many to flee the country. By 1961, Belgium withdrew from Rwanda, allowing the country to transform from a "Tutsi-dominated monarchy to a Hutu-led republic".[7] This transition led to "a cycle of turbulent clashes for power, where "capture of the Rwandan state from political opponents has been a violent zero-sum game in which the winner takes all".[8]

Following the death of the President of Rwanda in 1994, members of the Hutu majority began a series of attacks on the Tutsi minority as well as Hutu moderates who favored the sharing of political power. These attacks were apparently planned in advance

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[5] Linda Maquire, *Power Ethnicized: The Pursuit of Protection and Participation in Rwanda and Burundi*, 2 BUFF. J. INT'L L. 49, 51 (1995). (This is important for the analysis of "permanent and stable" groups). [Reproduced in the accompanying notebook at Tab 41.]

[6] Wang, *supra* note 3, at 180.

[7] C. SCHELTMAN AND W. VAN DER WOLF [editors]. THE INTERNATIONAL TRIBUNAL FOR RWANDA: FACTS, CASES, AND DOCUMENTS. Vol. 1: The Facts 37 (1999). [Reproduced in the accompanying notebook at Tab 33.]

[8] *Id*.

of the plane crash and motivated by ethnic hatred.[9] During the three month span that these attacks took place, an estimated 500,000 to 1 million people were killed. Following this three month period, the Tutsis were able to overthrow the Hutu government. The new government then requested that the United Nations to create an international war crimes tribunal. The United Nations Security Council, with the recommendation of a commission of experts, determined that serious breaches of international law had occurred in Rwanda.[10] On November 8, 1994, the Security Council decided that these breaches constituted a threat to international peace and security within the scope of its Chapter VII authority, and adopted Resolution 955[11] This resolution established the International Criminal Tribunal for Rwanda.

III. Precedent of Previous Judgments As Used to Expand the Grounds For Charges of Persecution.

The grounds upon which the crime of persecution may be brought are limited within the Statute of the ICTR to racial, religious, and political. However, the application of previous interpretations of crimes that require a similar discriminatory intent or protected groups may allow this charge to be expanded to include both ethnic and national grounds. Among the crimes that have this similarity are genocide and grave

[9] Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity"*, 22 BROOK. J. INT'L L. 111, 128 (1996). [Reproduced in the accompanying notebook at Tab 49.]

[10] S.C. Res. 935, U.N. SCOR, 3400th mtg. at 2, U.N. Doc. S/RES/935 (1994). (These breaches are later reflected in the ICTR Statute) [Reproduced in the accompanying notebook at Tab B.]

[11] International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible For Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between January 1, 1994 and December 31, 1994, S.C. Res. 955, annex, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/RES/955 (1994). [Hereinafter ICTR Statute]. [Reproduced in the accompanying notebook at Tab 1.]

breaches of the Geneva Conventions. As these crimes have been expanded beyond the plain meaning of the Statute, the crime of persecution can also.

A. Definitions of Persecution

The Crimes of genocide and persecutions have been codified many times over the years within the statutes of the various international tribunals, in case law, and in customary international law. The definitions of these crimes can be difficult to find, and are not always consistent. The crime of persecution is different from most other crimes against humanity as it does not exist in most domestic legal systems.[12]

The Charter of the International Military Tribunal (IMT) was the first instrument to lay out the crime of persecution.[13] As stated in this document, "…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" were considered crimes against humanity.[14] The crime of persecution contained in the Nuremberg Charter was further developed in the Genocide Convention.[15] The subject-matter jurisdiction of the IMT was limited to those crimes that were identified as violations of customary international law at that time.

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[12] Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 460 (2001). [Reproduced in the accompanying notebook at Tab 36.]

[13] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. [Hereinafter Nuremberg Charter]. (Established to prosecute war criminals from Nazi Germany who committed crimes against humanity against the Jewish people). [Reproduced in the accompanying notebook at Tab 3.]

[14] *Id*. at Art. 6(c). (This was an important factor as the actions that made up the persecutions in question were within the law of Germany at the time).

[15] 1 VIRGINIA MORRIS AND MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, A DOCUMENTARY HISTORY AND ANALYSIS 77 (1995) [Reproduced in the accompanying notebook at Tab 29.].

The next occasion in which the crime of persecution was used was in the trials held under Control Council Law No. 10 (Control Council).[16] Under Article II section 1(c) of the Control Council Law, the following was recognized as a crime against humanity: "persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated".[17]

Following World War II, the International Military Tribunal for the Far East was established.[18] Under Article 5 of this charter, one of the crimes against humanity within the jurisdiction of the Tribunal was "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".[19] The most glaring difference between the grounds for persecution in past charters and in this charter is the omission of persecution on religious grounds.[20] This omission was apparently due to the inapplicability to the Pacific Theatre of operation of religious persecution because there was little evidence of persecutions on religious grounds in that conflict[21], thereby rendering it unnecessary in the statute.[22]

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[16] Control Council Law No. 10, available at http://www.yale.edu/lawweb/avalon/imt/imt10.htm (last visited November 25, 2003). (Used for further prosecutions of Axis war criminals). [Reproduced in the accompanying notebook at Tab 4.]

[17] *Id*. at Art. II sec. 1(c).

[18] Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, 4 Bevans 20, T.I.A.S. No. 1589 (amended Apr. 26, 1946, 4 Bevans 27). (Prosecuting Japanese war criminals). [Reproduced in the accompanying notebook at Tab 5.]

[19] *Id*. at Art. 5.

[20] *Id*.

[21] Darryl Robinson, *Defining "Crimes Against Humanity" At the Rome Conference*, 93 AM. J. INT'L L. 43, FN 66. [Reproduced in the accompanying notebook at Tab 47.]

[22] J. OPPENHEIMER AND W. VAN DER WOLF, GLOBAL WAR CRIMES TRIBUNAL COLLECTION; Vol. 2D 253 (1999). [Reproduced in the accompanying notebook at Tab 31.]

Article 5(h) of the ICTY Statute states that "persecutions on political, racial, and religious grounds" are a crime against humanity.[23] Similarly, the ICTR statute gives the power to prosecute "persecutions on political, racial, or religious grounds".[24] However, under the ICTR Statute, these crimes must be committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds,"[25] a requirement which is missing from the previous statutes. The negotiating record of the ICTY serves to shed light on the meaning of persecution within the Statutes. Italy recommended including persecutions on social, political, racial, religious, or cultural grounds,[26] as did the Organization of the Islamic Conference.[27] Amnesty International suggested the prosecution of gross human rights violations committed against any civilian population.[28] The Russian Federation would limit the scope of crimes against humanity to what was reflected in the IMT Charter.[29] The United States' recommendation, which would usually be the most important for interpreting the

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[23] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add. 1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]. [Reproduced in the accompanying notebook at Tab 2.]

[24] ICTR Statute, *supra* note 11 at Art. 3.

[25] *Id*. (This Chapeau requirement is only jurisdictional and does not add a further element to crimes against humanity).

[26] 2 VIRGINIA MORRIS AND MICHAEL SCHARF, AN INSIDERS GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, A DOCUMENTARY HISTORY AND ANALYSIS 376 (1995) [Reproduced in the accompanying notebook at Tab 30.]

[27] *Id.* at 406.

[28] *Id.* at 412.

[29] *Id.* at 441.

