

# Persecution in International Criminal Law and International Refugee Law

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*The term “persecution” pertains to both international criminal law and refugee law. In light of the fact that displacement is often a result of large scale human rights deprivation, it seems likely that intersections and possibilities of cross-referencing exist. This paper analyses the correlation of persecution as an international crime and as the core element of the refugee definition. On the one hand, persecution is a crime against humanity pursuant to Art. 7 (1) (h) ICC Statute and is defined as “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity” (Art. 7 [2] [g] ICC Statute). On the other hand, persecution is part of the refugee definition of Art. 1 A (2) Refugee Convention. Art. 1 A (2) Refugee Convention defines as a refugee a person who, “owing to well-founded fear of being persecuted [...] 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”. In this paper, the term “persecution” is interpreted in both contexts in order to detect similarities and differences. It is argued that a refugee phenomenon implies the existence of the crime of persecution and that respective authorities should engage in cross-referencing and information exchange.*

## I. Introduction

International criminal law and international refugee law are not obviously intertwined, but do have some intersections. One rather noticeable similarity lies in the term “persecution”:<sup>1</sup> Persecution is a crime against humanity defined in, inter alia, Art. 7 (1) (h) of the Rome Statute of the International Criminal Court (“ICC Statute”). At the same time, persecution is part of Art. 1 A (2) of the 1951 Convention Relating to the Status of Refugees (“CSR51”/“Refugee Convention”), which defines a refugee as a person who, “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 [...] to avail himself of the protection of that country [...]”. This wording has been adopted in regional and domestic refugee law. For instance, Art. 2 (d) 2011 EU Qualification Directive (“QD11”) is a verbatim reflection of the Refugee Convention’s refugee definition with equivalent translations into the Member States’ domestic law also referring to persecution<sup>2</sup>. Section 96 of the Canadian Immigration

and Refugee Protection Act also includes the internationally agreed refugee definition with reference to “persecution” as does, e.g., section 101 (a) (42) of the US Immigration and Nationality Act.

Although the recognition as a refugee by the State of refuge is a peaceful and humanitarian act which shall not be regarded as an unfriendly act by another State,<sup>3</sup> it suggests that some kind of discriminating human rights violation in the State of nationality has occurred. At the same time, large-scale discriminating human rights violations can constitute an international crime. This paper therefore analyses whether analogies between the understanding of persecution within the refugee context and persecution as an international crime exist and if so, whether such similarities can be considered in the assessment of a refugee claim or an international crime in order to facilitate the confirmation of persecution in one or the other context. Cross-referencing with regard to the interpretation of “persecution” would then advance refugee protection through reference to international criminal law.

The paper concentrates on “persecution” as a crime against humanity since this crime and persecution in Art. 1 A (2) Refugee Convention have the most common features. Although the parallel is striking, the exact analogies but also discrepancies have never been analysed nor have legal practice or academia argued for cross-applicability. This, however, suggests itself not only because of the same wording. Both phenomena are based on human rights violations on discriminatory grounds. Persecution as crime against humanity is, just like persecution in the context of the refugee definition, not confined to an armed conflict context. It moreover is not focused on relocation of the victim (such as, for instance, the crimes of deportation or forcible transfer are) but on discriminatory measures. Whereas relocation inheres in the concept of a refugee, the change of locality itself is not necessarily driven by the agent of persecution.

It suggests itself that the crime of persecution is more limited than the element of persecution within the refugee definition,<sup>4</sup> as the first is merely to determine individuals who are responsible for a crime against humanity, i.e., one of the most serious crimes. Although the legal definitions might not entirely concur, there might be factual circumstances that allow a conclusion from one phenomenon to the other. Based on the presumption that the crime of persecution is narrower than the notion of persecution in refugee law, only those elements of the refugee definition will be analysed that have an equivalent counterpart in the elements of crime. Questions relating

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<sup>1</sup> See for another intersection in the context of exclusion of refugees with a macro-criminal background Li, Exclusion from Protection as a Refugee, 2017.

<sup>2</sup> See, e.g., the French version in Article L711-1 Ceseda (“persécutée”) with explicit reference to the Refugee Convention; the Italian version in Art. 7 of the Qualification Decree (“persecuzione”) also with explicit reference to Art. 1 (A)

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Refugee Convention; the German version in § 3 (1) Nr. 1 AsylG (“Verfolgung”).

<sup>3</sup> Art. II (2) OAU Refugee Convention; Art. 3 of the 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World; Conclusion No. 4 of the 1984 Cartagena Declaration on Refugees.

<sup>4</sup> ICTY, Trial Judgement of 14.1.2000 – IT-95-16-T (Prosecutor v. Zoran Kupreškić et al.), para. 589.

to “internal flight alternative”, the threshold for “well-founded fear”, or evidentiary issues are therefore not part of this paper.

## II. Cross-referencing between International Refugee Law and International Criminal Law

Generally, the idea of cross-referencing has emerged in international law with the idea of an interdisciplinary exchange between the different fields of international law. “Cross-fertilisation” is acknowledged as either a method of “transjudicial communication” or “normative cross-referencing”.<sup>5</sup> With the recognition of increasing fragmentation in international law<sup>6</sup>, treaty interpretation on the basis of “systemic integration” pursuant to Art. 31 (3) (c) VCLT69 has become one idea to overcome such fragmentation.<sup>7</sup> However, the idea of this paper is not to converge interpretation so that it is interchangeable or to alter one meaning to conform to the other. Rather, “transjudicial” – or even “trans-authority” communication would be a worthwhile practice in the determination of persecution. *Smith* takes a comparable approach with regard to ICC complementarity decisions: He suggests that practitioners should rely on such decisions for refugee status determination when it comes to the level of protection afforded by the State of nationality.<sup>8</sup> Similarly, refugee status determination could refer to ICC decisions when it comes to the level of persecution the asylum seeker has fled from.

The idea of cross-referencing for contouring the term “persecution” has already been considered selectively in practice, literature, and jurisprudence. For instance, UNHCR draws on the definition of persecution in the ICC Statute when confirming that persecution could also be committed by non-State agents. UNHCR concludes: “It would be contradictory if the international community were to qualify such offences as persecution under criminal law and punish their perpetrators but were to refuse to acknowledge an offence of persecution under refugee law and deny the victims reasona-

ble international protection.”<sup>9</sup> In another context, *Zimmermann* and *Mahler*, in the commentary on the Refugee Convention, refer to the ICC Statute when discussing whether persecution (in the context of the refugee definition) needs to be intentional.<sup>10</sup> As the commentators correctly observed, both treaties have genuinely different characters: Whereas the ICC Statute establishes criminal liability, the Refugee Convention’s refugee definition focuses on human rights violations on one of the listed grounds.<sup>11</sup> The ICTY has, in order to define “persecution” as a crime, established in its *Tadić* trial judgement that refugee law is a “distinct area of municipal and international law and thus its norms cannot readily be applied to customary international criminal law entailing individual criminal responsibility”.<sup>12</sup> It also stated that “[i]t 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. [...] The result is that the net of “persecution” is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility.”<sup>13</sup> *Hathaway* and *Foster* similarly emphasise the different object and purpose of both fields of law and support only a marginal implication from criminal law for refugee law with reference to the ICTY *Kupreškić* trial judgement:

