Adjudicating attacks targeting culture: revisiting the approach under state responsibility and individual criminal responsibility

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CHAPTER 2: CRIMES AGAINST HUMANITY

I. Introduction: crimes coined by the clash of civilisations

Unlike with war crimes and genocide, international legislators have yet to draw-up and adopt an instrument dedicated solely to CaH.[582] Only the statutes of ICR-based jurisdictions have defined, for their own purposes, CaH, alongside war crimes and genocide. This has resulted, pending the adoption of a CaH treaty,[583] in a complex situation with a multiplicity of definitions of CaH.

A denomination evoking the sacrality of human condition across the globe, CaH's origin is in fact quite the opposite, as they were born in deference to the clash of civilisations rather than their dialogue. Accordingly, the first multilateral reference to CaH in an ICL context dates back to the massacre of Armenians in the Ottoman Empire.[584] At a time of a pan-Christian peak in Europe, many Western diplomats referred to Armenians as "native Christians" to distinguish them from the Sunni Muslim Ottoman perpetrators.[585] Eager to satisfy its Armenian population, Russia proposed to France and the United Kingdom to issue the following declaration:

> In the face of these fresh *crimes* committed by Turkey *against Christianity and civilisation*, Allied Governments […] will hold all the members of the Ottoman Government, as well as such of their agents as are implicated, personally responsible for Armenian massacres.[586] [emphasis added]

France, however, omitted "Christianity and civilisation" so as to read "crimes committed by Turkey", to avoid alienating its Muslim colonies and possessions.[587] Pragmatic as ever, the United Kingdom omitted the word "Christianity" so that it read "crimes committed by Turkey against civilisation".[588] As a compromise, Russia successfully proposed substituting "humanity" for "Christianity", so as to read "crimes against humanity and civilisation".[589] Issued on 24 May 1915, the declaration read:

> the Kurd and Turkish population of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities. […] In view of these new *crimes*

[582] There are conventions on specific types of crimes against humanity. *See* Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243; UNGA, "Declaration on the Protection of All Persons from Enforced Disappearance" (adopted 28 February 1992) UNGA Res 47/133, UN Doc A/47/49; Inter-American Convention on the Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) OEA Doc AG/RES 1256 (XXIV-0/94).
[583] *See* UNGA, "Report of the International Law Commission Sixty-Ninth Session" (1 May-2 June and 3 July - 4 August 2017) UN Rep A/72/10. *See also* Sadat (n 15).
[584] The term would be used also in a moral context, such as for starting wars. *See* Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000), p 349.
[585] Bass (n 584) p 116.
[586] "Buchanan to Grey" (11 May 1915) FO 371/2488/58387 *in* Bass (n 584) pp 115 and 349.
[587] "Bertie to Foreign Office" (21 May 1915) FO 371/2488/63903 *in* Bass (n 584) pp 116 and 349.
[588] "Bertie to Foreign Office" (21 May 1915) FO 371/2488/63903 *in* Bass (n 584) pp 116 and 349.
[589] FO 371/2488/65759 (24 May 1915) *in* Bass (n 584) pp 116 and 349.

> of Turkey *against humanity and civilisation*, the Allied Governments […] will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.[590] [emphasis added]

CaH as a subject of ICL were thus first conceived in the context of a clash between Christianity and Islam. A Christian Europe felt duty-bound to rescue the Armenian Christian minority from the Ottoman Empire's Sunni Muslim population, ie Kurds and Turks. Initially conceived by three culturally Eurocentric empires against a culturally Asia-centric empire, the secularisation of this initially religion-based posture was driven by pragmatism more than idealism. The concept of CaH in ICL was thus born in a cultural/civilisational context.

CaH's *context* would change with the post-Second World War, Cold War and post-Cold War world order, respectively. However, CaH's *concept* has remained unchanged. This is best encapsulated in the ILC work, as reflected in its Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal ("1950 ILC Nürnberg Principles"),[591] the Draft Code of Crimes against the Peace and Security Mankind ("1954 ILC Draft Code"),[592] the 1991 ILC Report,[593] or the 1996 ILC Report.[594] Throughout the ILC work, not only the definition but also the denomination of CaH would evolve – the 1954 ILC Draft Code and the 1991 ILC Report would even at one time call it "inhumane acts" and "systematic or mass violations of human rights", respectively.[595] As this Chapter will show, CaH remain relevant for the adjudication of attacks targeting culture, as conceived in this study. Accordingly, CaH's chapeau elements will always require attacks against a collective, something akin to the ECtHR-IACtHR's practice with respect to gross human rights violations (Part I, Chapter 2). This collective aspect is further reinforced by CaH persecution, since it targets individuals by virtue of belonging to defined collectives, or even, under the ICC Statute, the collective as the sum of its individual persons. Finally, persecution's mens rea, ie its discriminatory grounds, will always have a twofold impact. On the one hand, they will be shaped by the adjudicators' cultural background. This is so because the meaning of those grounds will change as cultural cannons change geographically (where the adjudicators come from) but also chronologically (the era when the adjudicators assess the grounds). Thus, like the crime of genocide's groups, the grounds of CaH persecution will be filtered through cultural interpretations (this Part, Chapter 3). On the other hand, due to its mens rea's discriminatory grounds, persecution is almost always committed against a cultural backdrop, even if its accompanying actus rei do not target culture as such. Indeed, the discriminatory grounds will always involve identity concerns, something that attaches to heritage. Beyond its mens rea, it will also be shown that ICR-based jurisdictions have gradually recognised that persecution's actus rei may also target culture's tangible and intangible.

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[590] "Buchanan to Grey" (11 May 1915) FO 371/2488/58387 *in* Bass (n 584) pp 115 and 349.
[591] *See* ILC, "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" (1950) 2(3) *Yearbook of the ILC*, UN Doc No A/1316 (A/5/12), paras 95–127.
[592] ILC, Draft Code of Crimes against the Peace and Security Mankind with Commentary (1954) 2 *Yearbook of the ILC*, UN Doc No A/CN.4/SER.A/1954/Add.l.
[593] 1991 ILC Report (n 425) p 104.
[594] ILC, "Report of the International Law Commission on the Work of Its Forty-Eighth Session" (1996) 2(17) *Yearbook of the ILC,* UN Doc A/CN4/SERA/1996/Add1 (Part 2), p 48.
[595] 1954 ILC Draft Code (n 592) art 2(11); and 1991 ILC Report (n 425) p103.

Like this Part's other Chapters, the present will analysis relevant normative provisions and a selection of judgments that are most helpful to understand the adjudication of attacks targeting culture. Based on the comparative analysis of the aforementioned, this Chapter will propose how the said adjudication could consider CaH as targeting culture under both its anthropo-centred (II) and tangible-centred (III) approaches.

II. The anthropo-centred approach

A. Introduction

The chapeau elements of CaH do not speak to culture, even less so to attacks targeting it. However, as will be shown, from the very beginning of the criminalisation of acts under the denomination of CaH, the IMT Charter and the IMTFE Charter considered them to be so only in case of collectives, ie a civilian *population* [emphasis added]. Unlike these jurisdictions and later the ICTY, all other ICR-based jurisdictions' statutory definition of CaH delinked the commission of CaH from armed conflicts. Accordingly, by progressively considering CaH as a set of criminal acts within an attack against civilian populations, international legislators and adjudicators have made CaH's chapeau capable of addressing scenarios of gross human rights violations against the collective through its natural person members – a reminder of the IACtHR-ECtHR contexts (B). Among those underlying acts, this study will focus on persecution, since it is capable of encompassing all other CaH as well as ICR-based jurisdictions' other subject matter crimes. The mens rea of the crime of persecution grounds the commission of that crime on factors, such as ethnicity and religion. These are concepts that contribute to the identity of natural persons as members of the collective. Broadly unchanged from the IMT-IMTFE onward, those discriminatory grounds would be expanded into a non-exhaustive list, through the ICC Statute to encompass, inter alia, gender and culture. As will be discussed, these grounds turns persecution into a culture-based crime. For example, when grounded on persecution's discriminatory grounds, the CaH deportation may be characterised as persecution. This has promoted the IMT and ICTY to reference this as "cleansing" or "ethnic cleansing", respectively, since they manifested identity-based attacks, in other words, attacks targeting culture. But as will also be shown, ICR-based jurisdictions have also considered that persecution's actus rei can focus on damage to/destruction of culture's tangible. More recently, this has expanded to culture's intangible. If confirmed upon appeals and/or trial, as the case may be, the encompassing culture's intangible in persecution's actus rei would bring the broad aspect of the crime into a full circle (C).

By analysing the actual texts of the progressive definition of CaH from the IMT-IMTFE up to the ICC, this Section will thus show that CaH contain the essence of a heritage-centred approach enabling the adjudication of attacks targeting culture.

B. The chapeau elements: attacks against a collective

The underlying offences of CaH may qualify as such only if they occurred as part of a widespread or systematic attack against any civilian population. As it will be shown, it took half a century for these "chapeau" elements to settle, from the IMT-IMTFE-ICTY, where the offences required an armed conflict nexus, to the ICTR-ICC, where the offences constituted part of an attack unrelated to the said nexus (1). In this process, the brief introduction of discriminatory grounds within the Chapeau illustrates the reigning confusion between CaH and genocide, thereby emphasising the former's collective and cultural dimensions (2). As it will be argued, the chapeau elements' break-down and evolution shows how, as an original extension of war crimes, CaH have come to embrace gross human rights violations in the context of the collective, making them capable of addressing attacks targeting culture. In other words, while the ECtHR-IACtHR characterised such attacks as human rights violations, CaH are capable of criminalising them,

1. A war crimes' by-product turned into a human rights crime

The IMT-IMTFE Charters and the ICTY Statute conceived CaH as a series of crimes committed against the civilian population, with an armed conflict nexus. As regards the latter, as international law stood at the time, it was thought that CaH could crystallise only by expanding the scope of war crimes, yet by placing the former in a separate provision – hence the armed conflict nexus.[596] Fifty years later, the ICTY Statute article 5 ("Crimes against humanity") did the same so as to anticipate, as explained by its drafter Bassiouni, potential challenges to the legality of the ICTY Statute, given how the UNSC regarded the existence of armed conflicts in the former Yugoslavia (and later Rwanda).[597] Once the dust had settled, the ICTY jurisprudence would clarify that the

[596] M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge 2011), p 136. Art 6(c) reads "Crimes against humanity.- ' namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". *See* IMT Charter (n 403) art 6(c). The IMTFE Charter art 5(c) reads: "Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders" organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any or' the foregoing crimes are responsible for all 'acts performed by any person in execution of such plan". The main difference was that the IMTFE charter omitted religion as a ground of persecution. *See* IMTFE Charter (n 488) art 5(c).

[597] Bassiouni, *Crimes Against Humanity* (n 596) pp 183-186 and 188, explaining that the said elements "were tailored to fit the situations to which they were to apply". As for the ICTY art 5, it reads:

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

armed conflict nexus is merely a jurisdictional requirement and not an element of the crime.[598] In fact, the Control Council Law No 10 ("CCL 10") article II and the 1950 ILC Nürnberg Principles resembled the IMT-IMTFE Charter, except that they abandoned the armed conflict nexus.[599] So would the ICTR and eventually the ICC, further refining the definition of CaH by introducing a formal and substantive chapeau. According to the ICTR Statute article 3, CaH consist of a series of crimes, inter alia, "committed as part of a widespread or systematic attack against any civilian population".[600] Article 3 thus introduced a chapeau, formally, by separating a number of requirements from the "underlying" offences, and substantively, by clarifying those requirements. Abandoning the armed conflict nexus, the ICTY Appeals Chamber explained that such an attack "could precede, outlast, or continue during the armed conflict, but not be part of it", and therefore "is not limited to the use of armed force; it encompasses any mistreatment of the civilian population".[601] As regards the latter, the *Tadić* Appeals Chamber clarified that the term "population" implies "crimes of a collective nature".[602] Thus, the use of the term "population" after "civilian" introduced an element of scale, going beyond individuals. Clearly, based on the 1996 ILC Report

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(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

See ICTY Statute (n 52).

[598] *Prosecutor v Tadić*, (ICTY) Judgment (15 July 1999) Case No IT-94-1-A, paras 249-251.

[599] Control Council Law No 10, "Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity" (20 December 1945) 3 Official Gazette Control Council for Germany 50–55, art II read:

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

The 1950 ILC Nürnberg Principles (n 591) would read:

> c. Crimes Against Humanity:
> Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

See 1950 ILC Nürnberg Principles (n 591).

[600] ICTR Statute art 3 reads:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
> a) Murder;
> b) Extermination;
> c) Enslavement;
> d) Deportation;
> e) Imprisonment;
> f) Torture;
> g) Rape;
> h) Persecutions on political, racial and religious grounds;
> i) Other inhumane acts

See ICTR Statute (n 55).

[601] *Kunarac et al* Appeal Judgment (n 410) paras 70 and 86.

[602] *Tadić* Trial Judgment (n 89) para 644.

and the ICTY-ICTR jurisprudence, "widespread or systematic attack against any civilian population" thus conveys not only the idea of a large geographic and/or demographic attack, but also that of a collective, ie the civilian population.[603] This echoed the IMT which, when discussing CaH, had held that "The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic".[604] One further step was thus taken towards criminalising the mass cultural rights violations scenarios covered in Part I, Chapter 2.

After years of oscillations, and absent a CaH convention, the ICC Statute provided the neatest version of the chapeau. According to article 7 ("Crimes against humanity"), CaH consist of a series of eleven "acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[605] The ICC Statute thus relinquished the earlier armed conflict nexus and the discriminatory grounds. Unequivocally, article 7 now enables adjudicating gross human rights violations committed by governments against their nationals.[606] In this regard, it should be noted that the ICC Statute article 7(2)(a) in combination with the ICC Elements of Crimes ("Introduction to crimes against humanity") consider the said

[603] With respect to the terms "large scale" (ie widespread), the 1996 ILC Report has explained covers "a multiplicity of victims" who could result from "the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude". *See* 1996 ILC Report (n 594) p 47, *Kunarac et al* Appeal Judgment (n 410) para 94; *Blaškić* Appeal Judgment (n 496) para 101; *Kordić & Čerkez* Appeal Judgment (n 415) para 94; *Prosecutor v Muhimana*, (ICTR) Judgment and Sentence (28 April 2005) Case No ICTR- 95-1B-T, para 527; *Prosecutor v Muvunyi*, (ICTR) Judgment and Sentence (12 September 2006) Case No ICTR-2000-55A-T, para 512. As for the term "systematic", the 1996 ILC Report (n 594) p 47, explains that systematic means "pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy". By reformulating this, the ICTY would hold that it refers "to the organised nature of the acts of violence and the improbability of their random occurrence". *See Kunarac et al* Appeal Judgment (n 410) para 94; *Blaškić* Appeal Judgment (n 496) para 101; *Kordić & Čerkez* Appeal Judgment (n 415) para 94.

[604] IMT Judgment (n 490) p 254.

[605] ICC Statute art 7 reads:

> 1. 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:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (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;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

See ICC Statute (n 54).

