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Collective Rights as Reflected by the Jurisprudence of the ICTY

From the exclusive inter-state set of relations, it has been a long road to involve individuals as actors of international law. It would be meaningless to deny the existence or the importance of certain "fundamental rights of the human being",[2] directly derived from and remedied by international rules. These would include some closely related, partially overlapping, yet not identical areas, human rights and humanitarian law, and international criminal law. In an efficient model of international law, these three distinct areas are depending on each other, particularly so, if we choose to initiate our examination from international criminal law perspectives.

Rules of criminal law usually do not describe or regulate life situations – they rather "protect" other rules. In other words, depending on which legal theoretical approach we prefer, we can always find a value, or an interest (both regulated by legal rules) to be protected in the background of a crime. What is then to be found in the background of international crimes? Human rights law or international humanitarian law?[3] A comfortable answer can be that the fundamental rights of the human being, wherever they come from. This way it is possible to bypass the technicality, that not all human rights violations will result in an international crime,[4] and that some international crimes can be committed in a situation, where the major corpus of international humanitarian law is not even applicable.[5]

As pointless a problem-making this argumentation seems regarding *individual* rights, as interesting it becomes if we apply it to *groups* of individuals. Humanitarian law and human rights law consider different classifications of human beings. From the perspective of international humanitarian law, ethnic or religious connections are not relevant – even if these are the very reasons to become a *victim of war*. Under international humanitarian law, people are divided into certain groups, depending on *their role in an armed conflict*. After the overwhelming political division of the cold war, these roles today are more and more determined by ethnic or religious affiliations – at least *de facto*. Attacks are often targeted against ethnicities, disrespecting the very concept of

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[2] These are part of international *erga omnes* norms, since the Barcelona Traction case, it is a *datum*. See in this regard: James Crawford: Revising the Draft Articles on State Responsibility, in EJIL, 1999, Vol 10. No. 2. p. 442
[3] For a more in-depth evaluation of such difference see Audrey I. Benison, War Crimes: A Human Rights Approach, in: The Georgetown Law Journal, Vol 88. 1999 pp. 143 & onwards
[4] Kupreskic, Trial Chamber Judgement 618.: Although the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.
[5] As the existence of an armed conflict is not a *de iure* element of genocide or crimes against humanity.

international humanitarian law classification.[6] It seems, as if these affiliations would be causes to become a member of an international humanitarian law protected group, but legally speaking, that cause is irrelevant inasmuch as it would not result in a different kind of humanitarian protection. In other words: the protection, assigned by international humanitarian law to every human being is not differentiated on ethnic or religious grounds. Unlike in human rights regulations, even positive discrimination, favourising an ethnic group over another for various – lawful and legitimate – reasons, seems unimaginable in the application of humanitarian law.[7]

This technicality gains immediate relevance in a conflict, where the hostilities are conducted among ethnic or religious groups.[8] Minorities, their national sentiment and identity is protected by law: yet, if distorted into xenophobia, rendering hatred toward other ethnicities the bases of national identity, all of these may result in serious ethnic conflicts.[9] The aforementioned interest or value in such a scenario is arguably not just the life and the well being of an individual, but also those of the group, that the effected persons belong to. The collapse of the multi-ethnic Yugoslavia resulted in such a conflict. As the first ICTY judgement stated:

> *"This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and* ethnicity rather than nationality may become the grounds for allegiance*. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions,* the requirement of nationality is even less adequate to define protected persons. *In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that* allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test."[10]

The ICTY – officially 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" – had to face not just the task of adopting the full body of international human rights as such, and the post war international humanitarian law norms to the Nuremberg heritage of international criminal concepts, but also to find a lasting answer to the threat to international peace and security embodied in the conflict of the former Yugoslav ethnicities.

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6 Drazen Petrovic, Ethnic Cleansing - An Attempt at Methodology in EJIL, Vol 5 No. 3, 1995, pp. 358-359

7 Daniel Thürer: Minorities: Their protection in general international law and in international humanitarian law in: elen Durham – Timothy L.H. McCormack (eds.): The Changing face of conflict and the efficacy of international humanitarian law, Martins Nijhof F, The Hague/London/Boston 1999, pp. 54-55.

