COMMENTARY

The Crime of Persecution and the Situation in Darfur:

A Comment on the Al Bashir Arrest Warrant Decision

Laurence Carrier-Desjardins*

Following Security Council Resolution 1593 (2005) referring to the Prosecutor of the International Criminal Court (ICC) the situation in Darfur since 1 July 2002, the Prosecutor has filed two requests for arrest warrants,¹ one against Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”),² and the other against Omar Hassan Ahmad al-Bashir (“al-Bashir”).³ In response to the Prosecutor’s first request, the Pre-Trial Chamber issued a warrant for Ahmad Harun, former Minister of State for the Interior in the Government of Sudan and currently Minister of State for Humanitarian Affairs and for Ali Kushayb, alleged leader of the militia/Janjaweed, for a total of 51 charges, including four for the crime of persecution in the regions of Kodoom, Bindisi, Mukjar and Arawala.⁴

However, at its request for the issuance of a warrant against al-Bashir, the President of the Republic of Sudan since 16 October 1993, the Prosecutor of the ICC, with evidence inter alia for crimes that occurred in the same regions mentioned above, failed to acquire a warrant for the crime of persecution.⁵ It has instead focused on allegations of genocide occurring in Darfur, as evidenced by

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¹ Upon correction of this article, the International Criminal Court was to announce the confirmation hearing against Bahr Idriss Abu Garda, chairman and general coordinator of the United Resistance Front. No arrest warrant has been issued.
³ ICC, Prosecutor’s Application under Article 58 regarding a request for a warrant of arrest against Omar Hassan Ahmad Al Bashir, filed on 14 July 2008 (see footnote 1 in document: <http://www.icc-cpi.int/iccdocs/doc/doc702324.pdf>.
⁵ Office of the Prosecutor, Public Redacted Version of Prosecution’s Application under Article 58...
the application submitted to the Pre-Trial Chamber\textsuperscript{6} and its subsequent application for leave to appeal.\textsuperscript{7} Thus, for the same actions committed during attacks on villages between August 2003 and March 2004, the Trial Chamber rejected the allegations of genocide and issued a warrant for five counts of crimes against humanity, namely murder, extermination, forcible transfer, torture and rape and two counts of war crimes. The majority of the Chamber, Judge Anita Ušacka dissenting on the issue, concluded that the evidence presented by the Prosecution in support of its request did not provide reasonable grounds to believe that there is a specific intent to destroy, in whole or in part, the groups Fur, Masaalit and Zaghawa.\textsuperscript{8}

In its decision, the Pre-Trial Chamber considered it particularly important to distinguish between the specific intent required for the crime of genocide and the specific intent required for crimes against humanity.\textsuperscript{9} This appears to be a clear attempt by the Chamber to bring the Prosecutor back to his first instincts, reminding him that when he asked for the issuance of a summons for Ahmad Harun in 2007, he did not see evidence of genocidal intent on his part, but only a persecutory intention.\textsuperscript{10} This decision leads to the following question: what is the logic behind the Prosecutor’s change in strategy? The benefits of this change in tactics are few. Other than the profound stigma associated with a conviction for the crime of genocide in Darfur, there is great interest for the Prosecutor and, moreover, for international justice, to prosecute al-Bashir and senior leaders of the Sudan for the crime of persecution. Prosecuting for persecution rather than for genocide has a real advantage, as it properly reflects the situation on the ground, and recognises the full criminality of serious violations of social, economic and cultural rights, the basis of the conflict in Darfur.

1. HISTORY OF THE CRIME OF PERSECUTION

The concept of persecution was legally recognised for the first time at the Military Tribunal of Nuremberg, after World War II. Indeed, Article 6(c) of the Nuremberg Charter gave the Tribunal jurisdiction over crimes against humanity, including murder, extermination, enslavement, deportation and persecution. The International Law Commission (ILC) had also included persecution in its definition of crimes against peace and security of mankind within the draft

\textsuperscript{6} Id.
\textsuperscript{7} ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-12, 10 March 2009.
\textsuperscript{8} ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009, para. 205. (Hereinafter “Decision on Warrant of Arrest”), Available at <http://www.haguejusticeportal.net/eCache/DEF/10/353.TD1GUg.html>. (Consulted 17/06/2009).
\textsuperscript{9} Id., paras. 141-145.
\textsuperscript{10} Id., para. 176. See also para. 200.
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Code of Offences against the Peace and Security of Mankind adopted in 1954. Persecution was placed alongside murder, extermination, enslavement and deportation as criminal acts when “committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or toleration of such authorities.”

