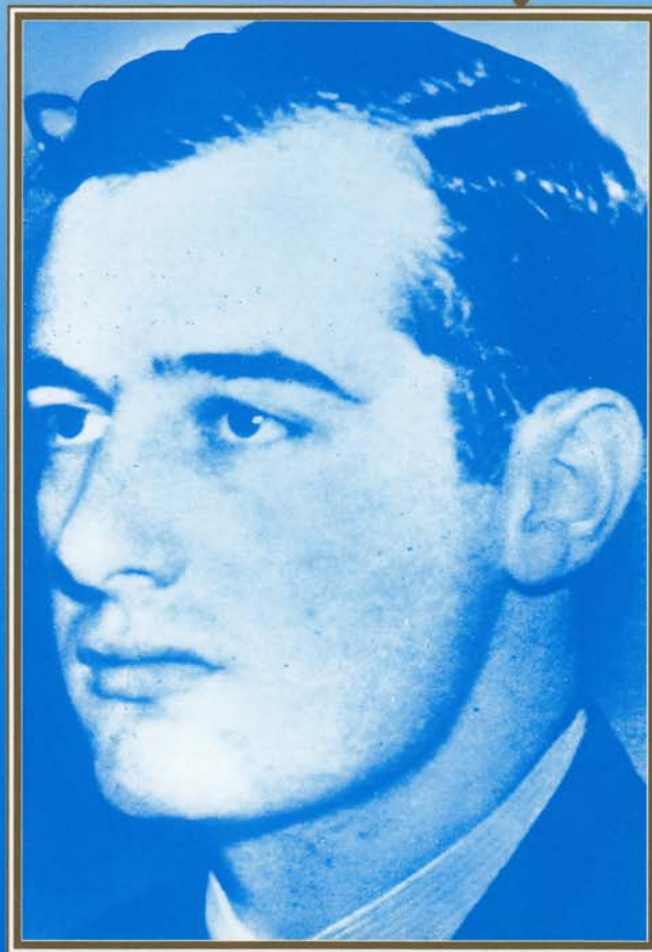


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Beyond a One-Dimensional State: An Emerging Right to Autonomy?



Edited by
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1. INTRODUCTION

The quest for greater autonomy on the part of ethnic, racial and religious minorities has sometimes been met with fierce reaction from Governments and in extreme cases, with violence and even war. In many instances, the reluctance of the State to deal seriously with minority rights stems from the concern that such claims could eventually lead to a devolution of power from the central Government or even to the break up of the State. The outbreak of numerous civil wars since the end of the Cold War underscores how social tension can take the form of extreme nationalism and degenerate into protracted ethnic, racial and religious violence.

Tragically, even in the era of the United Nations collective security system, the international community has largely failed to prevent massive violations of minority rights. Until very recently, international criminal justice has been more concept than reality. For the victims of genocide in Nazi Germany, the former Yugoslavia, Rwanda or Bangladesh, or of severe violations committed in Angola, Cambodia or Sierra Leone, international criminal justice has been either completely absent or 'too little too late'. One can even consider the UN Security Council's International Criminal Tribunals for the former Yugoslavia and Rwanda primarily as salves for the international community, which had failed to prevent both the outbreak of war in these countries and the horrible atrocities that attended them.

Despite this discouraging record, the international community at large has been forced to recognize that, unless it checks systematic violations *prospectively* i.e. before they are committed, such violations can destroy not only the stability and territorial integrity of individual States, but also regional and international peace and security.

It is argued in the present paper that the institutionalization of international criminal law enforcement since 1945 has been propelled largely by the international community's concern to halt, suppress and deter the kinds of violations typically perpetrated in serious ethnic, racial and religious conflicts and that international criminal law enforcement constitutes in effect an important form of minority rights protection. Moreover, although neither the International Criminal Court's² Statute nor its Rules of Procedure and Evidence refer explicitly to 'minority' or 'minority rights', the ICC is designed to provide deterrence on a more prospective and global basis than the international criminal tribunals, and therefore the ICC holds out

¹ The author thanks Dr. Ilaria Bottiglieri for her helpful comments on this paper.

² The International Criminal Court is hereinafter referred to as the 'ICC'.

greater promise for the effective protection of minority groups against the severest forms of abuse.³

In line with this argument, we first relate how severe minority rights violations played a critical role historically in the outbreak of the Second World War and the Allied Powers' decision to establish the Nuremberg and Tokyo Tribunals. Second, we sketch the development of minority rights protection in the period from 1945 to the end of the Cold War, and we underline that although the international community has generally been quite ambivalent about the issue, it has had to resort to the establishment of *ad hoc* international criminal tribunals to address severe violations of minority rights where domestic jurisdictions have failed to do so. Finally, we consider the relevance of the ICC's material jurisdiction and procedures to strengthen minority rights protection in future.

2. INTERNATIONAL CRIMINAL LAW AND MINORITY RIGHTS FROM 1945 TO THE END OF THE COLD WAR

The potential for minority tension to lead to violence and even the collapse of the State has always made Governments wary of addressing minority problems at home. Equally, Governments confronted with minority rights challenges commonly consider international attention to these questions as unwelcome interference in their domestic affairs. The traditional ambivalence of States on minority rights questions partly accounts for the international community's failure to deal effectively with Nazi Government policies prior to World War II. The stigmatization and persecution of the Jewish, Roma and Sinti minority groups, as well as the elderly, homosexuals and disabled persons, constituted a key element of the Nazi Party programme since its rise to power in 1933. Hitler's skilful manipulation of minority rights prior to the opening of hostilities as a pretext to seize the Sudetenland and snatch the Free City of Danzig realized the worst fears of democratic Governments as to the vulnerability of political and legal sovereignty in the face of insistent minority rights claims. The systematic persecution of minorities at home prepared the German people for aggression to be projected internationally and in this sense, the abuse of minorities in Germany contributed directly to the outbreak of the Second World War.⁴ For too

³ Statute of the International Criminal Court, adopted in Rome in a non-recorded vote, 120 in favour, seven against and 21 abstaining, on 17 July 1998 (A/CONF. 183/9); entered into force on 1 July 2002, ratified by 88 States as of 1 February 2003, hereinafter referred to as the 'Rome Statute'.

