Protecting minorities from mass violence and atrocity crimes through the International Criminal Court: a legal appraisal

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Abstract Deutsch

Die Urheber des Internationalen Strafgerichtshofs (IStGH oder Gerichtshof) hatten bei der Ausarbeitung des Römischen Statuts Verbrechen gegen ethnische und andere Minderheiten im Sinn, und die Einrichtung des Gerichtshofs wurde auch als Garantie für den Schutz dieser Minderheiten angesehen. Dies spiegelt sich in der Tatsache wider, dass das Römische Statut sowohl Völkermord als auch Verfolgung als Verbrechen gegen die Menschlichkeit unter Strafe stellt. Es ist jedoch ziemlich unklar, wie dieser Schutz durch internationale Strafgerichte durchgesetzt wird. Durch eine Betrachtung der Hauptfunktionen des Gerichtshofs und eine kritische Analyse seiner einschlägigen Rechtsprechung wird in diesem Beitrag darüber nachgedacht, wie die Rechte von Minderheiten im Rahmen des Römischen Statuts im System der internationalen Strafgerichtsbarkeit geschützt werden können. Insbesondere wird untersucht, ob das Römische Statut einen wertvollen Rahmen für die Rechtsprechung gegenüber Minderheiten darstellt, und es wird geprüft, inwieweit der Gerichtshof zu einer wirksamen Durchsetzung des Völkermord- und Verfolgungsrechts, einschließlich der Verhinderung künftiger Verbrechen gegen Minderheiten, beitragen kann. Dabei wird eine Bestandsaufnahme ausgewählter IStGH-Urteile (und der beigefügten separaten Rechtsgutachten) vorgenommen, um sowohl die Vorzüge als auch die Fallstricke der internationalen Strafgerichtsbarkeit bei der Förderung des Schutzes der Menschenrechte in Fällen, in denen Minderheiten gefährdet sind, zu erörtern. In diesem Kapitel wird argumentiert, dass der Gerichtshof durch seine Verfahren wichtige rechtswissenschaftliche Beiträge zur Konsolidierung und Weiterentwicklung eines soliden Völkerstrafrechts leisten kann, wodurch der Schutz von Minderheiten vor Völkermord, Massenverbrechen und anderen Bedrohungen ihrer Existenz verbessert wird. Dies gilt insbesondere für komplexere Strafsachen, bei denen die internationalen Strafrichter die verschiedenen Identitäten einer bestimmten Minderheit zusammen und nicht getrennt voneinander betrachten müssen. Dennoch kann man kaum davon sprechen, dass das Römische Statut ein umfassendes Schutzsystem für Minderheiten als Opfer von Massengewalt darstellt, trotz einiger bemerkenswerter Schritte, die in Richtung eines universellen Geltungsbereichs der Gerichtsbarkeit des Gerichtshofs unternommen worden sind.

Abstract English

The creators of the International Criminal Court (ICC or Court) very much had crimes against ethnic and other minorities in mind when drafting the Rome Statute, and the

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establishment of the Court was also seen as a guarantee for the protection of such minorities. This is reflected in the fact that the Rome Statute incriminates both genocide and persecution as a crime against humanity. It is, however, rather unclear how this protection is enforced through international criminal tribunals. By considering the Court's main functions and critically analysing its relevant jurisprudence, this contribution reflects on how the rights of minorities can be protected within the Rome Statute system of international criminal justice. In particular, it looks at whether the Rome statute constitutes a valuable framework for delivering justice to minorities and examines the potential for the Court to contribute to effective enforcement of the law of genocide and of persecution, including prevention of future crimes against minorities. In so doing, it takes stock of selected ICC rulings (and appended separate judicial opinions) to address both the merits and pitfalls of international criminal judiciary in advancing the protection of human rights when minorities are at risk. This chapter argues that through its proceedings the Court can make important jurisprudential contributions to both consolidation and further development of a stout body of international criminal law, thus enhancing the protection of minorities from genocide, mass crimes and other threats to their existence. This is especially true of more complex criminal cases that require international criminal judges to consider different identities of a particular minority together with, and not separately from, one another. Yet, one could hardly speak about the Rome Statute as a comprehensive protective system for minorities as victims of mass violence despite some remarkable steps that have been taken towards a universal coverage of the Court's jurisdiction.

1. Introduction

A plethora of incidents from the past have clearly demonstrated the devastating consequences of discriminatory treatment and suppression of minorities in situations of conflict. Among the most dreadful are serious human rights violations and attacks against ethno-religious minorities committed by ISIS in Syrian civil war and in Iraq where members of Iraq's diverse ethnic and religious communities have particularly been affected by the situation, Myanmar's Rohingya crisis, Dinka-Nuer ethnic conflict in South Sudan, ethnic conflict between the Christian militias called the 'anti-Balaka' and the Muslim coalition in the Central African Republic, and persecution of non-Arab people and internally displaced Darfuris by Arab militia in Sudan. These unfortunate events show that discrimination against various racial, ethnic, religious and political groups and of their members is often at the root of identity-related tensions. Such tensions have a potential to develop into crises that could ultimately lead to conflict, forced displacement and, in the worst cases, to atrocity crimes, including genocide. Incidents involving hate speech, negative stereotyping in the media, nationalist hate propaganda and advocacy of religious or national hatred by public officials and political parties may fuel a climate of mistrust and tensions and may, in most extreme cases, constitute incitement to atrocity crimes with devastating consequences for minority groups.

Mass atrocities almost invariably involve the targeting of racial, ethnic, religious or political groups. It is generally accepted that, conceptually, there is an es-

sential link between mass crimes targeting specified groups and their members on account of protected characteristics and direct discrimination.[2] Such discriminatory crimes include genocide, apartheid practices, persecution on the protected grounds of discrimination and various gender-based crimes. As regards violence and atrocity crimes against minorities, certain groups such as minority women and girls are often particularly targeted, including for sexual violence in detention or in armed conflicts. CEDAW General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations highlights that during and after conflict women and girls belonging to minorities are at particular risk of violence, especially sexual violence.[3] In the same vein, the 1993 UN Declaration on the Elimination of Violence against Women reminds us that women and girls belonging to minority groups are especially vulnerable to violence.[4] This implies that in more complex cases, the protected characteristics (such as gender, ethnicity and political affiliation) will need to be considered together with, and not separately from, one another as the International Criminal Tribunal for Rwanda pointed out in its *Akayesu* judment.[5] Hence, in international criminal trials the concept of intersectional discrimination should come into play when individuals are being targeted due to overlapping identities. As we shall see below, the issue of intersectionality has once again come to the fore in a recent case before the International Criminal Court (ICC or the Court). Moreover, special attention must be paid to those minorities who are politically, economically or socially most marginalized, and whose rights are therefore most at risk. In many cases this translates into a focus on religious minorities.

Although the rights of minorities are codified in several human rights treaties, including those specifically intended to protect minorities and other vulnerable groups from discrimination, large-scale human rights abuses and other threats to their existence,[6] it is rather unclear how their protection is enforced through international criminal tribunals. The purpose of this chapter is thus twofold: (1) by critically analysing the selected cases to assess the contribution of the Court's rulings in interpreting, defining the content and developing the law of genocide and persecution (including ethnic cleansing), and (2) to examine the potential for the Court to enhance – through the Rome Statute's regime of international criminal justice – the protection of minorities against mass atrocities.

