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A RACE BETWEEN EDUCATION AND
CATASTROPHE? THE ROLE OF
MINORITY ISSUES IN THE
PREVENTION OF CRIMES UNDER
INTERNATIONAL LAW

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To my parents, Angelika and Heinz Gebhard, for letting me know how big the world is

"Human history becomes more and more a race between education and catastrophe"

H.G. Wells, 1920

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SUMMARY

Minorities are the part of a population that suffer most from conflict and are most likely to become victims of crimes under international law. This is acknowledged by one of the fundamental principles of minority rights law, namely the contribution to peace and stability. Furthermore, the major international legal instruments governing the rights of minorities relate to this objective, by setting out obligations regarding the physical existence of minorities. Additionally, the fact that the crimes as set out in the Rome Statute of the International Criminal Court do, for a large part, have a minority aspect inherent in them shows that minorities could be the primary beneficiaries from international justice in the future.

Minority rights can be used to prevent crimes perpetrated against them in a variety of areas. This can be the case in fields conventionally associated with minority rights such as identity of communities and the education of the general public thereof. Additionally, areas that seem to be at first glance further away from the traditional realm of minority rights, such as the international criminal legal system that sets out deterrence as one of their major objectives, have a lot to gain from taking minority rights into account. International criminal law can serve as active protection of minorities.

However, these findings are currently not implemented in the practical work of international criminal justice, in particular in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda. This is regrettable, since their impact could increase by making use of the concept of international minority rights law as a way of broadening the understanding of crimes committed as to their roots, causes and prevention.

Therefore, education and mutual exchange within different societal groups or between different branches of law or legal practitioners are seen as key elements in the struggle against crimes perpetrated against minorities. Emphasis should be laid on the interrelation and connection between the areas of international criminal and international human rights law.

ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
American Declaration	American Declaration on the Rights and Duties of Man
AU	African Union
BYBIL	British Yearbook of International Law
CAT	Convention against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights]
Et. seq.	et sequentes/et sequential
Framework Convention	Framework Convention for the Protection of National Minorities
GA	General Assembly
GC	General Comment
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
HRC	Human Rights Committee
HRQ	Human Rights Quarterly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICJ	International Court of Justice

ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Law Commission
Melb. U.L. Rev	Melbourne University Law Review
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
Nuremberg Charter	Charter of the International Military Tribunal for the Trial of Major War Criminals, appended to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis
OAU	Organization of African Unity
OSCE	Organization for Security and Co-operation in Europe
p., pp.	page(s)
para(s)	paragraph(s)
Rome Statute	Rome Statute of the International Criminal Court
RPF	Rwandan Patriotic Front
SC	Security Council
Tokyo Charter	Charter of the International Military Tribunal for the Far East
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	Charter of the United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNMD	United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Rights
Va. J. Int'l L	Virginia Journal of International Law

1 INTRODUCTION: APPROACH AND CONCEPTUAL FRAMEWORK

“We must do more to prevent conflicts happening at all. Most conflicts happen in poor countries, especially those which are badly governed or where power and wealth are very unfairly distributed between ethnic or religious groups. So the best way to prevent conflict is promote political arrangements in which all groups are fairly represented, combined with human rights, minority rights and broad-based economic development.”

(Kofi Annan, Secretary-General of the United Nations

Statement on presenting his Millennium Report, 3 April 2000)

1.1 Issues to be Addressed

Minority issues have been at the heart of many violent conflicts. In 2002, an assessment of 53 ongoing conflicts found that over seventy-one percent of the world’s conflicts had an ethnic dimension.¹ Internationally, ethnations, especially in Europe, Asia and Africa, have been divided by state borders through wars, the wake of communism or colonialism. This sometimes caused very serious kin-state/home-state conflicts.²

Furthermore, international and domestic peace can also be jeopardised when an ethnic minority considers itself a nation and wants to break out of a country either to become independent or to join a neighbouring state.³ Minorities are particularly vulnerable to persecution by their own governments in internal conflicts and what has been called “tyrannical regime victimisation”.⁴

According to a study undertaken in 2005, nearly fifty ethnic and religious minorities have been targeted in forty-one episodes of genocide and mass political murder, resulting in at least thirteen million and as many

¹ Minority Rights Group International, *Why conflict?*, (www.minorityrights.org/?lid=483), last accessed 17 January 2008.

² A. Eide, ‘The Rights of “Old” versus “New” Minorities’, 2 *European Yearbook of Minority Issues* (2004) p. 367.

³ *Ibid.*

⁴ M.C.Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’, 59:4 *Law and Contemporary Problems* (1996) p. 10.

as twenty million casualties of non-combatants.⁵ Non-international conflicts in the twentieth century resulted in more than 170 million deaths until the mid-nineties.⁶ In the last decades, the conflicts raging, *inter alia*, in the Socialist Federal Republic of Yugoslavia (hereinafter: Former Yugoslavia), Rwanda, Northern Ireland and East Timor can all be traced back to the existence of minority people asserting various rights.⁷ The suppression of minorities leads not only to internal instability and unrest, but can cause destabilisation of entire regions, such as the former Yugoslavia and Indonesia.⁸

Both during international and internal armed conflicts, minorities often suffer from large-scale violence and atrocities. Often they are specifically targeted. There has often been a long history of neglecting minorities and/or violating their rights before these kinds of crimes are committed.

Therefore, it seems only logical that minority rights and issues are specifically considered in regional and universal attempts to prevent conflict and crimes under international law. In fact, the protection of minority rights, whether in the early religious peace treaties of Augsburg (1555) and Westphalia (1648) or during the existence of the League of Nations, evolved with the aim of conflict prevention.⁹ This thesis will examine the link between international criminal law and minority rights and issues, how minority issues can be used to prevent and deter crime and how they are in fact used in practice.

⁵ B. Harff, 'Assessing Risks of Genocide and Politicide' in M. G. Marshall and T. R. Gurr (eds.), *Peace and Conflict 2005: A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy* (Center for International Development and Conflict Management, University of Maryland, College Park, 2005) p. 57-61.

⁶ R.J.Rummel, *Death by Government* (Transaction, New Brunswick, 1994) pp. 1-30.

⁷ C. Ward, 'Majoring in Minorities: Minority Rights in Europe', *24 Melb. U.L. Rev.* 530 (2000) p. 530

⁸ Ward, *Ibid.*

⁹ C. Baldwin, C. Chapman and Z. Gray, *Minority Rights: The Key to Conflict Prevention* (Minority Rights Group International, London, 2007), available at <http://www.minorityrights.org/?lid=1198> (last accessed 17 January 2008) p. 4.

1.2 Research Question and Hypothesis

The initial research question to be answered in this study is whether minority rights can be and in practice are used in order to prevent crimes under international law. Based on the research question, the original hypothesis claims that even though crimes under international law and minority issues are linked, the latter is not fully understood and/or used in the prevention of conflicts and crime.

1.3 Structure

This thesis consists of seven chapters. Chapter One serves as a general introduction. Chapter Two will explain the general connection between minorities and crimes under international law. Subsequently, Chapter Three will examine state obligations towards minorities, in particular the obligation to protect the existence of minorities. Following that, Chapter Four will look at specific crimes under international law as laid out in the Rome Statute of the International Criminal Court (hereinafter: the Rome Statute) and their relevance in terms of minority protection. The practical use of minority rights in conflict and violence prevention will be examined in Chapter Five, which will look into the link between the prevention of the crimes previously studied and minority rights in its widest sense. The focus will be on minority identity and judicial systems, in particular on how international criminal law with its claims of prevention and deterrence can contribute to the protection of minorities. Furthermore, the jurisdiction of the *ad hoc* tribunals for the former Yugoslavia and Rwanda will be analysed in Chapter Six as to their awareness of minority rights law and its impact to the protection of minority populations. Finally, the findings of this investigation will be concluded in Chapter Seven.

1.4 Scope

Both the subjects of minority rights and conflict prevention are extensive and very controversial in parts. Therefore, this thesis will necessarily be selective and limited to the following key issues concerning both subjects and the link between them. It will concentrate on the prevention of crimes under international law, as well as identity and judicial systems as a means to prevent the commission of these crimes. Each chapter will delimit its own scope if appropriate.

1.5 Methodology

The method used to examine the subjects discussed is first and foremost traditional doctrinal research, the analysis of basic legal instruments and their application. The major instruments regarding minority rights law will be consulted together with the major crimes under international law as enshrined in the Rome Statute. After having established the basic state obligations towards the protection of minority populations from crimes under international law, the study will concentrate on non-doctrinal research based on policy, academic work and experiences of practitioners. Furthermore, case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) will be examined to see how the findings of the previous chapters are implemented in practice.

2 MINORITIES AND CRIMES UNDER INTERNATIONAL LAW

This chapter will serve as an introduction explaining the link between minorities and prevention of crimes under international law. First, it defines the term ‘minority’ for the purpose of this study. It then outlines the importance of minority issues for the prevention of conflicts and more specifically, crimes under international law. Finally, it summarises the main reasons for crimes perpetrated against minorities.

2.1 Defining Minorities in the Context of Crimes under International Law

In order to talk about minorities and international criminal law, it is necessary to first define what a minority is. The definition of the term ‘minority’ is often portrayed to be a controversial one.

Classically, a minority is defined as:

“A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”¹⁰

However, there exists a disagreement concerning the requirement of being citizens of a state, especially because modern society with its free flow of people for the purpose of work might require to grant minority protection also to non-citizens.¹¹ Another argument in favour of this expansion is that otherwise it would be much easier for governments to exclude groups by simply denying them citizenship. Historically, and in particular under the League of Nations, the term ‘minority’ has been

¹⁰ F. Capotorti, Study on the Rights of Persons belonging to ethnic, religious and linguistic minorities, E/CN.4/Sub.2/384/Rev.1 (New York, 1979)=UN Sales No. E.78.IV.1, 16ff.

¹¹ M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (2nd Edition, N.P.Engel, Kehl, 2005), p. 647.

understood as applying only to citizens.¹² However, the Human Rights Committee (HRC) stated that Article 27 of the International Covenant on Civil and Political Rights (ICCPR) is applicable not only to state citizens, but also to aliens constituting a minority within the meaning of the Covenant.¹³ Article 27 itself does not hint at the exclusion of foreigners from its protection, as it only speaks of ‘persons,’ not ‘citizens.’ However, mostly due to political realities, it might not be realistic or sustainable to grant or demand instant minority protection to actual cases of recent arrivals in a country.¹⁴

No matter which definition is the most appropriate when it comes to granting individuals minority rights in the strict sense, “[t]he existence of [minority] communities is a question of fact; it is not a question of law.”¹⁵ Therefore, in the context of international criminal law, the protection of a group does not depend on its nationality, but rather on its vulnerability and need for protection. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: the Genocide Convention) refers to the destruction of a national, ethnical, racial or religious group as such, and does not ask for any additional formal requirements. Clearly, it would be an absurdity to distinguish between nationals and non-nationals: the prohibition transcends the category.¹⁶ The same must be true for the other crimes under international law examined here, namely crimes against humanity and war crimes.

¹² M. Nowak, p. 645.

¹³ Human Rights Committee, General Comment No. 15, *The position of aliens under the Covenant*, (1986) U.N. Doc. HRI/GEN/1/Rev.6 at 140 (2003). § 7; General Comment No. 23, *The rights of minorities*, CCPR/C/21/Rev.1/Add.5 (1994) § 5.1.

¹⁴ G. Alfredsson, ‘Minorities, Indigenous and Tribal Peoples: Definition of Terms as a Matter of International Law’ in N. Ghanea/A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination, Essays in Honour of Patrick Thornberry*, (Martinus Nijhoff Publishers, Leiden, Boston, 2005) p. 167.

¹⁵ Greco-Bulgarian Communities Case (1930) PCIJ, Advisory Opinion, SerB. No. 17, p. 22

¹⁶ P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991) p. 8.

2.2 Minority Rights and the Prevention of Crimes under International Law: Two Sides of the same Coin

The fundamental aim of minority rights is to keep minorities satisfied within states.¹⁷ The justification underlying the evolution of minority rights can be generally divided into three considerations. Whereas the first two aim at the full enjoyment of human rights for everyone and the preservation of cultural pluralism or diversity in a society, the third reflection considers minority protection as a contribution to strengthening peace and security nationally and internationally.¹⁸ As this thesis will examine, the instruments governing the protection of minorities, both on a global and on a regional level, acknowledge this preventive role of minority law. It has also been publicly echoed by a number of experts, for example the Special Rapporteur on the Protection of Human Rights and States of Emergency, who emphasised that minorities are amongst those groups of people who are especially vulnerable in crisis situations and states of emergency.¹⁹ In countries where ethnic minorities are subjected to significant political or economic discrimination, war is said to be at least ten times more likely to occur.²⁰

However, when it comes to putting into action the theoretical findings, there is surprisingly little awareness. The Organization for Security and Cooperation in Europe (OSCE) is so far the only security organisation that has prioritised minority rights on their agenda and, with the High Commissioner on National Minorities, possessed a notable expert institution to “identify and seek early resolutions of ethnic tensions that might

¹⁷ Alfredsson, *supra* note 14.

¹⁸ A. Eide, *supra* note 2, p. 366; He also refers to a similar categorisation by A.S. Åkermark who invokes (1) peace and security, (2) human dignity and (3) culture as justifications for minority protection (A.S. Åkermark, *Justifications of Minorities in International Law* (Kluwer Law International, Boston/London 1997), 67 and 68-85.

¹⁹ UN. Doc. E/CN.4/Sub.2/1997/19; Final Report of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission on the Protection of Human Rights and States of Emergency, , *The administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, 23 June 1997, paragraph 173.

²⁰ United States State Failure Task Force Report: Phase III Findings, 30 September 2000, <http://globalpolicy.gmu.edu/pitf/SFTF%20Phase%20III%20Report%20Final.pdf>, p. 13 (last visited 17 January 2008).

endanger peace, stability and friendly relations between the participating states of the OSCE.”²¹ The position of the High Commissioner was set in 1992 to “provide ‘early warning’ and, where appropriate, ‘early action’ at the earliest possible stage.”²² The issue of national minorities was in fact an incipient institutional concern, evident from the Helsinki Final Act in 1973.²³

Among the other institutions working on conflict prevention, resolution, and security, notably the United Nations (UN) and the North Atlantic Treaty Organization (NATO), there are few or no specialists on minority rights.²⁴ This is even more astonishing considering that the resolution of a conflict, once it broken out, is a costly venture, both financially and politically.

2.3 The Logic of Crimes Against Minorities: Why are Minorities Targeted?

According to Chirot and McCauley²⁵, there are four main reasons for genocide and mass political murder that can serve as examples for the understanding of violence against minorities. All these motives are obviously interlinked and non-exclusive, even though in different situations one or more of the motives might gain importance and become the main rationale of targeting minority groups.

2.3.1 Convenience

The first rationale behind the targeting of minorities is convenience.²⁶ In this case, groups are simply targeted because the advantages obtained by their removal, expulsion or murder, outweigh the risks or disadvantages that

²¹ <http://www.osce.org/hcnm/13019.html> (last visited 17 January 2008).

²² CSCE Helsinki Document of the Ministerial Summit 1992, *The Challenges of Change*, para. 23.

²³ Final Act of the Conference on Security and Cooperation in Europe Section VII and subsection on cooperation in humanitarian and other fields, 14 ILM 1292, (1975)

²⁴ Baldwin/Chapman/Gray, *supra* note 9, p. 4.

²⁵ D. Chirot/C McCauley, *Why not kill them all? The Logic and Prevention of Mass Political Murder* (Princeton University Press, Princeton/Oxford, 2006)

²⁶ *Ibid*, p. 20-25

the alternatives bring. It might be the case that targeting a resisting minority group is financially more convenient than fighting a regular war or making political compromises. This was the reason, for example, in the campaign launched by the Russian empire against the Muslim Circassians in the Russian-Circassian War, especially from 1860-1864.²⁷ Another potential cost-benefit calculation includes the removal of militarily weak minorities in order to gain land for strategic holding or economic exploitation, as it was the case with the forcible removal of hundred thousand Native Americans in the 19th century.²⁸

Nevertheless, trying to explain violence against minority only in a cost/benefit-context misses the tenacious ferocity of those who commit dreadful acts that might seem to defy any material calculation.²⁹ Therefore, one has to also look at other motives that are not that clearly focused on gaining immediate benefits or advantages.

2.3.2 Revenge

Another motive for atrocities is revenge, which gets fuelled by concepts like ‘pride’ and ‘honour’ and perceptions of ‘us against them’.³⁰ As it will be examined below, the question of identity, the feeling of belonging either to a minority community or to the majority population, is of particular importance when it comes to crimes perpetrated against minorities. It was this concept that contributed to the extermination of the Herero by the Germans in 1904-05 in Southwest Africa. Although ethnic cleansing was carried out partly because of convenience, in order to allow Germany to rule what is today Namibia more easily, it was also a matter of ‘honour’ to avenge an uprising that was deemed to be treacherous and humiliating and to set out a warning example to Germany’s enemies.³¹

²⁷ Chirot/McCauley, *supra* note 25, p. 23.

²⁸ Chirot/McCauley, *supra* note 25, p. 20-22.

²⁹ Chirot/McCauley, *supra* note 25, p. 41.

³⁰ Chirot/McCauley, *supra* note 25, p. 25-31.

³¹ Chirot/McCauley, *supra* note 25, p. 27-28.

2.3.3 Fear

The third rationale that Chirot and McCauley suggest is plain fear: fear of domination, humiliation, impoverishment or elimination.³² Even though one might think that this is a rather irrational emotion when it comes to minority populations and the extent of threat they can possibly impose on the majority community, this motive should not be underestimated. ‘Ethnic entrepreneurs’ can use and abuse ethnicity for their own ends, whether it be for struggles over political power, social status or economic resources, and these arguments can be very effective in instilling fear of ‘the other’ in the minds of people, no matter how miniscule the threat might be in reality.³³ This is even more likely if there has been a recent history of violent conflicts in the respective country, like in the former Yugoslavia.³⁴ In the case of Yugoslavia, the history of violence gave rise to ideas of ‘pre-emptive violence’³⁵ and first-strike-policies to disable ‘the enemy’ before it strikes.³⁶ The fact that minority communities may look harm- and defenceless can, in such a context, even boost the fear, where the enemy is described as treacherous and secretive.³⁷ States that follow assimilationist policies and perceive certain national minorities as particularly hard to assimilate can resort to ethnic cleansing to remove a potential threat to their rule, as it was case with Stalin’s persecutions of Chechens and Ingush during World War II.³⁸

2.3.4 Fear of Pollution

The last motive examined by Chirot and McCauley is the fear of pollution.³⁹ In this case, it is not the (potential) behaviour that turns a minority into a threat, but the minority’s pure existence. Its very presence

³² Chirot/McCauley, *supra* note 25, p. 31-36.

³³ Baldwin/Chapman, Gray, *supra* note 9, p. 7; R. Lipschutz/B. Crawford, *Ethnic Conflict isn’t*, Institute on Global Conflict and Cooperation, Policy Brief, No. 2, (1995), p. 2, accessible at <http://igcc.ucsd.edu/pdf/policybriefs/pb02.pdf> (last visited 17 January 2008).

³⁴ Chirot/McCauley, *supra* note 25, p. 34.

³⁵ Chirot/McCauley, *supra* note 25, p. 34.

³⁶ A. Oberschall, ‘From Ethnic Cooperation to Violence and War in Yugoslavia’, in D. Chirot/M. E. P. Seligman (eds.), *Ethnopolitical Warfare-Causes, Consequences and Possible Solutions* (American Psychological Association, Washington DC, 2001) p. 143

³⁷ *Ibid.*

³⁸ Chirot/McCauley, *supra* note 25, p. 34-35.

³⁹ Chirot/McCauley, *supra* note 25, p. 36-44.

is supposed to be a mortal danger for the majority community. This motive often plays a prominent role in genocides, in which the existence of any person belonging to a minority, no matter what their age or status in society, is seen as a threat. In circumstances in which the mere existence of a group is seen as some form of contamination, it is not enough to simply exterminate the members of a minority group. In fact these acts of killing are often accompanied by destruction of property, mutilation or rape, in an attempt to achieve ‘purification.’ Elements of this rationale can be seen in many of the genocides of the 20th century, whether the Holocaust, during which the Jews were portrayed as the cause of disease, pollution, corruption and degeneracy; the extinction of one-quarter of the Cambodian population by the Khmer Rouge whose aim was to eliminate all traces of Vietnamese and Western influence; or the Rwandan genocide in which the members of the Tutsi minority were dehumanised and described as “*inyenzi*” (cockroaches) or “*inkontanyi*” (enemy) that needed to be killed in order to achieve purification. The fear of pollution is said to be most acute when there is a sense that a failure to act up on it and ‘purify’ the society would result in catastrophe or when a catastrophe has happened and people search for explanations.⁴⁰

For one or the other of the above-examined reasons, minorities have always been and continue to be persecuted in both the domestic and international arena. As mentioned earlier, these persecutions have posed a massive threat to international peace and security. This danger reinforces the idea that laws criminalising abuse of minorities should be established and utilized under international criminal law, as the following chapters demonstrate.