“This holding sensibly implies that any refugee claimant who is able to show that her persecutor actually did engage in acts deemed “persecution” at international criminal law faces a risk of a sufficient gravity to amount to persecutory harm for refugee law purposes, since the former is a subset of the latter. But it would be both legally unjustified and dangerous to suggest any tighter connection than this based upon little more than the superficial similarity of words used in treaties with dramatically different objects and purposes.”<sup>14</sup>

Therefore, one major distinction is that in international criminal law, the perpetrator’s individual criminal responsibility needs to be established, whereas international refugee law focuses on the human rights violation the refugee seeks pro-

<sup>5</sup> *Geneuss*, *Nordic Journal of International Law* 15 (2015), 404 (405–406), with reference to *Wiener/Liste*, *Indiana Journal of Global Legal Studies* 21 (2014), 263.

<sup>6</sup> On fragmentation in international law see *Andenas/Bjorge*, *A Farewell to Fragmentation – Reassertion and Convergence in International Law*, 2015, passim; *Jakubowski/Wierczyńska* (eds.), *Fragmentation vs the Constitutionalisation of International Law*, 2016, passim; *Canefe*, in: *Simeon* (ed.), *Critical Issues in International Refugee Law – Strategies Toward Interpretative Harmony*, 2010, p. 174; *Carcano*, *Journal of International Criminal Justice* 14 (2016), 771; *Cassimatis*, *International and Comparative Law Quarterly* 56 (2007), 623; *McLachlan*, *International & Comparative Law Quarterly* 54 (2004), 279.

<sup>7</sup> *International Law Commission*, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58<sup>th</sup> session, 13 April 2006, A/CN.4/L.682, passim.

<sup>8</sup> *Smith*, *International Journal of Refugee Law* 20 (2008), 166 (185).

<sup>9</sup> *UNHCR*, *Opinion of UNHCR regarding the question of non-State persecution*, as discussed with the Committee on Human Rights and Humanitarian Aid of the German Parliament (Lower House) on 29 November 1999, 1999, para. 18.

<sup>10</sup> *Zimmermann/Mahler*, in: *Zimmermann* (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, 2011, Art. 1 A para. 2., para. 232. See for details *infra* III. 5.

<sup>11</sup> *Zimmermann/Mahler* (fn. 10), para. 232.

<sup>12</sup> ICTY, *Trial Judgement of 7.5.1997 – IT-94-1-T* (Prosecutor v. Duško Tadić), para. 694; see also ICTY, *Trial Judgement of 14.1.2000 – IT-95-16-T* (Prosecutor v. Zoran Kupreškić et al.), para. 589.

<sup>13</sup> ICTY, *Trial Judgement of 14.1.200 – IT-95-16-T* (Prosecutor v. Zoran Kupreškić et al.), para. 589.

<sup>14</sup> *Hathaway/Foster*, *The Law of Refugee Status*, 2<sup>nd</sup> ed. 2014, p. 193.

tection from. Simply speaking, international criminal law focuses more on the perpetrator and international refugee law more on the victim.<sup>15</sup> This apparent contrasting proposition does, however, not per se argue against a comparison of the meaning of “persecution”. Keeping the genuine distinctions in mind, this paper therefore does not seek to implement one definition to another context, but asks whether under certain conditions, overlaps exist that would simplify the application of the provisions.

### III. “Persecution” as Defined in International Criminal Law and International Refugee Law

The provision of “persecution” in the ICC Statute is understood as the first definition of this term in an international binding document.<sup>16</sup> The definition is evidently inspired by the ICTY Tadić trial judgement<sup>17</sup> and Art. 18 of the 1996 Draft Code<sup>18</sup>. The International Law Commission’s 2019 Draft Articles on crimes against humanity<sup>19</sup> reflect in its Art. 2 (1) (h) and Art. 2 (2) (g) almost<sup>20</sup> the same definitions as the ICC Statute. Art. 7 (1) (h) ICC Statute reads:

<sup>15</sup> Similarly ICTY, Trial Judgement of 14.1.2000 – IT-95-16-T (Prosecutor v. Zoran Kupreškić et al.), para. 589.

<sup>16</sup> *Hall/Powderly/Hayes*, in: Triffterer/Ambos (eds.), Rome Statute of the International Criminal Court: A Commentary, 3<sup>rd</sup> ed. 2016, Art. 7 para. 71. Although “persecution” is mentioned as crime against humanity already in all earlier international criminal law instruments such as the Nuremberg and Tokyo Charters, Control Council Law No. 10, the Nuremberg Principles, the ICTY and ICTR Statute, the Statutes of the East Timor Tribunal, the SCSL, and the ECCC, the crime was never defined until the Rome Conference in 1998. The ICC Statute can be regarded as the most important source of international treaty law as it is the latest and most comprehensive document in the field of international criminal law. However, the provisions of the ICC Statute do not precisely reflect customary international law in all cases; sometimes it is more “progressive” and further develops customary law; sometimes, it lags behind customary international law. Therefore, although the treaty text is a valid basis for interpretation, whenever it deviates from customary international law, the latter should be the authoritative meaning as it is universally binding.

<sup>17</sup> ICTY, Trial Judgement of 7.5.1997 – IT-94-1-T (Prosecutor v. Duško Tadić), para. 697.

<sup>18</sup> ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, Report of the ILC on the work of its 48<sup>th</sup> session, 1996, p. 47.

<sup>19</sup> ILC, Crimes against humanity – Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading, 71<sup>st</sup> Session, A/CN.4/L.935, 15 May 2019.

<sup>20</sup> While the ICC Statute requires a “connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”, the ILC draft article does not refer to the jurisdiction of the ICC but merely to “any act referred to in this paragraph” (i.e., any other crime against humanity).

“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (h) 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 recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court [...].”

Art. 7 (2) (g) further stipulates: “‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity [...].” The Elements of Crimes (EoC) accompanying the Rome Statute list six elements of the crime against humanity of persecution, which serve as interpretative guidance.

In contrast, in the context of international refugee law, no universally accepted definition exists.<sup>21</sup> The term “persecution” is neither defined in the Refugee Convention nor in any other relevant human rights instrument. Moreover, no consistent case law exists on the definition.<sup>22</sup>

The different status of definition and codification does not come as a surprise since international criminal law must comply with the rule *nullum crimen, nulla poena sine lege*. Whereas the exact scope of this rule is unclear in international criminal law and has experienced misinterpretation, if not violation by Courts and Tribunals, at least the *lex certa* and *lex praevia* component can be said to be valid in international criminal law.<sup>23</sup> That is, a conduct must have been established as crime in advance and in a defined way in order to be punishable. In the specific case of the ICC, its scope of applicable law according to Art. 21 ICC Statute is difficult to define, especially taking into account the *lex scripta* principle as set forth in Art. 22–24 ICC Statute.<sup>24</sup> Nevertheless, the codification of persecution in the ICC Statute was an important step to include it into the Court’s jurisdiction. Persecution in international refugee law, on the other hand, rather affects the question of when a person can be considered to have suffered from human rights violations in order to claim protection from a national State. Therefore, although it would be desira-

<sup>21</sup> *UNHCR*, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, HCR/1P/4/ENG/REV. 4, 2019, para. 51.