⁴ See 'International Military Tribunal (Nuremberg): Judgment and Sentences', of 1 October 1946, 41 *American Journal of International Law* (1947) at p. 217, particularly the sections entitled 'Invasion of Austria' as well as Hitler's speech to the Reichstag of 1 September 1939 in which he bitterly denounced the oppression of German minorities in Poland and the Free City of Danzig. See also R. B. Bilder, *Can Minorities Treaties Work?* in Y. Dinstein and M. Tabory (eds.), *The Protection of Minorities and Human Rights* (1992) pp. 59–82.

long left unchecked by Chamberlain's appeasement policy,⁵ American isolationism,⁶ and Stalin's cynical mutual non-aggression pact with Hitler,⁷ the Nazi Government was left a free hand to form Axis power alliances and pursue grand imperial designs for world domination, until 'blood, toil, tears, and sweat' eventually assured Allied victory.⁸

Look at the immense cost: between 50 and 60 million deaths,⁹ countless injured and billions of dollars in property damage, including the massive destruction of cultural and personal property, not only in Europe but in other theatres of the conflict. In the Far East, Japanese forces perpetrated systematic murders and mass rape as early as 1937 in Nanjing and committed horrendous atrocities against other peoples in the countries they invaded throughout the duration of World War II under the guise of aiding peoples to liberate themselves from colonial domination.

The point is that the international community ignores severe minority rights violations at its own peril and it can become very costly not to intervene. The massive suffering brought about by the Second World War had an inescapable dimension of ethnic persecution, genocide, and severe minority rights violations, from the events leading to the outbreak of war, to its fateful conclusion, the setting up of the Nuremberg and Tokyo International Military Tribunals and the post-World War II reformation of the international legal order. World War II should have taught Governments that they can not stand by while a Government persecutes its own citizens, not only because human dignity should be considered a matter of

⁵ See A. J. Crozier, *Appeasement and Germany's Last Bid for Colonies* (1988); K. Robbins, *Appeasement: Second Edition* (1997); S. R. Rock, *Appeasement in International Politics* (2000); and A. L. Rowse, *Appeasement: A Study in Political Decline: 1933–1939* (1963).

⁶ See M. Jonas, *Isolationism in America: 1935–1941* (1966); S. Adler, *The Isolationist Impulse: Its Twentieth-Century Reaction* (1966) and R. W. Tucker, *A New Isolationism: Threat or Promise?* (1972).

⁷ See the German-Soviet Non-Aggression Pact, signed on 23 August 1939 in Moscow between Ribbentrop and Molotov, the Secret Additional Protocol as well as cables No. 360 of 15 September 1939, No. 395 of 19 September 1939; No. 417 of 22 September 1939 and German-Soviet Confidential Protocol, signed on 18 September 1939 in Moscow between Ribbentrop and Molotov and its Secret Supplementary Protocol, signed on 28 September 1939 concerning the partition of Poland.

⁸ On 13 May 1940, in his maiden speech to the British Parliament, Prime Minister Winston Churchill steered the nation to fight the Nazi Government with these words: 'I say to the House as I said to ministers who have joined this Government, I have nothing to offer but blood, toil, tears, and sweat. We have before us an ordeal of the most grievous kind. We have before us many, many months of struggle and suffering. You ask, what is our policy? I say it is to wage war by land, sea, and air. War with all our might and with all the strength God has given us, and to wage war against a monstrous tyranny never surpassed in the dark and lamentable catalogue of human crime. That is our policy. You ask, what is our aim? I can answer in one word. It is victory. Victory at all costs - Victory in spite of all terrors - Victory, however long and hard the road may be, for without victory there is no survival.' See also D. Cannadine (ed.), *Blood, Toil, Tears and Sweat: The Speeches of Winston Churchill* (1989).

⁹ See M. Small and J. D. Singer, *Resort to Arms: International and Civil War: 1816–1980* (1982).

everyone's moral concern regardless of the potential victim's race or nationality, but also because severe violations tend to spiral out of control, threatening lives and property in other countries as well. Even before the Allied Powers secured victory, they understood that it would not be enough to win the war militarily, but that Nazi and Fascist totalitarian ideology had to be de-legitimized. Despite the fact that the Nuremberg and Tokyo Trials are often criticized, quite justifiably, for being 'victors' justice', they affirmed the principle of individual criminal responsibility under international law for massive crimes and shattered the doctrine of absolute sovereign immunity.¹⁰ The UN General Assembly's adoption of the Nuremberg Principles was intended to affirm the principle of individual criminal responsibility for crimes against peace, war crimes and crimes against humanity.¹¹ The General Assembly accordingly tasked the International Law Commission to elaborate an international criminal code and court.¹² The crime of genocide was added to the rubric of international criminal law with the Assembly's adoption of the Genocide Convention on 9 December 1948, which has been ratified by over 130 States.¹³ In 1949, the international community developed the four Geneva Conventions¹⁴ to update the rules of international humanitarian law and for the first time to make

¹⁰ See A. C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (1987); R. Clark and I. A. Lediakh, 'The Influence of the Nuremberg Trial on the Development of International Law', in G. Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990) 249–283; B. B. Ferencz, 'International Criminal Courts: the Legacy of Nuremberg' 10 *Pace International Law Review* (1998) p. 203; G. Finch, 'The Nuremberg Trial and International Law' 41 *American Journal of International Law* (1947) pp. 20–37; D. W. Layton, 'Forty Years after the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law', 80 *American Society of International Law Proceedings* (1986) p. 56; E. J. O'Brien, 'The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood', 149 *Military Law Review* (1995) p. 275; W. O'Brien, 'The Nuremberg Precedent and the Gulf War', 31:3 *Virginia Journal of International Law* (1991) pp. 391–401; S. Pomorski, 'Conspiracy and Criminal Organization', in G. Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990) pp. 213–248; F.B. Schick, 'The Nuremberg Trial and the International Law of the Future', 41 *American Journal of International Law* (1947), pp. 770–794; L. S. Sunga, 'Full Respect for the Rights of Suspect, Accused and Convict: From Nuremberg and Tokyo to the ICC', in M. Henzelin et al. (eds.), *Le droit pénal à l'épreuve de l'internationalisation* (2002) pp. 217–239; T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1993); and Q. Wright, 'The Law of the Nuremberg Trial', 41 *American Journal of International Law* (1947) pp. 38–72.

¹¹ General Assembly resolution 95(1), adopted on 11 December 1946 on Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.