2 See, for example, Ambrus, M., Genocide and Discrimination: Lessons to Be Learnt from Discrimination Law, in: 25 Leiden Journal of International Law 4/2012, pp. 935–954.

3 UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, 1.11.2013, CEDAW/C/GC/30, para. 36.

4 Declaration on the Elimination of Violence against Women, United Nations General Assembly, A/RES/48/104, 20 December 1993.

5 *The Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2.9.1998).

6 These international legal instruments include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women and the 1989 Convention on the Rights of the Child.

The chapter begins by examining the core principles and norms of international criminal law aimed at protecting minorities from atrocity crimes. It then analyses the Court's jurisprudence on genocide, persecution and other serious crimes involving minorities. The aim here is to ascertain whether the Court really offers a guarantee for the protection of minorities and to detect a common pattern that it may follow in this respect. Next, the chapter turns to consider – in light of a relevant case – the ways in which the Court could approach the challenges of intersectional discrimination when minorities are targeted on more than one ground of discrimination. Finally, the chapter draws some tentative conclusions and briefly reflects on the prospects for the Court to fully realize its potential of protecting minorities and of a deterrent effect – as envisaged in its founding treaty – to prevent or stop the commission of atrocities against minorities.

2. The normative framework: What does the law of the international criminal court require?

The definitions of core international crimes enshrined in the Rome Statute of the ICC cover a lot of ground concerning minorities. After all, the provisions on genocide and crimes against humanity are most applicable when it comes to violence and atrocities against or affecting any identifiable minority group. Various acts of discriminatory violence and persecution, notably ethnic cleansing and conflict-related sexual and gender-based violence particularly target minority groups. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was the first international treaty to deal with the prevention and protection of certain groups of people from genocide and mass killing. The Rome Statute draws its own definition of genocide from the Genocide Convention which protects national, ethnical, racial or religious groups from the listed genocidal acts.[7] According to this definition, there are five specific acts amounting to the crime of genocide when they are intended to destroy, in whole or in part, the protected groups. It is important to stress that the listed genocidal acts involve acts against the physical or psychological integrity of members of a group or its existence or biological continuity.[8]

7 In spite of the initial attempts of some delegations to extend international legal protection from genocide to social and political groups and to include in the definition of genocide further considerations and clarifications of various aspects, terms and phrases, such as 'in part', 'mental harm', 'imposing measures intended to prevent births within the group', or proposals that the provision on forcible transfers of children should be expanded to include persons who were members of a particular group, the finally adopted text in the Rome Statute was a mere reproduction of Article II of the Genocide Convention. Summary of the Proceedings of the Preparatory Committee During the Period 25 March–12 April 1996, A/AC.249/1, 7 May 1996, §§19–23, available at https://www.legal-tools.org/doc/d7aad5/pdf.

8 Kaul, H.-P., The International Criminal Court and the Crime of Genocide, in: C. J. M. Safferling/E.-A. Conze (eds.), The Genocide Convention Sixty Years after its Adoption, T.M.C. Asser Press: The Hague 2010, pp. 195–211.

The Elements of Crimes elaborate on the definition of genocide provided for in Article 6 of the Rome Statute, establishing that the following three common elements must always be fulfilled for the existence of the crime of genocide under the Statute: (1) the victims must belong to the targeted group (this is, to a particular national, ethnical, racial or religious group); (2) the genocidal conduct such as killings, serious bodily harm, serious mental harm, the conditions of life, measures to prevent births or the forcible transfer of children must occur 'in the context of a manifest pattern of similar conduct' directed against a protected group or the conduct 'could itself effect such destruction' of the group (the so-called 'contextual' element);[9] and (3) the perpetrator must act with genocidal intent, this is the intent to destroy, in whole or in part, the targeted group as such.[10]

States party to the Genocide Convention and/or Rome Statute are obliged to enact legislation to enable the prosecution of genocide committed on their own territory, and to cooperate in extradition where this is necessary to ensure criminal responsibility. They are required to prevent such criminal acts, as well as prosecute and punish their perpetrators. The ICC should thus act as a complementary safeguard and exercise its jurisdiction only when the domestic judicial authorities with territorial jurisdiction are unwilling or unable to genuinely investigate and prosecute those allegedly responsible for the most serious crimes. Moreover, when states incorporate into their criminal laws the relevant provisions of the Rome Statute national authorities can investigate and prosecute the core international crimes, and in adjudicating such crimes domestic courts can recognize and repair specific harms affecting minority groups.

Guatemala, for example, following its ratification of the Rome Statute in 2012 embarked on a thorough process of adapting and implementing the Rome Statute into domestic legislation. The country's commitment to international justice has also been shown by Guatemalan courts through several high profile cases concerning international crimes. Perhaps most notable is the conviction of former military dictator José Efrain Ríos Montt by the High Risk Court in 2013 for genocide and crimes against humanity committed against the indigenous Maya Ixil population during civil war in the country. Indeed, this is the first and only case of trying a former head of state for core international crimes in clearly genuine domestic proceedings.[11]

On the other hand, there is no international convention for the prevention and punishment of crimes against humanity.[12] Instead, the Rome Statute calls upon

9 Experience shows that the genocidal acts are regularly or typically committed as part of a systematic or widespread attack on a protected group, thus *ipso facto* containing such contextual element. Cassese, A. et al. (eds), The Rome Statute of the International Criminal Court: A Commentary, vol. II, OUP: Oxford 2002.

10 Article 6(a)(b)(c)(d)(e), Elements of Crimes.

11 ICTJ: Conviction of Ríos Montt on Genocide a Victory for Justice in Guatemala, and Everywhere, available at https://www.ictj.org/news/ictj-conviction-rios-montt-genocide-victory-justice-guatemala-and-everywhere.

12 The prospects of adopting such a convention in the future have been considerably enhanced, given that in 2019 the International Law Commission completed the first draft

states to ensure that crimes against humanity, including various acts of persecution,[13] are appropriately prosecuted and punished. Although the ICTY and the ICTR on several occasions described persecution as a crime of discrimination,[14] the term 'discrimination' is not used in Article 7 of the ICC Statute. In addition to protecting national, ethnic, racial, and religious groups, Article 7(1)(h) of the ICC Statute also protects from persecution groups defined by political, cultural and gender characteristics, as well as by 'other grounds that are universally recognized as impermissible under international law'. Such 'other grounds' may include, for example, social, economic and mental or physical disability grounds, as well as age and sexual orientation.[15] The Elements of Crimes do not seem to add anything meaningful to the provisions of the Rome Statute on the persecution. They only specify that the perpetrator must severely deprive 'one or more persons of fundamental rights'[16] and link such a targeting to the identifiable group or collectivity

of its Draft Articles on Crimes Against Humanity. The draft provides a basic legal framework of what might someday become a new international treaty on the prevention and punishment of crimes against humanity. Report of the International Law Commission: Sixty-ninth session (1.5–2.6 and 3.7–4.8.2017), UN Doc. A/72/10, 2017, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/237/29/PDF/G1723729.pdf?OpenElement.