8 See e.g. Bertram S Brown: Nationality and Internationality in international humanitarian law, in Stanford Journal of International Law, pp. 350-351.

9 Daniel Thürer: Minorities: Their protection in general international law and in international humanitarian law, p. 46. Fears derived from the lack of an adequate protection of the group may fasten this sorry process, IT-96-21-T, Delalic Trial Chamber Judgement from the 2nd of November, 1998 130.

10 Tadic, Trial Chamber Judgement of the15th of July, 1999, 166. emph. added

Grave violations of international humanitarian law are reflected in the early UNSC resolutions about the ICTY[11], while no reference is made by the Security Council to human rights until 1998.[12] This suggests that the atrocities committed in the ex-Yugoslav conflict are treated from the perspective of international humanitarian law primarily – while in spite of the lack of their mentioning, it remains quite apparent, that those violations are breaching fundamental human rights as well. Following the daring introduction of the Tadic decision cited above, this (IHL based) perspective resulted in a return to the traditional international legal approach: the ICTY found a solution to make the acts attributable to another state in order to find a protected group under international humanitarian law, this way avoiding the need to go beyond the limits of sovereignty.

> *"In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as* de facto *organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were "protected persons" as they found themselves in the hands of armed forces of a State of which they were not nationals."*[13]

Also this approach helped to apply the full body of international humanitarian law to the situation, and not only the rules applicable in a non-international armed conflict. However, this perspective limits the field for collective rights based on ethnicity, while it offers a more efficient protection for the individuals, at least in consideration of the actual conditions. The possibly asymetrical outcomes of this argumentation has not been tolerated by the Appeals Chamber.[14] In later cases the ICTY also clarified, that ethnicity may gain relevance in international humanitarian law. In the Blaskic Appeals Judgement the Chamber clarified, following the line set out in the Tadic judgement, that in "an inter-ethnic armed conflict, a person's ethnic background may be regarded as a decisive factor in determining to which nation he owes his allegiance and may thus serve to establish the status of the victims as protected persons."[15]

This interpretation of an inter-ethnic conflict as an inter-state one is not only a notable example of the terminological problems. It is also an evidence, that the goals of the norms of human rights law – including collective rights of minorities – and humanitarian law, offering no collective protection to ethnicities as such, may still often collide. Therefore in order to translate the questions of minority protection into international criminal legal language, a mutual understanding of the effected phrases should suffice. A unified terminology seems utopistic, and maybe not even desirable, as there would emerge too many dogmatic and other problems. The above approach introduced in the Tadic case, offers a practically more suitable protection for the groups, through a higher level of humanitarian protection of its members, in case the immediate survival of that group is at stake. Another example of the dogmatic issues can be that even if

[11] Resolutions 808; 827 (1993),
[12] See the rules on the election of judges, in UNSC Res. 1166 (1998)
[13] Tadic, Trial Chamber Judgement of the15th of July, 1999, 167.
[14] Tadic, Decision from the 2nd of October, 1995, 76-77.
[15] Blaskic, Appeals Chamber Judgement, 127.

membership in a group is an element of a given crime, the numerical dimensions within that particular society is hardly relevant. Correlating these different terms with each other (like group *vs.* minority) would also outline the interdependencies of the two more or less distinct areas, and their basic concepts.

As a kind of precondition to our examination in this matter, the possibly relevant crimes have to be identified, since they serve as the form and essence of any ICL action. Among international crimes as applied by international tribunals, there are three obvious choices for our examinations, as these crimes have a *per definitionem* discriminatory element,[16] that may be suitable for the application to national, ethnic or religious minorities. These crimes are the crime of genocide, and two crimes against humanity, namely persecution and appartheid. In the present paper the examination is directed at the ICTY and the underlying Balkan conflicts only, therefore it will not cover the crime of appartheid,[17] as it is not present amongst the crimes under the ICTY jurisdiction.

