

Department of Law, University of Gothenburg

Master of Laws Programme

Master's Thesis, 30 ECTS

Fall Semester 2017

# Gender Groups and the Genocide Convention's Protected Groups

Filip Hassellind

Examiner: Andreas Moberg

Supervisor: Mikael Baaz

## Abstract

This thesis explores the crime of genocide in connectivity to ‘gendercides’. Its aim is to investigate whether including gender groups as a protected group in the Genocide Convention is theoretically plausible. Drawing from feminist legal theory, the thesis begins by probing the historical origins of the concept of genocide and critically approaching the criminal elements of genocide. This exposition emanates into an analytical examination of the rationale of protecting human groups in ICL. Against this background, the thesis advocates an understanding of the crime of genocide as a rights-implementing institute. Subsequently, it employs an *ejusdem generis* analysis to assess whether gender groups are coherent with the current canon of the protected groups, and if similar treatment thereby can be motivated. It then turns to examine other international law instruments, to expose that none of these are suitable proxies in dealing with ‘gendercides’. In answer to this ‘legal reality’, the thesis examines the conceptual underpinnings of international criminal regulation, to explicate that ‘gendercides’ fit this theoretical frame, using the ‘Indian gendercide’ as an illustrative setting. From this perspective, the thesis suggests that the content of the crime of genocide is not determinate, but rather emerges as a battlefield for hegemonic interests. Therefore, it is argued, the current construction of the protected groups in the Genocide Convention in the way it relates to gender groups reflects a deliberate choice. The thesis concludes with asserting that this ‘choice’ represents a lacuna in ICL, that in the long run compromises the legitimacy of the crime of genocide, since the personal scope of the crime of genocide risks being in discord with current social and political trajectories.

## Table of Contents

|  |           |
|--|-----------|
| Abbreviations  | 5         |
| 1 ‘Gendecide’ and Genocide – an Introduction to the Thesis                               | 6         |
| 1.1 A Lacuna in ICL? Development of the Topic  | 6         |
| 1.2 The Theoretical Plausibility of Protecting Gender Groups – the Purpose of the Thesis | 7         |
| 1.3 Delimitations  | 8         |
| 1.4 Theoretical Points of Departure  | 9         |
| 1.4.1 <i>How Is the Thesis Inspired by Feminist Legal Theory?</i>                        | 9         |
| 1.4.2 <i>Using ‘Gendecide’ as a Theoretical Framework in ICL</i>                         | 10        |
| 1.4.3 <i>Normative, Empirical and Constructive Theories</i>                              | 13        |
| 1.5 Performing the Research – Methods and Material                                       | 14        |
| 1.5.1 <i>The Use of Methods</i>  | 14        |
| 1.5.2 <i>Regarding Objectivity</i>   | 17        |
| 1.5.3 <i>Is the Thesis to Be Considered Jurisprudential?</i>                             | 17        |
| 1.5.4 <i>Possible Restraints of the Method</i>   | 18        |
| 1.5.5 <i>Materials and Sources Used</i>  | 18        |
| 1.6 Positioning to Existing Research   | 20        |
| 1.7 Disposition – How the Purpose has Formed the Method and Structure                    | 20        |
| <b>Part I: Empirical Theory</b>  | <b>22</b> |
| 2 The Historical Origins of the Concept of Genocide                                      | 22        |
| 2.1 The Legacy of Raphael Lemkin   | 22        |
| 2.2 Genocide From a Political-Diplomatic Perspective                                     | 24        |
| 2.3 Concluding Remarks   | 27        |
| 3 The Legal Canvas – the Crime of Genocide   | 29        |
| 3.1 Actus Reus   | 29        |
| 3.1.1 <i>The Prohibited Acts</i>   | 29        |
| 3.1.2 <i>The Protected Groups</i>  | 30        |
| 3.1.3 <i>Determining Group Membership</i>  | 33        |
| 3.2 Mens Rea   | 34        |
| 3.2.1 <i>‘Committed With Intent’</i>   | 35        |
| 3.2.2 <i>‘In Whole or in Part’ – the Qualitative and Quantitative Approaches</i>         | 36        |
| 3.3 Concluding Remarks   | 37        |
| <b>Part II: Normative Theory</b>   | <b>38</b> |
| 4 Protecting Human Groups in ICL   | 38        |
| 4.1 The Ontology of Human Groups and Their Significance ‘As Such’                        | 38        |
| 4.1.1 <i>Implications in Transforming Human Groups for Legal Objectives</i>              | 40        |
| 4.2 Reacting to the Restraints in the Application of Article II                          | 41        |
| 4.2.1 <i>Stable and Permanent Groups</i>   | 41        |
| 4.2.2 <i>Other Ideas – Pinochet and Customary International Law</i>                      | 43        |

|   |           |
|---|-----------|
| 4.3 Viewing the Crime of Genocide as a Rights-Implementing Institute                          | 44        |
| 4.3.1 <i>Why Should Not All Groups Be Protected Under the Genocide Convention?</i>            | 45        |
| 4.3.2 <i>The Exclusion of Political Groups from an E Contrario Perspective</i>                | 46        |
| 4.3.3 <i>The Common Factor for the Protected Groups</i>                                       | 49        |
| 4.4 An Eiusdem Generis Approach to Gender Groups and the Protected Groups                     | 51        |
| 4.4.1 <i>Gender Groups in Comparison to the Protected Groups</i>                              | 51        |
| 4.4.2 <i>A Historical Reality</i>   | 54        |
| 4.5 Concluding Remarks  | 54        |
| <b>5 Analysis of Other International Law Instruments</b>                                      | <b>55</b> |
| 5.1 Crimes Against Humanity – An Adequate ‘Proxy’?  | 55        |
| 5.2 Human Rights Adjudicatory Bodies and Adjudication in the ICJ                              | 58        |
| 5.2.1 <i>Human Rights Adjudicatory Bodies</i>   | 58        |
| 5.2.2 <i>Adjudication in the ICJ</i>  | 60        |
| 5.4 Labelling Matters   | 60        |
| <b>6 ‘Gendercide’ and International Criminal Regulation</b>                                   | <b>62</b> |
| 6.1 ‘Gendercide’ and ICL  | 62        |
| 6.2 The Complexities in Characterising International Crimes                                   | 63        |
| 6.2.1 <i>‘Unimaginable Atrocities that Deeply Shock the Conscience of Humanity’</i>           | 63        |
| 6.2.2 <i>‘Threats to Peace and Security’</i>  | 65        |
| 6.3 The Problems of Criminalising in the International Arena                                  | 67        |
| 6.3.1 <i>Retribution and Deterrence</i>   | 68        |
| 6.3.2 <i>Denunciation, Rehabilitation and Other Broader Goals</i>                             | 69        |
| 6.3.3 <i>Does ‘Gendercide’ Fit the Conceptual Bases of International Criminal Regulation?</i> | 71        |
| 6.4 A Battlefield For Hegemonic Interests   | 72        |
| <b>Part III: Constructive Theory</b>  | <b>74</b> |
| <b>7 A Place for Gender?</b>  | <b>74</b> |
| 7.1 Is it Theoretically Plausible to Include Gender Groups as Protected?                      | 74        |
| 7.1.1 <i>The ‘Expressivist’ Function and the Legitimacy of the Construction of Genocide</i>   | 74        |
| 7.1.2 <i>The Impact on How Contemporary Atrocities Are Dealt With</i>                         | 76        |
| 7.1.3 <i>The ICL System Is Substantively Gendered</i>   | 77        |
| 7.1.4 <i>The Creation of (Stereo)Types</i>  | 78        |
| 7.1.5 <i>The Tension Between Formalism and Instrumentalism</i>                                | 80        |
| 7.2 Suggestions for Further Research  | 82        |
| <b>8 Completion</b>   | <b>83</b> |
| <b>Bibliography</b>   | <b>85</b> |

## Abbreviations

|        |  |
|--------|--|
| CC10   | Control Council No. 10   |
| ECHR   | European Convention for the Protection of Human Rights and Fundamental Freedoms                  |
| ECOSOC | United Nations Economic and Social Council   |
| ICC    | International Criminal Court   |
| ICCPR  | International Covenant on Civil and Political Rights   |
| ICL    | International Criminal Law   |
| ICJ    | International Court of Justice   |
| ICTR   | International Criminal Tribunal for Rwanda   |
| ICTY   | International Criminal Tribunal for the former Yugoslavia  |
| ILC    | International Law Commission   |
| IMT    | International Military Tribunal  |
| IMTFE  | International Military Tribunal for the Far East   |
| SCSL   | Special Court for Sierra Leone   |
| TWC    | Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 |
| UDHR   | Universal Declaration of Human Rights  |
| UN     | United Nations   |
| UNGA   | The General Assembly of the United Nations   |
| UNSC   | The Security Council of the United Nations   |
| USMT   | United States Military Tribunal  |
| VCLT   | Vienna Convention on the Law of Treaties   |

# 1 ‘Gendercide’ and Genocide – an Introduction to the Thesis<sup>†</sup>

## 1.1 A Lacuna in ICL? Development of the Topic

Throughout history, mankind has proven itself capable of performing the most horrendous acts towards each other. Some of the worst of such atrocities are ascribed the locution ‘genocide’. Subsequent to the Holocaust, the ‘international society’ started treating genocide as a substantive crime under international criminal law (ICL), instead of a regrettable consequence of State sovereignty.<sup>1</sup> The crime of genocide has been regarded by some to stand at the apex of international criminality, labelling it the ‘crime of crimes’.<sup>2</sup> Constructing an act as genocide will always express denunciatory implications, bearing strong connotations to value-based considerations. Exposing such undertones highlight the close connection between law and politics in ICL.<sup>3</sup>

The crime of genocide is defined in Article II of the UN’s Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (hereinafter ‘the Genocide Convention’).<sup>4</sup> The Article specifies that certain acts intended to destroy, in part or in whole, a national, ethnical, racial or religious group are condemned as genocide. The personal scope, however, has not always been limited to the enumerated collectives. That was a demarcation made during the Genocide Convention’s drafting process. In consequence, ‘genocidal’ acts committed with ‘genocidal’ intent, when directed against other groups, for instance gender groups, are not constructed as genocide – if departing from a formalist interpretation of Article II of the Genocide Convention. This creates a discrepancy, perhaps even a lacuna, within the ICL system.

---

<sup>†</sup> I wish to express my most sincere gratitude to my supervisor Mikael Baaz for all your wise reflections, intelligent remarks and inspiring guidance throughout this research. Also, a special thank you to Anna-Gabrielle.

<sup>1</sup> I define the ‘international society’ as a group of independent political communities, not only forming a system, in the sense that the behaviour of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognise their common interest in maintaining these arrangements. Cf. Hedley Bull and Adam Watson (eds.), *The Expansion of International Society* (Oxford: Clarendon Press, 1984), p. 1.

<sup>2</sup> *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S. Judgement and Sentence, 4 September 1998, para. 16.

<sup>3</sup> For more on this subject, see Martti Koskeniemi, *The Politics of International Law* (Oxford: Hart Publishing 2011).

<sup>4</sup> The Convention on the Prevention and Punishment of the Crime of Genocide (9 Dec 1948), 78 UNTS 277.

The following narrative can serve to explicate this inconsistency. A community is suffering from over-population. To gain control over its population size, it decides that all families may only have one child. Since the imagined community adheres to a draconian interpretation of primogeniture, the child must be male. In consequence, all female-born children under this period must be discarded. Granted, this situation may be hyperbolic. At the same time, however, it is not far removed from the sex-selection practices of various collectives throughout the world. The same conduct and intent directed against members of any of the enumerated groups in Article II would with all likelihood amount to genocide. That would, in turn, construct the victims as victims of genocide. The same can not be said for the girls in our narrative. ICL distinguishes between the collectives and the deaths of their members through legal terminology of inclusion and exclusion. Does this current state of affairs emerge as problematic? Inspired by post-modern research in ICL, the thesis delves deeper into this inquiry the way it relates to gender groups. Hannah Arendt explores a similar notion. The following statement can serve as an illustrative point of departure.

