



PROSECUTING RELIGIOUS PERSECUTION AS GENOCIDE, WAR CRIMES OR CRIMES AGAINST HUMANITY UNDER THE ROME STATUTE: HISTORY, STANDARDS AND EXAMPLES FOR FUTURE CASES AT THE ICC

Introduction

Religious persecution has been addressed and tried before international tribunals as a crime in at least two instances since it was first dealt with at the Nuremberg Trials following World War II of those responsible for the Holocaust. Several international treaties, charters, and conventions spell out in detail the meanings of religious freedoms, the need for inter-religious dialogue, and the paramount requirement of protection for persons of all religious backgrounds. Yet in the face of such progress, religious persecution is still committed against those assured so many years ago of its end. The International Criminal Court (ICC) can now hold individuals accountable for acts of religious persecution as genocide, war crimes and crimes against humanity. The Rome Statute's standards and their application by the Office of the Prosecutor and the ICC judges will set a standard for future domestic prosecutions of religious persecution.

Previous Prosecution of Religious Persecution at International Courts and Tribunals

From accounts of the horrors of the Holocaust, the former Yugoslavia, and Rwanda, as well as extensive country studies on Egypt, the Islamic Republic of Iran, the People's Republic of China, and others, it is possible to ascertain indicators which may lend to judicial intervention where persecution is occurring.¹ Frequently, persecution is initiated with the fall of one political party in favor over another. One religion may be politically proscribed to the legal exclusion of all others. To enforce the new policies, forced conversion and forced registration on citizenship documents as other than one's chosen religion may employed. Personal religious icons and property may be confiscated and destroyed, and dissemination of religious literature may be regulated. Genocide, the ultimate end of such a process,

is preceded by a period in which the victims are vilified and de-humanized by the perpetrators. ... [I]deology ... glorifies the perpetrators' group by assigning to that group a special historical or religious mission. It demeans the victims' group by assigning to its members many negative and often nonhuman characteristics. ... It calls for extreme action and excuses the action as necessary in a time of crisis to protect the perpetrator's group and their special mission....²

These patterns and their accompanying histories, when combined with contemporary international adjudications of acts of religious persecution and the Rome Statute framework, provide insight for the effective prosecution of any future acts.

¹ The Special Rapporteur on freedom of religious thought or belief has compiled a model questionnaire to be used by countries, aid agencies, and non-governmental organizations in assessing religious persecution within their areas. Available at <http://www.ohchr.org/english/issues/religion/complaints.htm>. Last visited November 15, 2007.

² THE HOLOCAUST AND OTHER GENOCIDES 182 (Helmut Walser Smith, ed., 2002).





The Nuremberg Trials marked the beginning of international prosecution of humanitarian crimes.³ Trying and punishing those deemed most responsible in an international forum also served the purpose of striving to break the cycle of impunity among officers of the military, heads of state, and other government officials.

Nuremberg ended with the cry of “never again,” yet in a campaign of “ethnic cleansing” during the 1990s, the Bosnian Serb leadership sought to rid the surrounding areas in Bosnia and Herzegovina of its ethnic Muslim population, in an effort to secure those lands for themselves.⁴ The statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) include provisions permitting prosecution of individuals responsible for “seizure of, destruction or wilful damage done to institutions dedicated to religion” as a war crime (article 3(d) ICTY); genocide when committed with the intent, in whole or in part, a religious group (article 4(2) ICTY, article 2(2) ICTR); and religious persecution as a crime against humanity (article 5(h) ICTY, article 3(h) ICTR). The ICTY adjudicated acts of religious persecution committed against Bosnian Muslims by Serbian leaders. The ICTY found in one case,

The genocidal intent of the Bosnian Serb leadership can be inferred from all the evidence.... The scale and pattern of the attacks, their intensity, the substantial number of Muslims killed in the seven municipalities, the detention of Muslims, their brutal treatment in detention centres and elsewhere, and the targeting of persons essential to the survival of the Muslims as a group are all factors that point to genocide.⁵

Dusko Tadic, a former Serbian police officer, was the first individual to be held criminally responsible for his role in the conflict. Count one of his indictment charged him with committing religious persecution as a crime against humanity. In the judgment,

The evidence satisfies the Trial Chamber beyond reasonable doubt that the accused participated in the attack on Kozarac and the surrounding areas and in the collection and forced transfer of civilians to detention camps; participated in the calling-out of four Muslim men from a column of civilians...; participated in the beating of a Muslim policeman in Kozarac; kicked one Muslim prisoner and beat another while they were held at the Prijedor military barracks; and killed two Muslim policemen in Kozarac....