⁴⁰ Chirot/McCauley, *supra* note 25, p. 39.

3 OBLIGATIONS OF STATES REGARDING THE PROTECTION OF MINORITIES FROM CRIMES UNDER INTERNATIONAL LAW

Minority rights have long been neglected on the international human rights agenda. The United Nations, as opposed to its predecessor, the League of Nations, decided to take a more passive stand on the protection of minorities. Even though international provisions for the protection of minorities can be found long before the evolvement of modern international human rights law⁴¹, the International Bill of Human Rights, consisting of the Universal Declaration on Human Rights⁴², the International Covenant on Civil and Political Rights (ICCPR)⁴³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁴, only specifically mentions minorities in Article 27 of the ICCPR. Historically, the UN's caution and the emphasis on individual rights rather than group rights was partly due to the misuse of the concept of minority rights by Nazi Germany at the beginning and during World War II and the fact that even the various instruments implemented by the League of Nations in order to protect minorities could not prevent the atrocities committed against them by the Nazis.⁴⁵ Many hoped that the new emphasis on human rights would resolve the problems associated with minority rights by guaranteeing basic civil and

⁴¹ E.g. in the religious treaties of peace treaties of Augsburg (1555) and Westphalia (1648) and the Peace Treaties following World War I; System of Minority Protection set up by the League of Nations; M. Nowak, *supra* note 11, p. 480.

⁴² *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 (1948), at 71.

⁴³ United Nations, *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, adopted on 16 December 1966; entered into force 23 March 1976.

⁴⁴ United Nations, *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 adopted on 16 December 1966, entered into force on 3 January 1976.

⁴⁵ L. S. Sunga, 'International Criminal Law: Protection of Minorities' in Z. A. Skurbaty (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (Martinus Nijhoff Publishers, Leiden/Boston 2005) p. 256.

political rights regardless of group membership.⁴⁶ The end of the Cold War and the decline of authoritarianism, which led to the outbreak of many previously suppressed internal (ethnic) conflicts made the international community rethink their stance on minority protection.⁴⁷ Hence, several universal and regional instruments for the protection of minorities were adopted in the early nineties that seem to focus on the resolution of intra-state conflict and the maintenance of peace and security.⁴⁸

However, even before that, the international community thought to protect the existence of minorities on several occasions in both universal and regional human rights and international law instruments. The relevant instruments of international criminal law, the Rome Statute and the instruments implemented therein, particularly the Genocide Convention and the Geneva Conventions, will be dealt with in a separate chapter. This chapter will therefore focus on the most crucial instruments of under general human right law from which an obligation to protect minorities from crimes under international law can nevertheless be inferred.

3.1 Charter of the United Nations

The Charter of the United Nations (hereinafter UN Charter) does not deal with minorities explicitly. Amongst the purposes of the UN's foundation are the maintenance of international peace and security, the development of friendly relations amongst nations and the promotion and protection of human rights.⁴⁹ The main governing principles on which the United Nations are based are the principle of state sovereignty (Article 2(1)) and the prohibition of the use of force, stipulated in Article 2 (4). Article 55 of the UN Charter expresses the aim of promoting “universal respect for, and observance of human rights and fundamental freedoms for all without

⁴⁶ W. Kymlicka, *Multicultural Citizenship: A Liberal Theory on Minority Rights* (Oxford University Press, Oxford, 1996), p. 2 et. seq.

⁴⁷ H. Quane, ‘Rights in Conflict? The Rationale and Implications of using Human Rights in Conflict Prevention Strategies’, 47 Va. J. Int’l. 463, p. 498.

⁴⁸ *Ibid.*

⁴⁹ Article 1(1), 1(2) and 1(3) of the Charter of the United Nations, open for signature on 26 June 21945, entered into force on 24 October 1945.

distinction as to race, sex, language or religion.” The member states pledge themselves to take joint and separate actions to achieve the aims set out in Article 55.⁵⁰ This is the framework in which minority protection within the United Nations takes place.

Regarding the protection of minorities against foreign aggression, the prohibition of the use of force outlaws the threat or use of force against the territorial integrity of other states. Force is only permitted in well-defined exceptions, namely for the purpose of self-defence under Article 51 and when the Security Council decided to take action pursuant to Articles 39 and 42. There has been much discussion and controversy about a third exception, humanitarian intervention, but it cannot be said to have crystallised into an exception to Article 2 (4) under international law.⁵¹

Things are much less clear when it comes to the treatment of populations by their own state. Even though the UN Charter sets out some standards in the field of human rights, for example on non-discrimination in Articles 1 and 55 regarding self-determination or in chapters XI-XIII, it does not contain a bill of rights. The initial proposal of several states to include a declaration of rights analogous to national constitutions was dropped under pressure of the major powers and the issue was essentially postponed.⁵² For this reason, one has to look further into the instruments adopted under the auspices of the United Nations and within other international and regional organisations to see the extent to which minorities are protected within the state they are living.

3.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) has until now been ratified by 160 states and includes the only binding provision

⁵⁰ Article 56 of the Charter of the United Nations.

⁵¹ See C. Gray, ‘The use of force and the international legal order’, in M. D. Evans (ed.), *International Law* (Oxford University Press, Oxford, 2006), p. 594 *et seq.*

⁵² W.A.Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations* (Minority Rights Group International, London, 2006), available at www.minorityrights.org/?lid=1070 (last accessed 17 January 2008) p. 7.

for the protection of minorities in a universal human rights instrument.⁵³

Article 27 of the ICCPR reads:

”In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

The formulation “persons belonging to such minorities” emphasises that Article 27 sets out an individual right and not a group right, even though it is the collective enjoyment of the right that is protected.⁵⁴ Article 27 is the only provision in the ICCPR that is formulated in a negative way, which shows that the first state obligation towards minorities is to refrain from interference and to practice tolerance.⁵⁵ Particularly prohibited are all measures directed against or threatening the existence of ethnic, linguistic or religious minorities.⁵⁶ In this respect, General Comment No. 29 of the Human Rights Committee is of particular importance as it states that:

“...the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances. This is reflected in the prohibition of genocide under international law, the inclusion of a non-discrimination clause in Article 4 itself (paragraph 1), as well as in the non-derogable nature of Article 18.”⁵⁷

However, the obligation set out in Article 27 goes beyond the mere prohibition of discrimination of minorities. Instead, it contains an element of a right to *de facto* equality, i.e., positive protection against discrimination.⁵⁸ It can require legislative, judicial or administrative- measures to be taken in order to guarantee the rights set out in Article 27, a fact that has been made

⁵³ Nowak, *supra* note 11, p. 638.

⁵⁴ Capotorti, *supra* note 10; Nowak, *supra* note 11, p. 655 et. seq.

⁵⁵ M. Nowak, *supra* note 11, p. 657. et. seq.

⁵⁶ *Ibid.*, p. 662.

⁵⁷ Human Rights Committee General Comment 29, *States of Emergency*, UN Doc. CCPR/C/21/Rev. 1/Add.11, (2001).

⁵⁸ Nowak, *supra* note 11, p. 500.

clear by the HRC in its General Comment No. 23.⁵⁹ This means that state at least have an obligation to prosecute acts that qualify as genocide.⁶⁰

Another provision that can be invoked in the protection of minorities is Article 20(2) of the ICCPR. According to this provision, states have an obligation to protect minorities against national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

3.3 United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities

On 18 December 1992, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM)⁶¹, which, although not legally binding, has been regarded as an important step forward in the internationalisation of minority rights.⁶² It was widely supported by states and governments⁶³ and can be applied to render states politically accountable for how they treat their minorities.⁶⁴ The Declaration was “inspired by” Article 27 ICCPR.⁶⁵ It builds up on, specifies and adds to the rights enshrined in the ICCPR and in the other two documents that together make up the International Bill of Human Rights.⁶⁶ The rights

⁵⁹ HRC, *supra* note 13, paragraph 6.1.

⁶⁰ P. Finell, *Accountability under Human Rights Law and International criminal law against Minority Groups Committed by Non-State Actors*, Åbo Akademi Institute for Human Rights, Åbo/Turku May 2002), p. 20, online publication available at web.abo.fi/institut/imr/norfa/peter.pdf (visited on 14 November 2007).

⁶¹ A/RES. 47/135; UN Doc. A/RES/48/138.

⁶² P. Thornberry, ‘The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update’ in A. Phillips/A. Rosas (eds.), *Universal Minority Rights*, (Åbo Akademi University Institute for Human Rights/Minority Rights Group (International), Turku/Åbo and London, 1995), p. 14.

⁶³ *Ibid.*, p. 27.

⁶⁴ Quane, *supra* note 47, p. 501.

⁶⁵ A. Eide, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Minorities, 4 April 2005, E/CN.4/Sub. 2/AC.5/2005/2, para. 3.

⁶⁶ *Ibid.*, para. 4.

contained are set out as rights of individuals, whereas duties of the state are in part formulated as duties towards minorities as a group, which means that even though only individuals can claim the rights, the state cannot fully implement them without ensuring adequate conditions for the existence and identity of the group as a whole.⁶⁷

In terms of minority protection from crimes under international law, the preamble of the UNMD is of particular importance. The preamble sets out the principle goals and purposes that the declaration is meant to achieve and can, in accordance with Article 31(2) of the Vienna Convention on the Law of Treaties, be drawn upon to establish the meaning of the operative provisions.⁶⁸ Preambles have been used in treaty interpretation by the International Court of Justice (ICJ) “(i) in order to elucidate the meaning of clauses the purpose of which otherwise would be doubtful” and “(ii) to indicate the judicial ‘climate’ in which the operative clause should be read, whether for instance liberally or restrictively, broadly or strictly.”⁶⁹ In the case of the UNMD, the preamble refers to, amongst other things, the promotion of the principles set out in, *inter alia*, the Convention on the Prevention and Punishment of the Crime of Genocide.

The preamble also acknowledges that the promotion and protection of the rights of persons belonging to a minority contributes to the political and social stability of the countries in which they live.⁷⁰ By stating that, the drafters of the declaration accept that the neglect of minority rights can be a cause of instability. Furthermore, they acknowledge that strengthening minorities’ positions by providing them with the rights set out in the operative articles is a way not merely to improve their individual well-being

⁶⁷ *Ibid.*, para. 14.

⁶⁸ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, adopted 23 May 1969, entered into force Jan. 27, 1980.

⁶⁹ G.G. Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points’, *British Yearbook of International Law* 28 (1951), 1-28, at 25; Sir G. G. Fitzmaurice, ‘The Law and Procedure of the International Court of Justice’, 1951-4, *British Yearbook of International Law*, 33 (1957), 203-38, at 227; see also *Asylum Case* (Colombia v. Peru) 1950 ICJ 266, 282; *Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. The United States of America) 1952 ICJ 176, 196.

⁷⁰ “[...]Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live”

or that of the group they belong to, but is a way to contribute to the stability of the whole state or region. The preamble also emphasises again the close relationship between the prohibition of genocide and the protection of minorities.⁷¹ This relationship is also addressed in the operative part of the Declaration, namely in Article 1(1), which starts: “States shall protect the existence ... of minorities”. From this Article, a basic right to be protected from genocide is inferred; although the right to existence is not expressly mentioned in the Genocide Convention itself, the key General Assembly resolution on which the Convention is based states that genocide is “a denial of the right of existence of entire human groups”.⁷² The Commentary of the working group on minorities to the Declaration explicitly mentions the prohibition of the elimination of minorities within the context of Article 1.⁷³ The Working Group also states that not only the physical destruction of minority group is covered by the requirement of protection in Article 1(1). States must also protect minorities from attempts to deliberately weaken them (e.g. by forced transfer of population) and protect their religious and cultural heritage, essential to group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues.⁷⁴

3.4 Independent Expert on Minority Issues

The position of an Independent Expert on Minorities was created in 2005, first to complement and then to replace the working group on minorities that acted under the auspices of the Sub-Commission on the Promotion and Protection of Human Rights. The Human Rights Commission’s resolution that sets out the mandate of the Independent Expert focuses on the link between minorities and conflict as a key element by acknowledging in its preamble the frequency and severity of conflicts involving minorities and affirming at the same time that minorities suffer

⁷¹ Schabas, *supra* note 52, p. 456.

⁷² General Assembly resolution 96 (I) of 11 December 1946; Thornberry, *supra* note 62, p. 40.

⁷³ Eide, *supra* note 65, paras. 21ff.

⁷⁴ *Ibid.*, para. 24.

disproportionately from the effects of conflicts and the resulting violations of human rights.⁷⁵ It also affirms that the creation of favourable conditions for minorities and the promotion of their rights contributes to the prevention and peaceful solution of human rights problems and situations involving minorities, as well as to political and social stability and peace. This sets the goal strived at with the creation of an Independent Expert in a framework of prevention of conflicts and inherent human rights violations.

The operative part of the resolution sets out the duties of the Independent Expert, which expressively cover the promotion of the 1992 Declaration on the Rights and Duties of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. One of the aims of the UNDM is the sponsoring of minority rights in order to contribute to political and social stability in a state. The Independent Expert is obliged to annually report to the Human Rights Commission and to issue recommendations that include best practices, taking into account gender perspectives and views of non-governmental organisations while working with regional organisations and existing United Nations bodies, mandates and mechanisms.

3.5 Responsibility to Protect

The ‘Responsibility to Protect’ is part of the Outcome Document adopted at the United Nations summit in September 2005 by representatives of the United Nations member states, mostly heads of states or governments. It accepts that:

“[E]ach state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary measures.”⁷⁶

⁷⁵ Commission on Human Rights, Resolution 2005/79, *Rights of persons belonging to national or ethnic, religious and linguistic minorities*, 60th meeting, E/CN.4/2005/L.10/Add.14, 21 April 2005.

⁷⁶ United Nations, *2005 World Summit Outcome*, 139, A/60/L.1A/RES/60/L.1, 15 September 2005, para. 138.

The document also affirms that the international community has the responsibility to use diplomatic, humanitarian and other peaceful means under Chapter VI and VII of the UN Charter to protect populations against these crimes and shows willingness to take collective action, in a timely and decisive manner, through the Security Council, in accordance with Chapter VII, if peaceful means are inadequate.⁷⁷ It further acknowledges that the promotion and protection of minority rights contribute to the social and political stability.⁷⁸ The ‘Responsibility to Protect’ was later reaffirmed by the Security Council.⁷⁹

Even though the outcome document does not mention minorities explicitly, acknowledging the responsibility of states to protect their own populations from crimes under international law is a step forward in the protection of minorities. As will be examined in the following chapter, the kinds of scenarios that trigger the responsibility to protect are those situations in which minorities are the most likely victims. Worthy to be mentioned in this context is also the appointment of a Special Advisor on the Prevention of Genocide by the UN Secretary-General based on a Security Council Resolution.⁸⁰ The mandate of the Special Advisor does not only refer to genocide but also to mass murders and other large-scale human rights violations such as ethnic cleansing.⁸¹

⁷⁷ *Ibid.* para. 139.

⁷⁸ *Ibid.*, para. 130.

⁷⁹ S/RES/1674/2006, 28 April 2006.

⁸⁰ S/RES/1366/2001, 30 August 2001.

⁸¹ A. Eide/R. Letschert, ‘Institutional Developments In the United Nations and at the Regional Level’, 14:2 *International Journal on Minority and Group Rights*, (2007) p. 305.

3.6 International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁸² is concerned with racial groups in general and not specifically with minorities.⁸³ However, in his study conducted for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, Capotorti commented that “the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided, in 1950, to replace the word 'racial' by the word 'ethnic' in all references to minority groups described by their ethnic origin”.⁸⁴

Article 1 of ICERD defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.” Minorities are the natural victims of racial discrimination in most states and have been frequently discussed within the General Recommendations issued by the Committee on the Elimination of Racial Discrimination and the reporting procedure under the Convention.⁸⁵ Racial minorities are also explicitly protected by international and national instruments that deal with minority rights like Article 27 of the ICCPR or the UNDM. The notions of (racial) discrimination and minority protection have been regarded as twin concepts that both make up the principle of equality.⁸⁶

⁸² United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

⁸³ Thornberry, *supra* note 16, p. 272.

⁸⁴ Capotorti, *supra* note 10, para. 197, referring to the debates held on a draft resolution on the definition of minorities (E/CN. 4/Sub. 2/103); see also *Prosecutor v. Radislav Krstić*, 2 August 2001, ICTY, Case No. IT-98-33, para. 555.

⁸⁵ Thornberry, *supra* note 10, p. 272; see e.g. United Nations, ICERD Committee, General Recommendation No. 27, *Discrimination against Roma*, U.N. Doc. A/55/18, annex V at 154 (2000), adopted on August 16, 2000; United Nations, *Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination on Romania*, U.N. Doc. CERD/C/304/Add.85 (2001), para. 10 *et. seq.*; United Nations, *Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination on Azerbaijan*, U.N. Doc. CERD/C/AZE/CO/4 (2005), para. 14.

⁸⁶ W. McKean, *Equality and Discrimination in International Law* (Clarendon Press, Oxford, 1983), p. 159

3.7 Council of Europe Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities (hereinafter: the Framework Convention) was adopted by the Committee of Ministers of the Council of Europe in 1994 and entered into force in 1998.⁸⁷ It was agreed on after the Heads of States and Government of the Council of Europe member states adopt the Vienna Declaration in 1993, expressing “awareness that the protection of national minorities is an essential element of stability and democratic security in our continent” and resolving to entering “into political and legal commitments relating to the protection of national minorities in Europe and to instruct the Committee of Ministers to elaborate appropriate international legal instruments.”⁸⁸ The Framework Convention is the first binding international instrument exclusively devoted to the protection of national minorities.⁸⁹ The Framework Convention aims at addressing “unstable minority-majority relations that have a clear potential to destabilize peace and security in Europe.”⁹⁰

The preamble of the Framework Convention mentions the protection of the existence of national minorities as one of the aims treaty. It refers to the upheavals in European history, which have shown that the protection of national minorities is essential to the stability, democratic security and peace in Europe. The preamble reflects the concern of the Council of Europe and its member states about the risk to the existence of national minorities and is inspired by Article 1(1) of the United Nations Declaration on the Rights of

⁸⁷ Council of Europe, *Framework Convention for the Protection of National Minorities*, ETS No 157, adopted by Council of Europe Committee of Ministers on 10 November 1994, entered into force on 1 February 1998.

⁸⁸ Council of Europe, Heads of States and Government, *Vienna Declaration*, (1993) 14 HRLJ 373.

⁸⁹ E.J.Aarnio ‘Minority Rights in the Council of Europe: Current Developments’ in: A, Phillips/A. Rosas, *supra* note 62 p 128.

⁹⁰ R. Hofmann, ‘The Framework Convention for the Protection of National Minorities: An Introduction’ in M. Weller (ed.), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, (Oxford University Press, Oxford/New York 2005) p.6

Persons belonging to National or Ethnic, Religious and Linguistic Minorities.⁹¹

3.8 Other Instruments Relevant to Minority Protection

At the international level further provisions concerning the rights of minorities can be found in Article 30 of the Convention on the Rights of the Child⁹² and Article 5 in the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education.⁹³

On the regional level, Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights, ECHR) contains a provision regarding minorities.⁹⁴ Protocol 12 of the ECHR is also of importance to the protection of minorities as it deals with the prohibition of discrimination.⁹⁵ Within the context of the OSCE, the appointment of a High Commissioner on National Minorities⁹⁶ and the adoption of the Copenhagen Document that emphasises the importance of the protection of national minorities to “justice, stability and peace in the participating States”⁹⁷ and introduces far-reaching provisions

⁹¹Council of Europe, *Explanatory Report of the Council of Europe on the Framework Convention for the Protection of National Minorities*, H(1995)010, para. 24.

⁹² United Nations, *Convention on the Rights of the Child*, General Assembly resolution 44/25, annex 44 U.N. GAOR Supp. (No. 49) at 167, U.N.Doc A/44/49 adopted on 20 November 1989, entered into force 2 September 1990.

⁹³ United Nations, *UNESCO Convention against Discrimination in Education*.429 U.N.T.S.93, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960, entered into force 22 May.

⁹⁴ Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 5, adopted by the Council of Europe on 4 November 19650, entered into force 3 September 1953.