Statutes, does not include persecutions as a separate crime.[30] Clearly, at least some of the nations and organizations involved in drafting these statutes intended to include broader protection than what was enumerated in the final draft.

The Rome Statute of the International Criminal Court was drafted after the creation of the ICTY and the ICTR, therefore this statute is not helpful for the purpose of determining the intent of the Security Council in forming those tribunals. However, it is useful for the purpose of determining what the present state of customary international law regarding the crime of persecution is. According to the Rome Statute, the court has jurisdiction over crimes against humanity which include "persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law…"[31] This statute demonstrates that customary international law prohibits persecutions based upon more grounds then merely those protected under prior International Tribunals.

The lack of clarity regarding the definitions of both the acteus reas and the mens rea of the crime of persecution has been pointed out many times by both courts and commentators. As the ICTY has stated, "Persecution under Article 5(h) has never been comprehensively defined in international treaties. Furthermore, neither national nor international case law provides an authoritative single definition of what constitutes 'persecution'.[32] Persecution has been defined as the "intentional and severe deprivation

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[30] *Id.* at 454.

[31] Rome Statute of the International Criminal Court, 37 I.L.M. 999, U.N. Doc. A/CONF. 183/ 9 (July 17, 1998). [Hereinafter ICC Statute]. [Reproduced in the accompanying notebook at Tab 6.]

[32] *Prosecutor v. Kupreskic*, International Tribunal for the former Yugoslavia, Case No. IT-95-16-T, Judgment, para. 567. [Reproduced in the accompanying notebook at Tab 13.]

of fundamental rights contrary to international law against any identifiable group of collectivity on prohibited discriminatory grounds."[33] Acts enumerated in other sub-clauses of the Articles containing crimes against humanity can constitute persecution, as can the consistent deprivation of a wide variety of rights including attacks on political, social and economic rights.[34] The ICTY has identified the following acts as persecution: participation in attacks, forced transfer of civilians, deportation, the destruction of property, and unlawful detention of civilians, among others.[35]

A substantial definition of what constitutes persecution remains unclear. "Although the crime of persecution is recognized in the major precedents (the Nuremberg and Tokyo Charters and the ICTY and ICTR Statutes), it was not defined".[36] Perhaps a good starting point to determine rights that may be protected by criminalizing persecution would be the International Covenant on Civil and Political Rights[37]; the International Covenant on Economic, Social, and Cultural Rights[38]; and the Universal Declaration of Human Rights[39], although the deprivation of some of these rights may not rise to the level

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[33] Darryl Robinson, *supra* note 21 at 53. (Regarding the ICC Statute).

[34] *Prosecutor v. Kupreskic et al.*, *supra* note 32.

[35] Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L. J. 237, 292 (2002). [Reproduced in accompanying notebook at Tab 42.].

[36] *Prosecutor v. Kupreskic et al.*, *supra* note 32.

[37] International Covenant on Civil and Political Rights, U.N.T.S. No. 14668, vol. 999, (1976). [Reproduced in the accompanying notebook at Tab 21]

[38] International Covenant on Economic, Social, and Cultural Rights, available at http://www.vnhrnet.org/english/eintbill/ebill_econsocial.htm (last visited November 25, 2003). [Reproduced in the accompanying notebook at Tab 22.]

[39] The Universal Declaration of Human Rights, available at http://www.un.org/Overview/rights.html (last visited November 25, 2003). [Reproduced in the accompanying notebook at Tab 25.]

of severity of the other crimes against humanity. The determination of whether a human rights violation constitutes an international crime depends on the fundamental importance of the right violated, and the level of magnitude of the violation.[40]

There is similar ambiguity regarding the grounds upon which the persecution must be based. "The lists of acts considered 'crimes against humanity' not only vary from definition to definition, but are sometimes qualified as illustrative and sometimes as restrictive."[41] As has been stated, "[t]here is no definitive list of persecutory grounds in customary international law."[42] Further evidence of the fact that there is no exhaustive list of the grounds upon which persecutory conduct is prohibited under international law is that although "the Nuremberg Charter and ICTY and ICTR Statutes include persecution on 'political, racial, or religious grounds,"[43] "…as delegations wished to take into account the evolution of international norms, the ICC statute builds on these precedents by adding national, ethnic, and gender grounds, which were drawn from the definition in the ICTR Statute."[44] The 1991 and 1996 I.L.C. Draft Code, which codifies existing international law, contains the additional ground of ethnicity, while the original 1954 Draft Code included culture.[45] The Canadian Criminal Code considers persecution against "any civilian population or any identifiable group of persons" to be a crime

[40] 1 VIRGINIA MORRIS AND MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, A DOCUMENTARY HISTORY AND ANALYSIS (1996). [Reproduced in accompanying notebook at Tab 28].

[41] Wang *supra* note 3 at 213.

[42] *Supra* note 22 at 254.

[43] Robinson, *supra* note 21 at 54. (Definitions of groups given later).

[44] *Id*.

[45] OPPENHEIMER AND VAN DER WOLF, *supra* note 22 at 253.

against humanity.[46] Whatever, the precise definition of persecution, given the additional requirement of a discriminatory intent, it is intended to be a very serious offense.[47]

B. Definitions of Genocide

The crime of genocide has been laid out in several international forums. In addition to the case law and customary international law where the crimes fall under the jurisdiction of the international tribunals, the crime of genocide is covered by a multilateral treaty, the Genocide Convention.[48] The definition of genocide under customary international law is much easier to determine than that of persecution, and would in fact seem quite clear. This definition is also codified within the Genocide Convention[49], and Article II of the Genocide Convention is reflected in the ICTY and ICTR Statutes as well as the ICC Statute.[50] "The Nuremberg Tribunal did not expressly refer to the crime of genocide although the persecutions condemned in its judgment clearly come under this crime."[51] The Genocide Convention is a more accurate codification of customary international law and jus cogens norms than most multilateral treaties.[52] This is reflected in the International Court of Justice holding that

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[46] *Prosecutor v. Kupreskic et al, supra* note 32 at Footnote 841.

[47] Danner, *supra* note 12 at 479.

[48] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951) [hereinafter Genocide Convention], adopted by G.A. Res. 260(III) (A), U.N. GAOR, 3d Sess., U.N> Doc. A/810 (1948). [Reproduced in the accompanying notebook at Tab 20.]

[49] *Id*.

[50] See ICC Statute *supra* note 31 at art. 17; ICTY Statute *supra* note 23 at art. 4; ICTR Statute *supra* note 11 at art. 2.

[51] MORRIS AND SCHARF, *supra* note 15 at 85.

[52] David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L. J. 231, 242 (2002). [Reproduced in the accompanying notebook at Tab 45.]

> [t]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. These jus cogens obligations are held erga omnes and extend to the entire world, not just to other signatories to the Convention…Some sources indicate that the Convention itself falls under customary international law. Others opine that it is not the treaty, but rather the normative content of the rule prohibiting genocide as expressed in Article II.[53]

This distinction would be important if the customary international law allows for broader protection than what is included in the Convention. However, the most important point for the purposes of the forthcoming analysis is that the crime of genocide is reflected in some form through customary international law. The Genocide Convention defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" and then goes on to give several prohibited acts that are covered by the act.[54] This Article is reproduced in the ICTR and ICTY Statutes, with the only change being the term "ethnical" to the more modern "ethnic".[55]

> Persecution as a crime against humanity is an offense belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging…Thus it can be said that, from the viewpoint of *men rea*, genocide is an extreme and most inhuman form of persecution.[56]

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[53] *Id*. at 243.