If genocide is an actual possibility of the future, then no people on earth [...] can feel reasonably sure of its continued existence without the help and the protection of international law.<sup>5</sup>

## 1.2 The Theoretical Plausibility of Protecting Gender Groups – the Purpose of the Thesis

The purpose of the thesis is to investigate whether including gender groups as a protected group in the Genocide Convention is theoretically plausible.<sup>6</sup> The objective can be understood as seeking to bring to surface the underlying world of beliefs that permeate the institutional practices of rendering particular groups ‘protected’ for the purposes of the Genocide Convention.<sup>7</sup> The thesis does not, however, suggest that what is needed is to implement more

---

<sup>5</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963), p. 273.

<sup>6</sup> The purpose is heavily influenced by Martti Koskenniemi. See his, ‘What is Critical Research in International Law? Celebrating Structuralism’, 29(3) *Leiden Journal of International Law* (2016), pp. 727-735, p. 732 (‘What does one need to believe in order to think that rule X instead of Y should be applied.’).

<sup>7</sup> The phraseology draws from Martti Koskenniemi, and how he views critical research in international law. See *ibid*, p. 733 (‘The question [...] aims to bring to the surface that underlying world of beliefs that controls our institutional practices, and accounts for the way decisions are made and resources are distributed.’).

policies and rules. Rather, it advocates a better understanding of what transpires beneath the surface of the application of Article II of the Genocide Convention.<sup>8</sup> The aim here is to highlight which conditions enable particular legal choices to appear theoretically plausible and may consequently be rejected or approved. The ‘choices’ underline implicit assumptions about the epistemology, ideology and other ‘truths’ that have been accepted in more or less feckless terms within the judicial construction.<sup>9</sup> It is these background assumptions that the phrasing of the purpose sets out to explicate. This will be done by virtue of the following main questions:

1. What are the historical origins of the concept of genocide and what is the legal locus of the explicitly protected groups in Article II of the Genocide Convention?
2. Why is the protection of human ‘groups’ relevant for ICL, and what are the inherent problems in delineating them for legal as well as social purposes?
3. Are other international law instruments adequate in responding to ‘gendericides’, and does ‘gendercide’ fit the underlying theoretical justifications for criminal regulation in the international arena as well as the overarching aims of the ICL system?

### 1.3 Delimitations

Conducting research on the crime of genocide and the protected groups in Article II of the Genocide Convention could surely engross an entire academic career. To steer clear of such dilemmas, some delimitations are necessary. Possibly the most conspicuous is the decision to refrain from evaluating post-Genocide Convention evolution in customary international law. The delimitation is motivated by the fact that such an analysis would require an all to wide scope and is not proportionally relevant in achieving the stated aim of the thesis. Essentially, it is a question of economics of space. For the same reasons, I have made the decision to not address questions relating to *jus ad bellum* or humanitarian intervention.

A further demarcation is made when actualising gender groups against the backdrop of human rights. Here, I venture – to some extent – into rights theory. That is, however, only in a very limited manner. The question of rights theory is undoubtedly a complex one. A complete

---

<sup>8</sup> See *ibid*, p. 730.

<sup>9</sup> The structure of the argument is, essentially, mirrored by Martti Koskenniemi. See *ibid*, p. 730.



account would steal focus from the main questions of the thesis. In consequence, I will only superficially account for rights theory in Sections 4.3.3 and 4.4.

Regarding the analysis of other instruments of international law, amongst them crimes against humanity, I have decided not to discuss theories of criminal cumulation to a significant degree. This decision is motivated by the fact that such a perspective would not further the purpose of the thesis to a discernible extent.

Lastly, the thesis will not depart from an intersectional perspective. This omission could be argued to comprise a drawback in the theoretical framework of the thesis, seeing as the research is inspired by feminist legal theory and intersectionality is, I would argue, paramount for feminist research. It is, however, my contention that a too high regard to intersectionality would cause some common tendencies to be lost through making experiences too individualised. Since I seek to approach ‘gender’ as a relatively isolated factor and to be able to engage in a deepened discussion relating to what that aspect entails, it is not within the purpose of the thesis to deal with intersectional issues. It is, however, mainly for space reasons I have not used an intersectional perspective.

## 1.4 Theoretical Points of Departure

### *1.4.1 How Is the Thesis Inspired by Feminist Legal Theory?*

It is valuable for the sake of intersubjectivity to acknowledge which perspective of reality the researcher employs as a point of departure, since the employed theoretical perspective impacts the results of the study. In the thesis, the normative starting point is that I oppose a construction of genocide that involves a locked system of rules and terms. Rather, I find it valuable to establish a pluralistic, socio-oriented legal construction of genocide that, *inter alia*, sets out to

face reality, to apply the relevant scientific theories and methods to illuminate the various issues, to produce a form of knowledge that is, in one sense or another, practically relevant and to leave previous theories and views when the experience shows that they are no longer durable.<sup>10</sup>

In light of the overarching normative starting point, the thesis will draw inspiration from feminist legal theory as it is construed by Nicola Lacey. According to her, the notion of feminist legal theory goes beyond a feminist critique of certain provisions, by virtue of

---

<sup>10</sup> Jørgen Dahlberg-Larsen, *Pragmatisk Retsteori* (København: Jurist & Økonomforbundets forlag, 2001), p. 103.

enabling the viewing of the entire system of provisions from a general and structural perspective.<sup>11</sup> The fundamental position of feminist legal theory is thus that ‘gender’ affects law and our understanding of it. Analytically, a central concern with feminist legal theory is structural biases in particular positions of inequality – and to investigate how these positions are constructed, reproduced and how power aspects are actualised in a ‘legal’ setting. Politically, the use of feminist legal theory contends that the way ‘gender’ has formed the legal domain is inherently politically and morally cumbersome, in that gender is an axle not only of differentiation, but also of discrimination, domination or oppression.<sup>12</sup> Methodologically, the starting point for feminist legal theory is that knowledge is socially constructed and contextual; that the power and meaning of gender is a product not of nature but of culture. I include all the above mentioned aspects as points of departure in the thesis.

Employing feminist legal theory as an influence render us capable to contest the most ‘natural’ concepts, in order to expose an underlying world of beliefs inherent in the legal system. An underlying world of beliefs is here to be understood as a process – something that is *created* in social interaction between people, as opposed to fixed structures, existing independently of time and space. In that sense, the theoretical influence feminist legal theory provides is closely linked to the purpose of the thesis. By virtue of uncovering such a dimension, a social and political change may be achieved. Put in other words: reality can be changed. ‘Changing’ reality is in this context to be understood as moving towards establishing, as stated above, a pluralistic, socio-oriented legal construction of genocide. The conceptual frame developed herein can therefore be characterised as critical legal studies, having an emancipatory interest of knowledge.<sup>13</sup>

#### *1.4.2 Using ‘Gendercide’ as a Theoretical Framework in ICL*

As a way of introducing gender as an analytical concept in the research, I frame my investigation of the intersection between gender groups and genocide through the theoretical

---

<sup>11</sup> Nicola Lacey, *Unspeakable Subjects – Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1988), pp. 2-3.

<sup>12</sup> *Ibid.*

<sup>13</sup> In this context, it should be noted that the Swedish strand of research ‘genusrättsvetenskap’ in many ways mirrors the emancipatory interest of knowledge here. See Åsa Gunnarsson and Eva-Maria Svensson, *Genusrättsvetenskap* (Lund: Studentlitteratur, 2009), pp. 116f.

lens of ‘gendercide’.<sup>14</sup> I have chosen to use Judith Butler’s gender theory as inspiration in understanding the gender-prefix in the term ‘gendercide’. In the following section, I seek to develop how the concept is to be used as a theoretical framework in the thesis.

The locution ‘gendercide’, a semantic corollary of genocide, is an analytical term first expounded by Mary Anne Warren. She defined it as ‘the deliberate extermination of persons of a particular sex (or gender)’.<sup>15</sup> This definition is mirrored in the thesis. Warren probed deliberate extermination of women, through analysing historical events such as female infanticide, witch-hunts in Early Modern Europe, Sati (commonly known as widow burning) and other atrocities committed against women.<sup>16</sup> Warren’s approach, however, has in recent time been expanded to ‘analysis of the extent to which males are targeted on the basis of gender’.<sup>17</sup> In line with these developments, ‘gendercide’ came to be perceived as a sex-neutral term, meaning that the victims could be ‘either men or women’.<sup>18</sup> The theoretical framework enables us to view the protected groups pursuant to Article II of the Genocide Convention from a critical perspective, exposing problems that arise in the nexus of gender and genocide. In particular, the ‘gendercide’ framework highlights that gender roles have often had lethal consequences and that these are in important aspects comparable to the lethal consequences of, *inter alia*, ethnic and racial prejudice.

Notwithstanding its potential merits, the use of ‘gendercide’ as a theoretical framework lends itself to some conceptual difficulties. In lack of a unified theory of ‘gendercide’, there has been diverging use of the term. Analytical inconsistency has ensued.<sup>19</sup> Within the dominating paradigm of research relating to ‘gendercides’, the prevailing view of gender is that it ‘can be defined primarily, if not exclusively, in terms of biological sex’.<sup>20</sup> This is a

---

<sup>14</sup> The contributions of Adam Jones have been seminal in furthering the ‘gendercide’ debate. See Adam Jones, *New Directions in Genocide Research* (London: Routledge, 2012).

<sup>15</sup> Mary Anne Warren, *Gendercide: The Implications of Sex Selection* (Maryland: Rowman and Littlefield, 1985), p. 22.

<sup>16</sup> *Ibid.*

<sup>17</sup> Charli Carpenter, ‘Beyond “Gendercide”’: Incorporating Gender into Comparative Gendercide Studies’, 6(4) *The International Journal of Human Rights* (2002), pp. 77-101, p. 78.

<sup>18</sup> Mary Anne Warren, *supra* n. 15, p. 22.

<sup>19</sup> Charli Carpenter, *supra* n. 17, pp. 79-81.

<sup>20</sup> Adam Jones, *Gendercide and Genocide* (Nashville: Vanderbilt University Press, 2004), p. 186.

view contrasting to the feminist legal theory that influences my research. Such a definition constructs a substantially narrow conceptualisation of gender as an analytical concept. Against this background, it has been suggested that the notion of ‘gendercide’ is best limited to a catchphrase.<sup>21</sup> In this regard, Charli Carpenter proposes that gender must be distinguished from sex for the theory to yield successful results.<sup>22</sup> Such a partition, she claims, is particularly important, if we want to use gender as an analytical category that goes beyond sex-selective killings.<sup>23</sup> To that end, Carpenter perceives sex and gender as dichotomies, whereby sex is biologically given and gender is a social process. I find her division problematic, with a consequence being that sex implicitly becomes perceived as something stable, coherent and pre-discursive.<sup>24</sup>

To build an appropriate theory of ‘gendercide’, inspired by feminist legal theory, there is reason to elaborate the employed perspective of gender, as it defines the ontology of the theoretical framework and draws the contours for what a ‘gender group’ is. In this regard, Butler has criticised the dichotomy sex/gender.<sup>25</sup> It is hard to overstate the impact of her research in gender studies.<sup>26</sup> For that reason, and since it is suitable for my research, Butler’s gender theory will be used as inspiration in understanding the gender-prefix in ‘gendercide’. She argues that both sex and gender are culturally contingent constructions, and that gender precedes sex. Sex is therefore, according to Butler, subordinated to gender.<sup>27</sup> The relationship between sex and gender can to that end be understood as *performative*. It is, *inter alia*, words and actions that stage a gender system, not pre-existing genders or gender identities.<sup>28</sup> In that way, an illusion of an inner and organised gender core is created. Gender is thus reproduced in different discourses. Applied onto the context of the thesis, the point of departure here is that ‘gender’ is constructed. It is changeable and influenced by social and cultural

---

<sup>21</sup> Charli Carpenter, *supra* n. 17, p. 93.

<sup>22</sup> *Ibid*, p. 80.

<sup>23</sup> *Ibid*.

<sup>24</sup> Toril Moi, ‘Vad är en kvinna? Kön och genus i feministisk teori [What Is a Woman? Sex and Gender in Feminist Theory]’, 35(1) *Res Publica* (1995), pp. 71-158., p. 120f.

<sup>25</sup> Judith Butler, *Gender Trouble* (New York: Routledge, 1990), p. 7.

<sup>26</sup> Butler is oftentimes quoted. She is also, however, criticised. See Toril Moi, *supra* n. 24, p. 96ff.

