

**Accountability under Human Rights Law and  
International Criminal Law for Atrocities Against  
Minority Groups Committed by  
Non-State Actors**



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## TABLE OF CONTENTS

<b>1. Introduction</b>	p. 1
1.1. International responses to war crimes, genocide, crimes against humanity and serious violations of human rights	p. 1
1.2. The aim and purpose of the study	p. 4
1.3. Method and sources	p. 6
<b>2. Minority groups and threats from non-state actors</b>	p. 7
<b>3. International human rights law and abuses perpetrated by non-state actors</b>	p. 9
3.1. Introductory remarks on the character of human rights treaties	p. 9
3.2. Protection of minority groups under human rights law	p. 11
3.3. State responsibility for human rights abuses by non-state actors	p. 14
3.4. Due diligence as applied to the protection of minority groups	p. 20
3.5. Other means for ensuring accountability	p. 21
<b>4. International criminal law and non-state actors</b>	p. 22
4.1. Initial remarks on international criminal law and international crimes	p. 22
4.2. Accountability and international crimes	p. 24
4.3. Individual international criminal responsibility of non-state actors	p. 26
4.4. Non-state actors and genocide	p. 31
4.5. Crimes against humanity and non-state actors	p. 34
4.5.1. The characteristics of crimes against humanity	p. 34
4.5.2. Persecution as a crime against humanity	p. 39
4.5.3. Accountability of non-state actors	p. 41
4.6. International humanitarian law, war crimes and non-state actors	p. 43
4.6.1. On international humanitarian law and the protection of minority groups	p. 43

4.6.2. Non-state actors and war crimes in the Rome Statute	p. 48
<b>5. The complementarity between human rights law and international criminal law</b>	p. 51
5.1. General remarks	p. 51
5.2. Benefits for the human rights protection systems brought about by the Rome Statute	p. 52
<b>6. Conclusions</b>	p. 54

## Abbreviations

AJIL	American Journal of International Law
Art.	Article
CoE	Council of Europe
ECHR	European Court of Human Rights
FRY	Federal Republic of Yugoslavia
G.A.	General Assembly
ICC	International Criminal Court
IMT	International Military Tribunal
Inter-Am Ct. H.R.	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICHRP	International Council on Human Rights Policy
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
S.C.	Security Council
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNTAET	United Nations Transitional Administration in East-Timor

## **1. Introduction**

### **1.1. International responses to war crimes, genocide, crimes against humanity and serious violations of human rights**

The nature of the armed conflicts has changed quite dramatically during the last decades. Recent conflicts in Europe and elsewhere in the world reveal that most of the contemporary armed conflicts are not fought between two states, but rather between parties inside states. The occurrence of non-international and purely internal conflicts, and tyrannical regimes, which produce systematic human rights violations, has dramatically increased victimisation. Since the Second World War around 250 conflicts of different kinds have taken place and during these conflicts some 170 million people have been killed. This is almost twice as much as during the two world wars, and most of the victimisation has taken place in non-international conflicts. Such victimisation has as we have witnessed included genocide, crimes against humanity, and war crimes, along with extra-judicial killings, torture and arbitrary arrests –all of which constitute serious violations of international human rights law.<sup>1</sup>

More than often the contemporary conflicts are caused by tensions between a central government and a minority population, or between the majority population and minority groups. According to the analytical report of the UN Secretary-General on minimum humanitarian standards, contemporary conflicts are characterised by situations where one or more groups have taken up arms against the central government in the pursuit of political objectives such as secession or autonomy for a particular ethnic, religious or linguistic group, or the overthrowing of the existing government. Typical are also conflicts where an existing Government has collapsed, or is otherwise unable or unwilling to intervene and stop the violence between armed groups.<sup>2</sup> Furthermore, the patterns of human rights abuses in these circumstances show that the civilian population in general

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<sup>1</sup> Bassiouni, p. 2, 1996, Bassiouni, p. 5, 1999.

and especially children, women, and minority populations are most vulnerable to unregulated terror and violence, which characterise the contemporary conflicts.<sup>3</sup>

The role of the international community in preventing and halting genocides, crimes against humanity and other atrocities is usually focused on actions after such atrocities have been committed. Thus, the international community strives to try and punish individuals for international crimes such as war crimes, genocide and crimes against humanity and other serious human rights violations. Institutions such as courts, which are designed to protect, restore and improve our public order, seeks to fulfil a set of fundamental goals. These goals, which are common for all legal systems are according to Reisman: the prevention of imminent discrete public order violations; suspending current public order violations; deterring in general, potential future public order violations; restoring public order after it has been violated; correcting the behaviour that generates public order violations; rehabilitating victims who have suffered the brunt of public order violations; and reconstructing in a larger social sense to remove conditions that appear likely to generate public order violations. The common denominator of these goals is thus to protect, re-establish or create a public order, which can be characterised by low expectations of violence and an increased respect for human rights. A wide range of international institutions and practises are thus being used in order to accomplish the above-mentioned goals. Of such institutional practises Reisman regards the following as most important: 1.) *International human rights law, the law of state responsibility, and the developing law of liability without fault*; 2.) *International criminal tribunals*; 3.) *Universalisation of the jurisdiction of national courts for international crimes*; 4.) *Non-recognition or the general refusal to recognise and to allow violators the beneficial consequences of actions deemed unlawful*; 5.) *Incentives in the form of foreign aid or other rewards*; 6.) *Commissions of inquiry or truth commissions*; 7.) *Compensation commissions*; and 8.) *Amnesties*.<sup>4</sup>

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<sup>2</sup> UN Doc. E/CN.4/1998/87 5 January 1998. Minimum humanitarian standards. Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21, at 17-19.

<sup>3</sup> Ibidem. at 25 –26.

<sup>4</sup> Reisman, p. 76-78, 1996.

For the purposes of this study categories 1-3 are most relevant as the objective of this paper is to examine the possible legal responses to serious human rights abuses under contemporary human rights law and international criminal law.

Human rights are conceived of as rights held by individuals vis-à-vis the State, and they create legal obligations, both positive and negative in nature, on part of the State to ensure the full enjoyment of these rights. The State is then arguably also the only entity, which can be responsible for human rights violations. Nevertheless, measures taken by other actors can also violate human rights. After the Second World War, large-scale victimizations of civilians have often been committed by non-state actors<sup>5</sup>, such as paramilitary units, armed civilian bands and even children. In the last decade we have also witnessed attacks on civilian populations, campaigns of ethnic cleansing and even genocides that have been perpetrated by militias, insurgent groups or other non-state actors. The threat posed by non-state actors have become so frequent that Kälin claims that the majority of refugees are today fleeing violence emanating from non-state actors.<sup>6</sup> During the conflict in the former Yugoslavia, most of the atrocities falling within the definition of crimes against humanity were according to Bassiouni perpetrated by such paramilitary groups or armed civilian bands. Moreover, the Hutu civilians were incited to kill Tutsi civilians in the Rwanda conflict, and in Liberia armed civilian bands have committed crimes against humanity.<sup>7</sup> In the international on-going discussion on fundamental standards of humanity, the accountability of armed groups and other non-state actors is seen as one of the most difficult challenges posed by contemporary conflicts, regarding the protection of fundamental rights.<sup>8</sup>

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<sup>5</sup> A study conducted by the International Council on Human Rights Policy, on the accountability of non-state armed groups, use the term “armed groups” in that context for “non-state actors”, and defines such groups as groups that are armed and use force to achieve their objectives and are not under state control.” A broad understanding of this definition will also be used below, but in relation to the term non-state actors. (International Council on Human Rights Policy: “Ends & means: human rights approaches to armed groups”, pp. 5-6.)

<sup>6</sup> Kälin, p. 43, 2001.

<sup>7</sup> Bassiouni, p. 274, 1999.

<sup>8</sup> See for example UN Doc. E/CN.4/1998/87 5 January 1998. Minimum humanitarian standards Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/2, and UN Doc. E/CN.4/2001/91 12 January 2001 Fundamental Standards of Humanity Report of

## **1.2. The aim and the purpose of the study**

As we have witnessed through the conflict in Kosovo, and elsewhere, minority groups are very often the victims of atrocities, which could classify as violations of minority rights under human rights law, the crime of persecution as a crimes against humanity, as war crimes and even as acts of genocide. Often it is as was mentioned above, non-state actors, which are behind such acts. With regard to war crimes, genocide and crimes against humanity, all actors are individually criminally liable, under international criminal law. The more complicated issues are whether human rights law applies to non-state actors, and how non-state actors could be made accountable for violations of fundamental rights.

The aim of this study is thus to examine the scope and the content of the legal responses available under two branches of contemporary international law, namely human rights law and international criminal law, to atrocities that can be defined as war crimes, crimes against humanity, genocide and human rights violations, when they are perpetrated by non-state actors. Minority rights are protected under human rights conventions, that are treaties between States, in which States have undertaken to respect and ensure the rights enshrined in the treaty. Thus, this paper seeks to examine the nature and scope of the obligations on part of the State, when the threat to minority groups stems from non-state actors. The main issue in this respect is thus to examine what kind obligations international human rights law puts on the duty-bearers for atrocities against minority groups, when non-state actors perpetrate them. The questions that arise in this connection are thus: Does human rights law apply to non-state actors? How can non-state actors violating the rights of minority groups or engaging in persecution of such groups be made accountable for such acts? What kind of duties do human rights conventions put on States, with regard to violations of the very rights that the convention is designed to protect? What is the scope of the “due diligence” doctrine?

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the Secretary-General submitted pursuant to Commission resolution 2000/69. Report from the Expert Meeting on Fundamental Standards of Humanity, Stockholm 22-24, February 2000.



In international criminal law, crimes against humanity overlap with some fundamental human rights violations in the Rome Statute, which as Meron puts it, means that fundamental human rights violations become criminalized under the Rome Statute. Scheinin also elaborates further on this important connection, and states that: “ *What is punishable for an individual under international law is also prohibited in relation to States. And what is prohibited by international law by qualifying certain acts as international crimes is certainly relevant for an understanding of what rights – fundamental standards of humanity- must be respected by States and individuals in all circumstances.*”<sup>9</sup> Moreover, the same reasoning can also be traced in General Comment No. 29 on states of emergency, which was adopted by the UN Human Rights Committee in July 2001.<sup>10</sup> This connection between international criminal law and international human rights law leads to the second major issue of this study. Thus, the study will examine the means to hold non-state actors accountable under the Genocide Convention and under the Statute of the International Criminal Court. Both genocide and crimes against humanity are very specific crimes, which put specific requirements regarding both the acts, the intentions behind the acts and the actor behind them. With this in mind the study seeks to identify the requirements, which must be fulfilled before a non-state actor can be held criminally liable for genocide and crimes against humanity. This study is especially interested in offences, which have targeted minority groups, and thus the offence of persecution, which has expanded through the codification will be paid special attention. The protection afforded to minority groups under international humanitarian law, and especially the means to hold non-state actors responsible for war crimes under the Rome Statute will also be examined under the heading of international criminal law. The Rome Statute is especially significant with regard to non-state actors, as it is the first

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<sup>9</sup> Scheinin, p. 32, 2000.