13 It can be noticed from the preparatory work concerning provisions of the Rome Statute on persecution as a crime against humanity that delegations were divided on whether this criminal act should be included within the jurisdiction of the Court. While some delegates expressed the view that persecution should be further clarified and limited to the most egregious cases, other questioned whether it met the jurisdictional standard and whether it constituted a general policy criterion or a separate offence. Still other delegates proposed to include persecution on political, racial, religious or cultural grounds. Summary of the Proceedings of the Preparatory Committee During the Period 25.3–12.4.1996, A/AC.249/1, 7.5.1996, § 59, https://www.legal-tools.org/doc/d7aad5/pdf/.

14 Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14.1.2000, § 621; Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2.8.2001, § 534; Judgment, *Naletilić et al.* (IT-98-34-T), Trial Chamber, 31.3.2003, § 634; Judgment, *Kordić et al.* (IT-95-14/2-A), Trial Chamber, 17.11.2004, § 101; Judgment, *Blaškić* (IT-95-14-A), Trial Chamber, 29.7.2004, § 131; Judgment, *Krnojelac* (IT-97-25-A), Trial Chamber, 17.9.2003, § 185; Judgment, *Vasiljević* (IT-98-32-A), Trial Chamber, 25.2.2004, § 113; Judgment and Sentence, *Ruggiu* (ICTR-97-32-I), Trial Chamber, 1.6.2000, § 21; Judgment and Sentence, *Nahimana et al.* (ICTR-99-52-T), Trial Chamber, 3.12.2003, § 1071.

15 It is, however, debatable whether and to what extent 'sexual orientation' can be placed within that category. While some commentators (Schabas, Đurić et al.) believe that 'sexual orientation' has already reached the status of a universally recognized ground of discrimination under international human rights law, thus satisfying the requirement of universality within the meaning of Article 7(1)(h) of the Rome Statute, others (Wiemann, Werle and Jeßberger) argue that this is not the case yet. Schabas, W. A., The International Criminal Court: A Commentary on the Rome Statute, OUP: Oxford 2016; Đurić, N. et al, Legal Protection of Sexual Minorities in International Criminal Law, in: 6 Russian Law Journal 1/2018, pp. 28–57; Wiemann, R., Sexuelle Orientierung im Völker- und Europarecht: Zwischen kulturellem Relativismus und Universalismus, Berliner Wissenschafts-Verlag: 2013; Werle, G./Jeßberger, F., Principles of International Criminal Law, OUP: Oxford 2020.

16 However, the Elements of Crimes do not define or further explain the term 'fundamental rights'.

as such.[17] This implies that the ICC system of minorities protection seeks to protect from persecution both groups as such, as well as individuals based on their membership in the group.[18]

Apart from the above international treaties' provisions, there is also an obligation to prosecute crimes against humanity as well as genocide under customary international law. The same is true of the duty to prevent crimes against humanity. This was confirmed, *inter alia*, in the 2005 World Summit Outcome Document: 'Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means'.[19] More significantly, the International Law Commission's 2017 Draft Articles on Crimes Against Humanity recognize in the preamble that the prohibition of crimes against humanity (encompassing also the obligation to prevent such crimes) is a peremptory norm of general international law (*jus cogens*).[20] Article 4 of the Draft Articles is specifically dedicated to the obligation of states to prevent crimes against humanity. It stipulates that each state is required to fulfil this obligation through: (1) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and (2) cooperation with other states and relevant intergovernmental or other organizations.[21] A preventative mission of the Draft Articles is also subsumed under the obligation of non-refoulement in Article 5.[22] These provisions aiming at prevention of crimes against humanity are informed principally by the ICJ's Bosnian Genocide judgment as well as the case law of international human rights (quasi-)judicial bodies.[23]

17 Article 7(1)(h), Elements of Crimes.

18 For concurring views, see also Schabas, *supra* note 15, 197; Brückner, W., Minderheitenschutz im Völkerstrafrecht, Nomos-Baden-Baden 2018.

19 Draft resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session, 2005 World Summit Outcome, A/60/L.1, 15.9.2005, §§ 138–139, https://www.who.int/hiv/universalaccess2010/worldsummit.pdf.

20 Report of the International Law Commission: Sixty-ninth session, *supra* note 12, § 45.

21 Article 4(1)(a)(b), ILC Draft Articles on Crimes Against Humanity.

22 Article 5(1), ILC Draft Articles on Crimes Against Humanity.

23 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports (2007) 43, 181–184. At the European Court of Human Rights (ECtHR): *Opuz v. Turkey*, Appl. no. 33401/02, 9.6.2009, § 128; *Osman v. the United Kingdom*, Appl. nos. 87/1997/871/1083, 28.10.1998, § 115; *Kontrová v. Slovakia*, Appl. no. 7510/04, 31 May 2007, § 49; *Mastromatteo v. Italy*, Appl. no. 37703/97, 24.10.2002, § 67 *in fine*; *Branko Tomašić and Others v. Croatia*, Appl. no. 46598/06, 15.1.2009, § 50; *Haas v. Switzerland*, Appl. no. 31322/07, 20.1.2011, § 54; *A. v. the United Kingdom*, Appl. no. 25599/94, 23.9.1998, § 22; *Z and Others v. the United Kingdom*, Appl. no. 29392/95, 10.5.2001, §§ 73–75; *Abdu v. Bulgaria*, Appl. no. 26827/08, 11.3.2014, § 40. At the Inter-American Court of Human Rights (IAmCtHR): *Velásquez-Rodríguez v. Honduras*, Judgment of 29.7.1988 (Merits), Series C, No. 4, § 175; *Gómez-Paquiyauri Brothers v. Peru*, Judgment of 8.7.2004 (Merits, Reparations and Costs), Series C,

3. The ICC case law on the protection of minorities

As regards the ICC case law involving minorities, interesting developments occurred in several cases at pre-trial stage. These cases implicate the Rome Statute's crimes of genocide and of persecution on prohibited grounds of discrimination. The following subsections explore in more detail the Court's jurisprudence on the law of genocide and of persecution, followed by discussion on how in the future the Court could address the challenges of intersectional discrimination in the context of international criminal law.

3.1. The Protection from Genocide

Much has already been written about the ICC's first – and so far the only – substantial encounter with the crime of genocide,[24] triggered by the Prosecutor of the ICC's Application for a Warrant of Arrest against Omar Al Bashir in 2008.[25] Accordingly, the purpose here is not to provide yet another comprehensive legal analysis of the Court's findings in this particular case, but rather highlight and legally assess those aspects and considerations of the Court's decision that are particularly relevant for the protection of minorities.[26] Against this background, several points should be made with respect to the Pre-Trial Chamber's interpretation and further clarification of the complex law of genocide. Some of these points turned out to be the main bone of contention between the majority opinion and Judge Ušacka's dissent.