... The accused’s role...clearly constituted an infringement of the victims’ enjoyment of their fundamental rights and these acts were taken against non-Serbs on the basis of religious and political discrimination.⁶

The trial against Serbia’s former President Slobodan Milosevic was not completed due to his early death in March 2006. However, Milosevic was charged with the crime against humanity of “persecution on discriminatory grounds of religion” in Bosnia, which included

³ Remarks of Henry T. King, Jr. at the American Bar Association’s Commemoration of the 60th Anniversary of the Nuremberg Trials, Georgetown University Law Center, Washington, DC (November 11, 2005) (transcript available at 40 INT’L LAW. 1).

⁴ See *Prosecutor v. Milosevic*, Decision on Motion for Judgment of Acquittal, Case No. IT-02-54-T, June 16, 2004, para. 238.

⁵ *Id.* at para. 246.

⁶ *Prosecutor v. Dusko Tadic*, Judgment, Case No. IT-94-1-T, May 7, 1997, paras. 714, 717.



- a. The extermination or murder of thousands of Bosnian Muslim ... civilians, including women and the elderly...;
- b. The prolonged and routine imprisonment and confinement of thousands of Bosnian Muslim ... civilians...;
- e. The cruel and inhumane treatment of Bosnian Muslim ... civilians ... include[ing] but not limited to, sexual violence, torture, physical and psychological abuse and forced existence under inhumane living conditions...;
- g. The beating and robbing of Bosnian Muslim ... civilians...;
- h. The forcible transfer and deportation of thousands of Bosnian Muslim ... civilians...;
- i. The appropriation and plunder of property belonging to Bosnian Muslim ... civilians...;
- j. The intentional and wanton destruction of homes, other public and private property belonging to Bosnian Muslims and Bosnian Croats, their cultural and religious institutions, historical monuments and other sacred sites....⁷

The ICTY is credited with many advances in international criminal justice, and its cases have set legal precedents for religious persecution upon which the ICC can draw.

In 2001, the Extraordinary Chambers in the Courts of Cambodia (ECCC) were established with jurisdiction to prosecute those responsible for crimes against humanity, acts of genocide, and grave breaches of the Geneva Conventions occurring during the rule of the Khmer Rouge. Crimes of religious or religious persecution are specifically included within the ECCC's jurisdiction and factual allegations.⁸ The ECCC's definition of religious persecution echoes that of the Rome Statute,⁹ and the outcome of prosecution against officials of the Khmer Rouge will contribute guidance to future efforts of the ICC in similar cases.

Prosecuting Religious Persecution at the ICC

In the recent past, the ICC's Office of the Prosecutor (OTP) has brought criminal cases against individuals in the Democratic Republic of the Congo (DRC), Uganda, and Darfur, Sudan. At issue in these cases are the crimes of enlistment or conscription of child soldiers, sexual slavery, murder and mutilation, and attacks on civilian populations, among others. While the crimes alleged to have been perpetrated against a distinct portion of the Sudanese population which could be identified by religion, the crimes committed there have been charged as persecution of an ethnic group, not as a religious group. Issues pertaining to religious persecution have not yet been addressed as such in any of the ICC's investigations and therefore the applicable provisions of the Rome Statute have not been interpreted to serve as examples for national and international tribunals. While the discussion of religious persecution to follow is mainly an exercise in legal analysis of the requirements of the Rome Statute, the examples it discusses may be illustrative for future actions by the ICC.

⁷ *Prosecutor v. Milosevic*, Second Amended Indictment for Bosnia, Case IT-02-54-T, para. 35.