Genocide

In spite minorities are not mentioned among the elements of crimes, they obviously remain the primary benefiters of the definition, prohibition and prevention of genocide.[18] The key for that lies within the *dolus specialis,* a special *mens rea* element of the crime. This so-called genocidal intent includes the destruction of the national, religious, ethnic or racial group, or *a part thereof*.[19] The intent has two major and conjunctive elements, identification of a protected group and the will for its physical destruction. As the ICTY said: "Mere knowledge of the victims' membership in a distinct group on the part of the perpetrators is not sufficient to establish an intention to destroy the group as such."[20] As the intent is a special state of mind, a psychological phenomenon, it is always very hard to prove, evidencing genocidal intent not being an exemption. As for the burden and standard of proof, general criminal legal requirements apply, so the Prosecution has to prove beyond reasonable doubt all elements of the crime, including the intent. From the perspective of substantive law this intent makes possible prosecution of crimes against national, ethnic and religious groups, while from a procedural point of view, it therefore hampers the finding of a genocide. As the Jelisic case proves, simple deduction based upon the criminal conduct would remain insufficient in determining the intent:

> *"[...] the behaviour of the accused appears to indicate that, although he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group. The Trial Chamber therefore concludes that it has not been proved beyond all reasonable doubt that the accused was motivated by*

[16] As for genocide, the concept is palpable through the concept described by the four targeted groups. As persecution, the discriminatory element, and the speciality thereof was described first in *Tadic*, Appeals Chamber Judgement, 305. For later representation see Blaskic, Appeals Chamber Judgement, 237.
[17] It was not even mentioned in the statute, in spite of having a definition since 1973.
[18] William Schabas: Genocide in international law, Cambridge, 2000, p. 107
[19] Antonio Cassese: The Defintion of Genocide, p 338 in: The Rome Statute of the International Criminal Court - A Commentary, by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, Oxford University Press, 2002.
[20] Kristic, Trial Chamber Judgement, 561.

> *the* dolus specialis *of the crime of genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelisic must be found not guilty on this count."*[21]

The same test led to the failure of the Prosecution in the Prijedor related cases,[22] where a primary accused, Milan Kovacevic died before judgement could have been delivered. However, with regard the intent, the Kristic judgement cited the *travaux préparatoires* of the 1948 Genocide convention, and following the International Law Commission, the Chamber noted: "[…] the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The […] act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group."[23] In the post World War II era, this was a notable representation of group interests, as defined in terms of collective rights. As emphasised by the ILC, it is more than a discriminatory mass killing: genocide highlights membership in a group, therefore protects the group itself, not just members thereof. The group this way is noted as such, collectively, as a community. Can we argue that it covers the same concept as minorities? There are some reasons for choosing the word "group" over the phrase "minority". First, as I already mentioned, it is more neutral, covers a wider a concept, rendering numerical considerations irrelevant: a minority may attack a majority, or more probably, it is possible, that a group of similar size attacks another. Second, in 1948 there was another important reason to opt for calling that community "group": minorities between the two world wars usually referred to a group of people cut away from their nation state, naturally except for several religious minorities. This difference is apparently outdated, yet it still illustrates, that these group include ethnicities without a kin-state.[24]

The third issue makes the biggest difference. Membership in a group under the Genocide convention is determined by solely subjective grounds – subjective, in this case meaning: identification by the perpetrators only.

> *"A group's cultural, religious, ethnical or national characteristics must be identified within the socio-historic context which it inhabits. As in the Nikolic and Jelisic cases, the Chamber identifies the relevant group by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics."*[25]

In other terms, the conviction of the perpetrator suffices in this matter.[26] This conviction must include the belief, that the victim is a member of a group, that the perpetrator intends to destroy. It seems even possible, that the victim of a genocide had absolutely no knowledge, that he is

[21] Jelisic, Appeals Chamber Judgement, 31.
[22] See Stakic, Trial Chamber Judgement 550.
[23] *Ibid.*
[24] William Schabas: Genocide in International Law, Cambridge University Press, 2000, p. 107-108.
[25] Krstic, Trial Chamber Judgement, 557.
[26] See for example Stakic, Trial Chamber Judgement 734.