[54] See Genocide Convention, *supra* note 48.

[55] ICTY Statute *supra* note 23 at art. 4; ICTR Statute *supra* note 11 at art. 2. (The change in terms is merely modernization and does not reflect a change of definitions of the terms).

[56] *Prosecutor v. Kupreskic et al, supra* note 32 at para. 636.

Also, according to the judgment in *Prosecutor v. Kayishema* the definition of the crime of genocide is a combination of extermination and persecutions.[57] The opinion has also been put forth that "it was not necessary to include persecution in the list of inhumane acts…as this inhumane act was covered by the definition of genocide."[58] An awareness of the definition of genocide both within the Convention and in customary international law is useful for examining the way that this offense has been interpreted by the Tribunals, which can help to understand the ways in which persecution could be interpreted.

C. Interpretation and Extension of Crimes under the ICTR and ICTY

During the drafting process of the Genocide Convention, there were several suggestions were made that did not make the final draft of the Convention. The original conception of the crime of genocide was developed by Professor Raphael Lemkin in his book, Axis Rule in Occupied Europe. "Lemkin's concept of genocide…went from an academic description to a firm principle of international law in just over four years."[59] Professor Lemkin created the term of genocide in 1944 in a comprehensive study of atrocities by the Axis powers. Lemkin laid out several techniques of genocide, that he believed represented a coordinated attack upon all aspects of nationhood: political, social, cultural, economic, biological, physical, religious, and moral.[60] By the final drafting of the Genocide Convention, however, the definition of genocide was reduced to only the killing of a population based upon the prohibited grounds, and the destruction of cultures

[57] *Prosecutor v. Kayishema* Judgment Case No. ICTR-95-1-T (International Criminal Tribunal for Rwanda II May 21, 1999) at para. 89. [Reproduced in the accompanying notebook at Tab 12.]

[58] MORRIS AND SCHARF, *supra* note 40 at 198.

[59] David L. Nersessian, *supra* note 52 at 244.

[60] RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE, 79-90, (1973) [Reproduced in the accompanying notebook at Tab 27.]

was removed from the definition. In fact, political groups were intentionally omitted from the list of protected groups in the Convention.[61] This shows that the Convention was intentionally limited to the grounds which were listed in the final draft of the Convention.

However, the protected classes have been expanded through the judgments in several cases before the two Tribunals. In the *Akayesu* case, in which a defendant was charged with the crime of genocide in the ICTR, the trial chamber held that the groups protected by the Genocide Convention are not limited to the four groups expressly mentioned but also include any group which is stable and permanent similar to the four groups.[62] This reasoning is given support by the intentional omission of political groups, which was done in part because they were considered to be mutable and unstable.[63] The fact that the trial chamber was experiencing difficulties in categorizing the Tutsi group necessitated this expansion, whether they fit neatly into these categories or not.[64] Since the trial chamber defined an ethnic group as a "group whose members share a common language or culture,"[65] they were unable to distinguish the Tutsis from the Hutus because the two groups share a language and culture that are essentially the same.[66] These two groups "speak the same Bantu languages, profess the same religions and have common

[61] Wang, *supra* note 3, at 208.

[62] *Prosecutor v. Akayesu*, *supra* note 1, para. 516. (national, ethnic, racial, and religious).

[63] Wang, *supra* note 3, at 208.

[64] William A. Schabas, *Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda*, 6 ILSA J. INT'L & COMP. L. 375, 376 (2000). [Reproduced in the accompanying notebook at Tab 48.]

[65] *Prosecutor v. Akayesu*, *supra* note 1 at para. 513.

[66] *Developments in the Law-International Criminal Law: IV. Defining Protected Groups Under the Genocide Convention*, 114 HARV. L. REV. 2007, 2014 (2001). [Reproduced in the accompanying notebook at Tab 37.]

traditions."[67] Also, the chamber decided that "it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux preparatoires*, was patently to ensure the protection of any stable and permanent group."[68] The court also found that these stable and permanent groups are "determined by birth."[69] The trial chamber believed that protection of the Genocide Convention was only excluded from the more mobile groups which a person may join voluntarily throughout the course of the life, such as political or economic groups.[70]

An indication that the Tutsis were a stable and permanent group was found in the fact that prior to 1994 every Rwandan was required to carry an identity card which listed his ethnic group, that Rwandan laws distinguished among groups of citizens by their ethnic group, and that these ethnic distinctions were passed down patrilineally.[71] Therefore, although the term "ethnic group" may not be technically accurate for the Hutus and Tutsis, the trial chamber was able to bring them within the protection of the Genocide Convention and find Akayesu guilty of genocide. Akayesu did not raise this issue upon appeal.[72]

There is, however, significant criticism of this decision. The decision clearly goes beyond the terms of the Convention's definition of genocide, using the intent of the

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[67] Maguire, *supra* note 5 at 51.

[68] *Prosecutor v. Akayesu*, *supra* note 1, at para. 516.

[69] *Id*. at para. 511.

[70] *Id*. at para. 515.

[71] *Id*. at para. 170.

[72] *Prosecutor v. Akayesu*, Appeals Chamber Judgment, 1 June 2001. (Therefore, this interpretation is not binding on the other trial chambers). [Reproduced in the accompanying notebook at Tab 11.]

drafters instead.[73] As a general rule, a court should not go beyond the clear meaning of a treaty except to assist in clarifying ambiguous or obscure terms, or to avoid interpretations of the treaty that are manifestly absurd or unreasonable.[74] In such cases, the Tribunal may then rely on the travaux preparatoires and the circumstances of the treaty's conclusion.[75] Tribunals are not allowed to legislate, merely interpret the law. Such a departure from the language of the Convention risks being seen as judicial legislation. This is particularly objectionable in the case of a criminal offense, "which should be subject to restrictive interpretation and respect the rule nullum crimen sine lege."[76] It has also been stated that the intent of the drafters of the Convention is not as clear as the Tribunal suggests.[77] These complaints may work against future chambers expanding definitions of crimes within the statute.

This danger is reflected in *Prosecutor v. Kayishema*[78] In this case, Clement Kayishema and Obed Ruzidana were both charged with genocide in the killing of thousands of Tutsis. Once again faced with the question of whether the Tutsis were protected under the Genocide Convention, the court found that the Hutus and the Tutsis could be considered to share a common ethnicity. However, the court in this case used a subjective standard to determine that Tutsis were an ethnic group, based upon the legal

[73] William A. Schabas, *supra* note 64, at 380.

[74] Vienna Convention on the Law of Treaties, (1979) 1155 U.N.T.S. 331, art. 32. [Reproduced in the accompanying notebook at Tab 26.]

[75] David L. Nersessian, *supra* note 52 at 238.

[76] William A. Schabas, *supra* note 64 at 380. ("no crime without law").

[77] *Id*. at 382.