⁸ Statement of the Co-Prosecutors of the Extraordinary Chambers in the Courts of Cambodia Office of the Co-Prosecutors, Phnom Penh, July 18 2007. Available at http://www.eccc.gov.kh/english/cabinet/press/33/Statement_of_Co-Prosecutors_18-July-2007_.pdf. Last visited November 16, 2007.

⁹ Article 5, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).





Genocide

Under Article 6 of the Rome Statute, the OTP may address religious persecution by prosecuting individuals for the crime of genocide if any the following acts are committed with the intent to destroy, in whole or in part, a religious group as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The elements of the crime of genocide vary depending on the specific acts of which an individual is suspected. Genocide by killing is codified in Article 6(a) of the Rome Statute. One prominent historical example of genocide by killing is the Holocaust which was responsible for the death of millions of Jews and others. While this example was tried by the International Military Tribunal and the Nuremberg Military Tribunal, it serves as factual precedent for prosecuting individuals within the framework of the Rome Statute and its elements of crimes.

The Prosecutor could base a modern trial of genocide by killing on the case of SS official Ernst Kaltenbrunner, who was convicted of crimes against humanity and war crimes. To prove the elements of genocide by killing, first, the Prosecutor would need to prove that the perpetrator killed one or more persons; an individual such as Kaltenbrunner would qualify for having ordered the killing of millions of prisoners in concentration camps. Second, many of those prisoners were Jews, a distinct religious group, as required by the elements for this crime. Third, Kaltenbrunner intended to destroy the Jews as a religious group in whole or in part by issuing these orders. Lastly, Kaltenbrunner's conduct took place in the context of a manifest pattern of similar conduct directed against that group – the widespread killing of Jews by the Nazi regime – or was conduct that did itself effect such destruction.

The case of Kaltenbrunner and others from Nuremberg provide an analytical framework by which to assess, in the context of the requirements of the Rome Statute and its Elements of Crimes, the viability and scope of future cases at the ICC.

War Crimes

Under Article 8(2)(b)(ix) and Article 8(2)(e)(iv) of the Rome Statute, the OTP may address religious persecution by prosecuting individuals for the war crime of “Intentionally directing attacks against buildings dedicated to religion ... provided they are not military objectives...” in international and non-international armed conflicts.

One example of how this crime could be charged and prosecuted by the ICC in the context of other crimes is found in the jurisprudence of the ICTR. In the case against the Catholic priest Anthonise Seromba who was



convicted of genocide on the basis of ethnicity as well as the crime against humanity of extermination, the Appeals Chamber found that the defendant took part in the decision to and was criminally responsible for destroying with a bulldozer a church containing 1,500 Tutsis.¹⁰ While Seromba was not charged with destroying the church as a war crime, it would be possible for the ICC Prosecutor to recognize and address religious persecution by charging similar future conduct as a war crime under the Rome Statute, provided that is committed as part of a plan or policy or as part of a large scale commission of such crimes, as required by Article 8(1) of the Statute.

Specifically looking to the elements of the war crime of attacking protected objects in a non-international conflict under Article 8(2)(e)(iv), one first needs to prove that the perpetrator directed the attack against the church, as the Appeals Chamber found in the case of Seromba. Secondly, the object of the attack was one or more buildings dedicated to religion, and thirdly, the perpetrator intended this building to be the object of the attack, in this case the destruction of the Nyange church on April 6, 1994 for which the ICTR judges found the requisite intent.¹¹ Fourthly and lastly, the conduct must have taken place in the context of and associated with a conflict not of an international character – as was the case of the 1994 Rwanda conflict – and the perpetrator must have been aware of factual circumstances that established the existence of the armed conflict. Adding such a charge to a future prosecution at the ICC would draw attention to crimes related to religious persecution, deter individuals who contemplate attacking places dedicated to religion and provide a precedent for domestic prosecutions of such a war crime.