[606] Daryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93(1) *American Journal of International Law* 43, p 46.

attacks to mean the multiple commission of the eleven acts "against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack" which "need not constitute military attack".[607] The latter is a logical requirement given the removal of the armed conflict nexus from the chapeau.[608] The element of scale, together with the separation of the attack from armed conflicts, now helps to neatly criminalise gross human rights – and thus cultural rights – violations regardless of the existence of an armed conflict, a scenario contemplated in Part I, Chapter 2.

2. A path toward genocide

But the ICC Statute would also abandon the ICTR Statute article 3's chapeau anomaly.[609] According to the latter, the said attack must occur "on national, political, ethnic, racial or religious grounds". As noted by Bassiouni, this language "which is so intrinsic to the Genocide Convention is puzzling, to say the least".[610] However, on further reflection, perhaps it is not. First, the express inclusion of genocide in the ICTR Statute title ("Genocide and Other Serious Violations of" IHL) may have confused matters during the drafting of the ICTR Statute, at a time when the separation between genocide and CaH was particularly unclear, as reflected in the 1991 ILC Report.[611] Second, and most importantly, the article 3 chapeau concerns attacks against any civilian population "on national, political, ethnic, racial or religious *grounds*" whereas article II of the Genocide Convention addresses the *intent* to destroy "a national, ethnical, racial or religious *group*, *as such*" [emphasis added]. As will be seen, during the Genocide Convention drafting, the words "as such" eventually replaced the enumerated grounds (national, racial, religious, political); with the motives being seen as reflecting the perpetrators' targeting "something different or alien" (this Part, Chapter 3). The discriminatory grounds enumerated in the ICTR Statute article 3 chapeau do in fact illustrate this approach. The widespread or systematic attack is conducted against any civilian population, as such. In other words, there is an attack against a collective as a cultural unit, (see the discussion on the crime of persecution). In practice, however, the ICTR Appeals Chamber clarified that the chapeau's discriminatory grounds were not part of the mens rea (which in light of the above explanation regarding motives is evident). Rather, they meant that the attack itself must

[607] ICC Statute (n 54). ICC, "Elements of Crimes: Crimes Against Humanity" (2011) Introduction, paras 2-3. The last two elements for each CaH describe the context in which the prohibited conduct should take place, ie the requisite participation in and knowledge of a widespread or systematic attack against a civilian population.

[608] D Robinson (n 606) pp 48 and 51. While the SPSC would copy-paste ICC Statute (n 54) art 7, SCSL Statute (n 101) art 2 would also require that the underlying offences "be committed […] as part of a widespread or systematic attack against any civilian population".

[609] D Robinson (n 606) pp 46-47.

[610] Bassiouni, *Crimes Against Humanity* (n 596) p 188.

[611] *See* Gideon Boas, James L Bischoff, Natalie L Reid and B Don Taylor, *International Criminal Law Practitioner Library Series: International Criminal Procedure*, vol 3 (Cambridge University Press 2011), pp 129 and 375-379. The ILC explained that:

> The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement. The [Genocide Convention] did not include any such requirement with respect to the second category of crimes against humanity, […].

See 1996 ILC Report (n 594) p 48.

be discriminatory.[612] Indeed, theories aside, a widespread or systematic attack against a civilian population will, in practice, not occur on random *grounds*. There would always be a reason for such an attack. It is true that the word "any" does mean that civilians are attacked regardless of whom they are (eg nationality).[613] However, notwithstanding the targeted population's single identity or a conglomerate of various identities, it is a collective that is attacked. This makes the attack *ultimately* identity-based. Within that attack, the targeting of culture may quality as CaH.[614]

3. Outcome

The CaH chapeau's half-a-century long evolution illustrates the international legislators and adjudicators' progressive differentiation between war crimes, CaH and genocide. Liberated from their armed conflict nexus, CaH are capable of addressing exactions both related and unrelated to war crimes. As for the ICTR's brief venture into discriminatory grounds, it showcases the difficulties inherent to separating CaH from genocide. Either way, CaH's chapeau elements embody the concept of mass crimes committed against individuals as part of a widespread or systematic targeting of a collective. Within these parameters, many of CaH's actus rei, such as deportation/disappearance; sexual crimes, enforced sterilisation; apartheid; other inhumane acts; or else persecution could be part of attacks targeting culture. Through this angle, a heritage-centred approach allows viewing the members of that collective as the actual victims of those underlying crimes which, under the ECHR-IACHR, qualify as human rights violations (Part I, Chapter 2). While judicial practice does not address expressly the heritage-centred targeting of culture, the following will compare and contrast the said practice so as to make propositions aimed at facilitating such adjudications. Since each of CaH's underlying offences may amount to persecution, the following analysis looks at the latter within the framework of attacks targeting culture.

C. The underlying offences: the crime of persecution

The crime of persecution has been ever present since the IMT Charter provided the first international statutory definition of CaH. Domestically, of those few legal systems that have criminalised persecution, the crime has included what Bassiouni has referenced as

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[612] *Prosecutor v Akayesu*, (ICTR) Judgment (1 June 2001) Case No IT-96-4-A, paras 464–469 and 595; *Prosecutor v Bagilishema*, (ICTR) Judgment (7 June 2001) Case No ICTR-95-1A-T, para 81. For the ICTY, see *Prosecutor v Tadić*, (ICTY) Appeal Judgment (27 February 2001) Case No IT-94-1-A, para 305. The ECCC too, which has the same chapeau, has considered the discriminatory grounds as a jurisdictional element rather than an element of the crime. *See Prosecutor v Kaing Guek Eav alias Duch*, (ECCC) Trial Chamber Judgement (26 July 2010) No 001/18-07-2007/ECCC/TC, para 313.

[613] *Tadić* Trial Judgment (n 89) para 635.

[614] This must be distinguished, from the perpetrator's commission of the underlying offences. As held by the *Kunarac* Appeals Chamber: "the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons.' […] It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof". *See Kunarac et al* Appeal Judgment (n 410) para 103.

"policies and practices of a discriminatory nature that cause a specific harm to a given person in violation of the law".[615] Bassiouni has further suggested that persecution:

> is more likely to take the form a motive, policy, or goal; it is not an act in and of itself. To accomplish "persecution" requires the intent to discriminate on prohibited grounds in conjunction with other acts, which are also usually criminal.[616]

It has thus befallen on ICR-based jurisdictions to determine the scope of CaH persecution. Unsurprisingly, the exercise has not led to a uniform approach. The analysis of the crime's mens rea (1) and actus reus (2) showcases the possibility to adjudicate attacks targeting of culture from an anthropo-centred approach.

1. Mens rea: a collective identity-based crime

a. The "lower genocide"

The crime of persecution is characterised by its mens rea, which requires the commission of its actus rei on discriminatory grounds, in contrast with all other underlying offences of CaH. Having long been limited to political, racial or religious grounds (IMT-IMTFE-CCL 10 and ICTY-ICTR-ECCC),[617] persecution's discriminatory grounds expanded to encompass ethnic grounds (SCSL), ie "Persecution on political, racial, ethnic or religious grounds".[618] Unlike the IMT-IMTFE-CCL 10 model, which provided for a disjunctive enumeration of the discriminatory grounds, the ICTY-ICTR-ECCC model opted for a cumulative one.[619] The ICTY, however, corrected this in light of customary international law.[620]

The telluric change was brought about by the ICC Statute article 7(1)(h), according to which, CaH includes:

> (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.[621]

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[615] Bassiouni, *Crimes Against Humanity* (n 596) p 405.
[616] Bassiouni, *Crimes Against Humanity* (n 596) p 405.
[617] The IMT Charter (n 403) art 6(c) and the IMTFE Charter (n 488) art 5(c) included: persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated"; IMT Charter (n 403) art 6(c) and IMTFE Charter (n 488) art 5(c). CCL 10 (n 599) art I did the same, with some alterations: „persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated"
[618] SCSL Statute (n 101).
[619] *See* the ICTY Statute (n 52) art 5(h), followed by the ICTR Statute (n 55) art 3(h) and the ECCC Law (n 102) art 5.
[620] *Tadić* Trial Judgment (n 89) para 713. For an overview of the ICTY's earlier jurisprudence regarding persecution, *see* William J Fenrick, "The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY" (2001) 32 *Netherlands Yearbook of International Law* 81.
[621] ICC Statute (n 54).

Furthermore, article 7(2)(g) provides that:

> (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.[622]

Accordingly, beyond article 7's chapeau elements and the elements of crimes common to all CaH, the mens rea of persecution is multi-fold, as it relates to who is targeted and on what grounds. As regards the victims, one or more persons must be targeted by reason of a group or collective's identity; or the group or collective. The former is reminiscent of the IACtHR jurisprudence on mass cultural rights violations, where individuals are deprived of their cultural rights *because* they belong to certain groups (Part I, Chapter 2.II.A). On the other hand, targeting the group or collective, as such is reminiscent of those IACtHR mass cultural rights violations involving the targeting of the collective as such (Part I, Chapter 2.II.B). Therefore, the same discussions regarding attacks targeting culture apply here. Anecdotally, targeting the group or collective, as such confirms Fournet and Pégorier's coining persecution as a lower-genocide crime[623] since both here and in the definition of the crime of genocide, the focus is on the group, as such, and no longer on the individual. However, persecution differs from genocide since the latter requires an *intent to destroy* the group, as such [emphasis added]. The *Kupreškić* Trial Judgment has most eloquently summed-up this "lower-genocide" feature as follows:

> the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. […] [P]ersecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate […] Thus, […] from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.[624]

Persecution thus differs from other CaH because of its discriminatory grounds. It is the transition from other CaH into genocide. As will be fully explained (Chapter 3.III), the understanding of most of persecution's discriminatory grounds is evolutionary, as it depends on both time and space.[625] These two pillars of culture, as a dynamic concept

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[622] ICC Statute (n 54). *See* also ICC, "Elements of Crimes: Crimes Against Humanity, Persecution" (2011), art 7(2)(g):

> 1. The perpetrator severely deprived, contrary to international law, 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. […].

[623] Caroline Fournet and Clotilde Pégorier, "'Only One Step Away From Genocide: The Crime of Persecution in International Criminal Law" (2010) 10(5) *International Criminal Law Review* 713, p 718.

[624] *Prosecutor v Kupreškić et al,* (ICTY) Judgment (14 January 2000) Case No IT-95-16-T, para 636.

[625] In the *Justice Case*, the tribunal explained that "'Political' as all Nazi judges construed it […] meant any person who was opposed to the policies of the Third Reich". *See United States of America v Josef Altstötter et al* ("The Justice Case"), (United States Military Tribunal) Judgment (17 February and 4

(general introduction), mean that anthropological and ethnological terms will vary not only chronologically, but also geographically. Already planted in a cultural setting, the interpretation and application of these grounds by international adjudicators will evolve as anthropological cannons do. This has made persecution a crime capable of addressing attack that target culture.

b. The discriminatory grounds' cultural dimensions: the case of gender

Under the ICC Statute article 7(1)(h), the targeting must have been grounded on a non-exhaustive list of defining features of the collective, which consists of expressly newly enumerated grounds in an open-ended fashion. The ICC has expanded the post-IMT-IMTFE-CCL 10 and ICTY-ICTR's political, racial and religious grounds to include national, ethnic, cultural and gender grounds. Since the first four will be discussed in details under genocide (Chapter 3), the following will focus on the term gender, and to a lesser extent culture itself, as an illustration of these terms' spacio-temporal evolutionary aspects.[626] Under, article 7(3):

> 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.[627]

During the drafting of the ICC Statute, contentious debates surrounded the inclusion of gender as a ground of persecution.[628] One group of States, the Holy See, a group of Arab States and some NGOs opposed such inclusion for two reasons. First, gender could be interpreted to encompass further rights such as gender identity and sexual orientation which would challenge religious beliefs.[629] Second, they argued that the term gender was too vague and could undermine the principle of legality.[630] In contrast, the majority argued that the term gender is able to capture socially constructed gender roles.[631] They further argued that its inclusion in the ICC Statute would ensure consistency with the UN framework use of the term gender, which accounted for male and female's both biological and sociological aspects.[632] In order to overcome the

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December 1947) 6 LRTWC 1, p 81. The ICTY-ICTR-ECCC model too did not explain the terms, other than the perpetrator discriminated against the victims' political beliefs or faith. *See Akayesu* Trial Judgment (n 612) para 583 and *Tadić* Trial Judgment (n 89) para 711.

[626] For other references to gender in the ICC Statute, *see* arts 21(3), 42(9), 54(1)(b) and 68(1).

[627] ICC Statute (n 54) art 7(3).

[628] Cate Steins, "Gender Issues" *in* Roy SK Lee (ed) *The International Criminal Court: The Making of the Rome Statute: issues, negotiations and results* (Kluwer Law International, 1999), p 371.

[629] For a comprehensive discussion of how the various State Parties voted *see* Valerie Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (2014) 16(4) *International Feminist Journal of Politics* 563, p 566; *see* Rome Conference (n 109).

[630] Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court"(n 629) p 566.

[631] Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (n 629) p 566.

[632] Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (n 629) p 566; Valerie Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice" (2005) 18(55) *Harvard Human Rights Journal*, p 67 listing the various United Nations definitions of gender that were available at the time of the Rome Conference, ie Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action, Conference Addendum Annex IV (4-15 September 1995), A/CONF.177/20/Rev.1; Report of the Expert Group Meeting on the Development of

impasse, the debate honed in defining gender in article 7(3). The opposing States managed to secure a biological component of the definition so that gender "refers to the two sexes, male and female",[633] although it failed to have gender defined in terms of "society" or "traditional family unit".[634] The supportive States' push for the acknowledgment of gender's socially constructed nature morphed into the addition of the phrase "within the context of society".[635] Furthermore, both sides agreed that "gender does not indicate any meaning different from the above".[636] This exercise of constructive ambiguity par excellence allowed the supporting States to view the phrase as reaffirming gender's sociological construct and the opposing States to view it as reiterating gender's biological aspects.[637]

Notwithstanding this, the ICC Office of the Prosecutor's ("OTP") OTP Policy Paper on Sexual and Gender-Based Crimes distinguishes between sex, as "the biological and physiological characteristics that define men and women", and gender, which "acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys",[638] although failing to be explicit on sexual orientation and non-binary sexual identity. To date, the ICC jurisprudence has not expressly grappled with gender as a ground of persecution, although *Lubanga* listed sexual orientation as a protected class in accordance with the ICC Statute article 21(3) for reparations purposes.[639] That the

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Guidelines for the Integration of Gender Perspectives into the United Nations Human Rights Activities and Programmes UN ESCOR, Comm 'n on Hum. Rts, 52nd Sess, Agenda Items 9, 12, 13 UN Doc. E/CN.4/1996/105 (1995): "the term 'gender' refers to the ways in which roles, attitudes, values and relationships regarding women and men are constructed by all societies all over the world. Therefore, while the sex of a person is determined by nature, the gender of that person is socially constructed"; Integrating Human Rights of Women Throughout the United Nations System: Report of the Secretary General, UN ESCOR, 53rd session, 10 UN Doc. E/CN.4/1997/40 (1996): "as sex refers to biologically determined differences between men and women that are learned, changeable over time and have wide variations both within and between cultures".

[633] Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court (n 632) p 64.