<sup>27</sup> Judith Butler, *supra* n. 25, p. 7.

<sup>28</sup> *Ibid*, p. 33.

preconditions, and not merely a foregone conclusion. Employing such an approach to gender helps describe how the construction of a gender group, which may potentially be target to ‘gendercide’, is an outcome of social beliefs.

Some authors have also used the term ‘gendercide’ to describe sex-selective abortions. To that end, they label the aborted foetuses as victims of murder. That is a standpoint I reject. The understanding of abortion in the thesis is that a foetus is not a human life. As such, it can not be subject to murder. Nonetheless, as will follow from the below, not all acts of genocide involve homicide. It is possible to imagine the abortion of particular foetuses to be ‘imposing measures intended to prevent births within the group’ pursuant to Article II(d) of the Genocide Convention, if ‘gender groups’ were protected under Article II.<sup>29</sup> The theoretical framework elaborated herein, however, leaves such complexities for future research to consider. ‘Gendercide’, for the purposes of the thesis, relates to episodes of mass killings and the application of the crime of genocide in its archetypical sense.

#### *1.4.3 Normative, Empirical and Constructive Theories*

Bearing in mind the above stated starting points, the crime of genocide, and perhaps ICL in general, can be studied by virtue of three different theoretical categories; ‘normative’, ‘empirical’ and ‘constructive’ theory. The various categories ask different questions. Applied onto the purpose of the thesis, an *empirical* focus means that the interest of knowledge is directed towards producing a description of the legal practice of genocide law. A *normative* focus means that the interest of knowledge relates to the way ‘gendercide’ ought to be dealt with within the framework of ICL and how that could be justified. Lastly, a *constructive* focus means that the interest of knowledge concerns the explication of potential ramifications emanating from the current construction of the crime of genocide.<sup>30</sup>

It should be stressed that these theoretical categories are analytical constructions. In reality, they influence each other and overlap. Bearing in mind the overall purpose of the thesis, all three of the categories will be considered. In fact, the thesis comprise three parts, each of them reflecting the theories. I have made the decision to draw heavily from these

---

<sup>29</sup> The question in that regard is what one puts in the locution ‘imposing’ – can structural complexities suffice?

<sup>30</sup> This section is inspired to a high degree by Lennart Lundquist, *Demokratins Våktare [The Guardians of Democracy]* (Lund: Studentlitteratur, 1998), pp. 27f and Mikael Baaz, *The Use of Force and International Society* (Stockholm: Jure Förlag AB, 2017), pp. 50-1.

categories because I believe it to be futile to discuss the ‘legal practice’ of genocide law without using it as a backdrop for the discussion of how ‘gendercide’ ought to be dealt with, else the research will be too descriptive. Conversely, to be able to engage in such normative excursions, empirical questions of ‘how’ must be answered. If not, the research risks being misguided. Moreover, in conveying potential ramifications stemming from the current construction of the crime of genocide there is need to let normative and empirical aspects provide the groundwork.<sup>31</sup>

## 1.5 Performing the Research – Methods and Material

### 1.5.1 *The Use of Methods*

To achieve the purpose established above, the thesis has had to be composed of an amalgamation of methodological perspectives. It is not the result of conformity to any single legal method, strictly applied. Rather, the thesis employs a mixture of procedural approaches. On a broader note, the thesis draws from *post-modernist social constructivism* and *feminist jurisprudence*. This is manifested in the view of a legal ontology that perceives legal concepts as collective constructs without inherent existence and the emphasis on the importance of gender as an analytical concept.<sup>32</sup> The quest to investigate the theoretical plausibility of including gender groups as protected under the Genocide Convention will, as stated above, draw from Nicola Lacey’s conception of feminist legal theory. That is, to not only assess particular provisions from a feminist perspective, but also explain how feminist analysis can be used to view the entire system of laws from a general and structural perspective. The need for drawing from multiple approaches can be explained by this analytical influence; for feminist legal theory, there is no consolidated theory or method,<sup>33</sup> although it is common for theory and method to be ‘merged’ into one.<sup>34</sup> This rationale is included as a methodological

---

<sup>31</sup> Cf. Lennart Lundquist, *Det vetenskapliga studiet av politik [The Scientific Study of Politics]* (Lund: Studentlitteratur, 1993), p. 85.

<sup>32</sup> Cf. Mats Glavå and Ulf Petrusson, ‘Illusionen om rätten! – juristprofessionen och ansvaret för rättskonstruktionerna [The Illusion of Law! – The Lawyer’s Profession and the Responsibility for the Legal Constructions]’, in Bjarte Askeland Bernt, Jan-Fridthiof Bernt (eds), *Erkjennelse og engasjement: minneseminar for David Roland Doublet (1954-2000) [Recognition and Engagement: Memorandum of David Roland Doublet (1954-2000)]* (Bergen: Fagbokforlaget, 2002), pp. 109-151, pp. 109-110 and Nicola Lacey, *supra* n. 11, p. 2.

<sup>33</sup> Åsa Gunnarsson and Eva-Maria Svensson, *supra* n. 13, p. 27.

<sup>34</sup> *Ibid*, p. 122.

point of departure. Practically, this means that the approach will be to analyse ICL and its jurisprudence through a conceptual method of interpretation, where the legal construction of the crime of genocide is perceived as a product of a dynamic social process, influenced by gender as a concept, and not as a part in a closed system. In that, the approach is closely linked to explaining what transpires beneath the surface of the application of Article II of the Genocide Convention, and thereby, the purpose of the thesis.

The method used in Chapter 3 deviates, to some extent, from such a conceptual method of interpretation. Instead, it takes its point of departure from an interpretation and systematisation of material that is traditionally given the status as ‘legal’ sources. The end result seeks to highlight how certain provisions can be understood in a certain context. Practically, my choice of method here means that I use Article II of the Genocide Convention as a starting point and through this draw necessary conclusions to answer the first research question. Initially, it is therefore a *de lege lata* line of reasoning at hand. At the beginning, the answer to the research question is of descriptive character. The results emanate, however, into analytical problematisation. Thereby, I go beyond merely stating ‘applicable law’. Upon using ‘legal’ sources, I employ both the classification and hierarchy in Article 38 of the Statute of the International Court of Justice (ICJ), with the addition of *jus cogens* norms and resolutions from the UN Security Council (UNSC). The hierarchy is, to clarify, as follows

- *jus cogens* norms;
- UNSC Resolutions;
- international conventions;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law, recognised by civilised nations;
- judicial decisions and the teachings of the most highly qualified publicists, as a subsidiary means for the determination of rules of law.

When legal sources call for interpretation, I employ mainly a teleological interpretation, seeing the object and purpose behind the legal source. Jurisprudence from the International Criminal Tribunals and the ICJ is included for the same reason.

The topic of the thesis moreover requires analogous interpretations of domestic law. It should be noted that there is no overall comparative perspective throughout the thesis. Rather,

the thesis include comparative *aspects*, in the form of using a micro-comparative point of view. That is, comparing different legal systems on a provisional level.<sup>35</sup>

The research finds additional support in trans-disciplinary reasoning. While the research has a rather firm ‘legal’ foundation, in the sense that it encircles the legal construction of the crime of genocide, it does not work solely within this distinctive field of inquiry. Rather, I seek to create a unity of intellectual frameworks beyond disciplinary perspectives.<sup>36</sup> This becomes particularly evident in Chapters 2 and 4. In Chapter 2, a ‘legal’ perspective is supplemented with a historical ditto. Practically, this means that I turn to ‘historical’ sources, allowing us to produce a historical narrative. Thereby, we can make interpretations relating to the historical interests that permeate the Genocide Convention. In Chapter 4, a sociological approach is interlaced with a ‘legal’ one, in order to draw a more nuanced picture of the ontology of a ‘group’. When doing so, I also employ the interpretative canon of *ejusdem generis*. This method of interpretation is employed to interpret general terms (i.e ‘protected groups’), using the specific terms (i.e national, ethnical, racial or religious groups) surrounding the general term as context, to ascertain whether a certain class (i.e gender groups) is of the same kind to the specific terms.<sup>37</sup>

On that account, the overall method used herein could be characterised as *exploratory*, as the work explores the interconnectivity between ‘gendercide’ and genocide from a perspective which has hitherto seldom been addressed. It does not attempt to offer finite and conclusive solutions in this regard, but rather to provide theoretical insights. Still, the approaches in the thesis set out to fulfil a research aim decided *a priori*. Consequently, the use of theories, methods and materials have been limited to such that can be expected to provide successful results in that regard. As such, a critical reader may question the objectivity of the research, or whether the following research is jurisprudential to begin with. Hence, a few remarks are in order.

---

<sup>35</sup> See Fredric Korling and Mauro Zamboni, *Juridisk metodlära [Legal Methodology]* (Lund: Studentlitteratur, 2013), p. 141 and onwards.

<sup>36</sup> Mikael Baaz, Mona Lilja and Stellan Vinthagen (eds), *Researching Resistance and Social Change: A Critical Approach to Theory and Practice* (London: Rowman and Littlefield, 2017), p. 10.

<sup>37</sup> Cf. Nicholas R. Bednar and Margaret Penland, ‘Asylum’s Interpretative Impasse’, 26(1) *Minn. J. Int’l L.* (2017), pp. 145-188, p. 152.



### 1.5.2 Regarding Objectivity

Concerning the epistemological question of objectivity, the chosen approaches testify my *context of discovery*. That is, the part of the scientific process where the scientific problems are identified, hypotheses are formulated and terms are defined. Upon seeking ‘objectivity’ in this context, I find that there is reason to discard the appearance of distance between the science subject and the science object, and to acknowledge a form of embodied objectivity.<sup>38</sup> That is because, bearing the social constructivist basis of the thesis in mind, no jurisprudence exist in a material sense. The same applies to legal methods. As such, these constructions can not be either ‘true’ or ‘false’, since it is humans, without interpretative prerogatives, who operate them. As long as the knowledge is situated, it is possible to align a pre-set aim and method with ‘objectivity’. In that sense, I view how the scientific research is to be carried out, and the ‘knowledge process’ in the same way as Donna Haraway:

I am arguing for politics and epistemologies of location, positioning, and situating, where partiality and not universality is the condition of being heard to make rational knowledge claims. These are claims on people’s lives; the view from a body, always a complex, contradictory, structuring and structured body, versus the view from above, from nowhere, from simplicity.<sup>39</sup>

### 1.5.3 Is the Thesis to Be Considered Jurisprudential?

As noted above, the thesis is to be characterised as trans-disciplinary. The more important question in the context of a Master’s thesis for the law programme is, however, what renders it jurisprudential? The inquiry is relevant to ponder, bearing the tension between ‘legal scholarship’ and ‘legal practice’ in mind. From the perspective of the latter, which perceives legal research as seeking knowledge *in* law, it could be argued that what I attempt to do here is not legal research at all. From the perspective of the former, however, which advocates an understanding of legal research as seeking knowledge *about* law, the thesis is decidedly qualified as jurisprudence. I shall clarify how directly below.

First of all, the thesis takes its point of departure from a ‘legal’ vocabulary and sets out to expose ‘beliefs’ in the legal system. Thus, its focal point is undoubtedly ‘law’. Second, relying on history and sociology is nothing but an inevitable consequence of the study object;

---

<sup>38</sup> Donna Haraway, *Simians, Cyborgs and Women. The Reinvention of Nature* (New York: Routledge, 1991), p. 188.

<sup>39</sup> *Ibid*, p. 195.

the crime of genocide is not limited to a legal world of understanding. In effect, trying to solely use a ‘legal’ point of departure – whatever that may be – would not be viable at all in this context, as the investigation needs to be anchored in a form of external analysis. Even the most puritan approach to ‘law’ ought to view it as a ‘normatively closed but cognitively open’ system, meaning that ‘law’ must not be viewed in isolation from other sciences.<sup>40</sup> Hence, the thesis is to be characterised as jurisprudential.