⁹⁵ Council of Europe, *Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted 4 November 2000, entered into force 1 April 2005.

⁹⁶ Created at the CSCE Summit on 9-10 July 1992 in Helsinki; CSCE *Helsinki Document of the Ministerial Summit*, supra note 22.

⁹⁷ OSCE/CSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 July 1990*, para. 30.

regarding their rights.⁹⁸ Details regarding the minority protection under the OSCE will be discussed in chapter 5.

The African Charter on Human and People's Rights (ACHPR) does not mention minorities explicitly, although it contains a prohibition of discrimination.⁹⁹ In 1994, the Heads of States and Governments of the African Union's (AU) predecessor, the Organization of African Unity (OAU), passed the Declaration on a Code of Conduct for Inter-African Relations in which they called for the protection of ethnic, cultural, linguistic and religious identity of minorities.¹⁰⁰

The American Convention on Human Rights¹⁰¹ and the American Declaration on the Rights and Duties of Man also lack an explicit mentioning of minorities.¹⁰² Nevertheless, they contain several provisions that are of particular importance to minorities, most importantly the principle of non-discrimination and the right to culture as stipulated in Article XIII of the American Declaration.

⁹⁸ *Ibid.* para. 30-40 (7); J. Binder, *The Human Dimension of the OSCE: From Recommendation to Implementation*, (Verlag Österreich, Vienna 2001), p. 38.

⁹⁹ Organization of African Unity, *African Charter on Human and People's Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), adopted on 27 June 1981, entered into force Oct. 21, 1986, Article 2.

¹⁰⁰ Organization of African Unity, Assembly of Heads of State and Government, *Declaration on a Code of Conduct for Inter-African Relations*, Thirtieth Ordinary Session, Tunis, Tunisia, 13-15 June 1994, Article 4; Pamphlet No. 6 published by the Office of the United Nations High Commissioner for Human Rights, available at ohchr.org/english/about/publications/docs/minorpam6.doc (last visited 17 January 2008)

¹⁰¹ Organization of American States, *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), Article 24.

¹⁰² Ninth International Conference of American States, *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

4 CRIMES EXAMINED AND THEIR RELEVANCE IN TERMS OF MINORITY PROTECTION

In the following chapter, different international crimes are examined according to the minority issue inherent in them. Minorities have always been especially vulnerable to the violation of their rights, from small-scale interference with their rights to culture, religion, language *etc.* to mass violence against them. The commission of crimes under international law directed against minorities is the ultimate violation of their rights. Even though there is little mention in the texts of international criminal law of ‘rights’, as the law aims for the condemnation or ‘criminalisation’ of acts, the context of the criminal prohibition makes it clear that the reason why a particular conduct is regarded as criminal is precisely because it violates a fundamental right.¹⁰³

All the crimes examined in the following are crimes as laid out in the Rome Statute of the International Criminal Court (hereinafter: The Rome Statute).¹⁰⁴ If appropriate, the differences between the crimes as set out by the Charters of the Nuremberg and Tokyo Tribunals¹⁰⁵ and the Statutes of the ICTY¹⁰⁶ and the ICTR¹⁰⁷ are explained. It is not possible to look at all crimes in the Rome Statute due to the limitation of this work. Therefore, the examined crimes have been selected because of their special interconnection

¹⁰³ Thornberry, *supra* note 16, p. 58.

¹⁰⁴ Rome Statute of the International Criminal Court (hereinafter ‘Rome Statute’), UN Doc. A/CONF. 183/9 (1998), adopted at the UN Conference on Plenipotentiaries on the Establishment of an International Criminal Court.

¹⁰⁵ Charter of the International Military Tribunal for the Trial of Major War Criminals, appended to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, UNTS 279, *as amended*, Protocol to Agreement and Charter, Oct. 6, 1945 [hereinafter Nuremberg Charter]; and *Charter of the International Military Tribunal for the Far East*, 19 January 1946 (General Orders No. 1), *as amended*, General Orders No. 20, Apr. 26, 1946, TIAS No. 1589, 4 Bevans 20 [hereinafter Tokyo Charter].

¹⁰⁶ United Nations, *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted 26 May 1993, SC Res. 827, UN Doc. S/25704, annex (1993), reprinted in 32 ILM 1192 (1993) [hereinafter ICTY Statute].

¹⁰⁷ United Nations, *Statute of the International Criminal Tribunal for Rwanda*, adopted 8 November 1994, SC Res. 955, reprinted in 33 ILM 1602 (1994) [hereinafter ICTR Statute].

with minority protection and the violation of minority rights. This does not in any way infer that the crimes examined are the only crimes that minorities are particularly vulnerable to.

4.1 Genocide (Art. 6 ICC)

“The fact of genocide is as old as humanity. To this day, there has been no society protected by its structure from committing that crime. Every case of genocide is a product of history and bears the stamp of the society which has given birth to it.”¹⁰⁸

The definition of genocide under the Rome Statute, which corresponds to Article 4 (2) of the ICTY Statute and Article 2 (2) of the ICTR Statute, does derive from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: Genocide Convention),¹⁰⁹ which constitutes a part of *jus cogens*.¹¹⁰ The Genocide Convention is based on a General Assembly Resolution of 1946, which was adopted in the aftermath of World War II and was clearly influenced by the genocide committed by Germany against national minorities within its own country and the occupied, allied or annexed territories. It can be seen as the first of the post World War II general conventions which has any bearing on minority protection and is listed in the compilation by the United Nations Secretariat as one of the texts of those international instruments, which provide special protective measures for ethnical, religious, or linguistic groups.

Article 2 of the Genocide Convention and Article 6 of the Rome Statute describe genocide as:

¹⁰⁸ J.-P. Sartre, ‘On Genocide’, in Falk/Kolko/Jay (eds.), *Crimes of War* (Random House, New York, 1971) p. 534

¹⁰⁹ United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter Genocide Convention), 78 UNTS 277, adopted 9 December 1948, entered into force 12 January 1951.

¹¹⁰ *Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, ICJ Reports 1951, p. 23; *Prosecutor v. Radislav Krstić supra* note 84, para. 541.

“...any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or 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 on whole or in part;
- (d) Imposing measures intended to prevent birth within the group;
- (e) Forcibly transferring children of the group to another group.”¹¹¹

The scope of protection against genocidal measures includes acts perpetrated both by public officials and private individuals, thus both from state and non-state actors.¹¹²

The protected object of the prohibition of genocide is the group itself and not the individual.¹¹³ Even though the individual is clearly a victim of genocidal measures, the perpetration of the act charged extends beyond its actual commission, for example, the murder of a particular individual for the realisation of an ulterior motive, which means that the intent must be specific to destroy, in whole or in part, a national ethnical, racial or religious group.¹¹⁴ Membership in a specific group would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.¹¹⁵ The Genocide Convention does not explicitly mention minorities, but instead refers to members of a “national, ethnical, racial or religious group”. However, in comparison, Article 27 of the ICCPR, as examined in chapter 3, protects the rights of “ethnic, religious or linguistic minorities” within a state. The term ‘ethnic

¹¹¹ *Genocide Convention*, *supra* note 104, Article 2; *Rome Statute*, *supra* note 104, Article 6.

¹¹² *Genocide Convention*, *supra* note 104, Article 4; *Rome Statute*, *supra* note 104, Article 25 (1).

¹¹³ Finell, *supra* note 60, p. 32, ICTR, *Prosecutor v Jean-Paul Akayesu*, 2 September 1998, ICTR, Case No. ICTR-96-4-T, para.521.

¹¹⁴ *Prosecutor, v. Jean Paul Akayesu*, *supra* note 113., para. 522.

¹¹⁵ *Ibid.*, para. 511.

minorities' is to be understood broadly and covers, *inter alia*, racial and national minorities.¹¹⁶

The Genocide Convention is therefore almost congruent with the only binding provision in a universal human rights instrument that deals with minorities regarding the subjects protected. The only difference is that Article 27 contains a reference to 'linguistic minorities,' whereas the Genocide Convention does not. A reference to 'linguistic groups' was deliberately avoided because the drafters of the Genocide Convention stated that it was "not believed that genocide would be practised upon them because of their linguistic, as distinguished from their racial, national, or religious characteristics."¹¹⁷ Nevertheless, the similarity of the two definitions already shows how interlinked minority issues and genocide really are.

The 1948 Genocide Convention was designed to prevent future extermination policies of the kind carried out by the Nazi German Government, namely the targeting of specific minority groups distinguishable from the majority population by relatively immutable and stable attributes.¹¹⁸ Furthermore, in the cases in which persons have been indicted for genocide before the ICTY and the ICTR, the genocide has been perpetrated against minorities. Minorities are clearly comprehended by the Convention as "natural victims" of genocidal measures,¹¹⁹ as "genocide's most frequent targets",¹²⁰ and therefore the principal beneficiaries of genocide law.¹²¹

Furthermore, the term 'genocide' was first mentioned in 1944 in the work of Raphaël Lemkin who acknowledged that a lack of protection towards minorities within the boundaries of another state could lead to

¹¹⁶ Nowak, *supra* note 11, p. 492.

¹¹⁷ United Nations, *Communication Received by the Secretary-General*, 27 September 1947, UN Doc.A/401.

¹¹⁸ Sunga, *supra* note 45, p. 270.

¹¹⁹ Thornberry, *supra* note 16, p. 59.

¹²⁰ K. A. Annan, *Address to the Commission on Human Rights*, Geneva 7 April 2004, http://www.un.org/News/press/docs/2004/0404_20040407_1.htm (last visited 17 January 2008).

¹²¹ W. A. Schabas, *Genocide in International Law* (Cambridge University Press, Cambridge 2000), p. 107.

international disturbances.¹²² He suggested an international treaty, followed by provisions in the criminal law of each country to protect minority groups from oppression because of their nationhood, religion, or race and outlaw genocidal practises.¹²³

Nevertheless, as genocide was not introduced at the international arena as a crime until 1948, the persecution of minorities carried out under Hitler were not addressed as genocide at the Nuremberg Trials, even though the word was used in one of the indictments.¹²⁴ What now is known as genocide was in Nuremberg prosecuted under the heading of crimes against humanity.

4.2 Crimes against Humanity

The insertion of the legal category of ‘crimes against humanity’ in the Nuremberg (and Tokyo) Tribunals was specifically designed to cover crimes committed by the government of Germany against its own minority population.¹²⁵ The crimes prosecuted under the heading ‘crimes against humanity’ in Nuremberg and Tokyo were:

“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”.¹²⁶

¹²² R. Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace, Washington D.C., 1944), p. 93.

¹²³ *Ibid.*

¹²⁴ *The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of the Soviet Socialist Republics v Hermann Wilhelm Göring et. al*, International Military Tribunal, Indictment of 6 October 1945 Nuremberg, November 14 1945-October 1 1946, Vol. I, 406-6.

¹²⁵ L. S. Sunga, *supra* note 45, p. 270.

¹²⁶ Nuremberg Charter, *supra* note 105, Article 6(c); Tokyo Charter Article 5(c).

Under Article 7 of the Rome 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.¹²⁷

In the context of minority protection, two general developments should be highlighted: first the disappearance of the link between the crime and an armed conflict as a requirement; and second, the expansion of international jurisdiction to both state and non-state actors.

¹²⁷ Rome Statute *supra* note 104

4.2.1 Crimes Against Humanity and Armed Conflict

Control Council Law No. 10, issued by the Control Council for Germany on 20 December 1945, omitted the restriction of crimes against humanity to acts connected to war from the definition of such crimes.¹²⁸ However, this does not mean that crimes against humanity as defined in the Nuremberg Charter can be considered the cornerstone of a system of international criminal law equally applicable in times of war and peace, protecting the human rights of inhabitants of all countries, “of any civilian population”, against anybody, including their own states and governments.¹²⁹ According to its preamble, Council Law No. 10 was enacted to give effect to the Nuremberg Charter; the London Agreement was mentioned in Article I as an integral part of the Law.¹³⁰ This link may be thought to give the definition of crimes against humanity in Law No. 10 the same connotation as in the Nuremberg Charter.¹³¹ Therefore, even though the Nuremberg Trials were an important contribution to minority protection and the evolution of international criminal law, crimes against humanity as interpreted in Nuremberg aimed to ensure that inhumane acts in violation of general principles of the laws of all civilized nations committed in connection with war should be punished; therefore, a crime against humanity was treated as an ‘accompanying’ or ‘accessory’ crime to either crimes against peace or war crimes.¹³²

Article 5 of the ICTY Statute explicitly links the concept of crimes against humanity to the existence of an armed conflict of an international or national character, whereas according to Article 3 of the ICTR Statute, the crime must be committed on national, political, ethnic, racial or political grounds, linking crimes against humanity more closely to the protection of minorities. This additional requirement of discriminatory intent in each of the enumerated crimes is omitted in the Rome Statute. This does not,

¹²⁸ *Allied Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and Humanity*, 20 December 1945, Official Gazette of the Control Council for Germany no. 3, p. 22

¹²⁹ E. Schwelb, ‘Crimes against Humanity’, 23 *BYBIL* (1946) p. 206.

¹³⁰ *Ibid*, p. 218.

¹³¹ Thornberry, *supra* note 16, p. 89, Schwelb, *supra* note 129, p. 217 et. seq.

¹³² Schwelb, *supra* note 129, p. 206; K. Kittichaisaree, *International Criminal Law* (Oxford University Press, Oxford, 2001), p.87.

however, mean that the relevance towards minority issues has been neglected at the Rome Conference. On the contrary, the delegations felt the need to avoid an onerous and unnecessary burden for the prosecution while at the same time not excluding other forms of crimes against humanity that can be committed without a discriminatory motive.¹³³ Nevertheless, with the notion that not *all* crimes against humanity require a discriminatory motive, the drafters of the Rome Statute also acknowledged that the (vast) majority of these crimes are indeed committed out of a discriminatory intent.

Article 7 of the Rome Statute removes the link between the crimes committed and the existence of an armed conflict. The majority of delegations believed that such a limitation would have rendered crimes against humanity largely redundant, as they would have been subsumed in most cases within the definition of war crimes.¹³⁴ This is of capital importance to minority protection. Many severe violations of minority rights are perpetrated in situations where the intensity of violence falls below that required for the qualification as an ‘armed conflicts’,¹³⁵ which is often the case for large-scale atrocities committed by governments against their own population.¹³⁶ Despite this major contribution to the protection of minority groups, one has to keep in mind that the threshold for crimes against humanity is still a very high one. The acts listed in Article 7 must be ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.’ Therefore, even though the omission of a nexus between the commission of crimes against humanity and an armed conflict is a big step forward in the prevention of crime perpetrated against minorities, numerous organised crimes perpetrated against minorities still fall short of the high requirements necessary for labelling a crime an international “crime against humanity.”

¹³³ D. Robinson, ‘Defining “Crimes against Humanity” at the Rome Conference’, . 93 American Journal of International Law, (1999), p.46-7.

¹³⁴ *Ibid.*

¹³⁵ Sunga, *supra* note 45, p. 271.

¹³⁶ Robinson, *supra* note 133, p. 46.

4.2.2 Crimes Against Humanity and Non-State Actors

Article 7 of the Rome Statute also states that crimes against humanity can be committed by both state and non-state actors as long as it consists of multiple commissions of acts referred to in Article 7(1) “against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack”.¹³⁷ Similarly, both the ICTY and the ICTR state that their jurisdiction covers action by non-state actors as well as actions committed by state actors.¹³⁸ However, it is disputable whether minorities will benefit from this development. On the one hand, it obviously seems to be an improvement of their situation if they are protected from crimes committed both by the state and by private actors. On the other hand, it is to be feared that governments will use the International Criminal Court (ICC) to get rid of insurgents and rebel forces and at the same time draw attention off their own human rights violations.¹³⁹ As the ICC was established to deal with such (state) actors that typically go unpunished as opposed to non-state actors, which, once the state can catch them, are exposed to its full force, this is a worrying development.¹⁴⁰ It needs to be kept in mind when following the ICC’s first investigations that, with the exception of the situation in Darfur, which was referred to the ICC by the Security Council and in which an arrest warrant was issued against the former Minister of the State for the Interior of Sudan,¹⁴¹ the investigations concentrate so far on cases transferred by cooperative governments concerning rebel forces and members of previous governments.¹⁴²

¹³⁷ Rome Statute, *supra* note 104, Article 7(2).

¹³⁸ *Prosecutor v. Duško Tadić*, 7 May 1997, ICTY, Case No. IT-94-1, para. 654; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, 21 May 1999, ICTR, Case No. ICTR-95-1-T, para. 126.

¹³⁹ W. A Schabas, *supra* note 52, p. 24.

¹⁴⁰ *Ibid.*

¹⁴¹ *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, 1 May 2007, ICC, Case No. Doc. No. ICC-02-/05-01/07-3, Warrant of Arrest for Ahmad Muhammad Harun (“Ahmad Harun”), Document No. ICC-02-/05-01/07-2.

¹⁴² Situations in the Democratic Republic of the Congo, Uganda and the Central African Republic.

4.2.3 Acts with Particular Importance to Minority Protection

As mentioned above, the category of crimes against humanity was included in the Nuremberg Statute to punish the persecution of minorities by, *inter alia*, their own government; the concept of crimes against humanity has always been closely linked to the protection of minorities. Some of the acts listed in Article 7 of the Rome Statute are of particular importance in this respect.

4.2.3.1 Murder/Extermination (Arts. 7(1)(a)(b) Rome Statute)

Murder as listed in Article 7(a) of the Rome Statute and extermination (Article 7(b)) cover the widespread or systematic targeting of a minority group that falls short of the definition of genocide.¹⁴³ What distinguishes murder from extermination is that extermination requires an element of mass destruction that is not imperative for murder.¹⁴⁴

4.2.3.2 Deportation or Forcible Transfer of Population (Art. 7(1)(d) Rome Statute)

The crimes of deportation and forcible transfer of population were often used in the past by ultra-nationalist governments in their attempts to ethnically cleanse the territory of its minority population.¹⁴⁵

Deportation or forcible transfer of populations is defined under Article 7(2)(d) as “forced displacement of the persons concerned by expulsion or other coercive acts from an area in which they are lawfully present, without grounds permitted under international law”. Article 7 (d) of the Rome Statute, as opposed to Article 5 (d) of the ICTY and Article 3 (d) of the ICTR Statute, refers to ‘forcible transfer of population’ as an alternative offence. ‘Deportation’ is defined as the forced removal of people from one country to another, whereas ‘forcible transfer of population’ means the compulsory movement of people from one area to another within

¹⁴³ Sunga, *supra* note 45, p. 271.

¹⁴⁴ *Prosecutor v. Jean-Paul Akayesu*, *supra* note 113, para. 591.

¹⁴⁵ E.g the deportation of more than 1 million Armenians by Turkish authorities between 1915 and 1917, see A. Jones, *Genocide*, (Routledge, London/New York, 2006) p. 107.

the same state.¹⁴⁶ This reflects the experiences in conflicts such as the former Yugoslavia, where the victims were transferred within the territory of Yugoslavia as a part of a greater policy of ‘ethnic cleansing.’¹⁴⁷

4.3.2.3 Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilisation, or any other Form of Sexual Violence of Comparable Gravity (Art. 7(1)(g) Rome Statute)

In comparison to the ICTY and the ICTR Statute, Article 7 (g) of the Rome Statute takes a much wider approach on sexual violence. Whereas Articles 5(g) of the ICTY Statute and 3(g) of the ICTR Statute mention only rape, the drafters of the Rome Statute seemed to have learned from past experiences, especially of the two *ad hoc* tribunals, which for a long time tended to marginalise sexual violence, and acknowledge that sexual violence as a crime against humanity can be committed through various actions. S

Sexual violence is often used as a means to demoralise minority populations by committing acts on individuals that are said to affect the ‘honour’ of the group as a whole. Furthermore, this form of violence is regularly used in the context of ethnic violence to destroy minorities by forcing their female members to give birth to babies that are considered to belong to a different ethnic group in order to “pollute and water down the blood line”,¹⁴⁸ which can constitute an act of genocide.¹⁴⁹ However, it should be noted that the way international criminal and international humanitarian law has dealt with sexual violence against women, concentrating on concepts of honour of the community rather than the physical harm caused to an individual, has been heavily criticised by feminist scholars.¹⁵⁰ In this respect, the Rome Statute with its expansion of

¹⁴⁶ M. Ch. Bassiouni, *Crimes against Humanity* in International Criminal Law (2nd edition, Kluwer Law International, The Hague, 1999), p. 301.

¹⁴⁷ Even though there is no formal legal definition of the term ‘ethnic cleansing’, it is often conducted through means of forcible transfer, deportation or persecution and was labelled a form of genocide by the General Assembly in Resolution GA/Res./47/121 of 18 December 1992.