[634]Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (n 629) p 567.

[635] Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court" (n 632) p 65.

[636] Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court" (n 632) p 65 and Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (n 629) p 567.

[637] Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court"(n 629) pp 564-68 and Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court"(n 632) p 64.

[638] *See* OTP "Policy Paper on Sexual and Gender-Based Crimes, The Office of the Prosecutor" (June 2014) <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> accessed 14 April 2019, p 3.

[639] *Prosecutor v Lubanga*, (ICC) Decision Establishing Principles and Procedures to be Applied to Reparations (7 August 2012) No ICC-01/04-01/06-2904, para 191; Among those believing art 21(3) will allow for an open interpretation of art 7(3), *see* Christopher K Hall, Joseph Powderly and Niamh Hayes "Article 7 Crimes Against Humanity" in Kai Ambos and Otto Triffterer (eds) C*ommentary on the Rome Statute of the International Criminal Court, Observers' Notes*, Article by Article (3rd edn CH Beck-Hart-Nomos 2015), pp 292-294; Steins (n 628) p 371. To critics who have noted that art 7(3) definition's biological starting point conflates gender with sex, thereby eroding the sociological aspect of gender, Oosterveld had responded that the biological definition is the point of departure and not determinative, there is room to still consider social construction, as required by the drafting history as well as how the UN considers gender issues. To critics who have noted that art 7(3)'s binary definition and "within the context of society" are too narrow to account for the social construction of gender thus

understanding of gender is both time-bound (as societies evolve) and space-bound (where societies evolve) reinforces the weight of culture's morals, values and norms, as illustrated by the heterogeneous terminology (LGBT, LGBTIQ, LGBTTTQQIAA, or else LGBTQ+) characterising sexual orientation and non-binary sexual identity.[640] These oscillations are reminiscent of the scope of culture as discussed in the general introduction. Indeed, virtually all the grounds of persecution are either part and parcel of culture or defined through it. Thus, it is the "cultural" ground of discrimination that epitomises the cultural setting behind the mens rea of persecution. This is a most interesting feature, in terms of the evolution of persecution's discriminatory grounds. Initially, viewing CaH under the denomination of "inhumane acts", the 1954 ILC Draft Code provided, inter alia, for:

> Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds […].[641]

Notwithstanding the fact that the distinction between social and cultural grounds is not evident, the 1954 ILC Draft Code expanded the IMT-IMTFE schemes' discriminatory grounds by adding the social and cultural ones. Later, the 1991 ILC Draft Report article 21 on "Systematic or mass violations of human rights" would drop social to read "persecution on social, political, racial, religious or cultural grounds".[642] Thus, up to 1991, culture constituted one of the discriminatory grounds of persecution's multiple transformations alongside CaH's evolution. Finally, the 1995 ILC Report article 18(e) on CaH would somehow align itself with the IMT-IMTFE ICTY-ICTR schemes in terms of discriminatory grounds, by adding "ethnic" and dropping "cultural" to read: "Persecution on political, racial, religious or ethnic grounds".[643] This confirms this study's position on the holistic concept of culture that has given rise to its multiple use by international legislators and adjudicators (general introduction). Initially constituting a discriminatory ground in the Cold War's four decade-long legislative activities, culture would eventually be dropped in 1995 only to return three years later in the ICC Statute. As a rule, thus, culture has constituted the longer stretch of the legislative existence of CaH's discriminatory grounds. Furthermore, the holistic understanding of culture is manifest in the transformation of the 1991 ILC Report's "political, racial, religious or cultural grounds" into the 1995 ILC Report's "political,

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potentially excluding sexual orientation and gender identity, Oosterveld has opined that "within context of society" is the international community as a whole rather than the society where the crime occurred. *See* Hilary Charlesworth, "Feminist Methods in International Law" (1999) 93(2) *American Journal of International Law* 379, p 394; Brenda Cossman, "Gender performance, sexual subjects and international law" (2002) 15(2) *Canadian Journal of Law & Jurisprudence* 281, p 284; Brian Kritz, "The Global Transgender Population and the International Criminal Court" (2014) 17 *Yale Human Rights & Development Law Journal* 1, pp 6 and 36; Charles Barrera Moore, "Embracing Ambiguity and Adopting Propriety: Using Comparative Law To Explore Avenues for Protecting the LGBT Population under Article 7 of the Rome Statute of the International Criminal Court" (2017) 101(2) *Minnesota Law Review* pp 1290 and 1321-1325; Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law" (2000) 46(1) *McGill Law Journal* 217, p 237; and Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court", (n 921) pp 72-74 and 76.

[640] Moore (n 639) p 1292; Lisa Davis, "Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes against Women and LGBTIQ persons" (2017) 24(3) *William & Mary Journal of Women and the Law* 513, p 543

[641] 1954 ILC Draft Code (n 592) art 2, para 11.

[642] 1991 ILC Report (n 425) p 103.

[643] 1995 ILC Report (n 594) p 47.

racial, religious or ethnic grounds". In other words, and as will be discussed in-depth in this Part's Chapter 3, ethnic is used, if not as a synonym for culture, but as a concept that encapsulates its feature through human groups. In *Al Hassan*, it is noteworthy that the Chamber did not opt, in addition to religion and gender, for racial or ethnic, even though it noted that the darker a woman's skin (and as a matter of fact a man's), the harsher the AQIM repression.[644] Furthermore, culture itself was not used as a ground, even though the Chamber referred to the banning of "D'autres pratiques culturelles communes", such as "la musique, la télévision, la radio et le sport, les jeux et les loisirs, et la tenue vestimentaire des hommes et des femmes".[645]

Moreover, the ICC Statute article 7(1)(h)'s grounds are non-exhaustive as the enumeration includes any other grounds that are "universally recognized as impermissible under international law". The latter phrase was added as a compromise for those who opposed a non-exhaustive list, since they viewed the ICC Statute as an ICL instrument rather than a declaratory human rights instrument.[646] However, the ICC Statute does not explain what is a "universally recognized as impermissible under international law" ground. Ehlers has proposed that this refers to customary international law.[647] The scope of this ground is thus capable of covering grounds that would assist considering attacks targeting culture, as the case may be.

2. Actus reus: fundamental (human) rights violations

Unlike most other CaH, the crime of persecution has not been defined via a concrete set of acts, leaving this task to ICR-based jurisdictions, which have identified anthropo-centred and tangible-centred actus rei. The latter will be described in III, while the former will be described in the following paragraphs, by comparing and contrasting the post-Second World War trials (a) and the post-Cold War ICR-based jurisdictions (b).

a. The post-Second World War trials

The post-Second World War trials provide an in-depth analysis of the anthropo-centred targeting of culture. However, a close look calls for caution since, while particularly detailed and informative on the facts, the judgments often lack details with respect to their legal characterisation, at times even confusing them. Notwithstanding this omission, below is a brief analysis of selected IMT (i) and CCL 10 (ii) jurisprudence given the ICTY's heavy reliance on it.

[644] *Al Hassan* Confirmation of Charges Decision (n 423) para 702.
[645] *Al Hassan* Confirmation of Charges Decision (n 423) para 690.
[646] D Robinson (n 606) p 54.
[647] Ehlert (n 442) p 171.

i. The IMT: mixed legal and colloquial use of the word "persecution"

The IMT Charter required that the actus rei of persecution be "in execution or in connection with any crimes within the jurisdiction" of the IMT. The latter addressed the crime of persecution from both its anthropo-centred and tangible-centred angles. The following will focus on the former (for the latter, see III). The IMT judgment does not always allow distinguishing between a legal and colloquial use of the words "persecution"/"persecuted". Referring to "a policy of persecution, repression, and extermination of all civilians", count four, titled "crimes against humanity", paragraph (A) explained that the victims were subjected "to persecution, degradation, despoilment, enslavement, torture, and murder".[648] These passages illustrate the vague use of the word persecution, which is followed by both legal concepts and words such as repression and degradation, which were not expressly criminalised. Accordingly, no information can be extracted therefrom. In contrast, in describing the fact that civilians "were exterminated and persecuted", paragraph (B), titled in part "persecution on political, racial, and religious grounds", read "These persecutions were directed against Jews" and those "whose political belief or spiritual aspirations" diverged from the Nazis'.[649] It further added that "Jews were systematically persecuted", inter alia, through deprivation of liberty, forcible displacement, ill-treatment, and eventually murder.[650]

Unfortunately, the judgment itself does not clarify matters. Its structure is divided into a general part and a part specific to each accused. The former is divided into sub-headings the placement of which is not always intelligible. For example, the sub-section "Persecution of the Jews" describes the latter as consisting, inter alia, of legislative means (the wearing of the yellow star) accompanied by acts which resulted in their public professional, civic and physical discriminations.[651] From the placement of this sub-section, however, it is not clear whether the word persecution is used colloquially or as a CaH. The second part of the judgment systematically groups war crimes and CaH under the same heading for each accused, even though the indictment separated them. Therefore, while that sub-heading provides an excellent factual information, it

[648] IMT Judgment (n 490) p 66.
[649] IMT Judgment (n 490) pp 66-67.
[650] IMT Judgment (n 490) pp 66-67.
[651] IMT Judgment (n 490) p 248, reads: "A series of discriminatory laws was passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organized, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of one billion marks was imposed on the Jews, the seizure of Jewish assets was authorized, and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettoes was carried out on an extensive scale, and by an order of the Security Police Jews were compelled to wear a yellow star to be worn on the breast and back". *See* also *The Attorney General of the Government of Israel v Adolf Eichmann*, (District Court of Jerusalem) Judgment (12 December 1961) (1968) 36 *International Law Report*, para 199, pp 227 and 238, holding that serious bodily or mental harm may be inflicted on the group, through its members, by their "enslavement, starvation, deportation and persecution […] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture".

remains unhelpful from a legal standpoint. Notwithstanding this, the following will briefly review the relevant parts since academia and the ICTY have relied on them in relation to CaH persecution. On Count Four, "War Crimes and Crimes against Humanity", Rosenberg was found to be responsible for, inter alia, segregating Jews, "cleansing the Eastern Occupied Territories of Jews", deporting labourers, and specifically for apprehending tens of thousands of youths, aged 10-14.[652] However, the judgment did not explain which acts constituted war crimes or CaH – let alone persecution. Frank and Streicher too were found guilty for anthropo-centred features under this heading. Regarding the former, the IMT explained that "the persecution of the Jews" included millions of them being "forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated".[653] With respect to Streicher, the IMT held that his actions "constitute persecution on political and racial grounds" as a CaH.[654]

Thus, the IMT viewed persecution as a discriminatory set of legislative and physical acts, ranging from forced displacement, ill-treatment and, as a final step, murder and extermination.[655] In the case of the Jewish population, these were undoubtedly anthropo-centred acts designed to bring them to their knees, on grounds of their political and "racial" identity. Uneasy to today's readers, these terms ought nevertheless to be contextualised, as will be explained in Chapter 3. What stands out from these passages of the judgment, is the heritage-centred goal of attacks against the members of the collective. Within the relevant contexts of the IMT and HRCts, the former saw CaH (probably persecution) as a series of acts that would otherwise be qualified as human rights breaches by the ECtHR and IACtHR practice (Part I, Chapter 2).

ii. CCL 10: Greiser's mixed use of persecution and genocide

Among the CCL 10 cases, *Greiser* stands out, since it provides, as part of the Nazis' multi-fold attempts at the Germanisation of Poland, a description of persecution's heritage-centred and tangible-centred actus rei. Below is the analysis of the former (for the latter, see III). The following will explain first how the indictment and the judgment understood these measures. According to the indictment, one means of Germanising was Greiser's "persecuting" Poles by, inter alia, forcibly transferring "Polish children and youth" to German families or institution dedicated to education so as to Germanise them totally by "cutting them off from all contact with their families and things Polish, and giving them German Christian names and surnames".[656] This study has already considered the IACtHR jurisprudence on the forcible transfer of the children of the group to another group as a heritage-centred means of attacking culture – therefore the same comments apply here (Part I, Chapter 2). Characterised here as ill-treatment and persecution, the said acts would be included in the Genocide Convention article II(e), as will be discussed in Chapter 3. The Indictment also alleged a threefold persecution

[652] IMT Judgment (n 490) pp 294-295.
[653] IMT Judgment (n 490) pp 297-298 and 339-340.
[654] IMT Judgment (n 490) p 304.
[655] *See* also IMT Judgment (n 490) pp 249-253, describing the killing of the Jews as persecution.
[656] *Poland v Gauleiter Artur Greiser*, (Supreme National Tribunal of Poland) Judgment (21 June and 7 July 1946) 13 LRTWC 70, p 72.

of Poles as part of the broader Germanisation.[657] First, it consisted of instilling fear among the victims, through food, health and employment restrictions. Second, it consisted of socially degrading measures, which could be symbolic (eg raising the hat to Germans) and operational (eg prohibition of employment where they would be in a position to give instructions to Germans). Third, it consisted of measures curtailing the religious component of the victim's culture, including, the removal and killing of religious leaders, a situation akin to the IACtHR jurisprudence (Part I, Chapter 2).

Moving to the judgment, under the section "specific charges", the UNWCC explained attacks targeting culture under a number of headings, most specifically, "Measures against Polish Culture and Science", "The Fight with religion", and "Exceptional Legal Status of Poles". The first of these headings described how all "began with the liquidation of the intelligentsia and clergy", which comprised "professors, scientists, teachers, judges, advocates, doctors, engineers" and all those who "constituted the greatest hindrance" to Poland's Germanisation.[658] The judgment described the subsequent closing of Poznan University's cultural centre, followed by the university officials and Professors' dispossession of their private and academic property, arrest, imprisonment, and transfer to concentration camps.[659] Beyond academia as such, these measures extended to art, where eg, choral societies were disbanded and their directors imprisoned.[660] Importantly, broadcasting stations became German-emitting, all Polish-owned wireless were confiscated, and death penalty was imposed on those listening to foreign stations.[661] Beyond these secular measures, focus was also placed on religious practice. The heading "The Fight with religion" contained the sub-headings "The Clergy", "Religious Practices" and "Churches, Cemeteries and Church Property". Therein, it was explained that, as intellectual leaders, the Polish clergy were first subjected to mass arrests, followed by their killing or transfer to concentration camps.[662] A further focus was placed on the limitation and prohibition of Poles' religious practice.[663] Finally, under the heading "Exceptional Legal Status of Poles", the sub-heading "Education" explained that "unqualified" Germans had to teach German to

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[657] The indictment described the three categories as follows:

> (1) keep the population in constant fear of life, health, and personal, liberty; and of losing their remaining property;
>
> (2) degrade the Polish population to a social status of serfs […], which took the form of constant insults, to the Poles on the part of the authorities; of creating for the Poles extra-legal obligations towards the Germans, from raising the hat to all Germans in uniform and descending off pavements, to prohibiting them from occupying positions in private undertakings, where they would have to give instructions to German employees; and by allotting to the Germans to the detriment of the Polish population easier conditions of life and better material comforts […];
>
> (3) deprive Poles of all confessions of the means of freely practising their religious cult, […] by […]
>
> (a) removing the majority of the clergy by killing them en masse, either on the spot, in concentration camps or by deporting them to the General Government;
>
> (b) depriving the Poles of so many of their places of worship as to amount in many localities to complete deprivation of the possibility of practising their cult […].
>
> (c) setting forth the time limit of religious services and forbidding certain kinds of them.