<sup>22</sup> *Zimmermann/Mahler* (fn. 10), para. 223.

<sup>23</sup> See *Ambos*, Treatise on International Criminal Law, Vol. I: Foundations and General Part, 2013, p. 88–93; for a comprehensive analysis of the principle of legality in international criminal law see *Cote*, Rückwirkung und die Entwicklung der internationalen Verbrechen, 2018.

<sup>24</sup> *Ambos* (fn. 23), p. 92–93. See for a rejection of customary international law to establish or increase conviction for an international crime *Fletcher/Ohlin*, Journal of International Criminal Justice 3 (2005), 539 (555–559).

ble, the standard in refugee law is not authoritatively defined on an international level.

### 1. Severe Deprivation of Fundamental Rights/Human Rights Violation

According to Art. 7 (2) (g) ICC Statute, the crime of persecution has to amount to a “severe deprivation of fundamental rights contrary to international law”; at the same time, persecution in the context of international refugee law is defined by commentators as “the severe violation of human rights accompanied by a failure of the State to protect the individual”.<sup>25</sup> Both terms therefore require a severe human rights violation that reaches a certain threshold.<sup>26</sup> With respect to the crime of persecution, this is own to the fact that only severe acts that affect the international community as a whole are considered international crimes; in refugee law, refugee protection duties address third States, which does not face the same level of duties as the State of nationality<sup>27</sup>, requiring a more severe human rights violation to trigger such protection rights.

Clearly, international human rights treaties, but also customary international law are sources of protected rights. In terms of the crime of persecution, the commentary to the 1996 ILC Draft Code refers to “human rights and fundamental freedoms to which every individual is entitled without distinction”<sup>28</sup>. The ICTY explicitly listed a number of human rights affirmed in the 1948 Universal Declaration of Human Rights (UDHR48), the violation of which “by their very essence may constitute persecution when committed on discriminatory grounds”<sup>29</sup>. Such rights are: the right to life, liberty and the security of the person, the right not to be held in slavery or servitude, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the right not to be subjected to arbitrary arrest, detention or exile.<sup>30</sup>

The Refugee Convention, especially in light of its humanitarian object and purpose<sup>31</sup>, also draws on the most im-

portant human rights instruments and human rights.<sup>32</sup> In comparison with the rights protected in criminal law, refugee law is more inclusive when it comes to civil and political rights. Not only infringements of the right to freedom, life, or personal integrity may trigger refugee protection, but also impairment of the right to due process (Art. 14 ICCPR66), the freedom from arbitrary interference with the privacy (Art. 17 ICCPR66), the freedom of thought, conscience, religion (Art. 18 ICCPR66) and expression (Art. 19 ICCPR66), the freedom to choose its own sexual orientation, the right to association (Art. 22 ICCPR66) and to take part in public affairs (Art. 25 ICCPR66). This set of rights is indispensable for a self-autonomous, political life.

The wider scope of protected rights can be explained if recalling that refugee rights are granted to persons who cannot be reasonably demanded to stay in their country of origin, whereas the crime of persecution is more restricted to the most serious infringements. For the same reason, the violation of socio-economic rights is also less likely to constitute a crime against humanity, whereas deprivations of essential rights that impair life as such (e.g., the right to earn a living, to food, shelter, and healthcare<sup>33</sup>) can be qualified as persecution with regard to refugee status determination. The targeting of property can, however, if conducted with discriminatory character and capable of destroying the economic livelihood of the targeted group, amount to persecution in both contexts.<sup>34</sup>

Whether a specific human rights violation amounts to persecution is dependent on a range of factors such as the intensity of the act, its duration, or whether it is an individual case or part of a larger campaign. Importantly, in refugee law, the individual effect of the persecutory act on the respective person is also to be taken into consideration; since Art. 1 A (2) CSR51 requires merely the “fear of being persecuted”, this is moreover to be determined from a subjective point of view, i.e., depending on the perception of the violated person.<sup>35</sup> Here, the more “victim-centred” perspective of refugee

<sup>25</sup> *Zimmermann/Mahler* (fn. 10), para. 216. Such human rights violation is not confined to a threat for life or freedom as stipulated for the prohibition of *non-refoulement* in Art. 33 (1) CSR51, since the prohibition of *non-refoulement* is to provide minimum protection in case of severe threats, whereas refugee status grants a set of standards and positive rights to all persecuted persons (cf. *Li* [fn. 1], p. 24, 34, 54; *Zimmermann/Mahler* [fn. 10], para. 221).

<sup>26</sup> See also *Zimmermann/Mahler* (fn. 10), para. 224.

<sup>27</sup> *Zimmermann/Mahler* (fn. 10), para. 226.

<sup>28</sup> ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, Report of the ILC on the work of its 48<sup>th</sup> session, 1996, p. 49.

<sup>29</sup> ICTY, Trial Judgement of 3.3.2000 – IT-95-14-T (Prosecutor v. Tihomir Blaškić), para. 220.

<sup>30</sup> Art. 3, 4, 5, 9 UDHR48.

<sup>31</sup> See Recitals 1, 2, 5 CSR51; *Kwakwa*, International Journal of Refugee Law 12 (2000 spp.), 79 (81); *Alleweldt*, in: *Zimmermann* (ed.), The 1951 Convention Relating to the

Status of Refugees and its 1967 Protocol: A Commentary, 2011, Preamble 1951 Convention, para. 31.

<sup>32</sup> *Zimmermann/Mahler* (fn. 10), para. 252; High Court of Australia, Minister for Immigration and Multicultural Affairs v Haji Ibrahim, [2000] HCA 55, 26 October 2000, Case no. S157/1999, para. 55 [Mc Hugh J].

<sup>33</sup> *Foster*, International Refugee Law and Socio-Economic Rights – Refuge from Deprivation, 2007, p. 94–96; *Hathaway/Foster* (fn. 14), p. 235–236; *Zimmermann/Mahler* (fn. 10), para. 258. See further on the right to medical treatment *Zimmermann/Mahler* (fn. 10), para. 263.

<sup>34</sup> See *Foster* (fn. 33), p. 109 f.; ICTY, Trial Judgement of 14.1.2000 – IT-95-16-T (Prosecutor v. Zoran Kupreškić et al.), para. 631; *Werle/Jessberger*, Principles of International Criminal Law, 3<sup>rd</sup> ed. 2014, para. 993 with further references in fn. 283.

