

Annex B

Public

Precedent and the law

Edited by
Ewoud Hondius

The book contains the general report and the national reports on the "Precedent and the Law", which were submitted to the world conference of the International Academy of Comparative Law held in Utrecht, 16-22 July 2006.

It is often considered a major distinction mark between the civil law and common law. But is this still the case? In common law jurisdictions the sharp edges of "stare decisis" seem to water down, and civil law jurisdictions now do admit that precedents - at least in some cases - constitute a source of law. Convergence, however, would be a word to characterise these tendencies. These reports throw light on this issue.

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International Academy of Comparative law
Utrecht, 16-22 July 2006

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CHAPTER 3.

PRECEDENT – REPORT ON AUSTRALIA (*)

BY

THE HON JUSTICE MICHAEL KIRBY AC CMG (**)

The doctrine of precedent has been referred to as “the hallmark of the common law” (1). It has been called “the cornerstone of a common law judicial system” (2) that is “woven into the essential fabric of each common law country’s constitutional ethos” (3). Its significance in day-to-day legal practice may have declined with the rise in the quantity and pervasiveness of statute law. However, it still lies at the heart of the Australian legal system and the way Australian lawyers approach the resolution of many legal problems.

Advocates of a strict view of precedent claim that the consistency, continuity and predictability resulting from adherence to precedent is essential to the maintenance of public confidence in the rule of law and the work of the judiciary. On the other hand, one Australian judge, Justice Lionel Murphy, who served on the High Court of Australia, the nation’s highest court, between 1975-1986, saw a risk of serious injustice in a rigid adherence to precedent. He even went so far as to suggest that it was an approach “eminently suitable for a nation overwhelmingly populated by sheep” (4).

Somewhere between the world of slavish obedience to past precedent and antagonism towards its rules, lies the real world of Aus-

(*) The author acknowledges the assistance of Mrs Lorraine FINLAY, Legal Research Officer, High Court of Australia, in the preparation of this paper.

(**) Justice of the High Court of Australia.

(1) The Hon. Sir Anthony MASON, “The Use and Abuse of Precedent” (1988) 4 *Australian Bar Review* 93, at 93.

(2) B.V. HARRIS, “Final Appellate Courts Overruling Their Own ‘Wrong’ Precedents: The Ongoing Search for Principle” (2002) 118 *Law Quarterly Review* 408, at 412.

(3) *Ibid.*, at 412.

(4) LK MURPHY, “The Responsibility of Judges”, opening address for the First national Conference of Labor Lawyers, 29 June 1979, in G. EVANS (ed.), *Law Politics and the Labor Movement*, Legal Service Bulletin, 1980 Clayton Victoria.

tralian law as it is practised in the courts and obeyed by those who are subject to its requirements.

The influence of English precedent

Possibly the most significant change to the application of precedent over the past thirty years in Australia has concerned the binding nature of English decisions in Australian courts. Until the 1970s and 1980s the Judicial Committee of the Privy Council in London was the final court of appeal for Australians and at the apex of our legal system. As such, in respect of any legal principle essential to the case, decisions of the Privy Council were binding upon all courts, both federal and state, throughout Australia (5).

In addition to the severance of formal legal and constitutional ties with the Privy Council the membership of the United Kingdom in the European Union, and the increasing influence of European law on the development of English law, will further diminish the role of English precedent in the future development of Australian law.

Australian law now rests squarely upon the decisions of Australian lawmakers and courts and the expression, application and development of Australian precedent, with the High Court of Australia at the apex of the system.

Determining precedent in Australia

The binding nature of the ratio decidendi: It is not the entirety of a judicial decision that binds lower courts, but rather the *ratio decidendi* as determined by the reasons of the judges in the majority. As was noted by the High Court of Australia in *Garcia v National Australia Bank Ltd* (6), the consequence of this approach to precedent is that the opinions of judges in dissent and all judicial remarks of a general character upon tangential or additional ques-

(5) *Skelton v Collins* (1966) 115 C.L.R. 94, per KITTO J. at 104; *Viro v The Queen* (1978) 141 C.L.R. 88, per GIBBS J. at 118.

(6) *Garcia v National Australia Bank Ltd* (1998) 194 C.L.R. 395, per KIRBY J. at 417; *Federation Insurance Ltd v Wasson* (1987) 163 C.L.R. 303, per MASON C.J., WILSON, DAWSON and TOOHEY J.J. at 314.

tions or issues ("obiter dicta") will not become part of binding precedent. ICC-01/12-01/18-279-AnxB-28-07-2026 5/19 A A3

Multiple concurring judgments: Determining the *ratio decidendi* of a judicial decision becomes a complex task when multiple concurring reasons are published by several judges in a single case. In such a case, the *ratio* must be drawn from the essential areas of agreement found within the reasons of the judges in the majority.