See Greiser (n 656) p 73.

[658] *Greiser* (n 656) pp 83-84.

[659] *Greiser* (n 656) pp 83-84.

[660] *Greiser* (n 656) pp 83-84.

[661] *Greiser* (n 656) pp 83-84.

[662] *Greiser* (n 656) pp 80-81.

[663] *Greiser* (n 656) p 81.

Polish children so as to both erode their Polish language skills and ensure that they would not master the German language.[664] Another sub-heading, "The Poles' Lingual Rights", described the Nazis' order that Poles could speak Polish only among themselves; otherwise, they had to speak German in Germans' presence.[665] These measures thus aimed at curtailing education-related rights (and by extension their language components) so as to erode Polish identity by progressively hybridising its language into something that would be neither Polish nor German. The above passage describes the "total character of the war against Polish culture" as a multi-fold criminal enterprise that encompassed both the secular and religious spheres.[666] The pattern consisted of professional restrictions, arrests and the eventual murder of both the secular and religious leadership, combined with a progressive transformation of Polish cultural (ie religious, educational and artistic) environment into German ones.

Notwithstanding the absence of the crime of genocide in the indictment, the UNWCC explained that the tribunal established "the commission of crimes against humanity (genocide) and crimes against peace".[667] This is not surprising as the distinction between CaH and the crime of genocide (which at the time did not exist) would continue to be commented on for decades to come. It is, however, unclear whether the judgment considered the above descriptions as a CaH persecution. Finally, the UNWCC explained that, when describing the three ways of the Germanisation of Poland, Greiser was found guilty of, inter alia:

> (b) Repression, genocidal in character, of the religion of the local population […] by restriction of religious practices to the minimum; […];
> (c) Equally genocidal attacks on Polish culture and learning.[668]

The above shows the limited value that may be extracted from the CCL 10 judgments, for the purpose of the twenty-first century analysis of the CaH persecution.[669] Nonetheless, the *Greiser* example was briefly described for two reasons. First, it showcased how comprehensively prosecutors and adjudicators envisaged the heritage-centred means of attacks targeting culture. Second, and despite the legal and colloquial confusions, this and other post-Second World War cases would be used extensively by the ICTY when developing its jurisprudence on CaH persecution.

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[664] *Greiser* (n 656) p 80.
[665] *Greiser* (n 656) p 80.
[666] *Greiser* (n 656) p 82.
[667] *Greiser* (n 656) p 108.
[668] *Greiser* (n 656) p 112.
[669] The indictment also provided a detailed list of acts directed against what it called "cultural values", consisting of both secular and religious manifestations, whether tangible or intangible. Although not characterising them as persecution, the indictment alleged that *Greiser* had:

> (ix) […] direct[ed] activities intended to destroy cultural values of the Polish nation by:
> (1) closing down or destroying all Polish scientific and cultural institutions, the entire press, the wireless, cinemas and theatres;
> (2) closing down and destroying the network of Polish schools […] and closing down all Polish collections, archives, and libraries;
> (3) destroying many of the relics and monuments of Polish culture and art and transforming them so as no longer to serve Polish culture; and limiting the Poles in their own culture by confining the use of the Polish language to private intercourse and forbidding its use in public life or places of instruction.

See Greiser (n 656) p 74.

b. The post-Cold War trials: the scope of fundamental (human) rights

i. Laying the foundation: the first twenty years' limited scope

Both the 1991 and 1996 ILC Reports have explained that persecution can be multi-fold.[670] This, together with the post-Second World War jurisprudence, would shape the ICTY's jurisprudence on the crime of persecution, specifically regarding attacks targeting culture and the drafting of the ICC Statute. Absent a definition of the actus rei of persecution in the ICTY Statute, noting that while human rights are "dynamic and expansive", the *Kupreškić* Trial Chamber defined persecution as:

> (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 the other crimes against humanity enumerated in Article 5 of the Statute.[671]

As clarified by the Appeals Chamber, (1) and (3)-(4) are the actus reus of persecution while (2) constitutes its mens rea.[672] During the drafting of the ICC Statute, many States feared an activist court's expanding the scope of discriminatory human rights breaches by characterising them as persecution; while States also agreed that extreme forms of discrimination could be characterised as persecution.[673] The compromise was that persecution would require an intentional and severe deprivation of fundamental rights contrary to international law in connection with any act under article 7(1) or with crimes within the ICC jurisdiction.[674] Many States desired this connection in order to avoid an otherwise expandable scope of the crime of persecution.[675] Others also feared that this nexus could turn persecution into an "auxiliary" crime, to be used as an additional charge or as an aggravating factor only, instead of a self-standing crime.[676] The outcome was the formulation of article 7(1)(h), which ensures that persecution is indeed a crime on its own right.[677] Thus, as noted by Schabas, while this provision's discriminatory grounds are the largest among the existing definitions of persecution, the nexus element reduces largely its scope.[678]

Notwithstanding the aforementioned legislative and adjudicatory stance, it is important to see whether this undefined crime, from a material standpoint, is capable of encompassing attacks targeting culture in an anthropo-centred manner. In other words, what are fundamental rights? The *Tadić* Trial Chamber, which first addressed this issue, held that attempting to define persecution through asylum and refugee law "cannot

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[670] 1991 ILC Report (n 425) p 104.
[671] *Kupreškić* Trial Judgment (n 624) paras 621 and 641. *See also Kordić & Čerkez* Trial Judgment (n 505) para 195. The Chamber in fact updated and enhanced the *Tadić* Trial Judgment (n 89) para 715.
[672] *Prosecutor v Krnojelac*, (ICTY) Appeal Judgment (17 September 2003) Case No IT-97-25-A, para 185.
[673] D Robinson (n 606) p 53.
[674] D Robinson (n 606) pp 53-54.
[675] D Robinson (n 606) p 54.
[676] D Robinson (n 606) p 54.
[677] D Robinson (n 606) p 54.
[678] Schabas William A., *An Introduction to the International Criminal Court*, (3rd edn Cambridge University Press 2007), p 108.

readily be applied" to ICL.[679] A contrario, the Chamber thus accepted that, with the evolution of international law, and also the facts of the case, this body of law may indeed by applicable to ICL. This was wise for multiple reasons. First, the 1991 ILC Report provides that persecution "relates to human rights violations" and the subjection of the victims "to a life in which enjoyment of some of their basic rights is repeatedly or constantly denied", such as the prohibition of religious worship; prolonged and systematic detention on grounds of representing a political, religious or cultural group; or else the prohibition of the use of national languages both in public and in private.[680] Similarly, the 1996 ILC Report saw the ICCPR article 2 as an illustration of the ICCPR and ICESCR common article 5's "fundamental human rights" in the context of persecution.[681] Second, a series of international instruments establish expressly the human rights-persecution link. In the refugee/asylum context, the UDHR article 15(1) provides that "Everyone has the right to seek and to enjoy in other countries asylum from persecution", and the 1951 Convention Relating to the Status of Refugees article 1(A)(2) refers to refugees' "fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".[682] On the actual discrimination side, the International Convention on the Suppression and Prevention of the Crime of Apartheid article II(f) refers to "persecution of organizations and persons, by depriving them of fundamental rights and freedoms".[683] Finally, as noted by Novic, the EU system allows for considering cultural rights as fundamental rights.[684]

In its practice, the ICTY scanned existing human rights instruments. The *Kupreškić* Trial Chamber found attacks on political, social and economic rights as potential actus rei of persecution, depending on their contextual assessment.[685] Accordingly, the *Kordić & Čerkez* Appeals Chamber held that the breach of the right to life and to be free from cruel, inhuman or degrading treatment or punishment could constitute persecution, as recognised by both customary international law, the ICCPR articles 6-7 and the ECHR articles 2-3.[686] While both Trial Chambers dropped the word "cultural" from those rights, the ECCC and ICC would eventually, with the passing of time, characterise acts of an eminently cultural nature as CaH persecution.

ii. The *Case 002/02* and *Al Hassan* turning points: expanding the scope

After the *Tadić* two decade-long hiatus, the ECCC *Case 002/02* Trial Chamber and the ICC *Al Hassan* Pre-Trial Chamber would expressly establish, in 2018 and 2019 respectively, the relationship between human rights law and the crime of persecution

[679] *Tadić* Trial Judgment (n 89) para 694.
[680] 1991 ILC Report (n 425) p 104.
[681] 1996 ILC Report (n 594) para 11.
[682] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
[683] Apartheid Convention (n 582).
[684] Novic (n 15) p 161.
[685] *Kupreškić et al* Trial Judgment (n 624) para 615. Accordingly, the Chamber found that acts targeting both natural persons (eg murder, imprisonment and deportation) and their property, *Kupreškić et al* Trial Judgment (n 624) paras 622 and 629-631.
[686] *Kordić & Čerkez* Appeal Judgment (n 415) para 106.

with respect to attacks targeting culture's intangible. Accordingly, the *Case 002/02* Trial Chamber found that the Cham "as an ethnic and religious distinct group" had been targeted through, inter alia, restrictions on their religious and cultural practices.[687] The Chamber held that restrictions on religious grounds had consisted of prohibition on daily prayers, burning of Korans and dismantling mosques or else using them for non-religious purposes, forcing the Cham to only speak the Khmer language, to eat pork and to dress and have haircuts similar to the Khmer.[688] The Chamber found that these acts constituted a violation of fundamental rights and freedoms as regards: movement, personal dignity, liberty and security, arbitrary and unlawful arrest, fair and public trial, and equality before the law.[689] The Chamber anchored these rights in customary international law by locating them in the ACHR, ECHR, ICCPR and the UDHR.[690] Considered cumulatively and contextually, the Chamber found that they lead to the requisite level of seriousness so as to constitute CaH persecution.[691] The Chamber found that the Vietnamese too were subjected to persecution on racial grounds.[692] This finding was based, inter alia, on the Vietnamese' identification through lists, and the mixed families' targeting based on matrilineal ethnicity.[693] As with the Cham, the Chamber grounded the said rights in customary international law.[694]

One year later, the ICC *Al Hassan* Pre-Trial Chamber confirmed ICL's turning point as regards attacks targeting culture's intangible. While at the time of writing, the trial was ongoing, the decision on the confirmation of charges contains anthropo-centred elements characterising attacks against culture's intangible as acts of CaH persecution. To reach this decision, the Pre-Trial Chamber first considered and found that crimes under counts 1-12 constituted severe deprivations of fundamental rights contrary to international law.[695] The Chamber considered acts that have both physical and mental consequences, such as forced marriage and sexual violence.[696] The Chamber further considered a set of restrictions. These, as held by the Chamber, consisted of the prohibition of "traditional and cultural" practice (wearing of talismans and amulets or practice of magic, witchcraft and sorcery) and of "cultural and religious" practice (prayer on the mausoleums and tombs' sites, the way of praying and the celebration of religious events).[697] The Chamber also considered within these acts what it referenced as the "control" of the freedom of education (prohibition of mixed classrooms, closure

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[687] *Case 002/02 Judgment*, (ECCC) Trial Chamber Judgment (16 November 2018) Case No. 002/19-09-2007/ECCC/TC, para 3328.
[688] *Case 002/02* Trial Judgment (n 687) para 3328.
[689] *Case 002/02* Trial Judgment (n 687) para 3330.
[690] *Case 002/02* Trial Judgment (n 687) para 3330.
[691] *Case 002/02* Trial Judgment (n 687) para 3331.
[692] *Case 002/02* Trial Judgment (n 687) para 3513.
[693] *Case 002/02* Trial Judgment (n 687) para 3513.
[694] *Case 002/02* Trial Judgment (n 687) para 3511.
[695] *Al Hassan* Confirmation of Charges Decision (n 423) para 673. Counts 1-5: Torture, other inhumane acts, cruel treatment and outrage upon persona dignity; Count 6: unlawful judgments and sentencing; Count 7: Attacks against protected property; Counts 8-12: sexual violence and other inhuman acts in the form of forced marriage; and count 13: persecution.
[696] *Al Hassan* Confirmation of Charges Decision (n 423) paras 677-680.
[697] The original reads:

> La Chambre relève en outre les catégories d'actes suivantes portant atteinte aux libertés individuelles: interdiction de pratiques traditionnelles et culturelles (telles que le port de talismans ou d'amulettes et la pratique de la magie et de la sorcellerie), interdiction de pratiques religieuses et culturelles (telles que les prières sur les sites des mausolées et des tombeaux, ainsi que la manière de prier et la célébration de fêtes religieuses).

See Al Hassan Confirmation of Charges Decision (n 423) para 683.

of public secular schools and the imposition of education conform to ACMI's religious and ideological vision).[698] The Chamber further added restrictions on the freedom of association and movement, namely the prohibition of public gathering and of movement of non-married and unrelated men and women.[699] Included in these acts was the confiscation of private property, such as cigarettes and alcohol and, importantly, those private properties, such as amulets, that support culture's intangible, in this case spiritual beliefs.[700]

Next, the Pre-Trial Chamber considered these acts' connection with any other article 7(1) crimes as well as crimes within the ICC Statute. On the former, it found connections with article 7(f) torture, (g) sexual violence, and (k) other inhumane acts.[701] On war crimes, the Chamber found that the acts were connected to article 8(2)(c)(i), (ii) and (iv) and (e)(vi), that is violence to persons, outrage upon personal dignity, unlawful judicial sentencing, and sexual violence, respectively; and finally article 8(2)(e)(iv), ie attacks targeting culture's tangible.[702]

With the above established, the Chamber then grounded the persecution at hand on religion and gender.[703] On the latter, the Chamber referred to the objectification of women, which resulted from a series of measures ranging from forced marriage to the ACIM veiling cannon and, in case the veil was not covering them enough and/or looked "trop joli", undergoing sanctions such as detention and/or sexual violence.[704] This led to women's loss of social status and, in case of sexual violence, stigmatisation within both their families and society.[705]

iii. Relationship with other inhumane acts

Here, a brief reference should be made to CaH "other inhumane acts". Bassiouni has rightly noted the ambiguity of this crime's contours.[706] Likewise, in order to adhere to the principle of legality, the ICTY urged the exercise of "great caution" in their

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[698] The original reads:

> La Chambre relève en outre les catégories d'actes suivantes portant atteinte aux libertés individuelles: […] le contrôle des libertés liées à l'éducation (interdiction de la mixité en classe, fermeture des écoles publiques laïques et imposition d'une éducation axée sur la vision de la religion et l'idéologie de l'organisation Ansar Dine/AQMI).

See Al Hassan Confirmation of Charges Decision (n 423) para 683.

[699] The original reads:

> La Chambre relève en outre les catégories d'actes suivantes portant atteinte aux libertés individuelles: […] l'imposition de restrictions quant à la liberté d'association et de circulation (interdiction des rassemblements publics, et interdiction pour des hommes et femmes non mariés ni apparentés de circuler ensemble).

See Al Hassan Confirmation of Charges Decision (n 423) para 683.

[700] *Al Hassan* Confirmation of Charges Decision (n 423) para 684.