<sup>10</sup> UN Doc. CCPR/C/21/Rev.1/Add.1131 August 2001 General Comment No. 29 on States of emergency, at paragraph 12, which reads: “*In assessing the scope of legitimate derogation from the Covenant, one criterion can be found in the definition of certain human rights violations as crimes against humanity. If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct. Therefore, the recent codification of crimes against humanity, for jurisdictional purposes, in the Rome Statute of the International Criminal Court is of relevance in the interpretation of article 4 of the Covenant.*”

major multilateral treaty codification of certain war crimes in non-international armed conflicts, which in turn are the circumstances in which non-state armed groups usually operate.

The study requires, in addition to an analysis of the ICC-Statute and its preparatory documents, also a careful examination of the case law from the international *ad hoc* tribunals with jurisdiction over these crimes.

The fifth chapter is then devoted to an elaboration of the idea of a merger between international criminal law and international human rights law. As the Rome Statute criminalizes genocide and crimes against humanity, it is also of relevance to consider what added value this brings to human rights treaty regimes, and to the protection of minority groups in conflict circumstances. In reverse, one also needs to consider whether or not the discourse concerning the merger of human rights law and international criminal, is premature and even harmful for international criminal law.

### **1.3. Method and sources**

This study approaches the theme from a legal point of view, with the aim of answering the questions posed through an examination of the relevant legal sources. In this respect, international human rights conventions, especially the International Covenant on Civil and Political Rights (ICCPR), instruments on international criminal law, such as the Genocide Convention and especially the Statute of the International Criminal Court (ICC) are of most relevance. In addition to the instruments and their preparatory documents, also the relevant case law of the ICTY and the ICTR, and the UN Human Rights Committee will be examined. Attention will also be given to the latest doctrine on these issues and the ongoing international discussion, especially on the fundamental standards of humanity, which relates closely to the theme.

## **2. Minority groups and threats from non-state actors**

The ability of non-state actors to commit large-scale victimisation has been clearly demonstrated during the conflicts in Rwanda, the former Yugoslavia, and elsewhere. The International Council on Human Rights Policy study on armed groups and human rights abuses confirms how the changing nature of armed conflicts, from international to internal, has brought about armed groups, which are not under the control of any State, and whose conduct give rise to serious human rights abuses. The study also enlists the most common human rights abuses, which are attributable to armed non-state actors. Among these are: arbitrary deprivation of the right to life, disregard for the protection owed to civilians caught up in conflicts, interference with freedom of movement, interference with freedom of expression, assembly and association, torture, ill-treatment, and abuses against children and women, and arbitrary deprivation of liberty and due process.<sup>11</sup>

The rights of minority groups are not mentioned as such on the list, but minority groups, or groups with distinct ethnic, religious, linguistic characteristics are usually the victims of the above-mentioned abuses. The vulnerability of minorities during crisis situations is also recognised in the reports of the UN Special Rapporteur on States of Emergency, Mr. Leandro Despouy of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, who mentions minorities, indigenous populations and migrant workers as groups that are particularly vulnerable during states of emergencies, and whose protection needs to be strengthened.<sup>12</sup>

The conflict in Kosovo is a good example of victimisation of minorities, which as been perpetrated by both State action and by non-state actors. Firstly, the Albanian community in Kosovo was the target of genocidal acts on behalf of the regime in Belgrade, which lead

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<sup>11</sup> International Council on Human Rights Policy: “Ends & means: human rights approaches to armed groups”, p. 10.

<sup>12</sup> 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, 23 June 1997, The administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency, paragraph 173.

to the indictments of the political and military leaders of the Federal Republic of Yugoslavia for crimes against humanity by the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>13</sup> After the deployment of UNMIK and KFOR, the Serb-minority residing in Kosovo, was according to the reports of the international human rights monitors, the target of revenge crimes perpetrated by armed non-state groups.<sup>14</sup> The human rights abuses by armed groups in Kosovo might also be tried by the ICTY. The chief prosecutor of the ICTY, Carla Del Ponte also stated at a Press Conference on the 21<sup>st</sup> of March 2001, that investigations with respect to possible violations of the laws or customs of war and crimes against humanity in Kosovo, involving allegations about activities, against Serbs and other minorities, by unidentified Albanian armed groups in Kosovo from June 1999 until the present, is underway.<sup>15</sup>

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<sup>13</sup> Milutinovic et al. Case No. IT-99-37 "Kosovo" Initial Indictment, 24 May 1999.

<sup>14</sup> Preliminary Assessment Of the Situation of Ethnic Minorities in Kosovo. UNHCR/OSCE 26 July 1999. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>. UN Doc. S/1999/987 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, p. 1-2. Taken from: <http://www.un.org/Docs/reports/1999/s1999987.htm>, UN Doc s/1999/1250 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, p. 1-2. Taken from: <http://www.un.org/Docs/reports/1999/s19991250.htm>. UNHCR OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering November 1999 through January 2000), p. 1-2, 5. <http://www.osce.org/kosovo/documents/reports/minorities/>.

<sup>15</sup> Statement given by the Prosecutor of the ICTY, Carla Del Ponte, at the Press Conference on 21 March 2001 with the President of the ICTY, Judge Claude Jorda, Mr. Grubac, the Minister of Justice of the Federal Republic of Yugoslavia, and Mr. Batic, the Minister of Justice of the Republic of Serbia. The Hague, 21 March 2001.FH/P.I.S./578e. Taken from <http://www.un.org/icty/latest/latestdev-e.htm>.

### **3. International human rights law and abuses perpetrated by non-state actors**

#### **3.1. Introductory remarks on the character of human rights treaties**

The general international human rights conventions, such as the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights, are treaties between States. They were drafted by States, addressed to States, and intended to create obligations on part of the States. Only States can be parties to international human rights treaties, and States are also the only subjects to the oversight mechanisms that the treaties establish.<sup>16</sup> Thus, only States can be held accountable for human rights violations, under an international human rights protection regime.<sup>17</sup>

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<sup>16</sup> Nevertheless, the UN Human Rights Committee, which is monitoring the implementation of the International Covenant on Civil and Political Rights, can also monitor the implementation of the Covenant on a territory, which is not a State party to the Covenant. In the case of Hong Kong for example, the government of China, which is not a State party to the Covenant, submitted a report concerning the implementation of the ICCPR in Hong Kong, as the Covenant continued to apply in the Hong Kong Special Administrative Region. See for example UN Doc. CCPR/C/HKSAR/99/1 16 June 1999 Initial report (Hong Kong) : China. 16/06/99. CCPR/C/HKSAR/99/1. (State Party Report).

<sup>17</sup> International Council on Human Rights Policy: “Ends & means: human rights approaches to armed groups, at p. 60. According to article in the Optional Protocol to the ICCPR only States can be found to have violated the rights enumerated in the Covenant. Thus, article 1 reads as follows: “A *State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.*” Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976. On the same issue article 44 of the American Convention on Human Rights prescribes: “*Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.*” Article 63 provides that: “*1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.*” 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). Furthermore, articles 33 and 34 of the European Convention on Human Rights, also reads as follows: “*Any High Contracting Party may refer to*

Human rights treaties are in the first place, designed to protect the individual against the exercise of State power, and they create a legal obligation for States to respect and to ensure the rights enumerated in the Convention. Furthermore, it also means that the State has an obligation to extend the reach of human rights law to relations between individuals, which is often referred to as *Drittwirkung*. This means that States have an obligation to adopt corresponding measures in municipal law, which in turn creates obligations on part of the individuals.<sup>18</sup> Under international law States are the duty-bearers, with regard to human rights treaties, and as such internationally responsible for what happens in their territory. States must therefore take effective measures, in order to protect the rights enshrined in the conventions, also when private actors threaten the rights.<sup>19</sup> Similarly, Provost also assert, that this means that human rights law could cover terrorist activities by non-state actors.<sup>20</sup>

Even if the State is primarily responsible for upholding human rights, new non-state entities, which have entered the global scene and perpetrated serious human rights violations, have seriously challenged the States' ability to regulate and control these entities. In the discussion concerning terrorism and human rights with the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Ms. Kalliopi K. Koufa asserted that there is a need to: "*assess objectively whether international human rights law is moving beyond the traditional dichotomy of individual versus State, beyond the duty of States to respect and ensure the observance of human rights, and towards the*

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*the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.* », and « *The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.* » [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

<sup>18</sup> Provost, p. 59, 2002.

<sup>19</sup> Scheinin, p. 26, 2000.

<sup>20</sup> Provost, p. 59, 2002.

*creation of obligations applicable also to private individuals and other non-state actors including liberation movements and terrorist organisations.”<sup>21</sup>*

Generally speaking, there are however divergent views among scholars and Governments regarding the question whether, non-state actors, such as armed groups can commit human rights violations, and whether they could be held accountable under international human rights law for these, or whether such violations, despite deserving condemnation, cannot per definition be regarded as human rights violations.<sup>22</sup>

Below, the question whether, and under which conditions, a State can be held liable for human rights violations perpetrated by non-state actors will be first addressed. This will be done through an examination of the obligations on part of the State, that the human rights conventions give rise to. This analysis will then be followed by a discussion on whether non-state actors could be held directly accountable.

### **3.2. Protection of Minority groups under human rights law**

Under international human rights law, article 27 of the International Covenant on Civil and Political Rights affords the main and general minority protection.<sup>23</sup> Article 27, which is the most widely accepted legally binding provision regarding minority rights, protects the existence of members of minorities, and their cultural, religious and linguistic activities, and reads as follows:

*“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*

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<sup>21</sup> UN Doc. E/CN.4/Sub.2/1997/28 Terrorism and human rights Working paper submitted by Ms. Kalliopi K. Koufa in accordance with Sub-Commission resolution 1996/20.

<sup>22</sup> UN Doc. E/CN.4/1998/87 5 January 1998. Minimum humanitarian standards Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21.