Lawyers of the common law tradition are often shocked that the civil law tradition does not generally allow the expression of honestly held dissenting opinions which they view essential to judicial independence. Moreover they are commonly left unconvinced by the very abbreviated and seemingly formulaic reasons of such courts in controversial cases, where the reasons hide the important policy concerns that common law reasoning identifies and discusses openly. It is to meet these needs that multiple reasons are common in Australian, multi-member appellate courts.

Distinguishing between legal principles and orders: A distinction must also be drawn between the legal principle for which the reasoning in a decision stands and the binding force of the orders made in the case. When the High Court of Australia overrules a previous legal decision of the Court, the *ratio decidendi* of that decision will no longer be binding as a legal precedent. However, this will not affect the validity and effect of the actual orders and judgment that were made in the case whose legal principle has been overruled. The reasons for this were outlined in *Ruddock v Taylor* (7):

"Before a party – or the community – is excused from compliance with the orders of this Court it is necessary for the Court to examine the question and itself set aside, or vary, any orders earlier made, if that course is justified. No person may decide for themselves to ignore orders of this Court or treat them as invalid so long as such orders remain in force".

The binding nature of decisions of the High Court

Given its position as the final court of appeal in Australia, and also its position as a constitutional court, the High Court of Australia has rejected the proposition that it is strictly bound by legal

(7) *Ruddock v Taylor* (2005) 222 CLR 612, per Kirby J., at 658-659 [169]-[172].

holdings in its own past decisions. As noted by Justice Dixon in *Attorney General for New South Wales v Perpetual Trustee Company Ltd*, such a restrictive view would be inappropriate, given the responsibilities of the Court in the nation's governance (8).

Although the High Court of Australia has not established precise rules as to the circumstances in which a previous decision will be overruled, it is often said that it is not sufficient that a judge personally disagrees with the earlier decision. Instead, when overruling past decisions High Court Justices have used phrases describing the earlier decision as "manifestly wrong" (9), "fundamentally wrong" (10) or "plainly erroneous" (11) to emphasise the exceptional nature of such an action. In practice, the difference between disagreement and strong disagreement may be little more than a difference in temperament and judicial expression.

The High Court of Australia has emphasised that previous decisions should only be overruled in exceptional circumstances and that the power to do so should be exercised with caution (12).

The opposite applies to constitutional cases. In such cases the High Court of Australia has been much more inclined to re-examine past decisions. This is because of the entrenched nature of the constitutional decisions reached by the Court. Constitutional decisions cannot be overruled by the legislature. So long as they stand, they may only be corrected in a future High Court challenge or by an amending constitutional referendum, the latter notoriously difficult to achieve in Australia (13). Further, judges of the High Court have recognized their primary and personal obligation as being to the

Constitution itself, over and above strict adherence to a legal doctrine of precedent.

These factors must be afforded even greater priority when the constitutional matter before the High Court involves the protection of individual human rights and fundamental freedoms. Justice Brennan acknowledged this consideration in *Street v Queensland Bar Association*, stating that (14):

"The doctrine of *stare decisis* ... is least cogent in its application to those few provisions which are calculated to protect human rights and fundamental freedoms".

Reviewing precedent – supposed requirement of leave

Whilst the High Court of Australia does not consider itself bound as a matter of precedential law by its previous authority, the question has arisen as to whether it is necessary, procedurally, to obtain leave from the Court to re-argue the correctness of a precedent of the Court. In *Evda Nominees Proprietary Ltd v Victoria* Chief Justice Gibbs expressed the view that leave would be required. A general practice has ensued that leave is commonly sought before a challenge to past authority is ventured. Once leave is granted, the practice is generally for argument on the question to be adjourned, if necessary, to be heard by a Full Bench of all available Justices.

A contrary view has been expressed. In his dissenting reasons in *Evda Nominees Proprietary Ltd v Victoria* Justice Deane stated that (15):

"In my view, counsel representing a party does not require the permission of the Court to present or to continue to present argument that is relevant to the decision in the case, including argument seeking to show that a previous decision of the Court is wrong and should not be followed".

I have expressed my own preference for the approach of Justice Deane in numerous cases. The procedural rule of leave effectively allows a majority of the Justices to "nip in the bud" propositions that the majority do not agree with, and effectively to deny others on the Court the full opportunity to consider argument, including

(8) *Attorney-General for New South Wales v Perpetual Trustees Company Ltd* (1952) 85 C.L.R. 237, per DIXON J. at 244.