[78] *Prosecutor v. Kayishema*, *supra* note 57.

usage of that distinction by the government of Rwanda.[79] Therefore in the view of the chambers, an ethnic group could be a "group identified as such by others, including perpetrators of the crimes.[80] While not endorsing the analysis of the *Akayesu* chamber, it also did not explicitly disagree with it.[81] A criticism of this approach is that it places too much power in the hands of the perpetrator to define his own crime.[82]

A similar analysis took place within the context of the ICTY, when charges were brought in the *Prosecutor v. Tadic*[83] for violations of Article II of the ICTY statute which gives the Tribunal jurisdiction over grave breaches of the 1949 Geneva Conventions.[84] This crime is also required to be committed against a member of a protected class.[85] The Appeals Chamber in this case also examined the intent of the drafters of the Geneva Conventions in order to reach a decision regarding who was protected under the treaty. The chamber determined that the intent reflected in the treaty was to protect civilians to the maximum extent possible.[86] Therefore, it is the substance of the relations between the parties and not their legal characterization, which is controlling.[87] "In essence, under this criteria, it does not matter if the victims (Bosnian Muslims and Bosnian Croats) and

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[79] *Prosecutor v. Kayishema*, *supra* note 57 at 522-530. (Identification cards, etc.).

[80] *Id*. at 98.

[81] William A. Schabas, *supra* note 64 at 384.

[82] *Id.*

[83] *Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-A, July 15, 1999. [Reproduced in the accompanying notebook at Tab 19.]

[84] See ICTY Statute *supra* note 18 at Art. II. (The international conventions codifying the laws of war).

[85] *Id*.

[86] *Prosecutor v. Dusko Tadic*, *supra* note 83.

[87] *Id*.

perpetrator (Bosnian Serb) are technically from the same nationality."[88] In this case, the Chambers found that the victims were in the hands of armed forces of which they were not nationals and were therefore "protected persons" under the statute, despite the fact that they were in fact from the same country as the perpetrators.[89]

These precedents involving the expansion of the protected groups under the respective articles of the Statutes show that at least some of the Trial Chambers have been willing to interpret the Statutes broadly in an effort to achieve justice.

D. <u>Application of the Precedents of the Tribunals to the Crime of Persecution</u>

The ability of the Tribunals to expand their reach beyond the plain meaning of the Statutes is not unprecedented, although they do not always choose to do so.

> "The Tribunal has alternatively acknowledged that it's jurisprudential and rulemaking power emanates from the Security Council through the…Statute and expanded its power beyond what the Statute provides. These expansions have generally taken three forms: 1) a claim that the ICTY did not need statutory authority; 2) a claim that it could ignore the Statute to achieve fairness (usually coupled with dubious statutory interpretation so that ignoring it did not seem so egregious); and 3) those with either express or tacit Security Council approval."[90]

The first two of these grounds for justifying the expansion of the definitions of the jurisdiction of the Tribunals are the ones that must be examined for the purposes of this memorandum as there has clearly not been Security Council approval.

The first ground to be examined is that statutory authority is unnecessary. The Appeals Chamber in the *Tadic* case applied the principle of "la competence de la

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[88] Kelly D. Askin, *supra* note 2 at 491.

[89] *Prosecutor v. Tadic*, *supra* note 83.

[90] Gregory P. Lombardi, *Legitimacy and the Expanding Power of the ICTY*, 37 NEW ENG. L. REV. 887 (2003). (As part of the analysis in determining its own jurisdiction under the principle of competence de la competence). [Reproduced in the accompanying notebook at Tab 40.]

competence" to the ICTY Statute. In so doing, the Chamber determined that it had the inherent power to determine its own jurisdiction.[91] Furthermore, the court believed that if their jurisdiction was absolutely limited to that which had been given to them by the Security Council, they would be a subsidiary organ of the Security Council.[92] In order to avoid the ex post facto imposition of criminal liability, the jurisdiction of the Tribunals was limited to those crimes that were based on rules that were beyond any doubt a part of customary law.[93] While the crime of persecution is certainly a part of customary international law as evidenced by its inclusion in both the ICTY and ICTR Statutes, "there is no definitive list of persecutory grounds in customary international law."[94] The fact that the proper discriminatory grounds for bringing charges of persecution is not limited to those codified in the ICTY and ICTR statutes by customary international law is given further support by the inclusion of many more grounds in the Rome Charter for the ICC.[95] If the prohibition of persecutions based on ethnic or national grounds is based on customary international law, a statute would not be necessary to bring charges for this crime. Therefore, by invoking the principle of "la competence de la competence" the court could expand their jurisdiction to cover persecutions on ethnic or national grounds.

The second ground to be considered is that the Tribunal is free to ignore the Statute to achieve fairness. "In these cases, the Tribunal portrays international law as

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[91] *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 18. [Reproduced in the accompanying notebook at Tab 18.]

[92] *Id*. at para. 15. (Wished to avoid this in order to establish its own legitimacy as non-political).

[93] Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2040 (1998). [Reproduced in the accompanying notebook at Tab 34.]

[94] OPPENHEIMER AND VAN DER WOLF, *supra* note 22 at 254.

[95] ICC Statute *supra* note 31. (These grounds are listed on page 9 of memo).

malleable, with none of the rigidity of national law, and argues that it should be modified to administer justice fairly. Though expansion is usually justified on fairness-to-the-defendant grounds, a desire to contribute to the development of international law is also a significant factor."[96] In the *Tadic* case, the Chamber observed that the ICTY Statute is "general in nature", and that it "must be supplemented where advisable, by the rules which the Judges were mandated to adopt."[97] However, expansion in this case was generally used to achieve fairness to the defendant. This area is where the precedent regarding the expansion of the definitions of genocide and grave breaches of the Geneva Conventions would come into play. The likely reason that these definitions were expanded was to achieve fairness.

It would be an injustice if the main group of victims of serious violations of international law were not protected by the Statutes of the International Criminal Tribunals that were formed specifically to bring them justice. In the *Delalic* case, the ICTY interpreted the Statute by applying

> the "literal rule" (giving effect to the plain wording of the Statute), the "golden rule" (modifying provisions in a logical manner where the plain wording of the text would lead to "injustice, absurdity, anomaly or contradiction") and the "mischief rule" (where the court ascertains meaning by scrutinizing the provision, its history, prior law and the circumstances in which it was adopted, and its object and purpose in light of the "mischief" that the provision was intended to address).[98]

This same principle should apply to the crime of persecution on ethnic and national grounds. As the victims would have been considered members of a distinct

[96] Gregory P. Lombardi, *supra* note 90 at 891.

[97] *Prosecutor v. Tadic, supra* note 83 at para. 4. (For example, judges may adopt procedural rules).

[98] David L. Nersessian, *supra* note 52 at 240.

ethnic group within their country, the law should allow justice; otherwise the Statute would have no effect and would lead to a clearly undesirable result. The main problem with attempting to use this means to expand the Statute is that since it is typically used to achieve fairness, it has previously been largely used expand on procedural grounds.[99]

There is also a possibility that attempting to expand the crime of persecution in order to protect ethnic and national minority groups could be seen as violating nullem crimen sine lege. The Statutes of the Tribunals did not claim to set forth new substantive law, merely to set out the elements of the tribunals' competence.[100] There the success of this tactic would require a finding that these groups were already protected under customary international law.

This expansion of the jurisdiction of the Tribunal is the best way to attempt to secure a conviction for persecution of ethnic or national minorities. "Ambiguous provisions should be interpreted so as to accomplish the broad humanitarian goal of protecting the integrity of human groups."[101] This expansion goes the farthest towards supplying ongoing justice for the victims of crimes against humanity on these grounds. It also keeps the process in the hands of the Tribunals and it clearly defines which classes are protected from persecutions. Unfortunately, it may also be the least likely to succeed. It also raises the largest issues of unfairness to the defendants. Given the precedents of the *Akayesu* and *Tadic* cases though, it does seem that it might be possible to convince the Chambers to expand the law to criminalize persecutions on these grounds.