<sup>23</sup> International Covenant on Civil and Political Rights adopted on the 16 December 1996. Hereinafter the Covenant will be called the ICCPR.

*members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*“<sup>24</sup>

As the aim of minority rights regimes is to protect minorities against activities that are aimed at the destruction of the group, it is evident that the protection of the physical existence of minorities is primordial.<sup>25</sup> This negative element of the provision obliges states to refrain from interference and to practise tolerance. All forms of integration and assimilation pressure, and of course all measures directed against, and threatening the existence of minorities are also prohibited.<sup>26</sup> With regard to the protection of this right, the new General Comment, on derogations from provisions of the Covenant during states of emergencies, stands out as extremely important, 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 in international law, in the inclusion of a non-discrimination clause in article 4 itself (paragraph 1), as well as in the non-derogable nature of article 18.*“<sup>27</sup> Although most threats to minority rights stem from the state side, since the dominant group usually use the state power mechanisms to oppress minorities, experiences from states with many rivalling ethnic or religious groups show that minority rights can also be threatened by the private side. Therefore article 27 has also a horizontal effect, and states are thus obliged to protect minority rights as well against threats stemming from the state side as well as against threats stemming from other groups of the population.<sup>28</sup> The Human Rights Committee, in its General Comment on art. 27, also confirmed this important obligation, as the Committee held that: “... *a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the*

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<sup>24</sup> ICCPR, art. 27.

<sup>25</sup> Lundberg Kristiansen, 1997, p. 381.

<sup>26</sup> Nowak, 1993, p. 502.

<sup>27</sup> UN Doc. CCPR/C/21/Rev.1/Add.11, (2001) Human Rights Committee General Comment 29, 31 August 2001.

<sup>28</sup> Nowak, 1993, p. 502-503.



*State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.”*<sup>29</sup>

Furthermore, there are also provisions applicable to minorities in the Convention on the Elimination of All Forms of Racial Discrimination,<sup>30</sup> in the Convention on the Rights of the Child<sup>31</sup> and in the Convention against Discrimination in Education.

In 1992 the UN General Assembly adopted the UN Declaration on the rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. This instrument, which formally is not legally binding, is, however, the first UN human rights instrument devoted solely to minorities. On the regional level, one also has to mention the Framework Convention for the Protection of National Minorities, within the Council of Europe, which is the first binding international instrument on minority rights. Further, the European Convention on Human Rights creates through article 14 a legally binding, but limited minority protection. Of significance with regard to minority groups is also Protocol No.12 to the ECHR, which regards the prohibition of discrimination. Moreover, the OSCE documents also include far-reaching minority rights, but these are formally non-binding, and as such not of primary importance for this study. With regard to non-legally binding standards, one can also mention the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, which has been part of the ongoing international discussion on fundamental standards of humanity, applicable in all circumstances and to all actors. This instrument was approved by a group of experts, and can be seen as a part in the process aimed at strengthening the protection of fundamental rights during various states of emergency.<sup>32</sup> It is formulated as a declaration to be adopted by the UN, and it

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<sup>29</sup> The rights of minorities (Art. 27):.08/04/94. CCPR General Comment 23 (Fiftieth session).

<sup>30</sup> International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by General Assembly Resolution 2106 A (XX) of 21 December 1965. Hereinafter this Convention will be referred to as CERD.

<sup>31</sup> Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

<sup>32</sup> Scheinin, 2000, p. 4. On 2 December 1990, a group of experts convened at the Åbo Akademi University Institute for Human Rights in Finland and approved a document called “Declaration of Minimum Humanitarian Standards“, which nowadays is internationally known as the “Turku Declaration“. The approval of the declaration by a group of experts can be seen as part of a more general process aimed at

contains norms that should be applicable in all circumstances, including internal violence, disturbances, tensions, and public emergency, and which cannot be subject to derogations. It also contains a provision on the protection of minorities.<sup>33</sup> Thus article 16 provides: “ *In observing these standards, all efforts shall be made to protect the rights of groups, minorities and peoples, including their dignity and identity.*“<sup>34</sup> This instrument is, however, not legally binding, but should rather be seen as a soft-law type of instrument. It has however gained some kind of recognition, as a revised version of it was transmitted to the Commission on Human Rights in 1994 by the governments of Finland and Norway, and it has been on the agenda of the Commission since then.<sup>35</sup> Moreover it has also been referred to by the ICTY in the *Tadic case*.<sup>36</sup>

### **3.3. State Responsibility for human rights abuses by non-state actors**

States have an obligation of due diligence to protect the enjoyment of rights of individuals under general international law. Under conventional international law States have an obligation to respect and to secure or ensure respect of the rights enumerated in the conventions. This obligation, which may depending on the circumstances include a duty to

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strengthening the protection of fundamental rights during various states of emergencies. The Declaration has since that been revised and submitted to the UN Commission on Human Rights, (See UN Doc.E/CN.4/1995/116). See also Asbjorn Eide, Allan Rosas, Theodore Meron:“ Combating Lawlessness in Grey Zone Conflicts through Minimum Humanitarian Standards“, AJIL 89 (1995), pp.215-223 for more information. This document will hereinafter be called “The Turku Declaration“.

<sup>33</sup> The Turku Declaration on Minimum Humanitarian Standards, art. 1.

<sup>34</sup> Ibid., art. 16.

<sup>35</sup> UN Doc. E/CN.4/1995/116, Scheinin, 2000, p. 42. , Report from the Expert Meeting on Fundamental Standards of Humanity, Stockholm, 22-24 February 2000. Within the Commission the Turku Declaration has been part of the discussion on fundamental standards of humanity. In this respect the analytical reports on fundamental standards of humanity, presented by the Secretary-General to the Commission, concluded that the most important purpose of identifying such standards is to enhance protection of all persons, and that a document identifying such standards would be useful for education- and training purposes as well for improving respect for and compliance with norms. There are however also disadvantages with the adoption of an instrument identifying fundamental standards of humanity. The most serious disadvantage, identified by the same report is that the adoption of such a document might undermine existing international standards, and imply that norms not included are less important. UN Doc. E./CN.4/1998/87 Minimum Humanitarian Standards Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21, paras. 89-95. See also UN Doc. E.CN.4/1999/92 Fundamental Standards of Humanity, Report of the Secretary-General pursuant to Commission Resolution 1998/29.

enact domestic legislation which impose obligations upon individuals, is laid down in similar terms in all major human rights conventions.<sup>37</sup> Thus, article 2 (1) of the ICCPR reads as follows:

*“1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*<sup>38</sup>

With regard to the International Covenant on Economic, Social and Cultural Rights, the corresponding article stipulates:

*“1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”*<sup>39</sup>

The corresponding article of the European Convention on Human Rights reads as follows:

*“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”*<sup>40</sup>

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<sup>36</sup> Case No. IT-94-1-AR-72 Prosecutor v. Tadic Decision of 2 October 1995.

<sup>37</sup> Provost, p. 60, 2002.

<sup>38</sup> ICCPR, art. 2.

<sup>39</sup> 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, entered into force Jan. 3, 1976.

<sup>40</sup> [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

Article 1 of the American Convention on Human Rights prescribes that:

*“ The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. ”*<sup>41</sup>

The African Charter on Human and Peoples’ Rights (Art. 1) also contains a similar obligation, which stipulates that:

*“The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them. ”*<sup>42</sup>

Thus, human rights conventions establish a system by which States are, as was said above, internationally responsible for what happens on its territory. This means that States are obliged to take effective measures in order to protect rights, against all threats, including threats stemming from non-state actors. Thus, a State, which fails to comply with this obligation, is in itself guilty of violating human rights.<sup>43</sup> The leading case on the issue is the *Velásquez Rodríguez-case*, a case against Honduras involving involuntary disappearances attributable to a non-state actor. Here, the Inter-American Court of Human Rights held that the obligation on part of the State to ensure the full enjoyment of rights entails a duty to prevent, investigate and punish any violation, through legislative measures and reorganisation of the State apparatus. On this issue the Court stated that: *“Thus, in*

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<sup>41</sup> 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).

<sup>42</sup> African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

<sup>43</sup> Scheinin, p. 26, 2000.

*principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”<sup>44</sup>*

Thus the Court upheld, that an omission to prevent, investigate and punish a violation might be in breach with the States’ obligations arising from a human rights treaty, also when the violation itself was not committed by a state agent. The State has then violated its obligation, if it tolerates or condones infringements in rights by non-state actors or private individuals.<sup>45</sup> Similar reasoning has also been adopted by other international treaty-monitoring bodies. The Human Rights Committee held in the *Herrera Rubio v. Colombia*-case, that: “*that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.*”<sup>46</sup>

In the *Osman v. United Kingdom*-case the European Court of Human Rights took a similar stand regarding the due diligence requirement, as it established a standard for positive obligations for States with regard to the right to life. Here the Court noted that: “*The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to*

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<sup>44</sup> Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988), at Para.172.

<sup>45</sup> Provost, p. 61, 2002.

*refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.*"<sup>47</sup>

The doctrine of due diligence to protect the full enjoyment of rights, as stated in the case-law, and advocated for by scholars, confirms that States have a duty to prevent, investigate and punish violation committed by non-state actors.

There seem however to be divergent views among scholars regarding the scope of the obligation. On the one hand, many commentators argue that the obligation to "ensure" implies a duty to prosecute those who violate the rights.<sup>48</sup> This view can certainly be backed up by the above-cited case law, and by other findings of the Human Rights Committee. In a case concerning alleged acts of torture in Zaire, the Committee held that the government was under a duty to conduct an enquiry, and to punish those found guilty of torture.<sup>49</sup> In a view concerning alleged extra-legal executions in Surinam, the Committee urged the government to take effective steps..."*to investigate the killings and*

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<sup>46</sup> Communication No. 161/1983 : Herrera Rubio v. Colombia. 02/11/87. CCPR/C/31/D/161/1983. (Jurisprudence), at 10.3.

<sup>47</sup> Osman v. United Kingdom, Judgement of 28 October 1998, European Court of Human Rights, Reports 1998-VIII., at para. 115.

<sup>48</sup> See for instance Pocar, p. 71, 2001.

<sup>49</sup> Communication No. 124/1982: Muteba v. Zaire. 24/07/84. CCPR/C/22/D/124/1982. (Jurisprudence).