Crimes Against Humanity

Under Article 7(1)(h) of the Rome Statute, the OTP may prosecute individuals for the crime against humanity of “Persecution against any identifiable group or collectivity on ... religious ... 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”, provided that the acts were “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Accordingly, the acts of persecution must be tied to any of the other ten categories of acts enumerated in the Article 7(1) – including but not limited to murder, forcible transfer, imprisonment, torture, persecution, enforced disappearance, and crimes of sexual violence – or to any other crime within the jurisdiction of the ICC, currently the crime of genocide (Article 6) and war crimes (Article 8).

In the first paragraph of Article 7, the words “widespread or systematic” precede and modify “attack directed against any civilian population”. As such, the attack needs to be widespread or systematic; acts of religious persecution do not. Paragraph 2(a) of the Article defines such an attack as a “course of conduct involving the multiple commission of acts ... against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” It follows, therefore, that not all of the acts committed as part of the multiple commission of acts need to be acts of religious persecution against an identifiable religious group or collectivity.

¹⁰ *Prosecutor v. Anthonio Seromba*, Appeals Judgment, Case No. ICTR-2001-66-A, March 12, 2008, para. 177.

¹¹ *Id.* at para. 190.





The culpability requirement of a crime against humanity in its generic form requires knowledge of the attack. Article 30 of the Rome Statute clarifies this: “‘knowledge’ means awareness that a circumstance exists or that a consequence will occur in the ordinary course of events, and “‘know’ and ‘knowingly’ shall be construed accordingly.” The introduction to Article 7 of the Elements of Crimes, which corresponds to Article 7 of the Rome Statute, qualifies this clarification, stating that the knowledge requirement

should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics ... or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.¹²

Under Article 7(1)(h) of the Elements of Crimes, the crime against humanity of persecution requires that:

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.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Regarding the first element, deprivation of religious freedom is widely recognized as contrary to international law through several treaties and conventions which establish the norms of religious freedom. Under article 18 of the Universal Declaration of Human Rights, “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” Also important are the Geneva Conventions of 1949, the International Covenant on Civil and Political Rights (ICCPR) of 1966, and the UN General Assembly Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981. While the Universal Declaration on Human Rights and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief are non-binding documents, when grouped with the ICCPR, they serve as the cornerstone of customary international law regarding religious freedom. Among ratifying countries, the ICCPR is binding, and signatory countries are held to application and cooperation with its provisions. Now, individuals can be held to account by the ICC under the Rome Statute for religious persecution as genocide, war crimes and

¹² Elements of Crimes, ICC-ASP/1/3, Article 7, Crimes against humanity, Introduction, para. 2.





crimes against humanity. Undeniably, religious freedom is now considered to be a fundamental right, and one for which an individual who severely denies this right may be prosecuted.

One possible approach to identifying cases of religious persecution is to examine evidence that has already been collected with respect to other crimes and linking these crimes to religious persecution. In order to do this, one must prove that the perpetrator deprived one or more individuals of fundamental rights contrary to international law (first element), targeted at a specific group (second element) based on religion (third element) in connection with any crime within the jurisdiction of the Court (fourth element), provided that the conduct – not necessarily the crime – is committed as part of a widespread or systematic attack directed against a civilian population (fifth element) and the perpetrator knew that or intended the conduct to be part of such an attack. This opens the possibility of charging a suspect with religious persecution as a crime against humanity in connection with different crimes without the burden of collecting much additional evidence. It is important to emphasize that the actual religious persecution does not need to be widespread or systematic as long as it is part of a widespread or systematic attack which could comprise a variety of crimes.

For example, if the OTP investigators identified instances of widespread or systematic torture and other related crimes in its investigations in any of the situation countries, they could also ascertain whether any of this torture had been done on the basis of religion. It could be argued, based on reports by human rights organizations and entities such as the United States Commission of International Religious Freedom (USCIRF), that individuals in nations such as China and Iran may have committed crimes against humanity such as imprisonment or other severe deprivation of physical liberty (Article 7(1)(e)) and torture (Article 7(1)(f)). If such nations were States Parties to the ICC or were to accept the Court’s jurisdiction pursuant to Article 12(3), and provided that other jurisdiction and admissibility requirements are met, individuals could be investigated and tried for these crimes. If the individuals were also deprived of fundamental rights under international law and were targeted as a group based on religion, prosecuting the crime of religious persecution would also be possible.