IV. Surrendering Defendants to National Courts for Trial

[99] *Prosecutor v. Tadic*, *supra* note 83 at para. 4. (As opposed to substantive).

[100] Wang, *supra* note 3, at 194.

[101] *Id.* at 209. (Quoting Matthew Lippman).

Another possible means to secure convictions for persecutions against ethnic or national minorities would be to allow domestic courts to prosecute for this crime. This could either be accomplished in Rwandan national courts under domestic law or in another State under universal jurisdiction. However, this theory raises some very serious issues which would first have to be addressed.

A. Universal Jurisdiction for Crimes against Humanity

In order for a crime to be tried before the national courts, one of two conditions must be met: the offense must be a crime within the legal system of the nation in which the trial is to take place, or it must be a grave breach of international law to which universal jurisdiction has attached. This policy is a result of the effort in criminal law to avoid violating the principle of nullum crimen sine lege (no crime without law). Furthermore, to do otherwise would violate Article 6(2) of Protocol II of the Geneva Convention which states that "no one shall be held guilty of any criminal offense on account of any act or omission which did not form a criminal offence, under the law, at the time when it was committed."[102] However, the Protocol II prohibition of convictions that violate the principle of nullum crimen sine lege would not prevent conviction for crimes against humanity as these are already prohibited by customary international law.[103]

Crimes against humanity are not a recent development for the assignment of individual criminal responsibility. In fact, there is a history of their use for more than

[102] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signatures Dec. 12, 1977, 1125 U.N.T.S. 609, art. 6(2) [Hereinafter Protocol II]. (As demonstrated by IMT, the law may be either domestic or customary international law). [Reproduced in the accompanying notebook at Tab 24.]

[103] *Id.*

fifty years, and it would have at least arguably been possible to use this concept prior to this if the world had the will even if these crimes had not been reflected in domestic laws. "More importantly…it does not depend for its enforcement on the degree to which its standard has been adopted in corresponding municipal legislation over individual violators without the need for such external references."[104] In short, the core offenses underlying crimes against humanity are as egregious as to be *jus cogens* norms, and therefore the violators of these norms may be brought before any court under the principle of universal jurisdiction on the theory that the perpetrators have rendered themselves hostes humani generis.[105] In this case, "the deliberate violation of a fundamental international human right may constitute a crime giving rise to universal jurisdiction even in the absence of a treaty or convention."[106]

The greatest strength supporting the argument that the crime of persecution may be brought to trial before a national court in addition to an international tribunal is that as originally formulated in the Nuremberg Charter, persecution is a crime against humanity "even if not against the laws of the nation where it occurred."[107] As has been stated, "[r]ights which can be properly classified as jus cogens, i.e., which have universally binding effect even in the face of contrary state legislation, enjoy the highest status to which any jurisprudential norm can aspire—non-derogability."[108] There is a presumption in international law that "an international legal instrument purporting to restate jus cogens

[104] Mark R. Von Sternberg, *supra* note 9 at 133.

[105] *Id*. at 134.

[106] *Id*. at 150.

[107] Nuremberg Charter, *supra* note 13 at art. 6(c). (Removes need for a violation of domestic law).

[108] Mark R. Von Sternberg, *supra* note 9 at 151.

norms is, in fact, consistent with those norms."[109] A consistent pattern of gross violations of internationally recognized human rights is a violation of customary international law and systematic racial discrimination is a violation of a jus cogens norm.[110] These would also seem to be a potential definition of persecutions.

Universal jurisdiction over crimes against humanity is considered to be a feature of customary international law.[111] It is presumed that every state has an interest in exercising jurisdiction since the level of the crime is so egregious. Adolph Eichmann was tried for crimes against the Jewish people, a crime similar to persecution or genocide, in Israel under the principle of universal jurisdiction for crimes which occurred before the creation of that State.[112] Few states have the necessary statutes to allow the prosecution of crimes of universal jurisdiction. However, such a statute would not be necessary in the case of Rwanda as they would also have territorial jurisdiction.

In order to ascertain the parameters of customary international law, the tribunals would first examine the plain test, purpose and preparatory work of a treaty. It would use case law as subsequent practice, and would then reference international authorities.[113] Upon analysis of these issues it seems that the prohibition of persecution is in fact a jus cogens norm, particularly since the severity of the offense must rise to the level of violations of other crimes against humanity, and would therefore be subject to universal

[109] *Id*. at 153.

[110] Restatement (Third) of Foreign Relations Law, §702 (1987). [Reproduced in accompanying notebook at Tab A.].

[111] Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 346 (2001). [Reproduced in accompanying notebook at Tab 44.].

[112] Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 802 (1988). [Reproduced in accompanying notebook at Tab 46].

[113] David L. Nersessian, *supra* note 52 at 240.

jurisdiction allowing a national court to take jurisdiction over the crime regardless of whether it was a violation of national laws.

B. Concurrent Jurisdiction

Following the genocide in Rwanda in 1994, a large number of individuals were in prison awaiting prosecution. Rwanda has established four categories of offenders according to the degree of their culpability. The first category includes leaders and organizers; the second category includes all others who committed homicides; the third category includes perpetrators of grave assaults; and the fourth category includes those who committed property crimes.[114] "As of January 1997, Rwanda's prison population has grown to over 90,000 virtually all awaiting prosecution for genocide-related crimes. The caseload of the ICTR is expected to be in the hundreds at most."[115] Clearly there are many cases that might have theoretically risen to the level that the ICTR could prosecute, but that the Tribunal lacks to resources to adequately prosecute. In fact, the national courts of Rwanda have largely taken to relying on plea agreements in order to expedite the process of disposing of the enormous number of cases before them.[116]

These genocide related crimes fall under the concurrent jurisdiction of the government of Rwanda and the ICTR.[117] Under the ICTR Statute, the ICTR has primacy of jurisdiction over the national courts of Rwanda.[118] When both the ICTR and the

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[114] Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 357 (1997). [Reproduced in the accompanying notebook at Tab 43]

[115] *Id*.

[116] *Id*. at 359.

[117] ICTR Statute *supra* note 11 at Art. 8(1).

[118] *Id*. at Art. 9(2).

national courts of Rwanda have a legal basis for jurisdiction over a case, the ICTR is entitled, but not obligated, to exercise jurisdiction to the exclusion of the national body.[119] Additionally, the opinion has been offered that international law has primacy over national law generally.[120]

Article 10 of the ICTY Statute discusses the concurrent jurisdiction of the ICTY.[121] Primacy of Article 10 is preserved on non-bis-in-idem, which provides that "no person shall be tried before a national court if that person has already been tried by the ICTY, but a person who has been tried by a national tribunal subsequently may be tried by the ICTY if a number of conditions are met."[122] Under Rule 11 of the Rules of Procedure for the ICTY, the Tribunal may surrender a defendant to a national court in which the alleged offense took place for the purpose of standing trial.[123] Furthermore, determinations of any state are not binding upon the Tribunal.[124] The conditions under the statute for a defendant to be tried in the Tribunal after having been tried in a national court is that: the act for which he was tried was characterized as an ordinary crime, or the national proceedings were not fair or impartial.[125]

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[119] Madeline H. Morris, *supra* note 114 at 365.

[120] Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 875 (2002). [Reproduced in the accompanying notebook at Tab 39].

[121] ICTY Statute, *supra* note 23 at Art. 10.