#### *1.5.4 Possible Restraints of the Method*

Bearing the purpose, delimitations and chosen methods in mind, the thesis sets out to deal with ‘real world’ problems. While my research can be said to be performed on a system level, it should be noted that I have no first-hand experience of the issues I approach. I have no means to pursue, for example, a multisited ethnography. Therefore, I will have to rely solely on second-hand sources. Essentially, this research will be written by a person sitting in a library, reading what other people sitting in libraries have written. In consequence, my experiences of ‘gendericides’ are solely based on accounts from other people. While there is field research carried out by various non-governmental organisations in India on the ‘Indian gendericide’, the general mapping of the issue is, at best, sparse and could be considered a ‘gap’ in the method. As such, in Section 7.2, when making suggestions for further research, I advocate a methodical shift, calling for the use of multisited ethnography.

#### *1.5.5 Materials and Sources Used*

Spanning across several scientific fields and having quite a broad ambit, a wide array of materials and sources, that represent ‘reality’, have been used. As noted above, codified international law (especially, but not limited to the Genocide Convention, with specific focus on its Article II and other UN Documents, *inter alia* resolutions from the UN General Assembly (UNGA)) and jurisprudence from the International Criminal Tribunals are at centre. Concerning the latter aspect, primarily case law from the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) is used. These materials are included to sketch a broader canvas for the

---

<sup>40</sup> See Niklas Luhmann, *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft* [Social Structure and Semantics. Studies on the Knowledge Sociology of Modern Society], 3rd edition (Frankfurt am Main: Suhrkamp, 1989), pp. 137-138.

thesis and to provide arguments. In juxtaposition to the aforementioned sources, comments to and analyses of such materials, primarily from works produced by scholars of ICL, are included for the same reasons. In that regard, the two monographs *Genocide and Political Groups* by David L. Nersessian<sup>41</sup> and *Genocide in International Law* by William A. Schabas<sup>42</sup> have been of prime importance in providing valuable information and arguments, but also for reference work. Concerning the ‘historical’ segment, I turn to the *travaux préparatoires*. Thereby, records from the drafting process are included as material. I have also made use of various feminist literature (that is, literature informed by the politics of feminism) to be able to produce and employ theoretical points of departure that rightly can be conceptualised as feminist jurisprudence. These materials are primarily used when defining how feminist legal theory has inspired the thesis and when chiseling the ‘gendercide’ framework out. Reports from the UN as well as various non-governmental organisations are also included, in particular when discussing the ‘Indian gendercide’ in Section 6.2.1. Moreover, I use domestic legislation of three contracting parties concerning the personal scope of the crime of genocide in order to produce a micro-comparative investigation.<sup>43</sup>

As an attempt to ensure that the material used is reliable, articles published in academic journals and monographs published by renowned authors or publishers is preferred. When searching material for Section 6.2.1, upon discussing the ‘Indian gendercide’, it has proven hard to find a large variation of sources. Nonetheless, in those circumstances, I limit the use of materials to reports from established non-governmental organisations. In that regard, I consider the reputation of the provider of the sources in order to determine the tenability of

---

<sup>41</sup> David L. Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press, 2010).

<sup>42</sup> William A. Schabas, *Genocide in International Law* (Cambridge UK: Cambridge University Press, 2009).

<sup>43</sup> It should be noted that, to gather material, I have primarily used various databases. One that in particular has proven fruitful for the purposes of the thesis is HeinOnline (to visit the database, please go to <https://home.heinonline.org/>). I have used the following search parameters: ‘gender + genocide’, ‘gendercide’ and ‘the protected groups in the genocide convention + gender’. In order to obtain judgments from the International Criminal Tribunals concerning the protected groups, I have used the UN’s Case Law Database (to visit the database, please go to <http://cld.unmict.org/>). When searching, I used the parameters ‘genocide’, ‘protected groups’ and ‘Article II’. This has, of course, resulted in a profusion of material. Therefore, a seriatim criteria has been employed in order to decide which material is going to be used, meaning that the material was assessed on the basis on how well it intersected with the purpose of my thesis. Material was, moreover, frequently collected through references of other scholars, in particular from the two monographs referred to above.

the sources. I also test the trustworthiness of the sources by confirming the information against the backdrop of news-media searches.

## 1.6 Positioning to Existing Research

There has been ample research regarding the protected groups pursuant to Article II of the Genocide Convention. Over the recent years, post-modern approaches, similar to what I seek to do, have been of increasing prevalence. Thereby, the thesis is not the first to be critical to the current construction of the protected groups. While the value and importance of previous assertions should not be understated, the thesis will position itself quite differently. It draws from feminist legal theory and employs a theoretical framework of ‘gendercide’, inspired by Butler’s gender theory. I believe these are important aspects that have been overlooked in the academic field of genocide studies. These perspectives introduce a conceptual frame that can contribute to the understanding of gender in the nexus to genocide. Additionally, they aid in exposing values, notions and norms expressed by the genocide law system.

The most notable divergence from existing research is the ambit of the thesis. The cookie-cutter approach for insertions being ‘critical’ to the protected groups of the Genocide Convention is to suggest that certain groups should be added, because they are similar to those currently protected. That is not what is attempted here. My hope with the thesis is to make a meaningful contribution concerning the application of the concept of genocide to gender groups. Thereby, my work seeks to rethink the terms of the debate to whether an inclusion of gender groups is *theoretically plausible*. The notion is to call attention to the underlying world of beliefs that controls the current construction of the protected groups, how this relates to gender groups, and to critique this implicit system on a theoretical level. Not to emanate into a policy proposal.

## 1.7 Disposition – How the Purpose has Formed the Method and Structure

As alluded to above, at the heart of the analysis lies the elucidation of certain ‘hidden’ beliefs that allows for hegemonic interpretations. To achieve such an explication, I have had the thesis comprise three parts, with associating chapters.

Part I deals with the *empirical* part of the thesis. Chapter 2 probes the historical underpinnings of the concept of genocide and its evolution from academic theory to a

substantive international crime. It provides a brief overflight of the etymology of the term and the legacy of Raphael Lemkin. It engages in a discussion of the decision to limit the scope of protection of the Genocide Convention to certain typologies through a diplomatic lens, drawing from the *travaux préparatoires*. In due order, Chapter 3 details the *actus reus* and *mens rea* for the crime of genocide. Here, special attention is paid to the intricacies in ascertaining the contours of the protected groups.

Part II addresses the *normative* part of the thesis. Chapter 4 discusses the concept of human ‘groups’ and the inherent difficulties in constructing typologies for legal and social purposes. It moreover addresses the connection between ICL and a broader understanding of human groups as social collectives. Against this background, it advocates an understanding of the Genocide Convention as a rights-implementing institute. This opens for a subsequent *ejusdem generis*-analysis, demonstrating that gender collectives have many similar characteristics to the four enumerated groups in Article II of the Genocide Convention. Following, Chapter 5 probes the linkage between the crime of genocide and other instruments in international law, with specific focus on crimes against humanity. It employs a comparative analysis between these instruments and ponders whether they are sufficient proxies for ‘gendericides’. The chapter assesses if the availability of such constructions is an adequate justification not to include other groups, such as gender groups, than the ones enumerated in the Convention. Chapter 6 closes off the normative part of the thesis with a discussion of ‘gendericide’ seen in the penumbra of the theoretical justifications for international criminalisation, and the overarching aims of the international criminal justice system.

Part III actualises the *constructive* part of the thesis. To conclude the thesis, Chapter 7 delves deeper into the possible ramifications of the current construction of the protected groups. It offers critique of the omission to protect gender groups, ultimately resolving whether an inclusion of gender groups as protected under the Genocide Convention is theoretically plausible. In view of that, I offer some brief suggestions for further research, justified by the study I have conducted. As a finale, in Chapter 8, a completion follows, stressing some final thoughts and reflections.

## Part I: Empirical Theory

### 2 The Historical Origins of the Concept of Genocide

In order to understand contemporary issues relating to genocide, it is necessary to trace back the history of its conceptual underpinnings. In the following chapter, I probe the origins of the crime of genocide in order to describe its evolution from academic concept to substantive crime under ICL. In what follows below, special attention is paid to the blurring of conceptual borders. In making these tensions discernible, I seek to highlight and contextualise challenges that might emanate from an effort to address ‘gendericides’.

#### 2.1 The Legacy of Raphael Lemkin

During the Second World War, the Polish scholar Raphael Lemkin coined the term ‘genocide’ in his treatise *Axis Rule in Occupied Europe*, published in 1944. The book detailed the Axis Powers’ practices of extermination in the Holocaust. To label these practices, Lemkin constructed the concept of genocide. Although ‘the fact of genocide is as old as humanity’,<sup>44</sup> the term was a ‘modern word for an old crime’.<sup>45</sup> The complete eradication of Carthage by Rome in 146 BC and the massacre of Armenians by the Ottoman Empire during and after the First World War are two examples of the extensive history of the ‘fact’ of genocide.<sup>46</sup>

Etymologically, the neologism is a hybrid combining the Greek *genos* (race, tribe or nation) and the Latin *cide* (killing).<sup>47</sup> *Prima facie*, a verbatim interpretation appears to confine the ambit of the concept to circumstances involving races, tribes or nations. Indeed, in *Axis*

---

<sup>44</sup> Jean-Paul Sartre, ‘On Genocide’, in Richard A. Falk, Gabriel Kolko and Robert Jay Lifton (eds), *Crimes of War* (New York: Random House, 1971) pp. 534-550, p. 534.

<sup>45</sup> Cf. Loui Rene Beres, ‘Justice and Realpolitik: International Law and the Prevention of Genocide’, 33(1) *Am. J. Juris.* (1988), pp. 123-160, p. 124.

<sup>46</sup> See Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide* (New Haven: Yale University Press, 1990) and Barbara Harff and Ted Robert Gurr, ‘Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases Since 1945’, 32(3) *International Studies Quarterly* (1988), pp. 351-371, p. 353.

<sup>47</sup> Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie, 1944), p. 79.

*Rule*, Lemkin speaks of genocide as something directed against national minorities.<sup>48</sup> Lemkin's conceptualisation of genocide was, however, broader. Notably, he emphasised that '[i]f the destruction of human groups is a problem of international concern, then such acts should be treated as crimes under the law of nations'.<sup>49</sup> In this regard, the concept of genocide was likely conceived in a similar vein as an earlier proposal Lemkin made in 1933. Then, he proposed the crime of 'barbarity', which covered acts of extermination perpetrated 'out of hatred towards a racial, religious or social collectivity [sic]'.<sup>50</sup> Following this logic, it is palpable that Lemkin did not anticipate the concept of genocide to be limited to a select number of groups. Rather, the object and purpose from his point of view was likely to construct a locution for 'actions subordinated to the criminal intent to destroy or cripple permanently a *human* group. The acts are directed against groups, as such, and individuals selected for destruction only because they belong to these groups'.<sup>51</sup> Such a perspective opens up for an inclusion of different types of human groups. Thereby, gender groups can be said to be in coherence with the spirit of the concept of genocide as it first was imagined by Lemkin.

The concept of genocide was rapidly incorporated into legal nomenclature after the Second World War. To counteract impunity of Nazi crimes,<sup>52</sup> the Allied forces held an International Military Tribunal (IMT) in Nuremberg. The IMT was granted jurisdiction over three separate crimes; crimes against peace, war crimes and crimes against humanity.<sup>53</sup> Consequently, since it was not a part of the IMT Charter, the locution 'genocide' did not appear in the judgments. It was, however, used in the indictments as well as the prosecutors' closing arguments as an explanatory term.<sup>54</sup> Even though none of the defendants were

---

<sup>48</sup> *Ibid*, p. 79.

<sup>49</sup> Raphael Lemkin, 'Genocide as a Crime under International Law', 41(1) *American Journal of International Law* (1947), pp. 145-151, p. 146.

<sup>50</sup> *Ibid*, p. 146. This suggestion was made to the 1933 International Conference for Unification of Criminal Law. It was not adopted.

<sup>51</sup> *Ibid*, p. 147. My emphasis.

<sup>52</sup> A comparable series of trials were convened to try Japanese war criminals in the IMTFE. In this regard, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge: Harvard University Asia Center, 2009).

<sup>53</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, annex, (1951) 82 UNTS 279, Article 6(a)-(c).