First, unlike the majority assertion that it is necessary to assess the genocidal intent of the Government of Sudan (GoS) rather than the individual intent of Omar Al Bashir himself, dissenting judge Ušacka argued that under the Rome Statute solely individuals as natural persons can bear criminal responsibility for violations of international criminal law. According to her, any proposals to include criminal responsibility for legal persons such as states or corporations were explicitly rejected during the process of drafting the Rome Statute.[27] Judge Ušacka's argument is in line with previous international jurisprudence that confirmed the universal ac-

No. 110, § 155; *Juan Humberto Sánchez v. Honduras*, Judgment of 7.6.2003 (Preliminary Objection, Merits, Reparations and Costs), Series C, No. 99, §§ 137 and 142; *Tibi v. Ecuador*, Judgment of 7.9.2004 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 114, § 159. For a more detailed discussion of relevant aspects of this case law, see Schabas, W. A., Prevention of Crimes Against Humanity, in: 16 Journal of International Criminal Justice 4/2018, pp. 705–728; Report of the International Law Commission: Sixty-ninth session, *supra* note 12, §§ 48–53.

24 Kreß, C., The ICCs First Encounter with the Crime of Genocide: The Case against Al Bashir, in: C. Stahn (ed.), The Law and Practice of the International Criminal Court, OUP: Oxford 2015, pp. 669–704; Kaul, *supra* note 8, 195–211.

25 Public redacted version of the Prosecution Application, ICC-02/05-157-AnxA, 14 July 2008.

26 Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber I, 4.3.2009.

27 Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber I, 4.3.2009, §§ 1 and 4.

ceptance of the principle of individual criminal responsibility.[28] Under Article 25 of the Rome Statute, an individual is criminally responsible if he or she perpetrates, takes part in or attempts to commit a crime within the jurisdiction of the Court. At this point, it is also worth recalling that, unlike national criminal law, international law creates accountability for acts committed in a collective context and systematic manner. Therefore, *an* individual's own contribution to the concrete criminal result is not always obvious.[29]

Second, the majority decision highlights that the crime of genocide is characterised by the fact that it targets a specific national, ethnic, racial or religious group. This writer shares the Chamber majority's view that its purpose is to destroy in whole or in part the existence of a specific group or people, as opposed to those individuals who are members thereof. Put differently, this decision finds that the definition of the crime of genocide aims at protecting the existence of a specific group or people rather than individuals. It thus recognizes the collective interest pursued by the international definition of genocide.

Third, the ICC Pre-Trial Chamber (majority) observed that the definition of the crime of genocide contained in Article II of the 1948 Genocide Convention, in the Statutes of the ICTY and the ICTR, as well as in the Rome Statute, does not expressly require any contextual element. Likewise, the case law of ad hoc tribunals interpreted this definition as excluding any type of contextual element, such as a genocidal policy or plan. Departing from this kind of interpretation, it held that since the Elements of Crimes require a contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof.[30] In other words, the protection offered by the penal norm defining the crime of genocide is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical. Judge Ušacka dissented from this majority's contention arguing that such a 'result-based' requirement would, in fact, replicate the purpose of the phrase 'or was conduct that could itself effect such destruction'.[31]

Fourth, the ICC chamber found that the targeted group must have particular positive, that is distinguishing and well-established characteristics (national, ethnic,

28 The Trial of the Major War Criminals Before the International Military Tribunal, Vol. 1 (Nuremberg, 1947) 223, https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf; Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-AR 72), 2 October 1995, §§ 128–137.

29 Ambos, K., Article 25, in: O. Triffterer/K. Ambos (eds.), Rome Statute of the International Criminal Court: A Commentary, C.H. Beck, Hart, Nomos 2016.

30 Judge Ušacka disagreed with the majority assertion that the Elements of Crimes – which require the common element of a manifest pattern of similar conduct – must be applied unless the competent chamber finds an irreconcilable contradiction between the ICC Statute and these rules. She took the position that the Elements of Crimes as such are not binding upon the Court as they only shall assist the Court in the interpretation and application of the Rome Statute. She moreover argued that only the ICC Statute contains the operative definition of the crime. *Supra* note 27, §§ 17–18.

31 *Ibid*., § 19.

racial or religious), and not a lack thereof.[32] In this respect, the ICC pre-trial judges followed jurisprudence of other international courts in rejecting the negative approach to the definition of the group in question.[33]

Fifth, in her dissenting opinion Judge Ušacka found that these ethnic groups were targeted because of 'a perception of an affiliation' between the Fur, Masalit and Zaghawa population and the rebel groups.[34] This finding is extremely important from the perspective of minorities protection, as it tends to recognize the concept of perceptive discrimination, this is discrimination based on a perception that an individual is a member of a relevant protected group.[35] Such a 'misperception' discrimination thus occurs on an assumed protected characteristic, like race, religion, or national origin. A discriminator (here, a perpetrator of a discriminatory crime) targets individuals based on the erroneous belief that they are members of a protected group.

Sixth, dissenting judge Ušacka also noted that – following from the jurisprudence of the *ad hoc* international criminal tribunals – the existence of an ethnic group is to be determined on a case-by-case basis. She argued that in making such an assessment, both subjective criteria (for example, the stigmatisation of the group by the perpetrators)[36] and objective criteria (for example, 'the particulars of a given social or historical context')[37] need to be applied. Employing both criteria in her analysis of the protected group in the present case she concluded that the Fur, Masalit and Zaghawa make up a single ethnic group of the 'African tribes'[38]. Her assessment thus differs from that of the majority who considered these three groups distinct ethnic groups.[39]

Seventh, as to the meaning of the term 'part of the group' in the definition of the crime of genocide, the ICC Pre-Trial Chamber (majority) took account of the

32 *Supra* note 26, § 135.

33 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment of 26.2.2007, ICJ Reports (2007) 43, 85–86; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports (1951), at 23; Judgment, *Akayesu* (ICTR 96-4-T), Trial Chamber, 2 September 1998, §§ 510–516; Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2.8.2001, §§ 551–561; Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22.3.2006, §§ 20–28.

34 *Supra* note 27, § 22.

35 This interpretation is also in line with international human rights jurisprudence, notably that of the ECtHR which held in *Timishev v. Russia* that the prohibition of discrimination, as enshrined in Article 14 of the ECHR, covers discrimination on account of not only actual, but also perceived ethnicity. The ECtHR stated in this case that 'Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination.' *Timishev v. Russia*, ECtHR, Appl. nos. 55762/00 and 55974/00, 13.12.2005, §§ 54 and 56.

36 Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004, § 684; Judgment, *Blagojević* (No. IT-02-60-T), Trial Chamber, 17 January 2005, § 667; Judgment, *Gacumbitsi* (ICTR-2001-64-T), Trial Chamber, 17 June 2004, § 254.

37 Judgment, *Semanza* (ICTR-97-20-T), Trial Chamber, 15.5.2003, § 317.

38 *Supra* note 27, § 26.