perceived to be member of a national, religious, racial or ethnic group. More importantly this way non-members of the group may still become victims of genocide.[27] It is rather odd, to consider the protection of a non-existing minority – yet it clearly marks, that international tribunals are primarily criminal bodies, fond of punishment of the criminals, and not only protection of the victims. If we can accept the theoretical approach in the introduction of the present article, we may still identify the underlying legal value of genocide, *i.e.* minorities or ethnic groups' right to exist in general, and not necessarily the actual – maybe not even existing – group in particular. This general right of existence is expressively recognised by the Tribunal, following the wording of different UN bodies:

> *"United Nations General Assembly resolution 96 (I) defined genocide as "a denial of the right of existence of entire human groups". On the same issue, the Secretariat explained:The victim of the crime of genocide is a human group. It is not a greater or smaller number of individuals who are affected for a particular reason but a group as such[28]"*

Still, deriving the protection of non-existing groups from the above arguments seems a bit absurd. The meaning of groups cannot evaluated without reference to the ICTR, as the first international forum to deliver a judgement on genocide, and lying the framework for the ICTY decisions on genocide as well. In the Akayeshu case, they emphasised the similarities rather than the differences between "groups" and "minorities". Possibly the most important test applicable to a group under the Genocide convention is stability and permanence of the effected community. As the ICTR found, a membership in such a group is achieved usually by birth, and not by individual decision.[29] Meanwhile, this requirement of stability became extremely important: all national, ethnic, religious groups are protected, if they are also identifiable and permanently existing.[30] At the ICTY, in the Jellisic case, there was an attempt to apply a negative definition of "groups" - that has included everybody, who is not a member of the perpetrator's own group. This is as far as the lack of self-identity of the "group" can lead. Later, this argument has been rejected by another Trial Chamber in the Stakic case.[31] The reason for not finding Stakic guilty on genocide results from the approach of that Trial Chamber, according to the judges a "clear distinction must be drawn between physical destruction and mere dissolution of a group."[32]

In the case of Radovan Krstic the Prosecution managed to prove charges on genocide for the first time at the ICTY, in 2001. There was a peculiar argument in the defence of the accused. From the strict elements of genocide, the argument was aimed at denying the fact, that the group of victims of the Srebrenica massacre formed a protected group under the Genocide convention. This resulted in a dogmatic debate about the precise meaning of the phrase "part of the group".

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[27] Dianne Marie Amann: Group Mentality, Expressivism and Genocide, in: International Criminal Law Review, 2, 2002. pp
[28] Krstic, Trial Chamber Judgement, 552.
[29] From the Akayesu Trial Chamber Judgement, 511.
[30] Antonio Cassese: The Definition of Genocide, *supra.* p. 344.
[31] See Stakic, Trial Chamber Judgement, 512.
[32] *Ibid*, 519.

> *"The Defence argued in its final brief that the Bosnian Muslims of Srebrenica did not form a specific national, ethnical, racial or religious group. In particular , it contended that "one cannot create an artificial 'group' by limiting its scope to a geographical area". According to the Defence, the Bosnian Muslims constitute the only group that fits the definition of a group protected by the Convention"*[33]

When evaluating this defence, the Trial Chamber needed to assess the journalism that became widely known as ethnic cleansing. The argument was partially accepted by the Trial Chamber, inasmuch as they noted, that "no national, ethnical, racial or religious characteristic makes it possible to differentiate the Bosnian Muslims residing in Srebrenica, at the time of the 1995 offensive, from the other Bosnian Muslims. The only distinctive criterion would be their geographical location, not a criterion contemplated by the Convention."[34] Nonetheless, this criterion was fond suitable to describe a part of the group. As the Appeals Chamber clarified it further, taking into account the *ad hoc* tribunals prior practice, the original concept of the crime described by Raphael Lemkin,[35] and some more recent commentators, and found, that the part of the group must be a substantial part. Still, the question if the part was "substantial", is not measured only in numbers – that's a starting point of the inquiry, but not the end thereof.