(9) *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 C.L.R. 261, per ISAACS J. at 278; *The Tramways Case [No. 1]* (1914) 18 C.L.R. 54, per GRIFFITH C.J. at 58; *Cain v Malone* (1942) 66 C.L.R. 10, per LATHAM C.J. at 15; *Lange v Australian Broadcasting Corporation* (1997) 189 C.L.R. 520, at 554.

(10) *McGinty v Western Australia* (1996) 186 C.L.R. 140, per McHUGH J. at 235.

(11) *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 C.L.R. 1, per MASON J. at 13.

(12) *McGinty v Western Australia* (1996) 186 C.L.R. 140, per McHUGH J. at 235; *Re Tyler; Ex parte Foley* (1994) 181 C.L.R. 18, per McHUGH J. at 38-39; *H.C. Sleigh Ltd v South Australia* (1977) 136 C.L.R. 475, per MASON J. at 501; *Queensland v Commonwealth* (1977) 139 C.L.R. 585, per GIBBS J. at 599, STEPHEN J. at 602-603, AICKIN J. at 620; *Hughes & Vale Pty Ltd v New South Wales* (1953) 87 C.L.R. 49, per KITTO J. at 102.

(13) In Australia, in 106 years there have been 44 attempts by referendum to amend the Constitution, often to override a decision of the High Court. Only 8 such attempts have succeeded.

(14) *Street v Queensland Bar Association* (1989) 168 C.L.R. 461, per BRENNAN J. at 518-519. See also MASON C.J. at 489, TOOHEY J. at 560, and McHUGH J. at 588.

(15) *Evda Nominees Pty Ltd v Victoria* (1984) 154 C.L.R. 311, per DEANE J. at 316.

on points of constitutional principle, that parties themselves wish to place before the Court.

Precedent and "judicial activism"

The Australian debate concerning the application of precedent takes place in the context of a broader debate about the judicial method. That is, the debate between the merits of "strict and complete legalism" and "judicial restraint" versus what critics call "judicial activism" and defenders describe as proper "judicial creativity".

The doctrine of legalism was expressed by Sir Owen Dixon on the occasion of his swearing in as Chief Justice of Australia (16):

"... close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safer guide to judicial decisions in great conflict than a strict and complete legalism".

However, the "judicial activist" or "judicial realist" accepts a wider role for judges in making the law. This approach acknowledges a greater ambit for judicial discretion and flexibility in a common law system by accepting that enduring community values and policy choices should be expressly acknowledged when judges are formulating legal rules. Examples of Australian decisions that have been criticized, as the product of so-called "judicial activism", include the development of an implied constitutional right to freedom of political communication (17), the reversal of the accepted doctrine of *terra nullius* and acceptance of the continued existence of rights to native title in the Aboriginal peoples of Australia (18), and the acceptance of the effective right of an indigent person to legal representation in a trial for a serious criminal offence as an essential element of the right to a fair trial (19).

(16) *Swearing in of Sir Owen Dixon as Chief Justice* (1951) 85 C.L.R. xi, per DIXON C.J. at xiv.

(17) *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 C.L.R. 106; *Nationwide News Pty Ltd v Wills* (1992) 177 C.L.R. 1; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 C.L.R. 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 C.L.R. 211.

(18) *Mabo v Queensland (No. 2)* (1992) 175 C.L.R. 1; *Wik Peoples v Queensland* (1996) 187 C.L.R. 1.

(19) *Dietrich v The Queen* (1992) 177 C.L.R. 292.

This constant tension between continuity and change in Australia is reflected in debates about the appropriate application of precedent. In the 2003 *Hamlyn Lectures*, I said (20):

"Somewhere between the spectre of a judge pursuing political ideas of his or her own from the judicial seat irrespective of the letter of the law, and the unrealistic mechanic deified by the strict formalists, lies a place in which real judges perform their duties: neither wholly mechanical nor excessively creative".

The application of precedent in State Supreme Courts

The High Court of Australia has stated that where a *ratio decidendi* exists in the reasoning of one of its decisions, it is not permissible for any other Australian court, whether in an appeal or at trial, to ignore, doubt or qualify the rule so stated. The rule may be analysed and elaborations suggested. But the legal duty of obedience requires that it must be followed and applied (21).

Whilst State Supreme Courts are bound by authoritative rulings on legal questions appearing in majority decisions of the High Court differing views have been presented as to whether they will be bound by their own decisions. The majority of intermediate appellate courts in Australia reserve to themselves the right to reconsider their own earlier decisions, although they will normally not do so unless satisfied that the earlier decision was manifestly wrong. This appears to be the accepted position of the Federal Court of Australia and the majority of State appellate courts (22).

(20) M.D. KIRBY, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (The Hamlyn Lectures, 55th Series).

(21) *Garcia v National Australia Bank Ltd* (1998) 194 C.L.R. 395 at 403, [17]; contrast 418, [57]-[59].