¹² The UN General Assembly requested the International Law Commission in 1947 to elaborate the Nuremberg Principles and to prepare a draft international criminal code to ensure that the lessons provided by the Judgements of Nuremberg and Tokyo would not be forgotten. See General Assembly resolution 177 (II) of 21 November 1947.

¹³ Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously 9 December 1948, entered into force 12 January 1951; 78 UNTS 277.

¹⁴ Geneva Conventions, adopted 12 August 1949, entered into force 21 October 1950.

certain 'grave breaches' of the Conventions crimes under international law for which individuals could be prosecuted and punished.¹⁵

All these initiatives seemed to signal the international community's determination and resolve to develop coherent deterrence of the major crimes through international law. However, little further advance was to be achieved in the field of international criminal law until the end of the Cold War opened fresh opportunities for international political and legal cooperation through the United Nations. In other words, the onset of the Cold War had a chilling effect on international cooperation at all levels and this effectively froze the development of international criminal law for almost half a century.¹⁶

In contrast, norms and implementation in the field of international human rights managed to grow and develop in fits and starts since 1945, mainly because governments found the UN Commission on Human Rights provided a valuable forum in which to attack the human rights practices of countries they did not like.¹⁷ However, while human rights norms and mechanisms began to develop throughout the Cold War, minority rights protection remained on the sidelines of international human rights law. In the immediate aftermath of the Second World War, particularly when Hitler's abuse of the minority rights treaty system was fresh in the minds of policy makers, States remained wary of developing human rights in terms of minority rights guarantees. At the same time, American liberal political ideology found expression in the Universal Declaration of Human Rights,¹⁸ elaborated by the UN Commission on Human Rights under the guidance of Chairperson Ms. Eleanor Roosevelt,¹⁹ and in the International Covenant on Civil and Political Rights²⁰ and the International Covenant on Economic, Social and Cultural Rights.²¹ Thus, in the early days of the United Nations, minority rights protection through domestic mechanisms

¹⁵ The grave breaches provisions of the four Geneva Conventions, 1949, are found in Articles 50 of Convention I, 51 of Convention II, 130 of Convention III, and 147 of Convention IV.

¹⁶ See generally L. S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997).

¹⁷ See generally M. Lempinen, *Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights* (2001); M. van der Stoep, 'Interview with Max van der Stoep, Special Rapporteur of the UN Commission on Human Rights on Human Rights in Iraq' 10 *Netherlands Quarterly of Human Rights* (1992) pp. 277–302; L. S. Sunga, 'The Special Procedures of the United Nations Commission on Human Rights: Should They Be Scrapped?', in G. Alfredsson et al. (ed.), *International Human Rights Monitoring Mechanisms* (2001) pp. 231–275; and H. Tolley, *The UN Commission on Human Rights* (1987).

¹⁸ Universal Declaration of Human Rights, adopted by UN General Assembly resolution 217A (III) of 10 December 1948.

¹⁹ See G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) p. 782.

²⁰ International Covenant on Civil and Political Rights, adopted 16 December 1966; entered into force 23 March 1976; U.N.T.S. No. 14668, vol 999 (1976) at 171.

²¹ International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; entered into force 3 January 1976; U.N.T.S. No. 14531, vol. 993 (1976) at 3.

was effectively side-stepped with the elevation of individualistic human rights guarantees to the international level. If universal human rights standards could prove effective for everyone, who would need special 'minority rights guarantees'?

The international community's emphasis on individualistic human rights guarantees at the expense of group rights is reflected even in the ambiguity phrasing of Article 27 of the International Covenant on Civil and Political Rights which 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 the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. Instead of a positive right on the part of minorities to assert their own cultural, religious or linguistic distinctiveness in association with other members of the group, 'persons belonging' in other words, *individual minority group members* shall not be denied the right to enjoy their own culture etc. Article 27 also fails to call for special measures, i.e. programmes of preferential treatment to help address the problem of entrenched patterns of *de facto* inequality and to protect the rights of the minority as a group, and it conceives of cultural, religious and language rights almost purely in terms of individual rights.²² Fortunately, Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination²³ provides that special measures do not count as forms of racial discrimination and the Convention refers both to groups and individuals.²⁴

More recently, States have shown greater willingness to revisit the question of minority group rights and in 1992 Yugoslavia introduced a draft which the UN General Assembly adopted as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.²⁵ In preambular paragraphs (which in any case are only hortatory), the Declaration underlines the contribution of minority rights 'to the political and social stability of States in which they live' and the promotion and protection of minority rights 'to the strengthening of friendship and cooperation among peoples and States'. The text of the Declaration deliberately avoids references to 'peoples' or the principle of 'self-determination' and follows the highly individualistic tenor of Article 27 of the ICCPR. Nonetheless, the

²² For the interpretation of the Human Rights Committee on Article 27 of the ICCPR, see General Comment 18(37); HRI/GEN/1 of 4 September 1992.

²³ Adopted by General Assembly resolution 2106 (XX) of 21 December 1965, entered into force, 4 January 1969.

²⁴ 'special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'.

²⁵ United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly in resolution 47/135 of 18 December 1992.

Declaration does provide in Article 1 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' and it obliges States to adopt appropriate legislative and other means to that effect. In addition to reiterating non-discrimination guarantees, the Declaration in Article 3 underlines the right of persons to exercise minority rights 'individually as well as in community with other members of their group'. More concretely, Article 4 of the Declaration urges States to 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' including to preserve the opportunity to learn one's mother tongue, history, traditions, language and culture and to participate fully in the economic development of their country. Such measures are subject, of course, to the Article 8(4) proviso that: 'Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States'.

One must add of course that, as a resolution of the UN General Assembly, the Declaration is not legally binding in any way, although it remains a valuable register of the current sentiments of States on this important issue. Significantly, the Declaration was followed up with the establishment in 1995 of the Working Group on Minorities under the Sub-Commission on Promotion and Protection of Human Rights (known formerly as the Sub-Commission on Prevention of Discrimination and Protection of Minorities), consisting of five members of the Sub-Commission. The Working Group meets for one week annually in May in Geneva to consider ways in which to promote and protect the minority rights enunciated in the Declaration.²⁶

Despite the evident lack of consensus on most core issues, the World Conference on Racism, Racial Discrimination, Xenophobia and Other Forms of Related Intolerance held in Durban, South Africa, in August – September 2001, did manage to set up a Working Group of People of African Descent to explore constructive solutions with regard to persistent discrimination against African origin minorities around the globe. As well, there have been some important initiatives in the area of the rights of indigenous peoples, namely, the establishment of the Working Group on Indigenous Populations under the UN Sub-Commission on the Promotion and Protection of Human Rights which has been working on a draft declaration on the rights of indigenous peoples, as well as the establishment of the Permanent Forum on Indigenous Issues.²⁷

²⁶ See further, Final text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, by Asbjørn Eide, Chairperson of the Working Group on Minorities of the Sub-Commission, on the Promotion and Protection of Human Rights; E/CN.4/Sub.2/AC.5/2001/2 of 2 April 2001.