¹⁴⁸ A. E. Ray, ‘The Shame of it: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries’, 46 *American University Law Review* (1997). 805-6.

¹⁴⁹ *Prosecutor v. Jean-Paul Akayesu*, *supra* note 113, para. 688

¹⁵⁰ E.g V. Nikolic-Ristanovic, ‘Sexual Violence, International Law and Restorative Justice’, in D. Buss/A. Manji (eds.), *International Law-Modern Feminist Perspectives*, (Hart,

the perception of sexual violence as a crime against humanity beyond rape is a positive development in the protection of women's physical individual integrity. It is minority women who are likely to benefit most from this evolution of international criminal law.

4.2.3.4 Persecution (Art. 7(1)(h) Rome Statute)

The crime of persecution is probably the cardinal crime when it comes to the protection of minorities under the heading of crimes against humanity. As with genocide, minorities can be regarded as the 'natural victims' of persecution. In contrast to the crime of genocide, persecution under the Rome Statute is however not limited to acts committed against national, ethnic or racial groups.¹⁵¹

According to Article 7(h) the punishable act is defined as:

“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.”

Persecution as a crime against humanity encompasses acts from killing to limitations on the type of professions open to targeted groups¹⁵² and acts of physical, economic or judicial nature in violation of an individual's right to equal enjoyment of basic rights.¹⁵³ The acts must be carried out with the intent of depriving the victims of the political, social or economic rights enjoyed by members of the wider society.¹⁵⁴

The persecution must occur on specified discriminatory grounds. Whereas the Nuremberg Charter and the ICTY and ICTR Statutes only refer

Portland 2005), p. 273ff.; J. Gardam/H. Charlesworth, 'Protection of Women in Armed Conflicts', 22:1 *Human Rights Quarterly*, p. 159

¹⁵¹ M. Boot/C. K. Hall in O. Triffterer (ed.), *Commentary on the Rome Statute, Of the International Criminal Court* (Nomos Verlagsgesellschaft, Baden-Baden, 1999) p. 147.

¹⁵² *Prosecutor v. Duško Tadić*, *supra* note 138, para. 704

¹⁵³ *Ibid.*, para. 710.

¹⁵⁴ *Prosecutor v. Vlatko Kupreškić et al.*, 14 January 2000, ICTY, Case No. IT-95-16 para. 634.

to persecution on political, racial, religious grounds,¹⁵⁵ the Rome Statute builds on these precedents by adding national, ethnic, gender and other grounds commonly recognized as impermissible under international law, which reflects the evolution of international norms.¹⁵⁶ The inclusion of the reference to “any identifiable group or collectivity” also reveals the broad approach taken by the drafters of the crime of persecution. The formula used in the Rome Statute corresponds to the one used in the Nuremberg Charter, but is considerably broader than the definition used in the Statutes of the ICTY and the ICTR.¹⁵⁷ Both tribunals referred to persecution on “political, racial *and* religious grounds”, whereas both the Nuremberg Charter and the Rome Statute state that persecution as a crime against humanity must be committed on “political, racial, *or* religious grounds”[Emphasis added]. This lowers the threshold immensely and makes a crucial contribution to the punishment of ‘ethnic cleansing’ perpetrated against minorities.

4.2.3.5 Enforced Disappearance of Persons (Art. 7(1)(i) Rome Statute)

The delegations at the Rome Conference agreed that enforced disappearance, which was previously identified as a crime against humanity only in international instruments¹⁵⁸ but not in the statutes of any of the international tribunals, was an inhumane act similar to the other acts in character and gravity, which warranted specific acknowledgement.¹⁵⁹ The practice of enforced disappearance has been employed by governments on many occasions to rid the country of political opponents and to silence dissidents over such issues as greater autonomy for minority groups.¹⁶⁰

¹⁵⁵ *Nuremberg Charter*, supra note 105, Article 6(c); *ICTY Statute*, supra note 106, Article 5(h); *ICTR Statute*, supra note 107, Article 3(h)

¹⁵⁶ Robinson, supra note 133, p. 54.

¹⁵⁷ Sunga, supra note 45, p. 272.

¹⁵⁸ United Nations *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res. 47/133, UN GAOR, 47th Sess., Supp. No. 49, at 207, UN Doc. A/47/49 (1992); Organization of American States, *Inter-American Convention on the Forced Disappearance of Persons*, open for signature 9 June 1994, entered into force 28 March 1996, OEA Doc. AG/RES. 1256 (XXIV-0/94), reprinted in 33 ILM 1529 (1994); ILC *Draft Code of Crimes*, ILC Report, UN GAR, 51st Sess., Supp. No. 10 at 14, UN Doc. a/51/10 (1996).

¹⁵⁹ Robinson; supra note 133, p.55

¹⁶⁰ Sunga, supra note 45, p. 272.

4.2.3.6 The Crime of Apartheid (Art. 7(1)(j) Rome Statute)

In general terms, apartheid refers to the racial segregation and discrimination policies enacted by a government against a part of its own people.¹⁶¹ Historically, the term evolved from the segregation policies institutionalized by the government of South Africa from the late 1940s until 1994. It has been a punishable crime against humanity since 1976, when the United Nations Apartheid Convention entered into force.¹⁶²

Article 7(1)(j) of the Rome Statute chooses a broader approach than the one taken by the Apartheid Convention. Whereas the latter states that Apartheid includes “similar policies and practices of racial segregation and discrimination as practised in southern Africa” (Article II), the Rome Statute does not contain that phrase and instead, in Article 7(2)(h), defines apartheid as:

“inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”.

This expands the scope of application of that prohibition and eliminates the connection to the South African apartheid system that was unique in the sense that it was a minority who oppressed a minority there. Today, there are still a significant number of states that have institutionalised *de facto* regimes of systematic oppression and domination by one racial group over at least one other racial group, which means that the potential number of acts which would be subjected to the Court’s jurisdiction is considerable.¹⁶³ The fact that in many cases a minority group is suppressed can be inferred from the commentary by the working group on

¹⁶¹ C. de Than/E. Shorts, *International Criminal Law and Human Rights* (Sweet & Maxwell: London 2003), p. 110.

¹⁶² United Nations, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 1015 UNTS 243, adopted 30 November 1973, entered into force 18 July 1976.

¹⁶³ M. Boot in: O. Triffterer, *supra* note 151, p. 154; See e.g. the practice of slavery in Mauritania that was not abolished until 2007.

minorities to the UNDM Minorities in which apartheid is expressively mentioned as a way to exclude minorities from society.¹⁶⁴

4.3 War Crimes (Art. 8 Rome Statute)

The law of war as set out in its fundamental instruments, the 1907 Hague Regulations¹⁶⁵, the 1949 Geneva Conventions¹⁶⁶ and their 1977 Protocols,¹⁶⁷ does not refer to minorities as such, but provides specific protection to especially vulnerable groups in conflicts, like civilians or prisoners of war. Therefore, in this context, minorities are only protected as victims of a conflict, even though they are indirectly shielded by the underlying principles of the law of war, impartiality and non-discrimination.¹⁶⁸ Furthermore, the principle of non-discrimination is also enshrined in many articles within the Geneva Conventions, like for example Article 3 common to all four Geneva Conventions.¹⁶⁹ War crimes have been considered core crimes punishable under the Rome Statute, as well as covered by universal jurisdiction by national courts, throughout its negotiation process.¹⁷⁰ The most essential problem in terms of minority protection and war crimes is deciding in which situations a certain act constitutes a war crime. Traditionally, the instruments governing the law of war, with the exception of Article 3 common to the four Geneva

¹⁶⁴ Eide, *Supra note* 65, para. 25.

¹⁶⁵ 1907 *Hague Regulations Respecting the Laws and Customs of War on Land*, 18 October 1907, annexed to the *1907 Hague Convention IV Respecting the Laws and Customs of War on Land*.

¹⁶⁶ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces*, 12 August 1949 (Geneva Convention I); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949 (Geneva Convention II); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949 (Geneva Convention III); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949 (Geneva Convention IV).

¹⁶⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 12 December 1977 (Additional Protocol I); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 12 December 1977 (Additional Protocol II).

¹⁶⁸ Finell, *supra note* 60, p. 44.

¹⁶⁹ *Ibid.*

¹⁷⁰ W. J. Fenrick in O. Triffterer, *supra note* 151, p. 180

Conventions, deal with international armed conflicts fought between one state and another. Consequently, war crimes as enshrined in the Nuremberg and Tokyo Charters related to crimes committed during international armed conflicts. However, after World War II, the international community has perceived a shift from international, conventional wars, to internal guerrilla style conflicts and civil wars between non-state actors and states.¹⁷¹ Since 1945, more than 250 internal conflicts and abuses of repressive regimes resulted in an estimated 86 million casualties.¹⁷²

As a result, most of the crimes under international law that have been committed within the context of a conflict occurred within an internal, not an international armed conflict. This is particularly true for crimes committed against minorities because they are, as previously discussed, particularly vulnerable against attacks from their own governments and the governments of the countries they live in respectively. In the situation of the former Yugoslavia, crimes were committed as part of an internal or internationalized armed conflict. For this reason, the ICTY Statute covers war crimes both as grave breaches of the Geneva Conventions relating to international armed conflicts (Article 2) and “violations of the laws and customs of war” (Article 3) which has been held to cover any serious violation other than grave breaches irrespective if it occurs within an international or an internal armed conflict.¹⁷³

Out of these experiences, many delegations at the Rome Conference, supported by a wide range of NGOs, insisted that the International Criminal Court should have jurisdiction not only over crimes committed in inter-state wars but also over those atrocities that occurred within the context of an internal armed conflict.¹⁷⁴ This view ultimately prevailed and accordingly Article 8(2) of the Rome Statute distinguishes among four categories of war

¹⁷¹ See e.g. L. Harbom/P. Wallensteen, ‘Patterns of Major Conflicts 1997-2008’ *Stockholm International Peace Research Institute Yearbook 2007: Armaments, Disarmaments and International Security* (Oxford University Press, Oxford, 2007)

¹⁷² M. C. Bassiouni, ‘Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights’ in M. C. Bassiouni (ed.). *Post-Conflict Justice* (Transnational Publishers, Ardsley, New York, 2002), p. 6.

¹⁷³ Kittichaisaree, *supra* note 132, p. 132 *et. seq.*; *Prosecutor v. Duško Tadić*, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, Case No. IT-94-1, Appeals Chamber, paras. 86-94.

¹⁷⁴ Sunga, *supra* note 45, p. 273.

crimes:¹⁷⁵ Concerning international armed conflicts, Article 8(2) defines war crimes as grave breaches of the Geneva Conventions of 1949 (Article 8(2) (a)) and secondly, “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law” (Article 8(2)(b)). As for non-international armed conflicts, Article 8 (2) defines war crimes as serious violations of Article 3 common to the four Geneva Conventions (Article 8(2)(c)) and secondly, “other serious violations of the laws and customs applicable in armed conflicts not of an international armed character, within the established framework of international law” (Article 8 (2)(d))¹⁷⁶.

4.3.1 International Armed Conflicts

Provisions especially relevant to the protection of minorities in international armed conflicts include, *inter alia*,:

4.3.1.1 Article 8(2)(a): Grave Breaches of the Fourth Geneva Convention Protecting Civilian Persons in Times of War:

- The prohibition of wilful killing (Article 8(2)(a)(i));
- The prohibition of torture or inhuman treatment, including biological experiments (Article 8(2)(a)(ii));
- The prohibition of wilfully causing great suffering, or serious injury to body and health (Article 8(2)(a)(iii));
- The prohibition of unlawful deportation or transfer or unlawful confinement (Article 8(2)(a)(vii)).

4.3.1.2 Article 8(2)(b): Other serious violations of the Laws and Customs Applicable in International Armed Conflict, within the Established Framework of International Law:

- The prohibition of attacks against the civilian population (Article 8 (2)(b)(i));
- The prohibition of deportation or forcible transfer (Article 8(2)(b)(viii));

¹⁷⁵ Sunga, *supra* note 45, p. 273.

¹⁷⁶ Sunga, *supra* note 45, p. 273.

- The prohibition of attack of religious, charitable, scientific, cultural objects (Article 8(2)(b)(xi));
- The prohibition of sexual violence (Article 8(2)(b)(xxii)).

4.3.2 Non- International Armed Conflicts:

When it comes to internal conflicts, the most crucial provisions on terms of minority protections are:

4.3.2.1 Article 8(2)(c): Serious Violations of Article 3 Common to the four Geneva Conventions of 12 August 1949:

- The prohibition of violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture (Article 8(2)(c)(i));
- The prohibition of outrages on human dignity, in particular humiliating and degrading treatment (Article 8(2)(c)(ii));

4.3.2.2 Article 8(2)(e): Other Serious Violations of the Laws and Customs Applicable in Armed Conflicts not of an International Character, within the Established Framework of International Law:

- The prohibition of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (Article 8(2)(e)(i));
- The prohibition of intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (Article 8(2)(e)(iv));
- The prohibition of rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2(f), enforced sterilisation and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions (Article 8(2)(e)(vi));

- The prohibition of ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand (Article 8 (2)(e)(viii)).

5 MINORITY RIGHTS AND ISSUES AND THEIR APPLICATION IN THE PREVENTION OF CRIMES AGAINST MINORITIES

As explained in Chapter 3, there have been more and more universal and regional instruments devoted to minorities within recent years, providing them with a variety of rights. In addition, it was examined that minorities suffer particularly often from crimes under international law, which has been acknowledged by most of the international instruments dealing with minorities. Most of them set out the prevention of crimes against minorities as an object and purpose of the declaration or treaty. Therefore, it seems obvious that the minority rights enshrined in the international instruments can be of use in the prevention of crimes under international law. Hence, this chapter will examine the practical relevance of the link between the concept of minority protection and the field of international criminal law.

Due to the limitation of this thesis, it will not be possible to cover every single relevant right. It will be restricted to the protection of minority identity and the use of judicial systems as two illustrative examples of the use of minority rights in the prevention of violence perpetrated against minority populations. This shall not indicate that other issues, such as political and economic participation, are less important. It is simply not possible to cover all the complex issues and rights contributing to the protection of minorities in this study.

Some of the issues examined in detailed are not ‘minority rights’ in the strictest sense of the term. The section on judicial systems, in particular, contains elements that may not be enshrined as a ‘right’ in the international instruments protecting minorities. Nevertheless, the way in which judicial systems react to crimes committed against minorities are a reflection of their role in a particular society and can shape that role by either strengthening

the minority's position or contribute to an atmosphere which is hostile and discriminates against them. For this reason, it is necessary to analyse the importance of these issues of an indefinite nature in addition to minority rights *per se*.

5.1 The Right to Identity: Raising Awareness Within Minority Communities and in Society as a Whole

5.1.1 The Right to Identity Under Minority Rights Law

The right to identity is a prominent feature of all major legal minority rights instruments. The right serves a twofold purpose. It preserves the cultural existence of minorities and is therefore closely linked to the prohibition of genocide, which protects the physical existence of minorities.¹⁷⁷ This relationship has been revealed through the introduction of the term 'cultural genocide' that refers to the oppressive destruction of the cultural existence or identity of minorities.¹⁷⁸

Secondly, the protection of the identity of minority populations and their ability to develop their minority identity is said to contribute to the prevention of conflicts and therefore to the physical existence of minorities as well. It strengthens their role in society and therefore makes violent attacks against them less likely. Furthermore, it prevents the minorities themselves resorting to violence because they feel they are under threat and have nothing to lose.¹⁷⁹ According to the former OSCE High Commissioner on National Minorities, Max van der Stol, "[a] minority that has the opportunity to fully develop its identity is more likely to remain loyal to the state than a minority who is denied its identity."¹⁸⁰ This section will therefore examine the link between the preservation and promotion of

¹⁷⁷ Thornberry, *supra* note 16, p. 141.

¹⁷⁸ *Ibid.*

¹⁷⁹ Baldwin/Chapman/Gray, *supra* note 9, p. 5.

¹⁸⁰ M van den Stoel, 'The Protection of Minorities in the OSCE Region', Address at a Seminar at the OSCE Parliamentary Assembly Antalya 12 April 2000, reproduced in: W. Zellner/F. Lange (eds.) *Peace and Stability through Human and Minority Rights; Speeches by the OSCE High Commissioner on National Minorities* (Nomos Verlagsgesellschaft, Baden-Baden, 2001) pp. 209.

minority identity on the one hand and the prevention of conflict and violence against minorities on the other. It will first outline the scope of the right to identity in the most relevant universal and regional instruments of minority protection and then analyse them regarding their relevance to prevent crimes under international law committed against minorities.

5.1.1.1 Article 27 ICCPR

Identity is the main focus of Article 27 ICCPR¹⁸¹, which covers the right of minorities to enjoy their own culture, profess and practise their religion and use their own language both in private and in public.

‘Culture’ in Article 27 does not only comprise customs, morals, traditions, rituals and habits of minorities, it also covers economic activities if they are an essential element of the culture of a minority community.¹⁸² Furthermore, it guarantees the right to pass on the own culture to future generations, which is especially important for educational systems.¹⁸³ The right to use the common language is of particular importance when it comes to education of minority children, which must not be prevented from learning their own language in public and private schools.¹⁸⁴ Regarding the profession and practising of religion, Article 27 does not contain any limitations as set out in Article 18(3), which guarantees the collective practice of religion. Even though it is sometimes claimed that the limitation of Article 18(3) is also applicable to Article 27, it seems more convincing to assume that Article 27 is *lex specialis* to Article 18 and as such contains no limitations.

The Human Rights Committee in General Comment No. 23 stated that positive measures on the part of the state might be necessary in order to ensure that minority identity is protected and to guarantee that individuals belonging to a minority can enjoy and develop their identity.¹⁸⁵

¹⁸¹ Thornberry, *supra* note 16, p. 142.

¹⁸² Nowak, *supra* note 11, p. 659; *Lubicon Lake Band v. Canada*, HRC, A/45/40 vol. II (26 March 1990), No 167/1984, § 32.2; *Kitok v. Sweden*, HRC, A/43/40 (17 July 1988), No. 197/1985, § 9.2.

¹⁸³ Nowak, *supra* note 11, p. 659

¹⁸⁴ Nowak, *supra* note, p. 659.

¹⁸⁵ HRC, General Comment No. 23, *supra* note 13, para. 6.2.

Furthermore, the Committee sees minority identity as a contribution to the enrichment of “the fabric of society as a whole,”¹⁸⁶ which indicates a broad concept of minority protection that includes the education of the wider society about minority culture and rights.

5.1.1.2 Articles 4 and 6 UNDM

Article 4 of the UNDM sets out that:

“ ...

(2) States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards

...

(4) States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.”

This provision obliges states to take measures to create an environment in which minorities can live and develop their distinct identity, as long as they do not conduct illegal practises. Their practices, just like those carried out by the majority population, must not violate international human rights.¹⁸⁷ The reference to national law leaves a margin of appreciation to the states. It does, however, not imply that states can simply declare illegal any action they do not approve of, as this would undermine the goals and principles set out in the Declaration. Instead, prohibitions must be based on reasonable and objective grounds.¹⁸⁸

Regarding funding of any of the practises carried out in the light of living and developing of minority identity, the state has to provide resources for similar activities of the minorities in the same way as it provides funding for the development of the culture and language of the majority.¹⁸⁹

¹⁸⁶ *Ibid.*, para. 9.

¹⁸⁷ Eide, *supra* note 65, para. 57.

¹⁸⁸ Eide, *supra* note 65, para. 58.

¹⁸⁹ Eide, *supra* note 65, para. 56.

Article 4 should be read together with Article 1(1) of the UNDM, which states that “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity”. Positive measures adopted according to these provisions can be vital in helping to preserve minority identity and can counteract some of the assimilationist tendencies associated with individual rights.¹⁹⁰

According to Article 6:

(1) “[t]he Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

(2) The parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.”

This provision sets out a state obligation to counteract prejudices, intolerance and discrimination by both state organs and the wider public.¹⁹¹ Because the wording mentions “persons living in their territory” (Article 6(1)), “persons” (Article 6(2)) and not “persons belonging to a national minority” like the rest of the Framework Convention, the Advisory Committee applies Article 6 also to people whose inclusion into the category of “national minority” is disputed. These include asylum seekers, immigrants and non-citizens¹⁹², as long as the respective country does not issue a limitation clause regarding these particular groups.¹⁹³ Furthermore, the provision acknowledges that education is one of the key areas in which minority rights can be made known to a wider society. It also specifically addresses the media, which has a massive influence in the way a minority is

¹⁹⁰ Quane, *supra* note 47, p. 500.