[701] *Al Hassan* Confirmation of Charges Decision (n 423) paras 686-687and 707.

[702] *Al Hassan* Confirmation of Charges Decision (n 423) paras 686-687and 707.

[703] *Al Hassan* Confirmation of Charges Decision (n 423) para 707.

[704] *Al Hassan* Confirmation of Charges Decision (n 423) paras 697-700.

[705] *Al Hassan* Confirmation of Charges Decision (n 423) para 701.

[706] *See* Bassiouni, *Crimes Against Humanity* (n 596) pp 405-406.

regard.[707] The ICTY-ICTR required that the conduct must (i) cause serious mental or physical suffering to the victim or constitute a serious attack upon human dignity; and (ii) be of equal gravity to the conduct enumerated in the ICTY Statute article 5 and the ICTR Statute article 3.[708] To do so, the ICTY found it necessary to assess all factual circumstances, such as the nature of the acts and their context, the situation of the victims, and the physical and/or mental effects on them.[709]

The ICC has also considered the ICC Statute article 7(1)(k) "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The ICC has found that such acts constitute a "residual category" within article 7(1) and "must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity".[710] The ICC has further held that such acts "are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute".[711] As such, the ICC has found corporal acts, such as mutilation or throwing of acid, to fall within this category.[712]

Importantly, from an anthropo/heritage-centred standpoint, both the SCSL and the ECCC have considered as other inhumane acts forced marriages, albeit as acts conducted by rebels against women,[713] and "as a matter of State policy",[714] respectively. Specifically, the ECCC found that forced marriages under the Khmer rouges:

> were used as methods to weaken the traditional family structure and to guarantee the loyalty of the people of the Regime. By forcing people into random marriages the Khmer Rouge intended to obtain control over people's sexuality and to ensure that the

[707] *Prosecutor v Martić,* (ICTY) Judgment (12 June 2007) Case No IT-95-11-T, para 82 and *Blagojević & Jokić* Trial Judgment (n 49) paras 624–25.
[708] *See* eg *Kordić & Čerkez* Appeal Judgment (n 415) paras 117 and 671; and *Prosecutor v. Kayishema*, (ICTR) Judgment (21 May 1999) Case No ICTR-95-1-T, para 154.
[709] *See* eg *Martić* Trial Judgment (n 707) para 84; *Blagojević & Jokić* Trial Judgment (n 49) para 627. The ICTY found that the act of forcible transfer may amount to other inhumane acts. *See* eg *Kordić & Čerkez* Appeal Judgment (n 415) para 151. Both tribunals considered other anthropo-centred means such as sniping, shelling, *see* eg *Prosecutor v Galić*, (ICTY) Judgment (30 November 2006) Case No. IT-98-29-A, para 158; injuring prisoners of war and generating poor detention conditions, *see* eg, *Prosecutor v Naletilić & Martinović*, (ICTY) Judgment (3 May 2006) Case No IT-98-31-A, para 435 and *Krnojelac* Appeal Judgment (n 672) para 163;mutilation and other types of severe bodily harm; *see* eg, *Prosecutor v Kvočka*, (ICTY) Judgment (2 November 2001) Case No IT-98-30/1-A, para 435; sexual violence to a dead woman's body; *see* eg, *Prosecutor v Niyitegeka*, (ICTR) Judgment (16 May 2003), Case No ICTR-96-14-T, paras 465 and 693. *See* also Bassiouni, *Crimes Against Humanity* (n 596) pp 405-406, explaining that a number of human rights and international instruments consider as "inhumane acts" offences such as Apartheid, torture and rape.
[710] *Al Hassan* Confirmation of Charges Decision (n 423) para 252, referring to *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, (ICC) Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012) ICC-01/09-02/11-382-Red, para 269.
[711] *Al Hassan* Confirmation of Charges Decision (n 423) para 252, referring to *Prosecutor v Katanga & Ngudjolo Chui,* (ICC) Pre-Trial Decision on the Confirmation of charges (30 September 2008) No ICC-01/04-01/07-717, para 448.
[712] *Al Hassan* Confirmation of Charges Decision (n 423) para 254.
[713] *Prosecutor v. Brima*, (SCSL) Judgment (22 February 2008) Case No SCSL-04-16-A, paras 197–203.
[714] *Civil Parties' Co-Lawyers' Request for Supplementary Preliminary Investigations*, (ECCC) Decision (9 February 2009) Case No 001/18–07-2007-ECCC/TC, para 29.

> reproductive function was managed by the state to produce more workers for the revolution.[715]

Later, In assessing the gravity of forced acts, the Chamber found that the severity of the mental suffering caused by forced marriage caused serious mental harm with lasting effects on the victims.[716] The Chamber found the conduct to be of similar gravity as other CaH. On the intent, authorities used threats to force individuals to marry, supplanted the family during wedding ceremonies and monitored sexual consumption.[717] While at the time of writing, ICR-based jurisdictions had considered other inhumane acts through corporal and often associated mental harm, they had also do so with acts such as forced marriage which, through the substitution of State apparatus for family environment, aimed at targeting culture. Thus, depending on the context, when combining forced marriage with the mens rea of CaH persecution, which is characterised by targeting the victims on discriminatory grounds, it is possible to conceive of persecution as a heritage-centred way of targeting culture which, by reason of the victims' identity is reminiscent of the IACtHR case law (Part I, Chapter 2.II.A).

3. Outcome

For the nearly half-a-century-long period stretching from the post-Second World War through to the end of the Cold War and the Détente, from the IMT to the ICC, the crime of persecution has kept evolving in terms of both its mens rea and its actus reus. From their decade-long exhaustive list, the mens rea's discriminatory grounds were turned into a non-exhaustive list by the ICC Statute. Thus, the political, racial and religious grounds expanded to encompass not only national, ethnic, cultural, religious and gender grounds, but also any other grounds "universally recognized as impermissible under international law". The judicial consideration of the quasi-totality of these grounds of persecution under the ICC Statute – not least "cultural" – will involve cultural considerations. This is so because their understanding is dynamic, like culture itself (general introduction). Moreover, the ICC Statute has provided that persecution is the targeting of either the victims by reason of their group or collective identity; or the group or collective, as such, both of which reminiscent of the IACtHR heritage-centred practice (Part I, Chapter 2.II.B and A, respectively).

In terms of the actus reus of the crime of persecution and attacking of culture, both the post-Second World War trials and post-Cold War ICR-based jurisdictions allow for such consideration from an anthropo-centred angle. With the crime of persecution not being defined, it will always fall on those jurisdictions to progressively clarify its elements. Among the jurisdictions that have had the opportunity to do so, the IMT and ICTY practice helps draw a relatively coherent picture of those elements in terms of the anthropo-centred actus rei of attacking culture. The ICTY did so through the so-called ethnic cleansing. Apart from early uses by the IMT, such as "cleansing the Eastern Occupied Territories of Jews", "ethnic cleansing" appeared mainly during the former Yugoslavia's collapse.[718] The ICTY wisely refrained from turning that concept into a

[715] *Civil Parties' Co-Lawyers* Decision (n 714) para 29.
[716] *Case 002/02* Trial Judgment (n 687) para 3692.
[717] *Case 002/02* Trial Judgment (n 687) para 3693.
[718] *See* IMT Judgment (n 490) pp 294-295; Letter from the Secretary-General to the President of the Security Council, May 24, 1994, U.N. Doc. S/1994/674 (1994), transmitting Final Report of the

specific crime, as it does not appear as an underlying offence of CaH's existing international definitions. The *Kupreškić* Trial Chamber referred to ethnic cleansing as one of "those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide".[719] In *Sikirica*, the Chamber viewed ethnic cleansing as the more colloquial description of the crime of persecution.[720] Indeed, both the IMT's "cleansing" and the former Yugoslavia's "ethnic cleansing" understood it as a set of discriminatory acts that aimed to rid territories of certain categories of populations. These measures were both legislative and physical, with the latter often in application of the former. Through these measures, which targeted both natural persons and property, the perpetrators aimed at forcing the victims into displacement.[721] As is often the case, these measures resulted in the ultimate physical elimination of the victims. Ethnic cleansing represents in effect the various stages of the progressive unfolding of the crime of persecution to uproot – and in its most extreme case to physically eliminate – the persons discriminated against. Once again, this type of practice illustrates the anthropo-centred means of attacking culture, wherein attacking natural persons making up the sum of the collective pursues or results in the alteration of heritage. The IACtHR adopted this approach by linking the acts to ACHR violations (Part I, Chapter 2)

At the ICC, despite the ICC Statute and the ICC Elements of Crimes' specific requirements that there be a severe deprivation, of fundamental rights contrary to international law in connection with any act under article 7(1) or crimes with the ICC jurisdiction, judges will still need to proceed on a case-by-case basis to determine whether certain actus rei amount to the anthropo-centred means of attacking culture. As with the ICTY, the ICC has connected the aforementioned deprivations with other ICC crimes, since many of them could be used with the aim of attacking culture through heritage-centred means (Chapters 1 and 3 of this Part).[722] Eventually, it will be for the Chambers to make such determinations on a case-by-case basis, taking into account the specific circumstances of each case at hand.[723] Already, the ICC has shown its capacity

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Commission of Experts Established pursuant to Security Council Resolution 780 (1992), paras 129-150. UNGA, "Resolution on the Situation in Bosnia and Herzegovina" (7 April 1993) UN Doc AG/Res/47/121 referred in its Preamble to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide".

[719] *Kupreškić et al* Trial Judgment (n 624) para 606.

[720] *Prosecutor v Sikirica et al*, (ICTY) Judgment (3 September 2001) Case No IT-95-8-T, para 89.

[721] The *Karadžić* Trial Chamber viewed the normative measure as restrictive and discriminatory measures (eg freedom of movement limitations; employment dismissal, including from positions of authority; arbitrary home search; unlawful arrest and/or the denial of the right to judicial process; and denial of equal access to public services), *see Prosecutor v Karadžić*, (ICTY) Judgment (24 March 2016) Case No IT-95-5/18-T, para 536. For the physical/mental measures, *see Karadžić* Trial Judgment (n 721) paras 502 (killing); 505, 509-510, 511 and 514 (cruel and/or inhuman treatment – eg torture, beatings and physical and psychological abuse, rape and other acts of sexual violence, establishment and perpetuation of inhumane living conditions); 516 (forcible transfer and deportation); 521 (unlawful detention) and 523 (forced labour and the use of human shields).

[722] *See* Frulli (n 58) p 203.

[723] *See* also ICC Statute (n 54) art 7(1)(k) on "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Under the ICC Elements of Crimes:

> The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
>
> 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. [Footnote 30: It is understood that "character" refers to the nature and gravity of the act.]

The *Katanga* Pre-Trial Chamber noted that:

to go beyond the ICTY's cautious steps by expanding the scope of persecution's actus reus to those targeting culture's intangible, one year only after the same approach was adopted by the ECCC.

D. Synthesis: crimes immersed in collective rights violations

From the IMT to the ICC, it took half a century to conceive and refine the definition of CaH, in terms of both the chapeau elements and underlying offences. While the first fifty years settled on the post-Second World War definition and practice, a post-Cold War five year fast-track process, from the 1993 ICTY Statute to the 1998 ICC Statute, finalised the twentieth century's development of CaH.

The IMT-IMTFE and CCL 10 models only contained early traces of the future chapeau, although they were connected with the offences themselves. These rudimentary fragments considered the civilian population as victims, together with an armed conflict nexus. After the Cold War's ICL hiatus, while the ICTY followed broadly the same model, it was the ICTR Statute that conceived the chapeau in both form and substance.[724] In contrast to the Second World War models, the ICTR chapeau elements required a series of general requirements within which the underlying offences of CaH needed to be committed. The common elements between the ICTY-ICTR chapeaux were the requirement of a (widespread or systematic) attack against any civilian population. They otherwise diverged, as they had each been prepared to reflect the factual matrix grounding each tribunal's creation. The ICTY Statute thus required an armed conflict nexus because it arose from a predominantly CaH-type situation during the former Yugoslavia's armed conflict. Rwanda's predominantly genocide-type situation resulted in the absence of an armed conflict nexus, and the addition of discriminatory grounds requirements.

On the basis of the above, and also the 1991 and 1996 ILC Reports, the ICC Statute chapeau would simply require a widespread or systematic attack against any civilian population, thereby conveying the idea of the targeting of a collective. For this study's purpose, this is a first step to consider attacks targeting culture through mass human rights violations (Part I, Chapter 2). This is further enhanced by the chapeau's relinquishing the armed conflict nexus, since attacking culture often occurs in times of trouble falling short of armed conflict (Part I). Within these parameters, attacks directed at culture could be effected through many of the underlying offences of CaH, such as enslavement; deportation or forcible transfer of populations; rape, sexual slavery,

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the Statute has given to "other inhumane acts" a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes. The latter conceived "other inhumane acts" as a "catch all provision," leaving a broad margin for the jurisprudence to determine its limits. In contrast, the Rome Statute contains certain limitations, as regards to the action constituting an inhumane act and the consequence required as a result of that action.

See Katanga & Ngudjolo Chui Confirmation of Charges Decision (n 711) para 450.

[724] For the ICTY-ICTR practice, *see* Guénaël Mettraux, "Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda" (2002) 43 *Harvard International Law Journal* 237. For a broader discussion, *see* Guénaël Mettraux, "The Definition of Crimes Against Humanity and the Question of a "Policy" Element" *in* Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press 2011).

enforced prostitution, enforced sterilisation; persecution; enforced disappearance; the crime of apartheid; or else other inhumane acts. As the actual victims of these offences would be the members of the collective, Part I, Chapter 2.II's comments will apply here.

Persecution can encompass all the other CaH underlying offences if accompanied by its requisite discriminatory intent which the ICC Statute expanded from their decade-long exhaustive list into a non-exhaustive one. Any judicial consideration of these grounds will always be subject to cultural considerations, at least implicitly, as their meaning will evolve spacio-temporarily, two defining features of culture. Notably, the ICC Statute also expanded the chapeau of earlier definitions of CaH by providing that persecution can focus not only on the victims by reason of their group or collective identity, but also, and innovatively, on the group or collective, as such, a scenario reminiscent of IACtHR jurisprudence (Part I, Chapter 2.II.A. and B, respectively). Accordingly, the same comments apply here.

Both post-Second World War and post-Cold War ICR-based jurisdictions have accepted that the actus reus of the crime of persecution may consist of anthropo-centred means of attacking culture. Absent a definition of the crime of persecution, this determination will always be made by the judges on a case-by-case basis. The IMT and ICTY contain a wealth of findings regarding the anthropo-centred actus rei, whether characterised as persecution or, more colloquially, as ethnic cleansing. In this situation, it is more the mens rea, rather than the actus reus that enables characterising persecution as a crime targeting culture. This is so because, from a heritage-centred viewpoint, persecution's legislative measures and (often) related bodily acts need not necessarily focus on culture, as such. Rather, persecution acquires almost automatically its cultural feature because of the discriminatory targeting of individuals as members of the collective. The actus rei thus become secondary as they need not be related to culture. In the case of deportation, for instance, what matters is the aim to geographically displace or potentially disperse, targeted victims on the grounds of their identity. Thus, legislatively undefined in terms of its actus reus, persecution's mens rea turns it into a cultural crime in terms of intent and consequence, no matter the means.