At the first trial of the International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber II in the Tadić case has defined persecution, included in Article 5 (h) of the Statute of the Tribunal, as a form of discrimination based on racial, religious or political grounds, which intends to be a denial of fundamental rights of an individual and results in such a denial. The Trial Chamber specified that the crime of persecution encompasses a large number of acts, including, among others, those of a physical, economic or judicial character, which prevent a person from exercising his fundamental rights. According to the successive jurisprudence of the ICTY, for an act to constitute the crime of persecution, it must be 1) an obvious or blatant denial, 2) for discriminatory reasons, 3) of a fundamental right under customary international law or treaty, 4) reaching the same gravity as other crimes against humanity prohibited by Article 5 of the Statute.

The similarity mentioned earlier between the charges for the crime of persecution and the crime of genocide in the two ICC Prosecutor’s requests for issuance of an arrest warrant is not new. As mentioned by the Trial Chamber in the case Kupreškić et al., persecution as a crime against humanity is an offence belonging to the same genus as genocide […] In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics […] Thus, it can be said that, 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.

The Chamber also referred to this case prior to the examination of specific elements of the crime of genocide in its decision on the arrest warrant against al-Bashir.

In addition to the acts constituting the crime of genocide, the jurisprudence of the Appeals Chamber of the ICTY is of the opinion that the destruction of property belonging to a given population may constitute the crime of persecution.
based on the extent and nature of destruction of this event and if all elements of Article 5 (h) are met. The Trial Chamber in the Milutinović\textsuperscript{17} case established as the \textit{actus reus} (a) the property has been destroyed or significantly damaged, (b) the property was not used for military purposes at the time of the acts and (c) the destruction or damage is the result of an act directed against it. To constitute an act of the crime of persecution and fulfill the requirement of equal gravity to other crimes against humanity prohibited by Article 5 of the Statute, the impact of the deprivation of the destroyed property must be serious, as this property was indispensable, a vital asset for the owners, or a livelihood of a given population.\textsuperscript{18}

When the cumulative effect of the destruction of property is the displacement of civilians from their homes based on discriminatory grounds, destruction and/or indiscriminate and extensive looting of homes, buildings, businesses, civilian personal property and livestock can be an act of the crime of persecution.\textsuperscript{19}

The definition of the crime of persecution, as developed in Article 7 (1) (h) of the Rome Statute, offers some substantial changes to that of the \textit{ad hoc} tribunals. While the Statutes of the ICTY and ICTR limited the discriminatory grounds of persecution to political, racial or religious reasons, the Rome Statute contains a more inclusive, updated list of discriminatory reasons. So political, racial, ethnic, cultural, religious or sexual reasons are also included. Moreover, the list of the Rome Statute ends with an open reference to “other grounds that are universally recognized as impermissible under international law” which allows a possible inclusion of reasons not existing within the present case law. However, Article 7 (1) (h) is more stringent by requiring that the acts of persecution must be committed “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.” This provision was included to address a possible elasticity of the crime of persecution, feared by some States in the negotiations leading to the drafting of the Rome Statute. The procedures taken against Ahmad Harun and Ali Kushayb are to be the first opportunity for the ICC Prosecutor to prosecute for the crime of persecution.

2. THE CRIME OF PERSECUTION AS A PROPER REFLECTION OF THE SITUATION IN DARFUR

The crime of persecution is not of interest only because its specific intent is significantly easier to prove than that of genocide, but also because its constituent elements are broader and less fixed than those of genocide. Indeed, as mentioned by the majority of the Pre-Trial Chamber in the decision leading to the arrest warrant issued against al-Bashir, “A proposal made during the drafting of the 1948 Genocide Convention to include in the definition ‘measures intended to

\textsuperscript{17} ICTY, Prosecutor v. Milutinović et al., Judgement, IT-05-87-T, 26 February 2009, paras. 206-207, (Hereinafter “Milutinović”).