¹⁹¹ G. Gilbert in Weller, *supra* note 90, p. 183.

¹⁹² E.g. Advisory Committee on Austria ACFC/INF/OP/I (2002) 009, 2002, para. 32; Advisory Committee on Liechtenstein ACFC/INT/OP/I (2001) 003, 2000, para. 15; Advisory Committee on Denmark ACFC/INT/OP/I (2001) 005, 2001, para. 27.

¹⁹³ Limitation clauses have been introduced by Austria, Denmark, Liechtenstein and Malta.

perceived in a society. The Advisory Committee has repetitively dealt with the issue of media stereotyping of minorities.¹⁹⁴

Article 6(2) requires states to put into place and enforce prohibitions of racial hatred and anti-discrimination laws.¹⁹⁵

5.1.1.3 Preamble and Articles 5 and 12 Council of Europe Framework Convention

The preamble of the Framework Convention refers to “a pluralist and genuinely democratic society “ that “should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a minority group, but also create appropriate conditions enabling them to express, preserve and develop this identity.” This purpose is reflected in Article 5 according to which,

(1) [t]he Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.

(2) Without prejudice to measures in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.”

Article 5 of the Framework Convention sets out a general obligation on states to allow minorities to run their own affairs and to enjoy cultural autonomy.¹⁹⁶ The state has to both avoid unjustified interference and, in consultation with the minority,¹⁹⁷ has to facilitate steps, taken by the minority group to maintain and develop their culture and identity and to

¹⁹⁴ G. Gilbert in M. Weller *supra* note 90, p. 182; see also e.g. Advisory Committee on Denmark ACFC/INT/OP/I (2001) 005, 2001 para. 37; Advisory Committee on Finland, ACFC/INF/OP/I (2001) 002, 2000, para. 27; Advisory Committee on Italy ACFC/INF/OP/I (2002)007, 2001 para 37; Advisory Committee on Romania ACFC/INF/OP/I (2002) para. 001 para. 34; Advisory Committee on Ukraine ACFC/INF/OP/I (2002)010, 2002, para. 39.

¹⁹⁵ G. Gilbert in M. Weller, *supra* note 90, p. 187; Advisory Committee on Romania ACFC/INT/OP/I (2002) 001, 2001, para. 38.

¹⁹⁶ G. Gilbert in M. Weller, *supra* note 90, p. 163.

¹⁹⁷ Advisory Committee Opinions under Article 25 on Italy, ACFC/INF/OP/I (2002), 007, 2001, para.34; Romania, ACFC/INF/OP/I (2002), 001, 2001, para. 31; Slovakia, ACFC/INF/OP/I (2001) 001, 2000, para.24.

exercise the rights set out in the specific provisions regarding religion, language, culture and traditions.¹⁹⁸ Therefore, Article 5 sets out the general obligations of states to facilitate and provide an environment in which minorities can make full use of their religious, linguistic and cultural rights and freely develop their own identity.

Regarding the manifestation of religion, the Framework Convention provides for an explicit provision to safeguard a minority's freedom of religion. Article 5, however, acknowledges that the states are under the obligation to put into place the necessary conditions for individuals to freely manifest their religion.¹⁹⁹

Furthermore, the Framework Convention calls for specific provisions regarding languages as the “root of pluralistic democracy” in Articles 10, 11 and 14²⁰⁰

The term ‘culture’ in Article 5 can be used as a synonym to describe the identity of a minority population. Moreover, it can also describe traditions and cultural heritage that are essential for a minority's “way of life”, a claim that is traditionally made by indigenous people and Roma.²⁰¹

Article 5 overlaps with Article 12, which states:

“(1) [t]he Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.

(2) In this context the Parties shall inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.”

Article 12 is the first of three Articles in the Framework Convention that deal with minorities and education. Whereas Article 13 guarantees the rights of minorities to set up their own educational systems and deals with educational systems and minority languages, Article 12 aims at the education of the (majority) population about minority cultures.

¹⁹⁸ G. Gilbert in M. Weller, *supra* note 90, 163.

¹⁹⁹ G. Gilbert in M. Weller, *supra* note 90, p. 163.

²⁰⁰ G. Gilbert, in M. Weller, *supra* note 90, p. 165.

²⁰¹ G. Gilbert, in M. Weller, *supra* note 90, p. 166

5.1.1.4 Instruments and Documents adopted under the auspices of the OSCE

The OSCE adopted a series of documents and recommendations regarding the protection of minority identity as part of its ‘human dimension’ policy, namely the Oslo Recommendations Regarding the Linguistic Rights of National Minorities,²⁰² the Hague Recommendations Regarding the Education Rights of National Minorities²⁰³ and finally the Copenhagen Document,²⁰⁴ which contains a comprehensive, progressive rights catalogue regarding national minorities in the areas of language, education and political participation.²⁰⁵

Furthermore, one should also mention the Lund Recommendations on the Effective Participation of National Minorities in Public Life.²⁰⁶ Even though political participation is not a distinct element of minority identity, safeguarding a minority’s participation in public life and their voice in communal affairs is essential in order to guarantee the fulfilment of state obligations and therefore the protection and facilitation of minority identities.

5.1.2 Minority Identity as Minority Protection

Culture, history, language and religion are aspects that shape the identity of a minority community. They help them to define their identity in comparison to the majority, but they will also foster the majority’s perception of minorities as “different” and “other”. As explained in chapter 2, this is an important factor in crimes perpetrated against minorities where “ethnic entrepreneurs” fuel the perception of a minority as ‘not one of us’ until the minority group is portrayed as some kind of ‘sub-human’ enemy.

²⁰² OSCE/CSCE, *Oslo Recommendations Regarding the Linguistic Rights of National Minorities*, adopted 1 February 1998

²⁰³ OSCE/CSCE, *The Hague Recommendations Regarding the Education Rights of National Minorities*, adopted 1 October 1996.

²⁰⁴ OSCE/CSCE, *Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE*, *supra* note 97

²⁰⁵ L. Thio, ‘Developing A “Peace and Security” Approach Towards Minorities’ Problems’, 52 *ICLQ* 115 (2003), p. 119.

²⁰⁶ OSCE/CSCE, *Lund Recommendations on the Effective Participation of National Minorities in Public Life*, adopted 1 September 1999.

“Simplifying identities to bipolar opposites makes easier for ‘ethnic entrepreneurs’ to rally support for nationalist platforms, demonise other groups and incite violence.”²⁰⁷ This is one reason why governments all over the world have, time and again, followed assimilationist policies and favoured the idea of a homogenous ‘melting pot’ society.

However, history has shown that forced assimilation only furthers the perception of a minority group as ‘the others’ when they wish to live according to their culture and traditions. This can have dangerous consequences for minorities, when the majority feels threatened by minorities clinging on to their identity. As examined in chapter 2.3, fear can be one of the reasons for crimes perpetrated against minorities. In addition, denial of minority identity can also contribute to extremism on the part of the minorities themselves. The violence associated with the Basque *Euskadi ta Azkatasuna* (ETA) began at a time when Madrid strongly oppressed the Basque identity.²⁰⁸

Today, it is widely accepted that states should protect an individual’s choice whether to assimilate with the majority population or to keep his or her distinct minority identity. This is reflected, for instance, in the prohibition of forced assimilation plans in Article 5(2) of the Framework Convention which does however allow for general integration policies.²⁰⁹

Hence, one of the first important steps governments can take is to embrace the pluralist, diverse composition of society²¹⁰ and acknowledge the existence of minorities in their respective state. States should also refrain from defining themselves as based on one specific ethnicity, language or religion, rendering other identities second-class. In the worst case, this can lead to a strong justification for the suppression of identities that are not conforming with the ‘state identities’.²¹¹ States should furthermore protect minorities against attempts of third parties that violate their right to

²⁰⁷ Baldwin/Chapman/Gray, *supra* note 9, p. 10

²⁰⁸ *Ibid.*, p. 5.

²⁰⁹ Council of Europe, Explanatory Report, *supra* note 91, para. 45.

²¹⁰ Eide, *supra* note 65, para. 28

²¹¹ Baldwin/Chapman/Gray, *supra* note 9, p. 9.

identity.²¹² Harassments and threats against minorities who speak their own language in public or are openly practising their religion, do often precede physical violence against minorities. The examined measures can contribute to strengthening a minority's role in society, to improve awareness as to their rights and to raise their self-esteem.

Nevertheless, it is not enough to tolerate or even encourage minorities to make full use of their rights and fully develop their identity. If minority rights are meant to be used effectively in order to prevent crime against minorities, the majority population has to be educated about minority rights too. In the words of Asbjørn Eide, “[w]here there has been conflict, the minority group’s culture, history and traditions have often been subject to distorted representations, resulting in low self-esteem within the groups and negative stereotypes towards members of the group on the part of the wider community. Racial hatred, xenophobia and intolerance sometimes take root.”²¹³ In this respect, Article 4(4) of the UNDM and Article 12 of the Framework Convention are essential because they make clear that minority rights must be understood and embraced by the whole of society if they are meant to be an effective tool of conflict prevention. The majority population needs to understand why minorities are given special rights and why minorities have a valid claim to their rights.

This can be achieved best in school education, especially in history class where a nationally agreed history curriculum should reflect a country’s ethnic diversity.²¹⁴ A common curriculum can prevent the development of historical myths, one-sided versions and exaggerations that could be used by ‘ethnic entrepreneurs’²¹⁵ and emphasise the contribution of the minority throughout history.²¹⁶ Article 29 of the Convention of the

²¹² See HRC, *General Comment No. 23*, *supra* note 13: “Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.”

²¹³ Eide, *supra* note 65, para. 65.

²¹⁴ Advisory Committee on Finland, ACFC/INF/OP/I (2001) 002, 2000, para 36; Advisory Committee on Norway, ACFC/INF/OP/I (2003) 003 2002, para. 53; Advisory Committee on Romania, ACFC/INF/OP/I (2002)001, 2001, para. 54

²¹⁵ Baldwin/Chapman/Gray, *supra* note 9, p. 11.

²¹⁶ Eide, *supra* note 65, para. 67.

Rights of the Child (CRC)²¹⁷ takes this idea on by setting out that the education of a child shall be directed at:

“the development of respect for human rights and fundamental freedoms”²¹⁸,

“the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own”²¹⁹ and

“the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin”.²²⁰

Article 7 of ICERD also sets out a similar obligation. As the Committee on the Framework Convention observed “teaching must aim at enhancing the self-confidence of pupils belonging to national minorities, while presenting the idea of a culturally pluralist [state] in a positive light to the majority population”.²²¹ The majority population should also have access to understand the basics of the minority cultures and learning the minority language majorities “as a means of encouraging interaction and conflict-prevention in pluri-ethnic societies.”²²²

The caution with which the international community acted in the past when drafting the major minority rights provisions, their individualistic formulation and individual enforcement, can in this context be seen as an advantage as they recognise the collective dimension to minority identity while avoiding the problems associated with group rights.²²³ Hence, minority rights are excellent tools to support minorities that want to preserve their distinct identity, without scaring off the governments of the countries concerned to a point where they take refuge to non-compliance. On the other hand, the rather vague formulation of the above-mentioned

²¹⁷ United Nations, Convention on the Rights of the Child, *supra* note 92.

²¹⁸ *Ibid.*, Article 29 1(b)

²¹⁹ *Ibid.*, Article 29(1)(c).

²²⁰ *Ibid.*, Article 29(1)(d).

²²¹ Advisory Committee on Norway, ACFC/INF/OP/I (2003) 003 2002, para.52.

²²² Eide, *supra* note 65, para. 67.

²²³ Quane, *supra* note 47, p. 501

instruments leaves considerable discretion to the states, which means that in the matter of education and minority identity, much depends on their willingness.²²⁴

In conclusion, it can be said that safeguarding and strengthening a minority's identity while at the same time educating the majority population about what assembles that identity and why it needs special protection, is widely acknowledged as an effective means of minority protection. However, in practise it is often neglected. Especially in post-conflict regions like Kosovo, 'ethnic' schools and universities are often preferred, probably because they seem to promise more stability in the short-run.²²⁵ These approaches do yet ignore that rifts between different sections of society deepen when they have access to separate educational institutions and medias, without trying to make other cultures and identities accessible. Positive examples like the implementation of the peace process in Nicaragua show that respect for and education about minority identities have a positive effect even in post-conflict situations.²²⁶

5.2 The Importance of Judicial Systems in Protecting Minorities from Crimes under International Law

The functioning of judicial systems is crucial to the protection of minorities. Recognition as a person before the law, equality before the courts, equality before the law and equal protection of the law, as laid down in the Universal Declaration (Articles 6 and 7) and the ICCPR (Articles 14, 16 and 26) are amongst those general human rights from which minorities can particularly benefit from.²²⁷

²²⁴ *Ibid.*

²²⁵ C. Baldwin, *Minority Rights in Kosovo under International Rule* (Minority Rights Group International, London, 2006), available at <http://www.minorityrights.org/?lid=1072> (last accessed 17 January 2008) p. 30.

²²⁶ S. Brunnegger, *From Conflict to Autonomy in Nicaragua: Lessons Learnt*, (Minority Rights Group International, London, 2007), available at www.minorityrights.org/?lid=969 (last accessed 17 January 2008) p. 5 *et. seq.*

²²⁷ G. Alfredsson/ A. De Zayas, 'Minority Rights: Protection by the United Nations', 14:1-2 *HRLJ*, p. 2 (1993).

Well-reasoned court decisions can boost the rights of minorities and contribute to the understanding of the minority community's history and identity by the majority. A biased court can, however, deteriorate the position of minorities in a society. There are many examples of judicial systems that fail to punish the perpetrators of crimes committed against minorities while emphasising crimes committed by minorities, leading to an over-representation of members of minority groups in prisons and to the general perception of the majority population that the minority is more criminal. On the part of the minority population, the feeling of injustice can lead to the alienation from the wider society and often results in injustice being blamed on other peoples or religions.²²⁸

Therefore, courts have to preserve the minority population's interest by effectively protecting them against ongoing injustice and punishing those responsible for 'historic injustice.'²²⁹ Protection against ongoing injustice can be guaranteed by the effective application of anti-discrimination laws. However, because the focus of this thesis is on the prevention of crimes under international law, this kind of domestic safeguard will not be further discussed. The present investigation concentrates on the punishment of historic injustice that minority populations have suffered from and the international criminal system that deals with them.

The institutionalisation of international criminal law has been regarded as an "important form of minority rights protection".²³⁰ In order to examine the validity of this statement, this section will examine the importance of investigation and punishment of these crimes for the protection of minorities and the prevention of new conflicts and atrocities. It is clear that the importance of international criminal law lies for a large part in the punishment of those responsible for the gravest violations of the rights of minorities. However, the present work concentrates on a more controversial aspect of international criminal law, namely the doctrine of deterrence as a rationale for the establishment of criminal laws and as a means to halt and prevent crimes perpetrated against minority populations. Because of the

²²⁸ Baldwin/Chapman/Gray, *supra* note 9, p. 24.

²²⁹ The terminology was taken from Baldwin/Chapman/Gray *supra* note 9, p. 24 *et. seq.*

²³⁰ Sunga, *supra* note 45, p.255.

inconsistency of states throughout the world regarding the implementation of universal jurisdiction in their domestic systems, it will focus on the efforts of international courts and tribunals as opposed to national courts.

5.2.1 The Use of Judicial Systems to Deter Crimes Against Minorities

Theories behind criminal law and criminal justice can generally be characterised as either deterrent (utilitarian) or retributive.²³¹ Whereas retributive theories focus on the affected individuals, the need for punishment of an individual perpetrator in order to satisfy the victim's (or his or her relatives') need for revenge, utilitarianists emphasise the use of punishment as a social control and the socially desirable consequences that punishment is supposed to create.²³² Deterrence can therefore be defined as "the ability of a legal system to discourage or prevent certain conduct through threats of punishment or other expressions of disapproval."²³³ In the context of minority protection and international criminal law, the utilitarian approach is more relevant as it (in the best case) goes beyond the specific criminal act committed and has the potential to identify the values, thoughts and fears that led to the persecution of a minority.

Within the framework of criminal theory, deterrence is described of being either special or general. Special deterrence targets the criminal individual, whereas general deterrence targets society as a whole and makes citizens law-abiding, either through law's moral authority or through habit, social imitation, fear, and coercion.²³⁴ In the international arena, deterrence is sought to function in three different ways. It is supposed to either prevent the same individual from committing more crimes, to prevent members of

²³¹ J. Nyumuya Maogoto, 'The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects', *Nordic Journal of International Law* 73 (2004), p. 197; A. P. Simester/ G. R. Sullivan, *Criminal Law: Theory and Doctrine* (3rd edition Hart, Portland, 2007), p. 5 *et. seq.*

²³² N. Roht-Arriaza, 'Punishment, Redress and Pardon: Theoretical and Psychological Approaches' in : N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York/Oxford, Oxford University Press 1995) p. 14; Maogoto, *supra* note 222, p. 197.

²³³ P. Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20:4 *HRQ* (1998), p. 741.

²³⁴ Roht-Arriaza, *supra* note 231; J. Andenaes, *Punishment and Deterrence* (University of Michigan Press, Ann Arbor, 1971), p. 138.

the same group in the same region or a region somehow linked to the post-conflict region from starting or continuing the commission of crimes, or to set an example to the international community that the commission of illegal acts under international law will not be tolerated and thereby deterring other individuals who are about to commit crimes. This intention has been expressed by then Secretary-General Kofi Annan in his report on the rule of law and transitional justice in conflict and post-conflict societies where he states that “[c]riminal trials can...help to delegitimise extremist elements, ensure their removal from the national political process and contribute to the restoration of civility and peace and to deterrence”.²³⁵

As a major aim of the imposition of sanctions in all legal systems, deterrence has long been described as “the ultimate end of every good legislation.”²³⁶ Nevertheless, the deterrent effect of criminal law beyond the countries affected has often been doubted, especially on the international level. This is partly because the *de facto* effect of (international) criminal law on a person likely to commit a crime is hard to prove or measure. Whether international criminal proceedings unfold the potential to have a deterrent effect at all will be discussed in-depth below.

5.2.2 Judicial Systems as a Way to End Ongoing Crimes

The suspension of existing public order violations is one of the goals for the protection, restoration and improvement of public order²³⁷ and therefore a rationale of criminal law.

The various tribunals and the investigations carried out under international criminal law seek to achieve deterrence in ongoing conflicts in two ways: first, they intend to instil fear of punishment into those who plan and those who execute criminal acts; second, international investigations and arrest warrants are supposed to lower the status of those responsible for

²³⁵ United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary General, , 23 August 2004, UN Doc. S/2004/616, at 13.

²³⁶ P. Knepper, *Explaining criminal conduct: Theories and systems in criminology*. Durham, NC: Carolina Academic Press, Durham, NC, 2003) p. 36; C. Di Beccaria, ‘On Crimes and Punishments’ in R. Bellamy (ed.) *On Crimes and Punishments and Other Writings*, (Cambridge University Press, Cambridge, 1995)

²³⁷ W. M. Reisman, ‘Legal Responses to Genocide and Other Massive Violations of Human Rights’ 59 *Law & Contemporary Problems*. (1996), p. 75 *et. seq.*

crime in their society and make them refrain from committing atrocities as they lose the support of their people. For the protection of minorities and their existence, this is obviously the primary short-term goal to achieve, even though it must be followed by a long-term plan of action that investigates the roots of the violence and comes up with strategies to overcome and prevent ethnic tension in the future.

Halting ongoing crimes was one of the rationales of the establishment of an international criminal tribunal in the former Yugoslavia by the Security Council in 1993. The ICTY, like its twin tribunal, the ICTR, was established as a measure for the restoration of peace and security under Chapter VII of the United Nations Charter. In Resolution 808 establishing the tribunal, the Security Council expressed its conviction that the establishment of an international tribunal would contribute to the restoration and maintenance of peace.²³⁸

This goal, however, was not achieved. The conflict that the establishment of the ICTY was supposed to resolve went on for another two and a half years after the ICTY's establishment until the war in the Western part of Yugoslavia was resolved with the Dayton Peace agreement in 1995. One of the major massacres, in Srebrenica, took place when the ICTY was fully operational and a few days after an ICTY Chamber confirmed its indictments against Bosnia Serb leaders Radovan Karadžić and Ratko Mladić.²³⁹ The presence of the ICTY also failed to halt ethnic violence breaking out in Kosovo several years later.²⁴⁰ Even though President Slobodan Milošević, along with other high-ranking Serbian officials, was charged by the ICTY with crimes against humanity, including murder, forcible transfer, deportation and persecution for the events in Kosovo, the indictment did not deter him from further engaging in a campaign of 'ethnic cleansing' until he was ultimately stopped by a NATO bombing campaign and the intervention of the NATO-lead International Kosovo Force (KFOR).