Notwithstanding the above, ICR-based jurisdictions have also found that certain actus rei could amount to persecution's heritage-centred means of attacking culture. As seen, this has been done by connecting the actus rei in question to other CaH and other crimes within the ICR-based jurisdictions' subject-matter. In this exercise, it is the fundamental nature of the human rights norms that enables characterising their violation as persecution. While understandably, like all pioneers, the ICTY cautiously changed the state of affairs, it still benefited from the post-Second World War's factually – albeit not always legally clear – enlightening descriptions. In turn the ECCC and ICC have benefited from the ICTY's practice to eventually adopt an expansive scope of the actus rei of CaH persecution. Accordingly, after a twenty years hiatus, both jurisdictions have accepted that the actus reus of persecution may be anthropo-centred insofar as attacks targeting culture are concerned. Accordingly, such attacks may either target human rights that are cultural rights or result in the violation of such rights. While the ECCC and ICC cases are subject to either appeal or trial, they have nonetheless pierced the taboo. In terms of actus reus, as will now be seen, ICR-based jurisdictions' practice has also allowed for considering persecution from a tangible-centred perspective.

III. The tangible-centred approach: the actus reus of the crime of persecution

A. Introduction

As just seen (II), CaH's underlying offences abound with anthropo-centred means (eg deportation) that may aim at adversely impacting heritage. In contrast, the CaH provisions of the IMT Charter, the IMTFE Charter, the ICTY Statute and the ICC Statute do not list tangible-centred underlying offences. Notwithstanding this, as will be shown, the IMT and CCL 10 would consider such destruction as falling within CaH, including, at times, persecution (B). Using partly these findings, the 1991 ILC Report and, importantly, the *Kupreškić* definition of persecution, the ICTY would consider the destruction of and damage to culture's tangible as ethnic cleansing's material aim, while referring to the means described in other ICTY provisions, such as war crimes, to explain such inclusion. As this Section will show, this may guide the ICC when the time comes for it to adjudicate cultural tangible damage as CaH persecution. (C).

B. The post-Second World War trials

The post-Second World War trials offer a limited, but in-depth analysis of damage to/destruction of culture's tangible. These would shape the ICTY's jurisprudence on the tangible-centred means of the crime of persecution. As seen, however, a closer review of the IMT and CCL 10 jurisprudence calls for caution since, while particularly detailed and informative on the facts, they were often vague regarding the legal characterisation of crimes, sometimes equating the same acts as genocide, an oddity since the Genocide Convention's draft had not yet been finalised. Notwithstanding this, the following will provide a brief analysis of selected IMT and CCL 10 jurisprudence addressing culture's religious (1) and secular (2) tangible. This is so given the ICTY's subsequent reliance on it.

1. Culture's religious tangible

As seen earlier, under the sub-section "Persecution of the Jews", the IMT Judgment explained the Nazi discriminatory policies against Jews, which it characterised as "persecution". While the analysis of those measures attempted to show how the legislative and physical measures could be adjudicated as anthropo-centred means of attacking culture (see II), other passages were unequivocally tangible-centred. Accordingly, in order to achieve "the complete exclusion of Jews from German life", the IMT explained that beyond its anthropo-centred means, the persecution of Jews extended to tangible-centred ones, which included "the burning and demolishing of synagogues".[725] This calls for no comment, evident as it is that the Nazis attacked Judaism's tangible. Like the first and second Temples' destruction by the neo-

[725] IMT Judgment (n 490) p 248.

Babylonians and Romans, respectively, the demolition of the said synagogue would be part and parcel of Jews' further Diasporic explosion.[726]

The tangible-centred attacks of culture would be however addressed in more details in *Greiser*. As seen (II), under the section "specific charges", the UNWCC dedicated mainly three headings to attacks targeting culture. However, like the indictment, these "specific charges" did not link the facts to any specific crimes. Only another sub-heading titled "Persecution of the Jewish population" described one such measure as the "Burning and destruction of synagogues and houses of prayer, often of artistic value, and defiling Jewish cemeteries".[727] No more information was given in this regard. It was in fact under "The Fight with religion", that the sub-heading "Churches, Cemeteries and Church Property" explained the targeting of culture's religious tangible. Both churches and cemeteries were thus subjected to legislative measures and material restrictions. The former concerned their closing down as well as regulations regarding property confiscation, transfer and despoliations of virtually any movable item. Material restriction consisted of the implementation of the legislative measures and of the overall destruction of the immovable.[728] Importantly, a passage also linked the said property to that of legal persons (foundations, associations, such as Caritas).[729] These exactions, which CCL 10 described as damage to "Polish culture", impacted on the tangible components of culture as both immovable and movable elements of a religious nature (general introduction).

2. Culture's secular tangible

On culture's secular tangible, the IMT convicted Rosenberg on Count Four ("War Crimes and Crimes against Humanity"), inter alia, for the plundering of museums and

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[726] Given that the IMT had ruled that it had no jurisdiction for CaH prior to the Second World War's outbreak, it intriguingly found Streicher "responsible" (as opposed to "guilty") "for the demolition on 10 August 1938, of the Nuremberg synagogue", though falling short of specifying whether this was persecution. *See* IMT Judgment (n 490) p 302. Referring to the same page of the IMT judgment, the *Blaškić* Trial Judgment (n 675) para 228 explained that the IMT had found Streicher "guilty of crimes against humanity inter alia for […] the fire at the Nuremberg synagogue". Not only did the ICTY mischaracterise the IMT Judgment's wording, but also it conflated that page with page 248 which, under the heading "persecution of Jews", viewed "the burning and demolishing of synagogues" as part of the pogroms organised by the Nazis against Jews.

[727] *Greiser* (n 656) p 94.

[728] *Greiser* (n 656) p 112, providing, inter alia:

> The churches closed were despoiled completely. […], money, foreign exchange, script, church books, documents, libraries, and other important written material […], chalices, montrances, candlesticks, candles and linen were removed from the churches. […].
> […], Greiser ordered the removal of all bells from Polish churches, both bronze and steel, and including those recognised as being protected by the law concerning ancient monuments and relics. […], all organs in churches whether closed or open, were sequestrated. Irreplacable losses were inflicted to Polish culture by the removal or destruction of church archives and libraries. […] the ownership of all confessional cemeteries [was transferred] to the local council. There were to be separate cemeteries for the Poles, or, if not, a separate area was to be fenced off in the German cemeteries for them and this was to have an entrance of its own. An order […], required all inscriptions on Polish gravestones to be removed. The insurgents' Memorial in Poznan cemetery was demolished […].

[729] *Greiser* (n 656) p 112, providing, that "Not only the property of the church itself was confiscated, but also that of church institutions and foundations [such as] "Caritas,"".

libraries and the confiscation of art treasures and collections.[730] Once again, however, these findings did not explain which war crimes and CaH were considered. As will be seen, however, the ICTY would refer to them when building its jurisprudence on damage to/destruction of culture's tangible as CaH persecution.

The *Greiser* indictment Section C(3) included the "[s]ystematic destruction of Polish culture, robbery of Polish cultural treasures" and the illegal seizure of public property.[731] However, these charges mentioned neither CaH nor, more specifically, CaH persecution. Under the section "specific charges", the UNWCC dedicated the heading "Measures against Polish Culture and Science" to secular tangible. Therein, the UNWCC described the "war against Polish culture".[732] The stunningly detailed description of the Nazi actions provides an almost exhaustive representation of culture's holism, which penetrates all fields of life. From this angle, the importance of culture's tangible to support the intangible becomes clear. Thus, it is explained that in addition of Poznan University's cultural centre, the university itself was closed and transformed into a German higher education institution and part-time crematorium; libraries were closed and sometimes destroyed; when not burnt, books and archives would be distributed to German universities or to paper-mills for pulping; museums' art collections would be confiscated; while Polish memorials, such as Chopin's, would be destroyed "in mockery and ridicule".[733] The Nazi enterprise to annihilate Polish culture was so systematic that it extended to the closure of publishing houses, theatres and music conservatories, and prohibition of selling French and English books "and even the sale of the music of Chopin and other Polish composers".[734] One last passage on this "war against Polish Culture" sums-up the holistic conception of culture:

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[730] IMT Judgment (n 490) p 297.

[731] *Greiser* (n 656) p 71.

[732] *Greiser* (n 656) pp 82-83.

[733] The passage reads, inter alia,

> The cultural centre of Poznan University was closed […]
> The buildings of Poznan University were taken over […] and used for various purposes [, including as] a crematorium in which eight thousand bodies were burned, […]. Gradually the entire organisation for higher education in Poznan ceased to exist, the German institutions were being set up in its place. […], a German university was opened in Poznan, […]
> All other cultural institutions suffered a fate similar to that of the university. […] Greiser laid […] the special duty of destroying all the libraries of the Society for People's Libraries, whose premises were demolished and the books burned and destroyed. Similarly school libraries were destroyed.
> […A] Book Collecting Point […] was organised […] to which close on two million […] volumes taken from public and private libraries […].These books were [… thereafter] distributed to various German institutions, while the others were sent to a paper-mill for pulping.
> The various archives met with a similar fate. […]. Museums and art collections [including private collections] were confiscated, […]; and also collections, in churches and cathedrals, […], [public and] private collections were destroyed […].
> Special care was devoted to the destruction of Polish memorials […, such as the] Chopin, […] monument. These monuments were destroyed in an especially insulting manner and the destruction was accompanied by mockery and ridicule. These acts were given great emphasis in the German Press.

See Greiser (n 656) pp 82-83.

[734] The passage reads, inter alia,

> The Polish Press and all Polish publishing was destroyed. Not one Polish paper appeared […], and the scientific periodicals were confiscated. All Polish printing works were confiscated and given to German undertakings. It was also forbidden to print any kind of

> War was even declared on Polish inscriptions not only of the streets, in tramcars, on shops and in public places, but even inside private houses on such things as letter-boxes, lavatories, bread bins or salt-tins. […] the removal of all Polish inscriptions [was ordered] […].[735]

This self-explanatory passage requires no additional comment, apart from the observation that "the war against Polish culture" encompassed the tangible components of "culture", whether movable, immovable, secular or religious, through confiscation, pillage and plunder as well as utter destruction.

Notwithstanding this, as seen (II), regardless of the absence of the crime of genocide in the indictment, the tribunal found Greiser guilty of, inter alia:

> (b) Repression, genocidal in character, of the religion of the local population […] by restriction of religious practices to the minimum; *and by destruction of churches, cemeteries and the property of the church*;
> (c) Equally genocidal attacks on Polish culture and learning.[736] [emphasis added]

This passage, which appears to use the word genocide colloquially, reflects the limited value, from the viewpoint of CaH persecution, of the post-Second World War judgments on which the ICTY would later rely.

To further illustrate these uncertainties, it is important very briefly review how these trials considered the targeting of private property which included "the looting of Jewish businesses", seizure of their assets, as well as the imposition of one billion marks fine.[737] With respect to the latter, the IMT specifically found that Goring "persecuted the Jews", in order to exclude them from "economic life".[738] As regards individual property/businesses, the IMT found Streicher guilty of CaH.[739] However, noting that the CCL 10 crimes such as murder and extermination concern human beings, the later *Flick* trial held that "the catch-all words 'other persecutions' must be deemed to include only such as affect the life and liberty"; accordingly, "[c]ompulsory taking of industrial property, however reprehensible, is not in that category".[740] Unlike the IMT, *Flick* did not consider those private property crimes as persecution.[741] This begs the question of

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> books in Polish and all the 397 Polish bookshops […] were closed and their stocks of books confiscated. […] [T]he sale·of all French and English books, and even the sale of the music of Chopin and other Polish composers [was forbidden] and […] a list of forbidden Polish books [was published].
> All the Polish theatres […] were closed and their buildings and equipment put at the disposal of German theatres; Polish cinemas were transformed into German ones. The opera and the Music Conservatory in Poznan were put at the disposal of German institutions. Even choral societies were closed […].
> The broadcasting stations […] were made into German stations; all wireless receiving sets belonging to Poles were confiscated […].

See Greiser (n 656) pp 83-84.

[735] *Greiser* (n 656) pp 83-84.

[736] *Greiser* (n 656) p112.

[737] IMT Judgment (n 490) p 248.

[738] IMT Judgment (n 490) p 248.

[739] IMT Judgment (n 490) p 302.

[740] *United States of America v Friedrich Flick et al*, (United States Military Tribunal) Judgment (20 April and 22 December 1947) 9 LRTWC 1, pp 27-28.

[741] In *Eichmann* (n 651) the Jerusalem District Court held that:

whether public property crimes, specifically those targeting culture's tangible, could have been considered as CaH persecution under the CCL 10 scheme.

3. Outcome

As indicated throughout this sub-section, the post-Second World War trials are of a very limited value as regard the tangible-centred means of attacks targeting culture. As explained in Section II, from a legal viewpoint, CaH were born out of war crimes. This explains why, the IMT indictment offered separate counts for each of war crimes and CaH but that the judgment tended to consider them together, when focusing on the guilt of each accused. This explains also why, despite persecution's inclusion in the IMT Charter, the judgment referred to it at times colloquially and not always legally. But this confusion has been exacerbated by an anachronism as regards CCL 10. Therein, the UNWCC compiled and commented upon the CCL 10 judgments after the Genocide Convention's adoption, thereby referring to many of the CCL 10 crimes as genocide.

Be that as it may, the afore-analysed judgments are useful for two reasons. First, they help understand the subsequent ILC and ICTY approach with respect to the tangible-centred attack of culture. Second, they provide a wealth of factual information as regards the IMT and CCL 10 adjudicators' approach to the targeting of culture's tangible under persecution, well before legal commentators would add their stone to the edifice. Thus, it is clear that both jurisdictions considered the destruction of culture's tangible as CaH persecution, somewhere between war crimes and genocide. With the benefit of hindsight, but also thanks, in part, to the aforementioned anachronism, the post-Cold War legal and judicial settings will confirm that damage to and destruction of culture's tangible may constitute CaH persecution.

C. The post-Cold War international criminal jurisdictions

Both the 1991 and 1996 ILC Reports opined that persecution can be multi-fold.[742] The 1991 ILC Report specifically explained that it may, inter alia, consist of the:

> systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group.[743]

This, together with the post-Second World War jurisprudence, influenced the ICTY's local-national/national-international diptych oriented jurisprudence regarding the

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> the persecution of Jews became official policy and assumed the quasi-legal form of laws and regulations published by the government of the Reich in accordance with legislative powers delegated to it by the Reichstag […] and of direct acts of violence organised by the regime against the persons and property of Jews. The purpose of these acts carried out in the first stage was to deprive the Jews of citizens' rights, to degrade them and strike fear into their hearts, to separate them from the rest of the inhabitants, to oust them from the economic and cultural life of the State and to close to them the source of livelihood.

See Eichmann (n 651) paras 56-57.

[742] 1991 ILC Report (n 425) p 104.

[743] 1996 ILC Report (n 594) p 268.

tangible-centred means of attacks targeting culture (1). Unlike the ICTY, a series of limitations placed by the ICC's definition of persecution and the ICC Elements of Crimes have made the ICC's task more challenging although the Court has gradually adopted the ICTY's approach (2).