[122] Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, 37 NEW ENG. L. REV. 1037, 1040 (2003). [Reproduced in the accompanying notebook at Tab ??].

[123] ICTY, Rules of Procedure and Evidence, IT-32/Rev. 28. Rule 11, available ate http://www.un.org/icty/legaldoc/index.htm (last visited November 25, 2003). [Reproduced in the accompanying notebook at Tab 7]

[124] *Id.* at Rule 12.

[125] ICTY Statute, *supra* note 23 at Art. 10.

The ICTR has an almost identical requirement within its own Statute,[126] as well as in its rules of evidence and procedure.[127] There is no evidence in the statute whether this requirement applies only to the same charged crime, the same acts, or any charged crime resulting from any act. However, in the ICC Statute it has been made clear that as long as the conduct being prosecuted for in the Tribunal is different from the conduct that was prosecuted for in the national court, the case could go forward.[128] This analysis may be applicable in the future, as it has been stated that "the creation of the ICC, for which the notion of complementarity is central, may well influence the practice of the ICTY"[129] Additionally, the recommendation of the United States, which is the most important for interpreting the Statute, states that the fact that a person has been tried by a State shall not preclude the trial of that person if the charges did not cover the crimes listed in the Tribunal's statute.[130] The only requirement is that the Tribunal must take into account any punishment of that person for the same acts.[131] If so, then the Prosecutor could allow the national court to begin with jurisdiction for the crime of persecution of ethnic or national minorities, and then take jurisdiction for the other crimes that the defendant could be charged with.

Among the risks with attempting this course of action include the Chamber interpreting the Rules of Procedure to mean that a defendant could not be brought back

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[126] ICTR Statute, *supra* note 11 at Art. 9.

[127] ICTR, Rules of Procedure and Evidence, available at http://www.ictr.org (Las visited November 25, 2003). [Reproduced in the accompanying notebook at Tab 6]

[128] El Zeidy, *supra* note 120 at 932.

[129] Mark A. Drumbl, *supra* note 122 at 1041.

[130] MORRIS AND SCHARF, *supra* note 26 at 455.

[131] *Id.*

before the Tribunal in the event that there is a verdict in the national court, or that the national courts would take a narrow view of the crime of persecution, instead of giving it the full weight that it deserves.

There has not been a ruling on whether the Chamber would follow the ICC method of concurrent jurisdiction, which would allow the defendant to be brought before the Tribunal after standing trial before the national court for different conduct than that which forms the basis for prosecution. Therefore, there is a risk that the defendant would not be able to be brought before the Tribunal at all. Since the actus reas of the persecution can be comprised of other crimes against humanity, allowing this crime to be tried in a national court may prevent the Tribunal from trying any other crimes against humanity of which the defendant is accused. As this may run counter to the interests of justice, with a major war criminal being unable to be brought before an international tribunal and likely being subject to receiving a plea agreement, this course of action may be undesirable. Rwanda may also be unwilling to prosecute the crime within their courts since they are already over crowded with defendants awaiting trial for genocide related crimes.

Even if the defendant is able to be brought back before the Tribunal after a judgment in national court, this course of action may be undesirable. The possibility exists that a national court would not give the crime of persecution the full weight that it deserves. For example, if the individual conduct comprising the persecution is illegal under the laws of the nation where it occurred, the court may simply look at it as its component acts rather than the pattern of conduct. That is to say, it may be tried as a series of domestically illegal acts rather than as a “crime against humanity”. This would

not be in the interests of justice, as it would not allow for appreciation of the seriousness of the conduct that only becomes apparent when looking at the entire pattern.

Also, depending on the view of human rights within the country where the persecution took place, the crime may not be accorded full weight. If the country has a narrow view of human rights, the pattern of conduct which would normally be considered persecution within the international system may not lead to a conviction for persecution or any other crimes. For this reason, persecution can be a dangerous crime to rely on the national courts to adjudicate. Murder is murder everywhere, but the weight afforded to basic human rights depends heavily on the domestic system of the country in question. This means that there is a risk that the crimes in question would not be prosecuted anywhere. The danger of justice not being served is particularly troubling as the discriminatory intent necessary for persecution leads many to the conclusion that this is the most serious of all of the crimes against humanity.[132]

V. Relying on the Unclear Definitions of Protected Groups to Allow for Convictions

Of the various means to secure convictions for the persecution of ethnic or national minorities, the most likely to succeed is to rely on the blurred distinctions between the various groups. Since most members of one group could be found to also be members of another group, it is possible to find a group that is among the protected classes, even if this group is not the most accurate description of the victims. This means has met with great success within the ICTY, but there have been mixed results within the ICTR.

[132] Danner, *supra* note 12 at 481.

A. Definitions of the Protected Groups under the Statutes

For the purpose of the analysis of the Statute, it is important to note the definitions that the statutes give to the groups that are listed as protected either under genocide or crimes against humanity. In many cases these definitions are unclear, particularly when applied to the facts on the ground. For the purposes of this section five groups of "protected populations" under the Statutes' provisions are identified: racial groups, ethnic groups, religious groups, national groups, and political groups will be examined.

1. Racial Groups

One definition of a racial group is "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."[133] Racial group is "an archaic term used to describe what we now know as Ethnic groups."[134] The Proxmire Act defines a racial group as "a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent."[135] "Racial groups are defined primarily by the physical appearance of their members. The ICTR defined them in terms of 'the hereditary physical traits often associated with a geographical region, irrespective of linguistic, cultural, national, or religious factors'. Both of these conceptions accord with prior academic commentary. Drost, for example, notes that the word 'racial…refer[s] mainly to external, physical features and appearance…'"[136]

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[133] *Akayesu supra* note 1 at para. 514.

[134] MICHAEL SCHARF AND WILLIAM SCHABAS, SLOBODAN MILOSEVIC ON TRIAL 155 (2002). [Reproduced in accompanying notebook at Tab 32].

[135] 18 U.S.C. §1093 (2003). (Hereinafter Proxmire Act). (The implementing legislation of the Genocide Convention for the United States). [Reproduced in accompanying notebook at Tab 9].

[136] David L. Nersessian, *supra* note 52 at 260.

2. Ethnic Groups

According to the *Akayesu* decision, an ethnic group is defined as "a group whose members share a common culture or language."[137] They can also be "a group which distinguishes itself, as such (self-identification); or a group identified as such by others."[138] This group is "similar in many respects to a national or racial group."[139] The Proxmire Act defines them as a "set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage."[140] This view accords with both the travaux and prior academic writing, which indicate that the term 'ethnical' incorporates the social, linguistic, and cultural aspects of the group at issue."[141]

3. Religious Groups

The *Akayesu* Trial Chamber found that a "religious group is one whose members share the same religion, denomination or mode of worship."[142] This appears to be a functional definition grounded in the objective practices of group members. The Proxmire Act accounts for the subjective belief system of group members and defines a religious group as one whose members have a "common religious creed, beliefs, doctrines, practices or rituals."[143] There is room for controversy over whether a nonreligious or an atheistic group qualifies for protection under the Convention. An

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[137] *Akayesu supra* note 1 at para. 513.

[138] *Prosecutor v. Kayishema*, *supra* note 57 at para. 98.

[139] SCHARF AND SCHABAS, *supra* note 134 at 168.

[140] Proxmire Act, *supra* note 135.

[141] David L. Nersissian, *supra* note 52 at 261.