39 *Supra* note 26, § 137.

three criteria that follow from the case law of the ICTY and the ICTR and were endorsed by the ICJ in its prominent Bosnian Genocide judgment, namely those of substantiality of a targeted part, its prominence within the group, and the opportunity available to the alleged perpetrator.[40]

3.2. The Protection from Persecution

Other cases before the ICC relevant to the present analysis concern the crime against humanity of persecution. What sets persecution apart from other crimes against humanity enumerated in Article 7(1) of the ICC Statute is discriminatory intent or motive that is required for this type of a punishable act.[41] Such an intent to discriminate can take various forms of inhumane acts and 'manifest itself in a plurality of actions including murder'.[42] Other persecutory acts may involve unlawful detention, deportation, or forcible transfer of civilians,[43] harassment, humiliation and psychological abuse,[44] and even crimes that target property when the victimization involves discrimination.[45] The crime of persecution is thus specific in that it entails racist or other discriminatory policies and practices of a state, sometimes also authorised by its legal regime.

The acts of persecution comprise wilful and severe deprivation of fundamental rights on discriminatory grounds.[46] Persecution can also be seen as a connection between crimes against humanity and genocide as the ICJ acknowledged in the Bosnian genocide judgment. Citing the relevant parts of the *Kupreškić et al.* judgment, the ICJ accepted the ICTY's interpretation that 'from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution'.[47] Consequently, 'when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide'.[48]

In *Muthaura et al.*, the pre-trial judges of the ICC referred to the criminal acts that underlie the crime of persecution, including murder, deportation and forcible transfer of the population, rape and other forms of sexual violence, serious physical injuries, and acts causing serious mental suffering, but did not specify the fundamental rights at issue – for example, the right to life, security of person, and freedom of movement – or otherwise relate these acts to widely recognised human

40 *Ibid*., § 146.
41 This was also confirmed by the Appeals Chamber of the ICTY in the *Tadić* case. The Appeals Chamber held that no discriminatory intent or motive is required for crimes against humanity, except for the specific crime of persecution. Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15.7.1999, § 297.
42 Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14.1.2000, § 636.
43 Judgment, *Vasiljević* (IT-98-32-A), Trial Chamber, 25.2.2004, § 234.
44 Judgment, *Kvočka et al.* (IT-98-30/1-A), Trial Chamber, 28.2.2005, §§ 324–325.
45 Judgment, *Blaškić* (IT-95-14-T), Trial Chamber, 3.3.2000, § 233.
46 Schabas, *supra* note 15, 194.
47 *Supra* note 33, 83.
48 *Ibid*.

rights law language.[49] The Pre-Trial Chamber (majority) confirmed the charges against Mr. Muthaura and Mr. Kenyatta, stating that there was sufficient evidence to establish substantial grounds to believe that they were individually criminally responsible as indirect co-perpetrators for, *inter alia*, crime against humanity of persecution committed against perceived supporters of Orange Democratic Movement because of their perceived political affiliation.[50] Similarly, in *Gbagbo*, the ICC Pre-Trial Chamber only listed the acts of violence – including killings, rapes and injuries committed by the pro-Gbagbo forces – that constituted persecution of civilian population on political, ethnic, national and religious grounds without also linking them to fundamental rights at stake.[51] Likewise, in *Harun and Kushayb*, the ICC pre-trial judges just referred to the individual criminal acts underlying the crime against humanity of persecution committed against Fur civilians on ethnic grounds: murder, rape, imprisonment or severe deprivation of liberty, torture, outrages upon personal dignity, attack of the civilian population, inhumane acts, pillaging, destruction of property and forcible transfer of the population.[52] In *Hussein*, the ICC Pre-Trial Chamber did not even spell out the specific criminal acts underpinning the crime of persecution committed against Fur population on grounds of their ethnic identity during armed conflict in Darfur. Neither did it specify the fundamental rights affected.[53] The same is true of the Warrants of Arrest that the ICC Pre-Trial Chamber issued in *Khaled* and *Yekatom and Ngaïssona*, neither of which even mentions the grounds of discrimination (political and religious or ethnic affiliation respectively) in the case of persecution.[54]

In *Gaddafi et al.*, the ICC Pre-Trial Chamber held that there were 'reasonable grounds to believe that several acts of persecution based on political grounds were committed' and that such inhuman acts inflicted on civilians because of their opposition to Gaddafi's regime severely deprived them of their fundamental rights. While listing various abuses, the pre-trial judges did not say anything as to which of them were to be considered acts of persecution within the meaning of Article 7(1)(h)

49 Public Redacted Version of Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Muthaura et al.* (ICC-01/09-02/11), Pre-Trial Chamber II, 23.1.2012, § 283.

50 Following the ICC Chamber's confirmation of charges, the Prosecutor decided to withdraw charges against both Mr. Muthaura and Mr. Kenyatta.

51 Public Redacted Decision on the confirmation of charges against Laurent Gbagbo, *Gbagbo* (ICC-02/11-01/11), Pre-Trial Chamber I, 12.6.2014, §§ 204 – 205.

52 Decision on the Prosecution Application under Article 58(7) of the Statute, *Harun and Kushayb* (ICC-02/05-01/07), Pre-Trial Chamber I, 27.4.2007, Counts 1, 10, 21 and 39.

53 Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', *Hussein* (ICC-02/05-01/12), Pre-Trial Chamber I, 1.3.2012, § 13(xi).

54 Warrant of Arrest for Al-Tuhamy Mohamed Khaled with under seal and ex parte Annex, *Khaled* (ICC-01/11-01/13), Pre-Trial Chamber I, 18 April 2013, § 8; Public Redacted Version of 'Warrant of Arrest for Patrice-Edouard Ngaïssona', *Yekatom and Ngaïssona* (ICC-01/14-02/18), Pre-Trial Chamber II, 13.12.2018, §§ 10 and 16.

of the Rome Statute.[55] In *Ruto and Sang*, the Pre-Trial Chamber of the ICC confirmed the charges against the two suspects, including those related to persecution committed against civilians based on their political affiliation through criminal acts of murder, torture, and deportation or forcible transfer of population, without any further substantial elaboration on these acts. There is a report that Mr. Ruto himself made speeches and instructed perpetrators to target Kikuyu, Kamba and Kisii communities because 'these people [...] don't vote for us the only thing is to kill them and evict them from the Rift Valley' and that local leaders coordinating the groups of raiders instructed the perpetrators to 'attack the Kikuyu because they stole the votes'.[56] In *Ntaganda*, however, the ICC Pre-Trial Chamber found that the crimes perpetrated against the non-Hema civilian population because of their ethnic origin amounted to severe deprivation of several fundamental rights,[57] including the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment and the right to private property.[58]

In *Ongwen*, the ICC pre-trial judges approached the crime of persecution in a much more elaborated fashion in terms of using well-established human rights law terminology. They explicitly mentioned specific human rights attacked as a result of persecution against civilian population on political grounds. These included the rights to life, to liberty and security of person, to freedom of movement, to private property, not to be subjected to torture or to cruel, inhumane or degrading treatment, and the right not to be held in slavery or servitude. The Pre-Trial Chamber also specified individual persecutory acts that caused a severe deprivation of the said fundamental rights, namely attacks against the civilian population as such, (attempted) murder, torture, other inhumane acts, cruel treatment, enslavement, outrages against personal dignity, destruction of property, and pillaging.[59]

The majority of the ICC pre-trial judges in *Mbarushimana* did not address persecution in more detail, as they previously found no substantial grounds to believe that this and other alleged crimes against humanity were committed because of the lacking essential requirement that the crimes were committed pursuant to or in furtherance of an organisational policy to commit an attack directed against

55 Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi', *Gaddafi et al.* (ICC-01/11), Pre-Trial Chamber I, 27.6.2011, § 65.