(22) See *Nguyen v Nguyen* (1990) 169 C.L.R. 245, per DAWSON, TOOHEY and MCHUGH J.J. at 268-269. The only State in which there appears to be any doubt is Western Australia, as see in *Transport Trading and Agency Co of WA Ltd v Smith* (1906) 8 WAR 33. However, that decision, and the creation of a new Court of Appeal for Western Australia, makes the former approach appear outdated.

One development which has had an enormous, and yet largely ignored, effect on the use of precedent in Australia is the internet. The proliferation of legal databases on the internet has had a significant impact on the conduct of legal research. Millions of judicial precedents are now available at a click of a button.

There is an obvious distinction between quantity and quality. The old rule that legal authority should only be cited with care is even more relevant in the electronic age. The challenge for lawyers and judges in common law countries is how best to use the increasing accessibility of precedent to strengthen legal analysis and the just development of the law, without being swamped by the sheer quantity of legal information that is now at our finger-tips.

The growing use of international precedents

The impact of internet legal research tools can also be illustrated by reference to the widening range of comparative materials being employed by advocates appearing before Australian courts. The sources of comparative materials is gradually widening beyond traditional references to English law. In the period of my judicial service over thirty years it has extended to new sources from jurisdictions across the world.

The use of international legal materials is a contentious issue in Australia, particularly in the context of using such materials in constitutional interpretation and in relation to basic human rights. The recent decision of the High Court of Australia in *Al-Kateb v Godwin* (23) provides a clear example of the different opinions on this issue. The opposing viewpoints in this debate were expressed through the reasons of Justice McHugh and myself. There are parallels between that case and the similar debates in the Supreme Court of the United States in *Atkins v Virginia* (24) and *Laurence v Texas* (25).

(23) (2004) 219 C.L.R. 562.

(24) 536 U.S. 304 (2002), at 316-321; contrast at 347-348, per SCALIA J.

(25) 539 U.S. 558 (2003), at 576-577; contrast at 586, per SCALIA J.

The doctrine of precedent continues to play an important role in the Australian legal system. In the vast majority of cases, particularly those decided in trial and intermediate courts, the application of precedent or of statute will ordinarily be decisive. There have, however, been changes in the use of precedent in Australia over the past two decades. The purpose of this paper has been to describe the most important of these.

I realize that lawyers of the civil law tradition, and some common law lawyers, regard the discursive reasoning of common law courts as messy, imprecise and unfocused; the presence of dissenting opinions as destabilizing; and the doctrine of precedent as obscure in practice and sometimes seemingly optional in application, at least in the higher courts (26). However, for those raised in this tradition, the principles work well, taken as a whole. They give a measure of stability and predictability to the law, without inflexibility. They mean that the broad contours of legal doctrine are known or knowable. And if there is uncertainty, dissent and debate at the edges, that is so because law is an attribute of the system of government in a generally free and democratic society and therefore always in a process of evolution (27). It is in the nature of that form of society that the content of law should be transparent – exposed to debate and criticism, including amongst the citizens governed by it.

(26) S.D. SMITH, *Law's Quandary* (Harvard, 2004) at 55.

(27) M.D. KIRBY, "Judicial Dissent – Common Law and Civil Law tradition", (2007) 123 *Law Quarterly Review* 378, at 397

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examples of forced nudity.²¹² The second element, coercive circumstances, is discussed above in the context of rape. The third element creates a threshold of seriousness, so that the acts warrant being described as crimes against humanity.²¹³

The UN Special Rapporteur on systematic rape, sexual slavery and slavery-like practices observed that sexual violence includes:

any violence, physical or psychological, carried out by sexual means or targeting sexuality. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals or slicing off a woman's breasts. Sexual violence also characterizes situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner.²¹⁴

11.3.9 Persecution

Persecution involves the intentional and severe deprivation of fundamental rights, against an identifiable group or collectivity on prohibited discriminatory grounds. In addition, the ICC Statute requires that persecution be committed in connection with another crime or at least one inhumane act.

Severe deprivation of fundamental rights

Until recently, the crime of persecution was not well defined, and the need for adequate precision was highlighted both in Tribunal jurisprudence and in the drafting of the ICC Statute.²¹⁵ The test developed in Tribunal jurisprudence requires (1) a gross or blatant denial, (2) on discriminatory grounds, (3) of a fundamental right, laid down in international customary or treaty law, (4) reaching the same level of gravity as other crimes against humanity.²¹⁶ Although there is some different terminology, this is generally compatible with the ICC definition, which refers to intentional and severe deprivation of fundamental rights, on specified discriminatory grounds.