²⁷ UN Draft Declaration on the Rights of Indigenous Peoples; UN Doc E/CN.4/Sub.2/1994/2/Add.1 of 20 April 1994.

To further round out the picture, one must mention that existing human rights implementation mechanisms at the global and regional levels accommodate minority claims in one way or other. Nothing prevents minority group members to send communications to the United Nations alleging a violation of their human rights. Once received by the UN, such communications are passed to the Working Group of Communications of the UN Sub-commission on Promotion and Protection of Human Rights for examination under the confidential ECOSOC resolution 1503 procedure, 'with a view to determining whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission'. Such situations can then be referred to the Commission on Human Rights for consideration as to whether they should become the subject of public investigation, study and reporting procedures under ECOSOC resolution 1235. In this connection, one must mention also that special rapporteurs and independent experts of the Commission on Human Rights can also highlight minority rights issues as they see fit. As for conventional human rights mechanisms, in addition to the Human Rights Committee consideration of individual complaints under the Optional Protocol as regards an alleged breach of Article 27 of the International Covenant on Civil and Political Rights, minority rights issues have come before other human rights treaty bodies, namely: the Committee on Economic, Social and Cultural Rights; and the Committee on the Rights of the Child (which do not have individual complaints faculties); the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; and the Committee against Torture. In short, minority rights issues have arisen frequently before each of these bodies in the context of State reporting and through the consideration of individual complaints where this faculty exists.

At the regional level, one must mention the European Convention on Human Rights,²⁸ the Inter-American Convention on Human Rights²⁹ and the African Convention on Human and Peoples' Rights, as legal grounds for possible minority rights claims in one form or another, although it must be noted that none of these instruments actually refer explicitly to 'minorities' or 'minority rights'.³⁰ More recently however, the Council of Europe's Committee of Ministers adopted in 1994 the Framework Convention for the Protection of National Minorities, which entered into force in 1998. The Framework Convention represents perhaps the most comprehensive legally binding multilateral treaty ever concluded on minority rights

²⁸ European Convention on Human Rights, adopted on 4 November 1950 in Rome, entered into force 3 September 1953.

²⁹ The American Convention on Human Rights, signed on 22 November 1969, entered into force on 18 July 1978, OAS Treaty Series No. 36 at 1.

³⁰ African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986; OAU Doc. CAB/LEG/67/3 Rev. 5; 21 ILM 58 (1982). See also the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human Rights on Human and Peoples' Rights, adopted on 10 June 1998; OAU Doc. CAB/LEG/66/5, not yet entered into force.

and signals that States seem to be more willing to return to minority rights questions.³¹

Taking a bird's eye view of the development of international minority rights guarantees since 1945 one sees that, in the aftermath of World War II when Hitler's use of minority rights guarantees to legitimize gross transgressions of international law and State sovereignty were fresh in the public mind, Governments chose to elaborate human rights norms almost exclusively in individualistic terms. The expansion in the size of the international community to accommodate African and Asian States that had liberated themselves from the yoke of colonial domination by the late 1950's and 1960's consolidated governmental wariness over minority rights guarantees. International boundaries that had been arbitrarily drawn by the former colonial Powers remained in force according to the *uti possidetis* principle and most of the newly independent States suddenly had to cope with challenges from minority groups which found that authoritarian colonial administrations had been replaced by authoritarian Governments.³² The political climate of the Cold War in which each superpower sought to undermine the influence of the other in countries around the globe through proxy wars and covert aid to dissidents, who often comprised ethnically, racially or religiously distinct groups fighting for self-determination, further discouraged States from developing strong and effective minority rights guarantees at the international level.

All these factors explain why minority rights guarantees were virtually dropped from the international agenda in the immediate post-World War II political climate and were not picked up again for decades. Recently however, the international community has had to deal more explicitly with minority rights protection and promotion, and the post Cold War climate has made it possible to establish international criminal law enforcement mechanisms that serve this purpose.

3. POST-COLD WAR RESURGENCE OF MINORITY RIGHTS VIOLATIONS AND THE RENAISSANCE OF INTERNATIONAL CRIMINAL LAW THROUGH THE ICTY AND ICTR

The efforts of the modern constitutional State to downplay race, ethnicity, culture, language and religion have not been completely successful, perhaps because classic liberal prescriptions of individualism and formal legal civil liberties against the

³¹ Framework Convention for the Protection for National Minorities, adopted 10 November 1994, opened for signature 1 February 1995, entered into force 1 February 1998; ETS 157; 34 ILM 351 (1995).

³² *Uti possidetis* is Latin for 'as you now possess'. This principle was affirmed in a resolution AGH/Res. 16 (I) adopted in Cairo in July 1964 at the first summit conference following the establishment of the Organization of African Unity, in which all member States 'solemnly . . . pledge themselves to respect the frontiers existing on their achievement of national independence'. See also Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), 1986 ICJ Reports, Judgment of the International Court of Justice of 22 December 1986, paras. 20-26 *et. seq.*

power of the State have often left minority groups feeling alienated and disenfranchised. The situation is far worse in countries ruled by illiberal or authoritarian regimes and therefore we are not likely to see 'the end of history and the last man'³³ anytime soon, but rather continued ethnic and denominational strife wherever minority rights are systematically abused, although an all-out 'clash of civilizations'³⁴ seems a bit far-fetched, even in our times of terrorist troubles. One can recall that Yugoslavia was once considered by many to have been an exemplary multinational State, that ethnically distinct former Soviet Socialist Republics have defected *en masse* from the bosom of Mother Russia, while violence rages on in Azerbaijan (Nagorno-Karabakh), Chechnya and Dagestan. Ethnic conflict continues to loom large in Rwanda and Burundi, Afghanistan, Burma and Congo (Brazzaville), the Democratic Republic of Congo, Abkhazia/Georgia, Ossetia, in many parts of India and Pakistan, in Aceh and Kalimantan and Papua New Guinea, Somalia, Sudan and Turkey, to name just a few places.