56 Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Ruto and Sang* (ICC-01/09-01/11), Pre-Trial Chamber II, 23.1.2012, § 273.

57 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, *Ntaganda* (ICC-01/04-02/06), Pre-Trial Chamber II, 9.6.2014, § 58.

58 For some controversies surrounding the question of whether and when property crimes may constitute persecution, as well as associated international substantive norms and jurisprudence of international criminal tribunals, see Schabas, *supra* note 15, 196.

59 Public Redacted Decision on the confirmation of charges against Dominic Ongwen, *Ongwen* (ICC-02/04-01/15), Pre-Trial Chamber II, 23.3.2016, §§ 25, 39, 52 and 65.

the civilian population.[60] The interpretation of a dissenting judge Monageng is much more detailed in this respect. Although she believed that the evidence established substantial grounds to believe that there was an attack on the civilian population pursuant to an organisational policy and that this attack was systematic in nature, she concluded that the alleged targeted group in this particular case 'lacked the required specificity, ideological coherence and necessary identifiable characteristics in order to fall within one of the protected groups as listed under article 7, be it political or otherwise'.[61] She noted, in particular, that the targeted civilian population could not reasonably be seen as 'being an identifiable "political" group with a coherent set of ideological beliefs'.[62] Therefore, it could not be said that this population was targeted because of 'the civilians' ideological beliefs'.[63]

3.3. The Future of Minorities Protection in International Criminal Law: The ICC and the Challenge of Intersectionality

Both experience and international case law demonstrate that atrocity crimes have more often than not been inflicted on women from minorities and on minorities within minorities. This entails that minorities and groups are often targeted on more than one ground of discrimination. Makkonen noted that sexual and gender-based violence perpetrated against 'enemy women' appears to be a 'deplorably common real-life example involving intersectional subordination and discrimination'.[64] Such a pattern is also reflected in a recent case, in which the ICC Pre-Trial Chamber issued an arrest warrant against Malian national Al Hassan and confirmed charges against him of committing crimes against humanity, including persecution of the inhabitants of Timbuktu in Mali on both religious and gender grounds.[65] The Chamber observed that civilians were targeted 'on the basis of

60 Decision on the confirmation of charges, *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber I, 16.12.2011, §§ 264–267.

61 Dissenting opinion of Judge Sanji Mmasenono Monageng, Decision on the confirmation of charges, *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber I, 16.12.2011, § 36.

62 *Ibid*., § 37.

63 *Ibid*.

64 Makkonen, T., Multiple, Compound and Intersectional Discrimination: Bringing the Experience of the Most Marginalized to the Fore 2002, available at https://www.abo.fi/wp-content/uploads/2018/03/2002-Makkonen-Multiple-compound-and-intersectional-discrimination.pdf.

65 Public redacted version of Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, *Al Hassan* (ICC-01/12-01/18), Pre-Trial Chamber I, 22.5.2018; The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-767-Corr-Red, Pre-Trial Chamber I, Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30.9.2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23.4.2020, 8.5.2020. Other interesting examples of ICC case law involving multiple and intersecting forms of discriminatory targeting in the context of mass atrocities include: *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-

specific criteria, namely the members of the local population – women and girls in particular – perceived as not adhering to the vision of religion held by Ansar Dine and Al-Qaida in the Islamic Maghreb (AQIM)'.[66] Upon considering the evidence, the Pre-Trial Chamber found reasonable grounds to believe that certain acts of persecution were committed against the civilian residents of Timbuktu, thus depriving them of the fundamental rights to freedom of expression, freedom of thought, freedom of association and assembly, freedom of movement, equality, education, privacy, personal dignity, security and property. These persecutory acts targeted, in the first place, civilians on the grounds of religion. In the second place, they targeted women and girls on gender grounds, 'applying stricter rules to them and attacking them for the slightest purported breach of those rules, bringing about the loss of their social status within the civilian population of Timbuktu'.[67] The Chamber stated that such religion- and gender-based persecution was committed through the criminal acts of torture, cruel treatment, rape, sexual slavery, other inhumane acts, the passing of sentences without previous judgment pronounced by a regularly constituted court, and the directing of attacks against monuments dedicated to religion.[68]

As the above case illustrates, discriminatory targeting of minorities and their specific members (here, female members of the targeted group not of the same religion as perpetrators) may be based on more than one ground of discrimination simultaneously.[69] Nevertheless, the international (criminal) judiciary has thus far tended to consider the crimes of genocide and of persecution on isolated grounds of discrimination, such as race or religion, political affiliation or gender. In *Al-*

02/06, Trial Chamber VI, Judgment with public Annexes A, B, and C, 8.7.2019, § 1009; *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Reparations Order, 8.3.2021, §§ 60–62, 90, 94–95, 195–195; *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18, Pre-Trial Chamber II, Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona', 14.5.2020; *The Prosecutor v. Mahamat Said Abdel Kani*, ICC-01/14, Public Redacted Version of 'Warrant of Arrest for Mahamat Said Abdel Kani', 17.2.2021, § 17. See extensively on these ICC cases, as well as on addressing compound and intersecting forms of discrimination in the context of mass atrocities by international criminal judiciary Maučec, G., On Implementation of Intersectionality in Prosecuting and Adjudicating Mass Atrocities by the International Criminal Court, in: 21 International Criminal Law Review 3/2021, pp. 534–560; Maučec, G., Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities – the Case for Intersectional Consideration of Mass Atrocities, in: 12 Journal of International Dispute Settlement 1/2021, pp. 42–83; Maučec, G., The International Criminal Court and the Issue of Intersectionality – A Conceptual and Legal Framework for Analysis, in: 21 International Criminal Law Review 1/2021, pp. 1–34.

66 Public redacted version of Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, *Al Hassan* (ICC-01/12-01/18), Pre-Trial Chamber I, 22 May 2018, § 63.

67 *Ibid*., § 95.

68 *Ibid*.

69 Mccolgan, A., Multiple Discrimination, in: P. Cane/J. Conaghan (eds), The New Oxford Companion to Law, OUP: Oxford 2008.

Hassan, the Prosecution has challenged this trend of relying upon a 'single-ground' approach to enforce international legal norms prohibiting core crimes of discrimination by alleging persecution on the grounds of religion and gender coupled together. As Grey has rightly noted, such a 'formulation puts the Court in a strong position to find that persecution on intersecting grounds is possible, as a matter of law'.[70] Following the confirmation of the charges of persecution on intersecting grounds (gender and religion),[71] the ICC trial judges will need to focus on the gender- and religion- related dimensions of some international crimes targeting minorities and think through the links between gender, religion and violence in their judgment. It will require the ICC judges to consider special vulnerability of women and girls inherent in their situation as civilian residents of Timbuktu. Such an intersectional approach by the Court thus offers a great potential of making a substantial jurisprudential contribution to the law of international crimes that involve discriminatory intent, notably genocide and persecution.