The emergent definition, with the notions of fundamental rights, severe deprivation, and discriminatory grounds, provides the needed precision for criminal law. Nonetheless, the test necessarily remains somewhat open with respect to the particular acts that may constitute persecution, as it is impossible to anticipate all future examples. Tribunal jurisprudence has noted that:

neither international treaty law nor case law provides a comprehensive list of illegal acts encompassed by the charge of persecution, and persecution as such is not known in the world's major criminal justice

²¹² La Haye, 'Sexual Violence', 198; *Final Report on Systematic Rape*, paras. 21–2.

²¹³ In the context of war crimes, the requirement refers to gravity comparable to a grave breach (or common Art. 3 in the case of internal armed conflicts) of the Geneva Conventions.

²¹⁴ *Final Report on Systematic Rape*, paras. 21–2.

²¹⁵ *Kupreškić et al.*, ICTY T. Ch. II, 14 January 2000, para. 618: 'However, this Trial Chamber holds the view that in order for persecution to amount to a crime against humanity it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty. There must be clearly defined limits on the types of acts which qualify as persecution. Although the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.'

²¹⁶ See e.g. *Kupreškić et al.*, ICTY T. Ch. II, 14 January 2000, para. 621.

systems. [Thus] the crime of persecution needs careful and sensitive development in light of the principle of *nullum crimen sine lege*.²¹⁷

Gravity or severity

Tribunal jurisprudence indicates that persecution requires a gravity comparable to other crimes against humanity;²¹⁸ in the ICC definition this requirement may be subsumed in the requirements of 'severe' deprivation.

Discriminatory grounds

The fundamental feature of persecution is that it be committed on discriminatory grounds. The ICTY and ICTR Statutes refer to persecution on political, racial or religious grounds.²¹⁹ The ICC Statute contains an updated and more inclusive list of prohibited grounds: political, racial, national, ethnic, cultural, religious or gender.²²⁰ In addition, the ICC list is cautiously open-ended in referring to 'other grounds that are universally recognised as impermissible under international law'.²²¹ The standard of 'universal' means that the threshold required to read in additional grounds is a high one, but a high standard was considered necessary in order to satisfy the principle of legality.

Connection to other acts

The ICC Statute contains an additional requirement, that persecution be committed in connection with (a) any crime within the jurisdiction of the Court or (b) any other act listed in Article 7(1). This requirement was included because of the concern of several States about the possible elasticity of the concept of persecution. The fear was that any practices of discrimination, more suitably addressed by human rights bodies, would be labelled as 'persecution', giving rise to international prosecutions. The connection requirement was inserted to ensure at least a context of more recognized forms of criminality. Although the original proposal was to require a link to another crime within the jurisdiction of the Court, this was widened to include a link to any other act referred to in Article 7(1).

The customary law status of this requirement is open to doubt. Such a requirement is not applied in Tribunal jurisprudence; in *Kupreškić*, an ICTY Trial Chamber found that, 'although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law'.²²² In any event, the requirement should not pose a significant obstacle for legitimate prosecutions of persecution, since it is satisfied by a linkage to even *one* other recognized act (a killing or other inhumane act), which one would expect to find in a situation warranting international

²¹⁷ *Kordić and Čerkez*, ICTY T. Ch., 26 February 2001, para. 694.

²¹⁸ See e.g. *Kupreškić et al.*, ICTY T. Ch. II, 14 January 2000, paras. 619 and 621; *Kvočka et al.*, ICTY T. Ch. I, 2 November 2001, para. 185; *Ruggio*, ICTR T. Ch., 1 June 2000, para. 21.

²¹⁹ Art. 5(h) of the ICTY Statute; Art. 3(h) of the ICTR Statute. ²²⁰ Art. 7(1)(h) of the ICC Statute. ²²¹ *Ibid.*

²²² *Kupreškić et al.*, ICTY T. Ch. II, 14 January 2000, para. 580. Antonio Cassese argues persuasively that the requirement is inconsistent with the elimination of the general nexus requirement in the Nuremberg Charter and therefore is a restriction on customary law: Cassese, 'Crimes against Humanity', 376.

prosecution. In so far as such an element exists, it is purely an objective element to ensure the seriousness of the situation, and does not require any mental element.²²³

Mental element

In addition to the normal mental element relating to the conduct and the broader context, persecution requires a particular intent to target a person or group on prohibited grounds of discrimination.²²⁴ Tribunal jurisprudence indicates that a particular *intent* to discriminate is required, not simply a *knowledge* that one is acting in a discriminatory way.²²⁵ With respect to the requirement in the ICC Statute of a 'connection' to other crimes or prohibited acts, this requirement is purely objective and no mental element is required.²²⁶

Relationship to other crimes

Persecution and genocide each require a particular discriminatory intent. In the case of genocide, however, the intent is more specific: it must be an intent to destroy a group as such, and the target must be a national, ethnical, racial or religious group. Genocide can only be based on the listed acts (see, for example, Article 6 of the ICC Statute) whereas the conduct potentially amounting to persecution is broader. Acts amounting to other crimes against humanity can constitute persecution if the additional aggravating element of discriminatory intent is present.