Religious persecution in connection with the crime against humanity of imprisonment or other severe deprivation of physical liberty. One of the crimes which may be committed in connection with religious persecution is imprisonment. Reports on China – over which the ICC does not have jurisdiction at this time since China is not a State Party – provide evidence of crimes against humanity, the study of which could provide a model for future ICC cases of situations over which it has jurisdiction. Regardless of the likelihood of ICC jurisdiction in counties such as China and Iran, the cases of religious persecution there are well documented and provide generic examples and precedent for potential ICC investigations which are unlike those in which the ICC has engaged thus far.

Human Rights Watch, Amnesty International, the United Nations, and the USCIRF have all documented instances of imprisonment and detention of religious individuals throughout the country. According to USCIRF’s 2007 Annual Report, “Every religious community in China continues to be subject to serious restrictions, state control, and repression.”¹³ Beginning in 2004, the United Nations Human Rights Council (UNHRC), in conjunction with the Special Rapporteur on Freedom of Religion or Belief, sent an urgent appeal

¹³ United States Commission on International Religious Freedom, Annual Report, May 2007, p. 67. Available at http://www.uscirf.gov/images/stories/pdf/Annual_Report/2007annualrpt.pdf.





to the Chinese government which contained reports of imprisonment and torture of eleven named individuals, among them Christians and Tibetan Buddhist monks, as well as several other unnamed individuals.¹⁴

In 2006, Human Rights Watch conducted an interview with two survivors of an attack on Tibetan Buddhist monks and nuns by Chinese and Tibetan soldiers.¹⁵ USCIRF included the attack in its 2007 report, and included information received that “soldiers took several members of the group into custody. One member ... who later reached asylum in India, reported that those detained were tortured with cattle prods...”¹⁶ The report also stated that “at least 40 Roman Catholic bishops or priests are under arrest, imprisonment, or detention”, and related that “[t]he Chinese government acknowledges that more than 100 Tibetan Buddhist monks and nuns are being held in prison.”¹⁷

From this sampling of acts directed against individuals of varying faith communities, it is clear that there has been purposeful targeting of such people by the Chinese government and therefore individuals in it. Such actions arguably meet the elemental requirements for religious persecution in connection with the crimes against humanity of imprisonment and torture. It would be essential to prove that the individuals were imprisoned because of their religion. The most difficult element for proving the crime of religious persecution itself in this example would be that the conduct was committed as part of a widespread or systematic attack against a civilian population. Depending on the circumstances and the available evidence, one could argue that the persecution, in connection with imprisonment, was systematically directed at diverse populations encompassing individuals in multiple religious groups.

The elements of the crime of religious persecution necessarily require that the elements of the act or crime to which the persecution is connected are satisfied. In reality, much of the proof required for one will be helpful in proving the other. For imprisonment, this would require the ICC Prosecutor to show a deprivation of liberty, such as incommunicado detention for periods longer than permitted by law (first element), as was the case of Tibetan monk Tsering Dhondup held in Gutsa prison in northern Lhasa beginning in July 2005;¹⁸ the gravity of the conduct was such that it was in violation of international law (second element), to which article 9 of the International Covenant on Civil and Political Rights (ICCPR) would apply; that the perpetrator was aware of the factual circumstances that established the gravity of the conduct (third element), which would depend on the identity of the actual suspect; that he conduct was committed as part of a widespread or systematic attack directed against a civilian population (fourth element) and that he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population (fifth element), the evidence for which could be shared with the corresponding elements of the crime of

¹⁴ Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, Addendum, A/HRC/4/21/Add.1, March 8, 2007.

¹⁵ Human Rights Watch, China: Interview with Two Survivors of the Nangpa Pass Shooting. Available at <http://hrw.org/english/docs/2006/11/21/china14654.htm>. Last visited January 15, 2008.