*to bring to justice any persons found to be responsible.*<sup>50</sup> With regard to the duty to prosecute one could also mention the view adopted by the Committee in a case involving disappearances in Uruguay, in which the Committee held that the Government should take effective steps to bring those responsible to justice.<sup>51</sup> Scharf, on the other hand seems to take a more restricted view, as he does not subscribe to the existence of a strict duty to prosecute violators. He asserts that the case law suggest that at a minimum States must conduct an investigation, and impose some form of punishment on those identified as responsible.<sup>52</sup>

Nevertheless, one must conclude that when it comes to violations of certain human rights, it is beyond doubt that States have an obligation to prosecute the violators. This is especially true concerning such human rights violations, which at the same time constitute international crimes. In this respect, article V of the Genocide Convention stipulates that States undertake *”...to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide...”*<sup>53</sup> Similarly, the UN Torture Convention also requires prosecution or extradition.<sup>54</sup> With respect to crimes against humanity, the case is not so clear. There is no international treaty-obligation requiring prosecution or extradition, but several General Assembly resolutions calling for the prosecution of crimes against humanity.<sup>55</sup> It is however difficult not to concur with Scharf, who points out that the absence of State practise concerning prosecutions of

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<sup>50</sup> Communication No. 154/1983: Baboeram-Adhin et. al. v. Suriname. 04/04/85. CCPR/C/24/D/154/1983. (Jurisprudence).

<sup>51</sup> Communication No. 107/1981: Almeida de Quinteros v. Uruguay. 21/07/83. CCPR/C/19/D/107/1981. (Jurisprudence)

<sup>52</sup> Scharf, pp. 7-9, 1997. In addition to a not so strict tone in the views, Scharf bases his conclusion in the fact that States rejected a proposal, which would have required States to prosecute violators, when the ICCPR was negotiated.

<sup>53</sup> The Genocide Convention art. 5.

<sup>54</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

<sup>55</sup> See for example UN Doc. A/8028 (1970) G.A. Res. 2712 United Nations Resolution on War Criminals UN Doc. A/9030 (1973) G.A. Res 3074 Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity Adopted by General Assembly resolution 3074 (XXVIII) of 3 December 1973.

perpetrators makes it difficult to prove the existence of a customary obligation to prosecute.<sup>56</sup>

### **3.4. Due diligence as applied to the protection of minority groups**

To conclude, one can therefore assert that States have an obligation to protect minority groups and their rights against infringements stemming from non-state actors. If the State fails to do so, it could itself, in accordance with the due diligence doctrine, be held responsible for a human rights violation. Exactly what this obligation entails is difficult to determine. The General Comment on article 27, states that article 27 recognizes the existence of a right, which must not be denied, and furthermore, that: “*a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. 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.*”<sup>57</sup> Thus, we can conclude that legislative, judicial and administrative measures can be required in order to protect the existence of minority groups and their rights. With regard to more violent acts, which are the main focus of this study, one could hold that States are under an obligation to protect minority groups against threats to their existence. In this respect, there is at least an obligation to prosecute acts, which would qualify as genocide. There is no outright duty to prosecute acts of persecution amounting to crimes against humanity under that heading, but such acts could fall under other articles, which *drittwirkung* would require prosecution. Moreover, with regard to other than violent threats, States have an obligation to protect the right of minority groups to enjoy their culture, profess their own religion, and to speak their own language, when it is threatened by private actors. Moreover, States have on the basis of article 20 in the ICCPR an outright obligation to prohibit “any advocacy of national, racial or religious

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<sup>56</sup> Scharf, p. 8-9, 1996.

<sup>57</sup> U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994). Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994).



hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”, of which minority could fall victim.

### **3.5. Other means for ensuring accountability**

State responsibility, coupled with the due diligence doctrine can as was described above be used as a vehicle for making non-state actors accountable for human rights violations. With reference to the above examination of the nature of human rights treaties, it is according to the present author, not possible to hold non-state actors directly responsible for human rights violations *per se*. Such violations must be addressed under domestic criminal law, or by enforcement mechanisms of international criminal law, such as the ICC or through the principle of universal jurisdiction, insofar as the violations also qualify as international crimes. This issue will be examined further in the coming chapters. Anyway, in the discussion on fundamental standards of humanity and in the ICHRP -study, strategies for making it attractive for armed non-state actors to respect for human rights are also highlighted. In that context, non-legal approaches such as shaming and persuasion, which includes fact-finding and denunciation and use of media, working with armed groups, which includes among other things the development of codes of conduct are highlighted.<sup>58</sup>

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<sup>58</sup> International Council on Human Rights Policy: “Ends & means: human rights approaches to armed groups”, p. 39-58. See also Scheinin, p. 28-30, 2000.

## 4. International criminal law and Non-State actors

### 4.1. Initial remarks on international criminal law and international crimes

The definition of international criminal law can be held to include both the penal and procedural aspects of international law and the international procedural aspects of national criminal law. For the purposes of this study, the penal aspects of international law, which establish international crimes and identify elements of criminal responsibility and enforcement modalities, and increasingly also procedural modalities, is of most relevance. The sources of law for international criminal law can thus according to Bassiouni, be distinguished as between international law for the *ratione materiae*, *ratione personae*, and enforcement obligations, and national criminal law for enforcement modalities. Accordingly, the basis for international criminal accountability and *ratione personae* is established in international law, as is also the *ratione materiae*. The general part, the elements of criminal responsibility, are also established by international law whenever an internationally created judicial body adjudicates criminal responsibility. Moreover, with regard to the sources, also international human rights law and general principles of criminal law recognised by the world's major criminal law systems, and emerging international criminological perspectives are regarded as additional collateral sources of international criminal law.<sup>59</sup>

With regard to the *ratione materiae*, the international crimes derive from both conventional international law and customary law. All international crimes are according to Bassiouni, linked by four factors that reflect the policy of international criminalisation of such acts. These factors are:

“ a) The prohibited conduct affects a significant international interest (including threats to peace and security);

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<sup>59</sup> Bassiouni, p. 9, 1999.

b) the prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community ( including conduct shocking to the conscience of humanity);

c) the prohibited conduct involves more than one state (transnational implications) in its planning, preparation or commission either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries;

d) the conduct bears upon an internationally protected interest which does not rise to the level required by (a) or (b) but which cannot be prevented or controlled without its international criminalisation.”<sup>60</sup>

Accordingly, Bassiouni has identified 25 categories of international crimes, adduced from international conventions, which all have penal characteristics, that identify proscribed conduct and/or establish legal obligations which are penal in nature.<sup>61</sup> These categories are: 1) aggression; 2) genocide; 3) crimes against humanity; 4) war crimes; 5) crimes against United Nations and associated personnel; 6) unlawful possession or use or emplacement of weapons; 7) theft of nuclear materials; 8) mercenarism; 9) apartheid; 10) slavery and slave-related practices; 11) torture and other forms of cruel, inhuman or degrading treatment; 12) unlawful human experimentation; 13) piracy; 14) aircraft hijacking and unlawful acts against international air safety; 15) unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas; 16) threat and use of force against internationally protected persons; 17) taking of civilian hostages; 18) unlawful use of the mail; 19) unlawful traffic in drugs and related drug offences; 20) destruction and/or theft of national treasures; 21) unlawful acts against certain

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<sup>60</sup> Bassiouni, p. 33, 1999.

<sup>61</sup> These ten penal characteristics are: 1) an explicit recognition of proscribed conduct as constituting an international crime, or a crime under international law, or as a crime; 2) implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like; 3) criminalisation of the proscribed conduct; 4) duty or right to prosecute; 5) duty or right to punish the proscribed conduct; 6) duty or right to extradite; 7) duty or right to cooperate in prosecution, punishment (including judicial assistance in penal proceedings); 8) establishment of a criminal jurisdictional basis (or theory of criminal jurisdiction or priority in criminal jurisdiction); 9) reference to the establishment of an international criminal court or an international tribunal with penal characteristics; and, 10) elimination of the defence of superior orders. (See Bassiouni, p. 47, 1999).

internationally protected elements of the environment; 22) international traffic in obscene materials; 23) falsification and counterfeiting; 24) unlawful interference with submarine cables; and, 25) bribery of foreign public officials.<sup>62</sup>

## **4.2. Accountability and international crimes**

The conflicts fought during the recent decade gave rise to an increasing attention to the issue of accountability for international crimes such as genocide, crimes against humanity and serious human rights violations. These crimes are generally characterised by their mass scale and by their impact on whole societies, and hence the purposes for seeking accountability for these crimes are somewhat different from the purposes for bringing “ordinary criminals” to account.<sup>63</sup>

Accountability for above-mentioned atrocities is thus according to Ratner and Abrams, first of all important for the victims of the atrocities and their relatives and friends, as it gives them a sense of justice and closure. Secondly, accountability is also especially important in transitional regimes, for repairing the damage done to society traumatised by massive human rights violations and for starting a national reconciliation process. Thirdly, accountability should also have a deterring effect, by deterring the specific accused from committing similar crimes in the future and deterring others from committing similar crimes, and more generally by promoting justice and the rule of law. Fourthly, accountability also seeks to rehabilitate the offender, although this aspect is invoked less prominently when it comes to genocide, crimes against humanity and massive human rights abuses. Fifthly, beyond the consequentialist arguments presented above, Ratner and Abrams assert that a retributive theory of justice would regard accountability as a just punishment for those who do wrong, and further that accountability may also serve as a righteous expression of moral condemnation of heinous offences.<sup>64</sup>

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<sup>62</sup> *Ibidem.*, p. 32, 1999.

<sup>63</sup> Morris, p. 1, 1996.

<sup>64</sup> Ratner & Abrams, p. 135, 1997. With regard to the purposes behind accountability for international crimes it is also of relevance to take a look at principal objectives for establishing The International

The primary legal response to war crimes, genocide, crimes against humanity and gross violations of human rights is thus to hold the individuals responsible for those acts accountable. Individual criminal responsibility for the above mentioned acts is today undisputed, but to make accountability meaningful requires the creation of specific mechanism. National judicial systems and international tribunals, such as ad hoc tribunals and the International Criminal Court (ICC) are most important in this respect.<sup>65</sup> Despite the high level of victimisation there have not been many prosecutions. Notwithstanding the establishment of the ICC, there have been two internationally established ad hoc criminal tribunals for the former Yugoslavia and Rwanda respectively, which have jurisdiction over war crimes, genocide and crimes against humanity.<sup>66</sup> Moreover, a hybrid international-domestic tribunal, with jurisdiction over crimes against humanity has been established in Sierra Leone,<sup>67</sup> and mixed international-national panels with exclusive jurisdiction over genocide and crimes against humanity were created by the United Nations Transitional Administration in East-Timor.<sup>68</sup> In addition, legislation, which allows for the establishment of an internationalised panel, for trying the leaders of the Khmer Rouge for genocide has also been approved in Cambodia.<sup>69</sup>

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Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter ICTY). In the first annual report submitted to the General Assembly and the Security Council, the Secretary-General identifies the bringing of the persons responsible of the crimes to justice, to deter further crimes and to contribute to the restoration of the peace and security as the principal objectives of the tribunal. In this respect the Secretary-General emphasises the role of the tribunal as a tool for promoting reconciliation and restoring true peace, as responsibility for the atrocities are attributed to individuals rather than to whole ethnic and religious groups. See UN Doc. A/49/342 and S/1994/1007 29 August 1994 Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, at pp. 11-13.