Examples of persecutory acts

Persecutory acts include the prohibited acts already listed in the definition of crimes against humanity, when committed with discriminatory intent.²²⁷ Examples that have been prosecuted include murder, extermination, imprisonment, deportation, transfer of populations, torture, enslavement and beatings (inhumane acts).²²⁸ In addition, they can include other conduct that severely deprives political, civil, economic or social rights. Examples include the passing of discriminatory laws, restriction of movement and seclusion in ghettos, the exclusion of members of an ethnic or religious group from aspects of social, political and economic life, including exclusion from professions, business, educational institutions, public service and inter-marriage.²²⁹ It also includes overt violence such as burning of homes and terrorization.²³⁰ The ICTR Appeals Chamber has held that, while hate speech alone does not constitute persecution, hate speech and calls to violence, contributing to acts of violence, and in a broader context of persecution, can be of comparable gravity to other crimes and hence constitute acts of persecution.²³¹

Attacks on property can constitute persecution. This includes 'systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other

²²³ ICC Elements of Crimes, footnote 22.

²²⁴ ICC Elements of Crimes, Art. 7(1)(h), Element 3; *Kordić and Čerkez*, ICTY T. Ch., 26 February 2001, para. 212.

²²⁵ *Krnjelac*, ICTY T. Ch. II, 15 March 2002, para. 435; *Kordić and Čerkez*, ICTY T. Ch., 26 February 2001, para. 212.

²²⁶ ICC Elements of Crimes, footnote 22. ²²⁷ *Kupreškić et al.*, ICTY T. Ch. II, 14 January 2000, paras. 593–607.

²²⁸ *Tadić*, ICTY T. Ch. II, 7 May 1997, paras. 704–10; *Kupreškić*, ICTY T. Ch. II, 14 January 2000, para. 594.

²²⁹ *Kupreškić et al.*, *ibid.*, paras. 608–15. ²³⁰ *Krštić*, ICTY T. Ch. I, 2 August 2001, para. 537.

²³¹ *Nahimana et al.*, ICTR A. Ch., 28 November 2007, paras. 986–8.

group',²³² and destruction of homes and means of livelihood.²³³ The *Tadić* decision noted doubts about whether attacks on purely industrial property would suffice, but thought economic measures with personal effects, including deprivation of livelihood, would suffice.²³⁴ The *Blaškić* decision affirmed that persecution includes 'targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community'.²³⁵ This may be seen in destruction of private dwellings, businesses, symbolic buildings, looting and plunder of businesses and private property, boycott of businesses and shops, and forcing the group out of economic life.²³⁶

11.3.10 Enforced disappearance

The ICC Statute expressly includes enforced disappearance as a crime against humanity. Enforced disappearance was recognized previously as an international crime and indeed as a crime against humanity. It was exemplified in the 'Night and Fog Decree' issued by the Nazis, to execute people and to provide no information to the families as to their whereabouts or fate.²³⁷ It was also a prevalent feature under military regimes in Latin America in the 1980s, and is still practised today in various regimes around the world. Enforced disappearance is expressly recognized as a crime against humanity in the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance, the 1994 Inter-American Convention on the Forced Disappearance of Persons and, more recently, in the 2005 International Convention on the Protection of All Persons from Enforced Disappearance.²³⁸

The definition in the ICC Statute is based on the UN Declaration and the Inter-American Convention,²³⁹ and refers to the 'arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of law for a prolonged period of time'.²⁴⁰

A welcome development in the negotiation of the ICC Elements of Crimes was the realization that there are various ways in which an *individual* may be liable for this crime. Previous definitions simply described the whole system of enforced disappearance, but it is unlikely that a single individual would be involved in the arrest, detention or abduction phase, as well as the refusal to acknowledge the deprivation or to provide information. Enforced disappearance typically involves many actors. Therefore, the ICC Elements of Crimes recognize that the crime may be committed (a) by arresting, detaining or abducting a

²³² ILC Report, 1991, p. 268. ²³³ *Kordić and Čerkez*, ICTY T. Ch. III, 26 February 2001, para. 205.

²³⁴ *Tadić*, ICTY T. Ch. II, 7 May 1997, para. 707. ²³⁵ *Blaškić*, ICTY T. Ch. I, 3 March 2000, para. 233.

²³⁶ *Ibid.*, paras. 220–33.