Given the weakness of international minority rights guarantees and the failure of some States to protect minorities against severe violations, the international community has had to turn to international criminal law enforcement as a way of suppressing violations that amount to crimes under international law.

The systematic and widespread violations perpetrated in the territory of the former Yugoslavia impelled the UN Security Council to establish the International Criminal Tribunal for the Former Yugoslavia in 1993³⁵ to address genocide, war crimes and crimes against humanity which were perpetrated mainly along ethnic, religious and cultural lines. In 1994, an even worse catastrophe in Rwanda - another story of ethnocultural enmity and terror - motivated the Security Council to establish the International Criminal Tribunal for Rwanda.³⁶

It is worth recalling that Tito had suppressed extreme ethnic nationalism consistently throughout Yugoslavia during his rule from 1946 until he died in 1980. Shortly after Tito's death, individual states within Yugoslavia intensified their quest for greater autonomy from the central Government. Slovenia first opted to secede from Yugoslavia following a December 1990 referendum on the issue and declared its independence on 8 May 1991 providing other Yugoslavian states with a bold example that secession was indeed possible. Slovenia's swift secession stimulated dormant minority rights claims for greater territorial and political autonomy and led quickly to ethnic and religious violence to avenge the harm, suffering and distress from wounds inflicted in past times. The Serbs of Croatia declared their independence from what was left of the Federation of Yugoslavia on 16 March 1991 and Bosnia-Herzegovina, after 63 per cent voted for the emergence of an

³³ See F. Fukuyama, *The End of History and the Last Man* (1992).

³⁴ S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996).

³⁵ See Report of the Secretary-General pursuant to Paragraph 2 of Security Council resolution 808 (1993), including the Statute of the Tribunal; UN Doc. S/25704 of 3 May 1993 & Add.1 of 17 May 1993.

³⁶ See Security Council resolution 955, adopted with 13 votes for, China abstaining, and Rwanda against, on 8 November 1994.

independent Republic, declared independence in April 1992. This event led Serb nationalist militia, including some soldiers from the Yugoslav National Army to invade parts of Bosnia-Herzegovina while the Serb Republic proclaimed its independence under Serbian Democratic Party leader Radovan Karadzic, headquartered in Pale.³⁷ By this time, Serbian leaders were carrying out a policy of genocide dubbed 'ethnic cleansing' to clear Bosnian Muslims out of Serb occupied territories.

When Yugoslavia dissolved in 1992, a number of the Governments of the newly emergent States were either unable or unwilling to prosecute the perpetrators of serious violations of international human rights and humanitarian law. In some cases, the judiciary was either intimidated from prosecuting alleged offenders because the Government responsible remained in power, or it lacked the necessary independence from the Executive to prosecute alleged offenders and considered them 'war heroes' rather than criminals. People were getting away with murder.

In response to a stream of alarming media reports and NGO alerts, the UN Commission on Human Rights held its first ever special session and appointed a special rapporteur 'to investigate first hand the human rights situation in the territory of the former Yugoslavia, in particular within Bosnia and Herzegovina'.³⁸ In his first report,³⁹ the Special Rapporteur documented a shocking range of minority rights violations and called for the prosecution of individual perpetrators to halt the ongoing violence and to deter future crimes from being committed.⁴⁰ He also called for the establishment of a commission to assess and further investigate specific cases in which prosecution may be warranted and to include data already collected by various UN entities, other intergovernmental organizations and NGOs.⁴¹ This eventually led to a number of Governments, international organizations and NGOs calling for international prosecutions to be conducted⁴² and in response, on 6

³⁷ In July 1996, Karadzic was indicted by the International Criminal Tribunal for the Former Yugoslavia.

³⁸ See Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission resolution 1992/S-1/1 of 14 August 1992, E/CN.4/1992/S-1/9, 28 August 1992.

³⁹ *Ibid.*, Chapter I.

⁴⁰ *Ibid.*, at para. 69.

⁴¹ *Ibid.*, at para. 70.

⁴² See e.g. E/CN.4/1992/S-1/10 of 27 Oct. 1992 at para 18 as well as Annex II (Statement by Dr. Clyde Snow). See also Report of the Special Rapporteur (transmitted by the Secretary-General to the Security Council and General Assembly) A/47/666; S/24809 of 17 November 1992, para. 140, where Mr. Mazowiecki stated: 'There is growing evidence that war crimes have been committed. Further investigation is needed to determine the extent of such acts and the identity of those responsible, with a view to their prosecution by an international tribunal, if appropriate'. See further the later reports of the Special Rapporteur for more details on the human rights situation in the former Yugoslavia: E/CN.4/1993/50 of 10 Feb. 1993; E/CN.4/1994/3 of 5 May 1993; E/CN.4/1994/4 of 19 May 1993; E/CN.4/1994/6 of 26 August 1993; E/CN.4/1994/8 of 6 September 1993; E/CN.4/1994/47 of 17 November 1993; E/CN.4/

October 1992, the Security Council adopted resolution 780⁴³ establishing a Commission of Experts

'to examine and analyze the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigation or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia'.

Finally, on 25 May 1993, the Security Council adopted resolution 827 to establish the ICTY 'for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace'.

As of 31 December 2002, 42 accused were in custody at the ICTY Detention Unit, 11 had been provisionally released, 23 arrest warrants were outstanding, 19 had been transferred or released, there were 30 completed cases and 34 accused had been tried. Slobodan Milosevic and a number of other high level leaders and commanders were in the process of being tried.⁴⁴

In the case of Rwanda, the international community had been given fair warning of the impending disaster in a report of 11 August 1993 in which the Special Rapporteur of the UN Commission on Human Rights on extrajudicial, summary or arbitrary executions⁴⁵ drew attention to continuing serious human rights violations in Rwanda and flagged that these violations might constitute 'genocide'.⁴⁶ At this juncture, it is important to remember that the United Nations had already preoccupied itself with the deteriorating situation in the Great Lakes region of Africa and on 24 September 1993, UN Secretary-General Mr. Boutros-Boutros Ghali recommended that the Security Council should authorize an international military force to ensure compliance with the Arusha Accords, and in fact succeeded in establishing the 'United Nations Assistance Mission in Rwanda' (UNAMIR) with the adoption on 5 October 1993 of Security Council resolution 872. However, these peace manoeuvres by the international community were viewed by extremist Hutu

militia in Rwanda as proof that the Government of Rwanda was merely a puppet of foreign Tutsi interests and in the final months of 1993, these extremist Hutu elements planned the full-scale elimination of the Tutsi people by training groups of 300 persons how to conduct systematic massacres of unarmed civilians. Despite the presence of UN peace-keepers in Kigali to enforce the Arusha Accords, the international community failed to intervene.