<sup>35</sup> Cf. *UNHCR*, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, HCR/1P/4/ENG/REV. 4, 2019, paras. 37–40; *Zimmermann/Mahler* (fn. 10), para. 227.

law becomes evident. With regard to the severity threshold, for a deprivation to qualify as a crime, it must reach a similar gravity threshold as other crimes against humanity.<sup>36</sup> This does not contradict the approach in refugee law, which takes human dignity as the key indicator for persecution<sup>37</sup>.

It must be kept in mind that for the crime of persecution, a violation that in isolation does not reach the severity level can, if assessed in the context of a possible discriminatory policy and together with other acts, still qualify as persecution.<sup>38</sup> The same holds true for persecutory acts in refugee law: If amounting to a “sustainable, persistent, or systematic risk of human rights violations”, this can be sufficient for persecution.<sup>39</sup> On the other hand, a severe violation such as torture can constitute persecution in refugee law even if it has occurred on a single basis; even a serious threat suffices.<sup>40</sup> Whereas a single severe human rights violation might also amount to persecution as crime against humanity if committed as part of a widespread or systematic attack, a serious threat would not be sufficient to convict the accused of the crime of persecution. Here again, the focus on the refugee (whom one would not expect to wait for the actual harm to take place in order to seek protection) becomes relevant again. Lastly, the deprivation can – in both refugee law and criminal law contexts – take any form, be it a physical violation, an economic impairment or a legal measure.<sup>41</sup>

## 2. Identity of a Group or a Collectivity/Discrimination

According to the wording of Art. 7 (1) (h) ICC Statute, the persecutory act must be directed against “any identifiable group or collectivity”.<sup>42</sup> Identifiability can be grounded on the subjective view of the perpetrator, of the victim or on objective criteria.<sup>43</sup> The “identity” requirement and the discriminatory criterion are obviously intertwined;<sup>44</sup> nevertheless, it should be distinguished between the identifiable group and the subjective discriminatory grounds. The targeted group must merely be identifiable but need not to objectively satisfy one of the mentioned criteria (political, racial, nation-

al, etc.); the latter are rather grounds on which the conduct must take place, thus part of the mental element.<sup>45</sup> The discriminatory intent is therefore a specific intent (*dolus specialis*) in a technical sense<sup>46</sup>, i.e., an intent that goes beyond the objective requirements.

For the refugee definition, no such objective identifiability is required. The discriminatory grounds become relevant on a subjective level (“for reasons of”) only. The refugee does not have to in fact possess that distinguishing attribute; it rather suffices that the persecutor attributes such a characteristic to the refugee (Art. 10 [2] QD11).<sup>47</sup> This results in a formally wider understanding of persecution in the refugee law context; factually, however, the identifiability requirement in criminal law would not preclude many instances in which the perpetrator only satisfies the discriminatory intent without a corresponding identifiable group.

## 3. Connection with an International Crime

Interestingly, the ICC Statute prescribes a link to another crime against humanity or a crime within the jurisdiction of the ICC, i.e., the deprivation of human rights only then amounts to persecution if committed in connection with another international crime. This requirement apparently restricts the scope of application; however, it does not reflect customary international law since the latter has overcome the nexus requirement<sup>48</sup>. With respect to the jurisdiction of the ICC, the connection requirement narrows down the scope of the crime of persecution to crimes committed simultaneously with another crime;<sup>49</sup> if only taking into account customary international law, no such connection is required.

For qualification as a refugee, persecution obviously does not have to occur in connection with another international crime. In this respect, the refugee definition is, again, wider than the crime of persecution as it is defined in the ICC Statute.

<sup>36</sup> ICTY, Appeals Judgement of 29.7.2004 – IT-95-14-A (Prosecutor v. Tihomir Blaškić), para. 135; *Ambos*, Treatise on International Criminal Law, Vol. II: The Crimes and Sentencing, 2014, p. 106.

<sup>37</sup> *Zimmermann/Mahler* (fn. 10), para. 248.

<sup>38</sup> *Werle/Jessberger* (fn. 34), para. 991 with further references in fn. 279.

<sup>39</sup> *UNHCR*, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, HCR/1P/4/ENG/REV. 4, 2019, para. 53; *Hathaway/Foster* (fn. 14), p. 102.

<sup>40</sup> *Zimmermann/Mahler* (fn. 10), para. 228.

<sup>41</sup> ICTY, Trial Judgement of 7.5.1997 – IT-94-1-T (Prosecutor v. Duško Tadić), para. 710; *Hall/Powderly/Hayes* (fn. 16), mn. 142.

<sup>42</sup> As becomes clear from the EoC, the target can as well be one or more persons.

<sup>43</sup> *Hall/Powderly/Hayes* (fn. 16), para. 73.

<sup>44</sup> See ICTY, Trial Judgement of 7.5.1997 – IT-94-1-T (Prosecutor v. Duško Tadić), para. 697.

<sup>45</sup> *Hall/Powderly/Hayes* (fn. 16), mn. 73; *Werle/Jessberger* (fn. 34), para. 998; see for a contrary view *Ambos* (fn. 36), p. 107.

<sup>46</sup> Although some judgements identify the discriminatory intent as specific intent or *mens rea*, this is not necessarily meant in a technical sense (see, e.g., ICTY, Appeals Judgement of 29.7.2004 – IT-95-14-A [Prosecutor v. Tihomir Blaškić], para. 164; ICTY, Trial Judgment of 12.12.2012 – IT-05-88/2-T [Prosecutor v. Zdravko Tolimir], para. 849).

<sup>47</sup> *Hathaway/Foster* (fn. 14), p. 366 f.; with respect to the ground “race” see *Zimmermann/Mahler* (fn. 10), paras. 346–351.

<sup>48</sup> ICTY, Trial Judgement of 14.1.2000 – IT-95-16-T (Prosecutor v. Zoran Kupreškić et al.), para. 580; ICTY, Trial Judgement of 26.2.2001 – IT-95-14/2-T (Prosecutor v. Dario Kordić et al.), para. 193. This is especially confusing considering that in general, the ICC Statute does not foresee a nexus to an armed conflict for crimes against humanity (as opposed to, e.g., the ICTY Statute).

<sup>49</sup> *Ambos* (fn. 36), p. 105.

#### 4. Widespread or Systematic Attack Directed Against a Civilian Population

For the crime of persecution, the distinct persecutory act must have been “committed as part of a widespread or systematic attack directed against any civilian population” (chapeau of Art. 7 ICC Statute). This additional element turns a single discriminatory act<sup>50</sup> committed by a private person to an international crime; the context element requires a systematic or large-scale dimension that qualifies a crime to be of concern to the world community. In contrast to the crime against humanity, persecution of a refugee does not need to take place in a context of a widespread or systematic attack, as long as the severity threshold of the human rights violation is met. Although in most instances, persecution has a systematic background, it is not a formal requirement here. In this respect, the crime of persecution again is narrower in scope.