²³⁸ United Nations Security Council Resolution 808, UN Doc. S/RES/808, 22 February 1993.

²³⁹ Schabas, *supra* note 52, p. 23; T. Meron, *Answering for War Crimes: Lessons from the Balkans* (Foreign Affairs, New York, 1997) at 2, 6.

²⁴⁰ Schabas, *supra* note 52.

The Security Council nonetheless continued expressing its belief that the establishment of international tribunals contribute to the restoration and maintenance of peace and security in the resolutions establishing the ICTR²⁴¹ and the Special Court for Sierra Leone.²⁴² However, as both of the conflicts in question were largely over when the international community decided to establish the tribunals, they cannot be drawn on in order to prove the argument that there is a link between the application of international criminal law and the stopping of ongoing conflicts and atrocities. The same is true for the two blueprints of international tribunals, the Nuremberg and Tokyo Tribunals, which were established after World War II had ended. Regarding the Holocaust and other atrocities committed by Germans during World War II, the highly publicised and broadcasted joint Moscow Declaration of 1943²⁴³ contained severe threats of punishments of those responsible.²⁴⁴ However, there are no signs that this warning had any deterrent effect on those carrying out the crimes committed throughout the remainder of the war.

This does not mean that international criminal law is not suitable to contribute to the restoration of peace. It might be one of the factors that contribute to ending a conflict by establishing a record of an official's

²⁴¹ United Nations, Security Council Resolution 955, UN Doc S/RES/955, 8 November 1994.

²⁴² United Nations, Security Council Resolution 1315, UN Doc. S/RES/1315, 14 August 2000.

²⁴³ T. Meron, 'From Nuremberg to the Hague', 149 *Military Law Review* 107 (1995), p. 110.

²⁴⁴ The *Declaration of the Four Nations on General Security* ("Moscow Declaration") was signed at the Moscow Conference on 30 October 1943 by the Governments of the United States of America, the United Kingdom and the Soviet Union. Section four ("Statement on Atrocities") states that "[a]t the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein.(...) Thus, Germans who take part in wholesale shooting (...) or who have shared in slaughters inflicted on the people of Poland or in the territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by the people whom they have outraged. Let those who have hitherto not imbued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done."

culpability in atrocities and thus excluding them from direct participation in the political arena.²⁴⁵

But it seems that international criminal law is rather powerless to end conflict once they have started. In the words of P. Akhavan, “hastily erected bulwarks cannot be expected to save lives when the deluge has already begun.”²⁴⁶ Once mass violence has erupted and a culture is already intoxicated with hatred, threats of punishment most likely do little to achieve immediate deterrence.²⁴⁷

In these cases, stronger measures with more immediate physical effects on those in power, like sanctions or military actions, are more likely to ‘convince’ perpetrators to stop committing crime. But often these actions are only promising if they are accomplished in an early stage of the conflict²⁴⁸. In order to achieve this, international judicial mechanisms can play a vital role. Particularly when it comes to interventions, the international community is reluctant to accept or take part in an operation that affects the core of state sovereignty without a strong international judicial mechanism.²⁴⁹ In this context, the regime of international criminal law can contribute to halting crimes committed against minorities. It can be used as proof that those acts are committed in a certain country and the international community, as it has decided to accept those acts as ‘international crimes’, cannot remain indifferent, which might lead to the conviction that stronger measures, like military intervention, are the only way to stop those crimes committed on a mass scale.

Nevertheless, when talking about military means, one should keep in mind that the international community has always been very reluctant when it comes to intervening in a country where no immediate national interests are at stake. The role of international criminal law in this scenario should therefore not be overestimated.

²⁴⁵ T. Meron, *supra* note 238, p. 5.

²⁴⁶ P. Akhavan., Beyond Immunity: ‘Can International Criminal Justice Prevent Future Atrocities?’, 95:1 *American Journal of International Law*, (2001), p. 9.

²⁴⁷ *Ibid.*, p. 10 *et. seq.*

²⁴⁸ G. Gallón, ‘The International Criminal Court and the Challenge of Deterrence’, in D. Shelton, *International Crimes, Peace and Human Rights, : The Role of The International Criminal Court* (Transnational Publishers, Ardsley, NY, 2000) p. 95.

²⁴⁹ *Ibid.*

5.2.3 Judicial Systems as a Means of Avoiding New Ethnic Tensions

Another aspect related to deterrence is the claim that international criminal procedures are conducive to avoiding new tensions or the anew outbreak of violence in post-conflict countries or regions. This corresponds to one of the goals of legal systems identified by W. M. Reisman, namely the correction of “behaviour that generates public order violations”.²⁵⁰ Correction is defined by him as “identifying and adjusting individual or group patterns of behaviour that have generated or may generate ruptures of public order”.²⁵¹

The United Nations expressed their claim to contribute to the prevention of new tensions in the Security Council Resolutions establishing the ICTY and the ICTR. Their preambles mention the contribution to “national reconciliation”²⁵² and the above mentioned “restoration and maintenance of peace”.²⁵³ International criminal law is likely to have a bigger effect on post-conflict countries than on countries that still experience conflict.

5.2.3.1 Deterrence as a Contribution to Post-Conflict Reconciliation

First, the above-made argument regarding the use of prosecution to marginalise political leaders that organised and/or incited ethnical violence against minorities and therefore keep them from further committing crimes is more likely to be promising in a post-conflict setting than in an ongoing conflict.

In the former Yugoslavia for example, even though leaders like Milošević have been seen as martyrs by many of their fellow citizens, the international pressure, including criminal prosecution, contributed to his de-legitimisation. This led him to lose re-election in 2000 and finally forced him to step down. The anti-Milošević organisation Otpor used the slogan

²⁵⁰ Reisman, *supra* note 226, p. 75.

²⁵¹ *Ibid.*, p. 76.

²⁵² UN Doc S/RES/955, *supra* note 240.

²⁵³ UN Doc. S/RES/808, *supra* note 237; UN Doc S/RES/955, *supra* note 240.

“Milošević to the Hague” in their rallies after the elections.²⁵⁴ After having lived as a fugitive for nine months, Milošević was arrested by Yugoslavian security forces and, within short time, turned over to The Hague. The ICTY indictment can be said to have weakened Milošević’s position in the country, which helped the government to extradite him to The Hague and prevented an amnesty agreement between him and the opposition.²⁵⁵ Additionally, other influential figures in Serbian politics and military were also arrested, for instance Momčilo Krajišnik, an ultranationalist politician and former Serb representative of the three-member Presidency of Bosnia and Herzegovina, the members of the military, Generals Stanislav Galić, Momic Tadić and Radolav Krstić. Akhavan refers to their arrests as the “dramatic enthronement of these once seemingly invincible architects of ‘Greater Serbia’” which “has gone far beyond what most observers imagined possible when the ICTY was first established in 1993”.²⁵⁶ However, the initial indictment of 1999, which included acts committed in the Kosovo in 1999, and the extended indictment from 2001 that included additional crimes committed between August 1991 and June 1992, were published 8-10 years after some of the crimes in question were committed.

Second, international criminal law can have a share in national reconciliation together with other measures such as truth and reconciliation commissions. It is claimed that it takes at least one generation to achieve peace and stabilisation in a post-conflict situation.²⁵⁷ The impact of international criminal law in this respect is likely to be a subtle, long-term one, as opposed to an immediate one that can be easily accounted for and understood. Nevertheless its contribution is substantial: if past violations of human rights have not been remedied, this can create a tendency in a minority population to generalise about entire peoples and to believe that crimes suffered give entitlement to compensation at the expense of another

²⁵⁴ Akhavan, *supra* note 245, p. 16.

²⁵⁵ *Ibid.*, p. 18.

²⁵⁶ *Ibid.*, p. 8.

²⁵⁷ M.S.Ellis, ‘Combating Impunity and Enforcing Accountability as a way to promote peace and stability – The Role of International War Crimes Tribunals’, 2 *Journal of National Security Law and Policy* (2006), p. 155.

people.²⁵⁸ What should be achieved is not only a sense of justice, but also the elimination of a sense of injustice.²⁵⁹

Mass violence is usually committed in a setting of indoctrination, which reverses basic principles and values in the collective conscience.²⁶⁰ Acts such as the killing of civilians can, in such an atmosphere, be presented as ‘necessary’ to ‘clean’ the country from the enemy. International criminal proceedings, if conducted properly, can fulfil an educational function by not only conveying to an individual why his or her behaviour was wrong, but also incorporating that act in a broader cultural setting. This is particularly important when it comes to the commission of mass violence against minorities that follows a long period of indoctrination, propaganda and discrimination. Courts can be constituted in order to establish what happened in a conflict, to educate people on how it evolved and why, by whom victimisation occurred and what the quantum of that victimisation was.²⁶¹ Such basic truths are, however, often disputed in post-conflict situations.²⁶² These disputes can lead to an emergence of myths and legends on both sides, which create feelings of injustice, resentment and victimisation and lead on conflicts in the minds of future generations. Even though both the issuing of a public statement by the respective court, labelling the convict a criminal and the actual punishment of the individual perpetrator are vital in terms of accountability and justice, this is often not enough in the context of crimes under international law that have usually been nurtured by an atmosphere of (ethnic) hatred.²⁶³

International criminal law is based on the principle of individual responsibility. This has been one of the cornerstones of international law since the Nuremberg Trials, when the judgement stated “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of

²⁵⁸ Baldwin/Chapman/Gray, *supra* note 9, p. 24.

²⁵⁹ Bassiouni, *supra* note 4, p. 23.

²⁶⁰ Chirot/McCauley, *supra* note 25, p. 51 *et seq.*

²⁶¹ Bassiouni, *supra* note 4, p. 11.

²⁶² *Ibid.*

²⁶³ Simester/Sullivan, *supra* note 231, p. 4.

international law be enforced”.²⁶⁴ Even though this is a fundamental principle, international jurists have to keep in mind that mass atrocities grow in an environment of propaganda and indoctrination that is usually widespread and believed by many people for decades, if not centuries. International legal proceedings, if their claim of deterrence is to be a credible one, need to address that system of demonisation and fear of minorities that exists beyond the case at hand. Only if the structure behind the crimes is exposed can people really accept international justice as a healing process and a chance for a fresh start. If the system of ethnical hegemonies is not addressed properly, there is a risk that the accused as well as people belonging to the same national, ethnical, racial or religious groups will feel that they are simply subject to victor’s justice.²⁶⁵

5.2.3.2 Obstacles to the Achievement of Deterrence in Post-Conflict Situations

International proceedings face obstacles that potentially hinder the achievement of the goals set out by, *inter alia*, the Security Council’s resolutions establishing the ICTY and the ICTR.

First, the application of international criminal law is selective by nature due to the scale of the crimes on the one hand and political and financial restraints on the other. Selectivity has remained the hallmark of international criminal justice, whether applied by international judiciary bodies or domestic courts.²⁶⁶ This needs to be accepted when considering the use of international criminal law in the protection of minorities. Not all crimes committed will be brought before court and not all victims can possibly be heard by the court. Accepting this fact does however not mean that international criminal law can have no effect in the respective countries and beyond. It simply means that international tribunals in particular carry a large amount of symbolic weight. This in no way diminishes their value, as

²⁶⁴ *The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of the Soviet Socialist Republics v Hermann Wilhelm Göring et. al*, International Military Tribunal for the Trial of Major War Criminals, Nuremberg, 30 September and 1 October 1946, Judgment and Sentences, pp. 41-42.

²⁶⁵ Nyamuya Maogoto, *supra* note 231, p. 199.

²⁶⁶ Bassiouni, *supra* note 172, p. 3.

symbolic prosecution by an international institution is a highly useful tool in order to expose the truth and the system and structure behind the commission of large-scale, widespread atrocities.

On the other hand, symbolic prosecution requires a high level of sensitivity and caution when it comes to the conducting of the trials and the selection of those who will be prosecuted. The prosecution has to carefully choose the accused due to their symbolic 'value', their role in the commission of crimes and in the respective society. The competent chamber has to take the opportunity to expose and explain the roots of the conflict and structure of (ethnic) hatred inherent. The trial itself and especially the judgement delivered should not be restricted to simply measuring the individual guilt of a person, but, if there is any form of deterrence to be achieved with this exercise, also expose the "socio-cultural code embedded in the collective subconscious of the group entities" that is often the deeply rooted cause for ethnic hatred.²⁶⁷ In this respect, minority rights law is particularly well suited to describe first the rights attributable to a specific group and subsequently their denial, the structural discrimination and suppression that finally led to the outbreak of violence. Individual level punishment can only affect a permanent change if the cause of the deviant behaviour resides solely with the individual.²⁶⁸ When it comes to international crimes, it is impossible that only single individuals are responsible; rather it was the society as a whole that consumed the idea of ethnic hatred after years of indoctrination and propaganda and thereby created an environment, which provided the ground for commission of atrocities against minorities.

If these thoughts are not considered, punishment of individuals will either result in the accused feeling unjustly convicted or permit the offending society to blame individuals without shouldering any of the blame itself, as explained below.

Either it is likely that the individual accused and persons belonging to his or her national, ethnical, racial or religious group will simply feel that

²⁶⁷ Nyamuya Maogoto, *supra* note 231, p 207.

²⁶⁸ *Ibid.*, p. 202.

they ended up on the “wrong”, the losing side and are therefore subjected to victor’s justice. With this, international criminal law will not contribute to reconciliation in the respective country and much less to deterrence of crimes outside that region. It will simply consolidate the already existing structures of animosity and victimisation even further. This is a risk that international criminal tribunals should be aware of especially when dealing with highly symbolic public figures, the ‘big fish’.²⁶⁹

There is also the danger that individual trials without any bigger reference to structures and groups people will permit people to feel that the trial has nothing to do with them, that it is simply individuals that violated the rules and that punishing them will solve the problem. By that, responsibility is taken away from society and transferred to a few individuals. As the ICTR was focusing its attention on individual deviants, it was presenting the world, and the Rwandans, with the image of a person who needs correcting through punishing instead of a social system that is structurally stratified by an ethnic rift that needs reorganisation.²⁷⁰ This failure to contribute to the set goals of peace and reconciliation bears the risk of partly delegitimising the *ad hoc* tribunals in the eyes of the international community.

The second problem that international criminal tribunals face in the context of their contribution to national reconciliation is due to the nature of a judicial process, which necessarily limits the extent to which courts can address general issues. Judicial proceedings have to concentrate on the accused, and only his or her personal acts are at trial. Therefore, general considerations of the structure and system that led to the commission of the crimes can be addressed only in the context of their relevance to the specific case. This requires a high level of sensitivity and talent on part of the judges. The court has the difficult task of considering these issues while respecting the rights of the accused. The double responsibilities of the *ad hoc* tribunals to decide on individual guilt for individual acts and, at the

²⁶⁹ *Ibid.*, p. 205.

²⁷⁰ *Ibid.*, p. 202.

same time, contribute to such high, hard to grasp, ideals like national reconciliation, are hard to fulfil.

As a third problem, international courts, although they try hard to present themselves as objective institutions, are often perceived as biased and in favour of one population. The ICTY, for example is seen as an anti-Serb tribunal by large parts of the Serbian population.²⁷¹ The ICTR concentrates on the genocide carried out against the Tutsi population and, depending on cooperation with the Rwandan government in power, has not started any investigations into the crimes committed by the Tutsi-dominated Rwandan Patriotic Front (RPF, now: Rwandan Patriotic Army), even though the Prosecutor repeatedly states that such investigations could be under way.²⁷² As the ICTR's completion strategy stipulates a completion of all first-instance-trials by 2008,²⁷³ it is likely that RPF crimes will not be dealt with by the ICTR. This has not only lead to the perception of the ICTR as a biased institution by parts of the Hutu population, but NGOs have also called on the ICTR to investigate criminal acts committed by the RPF²⁷⁴ and expert witnesses accused the tribunal of one-sided justice or even refused to testify because of that reason.²⁷⁵ In these cases, the signalling effect of punishment, let alone its contribution to peace and reconciliation, is not clear: if one population views the court as biased, it might refuse to accept its judgements as confirming important social norms.²⁷⁶

²⁷¹ D. Saxon, 'Exporting Justice: Perception of the ICTY among the Serbian, Croatian, and Muslim Communities in the former Yugoslavia', 4:4, *Journal of Human Rights* 4 (2005), p. 566

²⁷² Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR to the United Nations, Security Council, 10 December 2007, available under <http://69.94.11.53/ENGLISH/speeches/jallow101207sc.htm> (last accessed 17 January 2008); Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR to the United Nations, Security Council, 15 December 2005, available under <http://69.94.11.53/ENGLISH/speeches/jallow151205.htm> (last accessed 17 January 2008).

²⁷³ United Nations Security Council Resolution 1774, UN Doc S/RES/1774, 14 September 2007.

²⁷⁴ E.g. Letter sent to the president of the UN Security Council, US Ambassador J. Negroponte, by the Executive Director of Human Rights Watch, K. Roth, 9 August 2002, available under <http://www.hrw.org/press/2002/08/rwanda-ltr0809.htm> (last visited on 17 January 2008)

²⁷⁵ Belgian historian Professor Filip Reyntjens in 2005 expressed his intentions not to collaborate with the prosecution of the ICTR anymore unless it investigates RPF crimes. However, he returned to the ICTR at the request of the defence in September 2007, <http://www.hirondellenews.com/content/view/878/26/> (last accessed 17 January 2008)

²⁷⁶ D. Wippman, 'Atrocities, Deterrence, and the Limits of International

In conclusion, it can be said that even though empirical data is lacking, deterrence deriving from international criminal proceedings is more than mere wishful thinking. If the above-mentioned obstacles and problems are kept in mind and appropriately tackled, international criminal law is likely to delegitimise those responsible for crime in the eyes of their people and contribute to post-conflict reconciliation. It is important to mention again that, in order to achieve this, international criminal courts and tribunals need to address the structural discrimination inherent in mass-scale crimes against minorities. Minority rights are an excellent tool to describe the causes and patterns of denial of rights that lead to a conflict. As public international law, international human rights law and international criminal law are complementary to each other, developments and findings in one field can and much affect development in the other fields.²⁷⁷ However, due to the nature of judicial proceedings and its limits, it must be clear that judicial systems alone cannot reverse the values of a culture that allowed mass atrocities against minorities to happen. It is a development that requires much time and effort and must be conducted not only from courtrooms, but also through governmental and non-governmental actions and other forms of accountability, such as peace and reconciliation commissions.

5.2.4 Judicial Systems as a Method of Creating Global Deterrent Effects

One of the central assertions of international criminal law is that the deterrent effect is not restricted to the affected countries, but evolves globally and prevents potential criminals from committing crimes all over the world. One can see this for example in the preambles of the *ad hoc* tribunals, which show that the Security Council is “determined to put an end to such crime”²⁷⁸ and that the Council believes that the establishment of the tribunals will “contribute to ensuring that such violations are halted and effectively redressed.”²⁷⁹ This is a claim crucial to minority protection worldwide. If it is able to being substantiated, the existing *ad hoc* tribunals

Justice’, 23 *Fordham International Law Journal* (1999), p. 486.

²⁷⁷ Kittichaisaree, *supra* note 132, p 56.

²⁷⁸ UN Doc. S/RES/808, *supra* note 237 and UN Doc S/RES/955, *supra* note 240.

²⁷⁹ UN Doc S/RES/955, *supra* note 240.

and their jurisdiction regarding crimes committed against minorities could actively protect minorities at risk in many countries around the world.

However, this claim is even harder to prove than in the context of conflict or post-conflict countries. The fact that some individuals continue to commit crime does not in any way disprove the possibility that others, who remain unknown, have been deterred.²⁸⁰ The *potential* offender remain anonymous and unknown if he or she decides to act according to legal rules and not to violate them.

Bearing in mind these difficulties, some general remarks can nevertheless be made regarding the way international criminal prosecution and punishment must be carried out in order make a certain level of deterrence more likely.

Criminal law sets out a code of human behaviour in a society that tries to discipline and prevent unwanted actions by stating: “Do not assault other people, or else....”.²⁸¹ Unlike most civil disputes, criminal acts are not merely seen as a private, but as a public matter because criminal acts are seen as direct and serious threats to the well-being of society.²⁸² These unwanted acts can only be deterred if there is a credible, effective and fair legal system that guarantees the prosecution and punishment of those who disobey the rules set out for societal behaviour and also succeeds to undertake its educational function. In the relatively young discipline of international criminal law, its implementation is often dependent on political consideration. In this arena, it is not enough to assume that violations will cease after the establishment of an international criminal court thanks to the deterrent effect such a court has.²⁸³ Quite the opposite, this “judicial romanticism in which we imagine that merely by creating entities we call ‘courts’ we have prevented or solved major problems”²⁸⁴ can turn out to be a treacherous fallacy. Deterrence of anonymous and potential violators can

²⁸⁰ Schabas, *supra* note 52, p. 23.