As argued elsewhere,[72] when approaching the conundrum of intersectionality in their deliberations, the ICC prosecutor and judges should look for inspiration and practical guidance in scarce and 'limited'[73] international and national human rights jurisprudence on the issue.[74] Specifically, they should take account of intersectionality in aspects such as the selection of situations and cases, formulation and phrasing of the charges, the gravity assessment, the contextualization of crimes, the determination of criminal sentence, and the provision of adequate reparations for victims.

70 Grey, R., International Criminal Court poised to interpret the crime of 'gender-based persecution' for the first time, IntLawGrrls, 12.4.2018, https://ilg2.org/2018/04/12/international-criminal-court-poised-to-interpret-the-crime-of-gender-based-persecution-for-the-first-time/.

71 The term 'intersectionality' recognizes the need for a 'holistic approach' in the determination of the right to be free from discrimination and violence. It has become a regular expression in international human rights law and is used to indicate that 'intersectional' discrimination is located at the intersection of individual grounds of discrimination. In the cases of such discrimination the legally protected grounds of discrimination do not function independently of one another, but are closely intertwined and located at the intersection.

72 See Maučec, *supra* note 65.

73 Chow, P. Y. S., Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence, in: 16 Human Rights Law Review 3/2016, pp. 453–481; Atrey, S., Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR, in: 35 Nordic Journal of Human Rights 3/2017, pp. 220–239.

74 It seems that the European Court of Human Rights, as well as other international and domestic judicial and quasi-judicial bodies have been increasingly inclined to take into consideration the specific aspects and effects of a single case of discrimination based on more than one ground of discrimination. See, for example, *B.S. v. Spain*, ECtHR, Appl. no. 47159/08, 24.7.2012. In light of such a gradual development of non-discrimination law towards the general acceptance of the concept of intersectional discrimination the ICC's substantial engagement with the subject would be both welcome and necessary.

By applying the above framework that recognizes complex identities of minorities and their members as victims of mass atrocities and serious human rights violations, and that further incorporates intersectionality in both international criminal law discourse and adjudication of international crimes, the Court should be able to better address difficult realities of those victims whose identities fall within more than one minority group. Such an acknowledgement and employment of intersectionality in the adjudication of situations in which two or more grounds of discrimination have caused a group to be targeted with violence would better respond to the complex realities of its experience in terms of both ordering adequate remedies (reparations) for victims and imposing appropriate and just punishment on a convicted person. Using intersectionality when making decisions on reparations would result in remedies that focus on the unique experiences of a victimized group. In this way, violence and atrocities against protected groups would be better understood and their needs better served.[75] Because of particularly harmful effects of a criminal conduct resulting from the accumulation and/or intersection of individual prohibited grounds of discrimination, the sanction should be stricter than in instances of targeting minorities on only one protected ground of discrimination. Indeed, through an intersectional analysis the Court would considerably increase the level of protection afforded to victims with multiple and compound identities and arguably enhance the preventive capacity of the Rome Statute system.

4. Final observations

As I hope this chapter has illustrated, the Rome Statute system of international criminal justice is an important means of protecting minorities along with their private property and cultural heritage.[76] Under this system, states are required to prevent and punish genocide, other acts of mass killing, and serious acts of persecution directed against different minority groups. To the extent that international (treaty and customary) law requires states to prevent and punish attacks and violence against minorities, such obligations become part and parcel of the general principles of international criminal law that support the activities of the ICC. Although these obligations are now widely recognized, it is debatable to what extent

75 For a similar conclusion, see Davis, A. N., Intersectionality and International Law: Recognizing Complex Identities on the Global Stage, in: 28 Harvard Human Rights Journal 1/2015, pp. 205–242.

76 The Commentary to the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities states that the protection of minorities and of their existence goes beyond the duty not to destroy or deliberately weaken minority groups. It also requires respect for and protection of their religious and cultural heritage, essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues. *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/2005/2, 4.4.2005, § 24.

they can be implemented in practice. For example, a responsibility to prosecute core international crimes may be constrained by limited funding or by political trade-off reached to achieve more non-retributive aims of transitional justice.[77] Well-known examples of the latter arrangement are the cases of amnesty in South Africa and Sierra Leone.

It bears noting that the Court's criminal justice system enables the prosecution of a broader spectrum of violations against or affecting minorities than the Genocide Convention, which with its rather narrow definition of genocide does not cover crimes based on discriminatory grounds other than nationality, race, ethnicity and religion, and is limited to the physical destruction of the protected groups. The concept of crimes against humanity has thus been of great relevance for the protection of minorities as it encompassed – as punishable acts – a range of acts of persecution, not just acts of physical destruction. More crucially, the essential connection between crimes against humanity and armed conflict, a requirement imposed by the states that established the International Military Tribunal in Nuremberg, has been abandoned in subsequent state practice concerning such international crimes. This trend can be discerned from international conventions regarding crimes of genocide and apartheid. Both conventions prohibit specific types of crimes against humanity irrespective of any connection to armed conflict. The ICTY endorsed this position with its decision in *Tadić*.[78] This ICTY ruling was later also confirmed in the relevant wording of the Rome Statute (Article 7[1]). In effect, the concept of crimes against humanity is now applicable to many serious human rights violations that previously could not be prosecuted under this label whenever they occurred in a time of relative peace.[79] This has considerably expanded and strengthened the international protection of minorities from mass atrocities.

So far, the Court has mostly placed reliance on the relevant case law of other international courts, including the ICTY, the ICTR, as well as the ICJ. This does not mean, however, that the ICC will always agree with the holdings of other international tribunals, as the case of Al Bashir shows. Although prior case law of the ICTY and the ICTR found that genocide does not require any contextual element, a different view was taken by the ICC Pre-Trial Chamber (majority) which

77 Some commentators have argued that offering amnesties as part of a transitional justice deal could undermine the certainty of legal sanctions, which in turn could limit the deterrent effect of the Court. See, for example, Buitelaar, T., The ICC and the Prevention of Atrocities: Criminological Perspectives, Working Paper 8, 2015, https://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2015/10/The_ICC_and_The_Prevention_of_Atrocities.pdf.

78 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-AR72), Appeals Chamber, 2.10.1995, § 141.

79 For example, atrocities that the Khmer Rouge committed in Cambodia during the late 1970s (when basically there was no armed conflict in the country) were labelled genocide, even though it would have been much more appropriate to characterize such acts of mass killing as crimes against humanity, since they lacked the ethnic dimension which was essential for the crime of genocide.

considered the real and concrete threat to the existence of the protected group or part thereof a necessary element.[80]

Within the Rome Statute system, there is still room for further jurisprudential developments as regards legal protection of minorities against mass atrocities. The Court is currently facing a challenging task to rule on the various aspects of the crime of genocide and the crime of persecution. Some important legal issues on which the ICC judges will likely continue to deliberate in the foreseeable future include the vexed issue of intersectionality. By recognizing it and carefully considering assertions that simultaneously invoke intersecting grounds of discrimination, the Court would substantively contribute to the legal concept of intersectionality which continues to structure discussions and be deployed in concrete analyses of different situations and contexts, including rape in war and genocide. More fundamentally, pursuing such an interpretive practice by the Court would clearly demonstrate that intersectionality does have a place in international criminal law both as an observational tool and as a guiding standard in deciding on punishment and reparations to victims in international criminal trials.