#### 5. Intentional Deprivation of Fundamental Rights

Art. 7 (2) (g) ICC Statute provides that persecution means “the intentional [...] deprivation of fundamental rights”. Although the explicit mention of “intentional” might suggest otherwise, the mental element does not deviate from the general requirement for mens rea, i.e., intent and knowledge (Art. 30 [1] ICC Statute).<sup>51</sup> The chapeau of Art. 7 ICC Statute also stipulates that the single act be committed “with knowledge of the attack”. In addition to this, the EoC list as last element that the “perpetrator knew that the conduct was part of or intended the conduct to be part of” a relevant attack. The perpetrator must therefore know both of the attack and the nexus between single act and the attack.

For persecution in refugee law, intent or knowledge is not required. Commentators and international criminal tribunals correctly observe that Art. 30 (1) ICC Statute is not applicable for the refugee definition as the ICC Statute, in contrast to the Refugee Convention, is concerned with criminal liability.<sup>52</sup> Whereas for criminal offences, a mens rea element is typically necessary, the Refugee Convention rather focuses on the human rights violation from which the refugee can seek protection in a third State. Interestingly, the fact that a State offers remedy for human rights violations in case of an unintentional infringement may argue against persecution of that affected person.<sup>53</sup> Moreover, if an impairing measure is implemented repeatedly or on a systematic basis, these acts presumably amount to persecution. Lastly, it is already hardly conceivable that persecution took place on a Convention ground while at the same time, the violation was not intentional. In conclusion, the crime of persecution requires a

mens rea element and is therefore formally narrower in scope; however, persecution of refugees will factually most likely be intentional as well.

#### 6. Impermissible Grounds/Discriminatory Intent

Both persecution in refugee law and criminal law require the human rights violation to be committed for discriminatory reasons. The crime of persecution must be committed on “political, racial, national, ethnic, religious, gender [...] or other grounds that are universally recognized as impermissible under international law”. Such a discriminatory intent distinguishes the crime of persecution from other crimes against humanity in the ICC Statute, which do not have such a requirement.<sup>54</sup> Different from the ICTY and ICTR Statute,<sup>55</sup> the ICC Statute lists – just as Art. 1 A (2) CSR51 – the discrimination grounds as alternatives and not cumulative. This reflects customary international law.<sup>56</sup> In terms of Art. 1 A (2) CSR51, a connection must exist between the human rights violation and the special attribute of the refugee.<sup>57</sup> It is widely accepted that at least one Convention ground must be shown to have been causal for the persecutory act;<sup>58</sup> however, a link to more grounds is equally possible<sup>59</sup> as well as the connection with other non-discriminatory reasons. The Convention ground’s role can range from a mere “contributing cause” to being the “central” reason<sup>60</sup>. This correlates to the acceptance of several different motives in criminal law.

##### a) Political Grounds

“Political grounds” and “political opinion” refer to grounds concerning governmental issues or public affairs. In both contexts, it does not presuppose a membership of a particular party or support of a particular ideology, but is rather to be understood in a broader way to include all acts grounded in

<sup>50</sup> See *Ambos* (fn. 36), p. 108.

<sup>51</sup> *Ambos* (fn. 36), p. 107; *Werle/Jessberger* (fn. 34), para. 997.

<sup>52</sup> ICTY, Trial Judgement of 7.5.1997 – IT-94-1-T (Prosecutor v. Duško Tadić), para. 694; see also ICTY, Trial Judgement of 14.1.2000 – IT-95-16-T (Prosecutor v. Zoran Kupreškić et al.), para. 589; *Zimmermann/Mahler* (fn. 10), para. 232.

<sup>53</sup> *Zimmermann/Mahler* (fn. 10), para. 232.

<sup>54</sup> See, however, Art. 3 ICTR Statute, which requires discriminatory grounds in the contextual elements.

<sup>55</sup> Art. 5 (h) ICTY Statute and Art. 3 (h) ICTR Statute read: „persecutions on political, racial *and* religious grounds” (emphasis added). The ICTR Statute prescribes discriminatory intent for the attack in the *chapeau*; however, this however only refers to the attack and does not add the requirement that the perpetrator must act with such an intent (*Hall/Powderly/Hayes* (fn. 16), para. 75).

<sup>56</sup> ICTY, Trial Judgement of 7.5.1997 – IT-94-1-T (Prosecutor v. Duško Tadić), paras. 712–713.

<sup>57</sup> See for a comprehensive analysis of the nexus requirement *Foster*, Michigan Journal of International Law 23 (2002), 265.

<sup>58</sup> See, e.g., Preamble 29 of the QD11.

<sup>59</sup> *Hathaway/Foster* (fn. 14), p. 365.

<sup>60</sup> *Foster*, Michigan Journal of International Law 23 (2002), 265 (283–286, 338 f.), with references to case law; see for a rejection of the “sole clause”- and “but for”-test with references to case law *Foster*, Michigan Journal of International Law 23 (2002), 265 (269–283, 335 f.); see *Zimmermann/Mahler* (fn. 10), paras. 327–329.

the difference of opinions with regard to public issues.<sup>61</sup> In the refugee law context, the possibly different situation in the State of nationality is to be considered, leading to the acknowledgment of opinions as political that are not necessarily an issue of public affair in the State of refuge.<sup>62</sup> On the other hand, it is not sufficient to have an internal and secret political opinion; such political opinion must at least be assumed to be so strong that it will sooner or later find expression<sup>63</sup>. In essence, “political” is understood congruently in both contexts.

#### b) Racial Grounds

The term “racial grounds” or “race” is problematic as definitions of “race” are outdated and defective, and should therefore be understood in a broad way (with some overlap with the term “ethnic”).<sup>64</sup> Recourse can be had to the definition of “racial discrimination” of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD65). Art. 1 ICERD65 defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin [...]”. Consequently, “racial” grounds are not confined to biological distinctions but warrants considerations of, e.g., culture and heritage. This is supported by Art. 10 (1) (a) QD11, which stipulates that “the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group”.

#### c) Ethnic Ground

“Ethnic” grounds as stipulated in the crime definition are rather close to a wide understanding of “racial” grounds; in fact, persecution on ethnic grounds is the preferred option for international indictments in comparison to the rather controversial concept of “race”.<sup>65</sup> Due to the similar understanding of the terms “racial” and “ethnic” in criminal law, the fact

that “ethnic” grounds are missing in the refugee definition does not result in a different scope of application.

#### d) Cultural Grounds

Similarly, “cultural” grounds are included in the crime of persecution but missing in the refugee definition. The concept of “culture” within the persecution definition can be interpreted as all grounds related to “customs, arts, social institutions”.<sup>66</sup> A helpful reference to culture could be Art. 1 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, which defines and lists examples of cultural property. It becomes clear that culture includes many facets such as religious but also secular art, science, history, and architecture. Understood as discrimination grounded on the cultural customs and background of a person, such discrimination can also be qualified as ethnic, religious discrimination or discrimination based on the membership of a particular social group. It appears hardly conceivable that persecution on cultural grounds qualifies as a crime against humanity that would not amount to persecution under the refugee definition.