<sup>54</sup> For instance, see *France et al. v. Göring et al.* [1946] 22 IMT 203, pp. 497-8.

convicted of genocide in the Nuremberg trials, the judgments did explain acts that today would be defined as genocide. Thus, the early use of the concept of genocide, as Nersessian puts it, set ‘the stage for the evolution of genocide into a separate criminal offence’.<sup>55</sup>

After the Nuremberg trials ended, lower-ranking Nazi officials were tried by a US military tribunal that operated pursuant to Control Council No. 10 (CC10).<sup>56</sup> In their jurisprudence, genocide started to materialise as a term with legal substance. In the so-called *Justice* case,<sup>57</sup> officials of the Reich Ministry of Justice, judges and prosecutors were tried. The case encircled the *Nacht und Nebel* program, under which civilians of occupied territories, charged with a type of (minor) offence were either executed or secretly removed to Germany.<sup>58</sup> The Tribunal in the *Justice* case found the defendants ‘accessory to and took a consenting part in the crime of genocide’.<sup>59</sup> Genocide, the Tribunal argued, was ‘the prime illustration of a crime against humanity’.<sup>60</sup> Consequently, the Tribunal constructed genocide as a subcategory of the broader notion of crimes against humanity. The genocide convictions pursuant to CC10 therefore highlight the transformation of the locution ‘genocide’ from an explanatory concept, to a part of legal terminology in the IMT proceedings, and then to a type of crime against humanity.

## 2.2 Genocide From a Political-Diplomatic Perspective

The end of the Second World War created the will to prevent horrendous acts like the Holocaust from repeating, which in turn provided the momentum for the international society to make considerable efforts to unify. This post-war momentum led to the establishment of the UN. Various lobby efforts to adopt an international legal instrument devoted to genocide ensued.<sup>61</sup> The UNGA was the first organ to actualise the matter within the new international order, and on the 11<sup>th</sup> of December 1946, it unanimously passed Resolution 96(1). The

---

<sup>55</sup> David L. Nersessian, *supra* n. 41, p. 8.

<sup>56</sup> Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10* (Buffalo: WS Hein, 1949), pp. 277-335.

<sup>57</sup> *Prosecutor v. Alstötter et al.* (1947) 3 TWC 1 (‘Justice [USMT 1947]’).

<sup>58</sup> *Ibid.*, p. 1034.

<sup>59</sup> *Ibid.*, p. 1128.

<sup>60</sup> *Ibid.*, p. 983.

<sup>61</sup> William A. Schabas, *supra* n. 42, p. 29.



Resolution defined the crime of genocide as ‘the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings’.<sup>62</sup> Notably, the Resolution proceeds to ascertain that ‘genocide is a crime under international law [...] whether the crime is committed on religious, racial, political or *any other grounds*’.<sup>63</sup> Matthew Lippman labels this a ‘liberal conceptualisation’,<sup>64</sup> with the philosophical underpinning that the use of violence to exterminate groups of human beings, on the sole basis of their affinity to a particular group, is despicable. Such a construction opens for a broad conception of genocide. Resolution 96(1) thus stays in line with Lemkin’s original object and purpose. In turn, as a matter of history, the core of the resolution could be extended to encompass gender collectives, apart from the currently enumerated ones. It should, however, be borne in mind that General Assembly Resolutions are not sources of binding law.<sup>65</sup> That is probably for the best, seeing as such an open-ended list could be conflicting with the *nullum crimen sine lege* principle. Nonetheless, since the Resolution was adopted unanimously and without debate, coupled with the explicit reference in the Genocide Convention’s preamble, renders it important as a matter of *opinio juris*.<sup>66</sup> It has even been argued that, by virtue of the phrasing in Resolution 96(1), other groups can be considered protected by a *jus cogens* norm which prohibits genocide.<sup>67</sup>

Resolution 96(1) requested the United Nations Economic and Social Council (ECOSOC) to prepare a draft convention on the crime of genocide,<sup>68</sup> which in turn instructed the Secretary-General to perform the same task.<sup>69</sup> The Secretariat’s Draft was written by the Secretariat’s Human Rights Division, assisted by – *inter alia* – Lemkin himself. The Secretary-General set out to draft a treaty that would, as far as possible, ‘embrace all points

---

<sup>62</sup> UNGA Res. 96(1) (11 December 1948), ‘The Crime of Genocide’.

<sup>63</sup> *Ibid.* My emphasis.

<sup>64</sup> Matthew Lippman, ‘The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later’, 15(2) *Arizona Journal of International and Comparative Law* (1998), pp. 415-514, p. 448.

<sup>65</sup> Cf. Article 38 of the Statute of the International Court of Justice (26 June 1945) 1 UNTS XVI.

<sup>66</sup> William A. Schabas, *supra* n. 42, p. 56.

<sup>67</sup> Beth Van Schaack, ‘The Crime of Political Genocide: Repairing the Convention’s Blind Spot’, 106(7) *Yale Law Journal* (1997), pp. 2259-2292, pp. 2259-2263.

<sup>68</sup> UNGA Res. 96(1) (11 December 1948), ‘The Crime of Genocide’.

<sup>69</sup> ECOSOC Res 47(IV) (28 March 1947), ‘Crime of Genocide’, UN Doc E/325.

likely to be adopted, leaving it to the competent organs of the United Nations to eliminate what they did not wish to include.<sup>70</sup> The protected groups under the draft convention covered national, linguistic, racial, religious and political collectives of human beings.<sup>71</sup> Thus, the draft convention discarded the residual reference to ‘any other groups’. However, the Secretary-General noted that the list of protected groups was to be considered ‘not exhaustive’.<sup>72</sup> The Secretariat’s Draft thereby gives sufficient leeway in imagining gender collectives as coherent with the other groupings. Nevertheless, the Secretary-General anticipated that which groups to protect will be ‘the first general question which will have to be settled’,<sup>73</sup> thereby identifying the crux of which groups to include as a political dilemma.

In order to deal with these political issues, an *Ad Hoc* Committee was created.<sup>74</sup> Notably, the Committee considered it ‘essentially within the competence of governments’ to answer the question of ‘[w]hat human groups should be protected? Should all human groups, whether racial, national, linguistic, religious or political, be protected or only some of them?’<sup>75</sup> Consequently, debates on the *ratio* for protecting groups ensued. The Soviet Union delegate considered that genocide was ‘organically bound up with Fascism-Nazism and other similar race “theories” [...]’.<sup>76</sup> The Polish delegate argued for the exclusion of political groups ‘since they lacked the necessary homogeneity and stability’.<sup>77</sup> The Lebanese delegate’s opinion juxtaposed that of the Polish delegate, arguing that political groups are ‘based on a body of theoretical concepts whereas sentiment or tradition bound the members of a national, racial or religious group’.<sup>78</sup> Consequently, the delegate argued, political groups are unfit for protection. On the other hand, France and China supported broader conceptualisations of the protected

---

<sup>70</sup> Opinion of the Committee on the Progressive Development of International Law and Its Codification (17 June 1947), UN Doc. E/447, p. 16.

<sup>71</sup> ECOSOC Res 77(V) (6 August 1947), ‘Genocide’.

<sup>72</sup> UN Doc. E/447, p. 224.

<sup>73</sup> *Ibid*, p. 224

<sup>74</sup> It was composed of China, France, Lebanon, Poland, the United States, the Soviet Union and Venezuela. See ECOSOC Res 117(VI) (3 March 1948), ‘Genocide’, UN Doc E/734.

<sup>75</sup> Ad Hoc Committee on Genocide: Summary Records (5 April-10 May 1948), UN Doc. E/AC.25/SR.2, p. 646.

<sup>76</sup> UN Doc E/AC.25/SR.7. Cited in William A. Schabas, *supra* n. 42, p. 71f.

<sup>77</sup> UN Doc. A/C.6/SR.63, p. 1291.

<sup>78</sup> UN Doc. E/AC.25/SR.13, p. 2.

groups, with France seeking to add groups of ‘opinion’ to the enumerated groups.<sup>79</sup> Moreover, according to Lippman, ‘some [delegates] suggested expanding Article III to encompass social and political groups’.<sup>80</sup> Eventually, the *Ad Hoc* Committee settled for the same category of protected groups as in the Secretariat’s draft. The question of whether the enumerated groups were to be considered exhaustive or not was, however, a matter left undiscussed.

The UN’s Sixth Committee drafted the final text of the Genocide Convention. Many of the points raised in the *Ad Hoc* Committee relating to the political nature of what groups to include re-emerged. *Inter alia*, the Soviet Union delegate reiterated its previous standpoint.<sup>81</sup> The Committee likely felt it was urgent to complete the Convention swiftly, ‘before the memory of the barbarous crimes which had been committed faded from the minds of men’.<sup>82</sup> It was likely against this background that the Iranian delegate suggested ‘adopting a convention embodying all the points on which agreement was possible’, leaving the more cumbersome problems for an ‘additional convention [to] settle’.<sup>83</sup> This outlook led to an overhaul of Articles II and III. Political groups were discarded from the enumerated groups; ethnic groups were added.<sup>84</sup> The concept of cultural genocide as a *modus operandi* was also scrapped.<sup>85</sup> The draft convention by the Sixth Committee was subsequently unanimously adopted on the 9<sup>th</sup> of December 1948 by the UNGA – the same construction applies today.<sup>86</sup>

### 2.3 Concluding Remarks

It is necessary to comprehend the deliberations over which groups to protect in a broader context. At its inception, the spirit of the concept of genocide, illustrated by Lemkin’s own

---

<sup>79</sup> ‘Prevention and Punishment of Genocide – Comments by Governments on the Draft Convention Prepared by the Secretariat’ (19 April 1948), UN Doc E/623/Add2 and ‘Draft articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China’ (16 April 1948), UN Doc E/AC25/9.

<sup>80</sup> Matthew Lippman, *supra* n. 64, p. 504.

<sup>81</sup> ‘USSR: Amendments to the draft convention on genocide (E/794)’ (4 October 1948) UN Doc A/C6/215/Rev1.

<sup>82</sup> UN Doc. A/C.6/208.

<sup>83</sup> UN Doc. A/C.6/SR.66.

<sup>84</sup> See David L. Nersessian, *supra* n. 41, Ch. 1.

<sup>85</sup> See Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford University Press, 2016), Ch. 2.

<sup>86</sup> William A. Schabas, *supra* n. 42, p. 83.

writings and the UNGA Resolution 96(1), was imagined to be applied on a wider scale. During the drafting process the concept became distorted, limiting both the personal scope as well as the *modi operandi*. Consequently, as it is constructed today, the scope of protection from genocide under ICL is limited to protected groups, instead of ‘actions subordinated to the criminal intent to destroy or cripple permanently a human group’.<sup>87</sup> Thus, there is an evident disparity between genocide as Lemkin imagined it and the legal construction of genocide – the latter being considerably more restrictive. Some scholars even question whether the drafters were aware of themselves making decisions of a legislative character, rather than a political ditto.<sup>88</sup> Frank Chalk and Kurt Jonassohn opines in this regard that ‘the wording of the Convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it’.<sup>89</sup> Consequently, ‘the Convention’s list of protected groups has probably provoked more debate since 1948 than any other aspect of the instrument’.<sup>90</sup>

I contend that the decision to limit the scope of the Genocide Convention to the enumerated groups appears to be a choice emanating from political compromise, rather than a conceptual conclusion that other groups, among them gender collectives, were unfit for protection. Indeed, the Secretary-General directly framed the question of which groups to include as such. That label seems representative for the entire drafting process. Drawing from a feminist legal theory perspective, the process can be characterised as a matrix, in which certain political positions express hegemonic interests. In the drafting process, there was a silence concerning gender. The silence speaks, in the sense that gender, as a concept, enters into focus in a very limited way in the context of genocide. To this day, the same ‘choices’ made during the political deliberations permeate the legal construction that is the crime of genocide. This begs the question, what does it take for an act to be constructed as genocide and what is the legal locus for the explicitly protected groups pursuant to Article II of the Genocide Convention? The next chapter will deal with this issue.

---

<sup>87</sup> Raphael Lemkin, *supra* n. 49, p. 147.

<sup>88</sup> David L. Nersessian, *supra* n. 41, p. 108.

<sup>89</sup> Frank Chalk and Kurt Jonassohn (eds), *supra* n. 46, p. 11.

<sup>90</sup> William A. Schabas, *supra* n. 42, p. 117.