> *"If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial"*[36]

Concluding the points on the relation between the two terms – groups, or parts thereof as in Article 4 of the ICTY Statute, and minorities – we find closely related, partially overlapping meanings. There has been still a notable difference – self-identity, which is not a requirement of a targeted group – but that seems rather theoretical, at least with regards to the Balkan conflict. Also, in some today infamous regions of the Bosnian war, the perpetrators were indected for applying a policy against both "other" ethnicities[37.] Therefore we find, that the targeted groups under Article 4 of the Statute, or originally those of the 1948 Genocide Convention cover basically the same concept as minorities in other international legal instruments – the later lacking a precise, universally recognised definition itself.[38] As for the criminal applications of the two notions, the ICTY warned from dogmatism, and showed a surprising level of tolerance toward the lack of precision of both effected terms:

> *"the preparatory work on the Convention and the work conducted by international bodies in relation to the protection of minorities show that the concepts of protected groups and national minorities partially overlap and are on occasion synonymous. European instruments on human rights use the term*

[33] Kristic, Trial Chamber Judgement 559.
[34] *Ibid.*
[35] Kristic Appeals Judgement, 10.
[36] Kristic, Appeals Chamber Judgement, 12.
[37] Cases related to Prijedor and Celebici, for the former see e.g. The indictment against Milan Kovacevic (IT-97-24-I, Indictment dated from the 28th day of January 1998 pp. 23-32)
[38] Schabas: An Introduction to the International Criminal Court, 2004, Cambridge University Press, p. 40.

> *"national minorities", while universal instruments more commonly make reference to "ethnic, religious or linguistic minorities"; the two expressions appear to embrace the same goals. [...] The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second word war, as "national minorities", rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention."*[39]

Persecution and group rights

Still, genocide keeps to have a rigid definition – that gives additional relevance to the crimes against humanity of persecution. Persecution was already present in the Nuremberg charter, but as all crimes against humanity, it had been connected to war crimes or crimes against peace. By the time the ICTY Statute was issued, crimes against humanity were considered an independent criminal category[40] – still the definition had some vaguely described elements. The possible applicability of crimes against humanity for minority groups lies in the interpretation of the victims, namely the "civil population".[41] As the ICTY had stated in Tadic,[42] and later, based upon that in Kunerac[43] and Blaskic[44] cases, the population, victimised by the systematic and widespread attack must not be interpreted as a term covering all dwellers of a particular region. The original statement of Trial Chamber II in the Tadic case, included a further clarification, most important for our present examination:

> *"the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population."*[45]

A victim of such crime is therefore not just the individual, who actually suffers an act of persecution, but also the group, in the Balkan conflict the ethnic group the victim is a member of. This concept is further strengthened by the next element of crimes against humanity, that is the attack must be systematic and widespread.[46]

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[39] Krstic, Trial Chamber Judgement, 555-556.
[40] In spite the defence sometimes challanged this.
[41] The non-humanitarian law bases for this classification is strengthened further by the interpretation resulting in that „the victims need not necessarily be civilians stricto sensu, but may also include military personnel." Guenael Mettraux: Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, in: Harvard Law Journal, Vol 43, No. 1, Winter, 2002
[42] Dusko Tadic, Opinion and Judgement, dated 7th May 1997, 644.
[43] Kunarac, Trial Chamber Judgement 427, strengthened by Appeals Chamber Judgement, 90-93.
[44] Blaskic, Appeals Chamber Judgement 105-107
[45] Consequence drawn from the report of the UN War Crimes Commission in Dusko Tadic, Opinion and Judgement, dated 7th May 1997, 644.
[46] Dusko Tadic, Opinion and Judgement, dated 7th May 1997, 645-648.