#### e) National Grounds

“National” grounds in the context of criminal law do not simply refer to a formal nationality in terms of citizenship, but can also include a group of persons who consider themselves as a nation even if scattered in different States;<sup>67</sup> nationality can therefore be derived from other aspects than citizenship. Although the term “nationality” is understood as “citizenship” in other Articles of the Refugee Convention, with regard to the grounds of persecution, it must be interpreted broadly as well. Several language versions indeed differ in their translations in the different contexts; moreover, the term nationality is often interpreted with an overlap with other Convention grounds.<sup>68</sup> Therefore, it is commonly accepted that nationality comprises membership in a particular ethnic, religious, cultural, and linguistic group.<sup>69</sup> The “national” grounds are therefore understood alike in refugee law and criminal law.

#### f) Religious Grounds

“Religious” grounds in the criminal context does not only include persecution based on the religion of the persecuted person but also instances of lack of religion or (perceived) failure to conform to religious rules.<sup>70</sup> The same holds true for persecution for reasons of religion in the refugee law context. According to the UNHCR, religion encompasses all forms of theistic, non-theistic, and atheistic beliefs, whereas beliefs “may take the form of convictions or values about the

<sup>61</sup> See *Hall/Powderly/Hayes* (fn. 16), para. 77; *Zimmermann/Mahler* (fn. 10), paras. 421 f.; *UNHCR*, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, HCR/1P/4/ENG/REV. 4, 2019, para. 80.

<sup>62</sup> *Zimmermann/Mahler* (fn. 10), paras. 421 f.

<sup>63</sup> *UNHCR*, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, HCR/1P/4/ENG/REV. 4, 2019, para. 82.

<sup>64</sup> See *Hall/Powderly/Hayes* (fn. 16), mn. 78; *Zimmermann/Mahler* (fn. 10), paras. 337, 342; *UNHCR*, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, HCR/1P/4/ENG/REV. 4, 2019, para. 68; *Goodwin-Gill/McAdam*, *The Refugee in International Law*, 3<sup>rd</sup> ed. 2007, p. 141.

<sup>65</sup> See, e.g., ICC, Confirmation of Charges Decision of 9.6.2014 – ICC-01/04-02/06 (The Prosecutor v. Bosco Ntaganda), para. 58; ICC, Arrest Warrant Decision of 1.3.2012 – ICC-02/05-01/12 (The Prosecutor vs. Abdel Raheem Muhammad Hussein), p. 6 (persecution of the Fur population, the largest ethnic group in the Darfur region).

<sup>66</sup> See *Hall/Powderly/Hayes* (fn. 16), para. 81.

<sup>67</sup> *Hall/Powderly/Hayes* (fn. 16), para. 79.

<sup>68</sup> *Zimmermann/Mahler* (fn. 10), paras. 387 f.

<sup>69</sup> *UNHCR*, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, HCR/1P/4/ENG/REV. 4, 2019, para. 74.

<sup>70</sup> *Hall/Powderly/Hayes* (fn. 16), para. 82.

divine or ultimate reality or the spiritual destiny of humankind”.<sup>71</sup> The 2011 EU Qualification Directive is quite clear on the understanding of religion to include “the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief” (Art. 10 [1] [b] QD11). The UNHCR also adopts a wide approach to include membership in a religious community, worship in private or in public, the manifestation of religion in teaching, practice, worship and observance; however, mere membership without disadvantageous consequences is normally not sufficient to support a refugee claim.<sup>72</sup> In both refugee and criminal law contexts, “religion” can therefore be applied in an identical manner.

### g) Gender Grounds

The last discriminatory ground explicitly named in the definition of persecution is “gender”, which is especially controversial.<sup>73</sup> It is defined in Art. 7 (3) ICC Statute as reference to “the two sexes, male and female, within the context of society” and could be interpreted as to refer to both biological and sociological notions.<sup>74</sup> Further to the limitation on two sexes, however, a more progressive and adequate understanding in criminal law includes socially constructed roles, behaviours,

expressions, and identities of girls, women, boys, men, and gender diverse persons.<sup>75</sup>

In the refugee law context, gender is usually understood as subcategory of a “membership of a particular social group”.<sup>76</sup> UNHCR defines gender as “the relationship between women and men based on socially or culturally constructed or defined identities, status, roles and responsibilities that are assigned to one sex or another”; moreover, gender “is not static or innate but acquires socially and culturally constructed meaning over time”.<sup>77</sup> This conforms with the more progressive understanding developed in criminal law.

In the case of potential persecution against women, Art. 1 of the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW79)<sup>78</sup> can serve as reference document as it includes several forms of discriminatory measures against women.<sup>79</sup> Gender-specific persecution against women, i.e., persecution that is per se directed exclusively or predominantly against women, can encompass gender-related violence (such as rape, dowry-related vio-

<sup>71</sup> UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1 A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, 28 April 2004, para. 6.

<sup>72</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, HCR/1P/4/ENG/REV. 4, 2019, paras. 71 ff.

<sup>73</sup> See for an extensive discussion of the term “gender” and for gender-based persecution *Grey/O’Donohue/Rosenthal/Davis/Llanta*, Journal of International Criminal Justice 17 (2019), 957 (957–979); *Oosterveld*, in: Sadat (ed.), Forging a Convention for Crimes against Humanity, 2011, p. 78 (78–83, 94–97); *Oosterveld*, Harvard Human Rights Journal 18 (2005), 55 (55–84); see also *ILC*, Crimes against humanity – Comments and observations received from Governments, international organisations and others, A/CN.4/726, 21 January 2019, with criticism of the definition of “gender” by Belgium (p. 31), Bosnia-Herzegovina (p. 31 f.), Canada (p. 33), Estonia (p. 40), Liechtenstein (p. 42) and others. Interestingly, “gender” was then defined like in the ICC Statute and has now been removed for the present ILC Draft Convention 2019. See also *ICC (The Office of the Prosecutor)*, Policy Paper on Sexual and Gender-Based Crimes, June 2014; ICC, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud of 30.9.2019 – ICC-01/12-01/18 (Le Procureur c. Al Hassan Agabdoul Azizag Mohamed Admahmoud), paras. 665–667.

<sup>74</sup> *Werle/Jessberger* (fn. 34), para. 1003.

<sup>75</sup> See also *ILC*, Crimes against humanity – Comments and observations received from Governments, international organisations and others, A/CN.4/726, 21 January 2019, comments by, e.g., Canada (p. 33), Estonia (p. 40), Liechtenstein (p. 42).

<sup>76</sup> See *UNHCR*, UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender, November 2016; *Binder*, Columbia Journal of Gender and Law 10 (2000–2001), 167; *Anker*, Harvard Human Rights Journal 15 (2002), 133; *Oosterveld*, Journal of International Criminal Justice 12 (2014), 953; UNHCR Gender-Related Persecution 2002; UNHCR Sexual Orientation and/or Gender Identity 2012; *Zimmermann/Mahler* (fn. 10), paras. 456–502; *Edwards*, in: Feller/Türk/Nicholson (eds.), Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection, 2003, p. 67 ff.; *Haines*, in: Feller/Türk/Nicholson (fn. 76), p. 344.