### 3 The Legal Canvas – the Crime of Genocide

The following chapter deals with the two fundamental elements of the crime of genocide; the *actus reus* and *mens rea*. Since genocide is a criminal offence, and bearing in mind that the thesis concerns genocide law, a framework bearing close semblance to domestic criminal law has been employed. Within a context of domestic criminal law, the criminal elements are essential since they establish the set of facts that must be proven for a crime to actualise.<sup>91</sup> Criminal offences in the context of ICL adhere to the same rationale. ICL analysis of an offence thus departs from a division between the ‘objective’ element (the *actus reus*) and the ‘subjective’ element (the *mens rea*). The former relates to the specific material facts and the latter to the accused’s criminal intent. The chapeau of Article II of the Genocide Convention references to the *mens rea* of genocide, the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’. The five subsequent subparagraphs detail the criminal conduct.<sup>92</sup> The aim with the chapter is to set the frame for the subsequent analysis of the application of the concept of genocide to gender groups, and to anchor later normative considerations to a specific context.

#### 3.1 *Actus Reus*

In the following section, I seek to probe the ‘objective’ element of the crime of genocide. First, I set out to provide a brief exposé of the prohibited acts that can constitute genocide. Subsequently, I intend to sketch the contours of the four enumerated groups in Article II of the Genocide Convention, and how they have been dealt with in the International Criminal Tribunals’ jurisprudence. Against this background, I venture deeper into the difficulties in determining group membership.

##### 3.1.1 *The Prohibited Acts*

After the chapeau, Article II enumerates five *modi operandi* of genocide:

- (a) Killing members of the group;

---

<sup>91</sup> For a Swedish comparison, see Petter Asp, Magnus Ulväng and Nils Jareborg, *Kriminalrättens Grunder [The Foundations of Criminal Law]* (Uppsala: Iustus, 2013), pp. 58 and onwards.

<sup>92</sup> Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996, UN Doc. A/51/10, p. 87.

- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The list is exhaustive, and only the specified acts are prohibited.<sup>93</sup> Article II is thus narrowly circumscribed, and only criminalises physical and biological genocide.<sup>94</sup> In contrast to the colloquial understanding of genocide, a *génocidaire* does not need to be successful in exterminating the protected group entirely. The point of completion for the crime of genocide is as soon as any of the enumerated acts is committed against a group member with the overall intent to destroy the group.<sup>95</sup> There is no threshold in terms of multitude in victims.<sup>96</sup> In that sense, the crime of genocide can be an inchoate offence against the protected groups.<sup>97</sup>

### 3.1.2 *The Protected Groups*

Not all human groups are protected by the Genocide Convention. The crime can only, per definition, be committed against members of national, ethnic, racial or religious collectives.<sup>98</sup> Thereby, departing from a formalist interpretation of the provision, it is clear that the crime of genocide can not be committed towards gender groups. The victims must moreover be chosen on the basis of their membership of such a collective, with the overarching intent to destroy the group ‘in whole or in part’. They are in this respect a ‘means to an end’.<sup>99</sup> Therefore, the group requirement is undoubtedly fundamental for the crime of genocide. To ‘anchor’ later analytical inquiries, the following section seeks to explicate of how a group is to be

---

<sup>93</sup> William A. Schabas, *supra* n. 42, p. 176.

<sup>94</sup> The acts enumerated in (a)-(c) can be characterised as physical genocide, whereas the acts in (d)-(e) constitute biological genocide. Cf. Draft Code of Offences Against the Peace and Security of Mankind (1954), UN Doc A/CN.4/SERA/1954, Article 17, Comment 12.

<sup>95</sup> Pieter N. Drost, *The Crime of State: Vol. II – Genocide* (Leiden: A.W Synthoff, 1959), p. 82.

<sup>96</sup> *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T. Judgment and Sentence, 1 December 2003, para. 809.

<sup>97</sup> David L. Nersessian, ‘The Razor’s Edge: Defining and Protecting Human Groups under the Genocide Convention’, 36(2) *Cornell Int’l L.J.* (2003) pp. 293-328, p. 298.

<sup>98</sup> Article II of the Genocide Convention.

<sup>99</sup> William A. Schabas, *supra* n. 42, p. 21.

constructed to fit within the scheme of a national, ethnical, racial or religious group for the purposes of the Article II.

### 3.1.2.1 National, Ethnical, Racial and Religious Groups

Seeing as these four groups are the sole beneficiaries of the protection granted by the Genocide Convention, it is regrettable that there is no recognised definition for any of them in the Convention or elsewhere.<sup>100</sup> It is near impossible to attribute a distinct ontology to them, as they intersect and overlap significantly. The ICTR Trial Chamber in *Akayesu*<sup>101</sup> largely set out to construct objective definitions for each of the four groups enumerated in Article II. In order to ascertain whether a group fell within the ambit of the Convention, the ICTR required an ‘objective evaluation’ of the group to see if it fit the scheme of the definitions they posed.

The concept of a national group was contended to be ‘a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.’<sup>102</sup> The ICTR tied its definition to the rationale put forth in the *Nottebohm* decision by the ICJ.<sup>103</sup> *Nottebohm*, however, concerned the issue of nationality. By making this reference, the tribunal seemingly juxtaposed citizenship with belonging to a national group.<sup>104</sup> Thereby, group members’ individual perceptions of nationality are irrelevant. The ICTR definition puts emphasis on the legal characteristics of nationality – ‘a shared legal bond’ and ‘rights and duties’. The rationale is closely associated with the nation state, and hits far from the way Lemkin imagined the concept of nationality.<sup>105</sup> Lemkin opined that the notion of a national group ‘signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology’.<sup>106</sup> Thus, a wider concept than citizenship.

---

<sup>100</sup> Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (Cambridge UK: Cambridge University Press, 2014), p. 211.

<sup>101</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T. Judgment, 2 Sep 1998.

<sup>102</sup> *Ibid*, para. 512.

<sup>103</sup> *Nottebohm*, Judgement of 6 April [1955] ICJ Reports, p. 24.

<sup>104</sup> Caroline Lingaas, ‘Defining the Protected Groups of Genocide Through the Case Law of International Courts, 2015’, *ICD Brief 18 December 2015*, p. 6 (accessed 10 October 2017).

<sup>105</sup> *Ibid*, p. 6.

<sup>106</sup> Raphael Lemkin, *supra* n. 47, p. 91.

In fact, by consolidating ‘traditions and genuine culture’, Lemkin’s idea had closer semblance to the way the tribunal conceptualised ethnical groups. In the same judgment, the Trial Chamber constructed ethnic groups as ‘generally defined as a group whose members share a common language or culture’.<sup>107</sup> It ascertained that the Rwandan Tutsi were an ethnical group, even though they did share the same language and culture as the Hutu who massacred them. The distinction was made possible by virtue of constructing the ‘stable and permanent’ criterion, which will be further discussed in Section 4.2.1. In a broader, sociology discourse, Anthony D. Smith defines ethnical groups as a ‘named human population with shared ancestry myths, history and cultures, having an association with a specific territory’.<sup>108</sup> Therefore, ethnicity seems to be a tangible notion and a fluid form of identity, connected to a plethora of contextual elements. It can virtually cover all forms of human interaction.

The ICTR moreover opined that a racial group is a group based on ‘the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors’.<sup>109</sup> The definition is, to say the least, problematic. The reference to ‘hereditary physical characteristics’ suggests that it is possible to discern biological differences between human ‘races’. This has, however, long been discarded as fiction,<sup>110</sup> rendering the definition insufficient. Additionally, making such a reference is not only scientifically inaccurate, but also conserves cumbersome and outdated ways of dividing people into separate races within the human species. As such, it may incite, or in any way approve of, racist considerations. From a different perspective, the definition also turns a blind eye to the wider social and historical context of certain groups, oversimplifying them to mere ‘races’.<sup>111</sup> However, it becomes evident that the discourses relating to ‘races’ in the time of the drafting was somewhat different than what it is today; it was considered unproblematic

---

<sup>107</sup> *Akayesu*, *supra* n. 101, para. 513.

<sup>108</sup> Montserrat Guibernau and John Rex, *The Ethnicity Reader: Nationalism, Multiculturalism and Migration* (Oxford: Polity, 1997), p. 18f, and Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, UN Doc E/CN.4/Sub.2/1985/6, 2 July 1985, pp. 27f.

<sup>109</sup> *Akayesu*, *supra* n. 101, para. 514.

<sup>110</sup> See Michael Yudell, *Race Unmasked: Biology and Race in the Twentieth Century* (New York: Columbia University Press, 2014), p. 204, and Leda Cosmides, John Tooby, Robert Kurzban, ‘Perceptions of Race’, 7(4) *Trends in Cognitive Sciences* (2003), pp. 173-179, p. 173.

<sup>111</sup> Ilana Feldman, Miriam Ticktin (eds.), *In the Name of Humanity: The Government of Threat and Care* (London: Duke University Press, 2010), pp. 33 and 37.



in that temporal context. Lemkin, a child of his time, divided the European people into different classes.<sup>112</sup> Of course, it was a similar rationale that influenced the Holocaust. However, with developments within the field of contemporary biology, it is ascertained that no such biological differences exist.<sup>113</sup>

The definition of a religious group is, according to the ICTR, ‘one whose members share the same religion, denomination or mode of worship’.<sup>114</sup> It has also been argued by some scholars that ‘religion is probably the least controversial standard [in the Genocide Convention]’.<sup>115</sup> The locus of religious groups should be interpreted in a lenient manner, in order to have a broad scope. It has been argued that essentially every ‘community united by a single spiritual ideal’ should be covered.<sup>116</sup> Thus, it is likely that non-theistic groups also are encompassed – seeing as they share a mode of worship (abstaining from religious rites) and a similar belief system (that there is no deity).

### 3.1.3 Determining Group Membership

The ‘objective’ approach to the protected groups offered by the ICTR in *Akayesu* risks missing the wood for the trees. Consequently, there was later a gradual shift in the jurisprudence of the International Criminal Tribunals. Later judgments employ a leaning towards subjective parameters. The objective approach was discarded in *Jelisić*, noting that

[t]o attempt to define a national, ethnical, racial or religious group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation.<sup>117</sup>

---

<sup>112</sup> Raphael Lemkin, *supra* n. 47, p. 87-88.

<sup>113</sup> The 1950 UNESCO Statement on Race emphasises: ‘For all practical social purposes, “race” is not so much a biological phenomenon as a social myth’, in UNESCO. *Four Statements on the Race Question* (Paris: UNESCO, 1969), p. 33.

<sup>114</sup> *Akayesu*, *supra* n. 101, para. 515.

<sup>115</sup> Antonio Cassese *et al*, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009). p. 334.

<sup>116</sup> Matthew Lippman, *supra* n. 64, p. 456.

<sup>117</sup> *Prosecutor v. Jelisić*, Case No. ICTY-95-10-T. Judgment, 14 December 1999, para. 70.

The subjective approach steers clear of objective, ‘scientific’ elements. Rather, the subjective approach makes reference to the perpetrator’s point of view of the victim group.<sup>118</sup> If the *génocidaire* defines the victim group as one of the protected groups of genocide, the victim group is such a group. The perpetrator’s perspective thereby becomes ‘the defining element for the crime of genocide’.<sup>119</sup> It is, however, hard to reconcile this rationale with principles of legality. Foreseeability and specificity of criminal conduct are paramount parameters of the principle of legality, and it is difficult to imagine the subjective approach fulfilling such requirements. Every *génocidaire* will differ in mindset and will have a different perspective of their victims. As such, a uniform measurement of victim groups will be absent. Employing a subjective approach is, however, coherent with the sociological processes leading up to a genocide. Inherent in every act of genocide is the *génocidaire*’s prejudice against ‘the Other’ group. The *génocidaire* identifies, distinguishes between and stigmatises the out-group.<sup>120</sup> Subsequently, they seek to exterminate it. Within a context of sociology, the stigmatisation of other groups is commonly referred to as ‘othering’.<sup>121</sup> To some extent, through leaning on subjective parameters, this process is transplanted into the context of genocide law. The criticism directed against the subjective approach above, however, appear quite serious. There is reason, I believe, to be weary of such drawbacks. At the same time, there is reason to underline that through the subjective perspective, the characteristics of the group can be identified in the penumbra of its socio-historic context, given that such stigmatisation can not arise from a structural vacuum.