Tragically Prime Minister Agathe Uwilingiyimana, as well as 10 Belgian peace-keeping soldiers assigned to protect her, were murdered by soldiers of the Rwandese Government on 7 April 1994 – a day after the downing of the aircraft that carried the Presidents of Rwanda and Burundi into Kigali, provoking the sudden withdrawal of Belgium's UNAMIR contingent from Rwanda on 12 April for fear of further attacks which cleared the way for Hutu extremists to carry out the genocide unimpeded by foreign forces. The international community did little to prevent the genocide while it raged on from 6 April 1994 until the end of June 1994, at which time Paul Kagame's Rwandan Patriotic Front stopped the massacres and took control of the country from the génocidaires. From 6 April until around the end of May 1994, the génocidaires succeeded in wiping out approximately one million mainly Tutsi men, women and children while the world watched. Again, the international community had failed to act decisively in time to prevent severe minority rights violations.

Following the approach it took with regard to the violations being perpetrated in the former Yugoslavia, the Security Council adopted resolution 935 on 1 July 1994, establishing a Commission of Experts to provide the Secretary-General with 'its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide'. On 8 November 1994, the Security Council passed resolution 955 creating the International Criminal Tribunal for Rwanda, with its Statute as the resolution's annex, reiterating its 'grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda' and determining that the situation constituted a continuing threat to international peace and security. As of 31 December 2002, the ICTR had completed 11 cases and 64 were in progress.⁴⁷

However, as *ad hoc* international criminal tribunals created after the main part of the violations had already been committed, the ICTY and ICTR have probably exerted a rather limited deterrent effect. The vagaries of international diplomacy and relations and the continuation of Big Power politics made the whole process of the Security Council's establishment of the *ad hoc* international criminal tribunals one of political whim and public caprice and this situation effectively annulled the possibility of such tribunals for Afghanistan, Burundi, the Democratic Republic of

1994/110 of 21 February 1994; E/CN.4/1995/4 of 10 June 1994; E/CN.4/1995/10 of 4 August 1994; A/49/641-S/1994/1252 of 4 November 1994; E/CN.4/1995/54 of 13 December 1995; E/CN.4/1995/57 of 9 January 1995; E/CN.4/1996/3 of 21 April 1995; and E/CN.4/1996/6 of 5 July 1995.

⁴³ See S/Res/780 (1992) adopted by the Security Council at its 3119th meeting, 6 October 1992. Reprinted in 31 International Legal Materials (1992) 1476.

⁴⁴ See <www.un.org/icty/glance/index.htm> last accessed on 31 December 2002.

⁴⁵ See the report of Mr. Bacre Waly Ndiaye on his mission to Rwanda from 8–17 April 1993, E/CN.4/1994/7/Add.1 of 11 August 1993.

⁴⁶ *Ibid.*, paras. 78–80.

⁴⁷ See <www.ictt.org/> last accessed 31 December 2002.

Congo, Chechnya, Colombia or anywhere else, except for Sierra Leone, where a Special Court was established.⁴⁸

Despite having encountered serious difficulties early on, the ICTY and ICTR must now be judged successes, and more importantly, they have pointed the way to move beyond mainly retrospective ‘too little too late’ solutions towards a standing permanent international criminal court to act *prospectively* wherever violations may be perpetrated.

4. THE ICC’S CONTRIBUTION TO MINORITY RIGHTS PROTECTION

Before considering the ways in which the ICC can contribute to minority rights protection, it is valuable to review the basic principles underlying this newly established institution, its general relevance to minority rights protection, and then to consider more specific aspects of the ICC, in particular, the principle of complementarity, the crimes covered and certain procedural aspects.

4.1. The ICC’s Relevance to Minority Rights Protection

As discussed above, *ad hoc* tribunals are typically limited in temporal and material competence and tend to be established after the major part of violations have already been committed. As such, they are essentially retrospective and their deterrent value is limited. Moreover, the process to establish *ad hoc* tribunals is inherently politically selective and to that extent, arbitrary, because it depends upon the will of a political body – the UN Security Council. Additionally, it is less efficient to establish diverse enforcement mechanisms for various countries each with different mandates and competences, which would duplicate functions, waste resources and hinder the coherent development of international criminal law jurisprudence.

The ICC is intended to be a permanent, standing institution that symbolizes the international community’s seriousness and commitment to prevent, punish and deter crimes under international law and dispel the climate of impunity for major crimes. As such, it can act prospectively, provide a more universal presence and provide more credible deterrence than *ad hoc* criminal tribunals can. Article 1 of the Rome Statute captures the ICC’s essence by stating that the ICC: shall be permanent; shall exercise jurisdiction over persons (i.e. natural persons and not corporations or States); shall cover only the most serious crimes of international concern, in other words, that the ICC is not designed to intervene every time crimes of purely local concern are committed; and shall be *complementary* to national criminal jurisdictions.

The principle of complementarity means that the ICC is not intended to replace the domestic obligation to prosecute crimes and it must be kept in mind that States

⁴⁸ In Sierra Leone, broad amnesties have been doled out as the price of peace. Now that the killing and raping and maiming of innocent civilians has been carried out, soldiers and commanders seem quite happy to return home to fight another day – perhaps in another conflict for another set of amnesties.

have the right and the responsibility either to prosecute or extradite alleged offenders of certain crimes even where such crimes are not committed by a national of that country, where the crimes was not committed in the country’s territory, or even without any other connection to the prosecuting State. The ICC is designed to act only where a State will not or cannot prosecute individuals for the crimes under the Rome Statute.

4.2. ICC Protection of Minority Rights in Terms of Crimes Covered

Broadly speaking, the Rome Statute covers only the most severe crimes under international law i.e. those categories of violations of a more systematic and widespread character: genocide, war crimes and crimes against humanity⁴⁹ – all crimes that figure typically in severe minority rights abuse.