\textsuperscript{18} ICTY, Prosecutor v. Mladen Naletilić & Vinko Martinović, Judgement, IT-98-34-T, 31 March 2003, para. 699; Kupreškić, para. 631; Milutinović, para. 207.

\textsuperscript{19} ICTY, Prosecutor v. Milomir Stakić, Judgement, IT-97-24-T, 31 July 2003, para. 763.
oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’ was not accepted.”

Although the majority uses this example to highlight the significant difference in the specific intent that characterises the two crimes, it is also a statement stressing the importance of the crime of persecution in the particular situation in Darfur, as shown in the final report of the International Commission of Inquiry on Darfur (“the Commission”).

Created in response to United Nations Security Council Resolution 1564, the International Commission of Inquiry on Darfur was established in October 2004 under the presidency of Antonio Cassese and his final report presented in Geneva on 25 January 2005.

The Commission concluded that, given their discriminatory systematic and widespread nature, murder of civilians, forced displacement of people, rape, other forms of sexual violence and torture may well amount to the crime of persecution, a crime against humanity. It also found that the destruction of property and looting in Darfur, also as part of a widespread and systematic attack on the civilian population, are discriminatory and likely to lead to the destruction of livelihoods and means of survival of the affected populations. In doing so, these acts may constitute the crime of persecution as a crime against humanity.

The conclusions of the Commission have been used by the Pre-Trial Chamber to justify issuing a warrant against Ahmad Harun and Ali Kushayb for crimes against humanity of murder, deportation or forcible transfer, imprisonment, torture, rape, persecution and other inhumane acts. This decision on the possible crime against humanity of persecution followed the statements of the Prosecutor according to which “the Sudanese Armed Forces and the Militia/Janjaweed launched attacks against specific localities believing that they were predominantly inhabited by the Fur population. The Prosecution is thus of the view that those acts may constitute persecution of the primarily Fur populations [...]”. However, in issuing the arrest warrant for al-Bashir, Pre-Trial Chamber I found that there are reasonable grounds to believe that he is criminally liable for plunder, murder, extermination, forced transfer, torture and rape. These are the same crimes that

20 Decision on the Warrant of Arrest, para. 144 (Citations ommitted).
22 Report, para. 295.
23 Report, para. 332.
24 Report, para. 360.
25 Report, para. 379.
26 Report, para. 321.
27 Report, para. 393.
29 Id., para. 74.
were considered by the Commission as acts underlying the crime of persecution in Darfur, and potentially the same acts constituting the alleged persecution requested in relation to Ahmad Harun and Ali Kushayb.

The Prosecutor himself, in his application for leave to appeal the Pre-Trial Chamber’s decision on the issue of the arrest warrant for al-Bashir, appears to confirm the existence of a possible plan of persecution, by referring to the genocidal acts as “destruction of the groups’ means of livelihood, and their forcible displacements into hostile terrain and the survivors to camps lacking essential food and water and protection.”30 Indeed, such acts, unless they are calculated to bring the physical destruction in whole or in part of the group, are not acts included in the definition of genocide, and thus correspond to a policy of persecution set up by the Sudanese government. In its study of the presence of a genocidal intent, the Commission concluded that “the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the IDPs belong.”31 This conclusion followed an observation that, despite its present inaccuracy as a result of the issuance of the arrest warrant against al-Bashir, was true at the time the alleged acts took place: “the Government of Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicines and logistical assistance (construction of hospitals, cooking facilities, latrines, etc.).”

It would have been more appropriate to seek the issuance of an arrest warrant for the crime of persecution, at least in the alternative, and especially following the report of the Commission based on evidence later given to the ICC Prosecutor. The issuance of an arrest warrant with charges for the crime of persecution would have several advantages. Without addressing the issue of specific intent mentioned above, the crime of persecution offers the possibility for the Prosecutor to cover the vast majority of violations identified by the Commission and thereby give equal importance in international criminal law to civil and political rights and serious violations of social, economic and cultural rights.