### 3.2 *Mens Rea*

The following section attempts to deal with the ‘subjective’ element of the crime of genocide (the *mens rea*). It investigates the crime of genocide’s *dolus specialis* and considers the notion of discriminatory intent against the protected groups. It also actualises the difficulties in

---

<sup>118</sup> Caroline Lingaas, *supra* n. 104, p. 9.

<sup>119</sup> *Ibid*, p. 9.

<sup>120</sup> Alexander Laban Hinton, ‘The Dark Side of Modernity’, in Alexander Laban Hinton (ed.), *Annihilating Difference: the Anthropology of Genocide* (Berkeley: University of California Press, 2002), pp. 1-43, pp. 6, 13. Cited in Caroline Lingaas, *supra* n. 104, p. 10.

<sup>121</sup> Anthonie Holslag, ‘The Process of Othering from the “Social Imaginaire” to Physical Acts: an Anthropological Approach’, 9(1) *Genocide Studies and Prevention* (2015), pp. 96-113, p. 96.

ascertaining a perpetrator's intent to destroy a group 'in part or in whole', and examines how such intent can be qualified, departing from the qualitative and quantitative approaches developed in the International Criminal Tribunal's jurisprudence.

### 3.2.1 'Committed With Intent'

For the crime of genocide to be committed, the perpetrator must act intentionally. The *mens rea* comprises both the intention to commit the underlying prohibited act as well as the *dolus specialis*.<sup>122</sup> The *dolus specialis* requirement means that genocide is committed only 'when the intent is to eradicate the individuals for no other reason than that they are a member of the specified group'.<sup>123</sup> The *dolus specialis* is the crime of genocide's 'specialty and distinguishes it from an ordinary crime and other crimes against international humanitarian law'.<sup>124</sup> Against the historical backdrop of the Holocaust, discerning such intent may not have been difficult. In other potential cases of genocide, however, the task is seldom as straightforward. Accordingly, the International Criminal Tribunals have needed to elaborate the contours of the *mens rea* requirement. In *Akayesu*, the Trial Chamber held that the *dolus specialis* requirement means that, for the perpetrator to be culpable 'the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group'.<sup>125</sup> Genocide is thus a crime against collectives – the *mens rea* must encompass the protected group. To that end, it is required that the intent is to destroy the group *per se*, as opposed individuals in their own right.<sup>126</sup> *Ergo*, a form of discriminatory intent.

The International Criminal Tribunals have elaborated more explicitly what is required to discern the discriminatory intent of a *génocidaire*. In their jurisprudence, it follows that it is not required for the *génocidaire* to have a 'specific plan to destroy'<sup>127</sup> the group to which the

---

<sup>122</sup> William A. Schabas, *supra* n. 42, p. 242.

<sup>123</sup> John Webb, 'Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the former Yugoslavia', 23(2), *Georgia Journal of International and Comparative Law* (1993), pp. 377-408, p. 391.

<sup>124</sup> *Jelisić*, *supra* n. 117, para. 66.

<sup>125</sup> *Akayesu*, *supra* n. 101, para. 521.

<sup>126</sup> Cf. David L. Nersessian, *supra* n. 41, p. 36.

<sup>127</sup> *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T. Judgment, 21 May 1999, para. 94.

genocidal acts are directed towards. Rather, intent can be implicitly determined from the methodical, wide-ranging and systematic manner in which the acts are committed.<sup>128</sup> The rationale is reflected in the International Criminal Court's Element of Crimes. Here, it follows that intent is at hand when the perpetrator's 'conduct took place in the context of a manifest pattern of similar conduct directed against that group'.<sup>129</sup>

### 3.2.2 'In Whole or in Part' – the Qualitative and Quantitative Approaches

Apart from the discriminatory character, the intention behind the acts must be to destroy, in whole or in part, the group 'as such', meaning 'as a separate and distinct entity'.<sup>130</sup> In spite of the fact that '[i]t is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe',<sup>131</sup> the phraseology of Article II begs the precarious question of where the 'group' ends, where a 'part' of it starts and where it ceases to be entirely.

In the jurisprudence of the International Criminal Tribunals, the question has been rephrased to how many people constitute a 'part' of a group. Case law recognises two possible qualifications in answering that question; the quantitative and qualitative. The quantitative approach focuses on the amount of the people killed, rendering the group members *per se* fungible. In *Kayishema and Ruzindana*, the ICTR held that this inquiry requires 'a considerable number of individuals who are part of the group' to be exterminated.<sup>132</sup> Taking a somewhat modified stance, the ICTY argued that it requires a 'substantial' number and that the targeted portion must be 'significant enough [...] to have an impact on the group as a whole'.<sup>133</sup> In *Krstić*, it was sufficient with approximately 7 000 out of 30 000 victims of Muslim Bosnians for the criterion 'in part' to be considered fulfilled. The point of view of the ICTY in this regard is reflected by the ICJ, which has noted that 'when

---

<sup>128</sup> See *Jelisić*, *supra* n. 117, para. 100-1, *Akayesu*, *supra* n. 101, para. 477, *Kayishema and Ruzindana*, *supra* n. 127, para. 93.

<sup>129</sup> Art 6(a)4 of the *Elements of Crimes*, Report of the Preparatory Commission for the International Criminal Court—Finalised Draft Text of the Elements of Crimes (6 July 2000), UN Doc PCNICC/2000/INF/3/Add2.

<sup>130</sup> *Jelisić*, *supra* n. 117, para. 79.

<sup>131</sup> ILC, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, UN Doc. A/CN.4/SER.- A/1950/Add.1 (1950), p. 89.

<sup>132</sup> *Kayishema and Ruzindana*, *supra* n. 127, para. 97.

<sup>133</sup> *Prosecutor v. Krstić*, Case No. ICTY-98-33-T. Judgment, 2 August 2001, para. 8.

part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole'.<sup>134</sup>

The qualitative approach, adopted in *Jelisić*,<sup>135</sup> takes a different point of departure, as it explicitly denotes that not all group members are equal. Here, the accused must intend to destroy 'either a major part of the group or a representative fraction thereof, such as its leaders'.<sup>136</sup> To that end, it suffices that persons in emblematic positions, such as political leaders, religious leaders, intellectuals and so forth, necessary for the survival of the group in question is victimised. Concerning gender groups, Kriangsak Kittichaisaree has argued in this regard that 'the destruction of all or almost all young, fertile women of child bearing age who account for only 5-10 per cent of the entire population of the protected group is genocide'.<sup>137</sup> Notwithstanding this, the extent of the acts committed against the victim group still bears relevance. From one perspective, the ICJ has noted that 'the qualitative approach can not stand alone'.<sup>138</sup> Moreover, figuring out the perpetrator's intent will be more difficult since '[w]here genocide involves the destruction of a large number of members of a group, the logical deduction will be more obvious. If there are only a few victims, the deduction will be far less evident'.<sup>139</sup>

### 3.3 Concluding Remarks

The above explicates that the notion of a 'group' is an essential part of the crime of genocide. After having done the empirical analysis of the legal practice of genocide law, we can now turn the searchlight to the normative level and start discussing how 'gendercide' ought to be dealt with within the framework of ICL and how that could be justified. In order to do so, the next chapter begins with a probing of the ontology of human groups – what are they to begin with, and why do we want to protect them through law?

---

<sup>134</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro (2007)) ICJ Judgment of 26 Feb 2007, para. 193.

<sup>135</sup> *Jelisić*, *supra* n. 117, para. 81-2.

<sup>136</sup> *Ibid*, para. 81.

<sup>137</sup> See Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001), p. 73.

<sup>138</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, para. 200.

<sup>139</sup> William A. Schabas, *supra* n. 42, p. 276.

## Part II: Normative Theory

### 4 Protecting Human Groups in ICL

In the following chapter, I seek to investigate whether similar treatment can be motivated for gender groups as for the enumerated groups in Article II of the Genocide Convention. I do so by first probing the ontology of human groups and the complexities in transforming them for legal objectives. Subsequently, I outline how the restrictive scope of the Convention has spurred extravagant interpretations of the treaty text and the *travaux préparatoires* in order to make amends to a shifting ‘everyday reality’. Against this background, I examine why not all human groups ought to be protected in the Genocide Convention and consider why political groups were excluded from the personal scope of the Convention to *e contrario* determine the justifications for including certain human groups. Thereafter, I suggest to view the crime of genocide as an instrument that ascertains paramount individual rights with intimate collective characteristics. In view hereof, I employ an *ejusdem generis* analysis to probe whether gender groups are of a similar kind to the enumerated collectives in Article II, so that they, when targeted as such, could be afforded protection from physical and biological destruction.

#### 4.1 The Ontology of Human Groups and Their Significance ‘As Such’

The question of what constitutes a ‘group’ to begin with is elusive. The concept is not elaborated in the *travaux préparatoires*, despite bearing relevance for the genocide framework. Granted, attempts to exhaustively define this notion would have been futile,<sup>140</sup> since groups are social phenomena that can not be described, quantified or measured as were they material objects.<sup>141</sup> They can, however, be transformed. By means of argumentation and interpretation a ‘human group’ can be constructed as such, transformed through description against a certain background.

Notwithstanding the complexities in defining ‘groups’ on a theoretical level, collective life is an essential part of human existence and may serve a plethora of values. Value, of course, has

---

<sup>140</sup> Indeed, in a broader context of social sciences, there are a multitude of definitions of what a ‘group’ is. See Aviam Soifer, *Law and the Company We Keep* (Cambridge: Harvard University Press, 1995), p. 3.

<sup>141</sup> Cf. Andreas Moberg, ‘Liv’, 8(1) *No Foundations: An Interdisciplinary Journal of Law and Justice* (2011). pp. 135-141, p. 141.

a multitude of parameters. Discerning between such parameters may be just as difficult as trying to ring-fence and define groups to begin with. One valuable aspect of group life may relate to facilitating for biological needs by means of mutual effort.<sup>142</sup> Another aspect may concern contractual arrangements of employment.<sup>143</sup> Although, there is undoubtedly more depth to belonging to a group than these ‘primal’ interests. Human groups go beyond being instruments for triggering individual rights or managing social control. Collective affinity can also function as an important facet of individual identity.<sup>144</sup> Ronald R. Garet suggests that ‘personhood, communality, and sociality are structures of existence, components of human being which are necessary to it.’<sup>145</sup>

The intentional destruction of a particular group violates the group members’ right to life. It also harms humanity as a whole; the vanishing of a group is a loss bearing connotations to the extinction of other species.<sup>146</sup> Prohibiting the physical and biological destruction of human groups as genocide can thereby be understood as an affirmation of the value the international society attaches to the survival of human diversity. The Genocide Convention convey that group existence is important and denotes that certain groups have an intrinsic social value *per se*, and must consequently be protected ‘as such’.<sup>147</sup> Transgressing this norm amounts to a conduct of ‘ultimate evil’ and the international society has deemed it important to proscribe criminalisation for such ‘evil’ deeds.<sup>148</sup> Since the transgression is closely intertwined with the notion of groups, it is inevitable that the legal construction of the crime of genocide mirrors this connectivity.

---

<sup>142</sup> Aviam Soifer, *supra* n. 140, p. 35.

<sup>143</sup> *Ibid*, p. 4-5.

<sup>144</sup> *Ibid*, p. 36.

<sup>145</sup> Ronald R. Garet, ‘Communality and Existence: The Rights of Groups’, 56(5) *Southern California Law Review* (1983), pp. 1001-1078, p. 1002.

<sup>146</sup> William A. Schabas, ‘Genocide and Political Groups by David L. Nersessian [Reviews]’, 21(1) *Finnish Yearbook of International Law* (2010), pp. 345-352, p. 348.

<sup>147</sup> *Ibid*, p. 1001-2.

<sup>148</sup> Steven R. Ratner, ‘The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity’, 92(1) *American Society of International Law Proceedings* (1998), pp. 1-3, pp. 1-2.

#### 4.1.1 Implications in Transforming Human Groups for Legal Objectives

Dealing with groups in a legal context turns out to be more complex than what *prima facie* could be expected, much since groups are without inherent meaning. All content is socially assigned through interpretation and argumentation. In a *legal* discourse, this operation is achieved in the context of ‘applicable law’. By means of legal nomenclature, the theoretical conception of a ‘group’ is diminished to a formal description, stipulating requirements for determining inclusion or exclusion. The description then becomes a vessel for rights and obligations.<sup>149</sup> In turn, such requirements must be applied to the ‘everyday reality’. Thereby, legal actors – such as judges and prosecutors – take active part in mobilising specific discursive resources in establishing and creating a sense of legitimacy for the requirements that define the groups.<sup>150</sup> Thus, it is these legal actors who realise the transformation of human groups from an ‘everyday reality’ to a ‘legal reality’, through strategies of legitimation.