1. The ICTY

As seen earlier (II), the *Blaškić* Appeals Chamber has held that it is not enough for the act(s) of persecution to have been committed discriminately; they must also "constitute a denial of or infringement upon a fundamental right laid down in international customary law", which reaches the same level of gravity as other article 5 CaH, thereby requiring a case-by-case approach.[744] The Chamber confirmed that the destruction of culture's tangible is a denial of basic or fundamental rights.[745] In its practice, the ICTY has adopted a tangible-centred approach regarding attacks targeting culture when considering CaH persecution in relation to its means (through war crimes) (a) and aims (as part of genocide) (b).

a. The means of attacking culture's tangible: relationship with war crimes

To assess whether damage to/destruction of culture's tangible could amount to CaH persecution, the ICTY had to assess whether in isolation or in conjunction with other acts, they reached the level of gravity of other CaH, and whether they infringed a fundamental right in international law. But, within the ICTY's ratione materiae competence, only war crimes provisions made reference to property crimes. Hence, the ICTY practice to charge the same facts, often under both war crimes and CaH, and for chambers to first establish the former before moving to the latter. Accordingly, in both *Blaškić* and *Kordić & Čerkez*, the Trial Chambers confirmed first that the destruction of sacred sites constituted war crimes.[746] With that finding secured, the *Blaškić* Trial Chamber held that beyond bodily and mental harm as well as violations of the individual freedom, the crime of persecution includes "acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind", such as "confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence".[747] The *Kordić & Čerkez* Trial Chambers did the same by holding that "This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity" of the collective.[748] The *Prlić* Trial Chamber adopted the same approach with respect to the destruction of the Old Bridge of Mostar.[749] Thus, by adding discriminatory grounds to the ICTY war crimes provisions, Chambers would establish CaH persecution.

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[744] *Blaškić* Appeal Judgment (n 496) para 138.
[745] *Blaškić* Appeal Judgment (n 496) para 145; *Kordić & Čerkez* Trial Judgment (n 505) para 206; and *Prosecutor v Stakić*, (ICTY) Judgment (31 July 2003) Case No IT-97-24-T, para 766.
[746] *Blaškić* Trial Judgment (n 412) para 234 and *Kordić & Čerkez* Trial Judgment (n 505) para 206.
[747] *Blaškić* Trial Judgment (n 412) para 227. *See also* Yaron Gottlieb, "Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes Under the Rome Statute of the ICC" (2005) 23(4) *Pennsylvania State International Law Review* 857, p 874.
[748] *Kordić & Čerkez* Trial Judgment (n 505) para 207.
[749] *Prlić et al* Trial Judgment (n 453) para 1713.

In practice, under the war crimes provisions, the ICTY considered the indirect and direct protection of culture's tangible. As regards the former, IHL's indirect protection considers culture's tangible as part of property located in cities, towns and villages (Chapter 1.II.B.). The *Kordić & Čerkez* Trial Chamber held that the combination of such attacks and discriminatory grounds "provides the factual matrix for most of the other alleged acts of persecution", like "the wanton and extensive destruction of property".[750] Later, the *Blaškić* Appeals Chamber, relying on customary international law, held that "indiscriminate attacks on cities, towns, and villages, may constitute persecutions".[751] This opened the possibility to consider tangible-centred damage as persecution, in these contexts. Here, it is important to refer to the ICTY jurisprudence on the relationship between persecution and attacks targeting private property. While not related to culture's tangible, this may be useful in drawing the possibilities and limits of characterising the latter's damage as persecution. In its discussion concerning private property the *Kordić & Čerkez* Trial Chamber held:

> If the ultimate aim of persecution is the "removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself", the widespread or systematic, discriminatory, destruction of individuals' homes and means of livelihood would surely result in such a removal from society.[752]

Later, when discussing the "destruction and plunder of property" as persecution, recalling IHL's plunder and pillage provisions and the post-Second World War cases (this Part, Chapter 1), the *Blaškić* Appeals Chamber echoed the CCL 10 *Flick*, by holding that "[t]here may be some doubt" as to whether plunder as such may reach CaH's level of gravity.[753] Accordingly, the Appeals Chamber held that "depending on [its] nature and extent", property destruction may constitute persecution of equal gravity to other article 5 crimes.[754] In this light, to assess whether discriminatory attacks targeting culture's tangible would result in the removal of individuals from society requires a case-by-case approach. In this regard, the IACtHR jurisprudence may provide some useful indicia (Part I, Chapter 2.I.A). Concretely, the *Karadžić* Trial Chamber provided a tangible-centred means of attacking culture, consisting of the plunder of property and wanton destruction of private and public property, including cultural monuments and sacred sites.[755]

Moving to IHL's direct protection, the *Kordić & Čerkez* Trial Chamber first noted that the destruction of culture's tangible as such was already part of the laws and customs of war under the ICTY Statute article 3(d) and had also been characterised as persecution by the IMT and the 1991 ILC Report.[756] The Chamber then held that:

> This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of

[750] *Kordić & Čerkez* Trial Judgment (n 505) para 203.
[751] *Blaškić* Appeal Judgment (n 496) para 159; see also *Kordić & Čerkez* Appeal Judgment (n 415) para 104.
[752] *Kordić & Čerkez* Trial Judgment (n 505) para 205.
[753] *Blaškić* Appeal Judgment (n 496) para 148.
[754] *Blaškić* Appeal Judgment (n 496) para 149; *Kordić & Čerkez* Appeal Judgment (n 415) para 108.
[755] *Karadžić* Trial Judgment (n 721) paras 527-529 and 531.
[756] *Kordić & Čerkez* Trial Judgment (n 505) para 206.

> the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.[757]

The Trial Chamber thus addressed attacks against culture's tangible as a crime of persecution under the war crimes angle, although it also referred to the 1991 ILC Report. The Chamber further emphasised the gravity of the acts by considering them, at minimum, as a national-international diptych, by injuring humanity as a whole. In *Brđanin*, the Trial Chamber noted the relationship between the ICTY Statute article 3(d) and the tangible's military purpose use.[758] Thereafter, the Chamber concluded that, in the case at hand, destruction of and wilful damage to culture's secular and religious tangible occupy the same level of gravity as article 5's other underlying offences.[759] In *Deronjić*, the accused pleaded guilty to persecution for a number of acts which in terms of culture's tangible, included the destruction of one mosque.[760] The Trial Chamber entered a single conviction for persecution for those crimes.[761] However, as noted by Ehlers, it remains unclear whether the Chamber found the act of destruction to be of sufficient gravity or whether it considered it together with the other acts as part of the wider persecution.[762]

b. The aim of attacking culture's tangible: "memory-cide" and genocide

The *Karadžić & Mladić* Indictment Part I (Counts 1-2) charged the accused for genocide and CaH through a series of anthropo-centred means but also "appropriation and plunder of property", "destruction of property" and "destruction of sacred sites".[763] While the first two charges concerned private property, the charge of destruction of sacred sites encompassed Muslim and Catholic places of worship that were systematically and intentionally damaged and/or destroyed.[764] Counts 1-2 further alleged that those events "destroyed, traumatised or dehumanised most aspects of Bosnian Muslim and Bosnian Croat life".[765] For the purpose of the ICTY rule 61 review,[766] the Chamber heard an expert witness, Colin Kaiser, who had worked for both UNESCO and the Parliamentary Assembly of the Council of Europe. The latter's reports, as explained by Kaiser, always mentioned cultural cleansing alongside ethnic cleansing because, by destroying culture's tangible:

> [y]ou are eliminating the memory of having lived together [and] you are talking about the removal of the signposts of collective and individual life. In this way, we are talking about the spiritual impoverishment for people all over the country. [Thus], the destruction of a mosque is a destruction of something within a Serb or something within a Croat as well.

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[757] *Kordić & Čerkez* Trial Judgment (n 505) para 207.
[758] *Prosecutor v Brđanin*, (ICTY) Judgment (1 September 2004) Case No IT-99-36-T, paras 598-599.
[759] *Brđanin* Trial Judgment (n 758) para 1023.
[760] *Prosecutor v Deronjić*, (ICTY) Judgment (30 March 2004) Case No IT-02-61-S, para 117.
[761] *Deronjić* Trial Judgment (n 760) para 77.
[762] *See* Ehlert (n 442) p 167.
[763] *Karadžić & Mladić* Initial Indictment (n 408) paras 20-22; 23-24; 25; 26; 27-28; 29; and 30, respectively.
[764] *Karadžić & Mladić* Initial Indictment (n 408) paras 30 and 37.
[765] *Karadžić & Mladić* Initial Indictment (n 408) para 31.
[766] Pursuant to ICTY Rules (n 98) rule 61 ("Procedure in Case of Failure to Execute a Warrant"), when an arrest warrant has not been executed, a Trial Chamber could consider whether there were reasonable grounds to believe that the accused had committed any of the offences.

> Destruction of an Orthodox church is a memory that a Croat has. You are dealing, breaking down the whole identity with the destruction of this cultural heritage.[767]

Kaiser's words echo the local-national diptych developed in the general introduction. He further explained that the perpetrators perfectly realised "the significance of heritage as one of the bonds that holds together a society"[768] By seeking to obliterate the targeted group's cultural presence, the perpetrator thus seeks to rid their own group's identity of any cultural impurities. Although culture's tangible constituted the object of the ravage, the implication was heritage-centred. Kaiser further explained that "destruction or damaging a minaret is clearly a sign to a population"; as a means of "chasing the people".[769] This passage may explain why the Trial Chamber, as will be now seen, seemed to have considered that attacks targeting culture's tangible constituted relevant evidence of the genocidal intent.

Referring to the destruction, "in particular, [of] sacred sites", the Chamber noted a predominantly Serbian city, where the destroyed mosques' "ruins were then levelled and rubble thrown in the public dumps in order to eliminate any vestige of Muslim presence".[770] The Trial Chamber observed that this targeting manifested the perpetrators' desire to annihilate the targeted group's culture and religious sites.[771] Next, in analysing ethnic cleansing, the Chamber held that the widespread and systematic nature of the sacred sites' destruction was "part of a "memory-cide", a policy of "cultural cleansing […] aiming at eradicating memory".[772] Clearly, the Chamber linked the tangible-centred means of attacking culture to the broader heritage. In addressing the legal characterisation of offences, the Trial Chamber held that the targeted population was attacked on national or political grounds – a clear reference to some of CaH persecution's discriminatory grounds – in order to establish an ethnically pure new State.[773] The Trial Chamber held that the acts in question constituted "the means to implement the policy of ethnic cleansing", and that they could "more appropriately be characterised as a crime against humanity".[774] This contrasted with the UNGA which considered ethnic cleansing as "a form of genocide".[775] The Chamber's cautious approach flowed from the fact that, as explained in details in this Part's Chapter 3, the Genocide Convention discussions would eventually not retain genocide's tangible-centred means. Be that as it may, the Chamber accepted that attacks against culture's tangible may not only constitute persecution but also serve as evidence with respect to genocide's intent.

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[767] *Prosecutor v Karadžić & Mladić*, (ICTY) Transcript of Hearing (2 July 1996) Case No IT-95-5-R61 and IT-95-18-R61, p 54.
[768] *Karadžić & Mladić* Transcript of Hearing (n 767) p 55.
[769] *Karadžić & Mladić* Transcript of Hearing (n 767) p 57.
[770] *Prosecutor v Karadžić & Mladić*, International Arrest Warrant and Order for Surrender (11 July 1996) Case No IT-95-5-R61 and IT-95-18-R61, para 15.
[771] *Karadžić & Mladić* International Arrest Warrant (n 770) para 41.
[772] *Karadžić & Mladić* International Arrest Warrant (n 770) para 60.
[773] *Karadžić & Mladić* International Arrest Warrant (n 770) para 90.
[774] *Karadžić & Mladić* International Arrest Warrant (n 770) paras 90-91. *See also Sikirica et al* Trial Judgment (n 720) para 89.
[775] UNGA, UN Doc AG/Res/47/121 (n 718).

2. The ICC

As seen earlier (II), the ICC Statute article 7(1)(h) and the ICC Elements of Crimes require, for the actus reus of persecution, that there be a severe deprivation of fundamental rights contrary to international law in connection with any act under article 7(1) or with crimes within the ICC's jurisdiction. The ICC Statute explains neither what these fundamental rights are, nor how to qualify their severe deprivation. While deciphering this is easier when considering the anthropo-centred actus rei of persecution, such as deportation, imprisonment or forced pregnancies, the matter is less obvious when conceiving the tangible-centred means. Here, the ICTY practice can serve as guidance, albeit limitedly. As seen, after reviewing the IMT jurisprudence, IHL-ICL instruments, and the 1991 and 1996 ILC Reports, the ICTY concluded that the destruction of culture's tangible amounted to a breach of customary/conventional international law. However, it was not always clear whether, and if so to what extent, the ICTY considered those breaches as a deprivation of fundamental rights.[776] Notwithstanding this, the IACtHR and ECtHR have made findings of IACHR and ECHR violations in relation to damage to the tangible, whether anthropical or natural (Part I, Chapter 2.II). These *human rights* violations could only enhance the aforementioned ICTY approach that destruction of/damage to culture's tangible may, depending on the circumstance, be characterised as CaH persecution. The question remains whether and how the ICC may consider similar charges as a "severe deprivation of fundamental rights contrary to international law".

On the required connection between persecution and other CaH or other ICC Statute crimes, only article 8 on war crimes expressly addresses crimes relating to culture's tangible and the natural environment (this Part, Chapter 1). Thus, a priori, persecution could apply to culture's tangible only during armed conflict. In this regard, the *Al Hassan* Pre-Trial Chamber has brought to an end twenty years of academic speculations. While the trial was ongoing at the time of writing, the related confirmed charges include, inter alia, the characterisation of the destruction of culture's tangible as persecution. To reach this conclusion, the Pre-Trial Chamber first confirmed the war crime charge of destruction of/damage to culture's tangible under the ICC Statute article 8(2)(e)(iv).[777] Once this was done, the Chamber also considered that these violations constituted the crime of persecution on, inter alia, religious grounds.[778] As seen in this Part, Chapter 1, the same destructions gave rise to war crimes charges and guilty plea in *Al Mahdi*. It remains to be seen whether, and if so to what extent, the *Al Hassan* trial and any subsequent appeals will process this.[779] Be that as it may, it is noteworthy that linking CaH persecution's actus reus to article 8 helped the *Al Hassan* Pre-Trial Chamber to characterise the destruction as CaH persecution. In other words, under this approach, there is still a conceptual relationship between persecution and war crimes, although, under article 7, CaH need not be committed during armed conflict. It would thus be interesting to see whether in future situations involving non-armed conflict cases of destruction of culture's tangible, the ICC will seek to characterise those violations as persecution by referring to provisions other than war crimes. To this effect,

[776] Ehlert (n 442) p 159.
[777] *Al Hassan* Confirmation of Charges Decision (n 423) pp 523-531and p 462.
[778] *Al Hassan* Confirmation of Charges Decision (n 423) pp 673-707and p 465.
[779] On how the destruction of Timbuktu's religious property could be considered a CaH persecution, *See* Sebastian Green Martínez, "Destruction of Cultural Heritage in Northern Mali" (2015) 13(5) *Journal of International Criminal Justice* 1073.

article 7(1)(k), ie CaH other inhumane acts, may provide for one such approach.[780] While both the ICTY and ICC have considered that the latter consists of bodily and its related mental harm, it is not excluded to characterise the destruction of culture's tangible as persecution in the form of other inhumane acts. This is so when considering the so-called indigenous/tribal cases, wherein the IACtHR found that the collectives' illness was caused by damage to their anthropical and natural tangibles (Part I, Chapter 2). Depending on the case at hand, this proposition is not unrealistic. Here, it should be recalled that, having held that the post-IMT-IMTFE customary international law no longer requires a link between CaH and war crimes, the *Kupreškić* Trial Chamber referred to the ICC Statute article 10, according to which:

> [n]othing in the Statute shall be interpreted as limiting or precluding in any way existing or developing rules of international law for purposes other than this Statute.[781]

It thus remains to be seen how the ICC will compare the ICC Elements of Crimes regarding articles 7(1)(h) and 10, and how it will approach this matter if and when it is called to address the question of the destruction of culture's tangible in a non-armed conflict context (for genocide, see this Part, Chapter 3). It may be assumed that this assessment will be conducted on the merits of each case.