<sup>65</sup> Ratner & Abrams, p. 133, 1997.

<sup>66</sup> The ICTY was established by UN Doc. S/Res. 827/1993 May 25, and the International Criminal Tribunal for Rwanda (ICTR) by UN Doc. S/Res. 955 of 8 November 1994.

<sup>67</sup> UN Doc. S/Res. 1351 2000 August 14.

<sup>68</sup> UNTAET Regulation No. 2000/15 on the Establishment of Panels with exclusive jurisdiction over serious criminal offences 6 June 2000.

<sup>69</sup> Linton, p. 146, 2001.

### 4.3. Individual international criminal responsibility of Non-State Actors

It is as noted above beyond doubt, that international law recognises that individuals can be held criminally responsible under international law. The Nuremberg and Tokyo trials paved the way for the individual criminal responsibility under international law, as article 6 of the Nuremberg Charter established individual criminal responsibility for crimes against the peace, crimes against humanity and war crimes.<sup>70</sup> Further, the principle of direct individual criminal responsibility under international criminal law was confirmed by the United Nations General Assembly on December 11, 1946 in the so-called Nuremberg principles.<sup>71</sup> The position of international law on the individual responsibility for international crimes after the Nuremberg trials can be summarised in the following citation from the Nuremberg Judgement:

*“ Crimes against international law are committed by men, not abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced. ”*<sup>72</sup>

Moreover, the establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) reinforced the principle of individual criminal responsibility for the commission of international crimes.<sup>73</sup> In 1996 the UN General Assembly adopted the ILC Draft Code of Crimes against the Peace and Security of Mankind, which article 2 prescribes:

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<sup>70</sup> IMT Charter, art. 6.

<sup>71</sup> UN Doc. G.A. Res. 95(1) A/236 (1946) Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.

<sup>72</sup> Trial of Major War Criminals before the International Military Tribunal, Judgement, Nuremberg, 14.11.1945 – 1.10.1946, Official Documents, 1947, Vol. I, s. 223.

<sup>73</sup> Statute of the ICTY, art. 7 and 23, the statute of the ICTR art. 6 and 22.

*“ Article 2*

*Individual responsibility*

1. *A crime against the peace and security of mankind entails individual responsibility.*
2. *An individual shall be responsible for the crime of aggression in accordance with article 16.*
3. *An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:*
  - (a) Intentionally commits such a crime;*
  - (b) Orders the commission of such a crime, which in fact occurs or is attempted;*
  - (c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;*
  - (d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;*
  - (e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;*
  - (f) Directly and publicly incites another individual to commit such a crime which in fact occurs;*
  - (g) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.”<sup>74</sup>*

The most important codification is however the Rome Statute, or the Statute of the International Criminal Court, which article 25 confirms the individual criminal responsibility for the international crimes over which the ICC will have jurisdiction. Thus, article 25 reads as follows:

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<sup>74</sup> International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind, 1996, art. 2. Taken from: <http://www.un.org/law/ilc/texts/dcodefra.htm>.

*“ Article 25*

*Individual criminal responsibility*

- 1. The Court shall have jurisdiction over natural persons pursuant to this Statute.*
- 2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.*
- 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*
  - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;*
  - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;*
  - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;*
  - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:*
    - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or*
    - (ii) Be made in the knowledge of the intention of the group to commit the crime;*



*(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;*

*(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.*

*4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.<sup>75</sup>*

These developments and precedents thus establish both the principle of individual criminal responsibility under international criminal law, and the ability of international criminal law to penetrate the shield of state sovereignty and enforce this principle directly, without going through the mediation of states.<sup>76</sup>

Whereas international crimes, such as hijacking, piracy or terrorist attacks, are committed by individuals without any complicity of states the situation is a bit more complicated when it comes to genocide and crimes against humanity. Dugard holds that these crimes are principally crimes of states, as the individual perpetrator is usually acting as agents of the state pursuing a policy of a state.<sup>77</sup> What distinguishes these crimes from other international crimes is that they are the product of a “state action or policy”, and require some form organisational structure of the perpetrator. Up to the Second World War victimisation of civilians and mass scale human rights violations of human rights was

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<sup>75</sup> UN. Doc. A/CONF.183/9. The Rome Statute of the International Criminal Court. Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, art. 25.

<sup>76</sup> Bassiouni, pp. 18 and 23, 1999.

perpetrated by the state's public apparatus, such as the armed forces, the police, paramilitary units and the civilian bureaucracy, as products of a state action or policy. Since WW II such atrocities have as mentioned above, often been committed by non-state actors during internal conflicts. These non-state actors have frequently exercised the same type of dominion over people and territory as states, and also possessed an organisational power structure comparable to the ones of states. Thus, Bassiouni asserts that such non-state actors are to be regarded as functional equivalents of states.<sup>78</sup> The Final Report of the Commission of Experts for examining the violations of humanitarian law during the conflict in the former Yugoslavia states that non-state actors committed most of the crimes falling within the definition of crimes against humanity.<sup>79</sup>

The Nuremberg Charter did not apply criminal responsibility to non-state actors, but the new realities of violent conflicts have brought about an extension of application of norms of international criminal law to non-state actors.<sup>80</sup> First of all, article 4 of the 1948 Genocide Convention, the first modern human rights treaty, extends the application of the Convention to non-state actors.<sup>81</sup> Secondly, the common article 3 of the 1949 Geneva Conventions, apply to all parties of a conflict, and similarly Additional Protocol II of the Geneva Conventions apply in conflicts between the governmental authorities and organised armed groups or between such groups.<sup>82</sup> Furthermore, the Statutes of the ICTY

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<sup>77</sup> Dugard, p. 239, 1999.

<sup>78</sup> Bassiouni, p. 25-26, 1999.

<sup>79</sup> UN Doc. S/1994/674 (1994) Final Report of the Commissions of Experts Established pursuant to Security Council Resolution 780 (1992) and UN Doc. S/1994/674/Add. 2 (1994) Annex I to the Final Report.

<sup>80</sup> Bassiouni, p. 26, 1999.

<sup>81</sup> In this respect, article IV reads: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials *or private individuals*" (*emphasis added*).

<sup>82</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978. Article 1 reads as follows: "*Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*" Whereas the grave breaches provisions of the 1949 Geneva Conventions do give rise to individual criminal responsibility and universal jurisdiction, but they are not so relevant for the discussion around accountability of non-state actors, as the Geneva Conventions apply only in international armed conflicts.

and the ICTR have extended the definitions of crimes against humanity to apply also to non-state actors. Of special relevance was also that the ICTR Statute recognised common article 3 and Additional Protocol II as bases for individual criminal responsibility.<sup>83</sup> The most important development is however the adoption of the ICC Statute, which not only reinforced the accountability of non-state actors for genocide, crimes against humanity, but also extend the accountability for non-state actors beyond Additional Protocol II, as it does not require that it is shown that organised groups are under responsible command, nor requires that such groups exercises any control over a part of the territory.<sup>84</sup>

As a conclusion one could assert, that on the one hand international treaties between states concerning international human rights law and international humanitarian law, create obligations for non-state actors with the help of domestic law. On the other hand, and in this context even more importantly, international criminal law through the latest developments does create direct obligations on part of the non-state actors.

#### **4.4. Non-State actors and Genocide**

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948. Article II of the Convention defines the crime of genocide as: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group, if they are “*committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group,*

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<sup>83</sup> See the ICTY Statute article 4, the Statute of the ICTR article 3 and article 7 of the ICC Statute. See also Meron: “International criminalization of internal atrocities” in *The American Journal of International Law* Vol. 89 (1995) pp. 554-577.

<sup>84</sup> The ICC-Statute articles 6, 7 and 8.

*as such.*”<sup>85</sup> Since that, the provisions of the Convention have also been incorporated as such in the Statutes of the ICTY, the ICTR and the ICC.<sup>86</sup>

The crime of genocide is a very specific crime. The victim of the crime of genocide is the group itself and not an individual. Thus, the prohibition on genocide protects the right to physical existence of minority groups, as the groups covered by the definition correspond to the groups mentioned in the ICCPR, with the exception, that the definition avoids reference to linguistic minorities. Even if linguistic minorities are not mentioned in article II, such groups can nevertheless be argued to fall under the definition of ethnic groups.<sup>87</sup>

For an act to be considered as genocide, it is necessary that one of the acts listed above has been committed, that the act has been committed against one of the protected groups, and that the crime has been committed with the special intent to destroy in whole or in part, the group as such. This third element, the so-called *genocidal intent*, together with the *special identity of the victims* requirement is what distinguishes genocide from other crimes.<sup>88</sup>

On the issue of criminal responsibility, the Genocide Convention and the Statutes of the ad hoc tribunals and the ICC Statute stipulate, in that, “*Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.*”<sup>89</sup> As the content and scope of this article has also been reinstated in the statutes of the *ad hoc*

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<sup>85</sup> Convention on the Prevention and Punishment of the Crime of Genocide approved and opened for signature and ratification or accession on 9 December 1948. Hereinafter called the Genocide Convention, art. II.

<sup>86</sup> ICTY Statute, art. 4, ICTR Statute art. 2, and art. 6 of the ICC Statute.

<sup>87</sup> Schabas, 2000, p. 124, 146. See also UN Doc. A./C.6/SR.75 (Petren, Sweden). While discussing the term “ethnicity” in the Sixth Committee, Sweden noted that the language might be a constituent factor of minority group, and furthermore that therefore linguistic groups, if not connected with an existing state, should be protected as an ethnicity rather than as a national group, within the meaning of the Convention. This interpretation has also been upheld by the ICTR in the Prosecutor v. Kayishema and Ruzindana case. Here the Tribunal held that an ethnic group is a group whose members share a common language.