[142] *Akayesu supra* note 1 at para. 515.

[143] Proxmire Act, *supra* note 135.

atheistic group could presumably be comprised of individuals from a variety of faiths who rejected their religious heritage…"[144]

4. National Groups

The Trial Chamber in the *Akayesu* decision stated that based on an opinion by the ICJ "a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."[145]

The Proxmire Act defines a national group as one "whose identity as such is distinctive in terms of nationality or national origins."[146] "The implication of this formulation is that any individual can belong to at least two national groups simultaneously: the nation of birth origin and the nation(s) of current citizenship. In *Akayesu*, the ICTR defined a national group as 'a collection of people who are perceived to share a common legal bond based on common citizenship, coupled with reciprocity of rights and duties.' Thus, group members' personal conception of their own nationality (whether by affiliation or otherwise) is not dispositive. The focus on the legal aspects of nationality (on 'rights and duties' and 'a common legal bond') indicates that a collection of individuals organized on the basis of political beliefs is insufficient to establish nationality without some additional legal interest tying them together. This accords with the intent of the…drafters to distinguish national groups from political groups."[147]

5. Political Groups

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[144] David L. Nersissian, *supra* note 52 at 261.

[145] *Akayesu supra* note 1 at para. 512.

[146] Proxmire Act, *supra* note 135.

[147] David L. Nersissian, *supra* note 52 at 261.

Political groups lack as substantial of a definition as the other protected groups under the statute. This is largely due to the fact that these groups were intentionally left out of the Genocide Convention since they are not a "stable and permanent group". "Political grounds include party political beliefs and political ideology."[148] Although national groups have been distinguished from political groups, it seems likely that a political group which overlaps with a national group would enjoy the protections of both. For the purposes of the Statutes, it would seem the term "political group" would have the meaning which it is given in common usage, a group of individuals who share a common political ideology. In these cases, common ideology would not necessarily mean identical. The key factor would likely be by which political ideology the victim would identify themselves with. The group could also be a negative one. That is, it could consist of all of those who oppose state policy.

Another possibility is that a political group would not necessarily have to share a common ideology, but would rather be more of a reflection of socio-economic status. That is to say, that if one class is the ruling class and another is a "subordinate" class; any persecutions based on this distinction may be considered to be based on political grounds.

B. <u>The Ambiguity and Overlap of Groups Definitions as Applied to the Facts</u>

It is important when applying the Statutes for the Tribunals to note that the ambiguity of some of these definitions of "protected groups" and the overlap that is inherent to these groups although on paper they are distinct categories, this can lead to confusion and a possible inability to fulfill the intent of the drafters of the Statutes. "To recognize that there exists discrimination on racial or ethnic grounds, it is not necessary

[148] *Prosecutor v. Kayishema*, *supra* note 57 at para. 130.

to presume or posit the existence of race or ethnicity itself as a scientifically objective fact."[149] The fact that individuals subjectively believe that either race or ethnicity exist is enough.

For example, in the case of the Tutsis in Rwanda there are several categories under which they could be included. They can be considered a racial group, since "there are slight physiological differences between [the] groups: the Tutsi are generally tall and thin with facial features resembling those of Ethiopians or Somalis, while the Hutu tend to be shorter and stouter."[150] This distinction has become somewhat less clear over the years due to intermarriage between Hutus and Tutsis.[151]

Hutus and Tutsis could also be considered to be ethnic groups due to the aforementioned legal status of the groups within Rwanda itself as ethnic groups. In fact, the Trial Chamber in the *Akayesu* case held that due to this legal status and the self-identification of Rwandan witnesses as members of an ethnic group, that Hutus and Tutsi constituted separate ethnic groups. Again, however, the Hutus and Tutsis do not meet the strict definition of ethnic groups as the ICTR has described them.[152] Therefore, this grouping is not entirely accurate for use in the Tribunals definitions.

They could also be considered to be political groups. Although there is no clear sign that the Hutu and the Tutsi maintained political ideologies distinct from one another, there is a possibility that they were in fact distinct political groups. This is based in part

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[149] SCHECHTMAN AND VAN DER WOLF, *supra* note 7 at 269.

[150] Linda Maguire, *supra* note 5 at 51. (Physiological differences are important in the identification of a racial group).

[151] Schabas, *supra* note 64 at 379.

[152] *Prosecutor v. Akayesu*, *supra* note 1 at para. 513. (The Hutus and Tutsis have the same language and a similar culture).

on the fact that for a large portion of Rwandan history, the minority Tutsis were the ruling political class. The Hutus had achieved power sometime before the plane crash that killed the President in 1994. It was at this time that the atrocities in Rwanda began. It seems that they were at least partially motivated by resentment brought about by years of minority rule.[153] Ethnic tensions were also used by those in power to carry out plans to avoid power sharing.[154] Some killings of moderate Hutus were based on the fact that they supported power sharing with the Tutsis. This may be enough to establish the Hutus and Tutsis as distinct political groups. There does not seem to have been national or religious ground for the atrocities in Rwanda.

A similar lack of clarity can be found in the Former Yugoslavia in the *Tadic* case.[155] In the case where the Bosnian Croats and Bosnian Muslims were considered to be of a different nationality than the Bosnian Serbs, they could also be considered to be respectively, a different ethnicity and different religious group as well.

C. Application of this Principle to Case Law

The were several cases within the ICTR where charges were brought against a Hutu defendant for persecution against a Tutsi victim. Despite the tendency of judges within their judgments to refer to the Tutsis as an ethnic group, there has been a demonstrated ability to obtain convictions for persecution. In the *Ruggiu* case, the court referred to the Tutsis as an ethnic group, but Ruggiu was convicted after pleading guilty

[153] SCHECHTMAN AND VAN DER WOLF, *supra* note 7.

[154] *Prosecutor v. Kayishema, supra* note 57 at para. 54.

[155] *Prosecutor v. Tadic, supra* note 83 at 513.

to persecution on racial and political grounds.[156] Ruggiu was also convicted for statements made against Belgians. The judgment mentions political or racial grounds. However, some of the statements seem as though they could have been made on national grounds instead. For example, he accused Belgium of shooting down the President's plane, and he also pointed out that three whites were killed with the RPF but they were not just any whites, they were Belgians.[157]

In the *Semanza* case, the defendant was acquitted of persecution.[158] However, although the charge was brought for persecution on political grounds the court held that the prosecution did not adequately explain the deaths of Hutus on the scene, since the primary target was the Tutsi ethnic group. The Trial Chamber also specifically rejected the prosecutor's assertion that persecution had occurred on ethnic grounds, and noted that national and ethnic grounds are not included among the protected groups.[159]

In the *Prosecutor v. Simic* case, the Trial Chamber examined the law of persecution. Discussing the protected groups under the Statute, the Chamber held

> the targeted group does not only comprise persons who personally carry the (religious, racial, or political) criteria of the group. The targeted group must be interpreted broadly, and may, in particular include such persons who are defined by the perpetrators as belonging to the victim group due to their close affiliations or sympathies for the victim group.[160]

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[156] *Prosecutor v. Ruggiu*, Judgment, Case No. ICTR-97-32-I, 1 June 2000. [Reproduced in the accompanying notebook at Tab 14]

[157] *Id.* at para. 44.

[158] *Prosecutor v. Laurent Semanza*, Judgment, Case No. ICTR-97-20-T, 15 May 2003. [Reproduced in the accompanying notebook at Tab 16]

[159] *Id.* at para. 350.