3. Outcome

As demonstrated, the ICTY jurisprudence has viewed damage to and destruction of culture's tangible as persecution, provided that the mens rea requirements are met. As nowhere is its actus reus defined, persecution is essentially a mens rea-type crime. Hence the ICTY judges's cautious consideration of the destruction of culture's tangible. Thus, may amount to persecution, those destruction of or damage to culture's tangible that, at minimum, reach the same level of gravity as other ICTY Statute crimes protecting culture's tangible. In this regard, only the war crimes provisions expressly refer to property crimes, whether directly (article 3(d)) or indirectly, as part of objects and urban ensembles of a civilian character (article 3(b)). This type of persecution can be viewed as part of a "memory-cide", and contribute to the so-called ethnic cleansing.

The same can be said of the ICC, although with the nuance that the ICC Statute and the EoC have formally tightened the relationship between the persecution acts and other ICC Statute crimes. As seen, this would in essence mean some of the war crimes actus rei. In effect, this would be tantamount to reinstating the armed conflict nexus, decades after its elimination by the ICC Statute itself. Paradoxically, it is the "severe" character of fundamental rights' deprivation that helps bringing under the persecution umbrella the tangible-centred means of attacking culture. While the term "severe" places a high threshold on the deprivation of fundamental rights, the ECtHR-IACtHR have considered as such damage to or destruction of the collective's anthropical and natural tangible (Part I, Chapter 2). This said, the task will not be easy since, as seen, the *Al Mahdi* Trial Chamber has held that property crimes "are generally of lesser gravity" than crimes against persons (this Part, Chapter 1). It remains to be seen how the *Al*

[780] *See* also Bassiouni, *Crimes Against Humanity* (n 596) pp 405-406, explaining that war crimes include, as "inhumane", acts such as "desecrating religious symbols; and the seizure or destruction of public, religious, and cultural property".
[781] *Kupreškić et al* Trial Judgment (n 624) paras 577 and 580.

Hassan Trial Chamber will view the Pre-Trial Chamber's characterisation of destruction of and damage to culture's tangible as persecution.

More generally, persecution can address the uniqueness of culture's tangible. Hence the *Blaškić* Appeals Chamber's holding that although often comprising a series of acts, persecution could also be made through a single act.[782]

D. Synthesis: heritage-oriented attacks targeting culture's tangible

Both the post-Second World War and post-Cold War ICR-based proceedings have considered the tangible-centred means of attacks targeting culture through culture's religious components, as well as its movable and immovable elements. However, although the post-Second World War trials were detailed in the description of damage to/destruction of culture's tangible, they nonetheless lacked legal precision. It is often hard, if not impossible, to see whether such crimes were characterised as war crimes or CaH. But even when the judgments point to the latter, they do not always mention the crime of persecution. Even when they do, it is not clear whether the words "persecuted"/"persecution" were used legally or colloquially. What further complicates the matter is the fact that the judgments have referred to the same acts as genocide, at a time when the Genocide Convention had not been finalised.

The situation is different with the post-Cold War ICR-based jurisdictions, which benefited from the ILC's forty-fifty years metabolising of the post-Second World War cases. In this regard, the ICTY was first to properly explore the scope of the crime of persecution with regard to culture's tangible. The ICTY did so in connection with other ICTY Statute crimes, ie articles 2-3 on war crimes. Throughout, the ICTY linked this to the concept of ethnic cleansing; the haphazard use of which was turned by the ICTY into precise legal terms through the judicial interpretation of CaH persecution. This, it is argued, resulted in a tangible-centred approach, in that the ICTY viewed damage to/destruction of culture's tangible as a means of attacking culture through the crime of persecution. Like war crimes practice, however (Part II, Chapter 1), the ICTY regularly linked this to the concept of heritage, showcasing once again that attacking culture's tangible results in the alteration of identity, whether as a diptych (locally-nationally or nationally-internationally) or as a triptych (locally-nationally-internationally).

In the case of the ICC, suffices it to note that the ICC Statute has required that acts of persecution be committed in connection with acts under article 7(1) or other ICC Statute crimes, of which, only war crimes expressly address culture's tangible, whether expressly or by assimilation to objects and sites of a civilian character. While the ICC has finally adopted the ICTY's approach in the Al Hassan confirmation of charges decision, it is imperative to wait for the outcome of the trial. As time will go by, the ICC will be confronted with cases where attacks against culture's tangible will occur outside an armed conflict scenario. It will thus be up to the ICC to consider such attacks as other inhumane acts. To adopt such an innovative thinking, the ICC will benefit from

[782] *Blaškić* Appeal Judgment (n 496) paras 135 and 138, referring to *Prosecutor v Vasiljević*, (ICTY) Judgment (25 February 2004) Case No IT-98-32-A, para 113; and *Krnojelac* Appeal Judgment (n 672) paras 199 and 221.

the ICC Statute article 10 on the relationship between the ICC Statute provisions and "existing or developing rules of international law". In any event, the question of the crimes' characterisation will depend on the facts before the judges.

IV. Conclusion to Chapter 2: fundamental (cultural) rights violations – between war crimes and genocide?

CaH can address attacks targeting culture under both tangible-centred and anthropo-centred angles. CaH can further do so as a diptych or triptych, by combining culture's local, national, and international layers. This is so because CaH may address attacks that target culture, both in terms of aims and means. As seen, the terminology used to describe CaH is both culture-centred and culture-sensitive. From the very beginning, in 1915, CaH were conceptualised by British, French and Russian Euro-centred empires against an ailing, predominantly, Asian empire, the Ottomans. Christian civilisations went on to denounce, originally for their domestic consumption, the Christian victims of their decaying rival Muslim empire. Out of British pragmatism and French fear of its Muslim colonies, the original Russian terminology of "crimes committed by Turkey against Christianity and civilization" was secularised into "crimes of Turkey against humanity and civilization". Eventually, with the IMT and IMTFE Charters' deletion of the word "civilization", the word "humanity" came to represent both religion and civilisation, notions representative of culture, par excellence (general introduction). In other words, CaH are synonymous with crimes against civilisation/culture, as both are the cause and consequence of each other. This would be implicitly reflected in the chapeau of CaH (the targeting of a civilian population as a collective) and, explicitly, in the underlying offence of persecution (the discriminatory grounds).

From the 1945 IMT Charter to the 1998 ICC Statute, it took half a century to conceive and refine CaH's chapeau elements. The IMT-IMTFE and CCL 10 models in fact only contained fragments of the future chapeau – such as the civilian population as victims, together with an armed conflict nexus – albeit in relation to the various actus rei of CaH. It was only in the 1990s that the ICTY-ICTR models progressively built the chapeau, both formally and substantively. Departing from the IMT-IMTFE and CCL 10 models, the ICTR chapeau elements introduced the general requirements for CaH's underlying offences to be made. After the Cold War's four decades-long ICL hiatus, a five year fast-track process clarified the definition of CaH from the 1993 ICTY Statute to the 1998 ICC Statute, which, absent a CaH treaty, provides the most authoritative definition, as it was adopted by 120 States and counts even more States Parties after the ICC Statute's entry into force. The ICTY-ICTR chapeau shared the requirements for a (widespread or systematic attack) against any civilian population. Otherwise, they diverged, as they reflected the specific situations grounding their creation. As regards the definition of CaH, at the ICTY, the predominantly CaH-type situation during international and non-international armed conflicts in Yugoslavia prompted the adoption of an armed conflict nexus requirement. At the ICTR, a predominantly genocide-type situation in Rwanda resulted in the absence of an armed conflict nexus but the adoption of discriminatory grounds requirements. This explains the status of CaH: forever born to war crimes, in fact as an extension of them; yet linked to genocide.

Hence, the ICTY's adjudication of attacks targeting culture always navigated between these two crimes. Often grounding persecution's actus reus on war crimes as regards the culture's tangible, the ICTY regularly linked persecution to genocide, specifically for ethnic cleansing and the genocidal intent's evidence. Based on these experiences, States drafting the ICC Statute clarified the chapeau elements, which now simply require a widespread or systematic attack against any civilian population, omitting the armed conflict nexus requirement. This facilitates characterising the attacking of culture as CaH for two main reasons. First, such attacks may also occur during times of trouble falling short of an armed conflict (Part I). Second, the chapeau elements of CaH, as clarified by the ICC Statute, focus on the mass targeting ("widespread or systematic attack") of given collectives ("any civilian population"). Once these are met, it should be possible to criminalise those mass human rights violations that target culture, whether anthropo-centred or tangible-centred. Accordingly, regardless of CaH's underlying offences, the chapeau elements mean that it is the members of that collective who would constitute the actual victims of CaH's underlying offences. This places CaH in a situation similar to HRCts' practice which, as shown in Part I, Chapter 2.II.A, have always considered attacks targeting culture through the collective.

Moving to CaH's underlying offences, it has been shown that they are all anthropo-centred. However, persecution and possibly other inhumane acts are abstract enough to encompass the inanimate. Specifically, persecution may not only encompass those underlying acts, but also other crimes (in connection with the ICC Statute or otherwise in the case of the ICTY). From the IMT to the ICC, the crime of persecution kept evolving for nearly half-a-century, in terms of both its mens rea and actus reus. Characterised by its discriminatory grounds, the ICC Statute extended the mens rea of persecution's decade-long exhaustive list (political, racial or religious grounds) to a non-exhaustive one, to encompass national, ethnic, cultural, religious and gender grounds as well as any other grounds, when "universally recognized as impermissible under international law". These grounds – not least the "cultural" one – are such that their judicial consideration cannot escape cultural considerations, since their meaning will evolve in culture's time and space dimensions, thereby influencing the adjudicators' analytical lens. Most importantly, however, the cultural features of these discriminatory grounds turn persecution into a cultural crime. This is because the perpetrators' discrimination is based on grounds that define the identity of victims, in whole or in part. Thus by virtue of its mens rea alone, persecution is a cultural crime. Accordingly, the CaH of deportation or rape may not be cultural per se, but when committed on persecution's discriminatory grounds, they target the individual's identity. This targeting of heritage thus forms part of the targeting of culture.

Under this approach, the combined practice of both the post-Second World War and post-Cold War ICR-based jurisdictions allows for persecution's actus reus with respect to attacks that target culture to be considered from anthropo-centred and tangible-centred angles. Indeed, absent a definition of the crime of persecution's actus reus, it has fallen on judges to progressively define its actus rei. The anthropo-centred approach has mainly consisted of a series of legislative/regulatory restrictions (social, civic and professional) and their implementing physical acts (ranging from imprisonment to forced displacement). Referenced as "cleansing" or "ethnic cleansing", both have been the means to rid wide territories of the targeted victims, on the grounds of their identity. In its most extreme form, persecution eventually escalated into the extermination of the victims. As far as the ICC is concerned, its legal requirements have been more explicit,

in that the ICC Statute already described them as a severe deprivation of fundamental rights contrary to international law, in connection with any act under article 7(1) or crimes within the ICC jurisdiction. But the ICC judges will still need to adopt a case-by-case approach, in order to establish whether certain actus rei could characterise the anthropo-centred means of attacks targeting culture. As seen, the ICC (and the ECCC) has gone further than the ICTY by expressly considering that attacks against certain rights with respect to culture's intangible can constitute persecution.

Moving to persecution's tangible-centred actus reus, both the post-Second World War and post-Cold War ICR-based jurisdictions considered culture's tangible, whether secular or religious, movable or immovable. While detailed in their description of damage/destruction, the post-Second World War trials often lacked legal clarity in their characterisation of such acts as CaH persecution. An additional complication flowed from the then confusion that reigned between CaH/persecution and genocide. Forty-fifty years later, combining the post-Second World War jurisprudence and the ILC work, the post-Cold War ICR-based jurisdictions have properly explored the tangible-centred component of the crime of persecution. The ICTY did so by grounding attacks against culture's tangible in its war crimes provisions. For these are the only ICTY subject-matter provisions to address crimes involving the tangible, whether possessing a general civilian character or being expressly referenced as culture's tangible. The ICTY's tangible-centred approach of attacks targeting culture remained, however, confined to culture's tangible as the object – rather than victim – of the attacks. This is unsurprising given the fact that the ICTY did not foresee any participation status for victims (general introduction). Over twenty years after the ICTY's first such practice, the ICC has replicated the same approach, since the ICC Statute requires that acts of persecution be committed in connection with acts under the ICC Statute crimes, of which, only war crimes address culture's tangible both expressly and as part of objects of civilian character and/or urban ensembles. It is nonetheless interesting to see how the ICC will address attacks targeting culture in cases not involving armed conflicts. As explained, it should be possible, depending on the facts of the case, to consider such attacks as other inhumane acts committed on discriminatory grounds. In this regard, the ICC could be guided by the findings of the IACtHR in its so-called indigenous/tribal cases (Part I, Chapter 2). No doubt this will be challenged. One could bring forward the ICC Statute article 10 on the relationship between the ICC Statute and "existing or developing rules of international law". Furthermore, one should recall that under the ICC Rules rule 85, culture's tangible, when capable of acting as a legal person, may participate as a victim in ICC proceedings and seek reparations for damage to itself.

As seen, CaH in general and persecution in particular are linked to both war crimes and genocide. The former has been manifest in the way in which the ICTY and ICC have characterised their tangible-centred approach by linking attacks against culture's tangible to their war crimes provisions. Methodologically, even if CaH no longer require an armed conflict nexus, they may still require going through armed conflict violation provisions. On the other hand, persecution acts as a lower genocide crime. This is by virtue of both the ICTY's ethnic cleansing jurisprudence and, mainly, article 7(1)(h) that persecution may occur by targeting victims by reason of their collective identity flowing from their affiliation to the enumerated grounds as well as of the group or collective. Beyond a connection with the IACtHR practice (Part I, Chapter 2), this brings persecution very close to the crime of genocide (Chapter 3), in that it is capable of addressing the attacks that target culture, both in terms of aims and means.