<sup>88</sup> The Prosecutor versus Jean-Paul Akayesu Case No. ICTR-96-4-T, 2 September 1998., at para. 499.

<sup>89</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951.

tribunals and the Statute of the ICC, the criminal responsibility of individuals, acting as heads of states, government officials or as private individuals for genocide is thus undisputed. The Genocide Convention was thus the first international instrument adopted after the Second World War, which applied its provisions also to non-state actors. There is no doubt, whether or not non-state actors could be held accountable for genocide, in the ICC for instance, but it might be difficult for a non-state actor to perform the crimes, in a way which would show genocidal intent. In this respect, Morris and Scharf assert that it would be: “virtually impossible for the crime of genocide to be committed without some or indirect involvement on part of the State given the magnitude of this crime.” Nevertheless, one could argue that some aspect of the existing case law from the ad hoc tribunals would suggest that non-state actors such as an armed group could commit genocide. In the *Jelusic-case*, the Trial Chamber held that: “*The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is a priori possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated. In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the ad hoc committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text and that such precision would only make the burden of proof even greater. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.*” And further that: “*it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system.*”<sup>90</sup> In the light of these statements it seems possible to argue, that an armed group, without any connection to the State, seeking to destroy in whole or in part a group as such, could commit genocide. Another important factor, which speaks for the possibility of successfully charging non-

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<sup>90</sup> The Prosecutor Versus Goran Jelusic, Judgement Case IT-95-10 14 December 1999, para.100-101.

state armed groups with genocide is that it is not required that the crimes have to be committed over a vast geographical area or to eliminate an important or substantial part of the population. In the *Jelusic-case* the Trial Chamber held that: “*international custom admits the characterisation of genocide even when the exterminatory intent only extends to a limited geographic zone*”.<sup>91</sup> What is central is the knowledge or the intent to seek the total or at least partial destruction of a certain defined group.<sup>92</sup>

Even if there is no case-law yet against a non-state actor concerning genocide, one is, in the light of the wording of the Convention and *Jelusic* judgement, bound to hold that it would be possible to hold non-state actors, such as armed groups accountable for genocide. It would however be difficult hold a non-state actor, which does not possess similar legal characteristics as a State, responsible.

#### **4.5. Crimes against humanity and non-state actors**

##### **4.5.1. The characteristics of crimes against humanity**

The Nuremberg Charter was the first international instrument to define crimes against humanity. In article 6 c of the Charter crimes against humanity were defined as, “*murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in the 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*”<sup>93</sup> Crimes against humanity have also been included in the Statutes of the ICTY and the ICTR, and these codifications together with the case-law they resulted in have developed the concept. The most important development was that the requirement of a nexus to an international armed conflict or any conflict was dropped already in the

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<sup>91</sup> Ibid., para. 83.

<sup>92</sup> The Prosecutor Versus Goran Jelusic Judgement Case IT-95-10 14 December 1999, para. 80-82.

<sup>93</sup> Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal, art. 6(c).

Statute of the ICTR and in the *Tadic-case*, with respect to the ICTY.<sup>94</sup> The most important and authoritative codification of crimes against humanity is however, the one of the ICC Statute. In this instrument crimes against humanity are defined as:

*“1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

- (a) Murder;*
- (b) Extermination;*
- (c) Enslavement;*
- (d) Deportation or forcible transfer of population;*
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) Torture;*
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
- (i) Enforced disappearance of persons;*
- (j) The crime of apartheid;*
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

2. *For the purpose of paragraph 1:*

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<sup>94</sup> Prosecutor versus Dusko Tadic, Case No. IT-94-1, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 141.

(a) *"Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;*

(b) *"Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;*

(c) *"Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;*

(d) *"Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;*

(e) *"Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;*

(f) *"Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;*

(g) *"Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;*

(h) *"The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised 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;*

(i) *"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give*



*information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*

*3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.”<sup>95</sup>*

The ICC definition is not a new invention but rather a reflection of the development of international law since Nuremberg. Thus, the contemporary notion of crimes against humanity as it has developed through the Statutes of the *ad hoc* tribunals, the case law of those tribunals and the Rome Statute and its draft elements of crimes can be scrutinized in three elements. First of all, that the perpetrator has committed one of the enumerated acts or offences. Secondly, that the offence was committed as part of a widespread or systematic attack directed against a civilian population, and thirdly, that the perpetrator knew that the conduct was part of, or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>96</sup>

As the Rome Statute is a result of multilateral negotiations, it also contains a more detailed definition of crimes against humanity than any previous instrument. Article 7 (1), which is to be regarded as the chapeau of the crimes against humanity category, states that crimes against humanity means the enumerated acts when committed as part of “ *a widespread or systematic attack directed against any civilian population*”. Due to the extensive negotiations an “attack directed against any civilian population”, is thus further defined in sub-paragraph 7 2(a), as “*a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack*”. The chapeau reveals that neither a nexus to an armed conflict, nor a discriminatory motive are

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<sup>95</sup> ICC Statute art. 7.

<sup>96</sup> See the Finalized draft text of the Elements of Crimes adopted by Preparatory Commission for the International Criminal Court, at its 23rd meeting on 30 June 2000 UN Doc. PCNICC/2000/1/Add.2, p. 9-

longer required. Furthermore, with regard to the *mens rea*, the ICC definition, confirms that the accused, when not responsible for the overarching attack against the civilian population, must at least be aware of the attack.<sup>97</sup> With regard to the “widespread or systematic” requirement, already the wording in subparagraph 7 2(a) shows that such an attack involves some degree of scale, and a policy element.<sup>98</sup> This policy element can also be found in the case law of the ad hoc tribunals, in the work of the International Law Commission (ILC) and in the doctrine. In the *Tadic-case*, the ICTY held that the phrase “directed at any civilian population entailed that “there must be some form of a governmental, organizational or group policy to commit these acts”<sup>99</sup>, and in the Draft Code of Crimes Against the Peace and Security, ILC held that: “A *crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group.*”<sup>100</sup> As the category of crimes against humanity consists of a number of crimes, which are included in most national criminal laws, this category must have an international legal or jurisdictional element, which distinguishes it from domestic crimes, and makes this category an international one. According to Bassiouni it is the “state action or policy”, which constitutes such an international or jurisdictional element. The policy element is, as Bassiouni notes, the essential characteristic of crimes against humanity, giving these otherwise domestic crimes the requisite international element, and thus distinguishing mass victimization in the absence of a policy element from crimes against humanity.<sup>101</sup>

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17. See also The Prosecutor versus Jean-Paul Akayesu Case No. ICTR-96-4-T, 2 September 1998., at para 578.

<sup>97</sup> Robinson, pp.43, 45 and 51, 1999.

<sup>98</sup> ICC Statute art. 7. In the Akayesu Judgement the ICTR held that “widespread”, refers to large-scale action involving a substantial number of victims, whereas “systematic” entails a high degree of orchestration and methodical planning. The Prosecutor versus Jean-Paul Akayesu Case No. ICTR-96-4-T, 2 September 1998. See also Robinson, p, 47-51, 1999.

<sup>99</sup> Prosecutor versus Dusko Tadic, Case No. IT-94-1, Trial Chamber II, Opinion and Judgement, 7 May 1997, para. 644.

<sup>100</sup> The International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind, 1996, art. 18.

#### 4.5.2. Persecution as a crime against humanity

Of the enumerated acts, persecution is of most interest in this context, as minority groups are usually the victims of these acts. The Rome Statute criminalizes “*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 recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*”<sup>102</sup> This definition is similar to the one given by the ICTY in the *Kupreskic-case*, where Trial Chamber II defined the crime against humanity of persecution as “*the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other crimes against humanity.*”<sup>103</sup>

The constituent elements of the crime of persecution are thus according to Kittichaisaree:

- *an act or omission that persecutes another person on a discriminatory ground;*
- *that the act is committed with the intent to, or the omission is intended to cause an infringement of an individual's enjoyment of a basic fundamental right;*
- *that the act or omission does result in such infringement.*

The existence of the elements required for all crimes against humanity, a gross or blatant denial of a fundamental right, which reaches the same level of gravity as other crimes against humanity, and discriminatory grounds must thus be proven by the prosecution when charging a person with persecution as a crime against humanity.<sup>104</sup> In the *Tadic case* the ICTY confirmed that the persecution could encompass acts from killing to limitations

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<sup>101</sup> Bassiouni, p. 243-245, 1999.

<sup>102</sup> UN. Doc. A/CONF.183/9. The Rome Statute of the International Criminal Court. Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, art. 7 (1) (d), (h). Hereinafter this document will be referred to as the “ICC-Statute.

<sup>103</sup> Prosecutor versus Kupreskic et al. Case No. IT-95-16 “Lasva Valley” Trial Chamber II 14 January 2000, at para. 621.

<sup>104</sup> Kittichaisaree, p. 117, 2001.

on the type of professions open to the targeted group, and acts of physical, economic or judicial nature, in violation of the right of an individual to equal enjoyment of basic rights.<sup>105</sup>

The *mens rea*, of the crime of persecution is the discriminatory intent with the aim of removing the victims from the society, in which they live alongside the perpetrators, on the basis of that people who share ethnic, racial, religious or other bonds, which are different from those of a dominant group are to be treated as inferior, resulting in the human rights of the victim group being grossly and systematically infringed upon.<sup>106</sup> The crime of persecution as a crime against humanity resembles to some extent the crime of genocide. Nevertheless, persecution differs from genocide in that the perpetrator of persecution selects his victims since they belong to a certain group or community, but he does not necessarily seek to destroy the group as such.<sup>107</sup>

The discriminatory grounds in article 7 cover political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law. Thus the list is not exhaustive, even if the threshold of universal recognition might be difficult to prove in practise.<sup>108</sup> A peculiarity of the ICC Statute, in comparison with the Statutes of the ad hoc tribunals, is that it requires that the crime of persecution must be committed in connection with any act enumerated as a crime against humanity in article 7 (1) or any crime within the jurisdiction of the ICC. This requirement was felt to be necessary, as many delegations felt a need to ensure an appropriate focus on

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<sup>105</sup> Prosecutor versus Dusko Tadic, Case No. IT-94-1, Trial Chamber II, Opinion and Judgement, 7 May 1997, paras. 704-710.

<sup>106</sup> Prosecutor versus Kupreskic et al. Case No. IT-95-16 "Lasva Valley" Trial Chamber II 14 January 2000, at para. 633-634.

<sup>107</sup> Kittichaisaree, p. 72, 2001.