<sup>77</sup> *UNHCR*, Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, para. 3; see for a more progressive approach in the context of “gender identity” *UNHCR*, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/09, 23 October 2012, paras. 8–9.

<sup>78</sup> Art. 1 CEDAW79 provides: “For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

<sup>79</sup> See also *Werle/Jessberger* (fn. 34), para. 1003.

lence, female genital mutilation, domestic violence, and trafficking), persecutory law, tolerance by the State towards prohibited persecutory practice, or disproportionately severe punishment with a gender dimension.<sup>80</sup> Gender-related persecution, i.e., persecution for reasons of gender in genuinely different contexts (e.g., persecution of women who do not wear a religious veil), may arise in the context of all discrimination grounds and therefore call for a gender-sensitive approach in all fields.<sup>81</sup>

#### *h) Other Impermissible Grounds*

As stipulated in Art. 7 (1) (h) ICC Statute, persecution can be committed on “other grounds universally recognized as impermissible under international law”. Such wording can only be understood as a provision to include all forms of possible discrimination that is prohibited under international law. In this context, “universally recognized” is a reference to customary international law obligations;<sup>82</sup> therefore, human rights instruments such as the 1958 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, or the UN Charter can assist in determining impermissible distinctions when reflecting customary international law.<sup>83</sup>

A similarly wide category of discrimination reasons is the “membership of a particular social group” in Art. 1 A (2) CSR51. This ground has evolved into a kind of umbrella clause in the past decades and is one of the most discussed elements of the refugee definition. Although the vague wording induces an interpretation of that ground as an undefined “catch-all-clause”, recent efforts to shape this element appear to be a good development to secure an independent meaning.<sup>84</sup> At the same time, a dynamic understanding of “social group” offers the opportunity to qualify new developments as Convention ground.<sup>85</sup> UNHCR defines a “particular social group” as persons of similar background, habits, or social

status.<sup>86</sup> More specifically, the group must be “both distinct as an entity within the broader society and definable in terms of non-arbitrary characteristics shared by its members”.<sup>87</sup> Such characteristics might be “innate (such as sex, caste, color, family background), shared past experiences (such as former military or political leadership), or shared values, attitudes or behaviours (such as sexuality)”.<sup>88</sup>

Membership in a particular social group has especially been discussed with respect to social classes and castes,<sup>89</sup> sexual orientation,<sup>90</sup> and gender.<sup>91</sup> However, in criminal law, persecution based on the sexual orientation cannot be considered to have been established in customary international law so far.<sup>92</sup> Social or economic grounds and mental or physical

<sup>86</sup> *UNHCR*, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, HCR/IP/4/ENG/REV. 4, 2019, para. 77; *UNHCR*, Guidelines on International Protection No. 2: “Membership of a particular social group” within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02, 7 May 2002, para. 11.

<sup>87</sup> *UNHCR*, UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender, November 2016, p. 2.

<sup>88</sup> *UNHCR*, UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender, November 2016, p. 2.

<sup>89</sup> *Foster* (fn. 33), p. 304–313; *Zimmermann/Mahler* (fn. 10), paras. 414–420.

<sup>90</sup> *Weßels*, Sexual orientation in Refugee Status Determination, Refugee Studies Centre Working Papers Series Nr. 73, 2011; *UNHCR*, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/09, 23 October 2012; *Zimmermann/Mahler* (fn. 10), paras. 503–535.

<sup>91</sup> See above and *UNHCR*, UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender, November 2016; *Binder*, Columbia Journal of Gender and Law 10 (2000–2001), 167; *Anker*, Harvard Human Rights Journal 15 (2002), 133; *Oosterveld*, Journal of International Criminal Justice 12 (2014), 953; *UNHCR*, Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002; *UNHCR*, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/09, 23 October 2012; *Zimmermann/Mahler* (fn. 10), paras. 456–502; *Edwards* (fn. 76), p. 46; *Haines* (fn. 76), p. 319.

<sup>92</sup> See *Werle/Jessberger* (fn. 34), para. 1003.

<sup>80</sup> *UNHCR*, Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, paras. 9–13.

<sup>81</sup> *Zimmermann/Mahler* (fn. 10), paras. 489–502.

<sup>82</sup> *Hall/Powderly/Hayes* (fn. 16), para. 85, widen the scope to include grounds “widely recognized” as impermissible grounds; however, such an understanding deviating from the explicit wording is to be avoided.

<sup>83</sup> See *Werle/Jessberger* (fn. 34), para. 1003.

<sup>84</sup> *Zimmermann/Mahler* (fn. 10), para. 397.

<sup>85</sup> *Zimmermann/Mahler* (fn. 10), para. 398. See for an analysis *Errera*, in: Dupuy/Fassbender/Shaw/Sommermann (eds.), *Völkerrecht als Wertordnung/Common Values in International Law: Festschrift für/Essays in Honour of Christian Tomuschat*, 2006, p. 133; *Aleinikoff*, in: Feller/Türk/Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, p. 264.

disability have been discussed as grounds for persecution but ultimately omitted in the ICC Statute.<sup>93</sup>

In conclusion, both the crime of persecution and the refugee definition include some kind of umbrella clause. Although the reference to “other grounds recognized by customary international (human rights) law” appears to be rather broad at first sight, it is restricted to treaty law, settled customary international law or general principles of law. This does not come as a surprise, considering the “*nullum crimen*” principle. In contrast, the development of the “membership of a particular social group” in refugee law appears to be somewhat more flexible. The latter includes recognition of persecution based on, e.g., the sexual orientation or social status, whereas this has been denied for the crime of persecution. This diverging interpretation can be harmonised if interpretation concerning the Refugee Convention is considered for interpretation of the crime. “Other grounds that are universally recognized as impermissible under international law” very well acknowledges the development in international refugee law. If recognition of sexual orientation, social groups and other grounds reaches customary international law level, these grounds must also be considered as discriminatory ground for persecution as crime against humanity.