¹⁶ United States Commission on International Religious Freedom, Annual Report, May 2007, p. 124. Available at http://www.uscirf.gov/images/stories/pdf/Annual_Report/2007annualrpt.pdf.

¹⁷ Id. at 123, 126.

¹⁸ Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, Addendum, A/HRC/4/21/Add.1, March 8, 2007, p. 27.





religious persecution and other crimes. As discussed above, the knowledge element does not require actual knowledge of all of the characteristics of the attack.¹⁹

Religious persecution in connection with the crime against humanity of torture. Torture is another crime which has been documented to have taken place along with the crime of religious persecution. In Iran, which is also a non-State Party to the Rome Statute, there have been reports of imprisonment and torture in violation of international norms. Christian and Jewish members of the protected minority communities have been the targets of an ongoing official practice of government pressure through detention and imprisonment.²⁰ In addition, it has been documented that non-traditional Sunni and Shi'a Muslims, as well as Bahá'í's are also subject to these efforts at coercion. According to USCIRF,

The government of Iran engages in systematic, ongoing, and egregious violations of religious freedom, including prolonged detention, torture, and executions based primarily or entirely upon the religion of the accused. ... [T]he Iranian government's poor religious freedom record deteriorated, especially for religious minorities and in particular for Baha'is, Sufi Muslims, and Evangelical Christians.²¹

Iran's actions have not gone unnoticed by the international community. In 2006, the General Assembly adopted resolution 61/176, and expressed its serious concern at "[t]he persistent failure to comply fully with international standards in the administration of justice, and in particular, the absence of due process of law."²²

An example of alleged religious persecution which could be charged in connection with torture is the treatment of over 1,200 Sufi Muslims in Qom following the repression of a protest in that city and their subsequent arrest, reported by Amnesty International in 2006.²³ According to the report, protests outside the Nematollahi Sufi Hosseiniye, or place of worship, began on February 9, 2006 and numbers of Sufi participants increased throughout the day. Four days later, the government told the protestors to evacuate. The same day, security forces, supported by outside anti-Sufists, moved against the protestors. The report states that "protesters were arrested and taken away on buses to unknown locations. Some, including people with serious injuries, were reported to have been transported to a sports stadium for interrogation. The detainees were interrogated, and many were allegedly tortured or ill-treated." Of the 1,200 arrested and detained, most were released, save 173 who remained in Fajr Prison. Those who remained were allegedly "tortured in order to force them to sign pre-

¹⁹ Elements of Crimes, ICC-ASP/1/3, Article 7, Crimes against humanity, Introduction, para. 2.

²⁰ See *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Report of the Special Rapporteur on freedom of religion or belief, A/HRC/6/5, July 20, 2007, para. 26. ("Formal or legal distinctions between different kinds of religious or faith-based communities carry the seed of discrimination insofar as such a distinction in their status implies a difference in rights or treatment.... The legalization of such a distinction between different categories of religion is liable to pave the way for future violations of the right to freedom of religion or for discrimination on the basis of religion or belief.

²¹ United States Commission on International Religious Freedom, Annual Report, May 2007, p. 211. Available at http://www.uscirtf.gov/images/stories/pdf/Annual_Report/2007annualrpt.pdf.

²² Situation of human rights in the Islamic Republic of Iran, G.A. Res. 61/176, A/Res/61/176, December 19, 2006, para. 2(b).

²³ Amnesty International, Iran: Incommunicado detention/fear of torture: At least 173 members of the Nematollahi Sufi community, Public AI Index: MDE 13/018/2006, February 22, 2006. Available at <http://rights.amnesty.org/en/library/asset/MDE13/018/2006/en/dom-MDE130182006en.html>.





prepared false confessions claiming that the protest held by the Sufi group had political motivations and links to anti-government groups. It is alleged that they will read these false confessions on national television.”²⁴

Based on Amnesty International’s account, one could make a case that religious persecution, in connection with torture and perhaps other crimes, had occurred in this incident and subsequent events in Qom in 2006. Similar to the analysis of the persecution of Tsering Dhondup, one could argue that some of the detained Sufi Muslims were severely deprived of the fundamental right (first element) to religious freedom, as previously discussed; that the Sufis were targeted as a group (second element) on the basis of their religion (third element); that the conduct was committed in connection with an act referred to in Article 7(1) (fourth element), torture; that the conduct was committed as part of widespread or systematic attack against a civilian population (fifth element), in this case individuals from the Sufi community and other minority religions in this and other documented instances, both with respect to the conduct persecuting specific religious groups and torture itself; the requirement of knowledge or intent on the part of the perpetrator that his actions further the State policy (fifth element), would depend on the identity of the perpetrator although, as discussed above, actual knowledge is not required.