<sup>108</sup> Robinson, p. 54, 1999. With regard to the discriminatory grounds, the ICTY confirmed in the Tadic-case that the enumeration of such grounds in article 5 (h) is not to be regarded as exhaustive. Such an application would, according to the Appeals Chamber create a legal lacunae as it would fail to protect victim groups not covered by the wording of art. 5(h). Prosecutor versus Dusko Tadic, Case No. IT-94-1, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995.

the criminal nature of the crime, due to the vague and potentially elastic nature of the crime of persecution.<sup>109</sup>

#### **4.5.3. Accountability of non-state actors**

Article 7 of the ICC-Statute clearly recognizes that crimes against humanity can be perpetrated by non-state actors, as it reads: "*Attack directed against any civilian population*" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack(own emphasis added)"<sup>110</sup> The evolution of crimes against humanity norms to apply also to non-state actors has developed through extensions. Article 6 (c) of the Nuremberg Charter did not contemplate nor apply to non-state actors, but the new realities of violent conflict brought about extensions in to the law. Thus, the statutes of the ad hoc tribunals and the ICC evolved the crimes against humanity category to apply also to non-state actors. This evolution was according to Bassiouni facilitated by the fact that the connection to war crimes and crimes against the peace was dropped in the Post-Charter developments.<sup>111</sup> The extension of the applicability of crimes against humanity is also reflected in the case law of the ICTY and the ICTR. In the *Tadic-case*, the ICTY confirmed that: "*under international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a de jure state, or by a terrorist group or organization.*"<sup>112</sup> Similarly the ICTR held in the *Kayishema and Ruzindana-case*, that the Tribunals jurisdiction covers both State and non-state actors. In this context one could also mention, that the Chief Prosecutor of the ICTY confirmed on a Press Conference in March 2001, that investigations into alleged acts of crimes against humanity perpetrated by armed groups against the Serb minority in

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<sup>109</sup> Robinson, p. 54, 1999. Also the Nuremberg Charter required a connection between the crime of persecution and another crime, but this requirement was dropped in the subsequent instruments.

<sup>110</sup> ICC Statute, art. 7(2).

<sup>111</sup> Bassiouni, p. 26-27, 1999.

<sup>112</sup> Prosecutor versus Dusko Tadic, Case No. IT-94-1, Trial Chamber II, Opinion and Judgement, 7 May 1997, at para. 654.

Kosovo, was underway.<sup>113</sup> Moreover the work of the ILC also reflects the understanding that crime against humanity can be perpetrated by non-state actors. The ILC Draft Code of Crimes against the Peace and Security of Mankind of 1996, stipulates namely that: “A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group”.<sup>114</sup>

It is thereby undisputed that non-state actors can commit crimes against humanity, but we need nevertheless, to consider whether and what kind of requirements international law puts on such non-state actors. In this respect, we need to take the “widespread and systematic” –concept as a starting point. This concept does not only refer to the manner in which the large-scale victimisation occurred, but it also characterises the nature of the act. It entails the underlying policy element, which according to Bassiouni is the international legal or jurisdictional element, which distinguishes mass victimisation crimes from crimes against humanity.<sup>115</sup> Thus, the “widespread or systematic” notion does put some requirement upon a non-state actor. Accordingly, Bassiouni holds that crimes against humanity apply only to a non-state actor which bear some characteristics of a state actor, namely, that they exercise dominion or control over territory or people, or both, and most importantly that they possess an ability to carry out a “policy”, which would satisfy the “widespread or systematic”-requirement.<sup>116</sup> The requirement of an organisational policy to commit crimes against humanity is also confirmed in the Rome Statute, and in the ILC Draft Code and this requirement must be considered as undisputed. Neither of these

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<sup>113</sup> The Prosecutor versus Kayishema and Ruzinanda Case No. ICTR-95-1, Judgement and Sentence. 21 May 1999. See also Statement given by the Prosecutor of the ICTY, Carla Del Ponte, at the Press Conference on 21 March 2001 with the President of the ICTY, Judge Claude Jorda, Mr. Grubac, the Minister of Justice of the Federal Republic of Yugoslavia, and Mr. Batic, the Minister of Justice of the Republic of Serbia. The Hague, 21 March 2001.FH/P.I.S./578e.

Taken from <http://www.un.org/icty/latest/latestdev-e.htm>.

<sup>114</sup> ILC Draft Code of Crimes against the Peace and Security of Mankind of 1996, art. 18. Already in 1991, the Commission had held in the Report of the International Law Commission on the work of its forty-third session, 29 April to 19 July 1991 (A/46/10), that: “...private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights...”

<sup>115</sup> Bassiouni, p. 275, 1999.

<sup>116</sup> Bassiouni, p. 275, 1999.

instruments nor the case-law of the ICTY or ICTR seem to require that a non-state actor would have to possess control or dominion over a people or a territory in order to be able to commit crimes against humanity, and therefore one could argue that this requirement no longer applies. The requirement that a non-state actor would have to possess control or dominion over people or territory, would be detrimental as it would fail to apply to terrorist groups which, as we have witnessed through the events of the 11<sup>th</sup> of September, are organised enough to commit crimes against humanity, without possessing control or dominion over people or territory.<sup>117</sup>

In conclusion, one can therefore hold that under current international law, crimes against humanity and also persecution, which usually target groups whose existence is also protected under the Genocide Convention and under human rights law applies to non-state actors, provided that they possess an ability to carry out a policy.

#### **4.6. International humanitarian law, war crimes and non-state actors**

##### **4.6.1. On international humanitarian law and the protection of minority groups**

International human rights law and international humanitarian law have been regarded as two distinct areas, but today the prevailing view is that they are complementary in that both are applicable in most situations of internal or international armed conflict. This view is supported by the fact that both violations of human rights law and humanitarian law are included in the jurisdiction of the international tribunals for Yugoslavia and Rwanda and in the statute for the International Criminal Court.<sup>118</sup> Although human rights law has times of peace as their primary environment of application, whereas international humanitarian law applies in international or internal conflicts, there is a growing overlap in their material

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<sup>117</sup> Ferencz, among other scholars have regarded the attacks of the 11<sup>th</sup> of September as crimes against humanity, and this could also be taken as support for the view that dominion or control over people or territory is not required in order to apply crimes against humanity to non-state actors. "Crimes Against Humanity – Transcript, National Public Radio Interview from "The World," 19 September 2001." Taken from: <http://www.benferencz.org/>.

<sup>118</sup> Hadden & Harvey, 1999, p. 1-2.

applicability. This can be illustrated by the fact that several of the rights recognised as inalienable, i.e. applicable in all circumstances in human rights instruments are also protected in the conventions and protocols in the field of humanitarian law, which do not allow states to derogate from their treaty obligations. Meron even argues that the catalogue of non-derogable rights enshrined in the ICCPR is more limited than the totality of human rights recognised by the instruments on international humanitarian law.<sup>119</sup>

International humanitarian law is articulated in the four Geneva Conventions of 12 August 1949 for the protection of victims of war, and in the two additional protocols of 1977. As such these instruments do not contain minority rights, though they apply in conflict situations when minorities are under particular pressure. International humanitarian law does not refer to minorities as a group but to persons protected because of their status as victims of a conflict. Hence, international humanitarian law only deals with minorities when they are victims of an armed conflict. Indirectly minorities are protected by the principles of impartiality and non-discrimination, which are guiding principles in the work of the International Red Cross. The principle of non-discrimination is also enshrined in many articles of the conventions, like for example in common article 3 of the Geneva Conventions, which is applicable in most armed conflicts. One has to keep in mind though, that the principles of independence, neutrality and impartiality prohibit the consideration of minorities or the fact that a person belongs to a minority being used as a category or as a criterion in its own right.<sup>120</sup>

There are also other provisions that are relevant in connection to minorities. Especially relevant is the prohibition of ethnic cleansing or mass deportation, of which minorities

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<sup>119</sup> Meron, 1991, pp. 33-38. In this respect it is important to note that Meron's article was written in 1991, i.e. quite early in the process of fundamental standards of humanity and well before the adoption of General Comment No. 29. See also Hadden & Harvey, 1999, pp. 5-6.

<sup>120</sup> Thürer, 1998, pp. 53-57., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention relative to the Treatment of Prisoners of War, Geneva Convention relative to the Protection of Civilian Persons in Time of War. Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949, Article 3. Hereafter these conventions will be referred to as Geneva Conventions I, II, III, and IV.



have been the direct targets, as during the conflicts in Bosnia and Kosovo. Ethnic cleansing has, although the term according to some scholars should be used only in connection with the former Yugoslavia, been defined as forced population transfer, based upon ethnic criteria, and which is carried out by different means, including the use of military force, in order to create ethnically homogenous territories.<sup>121</sup> Inasmuch ethnic cleansing constitutes a specific form of mass deportation that usually targets minority groups; it is an illegitimate mean of warfare. This prohibition, which is laid down in art. 49 of the fourth Geneva Convention protect civilians in enemy territory, whereas article 17 of additional protocol II protects civilians in civil wars.<sup>122</sup>

With regard to obligations, international humanitarian law, differs from human rights law in that it creates and imposes obligations directly upon on all individuals in armed conflicts. Acts that can be defined as war crimes gives rise to individual criminal responsibility under international law. This was clearly established after the Second WW, in article 6 of the Nuremberg Charter, article 5 of the Tokyo Charter and article 2 of Control Council Law No. 10, which gave the tribunals the power to try and punish persons who, as individuals or as members of organisations had committed war crimes. The concept of war crimes was further developed in the Statutes of the ICTY and the ICTR. The ICTY were thus given jurisdiction over “grave breaches of the Geneva Conventions of 1949”, and over “violations of the laws and customs of war”, whereas the jurisdiction of the ICTR includes “violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>123</sup> The Rome Statute includes also criminalisations, which belong to the branch of international humanitarian law, as article 8 provides the ICC with jurisdiction over four types of war crimes. These are: grave breaches of the Geneva Conventions of 12 August 1949; other violations of the laws and customs applicable in international armed conflict, within the established framework of

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<sup>121</sup> Jackson- Preece, 1998, pp.820-822.

<sup>122</sup> Ibid., 1998, p. 834. Geneva Convention IV, art. 49. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. Adopted on June 8 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, art. 17. Hereafter this instrument will be referred to as additional protocol II.

international law; and in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949; and other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.<sup>124</sup>

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<sup>123</sup> Statute of the ICTY articles 2 and 3. Statute of the ICTR, article 4.