²³⁷ Nuremberg IMT, Judgment and Sentences, reprinted in (1947) 41 *American Journal of International Law* 172, 230.

²³⁸ Preamble, paras. 4, 5 and 6 of the respective instruments.

²³⁹ Preamble, para. 3 of the UN Declaration and Art. 2 of the Inter-American Convention. ²⁴⁰ Art. 7(2)(i) of the ICC Statute.



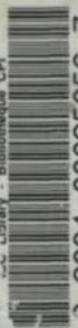
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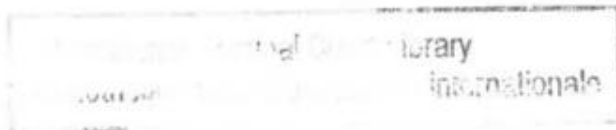
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H. Article 7(1)(h)—Crime Against Humanity of Persecution*Georg Witschel and Wiebke Rückert**Rome Statute:*

- 7(1)(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;
- 7(2)(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- 7(3) For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Relevant Elements:

1. The perpetrator severely deprived, contrary to international law,^[21] one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.^[22]

[21] This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.

[22] It is understood that no additional mental element is necessary for this element other than that inherent in element 6.⁸¹

Background:

Persecution is a crime unique to the section on crimes against humanity, unlike the previously enumerated crimes, which are also covered as war crimes.⁸² Persecution was recognized as a crime against humanity in the Nürnberg Charter, the Tokyo Charter, Control Council Law No. 10, and the Statutes of ICTY and ICTR.⁸³ However, none of these precedents provided a definition of the crime of persecution. At the

81. Element 6, one of the contextual elements, reads: "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

82. See, for a recent example, Olivia Swaak-Goldman, "Persecution," in *Substantive and Procedural Aspects of International Criminal Law, The Experience of International and National Courts*, 247 (Gabrielle Kirk McDonald, Olivia Swaak-Goldman eds., 2000).

83. The fact that all these instruments referred to "persecutions" in the plural form appears to be of mere grammatical, not substantive relevance.

Rome Conference, many delegations were concerned that persecution might be interpreted as including any kind of discriminatory practices. This concern led to the adoption of the more detailed definition of persecution now appearing in the Statute.

It was thus agreed that persecution refers to the intentional and severe deprivation of fundamental rights on certain specific discriminatory grounds. Whereas most of the precedents listed only political, racial or religious grounds, it was decided that, for the Rome Statute to be "up to date," it would also include persecution on national, ethnic, cultural and gender grounds. In addition, the Rome Statute definition also includes persecution on any other grounds that are universally recognized as impermissible under international law.

In order to emphasize the criminal law nature of persecution, several delegations argued for a requirement that persecution must be "connected" to another crime within the jurisdiction of the Court. At the end, this was slightly modified so that article 7(1)(h) includes a requirement that persecution be committed in connection with any act referred to in the paragraph on crimes against humanity or any other crime within the jurisdiction of the Court.⁸⁴

Material Elements:

The *actus reus* of persecution under the Rome Statute requires, first, that the perpetrator severely deprives one or more persons of fundamental rights. This first material element merely reformulates the definition of persecution contained in article 7(2)(g) of the Statute. According to this first material element, the deprivation itself is directed against one or more individual persons, not against a whole group of persons. There were heated discussions in the Preparatory Commission as to whether the element should also refer to perpetrators depriving a group *per se* of rights. Surprisingly, the negotiations did not always follow the path to be expected against the backdrop of the proposals submitted. The Canadian/German proposal referred only to acts depriving individuals of fundamental rights "by reason of their membership in an identifiable group or collectivity."⁸⁵ On the other hand, the proposal by a number of Arab states⁸⁶ and the US proposal⁸⁷ considered the depriving of an identifiable group or of members of that group of a fundamental right as *actus reus*. Yet, after Israel and a number of mainly European and American States suggested that a group itself might be deprived of rights, a number of other countries, including countries from the Arab world, argued against that position. These countries were often critical of the concept of group rights *per se*. Some also referred to the *Tadić* judgement of the ICTY, in which the Trial Chamber held that persecution requires some form of discrimination that is intended to be and results in an infringe-

84. See Darryl Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference," 93 *Am. J. Int'l L.* 43, at 53-55 (1999).

85. PCNICC/1999/WGEC/DP.36.

86. PCNICC/1999/WGEC/DP.39.

87. PCNICC/1999/DP.4/Add.1.

ment of an individual's fundamental rights, in order to prove the need for individual rights to be violated.⁸⁸ Others took a conciliatory position, noting that any deprivation directed against a group would inevitably result in the deprivation of rights of individual members of that group. The issue was not settled until second reading, when the U.S. proposed a compromise which garnered consensus. Under this compromise, no reference to groups is made in the first element, but the group or collectivity as such was introduced as a possible target of the perpetrator in element 2.