To prove torture, one must show infliction of either severe mental or physical abuse against one or more persons (first element), which in the Sufi case may have included documented methods used in the past by Iranian officials such as flogging, beating, amputation, sleep deprivation, and solitary confinement;²⁵ custody and control by the perpetrator over the victim (second element), demonstrated here by those in control transporting the detained persons by bus to “unknown locations” and tortured by security forces; that the pain or suffering did not arise only from, or be inherent to, lawful sanctions (third element), which would be contrary to article 23 of Iran’s Constitution which states that “The investigation of individual’s beliefs is forbidden, and no one may be molested or taken to task simply for holding a certain belief” and its obligations under ICCPR article 7; that the conduct was committed as part of widespread or systematic attack against a civilian population (fourth element) and the requirement of knowledge or intent on the part of the perpetrator that his actions further the State policy (fifth element) would parallel the elements for persecution.

It would also be possible to identify cases of crimes against humanity of religious persecution in connection with the war crime of torture in the context of an international (Article 8(2)(a)(ii)) – provided the persons subject to the alleged torture were protected under one of the Geneva Conventions – or a non-international conflict (Article 8(2)(c)(i)).

Religious persecution in connection with the war crime of pillaging. It would also be possible to prosecute an individual for religious persecution at the ICC in connection with a war crime such as pillaging (Article 8 (2)(b)(xvi) and Article 8(2)(e)(v)) that is arguably less grave than torture or imprisonment but may still be offensive to religious freedom. Hypothetically, investigators could discover that a series of villages in a situation country were pillaged and the victims were targeted based on religion. The analysis would be similar

²⁴ Id.

²⁵ See Amnesty International, Report 2007: Iran. Available at <http://thereport.amnesty.org/eng/Regions/Middle-East-and-North-Africa/Iran>. Last visited May 9, 2008. See also Human Rights Watch, Work Report 2008, Iran: Events of 2007, January 2008. Available at <http://hrw.org/englishwr2k8/docs/2008/01/31/iran17597.htm>. Last visited April 3, 2008. See also Situation of Human Rights in the Islamic Republic of Iran, G.A. Res. 62/168, A/RES/62/168, December 18, 2007, para. 2(b), (h).





to examples discussed above, including the widespread or systematic element required for crimes against humanity. Instead of being committed in connection with imprisonment or torture, the conduct would involve the perpetrator appropriating certain property (first element) intending to deprive the owner of the property and to appropriate it for private or personal use (second element) without the consent of the owner (third element) in the context of and was associated with an international or non-international armed conflict (fourth element) and the perpetrator was aware of factual circumstances that established the existence of an armed conflict (fifth element). This would draw attention to anti-religious aspects of certain war crimes and show the ICC's commitment to the Rome Statute's provisions on protecting religious values and places.

Conclusion

Most individuals responsible for crimes of religious persecution committed around the world have not faced justice. The patterns involved in each are repetitive across geographical and cultural borders and re-emergent within generations. Recently, several international tribunals have established limited precedents on religious persecution. It is now possible to prosecute different forms of religious persecution as genocide, war crimes and crimes against humanity at the ICC. The framework of the Rome Statute also permits the OTP to incorporate crimes against humanity of religious persecution into future prosecutions without requiring vast additional evidence because persecution itself can be charged in connection with any other crime within the jurisdiction of the Court. Prosecutions initiated by the ICC on an international scale would set a standard for trying crimes of religious persecution in international and national courts and help to ensure lasting reconciliation and religious freedom.

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