[160] *Prosecutor v. Simic*, Judgement, IT-95-9-T, 17 October 2003. [Reproduced in accompanying notebook at Tab 17].

In the ICTY, there has been more success in obtaining conviction for persecution. However, this has been aided by the existence of persecutions against Bosnian Muslims. The law in the ICTY seems to have been stretched to accommodate the persecution of Bosnian Croats as well however.

In the *Kupreskic* case, the court found the defendants guilty of the persecution of Bosnian Muslims.[161] Although the Muslims would seem to be a religious group under the common definition of the term, they were widely considered to be an ethnic group as well. Dusko Tadic was also convicted of persecution before the ICTY for discriminatory actions taken against Bosnian Croats and Bosnian Muslims, again both arguably ethnic groups.[162] This was allowable as a political persecution since they were committed as part of a political campaign to commit ethnic cleansing.[163] There have been several other cases in which a Trial Chamber found a defendant guilty of persecution in the ICTY, a total of eleven cases ending in conviction. Therefore, it seems clear that the ICTY is not having difficulty defining the protected groups under the Statute in such a way as to protect the victims of persecution.

D. Practical Effects of Relying on the Overlap of Definitions

It would be possible to convict the leadership of the Hutu ethnic group of persecution under the theory that they were persecuting against the Tutsi ethnic group in an effort to maintain political power or that they were attempting to persecute a political group that largely consisted of Tutsi.[164] "Difficulty in constructing a definition does not

[161] *Prosecutor v. Kupreskic et al, supra* note 32.

[162] *Prosecutor v. Tadic, supra* note 83.

[163] Alvarez, *supra* note 93 at 2059.

[164] Wang, *supra* note 3 at 209.

render an expression useless, particularly from a legal point of view."[165] In fact, this ambiguity leaves considerable discretion in the hands of the Trial Chambers, which permits them to adapt to the changing social and political climate.[166] These five groups- national, ethnic, racial, religious, and political- "necessary involve a degree of subjectivity because their meaning is determined in a social context."[167] The terms "not only overlap, they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups…find protection."[168]

The *Semanza* Judgment stated that a determination of whether a group is protected should be assessed on a case-by-case basis by looking at the objective context and the subjective perceptions of the perpetrators.[169] Also, according to the *Rutaganda* judgment, each of the groups must be "assessed in light of the particular political, social, and cultural context."[170] It has also been observed that

The International Convention on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination. In that convention, the term "racial discrimination" means any "distinction, exclusion, restriction or preference based on

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[165] William A. Schabas, *supra* note 64 at 384.

[166] *Developments in the Law-International Criminal Law: IV. Defining Protected Groups Under the Genocide Convention*, *supra* note 66 at 2021.

[167] William A. Schabas, *supra* note 64 at 384.

[168] *Id* at 385.

[169] *Prosecutor v. Laurent Semanza*, *supra* note 158.

[170] *Prosecutor v. Rutaganda*, Judgment, ICTR-96-3, 6 December 1999. [Reproduced in accompanying notebook at Tab 15].

race…or national or ethnic origin."[171] This suggests that the definition of "race" in international law may be broad enough to include ethnic and national minorities.

Relying on the overlap of the definition of the protected groups is a dangerous route to take. As was shown in the *Semanza* case, a Chamber can dismiss a count if they do not feel that the facts have been adequately explained by the prosecution to account for discrepancies caused by the overlapping definitions.[172] Therefore, it would be important to clearly explain how the evidence leads to the conclusion that the victim population belongs to a particular protected group despite the fact that they also belong to a particular unprotected group. If this cannot be adequately explained, this tactic is likely to fail. Also, mistake of fact by the defendant of which group a victim belongs to may not be enough to bring a conviction.[173]

However, it must be possible to defeat an argument of innocence based on the blurred distinctions between groups. If decisions similar to *Semanza* continue to come about, it would be a challenge to prosecute for persecution at all. The lack of clarity about which group the Hutus and Tutsis belong in could allow the defendants to argue that they focused their campaign on an unprotected group rather than a protected group.[174]

VI. Application of Rwandan Treaty Law in the ICTR

[171] International Convention on the Elimination of All Forms of Racial Discrimination, 60 UNTS 195. [Reproduced in the accompanying notebook at Tab 23].

[172] *Prosecutor v. Laurent Semanza*, *supra* note 158.

[173] Mettraux, *supra* note 35 at 269.

[174] Wang, *supra* note 3, at 208.

The international tribunal may apply international agreements binding upon the conflicting parties. This decision was reached in the *Tadic* Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction.[175] According to this decision the sole purpose of the Tribunal applying customary international law was to avoid violating the principle of nullum crimen sine lege in the event that a party did not adhere to a specific treaty. Therefore, "it follows that the International Tribunal is authorized to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offense; and (ii) was not in conflict with or derogating from peremptory norms of international law."[176] For example, Rwanda had acceded by legislative decree to the Convention on Genocide[177] Rwanda was also a party to the ICCPR, CERD, and ICESC.[178] Under the principle of succession, any treaties that the previous government had entered into would be binding on the new government, and these treaties would be binding at the time of the violations. Therefore, prosecutions could be brought before the Tribunal for the violations of these treaties. This would not technically allow conviction for persecution, but would rather allow conviction for the same acts as if the charge was for persecution under the Statute.

VII. Conclusion

The ability of the chambers of the ICTR and ICTY to determine their own jurisdiction under the principle of competence de la competence, as was laid out in the *Tadic* case, combined with the prior extension of the protected populations of the crime

[175] *Prosecutor v. Tadic,* Interlocutory Appeal, *supra* note 91 at para. 143.

[176] *Id.*

[177] *Prosecutor v. Akayesu, supra* note 1 at para. 496.

[178] [Reproduced in accompanying notebook at Tab C].

of Genocide and Grave Breaches of the Geneva Conventions leads to the conclusion that it would be possible to extend the protections afforded under the Crimes Against Humanity section of the ICTR and ICTY Statutes to include ethnic and national minorities in an effort to satisfy the intent of the statute.

Furthermore, the Tribunals would be able to surrender a defendant to the national courts in order that they could be prosecuted for the crime of persecution on ethnic and national grounds. However, there would be limitations to this possibility. There is a requirement that a defendant not be tried for a crime for which he had previously been convicted of in the International Tribunals. In addition, there would be a requirement that the persecution rise to the level of customary international law which would grant the nation the ability to try the crime under universal jurisdiction. This would be necessary since it would be unlikely that the nation would have a law against persecution on a domestic level, although they may have crimes against the individual upon which the persecution is comprised.

The final means to obtain a conviction for persecution against an ethnic or national minority would be to maintain the present course of indictments. Given the unclear and even overlapping nature of the definitions of the protected groups under the Statutes of the Tribunals, the ethnic and national minorities would likely be protected under another category of protected class.

Given the inherent limitations of the second two possibilities of obtaining convictions for the persecution of ethnic and national minorities, the best course of action would be to attempt to expand the protected classes as was done for the crime of genocide.

However, one of these means must be successful as "the Statute for the Tribunal was drafted specifically for application to the Rwanda events and…was written with the ultimate goal of trying and convicting those clearly responsible for orchestrating the killing of hundreds of thousands of people."[179] The Tribunal must keep this purpose in mind as it interprets the words of its Statute.

[179] Wang, *supra* note 3 at 210.