<sup>124</sup> ICC Statute, article 8. This article reads as follows: 1. 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.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) 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;

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- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (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, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

These war crimes provisions are thus based upon the four Geneva Conventions, the 1907 Hague Convention Respecting the Laws and Customs Of war on Land and the Nuremberg Charter.

#### **4.6.2. Non-state actors and War crimes in the Rome Statute**

The category of war crimes is relevant in relation to non-state actors in several ways. With regard to the applicability, it is however clear that the prohibited conduct must take place in the context of and in association with an international or a non-international armed conflict. In the *Tadic-case* the Appeals Chamber defined an armed conflict as situations in

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- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
  - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - (iv) 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;
  - (v) Pillaging a town or place, even when taken by assault;
  - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
  - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
  - (viii) 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;
  - (ix) Killing or wounding treacherously a combatant adversary;
  - (x) Declaring that no quarter will be given;
  - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
  - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

which there is resort to armed force between States or protracted violence between the government and organised armed groups or between such groups within the State.<sup>125</sup> The Rome Statute follows a similar definition in article 8. Thus, article 8 (2a and b) apply only in international armed conflicts, and articles 8 (2(c), (d) and (e)) in armed conflicts not of an international character. Furthermore, article 8 (2(d)) narrows down the environment of application of “serious violations of common article 3” as it stipulates that they do not apply “...to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” Similarly, article 8 (2(f)) excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”, from the application of the category “Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. Moreover, it stipulates that the category applies to “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”<sup>126</sup> The existence of an armed conflict, international or non-international is thus a pre-condition for holding non-state actors accountable for war crimes.

The definition of war crimes in non-international conflicts, is of most interest from a non-state actor perspective, as it is in such conflicts that non-state armed groups usually operate. Thus, it is significant that the Rome Statute with regard to such conflicts codified norms not only from Additional Protocol to the Geneva Conventions, but also from various treaties on the laws of warfare and customary law. The fact that the Rome Statute extends the accountability for non-state actors beyond Additional Protocol II, as it neither requires that it is shown that organised groups are under responsible command, nor that such groups exercise any control over a part of the territory, is especially significant with

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<sup>125</sup> Prosecutor versus Dusko Tadic, Case No. IT-94-1, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 70.

<sup>126</sup> ICC Statute article 8.

regard to the accountability of non-state actors.<sup>127</sup> With regard to the offences mentioned in the previous section, for which minority or other groups run the risk of being targets in inter-ethnic conflicts, they are all covered by the jurisdiction of the ICC, also with respect to non-international armed conflicts.

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<sup>127</sup> Un Doc. E/CN.4/2001/91 12 January 2001 Fundamental Standards of Humanity Report of the Secretary-General submitted pursuant to Commission resolution 2000/69, para. 35.

## **5. The complementarity between human rights law and international criminal law**

### **5.1. General remarks**

With regard to the adoption of the Rome Statute one often finds views in the doctrine, which advocate for a merger between international human rights law and international criminal law. Carter writes about the fusion of international criminal law and international human rights law, and Dias about the definition of international human rights crimes.<sup>128</sup> The present author finds such expression somewhat problematic, as human rights law is expressed in international treaties between States, which confers obligations upon States, and which set up monitoring mechanisms to which States are the only subjects. The State is then obliged to enact legislation, which makes it possible for the right holders to enjoy their rights. International criminal law on the other hand establish international crimes and identify elements of criminal responsibility and enforcement modalities for these crimes. Thus, treaties of international criminal law may on the one hand authorise and oblige States to enact and enforce individual criminal responsibility, or on the other hand, like the ICC Statute define the crimes, and the grounds for bringing in an individual under the ICC's jurisdiction. The individual criminal responsibility is thus not dependent upon domestic criminalisation, but has its basis in international law. It is however true, that international criminal law and human rights law coincide or bond in the Rome Statute, as it defines and criminalizes crimes against humanity and genocide, which covers acts that could also be defined as human rights violations. Therefore, one could argue that it would be more appropriate to speak about the complementarity between human rights law and international criminal law, and examine what added-value the ICC and its codification of crimes against humanity could bring the to the human rights regime. This is especially valuable when discussing accountability of non-state actors for human rights abuses.

## **5.2. Benefits for the human rights protection systems brought about by the Rome Statute**

The development of international criminal law, or in other words the forthcoming establishment of the ICC has significance for the protection of human rights in several manners. There are thus also a few issues that are of relevance for the topic of this study. First of all, the ICC is a tool against impunity. The fact that the Rome Statute codifies crimes against humanity is important to the human rights regime, as human rights violation that also qualify as crimes against humanity, will be prosecuted internationally when the State is not willing or able to prosecute. One should however be careful not to read too much into this article. The threshold for defining some action as a crime against humanity has not been lowered significantly, and it is only the most abusive and gross human rights violations, that can qualify as crimes against humanity. Furthermore, the extension of crimes against humanity to apply also to non-state actors, which came about already in the Statutes of the ad hoc tribunals, but which as been more clearly defined in the ICC Statute, is certainly of great significance, as such actors can be held directly responsible in an international court, when the State fails to prosecute.

Moreover, the codification of crimes against humanity also plays an important role, with regard to situations of public emergencies and the weak protection in the so-called grey-zone. The ICC can be said to play an important role in widening the field of non-derogable human rights, that is rights that have to be respected in all circumstances. In this respect one could argue that what is defined as an international crime during both peace and conflict, must also be taken as an indication for that the same norm protects rights, which must be respected in all circumstances.<sup>128</sup> This reasoning can be found also in General Comment No. 29 on States of emergencies, where the Human Rights Committee makes

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<sup>128</sup> See Carter, p. 157, 2002, and Dias, p. 35- 41.

<sup>129</sup> Scheinin, p. 32, 2000.



references to the ICC and the crimes against humanity category, when reasoning why certain elements of rights are to be regarded as in fact non-derogable.<sup>130</sup>

With regard to the protection of minority groups under human rights law, it is certainly of great significance that the ICC Statute, and its inclusion of genocide and codification of crimes against humanity, especially persecution have resulted, in that some elements of minority protection under human rights law are now to be regarded as non-derogable. Furthermore, the deterrent effect that the establishment of the ICC and the confirmed extension of application of crimes against humanity and genocide might have, also on non-state actors, is naturally also to be seen as an added value in itself.

It is nevertheless important to stress that even if the ICC has jurisdiction over gross human rights violations, it cannot subsume, only complement, the State's responsibility to respect and ensure the rights within its jurisdiction. The human rights regime and international criminal law must therefore continue as two separate, but complementary branches of international law.

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<sup>130</sup> See UN Doc. CCPR/C/21/Rev.1/Add.11, (2001) Human Rights Committee General Comment 29, 31 August 2001, at paragraphs 12 and 13.

## 6. Conclusions

Modern conflicts are characterised by attacks on civilians, raids of ethnic cleansing and deportations, destruction of civilian property, and widespread human rights violations. More than often these conflicts are fought between a central government and a part of the population, and thus many civilians are the targets of atrocities due their membership in distinct ethnic, religious or linguistic group. In these circumstances, the atrocities against the civilian population in general and against minority groups in particular, are also often attributable to armed groups or bands, or non-state actors in general.

This study has aimed at examining the means to ensure accountability for atrocities committed by non-state actors, against minority groups, under the minority protection regime in human rights law, and through the prohibitions of war crimes, genocide and crimes against humanity. Human rights law and international criminal law, under which war crimes, crimes against humanity and genocide are dealt with in this study are fundamentally different, as human rights law obliges States to respect and ensure the rights in their territory, whereas international criminal law, applies to individuals, who commit acts defined as international crimes. Despite the differences, these two branches protect similar values and complement each other.

With regard to the issues that this paper sought to examine, one can conclude that under human rights law, accountability for atrocities against minority groups committed by non-state actors can be achieved exclusively by using state responsibility as a vehicle. In accordance with the due diligence doctrine, which was developed by the Inter-American Court for Human Rights, and later also confirmed by other treaty-monitoring bodies, States are responsible for atrocities committed against minority groups by non-state actors, if they fail to prevent, investigate and punish such acts. This position, is also in resonance with the General Comment on article 27 of the ICCPR, which expressly stipulate that States are obliged to protect minorities against threats stemming from the

private side. Consequently, States can be held responsible under human rights law for violations of minority rights, which are attributable to non-state actors.

When such threats to minority groups take the form of persecution or mass victimisation, which could qualify as war crimes, crimes against humanity or even genocide, the complementary function of international criminal law sets in. The Genocide Convention applies directly also to non-state actors, and gives rise to universal jurisdiction. Moreover, genocide is also included in the jurisdiction of the forthcoming International Criminal Court, which will function as a deterrent to non-state actors, which are able to commit genocide, and to governments who are unwilling or unable to prosecute those responsible.

Crimes against humanity were codified in a truly international instrument for the first time through the adoption of the Rome Statute. The ICC will thus hopefully provide an effective tool for combating impunity with regard to gross human rights violations, which also qualify as crimes against humanity. With respect to atrocities against minority groups, the crime of persecution is of most interest and in this connection, one can conclude that under the present state of the law, as it has developed through the Statutes of the *ad hoc* tribunals and their case law, to the Rome Statute, the applicability of crimes against humanity has been extended to apply to non-state actors, provided that their actions are a result of an organisational policy. In this regard it is of special importance, that control over people or territory is not required of non-state actors before they could be charged with crimes against humanity.

Attacks on and forceful deportations of minority groups perpetrated by non-state actors can also fall under the category of war crimes under the Rome Statute. Especially significant with regard to war crimes is that the Rome Statute as the first multilateral treaty codified war crimes in non-international conflicts. With respect to the challenges posed by the contemporary conflicts, and the threats stemming from non-state armed groups, it is very significant to note that the threshold for the existence of a non-international armed conflict is lower in the Rome Statute than in Additional Protocol II, as

neither responsible commanders, nor control over a part of the territory is required on part of a non-state actor in the former.

As a general conclusion, one is bound to hold that the development of international criminal law in general and the establishment of the ICC, with jurisdiction over gross human rights violations, provides the international community with a potentially strong tool to fight impunity with. Furthermore, the ICC Statute is also well suited for addressing the challenges posed by the modern in conflicts, and the threats against the public order coming from different types of non-state actors. Lastly, it is however important to underline that the criminalisation of gross violations of human rights in the ICC Statute must not in any way be regarded as a substitute for the human rights regime, and the States' responsibility for what happens in their territory. These two regimes must be regarded as complementary.

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