²⁸¹ Simester/Sullivan, *supra* note 231, p. 3.

²⁸² See e.g. C. Allen, *Legal Duties and Other Essays in Jurisprudence* (Oxford: Oxford University Press 1931), p.233-4

²⁸³ Gallón, *supra* note 248, p. 97

²⁸⁴ M. Reisman, *supra* note 237, p.75.

be “a dangerous illusion with painful consequences.”²⁸⁵ It needs to be accompanied by effective accountability of the known violators;²⁸⁶ otherwise it can be nothing more than a hollow promise. In order to set out the minimum conditions under which any kind of deterrence can be achieved, the international legal system must guarantee an effective prosecution of the ones responsible for crimes under international law and avoid justice being “bartered away for political settlements” which gives rise to factual impunity.²⁸⁷

The task of international criminal law in terms of deterrence is therefore to create a credible system of international prosecution of the most heinous crimes. In such a context, international criminal proceedings have both conscious and unconscious effects.²⁸⁸

First, as examined in chapter 2, in many cases, leaders involved in large-scale crimes engage in some form of cost-benefit calculation. Where the benefit of committing such crimes, for example economic advantages or gain outweigh the risks, the crime is more likely to be committed.²⁸⁹ In the context of minority protection this is of particular importance as minorities are often militarily inferior to the entity that persecutes them.²⁹⁰ Here, the (credible) threat of punishment can increase the cost of a policy that is criminal under international law.²⁹¹

Second, international tribunals can outlaw the commission of crimes under international law in a way that these action will not present themselves as a real alternative to conformity, even in situation where the potential criminal would run no risk whatsoever of being caught.²⁹² Without effective and insistent stigmatisation of illegal actions, a political climate is created in which crimes like extermination, deportation and wanton destruction lie within the range of options available to leaders.²⁹³

²⁸⁵ Gallón, *supra* note 248, p. 97.

²⁸⁶ *Ibid.*

²⁸⁷ Bassiouni, *supra* note 172, p. 7.

²⁸⁸ Akhavan, *supra* note 245, p. 12.

²⁸⁹ Chirof/McCauley, *supra* note 25, p. 20-5

²⁹⁰ Chirof/McCauley, *supra* note 25, p. 23.

²⁹¹ Akhavan, *supra* note 245, p.12.

²⁹² Akhavan, *supra* note 245, p. 13.

²⁹³ *Ibid.*

In stigmatising such behaviour, international criminal law also contributes to raising awareness about the illegality of a certain action. Even though one might think that considering the scale of crimes under international law, individuals should be aware of the fact that for example extermination, forced disappearance, torture or deportation are all illegal, in extreme situations a society might invoke national emergency or the need to restore order to justify actions that would otherwise be clearly punishable acts.²⁹⁴ This is again a point to whose emphasis minority rights law could contribute. The rationale underlying the adoption of the major minority rights instruments, the individual rights set out, the findings of scholar and practitioners in this field: all these experiences could be used in order to stress why violence against minorities is illegal under any circumstance.

A permanent institution like the International Criminal Court may help to spread the word that certain actions cannot be justified by special circumstances and that these circumstances cannot be invoked as a defence by a person committing a crime. For this reason, as mentioned above, symbolic punishment can contribute to the protection of minorities. Speaking with P. Akhavan, “it is not necessary (...) to punish a large number of perpetrators to achieve deterrence.”²⁹⁵ Rather, “[t]he punishment of particular individuals-whether star villains such as Karadžić or Mladić or ordinary perpetrators such as Tadić or Erdemović- becomes an instrument through which respect for the rule of law is instilled into popular consciousness”.²⁹⁶

Summarising the above, international legal proceedings are, despite their selective application, likely to add to general deterrence of crimes against minorities if conducted in an effective and credible manner. They can increase the risks associated with criminal conduct for those in power and contribute to the stigmatisation of such behaviour in the general public. Minority rights law can thereby serve as a means to illustrate a pluralistic society and to establish the illegality of violence against a specific group in the collective memory. Even though deterrence is hard to measure, it is clear

²⁹⁴ Roht-Arriaza, *supra* note 232, p. 14.

²⁹⁵ Akhavan, *supra* note 233, p. 747.

²⁹⁶ *Ibid.*, p. 749.

that its degree depends in large part on the acceptance and visibility of the implementation of international criminal law. This makes it harder for the existing *ad hoc* tribunals to contribute to general deterrence, as their establishment was tailored to a specific situation and their setup depended much on external factors such as politics and finances.²⁹⁷

The International Criminal Court, however, has the potential to serve as a more effective example of international justice. Its permanent establishment symbolises the international community's commitment to punish international crimes and fight the culture of impunity.²⁹⁸

However, one must acknowledge that the speed in which the ICC is currently conducting its investigations is discouraging. To mention two examples, the Government of Uganda decided in December 2003 to refer the situation concerning the Lord's Resistance Army to the ICC.²⁹⁹ The prosecutor, Mr. Luis Moreno-Ocampo, did not decide to open investigations until July 2004.³⁰⁰ The first arrest warrants were not issued until July 2005.³⁰¹ Additionally, the case of Darfur has been referred to the ICC by the Security Council in March 2005,³⁰² but arrest warrants were not been issued until more than two years later, on 1 May 2007.³⁰³ Even though this might be due to a tight budget on the one hand and also organisational and administrative problems that this new institution faces temporarily, this is a serious obstacle to credibility and the effectiveness of the prosecution that can be a threat to minorities, as a deterrent effect, in such a situation, might be rather weak.

²⁹⁷ L. Sunga, *supra* note 45, p.268.

²⁹⁸ *Ibid.*

²⁹⁹ http://www.icc-cpi.int/pressrelease_details?id=16&l=en.html.

³⁰⁰ http://www.icc-cpi.int/pressrelease_details?id=33&l=en.html

³⁰¹ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, 8 July 2005, ICC, No. ICC-02/04, Warrants of Arrest for Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen., Doc. Nos. ICC-02/04-01/05-53, ICC-02/04-01/05-54, ICC-02/04-01/05-55, ICC-02/04-01/05-56, ICC-02/04-01/05-57.

³⁰² United Nations, Security Council Resolution 1593, U.N Doc. S/RES/1593 (2005), 31 March 2005.

³⁰³ *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, 27 April 2007, ICC, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Muhammad Harun ("Ahmad Harun"), Doc. No. ICC-02-/05-01/07-2; Warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Doc. No. ICC-02-/05-01/07-3.

6 ANALYSIS OF THE ICTY AND THE ICTR JURISPRUDENCE REGARDING THEIR USE OF MINORITY RIGHTS

This section will examine whether the existing international *ad hoc* tribunals address the role of issues concerning minorities in international criminal jurisdiction.

As already established, judicial systems and the way they deal with historic injustice play a vital role in the protection of minorities.³⁰⁴ Minorities, apart from having the political, linguistic, religious and cultural rights given to them by international instruments, have the right to existence and the right to equality (prohibition of discrimination).³⁰⁵ Hence, acts of genocide, crimes against humanity and war crimes are the ultimate infringement of the rights of minorities and usually the result of years of discrimination and denial of rights by the majority population.³⁰⁶ On the other hand, granting, implementing and protecting minority rights in the traditional sense are a key element of prevention of such crimes.³⁰⁷ Taken together, minority rights- their protection and their infringement - are likely to play a role in the decision-making of both the ICTY and the ICTR.

Therefore, this chapter analyses the importance that the ICTY and the ICTR give to deterrence as a means of preventing future crimes and then examines how the tribunals intend to contribute to that goal, taking into account the importance of addressing the rights of minorities and their violation in the prevention of future crimes. Due to the limitation of this study, it is not possible to examine all ICTY and ICTR judgements. Rather, this chapter provides an overview of the general approach and awareness of the two *ad hoc* tribunals regarding minority rights and issues that are involved in the overall commission of the respective crimes.

³⁰⁴ See Chapter 5.1.

³⁰⁵ See Chapter 3.

³⁰⁶ See Chapter 4.

³⁰⁷ See Chapter 5.2.

6.1 The ICTY and the ICTR: Their Stance on Deterrence

As the *ad hoc* tribunals' views on deterrence differ slightly from each other, the ICTY's and the ICTR's case law will be analysed separately.

6.1.1 ICTY: Deterrence as a guiding objective with undue prominence

The ICTY has a strong stance on deterrence as one of the guiding principles of sentencing. It does, however, acknowledge that deterrence only plays a secondary role after individual culpability, which is the main factor for the tribunal in its decision making process.

The ICTY's strong position regarding deterrence is apparent from the very beginning of its establishment. Antonio Cassese, the first president of the tribunal, made it clear that the main purpose of the tribunal would be a deterrent one, preventing feelings of hatred and resentment that could lead to the outbreak of new violence.³⁰⁸

The court has seen deterrence as a guiding principle of its sentencing policy, independent from considerations made on behalf of the Security Council on that matter. In *Kunara, c et. al.*, the tribunal states that Security Council resolutions dealing with the situation in the former Yugoslavia and the establishment of an international criminal tribunal cannot be used for guidance as to what the general sentencing factors of the tribunal should be. In fact, the sections of the resolution in question should be understood against the background that the Security Council needed to justify the establishment of the tribunal and the prosecution of individuals as a measure under Chapter VII of the UN Charter.³⁰⁹ Rather than turning to Security Council resolutions, the trial and appeal chambers repetitively use

³⁰⁸ A. Cassese, *Annual Report of the ICTY*, UN Doc A/49/342-S/1994/1007, 29 August 1994, para 15 in ICTY Yearbook 1994 at 86-87.

³⁰⁹ *Prosecutor v. Dragoljub Kunarac et al.*, 22 February 2001; ICTY Case No. IT-96-23-T&IT-96-23/1-T, para. 842

deterrence as a main function of criminal law under legal theory amongst retribution and rehabilitation.³¹⁰ In *Furundžija* the Trial Chamber states:

“It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity. It is not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but also *punitur ne peccatur* (he must be punished so that he and others will no longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence.”³¹¹

Where crimes under the Rome Statute are concerned, special deterrence does not play a major role in sentencing, because the chance that the convicted person(s) would ever again be faced with an opportunity to commit crimes under international law is so remote that a consideration of special deterrence would be unreasonable and unfair.³¹² However, general deterrence has been referred to as “probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law”.³¹³ Nevertheless, the court also stresses on several occasions that even though it may legitimately be considered in sentencing, the principle of deterrence should not be given “undue prominence in the overall assessment of the sentences to be imposed”³¹⁴ because a sentence should in principle be imposed for culpable conduct and not “solely in the belief that it will deter others”.³¹⁵

³¹⁰ E.g. *Prosecutor v. Zlatko Aleksovski*, 24 March 2000, ICTY Case No. IT-95-14/1-A, Appeals Chamber Judgment, para. 185; *Prosecutor v. Zejnil Delalic et al.*, 20 February 2001 ICTY Case No. IT-96-21-A, Appeals Chamber Judgment, para. 806; *Prosecutor v. Stevan Todorović*, 31 July 2001, ICTY Case No. IT-95-9/1-S, paras 28-30; *Prosecutor v. Milorad Krnojelac*, 15 March 2002, ICTY Case No. IT-97-25-T, para. 508.

³¹¹ *Prosecutor v. Anton Furundžija*, 10 December 1998, ICTY Case No.: IT-95-17/1-T, para. 288.

³¹² *Prosecutor v. Dragoljub Kunarac et al.*, supra note 309, para. 840.

³¹³ *Prosecutor v. Zejnil Delalic*, supra note 310, para. 799; *Prosecutor v. Anton Furundžija*, supra note 311, para. 288; see also *Prosecutor v. Drazan Erdemovic*, 29 November 1996, ICTY Case No. IT-96-22-T, para. 64 and , *Prosecutor v. Enver Hadžihasanović and Amir Kubura* 29 November 1996, ICTY Case No. IT-96-22-T, para 64:

...the Trial Chamber deems most important the concepts of deterrence and retribution.”

³¹⁴ *Prosecutor v. Duško Tadić*, 20 January 2000, ICYT Case No. IT-94-1-A and IT-94-1-A bis, Judgment in Sentencing Appeals, para. 48; see also *Prosecutor v. Dragoljub Kuranac et al.*, supra note 309, para. 839; *Prosecutor v Mitar Vasiljević*, 29 November 2002, ICTY Case No. IT-98-32-T, para 665.

³¹⁵ *Prosecutor v. Dragoljub Kunarac et al* supra note 309, para. 840.

6.1.2 ICTR: Detering Forever Others Tempted to Commit Atrocities

In comparison to the ICTY, the ICTR has given even more observation to the principle of general deterrence and did not restrict it through the exclusion of undue prominence. Throughout its existence, the ICTR has repetitively stated that the imposing of sentences aims at deterrence, retribution and rehabilitation.³¹⁶ Other principle aims of sentencing include reconciliation and justice,³¹⁷ as well as stigmatization, public reprobation³¹⁸ and the protection of society.³¹⁹

The principle of protection of society as an aim of sentencing seems relevant to the protection of minorities. However, the court does not explain in the relevant cases how it defines that term or how the protection is to be achieved. It can be presumed that the protection of society is meant to be achieved through one of the other, more specific aims that underlie the tribunal's work, mainly through the principle of deterrence.

The principle of general deterrence is considered of utmost importance to the court.³²⁰ When dealing with deterrence as a guiding principle, the tribunal often shifts away from the language of legal analysis it usually uses. It is obvious that the court considers the deterrence of future crimes to be its primary function when it states that the penalties imposed must be directed “at deterrence, namely to dissuade *for ever* others who may be tempted in the future to perpetrate such atrocities by showing them that the

³¹⁶ *Prosecutor vs. Clément Kayishema and Obed Ruzindana*, supra note 138, para. 2; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana* Case No. 21 February 2003, Case No. ICTR-1996-10 & ICTR-1996-17-T, paras 882 and 887; *Prosecutor v. Eliezer Niyitegeka*, 16 May 2003, ICTR-96-14-T, para 484; *Prosecutor v. Alfred Musema*, 27 January 2000, Case No-ICTR-93-13-T, para. 986; *Prosecutor v. Jean Kambanda* 4 September 1998, Case No. ICTR-97-23-S, para. 28; *Prosecutor v. Aloys Simba*, 13 December 2004, Case No. ICTR-01-76-T, para 429; *Prosecutor v. Georges Ruggiu*, 1 June 2000, ICTR-97-32-I, para. 33; *Prosecutor v. Joseph Serugendo*, 12 June 2006, Case No. ICTR-2005-84-I, para. 33; *Prosecutor v. Juvénal Rugambarara* 16 November 2007, Case No. ICTR-00-59-T, para 11.

³¹⁷ *Prosecutor v. Georges Ruggiu*, supra note 316.

³¹⁸ *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, supra note 316, para. 882..

³¹⁹ *Prosecutor v. Clément Kayishema and Obed Ruzindana*, supra note 138, para 2; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, supra note 316, para 882.

³²⁰ *Prosecutor v. Eliezer Niyitegeka*, supra note 316, para 484; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, supra note 316; para 882.

international community will not tolerate serious violations of international humanitarian law and human rights.”[*Emphasis added*]³²¹ The court uses a similar choice of words is used in several other judgements, for example in the *Kambanda* case, where it states:

“...it is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on other hand, at deterrence, namely dissuading for good those who will attempt in future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights.”³²²

6.2 Practising Deterrence: The *Ad Hoc* Tribunals and Their Use of Minority Rights - Illustrative Case Studies

The previous section showed that both *ad hoc* tribunals place a great weight on the principle of deterrence when deciding on a sentence. As examined in chapter 5.2, in order to achieve general deterrence, judicial systems must expose the wider system of structural discrimination and violence for which the use of international human rights law in general and minority rights law in particular would be particularly suitable. For that reason, this section will analyse the cornerstone minority rights cases of both tribunals and outline some of the general developments that are likely to benefit minorities in the future.

6.2.1 General Remarks on the *ad hoc* Tribunals’ Contribution to the Protection of Minorities

The establishment of the ICTY and the ICTR were the international community’s first attempts to judge crimes under international law after World War II. The case law of the two *ad hoc* tribunals has without doubt contributed immensely to the evolution and practical application of

³²¹ *Prosecutor v. Alfred Musema*, *supra* note 316, para. 986

³²² *Prosecutor v. Jean Kambanda*, *supra* note 316, para. 28

international criminal law. As international criminal law is, in general and specifically regarding the crimes in the former Yugoslavia and Rwanda, often concerned with crimes against minorities, minorities are the prime beneficiaries of the tribunals' work. The crime of genocide, in particular, has not been subject of an international court ever before, meaning that the decisions of the tribunals are groundbreaking developments in the protection of minorities. The crimes in question were mostly committed against minorities, and in this respect, the institutionalisation of international criminal law enforcement does indeed constitute an important form of minority rights protection.³²³ In particular, the understanding of the crimes contained in the Rome Statute benefited vastly from the elaboration on the respective crimes tried in The Hague and Arusha.

In the following two subsections, two of the most important judgments in this respect, the ICTR judgment on *Prosecutor v. Jean-Paul Akayesu* (hereinafter: the *Akayesu* Case) and the ICTY's judgment *Prosecutor v. Radislac Krstić* (hereinafter: the *Krstić* Case) will exemplarily be examined.

6.2.1.1 *Prosecutor v. Jean-Paul Akayesu*

The *Akayesu* case was one of the first judgements delivered by the newly established ICTR.³²⁴ Therefore it elaborates in detail about the roots of the Rwandan genocide and the relationship between the Hutu majority and the Tutsi minority. It is considered a very important precedent not only for the tribunal itself but also for the development of international criminal law whose importance clearly surpasses the case at hand.³²⁵

It contains several issues that improve the protection of minorities under international criminal law, even though the trial chamber that delivered the judgement does not mention minorities explicitly. The chamber first has the difficult task of assessing whether the events that took place in Rwanda in 1994 actually qualified as genocide. As evidence for an existing plans to eliminate the Tutsi minority, the court considers several things: the usage of

³²³ Sunga, *supra* note 45, p. 255.

³²⁴ *Prosecutor v. Jean-Paul Akayesu*, *supra* note 113.

³²⁵ E. Fronza in A. Klip/G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals- The International Criminal Tribunal for Rwanda 2001-2002, Volume 10* (Intersentia Antwerp/Oxford 2006), p. 481.

ethnic identity cards, which were checked at roadblocks;³²⁶ the often-quoted claim by the political leaders and *Interahamwe* militia that the Tutsi minority must be wiped out of Rwanda so that their children would not know what a Tutsi looked;³²⁷ the practise of killing pregnant women, even Hutu women, when the father was a Tutsi, as in a patrilineal society like Rwanda, the child is of the father's ethnic origin;³²⁸ the use of radio and newspaper as instruments of propaganda;³²⁹ and the fact that Tutsi victims were deliberately thrown into the Nyabarongo River, which flows towards the Nile in order to return them to where they supposedly came from. These acts are seen as signs of extremist forces wanting to 'clean' the country from groups they looked upon as foreign and alien to their culture.³³⁰ The court also examines the mentioning of 'Tutsi' as enemies in official military document.³³¹ Consequently, the court states that the victims were not chosen on an individual basis, but solely because of their membership to a particular ethnic group and that genocide had therefore been committed in Rwanda.³³²

The Tribunal emphasises that the perpetration of the act of genocide extends beyond its actual commission, meaning that for example the killing of an individual is committed with the ulterior motive of destroying a group of which an individual is only one element.³³³ First and foremost targeted is the group as such and not the single individual.

In particular, the court determines for the first time in international criminal law that genocide can be committed through rape and other forms of sexual violence that are not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact because of both its physical and its mental implications.³³⁴ As long as sexual violence is perpetrated with the specific genocidal intent,

³²⁶ *Prosecutor v Jean-Paul Akayesu*, *supra* note 113, paras. 116, 123.

³²⁷ *Ibid.* para. 118

³²⁸ *Ibid.* para. 121, 159.

³²⁹ *Ibid.* para 123.

³³⁰ *Ibid.* para 100, 168.

³³¹ *Ibid.* para. 123.

³³² *Ibid.* para. 124 ff.

³³³ *Ibid.* para 522.