3. PERSECUTION AS A WAY TO RECOGNISE THE SERIOUS VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Economic, social and cultural rights have suffered a long period of neglect, despite the fact that they are regarded as equal to civil and political rights in the

30 ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-12, 10 March 2009, para. 23.

31 Report, para. 515.

32 Following the issuance of a warrant for his arrest, Mr. Al Bashir ordered the departure of 13 international non-governmental organisations (NGOs) and has ordered all international NGOs to stop distribute aid in Sudan within one year. He allowed the return in Darfur of international NGOs evicted in March, and resumed their activities, as announced on Thursday 11 June by the head of the UN for humanitarian assistance.
light of the Universal Declaration of Human Rights, and that the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) was adopted alongside the International Covenant on Civil and Political Rights in 1966.33 In the same way that international law tends to put aside economic, social and cultural rights to civil and political rights, the decision of the ICC Prosecutor to prosecute al-Bashir for the crime of genocide without a de jure prosecution for the crime of persecution has the effect of eclipsing several violations which constitute crimes against humanity. This, in the view of the author, damages the connection between them and economic, social and cultural rights, reinforcing the artificial cleavage between the two sets of human rights.

Violations of economic, social and cultural rights are one of the main reasons for the creation of rebel groups in Darfur. Indeed, the “black book” of the Justice and Equality Movement, a manifesto written in 2001, aims to prove that there was a total marginalisation of Darfur and other regions of Sudan in terms of economic and social development.34 Moreover, the Janjaweed militiamen who have responded to the Government call to fight against these rebel groups are mostly members of Arab nomadic tribes without lands, who wish to settle and be allocated land as reward for their involvement in the conflict.35 This division between the nomadic and sedentary communities in Darfur is partly due to the end of a sharing system of semi-arid lands in the dry season. With the desertification that started in the late 1970s, cooperation has given way to an intense struggle for the possession of resources.36

The International Commission of Inquiry on Darfur has stated in its report six serious systematic and widespread violations that may constitute a form of persecution as a crime against humanity37: murder, forced displacement of persons, rape and other forms of sexual violence, torture, destruction of property and looting. These last two violations were the most striking examples of violations of social and economic rights that are partially included in a charge of genocide, but would be fully taken into account by a charge of persecution. Indeed, these violations are only included in genocide charges if they are part of a series of acts calculated to bring about physical destruction in whole or in part of a group. The International Criminal Tribunal for Rwanda (ICTR) found that, by the terms “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” equates to means of destruction by which the author does not necessarily want to immediately kill the

33 S.I. Skogly, Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?, The International Journal of Human Rights, 5:1, pp. 58-80 at 59. See also The Vienna Declaration and Programme of Action as adopted by the World Conference on Human Rights on 25 June 1993, which reaffirmed “the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all.” (Emphasis added). It therefore disclaimed any priority of rights.
34 Report, para. 135.
35 Report, para. 68.
37 Report, paras. 295, 321, 332, 360, 379 and 393.
members of the group, but, ultimately, aims at their physical destruction.\textsuperscript{38} The means of a deliberate infliction on the group conditions of life calculated to bring about its physical destruction in whole or in part, include, without limitation, the submission of a group of people to a subsistence diet, the systematic expulsion from housing, and reduction of necessary medical services below the minimum.\textsuperscript{39}

Needless to say that the threshold of “physical destruction” developed by the jurisprudence of the ICTR is much higher than the one required by the ICESCR, since we are facing international criminal prosecution and not violation of human rights by a State. Article 11 of the ICESCR refers to the “right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing […]”. Yet, in the context of the crime of persecution, where no evidence of physical destruction is mandatory, these rights should not be interpreted as the minimum threshold related to the survival of human beings. They should rather be seen as ensuring physical and economic access to food, clothing and housing to ensure a proper standard of humanity, security, peace and dignity.\textsuperscript{40} Thus, the destruction of kitchen utensils, equipment for food processing, water containers and other household items essential for the survival of the inhabitants during attacks by Janjaweed militias\textsuperscript{41} is perhaps not an integral part of a plan leading to the physical destruction of the group and thus does not constitute an act of genocide, but it is sufficiently serious to be a violation of fundamental human rights constituting a crime against humanity.