Genocide

Looking more closely at the specific crimes covered by the Rome Statute from the angle of minority rights protection, we see that the crime of genocide has been basically lifted from the Genocide Convention, 1948.⁵⁰ Article 6 of the Rome Statute takes the definition of ‘genocide’ word for word from part of Article II of the Genocide Convention, 1948 as follows:

‘genocide means any of the following acts committed with 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 in whole or in part;

⁴⁹ The crime of aggression, that is, the international use of force beyond that permitted by the UN Charter or general international law, had to be included as well because war creates the context in which serious violations are frequently committed. Delegations to the Rome Conference realized that for the ICC to address only the consequences of aggression without addressing aggression as a crime itself would produce a prosecutorial paradox in which only the symptoms of war would be outlawed and not the launching of aggressive war itself. However, aggression has never been defined for the purposes of international criminal prosecution, and so definitive inclusion of this crime into the Rome Statute must await completion of this important task by the Assembly of State Parties to the ICC. *See further* Proposals pursuant to resolution F of the Final Act for a Provision on Aggression, including the Definition and Elements of Crimes of Aggression and the Conditions under which the International Criminal Court shall Exercise Its Jurisdiction with regard to This Crime UN Doc. PCNICC/2002/2/Add.2 and PCNICC/2002/WGCA/L.1 and Add.1.

⁵⁰ Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously 9 December 1948, entered into force 12 January 1951; 78 UNTS 277.

- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁵¹

It is well known that during the drafting of the Genocide Convention, the main preoccupation was to prevent future extermination policies of the kind carried out by the Nazi German Government which tried to wipe out specific groups distinguishable from the majority population by relatively immutable and stable attributes. Accordingly, neither the Genocide Convention nor the Rome Statute provisions on genocide protect groups that may find themselves the target of Government crackdowns on political dissident movements, except to the extent that race, religion and ethnicity or other relatively immutable characteristics are involved.⁵¹

Crimes against Humanity

The insertion of the new legal category of 'crimes against humanity' in the Nuremberg and Tokyo Charters alongside 'crimes against peace' and 'war crimes' was designed specifically to cover crimes committed by Germans against Germans, in other words, the violations of the Government of Germany of the rights of its own minority populations, 'namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.⁵² The other two main avenues for the Allied prosecution of Axis crimes would not have been

⁵¹ See J. Kunz, 'The United Nations Convention on Genocide' 43 *American Journal of International Law* (1949) pp. 738-746; L. Leblanc, 'The Intent to Destroy Groups in the Genocide Convention: Proposed U.S. Understanding' 78 *American Journal of International Law* (1949) pp. 369-385; N. Robinson, *The Genocide Convention: a Commentary* 1960; and G. J. Andreopoulos, (ed.) *Genocide: Conceptual and Historical Dimensions* 1994. See further W. A. Schabas, *Genocide in International Law* (2000).

⁵² See M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law: Second Revised Edition* (1999); W. J. Fenrick, 'should Crimes Against Humanity Replace War Crimes?' 37 *Columbia Journal of Transnational Law* (1999) p. 767; Ph. Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court', 22 *Fordham International Law Journal* (1998) p. 457; G. Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', 43 *Harvard International Law Journal* (2002) p. 237; D. Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference', 93 *American Journal of International Law* (1999) p. 43; B. Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', 37 *Columbia Journal of Transnational Law* (1999) p. 787; L. S. Sunga, 'The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5-10)', 6:4 *European Journal of Crime, Criminal Law and Criminal Justice* (1998) pp. 377-399.

sufficient to sweep in the horrendous persecution and mass killing perpetrated by the Nazi Government against sections of its own population.

In the Rome Statute, crimes against humanity can be committed either during armed conflict, or in situations that qualify technically as peace-time. Article 7(1) lists the acts covered by the broad legal category of 'crimes against humanity', whereas Article 7(2) defines a number of key terms to guide the Court's adjudication on any crime against humanity. The chapeau to Article 7(1) makes clear that the prohibited acts only qualify as 'crimes against humanity' 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.⁵³

The Rome Statute's refinement of 'crimes against humanity' makes an important contribution to minority rights protection by removing any necessary connection between the legal category of 'crimes against humanity' and the existence of an armed conflict. This is of capital importance because many severe minority rights violations are perpetrated in situations where the intensity of the violence falls below that required to qualify them as 'armed conflicts'. In effect, this represents an important lowering of the threshold for the applicability of 'crimes against humanity' and one hopes, an increasing level of deterrence for would-be perpetrators of minority rights violations.

On the other hand, Article 7(1) does not bring isolated acts listed as 'crimes against humanity' within ICC jurisdiction, but only situations where the acts were 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. At the Rome Conference, States were not prepared to go further and confer upon the ICC authority to seize jurisdiction over isolated acts of murder, extermination, enslavement, etc. because they did not envisage the ICC either to function as a sort of human rights court competent to take individual complaints on this basis, or as an enforcement mechanism empowered to replace competent domestic authorities.

Finally, the kinds of acts listed under the umbrella of 'crimes against humanity' remain highly relevant to minority rights protection, in particular, the crime of 'extermination' can cover killings that might target a minority group, but which fall short of the definition of genocide. In fact, the formula for the Rome Statute's

⁵³ Article 7(1) provides that: 'For the purposes of this Statute, "crimes 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' and then lists the following specific acts: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; 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; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

definition of 'crimes against humanity' comes from Article 6(c) of the Nuremberg Charter, 1945, which listed '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'. Interestingly, Articles 5 and 3 of the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, narrowed the definition of 'crimes against humanity' by altering the Nuremberg formula of 'persecutions on political, racial *or* religious grounds' to 'persecutions on political, racial *and* religious grounds'. Fortunately, the Rome Statute reintroduces the broad coverage originally intended for 'crimes against humanity' and in so doing increases minority rights protection in respect of the acts listed.

Another important contribution from the point of view of minority rights protection, comes in the form of Article 7(2)(h) of the Rome Statute which expands the scope of the crime of persecution beyond that expressed in the Nuremberg and Tokyo Charters and the narrower Yugoslavia and Rwanda Tribunal Statutes to cover:

'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.'

The reference in paragraph (h) to 'any identifiable group or collectivity' is considerably broader than terms in the Rome Statute employed for delimiting the scope of crimes. Moreover, paragraph (h) is non-exhaustive in that it refers to 'other grounds that are universally recognized as impermissible under international law'.