Persecution adds further emphasis on the collective nature of the protected values. However, a verbatim, narrow interpretation of the Statute would not help much in doing so, neither is such a narrow interpretation supported by customary law.[47] As the Trial Chamber noted in the Kupreskic case, "Persecution under Article 5(h) has never been comprehensively defined in international treaties."[48] Article 5 (h) mentions persecutions on political, racial and religious grounds – while ethnic considerations are seemingly forgotten. A great extent due to the development conducted by the *ad hoc* tribunals, the Rome Statute of the ICC has a much more precise wording of the same concept: there, persecution is possible against any identifiable group, insofar it is universally recognized as impermissible under international law.[49] However, before the adoption of the Rome Statute, three permanent members of the UN Security Council required clarification of Article 5 of the ICTY Statute, Russia expressively mentioning the discriminatory element, as such.[50]

Persecution and genocide share a common concept: both crimes punish certain acts committed against groups. They share at least three other elements, the gravity of the offence, linkage to a broader practice of misconduct and usually at least some level of toleration of the state authorities.[51] The two categories however remain different. Differences as well as similiraties, or even overlaps among the criminal conducts are palpable. Yet, the subjective elements of the two crimes describe different requirements as for the intent of the perpetrator. Genocidal intent includes discrimination and the will to destroy a group, or a part thereof. Persecution shares the discriminatory element, yet the destruction of the group is ommitted from the elements of the crime. The discriminatory nature may become the ground for punishment: ethnic groups are therefore directly protected . As it was noted in the Blaskic Appeals Judgement, "persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind"[52] Examined separately, acts of persecution may not even tantamaunt to a crime against humanity. Still, their cumulative effect, may result in persecution. The Trial Chamber in the Kupreskic case came to a conclusion, that

> *„Some of the acts […] may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect."*[53]

[47] Kupreskic, Trial Chamber Judgement I, 615.
[48] Kupreskic, Trial Chamber Judgement I, 567.
[49] Rome Statute of the International Criminal Court, Art. 7 para. 1. (h)
[50] Cited in Tadic Appeals Chamber Judgement I, 299.
[51] Antonio Cassese: The defintion of genocide, *supra.* p. 339.
[52] Blaskic, Appeals Chamber Judgement, 227.
[53] Kupreskic, Trial Chamber Judgement I, 615 (e)

Seen in the light of the 1930's Nazi policies, this position has a clear moral message, that cannot be disagreed with. For our present examination this statement has some most important technical implications, as well: this position cannot be upheld without considering the collective entirety of a group, and not just individual members thereof. Although this Trial Chamber cites the Tadic decision, and relies expressively on the severe violations of *individual* basic or fundamental rights,[54] if "the discrimination itself makes the act inhumane", and as found later in the judgement, the "acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5", *i.e.* systematic and widespread, we found, along with the Tribunal, that "the perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group." As we had seen above, other crimes against humanity are attacks on the community,[55] persecution cannot include but attacks on a discriminatively chosen collectivity – which takes us as close to the term ethnic minorites as we can get, without naming them. In other words, our prior considerations made the final step between evaluating a group, as a collection of "memberships", and the group, as a *sui generis* entity.

From international criminal legal perspective, there are some inherent dangers of our arguments so far, that require some additional comments. I do not intend to suggest, that all these would result in a new element of persecution. Such would be a false and undesirable consequence. In the Vasiljevic case, the accused has appealed against the charges of persecution, stating that his killing of seven Moslims was only one incident, and thus not a case of persecution, which, according to his statements, were always a series of acts. This appeal was dismissed: "Although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and is carried out deliberately with the intention to discriminate on one of the listed grounds."[56] As it was reaffirmed in a subsequent case, "a specific persecutory intent behind an alleged persecutory plan or policy, that is, the removal of targeted persons from society or humanity, is not required to establish the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions."[57] In the Krnojelac case, the Appeals Chamber examined the discriminatory nature of the transfer of 35 detainees to Montenegro, "as a result of their ethnicity."[58] According to the Chamber, "the discriminatory intent of forced displacements cannot be directly inferred from the general discriminatory nature of an attack described as a crime against humanity."