#### 7. Agents of Persecution

With regard to the agents of persecution, the crime of persecution can be committed by anyone. In refugee law, persecution according to Art. 1 A (2) CSR51 is undoubtedly taking place if the agent of persecution is a State actor.<sup>94</sup> Persecution by non-State actors, however, used to be controversially discussed and handled,<sup>95</sup> mostly based on an understanding that persecution means State persecution<sup>96</sup>. Keeping in mind that refugee protection extends protection usually granted by the State of nationality to international protection by the State of refuge,<sup>97</sup> only the absence of national protection is decisive – irrespective of the reason for such absence<sup>98</sup>. Refugee law does not seek to determine State accountability for discriminatory human rights violations<sup>99</sup> (the so called “accountabil-

ity theory”<sup>100</sup>) but aims at protection;<sup>101</sup> emphasis should therefore be laid on the victim rather than on the persecutor, since the “source” of persecution does not alter the fact that the refugee’s human rights are violated<sup>102</sup>. With introduction of the 2011 EU Qualification Directive, the inclusion of non-State actors (Art. 6 [c] QD11) is prescribed by legislation for EU Member States. Nevertheless, it has to be kept in mind that jurisprudence requires that the refugee proves that the State was unable or unwilling to provide protection.<sup>103</sup>

Therefore, in both refugee and criminal law contexts, anyone can be the persecutor; however, for refugee status determination, the inability or unwillingness has to be proven. For establishing the crime of persecution by a private person, it obviously need not be determined whether the victim could have availed himself of State protection. In this exceptional case, the crime definition is broader than the refugee definition.

#### IV. Conclusion

Comparing the crime against humanity of persecution and persecution as core element of the refugee definition it is striking that both phenomena follow a similar structure: The basis is a severe violation of human rights based on a discriminatory ground. After having analysed the single elements of both the crime against humanity of persecution and the persecution related elements of the refugee definition, the initial assumption that the elements of crime are more limited has proved to be true for the majority, but not for all components of persecution. Whereas no complete congruence exists, some important and useful conclusions can be drawn:

A determination of persecution in a refugee context does not imply a respective crime against humanity, as too many additional elements are still required for establishing the latter. However, whenever a crime against humanity of persecution can be established, persecution within the refugee definition can most likely be established. The requirements of the crime are on the one hand higher (e.g., in terms of the contextual or subjective requirements); on the other hand, where refugee law appears to be more restrictive (with regard to the agents of persecution or the membership of a particular social group), such restriction merely call for additional assessment in single cases: Firstly, in principle, just like with regard to the crime of persecution, anyone can be the persecutor as State and non-State actors are included; it is merely to be additionally assessed whether the State was unwilling or unable to protect the refugee. Secondly, if discrimination is based on a ground universally recognised in international law, such ground must be scrutinised for its compatibility with a membership of a particular social group.

<sup>93</sup> See Draft ICC Statute 1998, p. 17, explanatory note 14.

<sup>94</sup> *Zimmermann/Mahler* (fn. 10), paras. 267, 281.

<sup>95</sup> See, e.g., *Phuong*, *European Journal of Migration and Law* 4 (2003), 521; *Wilsher*, *Journal of International Refugee Law* 15 (2003), 68; *Kälin*, *Georgetown Immigration Law Journal* 15 (2000-2001), 415; *UNHCR*, *Agents of Persecution – UNHCR Position*, 14 March 1995.

<sup>96</sup> See references in *Hathaway/Foster* (fn. 14), p. 303; see also *UNHCR*, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, HCR/1P/4/ENG/REV. 4, 2019, para. 65.

<sup>97</sup> *Hathaway/Foster* (fn. 14), p. 292.

<sup>98</sup> *UNHCR*, *Agents of Persecution – UNHCR Position*, 14 March 1995, para. 3.

<sup>99</sup> This is supported by the fact that the recognition of refugees should not be perceived as unfriendly act. See Art. II (2) OAU Refugee Convention; Art. 3 of the 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab

World; Conclusion No. 4 of the 1984 Cartagena Declaration on Refugees.

<sup>100</sup> See for an overview *Hathaway/Foster* (fn. 14), p. 303–305.

<sup>101</sup> *Zimmermann/Mahler* (fn. 10), paras. 292 f.

<sup>102</sup> *Zimmermann/Mahler* (fn. 10), para. 286.

<sup>103</sup> See *Li* (fn. 1), p. 17.

It is nevertheless to be kept in mind that this finding does not lead to automatic recognition of a refugee once a criminal persecution can be established. For instance, issues such as an internal flight alternative can be linked with the crime of persecution only to a certain extent (see below) but has to be assessed in addition. Moreover, evidentiary issues were left out in this analysis. However, if a crime of persecution has been confirmed in a judgement beyond reasonable doubt, a well-founded fear can easily be derived from the existence of such a conviction.

This calls for a close cooperation between authorities dealing with international crimes on the one hand and decision makers in refugee law on the other hand in order to benefit from an exchange of information. For refugee status determination or practitioners in the field of refugee law, information on the country of origin and the specific situation of a persecuted group can be derived from investigations conducted in an international criminal law context. If an international or national court has established that the crime of persecution has been committed, the asylum seeker is likely affected by persecution if belonging to the victim group. Such information can also be relevant for determination of the agent of persecution, as the acknowledgement of the existence of a crime against humanity of persecution implies that the perpetrator of such crime has been identified. For assessing internal flight alternatives in the refugee claim context as well as the requirements of group persecution, the widespread and systematic character of the context of persecution serves as an indicator and information basis for establishing the relevant facts.

Criminal law authorities can also rely on evidence emanating from refugee status determination supporting substantial elements of the crime of persecution (e.g., for the severe human rights violation or the discriminatory grounds). While this practice is more limited to single aspects of the elements of crime, resources arising from refugee status determination and court decisions are more extensive due to the higher number of refugee claims compared to the number of international criminal law judgements. Even prosecution authorities should find it helpful to rely on country of origin information if persecution as crime against humanity is at stake.

Such trans-judicial and trans-authority exchange of information also enforces more economic and efficient procedures. Information on the same event does not have to be gathered multiple times by different authorities; the smaller the number of interviews with refugees/victims is, the smaller the risk of re-traumatisation and victimisation.

Lastly, the practice of cross-referencing streamlines the interpretation and application of the term “persecution” and consequently prevents fragmentation in international criminal law. While a congruent application or harmonising interpretation should not be aimed at, as the objects and purposes are different, it should nevertheless be avoided that interpretation of the matching elements (such as the discriminatory grounds) diverge or even lead to contradictions. Having an exchange of findings in refugee law and international criminal law with regard to the term of persecution will indirectly harmonise decisions on an interdisciplinary level.

Nevertheless, cross-referencing entails certain risks as well. The similar meaning and same wording might tempt authorities to adapt interpretation and applications too carelessly. Therefore, the different objects and purposes and especially the varying standards of proof must be kept in mind: For persecution as a crime, the individual criminal responsibility and the character of this heinous crime to affect mankind as such are crucial points, whereas in refugee status determination, the vulnerability of the individual refugee and lacking state protection is in the foreground.

The obvious congruence in the wording of the Convention refugee definition and the crime against humanity is therefore not merely a random coincidence but proves that both persecution in international criminal law and in international refugee law are based on the same idea of dealing with severe human rights violations on discriminatory grounds. Whereas the crime definition is naturally more limited as it serves the purpose of identifying individual criminal responsibility, refugee status determination can still benefit from assessments with regard to the country of origin, the persecutory acts, the discriminatory grounds and the systematic character of persecution. Cross-referencing not only prevents fragmentation and contradictions but also contributes to a more efficient procedure. Refugee status decisions should therefore be informed by criminal law assessments and vice versa.