Furthermore, the importance of the inclusion of such violations in the indictment against those responsible for atrocities in Sudan is highlighted in the Report of the Commission. Indeed,

[a] particular pattern recorded by the Commission was the fact that the IDPs and refugees interviewed would place great emphasis on the crime of looting, and explain that the Janjaweed had taken everything these persons had owned, involving all goods necessary to sustain life in the difficult conditions in Darfur, including pans, cups and clothes, as well as livestock, representing the key source of income of the affected people. Often, the IDPs and refugees had compiled detailed lists of the items looted which were presented to the Commission.\textsuperscript{42}

In addition, the Commission emphasises, in its consideration of the specific intent of genocide, that some murders are not motivated by the desire to annihilate the group, but to oppress the resistance that some civilians show during looting, “only motivated by the desire to appropriate cattle belonging to the inhabitants of the


\textsuperscript{39} Akayesu, paras. 505-506; see also ICTR, Prosecutor v. Clément Kayishema & Obed Ruzindana, Judgement, ICTR-95-1-T, 21 May 1999, para. 115-116.


\textsuperscript{41} Report, para. 305.

\textsuperscript{42} Report, para. 385 (Emphasis added).
Thus, it is important to note how the violations of social and economic rights are perpetrated with a discriminatory intent. The victims are almost exclusively from Fur, Zaghawa and Masalit ethnicity and the discriminatory intent of such acts is inferred from the different words heard in the attacks and reported by the victims. These acts are clearly intended to cause suffering and injury to individual members of ethnic groups listed, and restorative and fair justice for the victims can only be foreseen if these acts are given an important place within the charges brought against those responsible for the situation in Darfur. But the Pre-Trial Chamber was correct in distinguishing what can amount to a discriminatory intent in the context of persecution and what is the specific intent required by the crime of genocide.

Indeed, when looking at the greater picture, there are reasonable grounds to believe that these multiple violations constitute 1) an obvious or blatant denial, 2) for discriminatory reasons, 3) of a fundamental right under customary or conventional international law, 4) reaching the same gravity as other prohibited crimes against humanity, thus opening the door for the inclusion of the crime of persecution as a crime against humanity in the arrest warrant against al-Bashir.

4. Conclusion

Despite the difficulties mentioned previously surrounding the Prosecutor’s decision to request an arrest warrant for the crime of genocide and not for the crime of persecution, the delivery of an arrest warrant for genocide by the Pre-Trial Chamber would have been interesting. Genocide, qualified as the “crime of crimes” in international criminal law, has become a label which, when affixed to an individual or government grants legitimacy and credibility almost immediately to court proceedings. But beyond this, the crime of persecution, being more flexible as described previously, has the advantage of giving the greater picture of a complicated conflict based on tribal feuds resulting from desertification and the availability of modern weapons, on the complexity of ethnic identity and governance, and on the emergence of armed rebel movements which enjoy popular support among some tribes.

The Pre-Trial Chamber’s emphasis on the differences and similarities between the crime of genocide and the crime of persecution as a crime against humanity is a clear indication of the message sent to the Prosecutor. Perhaps it would

43 Report, para. 517.
44 “You are Massalit, why do you come here, why do you take our grass? You will not take anything today.”; “You are Zaghawa tribes, you are slaves.”; “You are the mother of the people who are killing our people”, “You, the son of Torabora, we are going to kill you.”, Report, para. 511, n. 189.
45 See in particular, Kupreškić, paras. 616-627.
46 Kupreškić, para. 621.
48 Report, para. 61.
49 R. Cryer, The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision, 7
be appropriate for the Prosecutor to request pursuant to Article 58 (6) of the Rome Statute, an amendment to the arrest warrant for Omar al-Bashir in order to include crimes against humanity of persecution. The objectives of international justice to stem impunity and bring justice to victims, as well as the interest for the international community to redress the situation in the region, would be better taken into account through additional charges for the crime of persecution. It would allow the indictment to reach beyond the violations committed during the conflict and into the human rights violations that pre-existed the conflict and contributed to its emergence. In doing so, the Prosecutor would rehabilitate the social, economic and cultural rights and give the serious violations of these rights the place they deserve in the body of the crimes punishable under the Rome Statute.


50 Decision on the Warrant of Arrest, para. 208.