An act of persecution "means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".[59] I cannot but agree with the underlying argument of the Joint Dissenting Opinion attached to the Appeals Chaber Judgement in the Kordic case, by Judge Schomburg and Judge Güney. That opinion is about the cumulation of crimes, yet it includes an excellent description of acts of persecution:

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[54] *Ibid.* 618.
[55] See the citation beyond footnote *supra.*
[56] Vasiljevic, Appeals Chamber Judgement, 113.
[57] Kordic Appeals Chamber Judgement, 111. with reference to Blaskic Appeals Chamber Judgement, 165
[58] Krnojelac, Appeals Chamber Judgement, 234
[59] Rome Statute, Article 7(2)(g) cited in the Kupreskic Trial Chamber Judgement, 617.

> *The crime of persecutions has to be seen as an empty hull: in fact, it is a residual category designed to cover all possible underlying offences of persecutions. Thus, to merely take the wording of the definition and convict the accused for a denial of a fundamental right is not what a criminal court can do, as it would be impermissibly vague. Instead, one has to ask: what is the fundamental right that has been denied. In the present case, the answer is: the fundamental right to life. It is only by incorporating this element in persecutions that the empty hull amounts to persecutions, a crime against humanity.*

Read in the light of the above statements, crimes against humanity in general are violating collective interests, so the same must hold true for persecution. We also know, that persecution has an implicit discriminatory element, which, in the Balkan wars was mainly ethnic allegiance. The fundamental right denied by persecutors therefor is not just the right to life of the individual members of the group, but also the very survival of that collective, too. This can only be possible, if we accept, that there exist fundamental collective rights, that would be the first and most important step in any minority protection system. For our present examination, it means, that collective rights are reflected to a certain extent in ICTY judicial practice. Also, as a consequences I cannot agree with the view, that it is only genocide to reflect group rights, while persecution is based on the "individual rights plus non-discrimination" type of protection.[60]

Conclusions

The existence of an ethnic group is a value,[61] that deserves the protection offered by law. This may very well lead to the recognition of certain collective rights of ethnic groups, or minorities themselves, evidenced e.g. by the crime of genocide.[62] Individual human rights protection and even an excellent system of non-discrimination attached thereto will not equal to minority protection in all possible scenarios. There are a number of cases, when group rights can only be granted for by going beyond this traditional approach. In an armed conflict such an approach would help the survival the members, but not necessarily with their identiy. In other words, the group may be destroyed, even if some members thereof survive.

Lack of an adequate minority protection may be a source of fear, that is very likely converted to hatred and ethnic tension. In the ex-Yugoslav states, former constituent nations feared to become a national minority of another state,[63] and there were truly frightening examples of disrespect of the recommendations of the Badinter commission.[64] Collective rights from the perspective of international criminal law must result in an assymetric situation: it can never be possible, that the concept of collective rights would result in collective responsibility of a certain

[60] Dianne Marie Amann: Group Mentality, Expressivism and Genocide, in: International Criminal Law Review, 2, 2002. pp 131-132.
[61] David Alonzo-Maizlish: In Whole or in Part: Group Rights, the Intent Element of Genocide, and the Quantitative Criterion, in: NYU Law Review, p. 1380
[62] David Alonzo-Maizlish: In Whole or in Part: Group Rights, ... pp. 1375-1376
[63] See e.g. IT-95-13/1-T Mrksic case, Trial Chamber Judgement, 21. or the Celebici cases, e.g. IT-96-21-T, Delalic Trial Chamber Judgement from the 2nd of November, 1998, paras. 98, 106,
[64] Strugar, Trial Chamber Judgement, 18.

ethnic group. As a vague conclusion for the present paper, it seems, that even if collective minority rights are not recognised as such by the ICTY, and international criminal law in general, but their attempted goal – the amelioration of the situation of minorities – ranks high among the own goals of international criminal law itself. Some examples evidence that it is near impossible to make the protection of ethnic group fit within the classic concepts of international law, most notably it may become very hard to find a link required for a nationality, to create an inter-state element. Moreover it seems not just hard, but useless and therefore dangerous in a conflict, where "ethnicity rather than nationality may [has] become the grounds for allegiance". The actual means for the (explicit or implicit) representation of group interests at the ICTY varies from chamber to chamber, although some outlines are clearly visible, alongside the ideas discussed above.