Unlike some states-oriented international courts and regional human rights courts (such as the International Court of Justice and the European Court of Human Rights), the ICC does not have a power to indicate provisional measures of protection.[81] What it does have, however, is its potentially deterrent function materialized mainly in the prosecution. This possibility of a deterrent effect is specifically stated in the preamble to the Rome Statute and was conceived by its writers as a rationale for the establishment of the Court. It is, however, questionable to what extent the Court's mechanism can actually contribute to preventing or ending atrocities involving or affecting minorities.[82] The hope that the ICC would deter the commission of mass atrocities it was established to try is part of a wider and growing commitment to early warning and prevention of such atrocities.[83] Indeed, prevention of atrocity crimes that target more often than not different minority groups remains one of the key challenges for the international criminal justice. It has been suggested that for potentially deterrent impact to become actual,

80 See *supra* note 26.

81 For a detailed analysis of distinct role that the ICJ provisional measures can play in the protection of minorities see Maučec, G., Protecting Minorities from Discrimination and Mass Violence through Provisional Measures Indicated by the International Court of Justice, in: 27 International Journal on Minority and Group Rights, 3/2020, pp. 377–409.

82 As David Koller acutely observed, in the absence of conclusive evidence that can prove deterrent effect of international criminal law, 'belief in this justification has remained largely a matter of faith that deterrence does work, even if it cannot be proven'. Koller, D. S., The Faith of the International Criminal Lawyer, in: 40 New York University Journal of International Law and Politics 2008, pp. 1019–1069. See also Akhavan, P., Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, in: 95 AJIL 1/2001, pp. 7–31.

83 For the latest thorough debate on the ICC deterrence see Symposium 'Who is afraid of the International Criminal Court? Deterrence in international criminal justice', (2021) 19 Journal of International Criminal Justice 855.

the ICC through its work, and states party to the Rome Statute through their support should strengthen the credibility and consistency of the Court's prosecutions and trials.[84] Only then will the ICC be truly able to reify its proponents' central idea of contributing to the protection of vulnerable groups from mass violence and atrocities, a leitmotif so dear to all those who (still) believe that the project of international criminal justice can enhance the protection and promotion of minority rights.

Bibliography

Akhavan, P., Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, in: 95 AJIL 1/2001, pp. 7–31.

Ambos, K., Article 25, in: O. Triffterer/K. Ambos (eds.), Rome Statute of the International Criminal Court: A Commentary, C.H. Beck, Hart, Nomos 2016.

Ambrus, M., Genocide and Discrimination: Lessons to Be Learnt from Discrimination Law, in: 25 Leiden Journal of International Law 4/2012, pp. 935–954.

Atrey, S., Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR, in:35 Nordic Journal of Human Rights 3/2017, pp. 220–239.

Brückner, W., Minderheitenschutz im Völkerstrafrecht, Nomos-Baden-Baden 2018.

Buitelaar, T., The ICC and the Prevention of Atrocities: Criminological Perspectives, Working Paper 8, 2015, https://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2015/10/The_ICC_and_The_Prevention_of_Atrocities.pdf.

Cassese, A. et al. (eds), The Rome Statute of the International Criminal Court: A Commentary, vol. II, OUP: Oxford 2002.

Chow, P. Y. S., Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence, in: 16 Human Rights Law Review 3/2016, pp. 453–481.

Davis, A. N., Intersectionality and International Law: Recognizing Complex Identities on the Global Stage, in: 28 Harvard Human Rights Journal 1/2015, pp. 205–242.

Đurić, N. et al, Legal Protection of Sexual Minorities in International Criminal Law, in: 6 Russian Law Journal 1/2018, pp. 28–57.

Experience of the Most Marginalized to the Fore 2002, available at https://www.abo.fi/wp-content/uploads/2018/03/2002-Makkonen-Multiple-compound-and-intersectional-discrimination.pdf.

Grey, R., International Criminal Court poised to interpret the crime of 'gender-based persecution' for the first time, IntLawGrrls, 12 April 2018, https://ilg2.org/2018/04/12/international-criminal-court-poised-to-interpret-the-crime-of-gender-based-persecution-for-the-first-time/.

Grono, N./de Courcy Wheeler, A., The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders, in: C. Stahn (ed.), The Law and Practice of the International Criminal Court, OUP: Oxford 2015, pp. 1225–1244.

84 Grono, N./de Courcy Wheeler, A., The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders, in: C. Stahn (ed.), The Law and Practice of the International Criminal Court, OUP: Oxford 2015, pp. 1225–1244.

Kaul, H.-P., The International Criminal Court and the Crime of Genocide, Safferling/E.-A. Conze (eds.), The Genocide Convention Sixty Years after its Adoption, T.M.C. Asser Press: The Hague 2010, pp. 195–211.

Koller, D. S., The Faith of the International Criminal Lawyer, in: 40 New York University Journal of International Law and Politics 2008, pp. 1019–1069.

Kreß, C., The ICCs First Encounter with the Crime of Genocide: The Case against Al Bashir, in: C. Stahn (ed.), The Law and Practice of the International Criminal Court, OUP: Oxford 2015, pp. 669–704.

Makkonen, T., Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore, 2002.

Maučec, G., Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities – the Case for Intersectional Consideration of Mass Atrocities, in: 12 Journal of International Dispute Settlement 1/2021, pp. 42–83.

Maučec, G., On Implementation of Intersectionality in Prosecuting and Adjudicating Mass Atrocities by the International Criminal Court, in: 21 International Criminal Law Review 3/2021, pp. 534–560.

Maučec, G., Protecting Minorities from Discrimination and Mass Violence through Provisional Measures Indicated by the International Court of Justice, in: 27 International Journal on Minority and Group Rights, 3/2020, pp. 377–409.

Maučec, G., The International Criminal Court and the Issue of Intersectionality – A Conceptualand Legal Framework for Analysis, in: 21 International Criminal Law Review 1/2021, pp. 1–34.

Mccolgan, A., Multiple Discrimination, in: P. Cane/J. Conaghan (eds), The New Oxford Companion to Law, OUP: Oxford 2008.

Measures Indicated by the International Court of Justice, in: 27 International Journal on Minority and Group Rights, 3/2020, pp. 377–409.

Schabas, W. A., Prevention of Crimes Against Humanity, in: 16 Journal of International Criminal Justice 4/2018, pp. 705–728.

Schabas, W. A., The International Criminal Court: A Commentary on the Rome Statute, OUP: Oxford 2016.

Werle, G./Jeßberger, F., Principles of International Criminal Law, OUP: Oxford 2020.

Wiemann, R., Sexuelle Orientierung im Völker- und Europarecht: Zwischen kulturellem Relativismus und Universalismus, Berliner Wissenschafts-Verlag: 2013.