Following the definition contained in the Statute, element 1 re-iterates that the deprivation of fundamental rights has to be contrary to international law. The inclusion of this passage in the elements resulted from discussions during the final session of the Preparatory Commission. At first reading, most delegations were originally of the view that a restatement of this statutory provision in the elements was unnecessary, since it amounted to the requirement of "unlawfulness" found elsewhere in the Statute, and in accordance with the general approach in drafting of elements, would therefore generally not be repeated in the Elements (see paragraph 6 of the General Introduction). However, other delegations emphasized their preference for explicit adherence to the statutory language on this point, so agreement was eventually reached to include the passage "contrary to international law." Consequently, footnote 21 was added to clarify that the explicit articulation of this requirement was without prejudice to paragraph 6 of the General Introduction.

With regard to the fundamental rights concerned, some delegations sought to introduce the concept of "universal recognition" to further qualify "fundamental rights."⁸⁹ On this approach, persecution would only exist where there was a deprivation of fundamental rights that were "universally recognized" as such. Others maintained, *inter alia*, that the term "fundamental" was already a compromise reached at the Rome Conference, where it was agreed that the high standard of "universal recognition" would only be required for the recognition of new grounds of persecution other than the ones enumerated in article 7(1)(h) of the Statute. These two irreconcilable positions were the subject of a lengthy debate. The demands to insert a reference to "universal recognition" were eventually withdrawn, once the underlying concerns were partially addressed in the discussions on the Introduction to crimes against humanity.⁹⁰

88. *Tadić*, *supra* note 14, at para. 697.

89. See PCNICC/2000/L.1/Rev.1/Add.2, footnote 25. The same position was taken with regard to the "inhumane act" in the crime against humanity of other inhumane acts, art. 7(1)(k), (PCNICC/2000/L.1/Rev.1/Add.2, footnote 34) as well as for "fundamental rules of international law" in the crime against humanity of imprisonment or other severe deprivation of liberty, art. 7(1)(e), (PCNICC/2000/L.1/Rev.1/Add.2, footnote 14).

90. The compromise formula contained in paragraph 1 of the Introduction reiterates that the provisions of article 7 of the Statute must be strictly construed, "taking into account that crimes against humanity [...] require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world." See *supra* section II.

Adequately reformulating the statutory definition proved to be equally difficult with regard to the second material element. The gravamen of the crime of persecution lies in the targeting of an identifiable group or collectivity. As was rightly pointed out during the negotiations, the group or collectivity as such can be the target of the crime, with the suffering of individual victims being a kind of unavoidable “byproduct.” The second material element therefore refers not only to the targeting of such person or persons, but alternatively also to the targeting of a group or collectivity as such. In the case of targeting one or more persons, there was an issue as to how to describe their relation to the group or collectivity. The text in the Elements is worded as closely as possible to the language of the Statute. Although variants of more clear and elegant wording were suggested on this point, the discussed alternatives were felt to be, for example, too restrictive (“by reason of their belonging to an identifiable group or collectivity”⁹¹), too vague (“by reason of their support for an identifiable group or collectivity”) or too subjective (“by reason of their identification with a group or collectivity”). Going back to the statutory language⁹² seemed to be the best way to accommodate all concerns, and it leaves the development of possible more detailed formulations on the relation between individual and group or collectivity for future case law.

The third element, containing the enumeration of discriminatory grounds, was built upon the provision negotiated in Rome and therefore uncontroversial.

With respect to the fourth element, however, even though it is equally reflective of the Statute, some doubts were raised as to the extent of mental coverage required, as is discussed below.

Mental Elements:

In conformity with paragraph 2 of the *General Introduction*, the mental elements of persecution are—with one exception—covered by the *mens rea* requirements that follow from article 30 of the Statute. In particular, element 3 arguably does not entail a specific mental element, but can be established objectively.

Element 4, which deals with the connection to any other act referred to in article 7(1), was a special case. Most delegations regarded this as a purely objective requirement, ensuring that the Court would only deal with serious cases of persecution, and for which no mental element was needed. After extensive discussions, agreement was reached to add footnote 22, clarifying that no additional mental element was necessary other than that already inherent in the contextual element 6. Thus, the perpetrator does not have to be aware of any specific “connected” acts; it suffices that he or she has the general awareness of the context of the attack directed against a civilian population, as is already required in contextual element 6.

91. As contained in PCNICC/2000/L.1/Rev.1/Add.2.

92. Without repeating that the group or collectivity has to be an “identifiable” one according to article 7(1)(h) because that would have been tautologous in the current wording of the element.