Yet another important development pertaining to minority rights protection is the introduction of 'enforced disappearance of persons' in Article 7(1)(I) of the Rome Statute. As we know, Governments have on many occasions resorted to the practice of enforced disappearances to rid the country of political opponents and to silence dissidents over such issues as greater autonomy for minority groups.

The Rome Statute definition of 'crimes against humanity' also encompasses 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'. This expansion of the legal norms has to be particularly welcomed since international criminal law had for a long time paid scant attention to such horrendous crimes. It is important also that Article 7(1)(g) includes sexual slavery and enforced prostitution and forced pregnancy which have often been systematically perpetrated in territories under occupation, for example in many of the territories of the former Yugoslavia, by Japanese forces during World War II, during the genocide carried out in Rwanda in 1994, and in many other armed conflicts. Moreover, the formula 'or any other form of sexual violence of comparable gravity' allows the ICC to bring a flexible interpretation to these sorts of crimes rather than to have to take an overly narrow or technical approach.

Finally in connection with 'crimes against humanity' one must mention also the crime of apartheid which Article 7(2)(j) of the Rome Statute defines as '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'.

War Crimes

The Rome Statute's definition of 'war crimes' also contributes to minority rights protection because it establishes that war crimes can be committed either in international or non-international armed conflict situations. Prior to the Rome Statute, it had been unclear as to whether the kinds of acts that qualified as 'war crimes' in international armed conflict, could also be considered to import individual criminal responsibility in the context of non-international armed conflict. Certain Delegations to the Rome Conference, supported by a wide range of NGOs, insisted that because civil wars have become much more frequent relative to inter-State wars, the ICC had to be conferred competence over war crimes committed in non-international armed conflict situations as well. This view ultimately prevailed and accordingly Article 8(2) of the Rome Statute distinguishes among four categories of 'war crimes'. Concerning international armed conflict, Article 8(2) defines 'war crimes' as grave breaches of the Geneva Conventions of 1949 and secondly, 'other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law'. As for non-international armed conflict, Article 8(2) defines 'war crimes' as serious violations of Article 3 common to the four Geneva Conventions and secondly, '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 ICC has to apply the Rome Statute's provisions on war crimes subject to Article 8(1) which provides that the 'Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes', in other words, only in cases where there is a certain level of organization and the violations have been carried out in the context of a command structure (whether that of a State or otherwise), rather than with respect to isolated acts or those committed outside any responsible authority whatsoever.

4.3. Procedural Aspects of the ICC's Protection of Minority Rights

Minority groups can access the available ICC procedures in order to spur the response of the international community in any situation where the violations in question amount to crimes under international law coming within the ICC's jurisdiction as described above.

It is important to note that the ICC Prosecutor has an independent role in the sense that he or she has the authority to initiate investigations on his/her own motion, and gather information from any reliable source. Minority group members

suffering serious violations can draw the attention of the ICC Prosecutor to the matter, who then has to determine whether the State having jurisdiction over the territory is both willing and able to prosecute the perpetrators. In other words, as mentioned briefly above, the ICC can seize jurisdiction over a situation only where the State or States with jurisdiction to prosecute remains or remain unwilling or unable to prosecute. In addition to the inability or unwillingness of the competent State to prosecute offenders for crimes under ICC jurisdiction, the ICC will not seize jurisdiction unless the preconditions to the exercise of jurisdiction have been satisfied, i.e. unless: 1) a State Party to the Rome Statute accepts the ICC's jurisdiction;⁵⁴ 2) a State Party refers a situation to the ICC;⁵⁵ 3) the person accused of the crime is a national of a State Party;⁵⁶ 4) the UN Security Council acting under Chapter VII of the Charter of the United Nations refers the situation to the Prosecutor;⁵⁷ or 5) the Prosecutor himself or herself has initiated an investigation *proprio motu* on the basis of information from 'States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate'.⁵⁸

It is important to bear in mind that the Prosecutor's investigation is subject to the judicial oversight of the Pre-Trial Chamber, which has to determine whether 'there is a reasonable basis to proceed'. At this stage in the ICC process, victims can make representations to the Pre-Trial Chamber, and equally, minority group members that have suffered violations that qualify as crimes within the ICC's jurisdiction can make their cases known.⁵⁹

In effect, the establishment of the ICC means that minority groups now enjoy the opening up of an entire new institutional framework to halt, suppress, prosecute and punish minority violations that constitute crimes under international law under the Rome Statute, as long as all ICC jurisdictional criteria are met.

⁵⁴ Article 12(2)(a) of the Rome Statute.

⁵⁵ Article 13(a) of the Rome Statute.

⁵⁶ Article 12(2)(b) of the Rome Statute.

⁵⁷ Article 13(b) of the Rome Statute.

⁵⁸ Articles 13(c) and 15 of the Rome Statute.

⁵⁹ In addition to the initiation of investigations by the Prosecutor *ex proprio motu*, a State Party may refer a situation to the Prosecutor requesting him or her to investigate (Article 14), the Security Council may invoke Chapter VII and refer a situation to the ICC pursuant to Article 13, or the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed, in essence, reactivating an investigation. There are of course a number of checks and balances within the ICC, such as the fact that under the Rome Statute, the Security Council can defer an investigation into a situation for a period of 12 months, if it manages to adopt a resolution pursuant to Chapter VII of the UN Charter to this effect, and it can renew this deferral. Moreover, the jurisdiction of the ICC in a given case can be challenged by an accused, a State having jurisdiction over the case as well as a State whose jurisdiction is necessary under Article 12 of the Rome Statute to proceed. *See* Article 19 of the Rome Statute.

5. CONCLUDING REMARKS

It has only been since the end of the Cold War that States have returned to the question of the effective guarantee of the human rights of minority groups as such. As we have seen, the rapid emergence of international criminal law enforcement mechanisms has been motivated largely to address the particularly intense kinds of violations typically committed in ethnic, racial and religious conflict. Paradoxically, while the Rome Statute of the ICC nowhere refers to 'minorities' or 'minority rights', in effect, the ICC constitutes the international community's foremost new weapon against severe minority rights abuse and against impunity, particularly as regards its more expansive definitions of 'crimes against humanity' and 'war crimes' and its new procedural avenues. Hopefully, the ICC will fulfill its potential to deter genocide, war crimes and crimes against humanity and thereby contribute to the effective protection of minority rights.