³³⁴ *Ibid.* para. 688.

it constitutes infliction of serious bodily or mental harm (Article 2(2)(b) of the ICTR Statute)³³⁵ or imposing measures intended to prevent births within the (Article 2(2)(d) of the Statute).³³⁶ This means that rape is considered genocide not only when it is used as an instrument to impregnated women with children of a different ethnicity, but also when rape is conducted in the expectation that women of a specific ethnicity will later refuse to procreate due to threats or trauma.³³⁷ The court sees sexual violence as an integral part of systematic physical and psychological destruction of Tutsi women, their families and their communities. With this decision, the ICTR paves the road for a more flexible approach on sexual violence that is reflected in the Rome Statute and acknowledged the use of sexual violence in genocides as a means to systematically destroying a group.

Another important statement of the court concerns the crime of incitement to genocide. The responsible chamber states that in fulfilling the requirement of being ‘direct’, the incitement can nevertheless be implicit, as long as the audience, to which the incitement is aimed, understands the genocidal message in its own cultural setting.³³⁸ This ruling lowers the threshold for incitement to genocide and contributes to the clarification and definition of what the crime constitutes of.

The ICTR’s method of proving that genocide took place in Rwanda and the innovations it made, particularly with regard to sexual violence, can serve as examples in other situations. Not only has the ICTY repetitively referred to the ICTR’s observations in its own holdings, the general public, NGO’s and the media often refer to the events in Rwanda and to the work of the ICTR to qualify the mistreatment of a specific minority as genocide.³³⁹ Even though these observations may often be inaccurate or overstated, it seems that the ICTR is partly responsible for raising awareness and educating the public about requirements and indications of genocide.

³³⁵ *Ibid.* para. 731.

³³⁶ *Ibid.* para. 507-8.

³³⁷ *Ibid.* para 508.

³³⁸ *Ibid.* para 557f.

³³⁹ See e.g. Prosecutor v. Radislav Krstić, supra note 84, paras. 508 et.seq.; 552, 582; Prosecutor v. .Vidoje Blagojević and Dragan Jokić, 17 January 2005, Case No. IT-02-60-T, fn. 2052 re para. 638.

6.2.1.2 *Prosecutor v. Radislav Krstić*

The *Krstić* Case is one of the rare examples where an *ad hoc* tribunal explicitly refers to instruments available under minority rights law in order to establish the groups protected by the prohibition of genocide. It was the first judgment in which the ICTY held that the events that happened in Srebrenica constituted genocide.³⁴⁰ The decision was later upheld on appeal³⁴¹ and in the *Bosnian Genocide Case* of the ICJ.³⁴² In order to establish the state of customary international law on genocide at the time of the events in Srebrenica took place, the ICTY refers to the Genocide Convention, the Rome Statute and the ICTR case law, as well as to the Report of the International Law Commission (ILC) on the Draft Code of Crimes against Peace and Security of Mankind³⁴³ and the reports of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights.³⁴⁴

First, the trial chamber establishes the *actus rea* of genocide, i.e. murder and serious bodily and mental harm had occurred. Then, the chamber turns to whether the *mens rea* existed in the actors, meaning whether they had the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. In order to define groups protected by the Genocide Convention, the court refers to minority rights law by establishing that the preparatory work conducted on the Convention and the work of the

³⁴⁰ *Prosecutor v. Radislav Krstić*, *supra* note 84, paras. 539-599.

³⁴¹ *Prosecutor v. Radislav Krstić*, 19 April 2004 ICTY Case No. IT-98-33, Appeals Chamber Judgment.

³⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, I.C.J. 140 paras. 231-376.

³⁴³ Commentary on the ILC Draft Code of Crimes against the Peace and Security of Mankind, *Report of the International Law Commission on the work of its 48th session, 6 May - 26 July 1996*, Official Documents of the United Nations General Assembly's 51st session, Supplement no. 10 (A/51/10), ILC Draft Code, in particular, pp. 106-114

³⁴⁴ Nicodème Ruhashyankiko, *Study on the Question of the Prevention and Punishment of the Crime of Genocide*, United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/416, 4 July 1978; Benjamin Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1985/6, 2 July 1985.

international bodies in relation to the protection of minorities “partially overlap and are on occasion synonymous”.³⁴⁵ The chamber states that even though the European human rights instruments use the term ‘national minorities’ while universal documents more commonly refer to ‘ethnic, religious or linguistic minorities,’ the two expressions appear to embrace the same goals.³⁴⁶ Furthermore, it establishes that

“[t]he preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as “national minorities”, rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.”³⁴⁷

The chamber further holds that Bosnian Muslims are a protected group under the Genocide Convention and that such a group cannot be limited to the Bosnian Muslim population in a specific geographical area.³⁴⁸ However, the court acknowledges that the destruction may target only a part of the geographically limited part of the larger group because the perpetrators regard the intended destruction as sufficient to annihilate the group as a distinct entity in the respective geographic area.³⁴⁹

Regarding the specific *dolus specialis*, the special intent, the court encompasses only acts committed with the goals to destroy a protected group in whole or in part, even though that goal does not have to be present from the beginning of the operation onwards, as long as the specific intent is present at the time the crime is committed.³⁵⁰ Furthermore, the court points out that genocide, as opposed to persecution as a crime against humanity, does require the intent to physically destroy a group and not merely eradicate its culture and identity as a distinct social entity.³⁵¹ It is however

³⁴⁵ *Prosecutor v. Radislav Krstić*, supra note 84, para. 555.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*, para. 556.

³⁴⁸ *Ibid.* 559-60

³⁴⁹ *Ibid.*, para. 590.

³⁵⁰ *Ibid.* para 571.

³⁵¹ *Ibid.*, para. 574 et. seq

acknowledged by the tribunal that a physical or biological attack on a protected group is often accompanied by simultaneous attacks on cultural or religious property and symbols and the intent to deliberately destroy a minority's identity can therefore serve as evidence for the intent to physically destroy the group.³⁵²

The *Krstić* Judgment is exceptional in several ways: apart from the explicit reference to minority rights law in order to establish protected groups under international criminal law, the court touches on the concept of group identity and the eradication thereof in the context of both persecution and genocide. The notion that the attack of a minority group's identity can serve as evidence of intent to physically eliminate them shows the connection between the neglect of minority rights and the outbreak of violence against minorities. It also demonstrates how much a broad understanding of both concepts can positively affect the development of each of the two branches of international law.

6.2.2 The *Ad Hoc* Tribunals and their Use of International Human Rights Law as Interpretational Guidance

6.2.2.1 The Definition of Persecution

The need for using minority rights for guidance in interpretation is especially obvious when it comes to the ICTY. From the time of its establishment, the tribunal's assignment was to punish large-scale violations of international humanitarian law in the territory of the former Yugoslavia.³⁵³ As the first international criminal tribunal since the end of World War II, the ICTY had to face a variety of problems regarding the doctrine of *nullum crimen sine lege*.

This is especially problematic when it comes to crimes against humanity, which, unlike genocide and war crimes, were not the subject of an international treaty before the establishment of the *ad hoc* tribunals. In

³⁵² *Ibid.* para. 580.

³⁵³ United Nations Security Council Resolution 808, Article 1, *supra* note 238; United Nations Security Council Resolution 827, Article 2 UN Doc. S/RES/827, 25 May 1993.

order to respect the principle of legality, the ICTY (and later the ICTR) repetitively looked at existing international human rights instruments to define certain crimes. As international *ad hoc* tribunals were established to punish large-scale violations of international humanitarian law (Article 1 ICTY Statute, Article 1 ICTR Statute), they cannot directly use the instruments available under general human rights law to declare certain behaviour criminal and punish the offender.³⁵⁴ Nevertheless, the tribunals can draw guidance from accepted human rights standards if appropriate and have in fact done so on several occasions. In the case of the permanent ICC, some of the conducts enshrined as crimes in the Rome Statute, such as forced disappearance and the crime of apartheid, were previously proscribed only under international human rights law.³⁵⁵

The case law of the ICTY and ICTR is replete with reference to jurisprudence of international judicial bodies applying international human rights law.³⁵⁶ The Convention against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment³⁵⁷ has for example been used for “interpretational aid”³⁵⁸ by both the ICTY and the ICTR.³⁵⁹

For other crimes, such as the crime of persecution, the tribunals were unable to look at a prior definition. Even though persecution on political, racial or religious grounds was listed as a crime against humanity in Article 6 (c) of the Nuremberg Charter, it was not clearly defined in international criminal law or in the world’s major criminal justice systems.³⁶⁰ It was also not defined in any statute or treaty prior to the adoption of the Rome Statute

³⁵⁴ Kittichaisaree, *supra* note 132, p.56

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

³⁵⁷ *United Nations Convention against Torture and Other Cruel, Inhumane and Degrading Treatment and Punishment* G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], adopted 10 December 1984, entered into force 26 June 1987 (1984), 1465 UNTS 85.

³⁵⁸ *Prosecutor v. Dragoljub Kunarac et al.* *supra* note 309, para. 482.

³⁵⁹ E.g. *Prosecutor v. Zejnil Delalic et al.*, *supra* note 310, para. 459; *Prosecutor v. Jean-Paul Akayesu*, *supra* note 113 para. 594; See also S. Sivakumaran, ‘Torture in International Human Rights and International Humanitarian Law: The Actor and the *Ad hoc* Tribunals,’ 18 *Leiden Journal of International Law* (2005), pp. 541-556, p. 541.

³⁶⁰ *Prosecutor v. Duško Tadić*, *supra* note 138, para. 494; M. C. Bassiouni, *supra* note 156, p. 318.

in 1998.³⁶¹ The respective trial chamber in the *Tadić* Case could therefore not draw guidance from international criminal law instruments when establishing the content of the crime of persecution. It finds that the commission of the crime must involve discrimination on racial, religious or political grounds that is intended to infringe an individual's basic or fundamental human rights.³⁶² At least when it comes to discrimination on racial or religious grounds, the prohibition of such forms of discrimination is set out clearly by the international instruments governing the rights of minorities. Furthermore, discrimination on these grounds with the intent to infringe an individual's fundamental human rights is, both generally and specifically in the context of the former Yugoslavia, a violation of the rights of minorities. However, in the *Kupreškić* Case, the responsible trial chamber does not take the opportunity to make use of the instruments available under minority rights law. The chamber emphasises that in order to define the crime of persecution, it cannot relate to the definition of persecution under human rights or refugee law, as the court deems this to be a violation of the principle of legality.³⁶³ The chamber concentrates on the definition of persecution set out in refugee law and concludes that it is based more on the perception and fear of being prosecuted than on factual and legal findings.

Despite this fact, the tribunal does not mention the instruments of minority protection that are closely connected to the concepts of persecution and non-discrimination and that could have been helpful for guidance in this matter. In particular, an instrument like the ICCPR, which has been ratified by 160 states, would have had considerable authority. It is unfortunate that the ICTY, established to contribute to peace and reconciliation in a conflict that centred largely on minority issues, missed the opportunity to show the interdependence between the crime of persecution and the protection of minorities.

³⁶¹ M. Boot, *Genocide, Crimes Against Humanity, War Crimes-Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia Publishers, Antwerp/Oxford/New York, 2002), p. 284f.

³⁶² *Ibid.* p. 285; *Prosecutor v. Duško Tadić*, *supra* note 138, paras. 695-697; 712-713.

³⁶³ *Prosecutor v. Zoran Kupreškić et. al.*, 14 January 2000, ICTY Case No. IT-95-16, para. 589.

6.2.2.2 The Definition of a Stigmatised Group within the Crime of Persecution

Another obvious example of the ICTY's reluctance to refer to international minority rights law lies in the definition of a protected group within the crime of persecution. Whereas the ICTY, as previously examined, refers to minority rights law when discussing the crime of genocide, it fails to do so when defining a group subjected to persecution. The respective chambers of the ICTY have repetitively used the criterion of stigmatisation instead. In *Prosecutor v. Dragan Nikolić*, for example, the court refers to discriminatory measures directed solely towards the Muslim population like the requirement of laissez-passers, the restriction of accounts towards person of Muslim faith, the requirement to hand in weapons, summary arrests, detention, torture and massive transfer of civilians that incorporated a greater policy of ethnic cleansing.³⁶⁴

Even though the court uses terms and principles of minority rights law, it does so without directly referring to the law, its instruments, and the scholarly work and findings. With this, the decisions lose legal weight and the court misses out on an opportunity to make use of an area of law closely interlinked with international criminal law. In the *Jesilić* Decision, for example, the court uses the term 'national, ethnical and racial groups' to established persecuted groups; however, this does not coincide with the use of the respective minority rights instruments or scholarly works in this area to give more weight to their interpretation.³⁶⁵ Although it is obvious that the concepts used by the court are crucial i.e. the identification by others and the self-identification within the group, these conceptions are also considered in minority rights law and a discussion of these concepts would have increased the authority of the delivered judgment.

³⁶⁴ *Prosecutor v. Dragan Nikolić*, 20 October 1995, ICTY Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 Decision of Trial Chamber I, ("the *Nikolic* Decision"), para. 27.

³⁶⁵ *Prosecutor v. Goran Jesilić*, 14 December 1999, ICTY Case No. IT-95-10, para. 70 et. seq.

2.4 An Attempt to Explain the Tribunals' Reluctance Regarding the Matter of Minority Rights

Examining the illustrative case law, it occurs that the concept of minority rights, their importance to stopping the outbreak of conflicts and the commission of crimes, and their potential in terms of national reconciliation still do not play a prominent role in the decisions of the ICTY and the ICTR.

As the method used in this study is limited to traditional legal method and analysis of the case law, one can only speculate about the reasons for the tribunal's caution when referring to minority rights. Given that the tribunals frequently refer to other areas of international human rights law as interpretational aids, the caution in this respect can only partly be explained by general observations as to the non-applicability of human rights standards under their statutes.

One reason might be a certain degree of suspicion of the concept of minority rights protection. The courts' jurisdiction is built on individual responsibility, so it makes sense to be suspicious about everything connected to group or collective rights, because it has the potential to expose the court to criticism.

This is intertwined with a second hypothetical reason, namely that the judges, educated in domestic and international criminal law, simply do not feel competent to talk about minority rights. This could be due a lack of knowledge and education in general human rights law as compared to their field of expertise, international criminal law.

However, this explanation is not suitable to describe fully why the tribunals refer to other parts of international human rights law, like the prohibition of torture, but they stay rather silent when it comes to minority rights. One reason for this silence is probably to be found in the long-term reluctance even within the field of international human rights law to integrate the issue of minority rights. As they have remained low on the agenda of international human rights law itself, it is easier for people outside

of the ‘international human rights bubble’ to ignore this branch of international human rights law.

Another possible explanation for the specific reluctance in the matter of minority rights as compared to other areas of international rights law could be that minority issues are generally less prominent in national criminal legal systems than, for example, subjects such as the prohibition of torture. Whereas torture is a crime under most national criminal legal systems, minority issues amount to criminal prosecutions on a domestic level less often. There are nonetheless elements regarding minorities in many areas ‘traditionally’ dealt with by criminal law, such as the prohibition of incitement to national, racial or religious hatred or the prohibition of hate crime. These provisions could be invoked for guidance by judges on the international level.

In conclusion, the reluctance of the tribunals towards minority rights and their implication for international criminal law seems to primarily result from a lack of knowledge about the concept itself and the contribution that minority rights can bring for the development of international criminal law. In this context, the importance that the tribunals award to the principle of deterrence could be used to raise awareness of the interdependence of the fields of international criminal and minority rights law. Even though the tribunal mentions deterrence repetitively as a crucial underlying principle, it does not explain how the sentencing of the specific person is supposed to contribute to the overall goal of general deterrence. On the one hand, the field of criminal theory is usually examined by academic scholars rather than practitioners like judges and prosecutors and the neglect of minority rights in international criminal law cannot not be blamed on the judges of two *ad hoc* tribunals alone. Rather, the failure to address minority rights is probably an indication of the general attitude of the international community, including NGOS and international organisations, towards that topic. On the other hand, for a tribunal that has such high aims of deterrence that are shared by many amongst the international community, one should be able to expect elaboration of how it plans to achieve these goals. This is even more the case when looking at the Statutes of the ICTY and the ICTR

and the qualifications they seek in a judge. Both Statutes take into account of the judges' experiences in criminal law and international law, including international humanitarian law and human rights law, which emphasises how these fields of law complement each other.³⁶⁶ As a result, a certain familiarity with minority rights and their interdependence with criminal law could be assumed.

Nonetheless, so far it seems like the tribunals' mention of deterrence and other rationales of sentences is more of an obligatory act before going on to substantial findings rather than a principle the tribunal has been elaborated on and is able to explain. If the tribunals take a holistic approach towards international criminal law by taking into account the instruments and other developments of general human rights law, the term 'deterrence' would gain meaning and contribute to an increased legitimisation of the tribunals and the concept of international justice.

³⁶⁶ ICTY Statute , Article 13 and ICTR Statute, Article 12(1).

7 CONCLUSION

This study has shown that minority issues and international criminal law and prevention of crimes are clearly interlinked and that minority rights law can be used in the struggle to prevent crimes under international law. Minorities do suffer disproportionately from conflicts and violence, as examined in Chapter Two. The international instruments examined in Chapter Three prove that the protection of minorities from mass violence is one of their foremost goals. The circle closes when looking at the in Chapter Four examined crimes under international law and the minority element inherent in them. As to the practical use of this interdependence, Chapter Five has highlighted two examples from different areas that show how minority rights can be utilised to prevent crimes against minority populations.

Whereas the connection of the concept of minority identity and its relationship and interdependence with the prevention of conflict has been subject to a vast amount of scholarly work, the concept of deterrence and the importance of judicial systems in the process of the protection of minority populations against crime have been neglected. The same is true when it comes to the actual use of scholarly findings by organisations and institutions responsible for international peace and security. Despite minority issues being at the heart of many conflicts, those who seek to end and prevent conflicts are currently given lower priority to understanding minorities and minority rights than before 1919.³⁶⁷ Minority rights law does not only touch upon the core of governmental competence and power as it is connected to state sovereignty and (non-) interference in internal affairs; it also relates to sensitive subjects within a society because it describes how individuals arrange their lives in relations to entities such as groups or states and in general relate to how a (pluralistic) society is shaped.

In this sense, it is not surprising to see that the analysis conducted into the jurisprudence of the *ad hoc* tribunals in chapter 6 showed that there has

³⁶⁷ Baldwin/Chapman/Gray, *supra* note 9, p. 4.

not been made full use of the link between these two concepts. However, as it has been established since the adoption of the Universal Declaration on Human Rights, human rights are universal, interdependent and indivisible. A narrow conception of ethnic tensions, their roots and their prevention, will only fail to put an end to these kinds of conflicts. Amelioration of ethnic conflict can only succeed if the sources and patterns of the conflict are understood.³⁶⁸ Furthermore, both minority rights and international criminal law are fields where easy and fast solutions or results are not to be found.

This thought ties in with what the present study considers to be a key element of preventing crimes under international law through the employment of minority rights: as indicated in the title of this work and confirmed by the findings throughout this study, education is one element in this context, if not the most crucial one. Chapter Five has shown that educating minority populations about their rights and raising awareness amongst the general public of the minority identity and culture, and their contribution to a common culture and history, contributes to mutual understanding and acceptance, preventing ethnic entrepreneurs to succeed in dividing communities.

The concept of education needs to be expanded to judicial systems, meaning that practitioners in both international criminal and minority rights law need to realise that the protection of minorities is an interdisciplinary effort, which cannot be achieved by experts focusing on one subject matter or one branch of law alone. If the *ad hoc* tribunals' claim of deterrence is supposed to be a valid one, they have to take into account minority rights law to expose the system of structural discrimination and violence in a society that often leads to crimes perpetrated against minorities.

Experts dealing with the practical implementation of minority rights, on the other hand, can benefit from the research and investigations conducted within the international criminal legal system.

³⁶⁸ D. L. Horowitz, *Ethnic Groups in Conflict* (2nd edition University of California Press: Berkeley and Los Angeles 2000) p. 564.

There is a need to acknowledge the connection between minority rights and the prevention of crimes under international law and to discuss how the two concepts can complement each other.

In the future, this linkage might be furthered by the judges of the ICC, who, according to the Rome Statute, need to be experts either in criminal law and procedure or in relevant areas of international law, such as humanitarian or human rights law.³⁶⁹ A quota provision guarantees that judges of both fields are represented in the court.³⁷⁰ This constitutes a promising development as to the recognition of the interdependence between international criminal law, international human rights law and public international law and confirms that these areas of law have a lot to gain from each other in the process of combating crimes under international law and protect minorities.

If, as Wells suggested, human history is a race between education and catastrophe, the international community must use the means it has to make sure it supports the right runner.

³⁶⁹ Rome Statute, Article 36(3)(b)(i) and (ii).

³⁷⁰ Rome Statute, Article 36(5).

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