Since simplicity and clarity is sought after, where none is to be found, it is not far-fetched to deduce that forcing human groups into legal conceptions prompts cursory understandings of the groups in question. This is oftentimes achieved by having group definitions revolve around quantifiable, ‘objective’ determinators, as if the groups were material objects. Indeed, that is what the ICTR sought to do in *Akayesu*. The same thought processes are evident in the historical precedents of genocide. For instance, Nersessian argues that in the Nazi practices of extermination during the Holocaust, the Nazis had problems ‘in parsing out a coherent legal definition for the Jewish community or even in identifying its members’.<sup>151</sup> Therefore, the Nazis forced the Jewish people and other victim classes to sew triangular cloth patches (with varying colours for each of the victim categories) of identification onto their clothes.<sup>152</sup> This was reflected in the genocide in Rwanda, where identification of group affinity was achieved

---

<sup>149</sup> This argument is derived from Aviam Soifer, *supra* n. 140, p. 70. Cited in David L. Nersessian, *supra* n. 41, p. 50.

<sup>150</sup> On this subject, see Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (New York: Routledge, 2003), p. 98-100 and Teun A. van Dijk, *Ideology: A Multidisciplinary Approach* (London: SAGE Publications, 1998), p. 225-262.

<sup>151</sup> David L. Nersessian, *supra* n. 41, p. 51.

<sup>152</sup> *Ibid*, p. 51.



by identification papers which described the keeper of the document as Hutu or Tutsi.<sup>153</sup> These practices show that dealing with ‘types’ of human groups is a cumbersome task. The same holds true in a legal setting. Despite the aforementioned complexities, the Genocide Convention opts for protecting four, clearly delimited, but narrowly construed human groups.

## 4.2 Reacting to the Restraints in the Application of Article II

As noted above, the restrictive personal scope of the Genocide Convention has sparked critique from scholars as well as practitioners.<sup>154</sup> The criticism has often emanated into creative interpretations of the treaty text, or finding something ‘new’ from the *travaux préparatoires* to solve the ‘faulty’ Article II. The assertions seemingly take aim to reach a predetermined conclusion of including a certain human group. Such an altruistic goal is respectable. The jurisprudence, however, is not. Below, I will elaborate why.

### 4.2.1 Stable and Permanent Groups

In the setting of the ICTR, problems concerning whether the Tutsi could be considered a protected group pursuant to Article II of the Genocide Convention emerged. The first case dealing with this issue was *Akayesu*, which concerned Jean-Paul Akayesu, the mayor of a Rwandan commune during 1993-1994.<sup>155</sup> He was charged with genocide before the ICTR for a multitude of genocidal acts committed in the commune. Early in the proceedings, the tribunal noted that it was unquestionably ‘the Tutsi ethnic group which was targeted’ by the Hutu majority government solely on account of their affinity to the Tutsi.<sup>156</sup> The categorisation of the Tutsi as an ‘ethnic group’ emanated from their history of being distinguished from the Hutu by previous colonial authorities as well as between the Rwandans themselves. This was not sufficient to fit the Tutsi within the scheme of an ‘ethnic group’ in the sense of the Genocide Convention, since, turning to the defining characteristics of ‘ethnic groups’ under the Convention, it becomes evident that the Tutsi and the Hutu who

---

<sup>153</sup> *Ibid*, p. 51.

<sup>154</sup> William A. Schabas, *supra* n. 42, p. 117.

<sup>155</sup> *Akayesu*, *supra* n. 101.

<sup>156</sup> *Ibid*, para. 124.

decimated them share many traits. Disregarding the racial, or even racist,<sup>157</sup> considerations of the colonial authorities, they share same language, religion and essentially the same culture.<sup>158</sup> This prompted the tribunal to scrutinise the theoretical underpinnings for protecting groups ‘as such’. As noted in Chapter 3, the tribunal set out to establish ‘objective’ definitions of each of the four groups enumerated in the Genocide Convention – reflected in Article 2 of the ICTR Statute.<sup>159</sup> Following, the tribunal turned to the *travaux préparatoires* and determined that the common denominator for the enumerated groups was that membership normally was unchallengeable by its members, ‘who belong to it automatically, by birth, in a continuous and often irremediable manner’.<sup>160</sup> By continued reference to the *travaux préparatoires*, the tribunal took the position that it was ‘particularly important to respect the intention of the drafters of the Genocide Convention’.<sup>161</sup> This led the Trial Chamber to the conclusion that the drafters’ intention was ‘patently to ensure the protection of any stable and permanent group’.<sup>162</sup> Accordingly, the Trial Chamber in *Akayesu* departed from a formalist reading of Article II and found it possible to construct the physical or biological destruction of a group ‘as such’ as genocide, even if a victimised group fell outside the confines of the four enumerated groups. That is, insofar the group is stable and permanent. Through an instrumentalist approach, the Tutsi could thereby comprise a protected group within the framework of the Genocide Convention.

There is reason, I would argue, to approach the jurisprudence in *Akayesu* with skepticism. The overarching goal with the judgment was likely to expand the groups encompassed by the Convention to fit into an ‘everyday reality’ that had changed since the drafting of the Convention. However, as a first remark, the *travaux préparatoires* are scarcely so consistent that it is possible to talk about *an* intent with it. A large number of states took part in the negotiations,<sup>163</sup> with many conflicting interests.<sup>164</sup> Furthermore, declaring standpoints in

---

<sup>157</sup> *Ibid*, para. 82.

<sup>158</sup> As follows from Chapter 3, these parameters are used to define ethnic groups.

<sup>159</sup> *Akayesu*, *supra* n. 101, paras. 512-515.

<sup>160</sup> *Ibid*, para. 511.

<sup>161</sup> *Ibid*, para. 516.

<sup>162</sup> *Ibid*, para. 516.

<sup>163</sup> A total number of 57.

<sup>164</sup> See *supra* Chapter 2.

treaty negotiations are hardly binding sources of international law. They may provide evidence for *opinio juris*, but as substantive legal sources, their use is limited. Additionally, it follows from the Vienna Convention on the Law of Treaties (VCLT) that recourse to the preparatory works of international treaties, such as the Genocide Convention, may be had when the provision ‘leaves the meaning ambiguous’, or ‘leads to a result which is manifestly absurd’.<sup>165</sup> This is unlikely the case for the Genocide Convention. Article II encompasses four groups. It would surely have followed from the treaty text if the intent, especially a ‘manifest’ ditto, was to extend the protection of the Convention to all stable and permanent groups. If taken seriously, the ‘stability and permanence’ criterion would mean that the catalogisation of groups in Article II is meaningless. That is not a plausible interpretation. Moreover, the ‘stable and permanent’ criterion is most likely incompatible with the principle of *nullum crimen sine lege*, seeing as it practically constructs an open-ended penal prohibition.

Secondly, arguing for stability and permanence as the sole parameters worth protecting in groups is conceptually confusing. Dialectically, the tribunal argued that group members in a ‘redeemable manner’ can not be ‘stable and permanent’. However, many of the groups enumerated in the Genocide Convention allow redeemable group membership. It is possible to exit a religion. It is possible to terminate nationality. Ethnicity can be achieved through marriage and terminated through divorce.<sup>166</sup> The argument is contradictory. Therefore, I argue that the ‘stability and permanence’ criterion developed in *Akayesu* should be discarded when approaching the rationale of protecting groups pursuant to the Genocide Convention.

#### 4.2.2 Other Ideas – Pinochet and Customary International Law

*Akayesu* is not alone in its attempt to align the ‘legal reality’ with changing discourses of ‘everyday reality’. From one perspective, the indictments of Augusto Pinochet, then-dictator of Chile, by Spanish lower instance courts are examples of this. Shortly after the creative interpretation in *Akayesu*, the Spanish Court of Appeals followed suit and departed from a verbatim reading of the treaty text. The Court of Appeals argued that the concept of a ‘national group’ as it follows from the Genocide Convention, in fact, also encompasses

---

<sup>165</sup> Articles 31 and 32(a)-(b) of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 (‘VCLT’).

<sup>166</sup> This was the case in Rwanda, through the ceremonial rite *Ubuhake*.

political as well as social groups.<sup>167</sup> The Court noted that genocide should be approached in ‘social terms, without any need for a criminal law definition’.<sup>168</sup> This line of reasoning is, however, hard to reconcile with principles of legality, especially the *nullum crimen sine lege*-principle. The Court of Appeals seemingly extended the definition of the crime by virtue of its analogous interpretation of what a ‘national’ group is. The extension, in turn, opens the scope of application of the concept of a ‘national’ group to virtually all socially constructed labels. Consequently, due to its discrepancy with principles of legality, it is a reasonable conclusion to draw that such an interpretation is not entirely legitimate.

It can be mentioned in the context that scholars have suggested to introduce new victim categories as a matter of customary law.<sup>169</sup> The proposal *per se* might not be incorrect. There is, however, no jurisprudential clarity in this regard – not much has changed in the ‘legal reality’.<sup>170</sup>

#### 4.3 Viewing the Crime of Genocide as a Rights-Implementing Institute

The section above concluded that the narrow conceptualisation of the protected groups under Article II of the Genocide Convention has sparked a myriad of arguments for introducing new victim categories within the framework for the crime of genocide. While these assertions might not withstand scrutiny, they highlight that the Genocide Convention is having difficulties answering to contemporary challenges concerning the groups it protects, in situations where utilising the Convention appear appropriate. Perhaps, the answer to these conundrums will not lie in extravagant readings of the treaty text, or unearthing something from the *travaux préparatoires*. A more appropriate approach would be to ascertain if there is a more systemically plausible path to achieving these goals. Such an operation first requires disentangling the theoretical underpinnings for including some groups and excluding others. In this section, I attempt to do so. Initially, however, it should be noted that the idea of expanding the list of the protected groups is not entirely novel. The debate has been ongoing for close to seventy years. It has been proposed that including new groups places a loose lid

---

<sup>167</sup> Reed Brody and Michael Ratner, *The Pinochet Papers – The Case of Augusto Pinochet in Spain and Britain* (London: Kluwer, 2000), p. 100.

<sup>168</sup> *Ibid.*, p. 100.

<sup>169</sup> Beth Van Schaack, *supra* n. 67, p. 2259.

<sup>170</sup> See Robert Cryer *et al.*, *supra* n. 100, p. 210.

on the Pandora's box of protecting human groups, and that there would be no 'logical stopping point' if new groups were added.<sup>171</sup> Schabas assumes this formalist position, as opposed to an instrumental ditto, noting that a dilemma with introducing new groups is 'the difficulty in providing a rational basis for such a measure'. He argues that if one group is to be included 'why not the disabled, or other groups based on arbitrary criteria?'<sup>172</sup> The argument is intriguing and needs to be probed further. This will be done in the section below.

#### *4.3.1 Why Should Not All Groups Be Protected Under the Genocide Convention?*

Seeing as the transformation of groups for legal purposes can not be anything but 'arbitrary' and *ad hoc*, it seems unreasonable to preclude protection of human groups on that ground.<sup>173</sup> Interestingly, departing from a micro-comparative perspective, a few parties to the Genocide Convention have opted for a wider conceptualisation of the protected groups as a matter of domestic law. Burkina Faso, Congo and France have constructed the list of protected group to end with a residual category, encompassing 'any arbitrary group'.<sup>174</sup> The overarching rationale can be explained by the fact that any arbitrary group could, theoretically, be subject to genocidal extermination. Notwithstanding which group this may be, such conduct is abhorrent and the group in question must be protected. From such a point of departure, gender groups would undoubtedly qualify as protected.

The standpoint is sympathetic, and while it does have some merit, it does not withstand closer examination. Genocide is a *sui generis* crime, seeking to protect the human diversity of groups. To preserve the crime's standing at the 'apex of international criminality', it can not have a too wide scope of application. Such an order could effectively render the concept of genocide to become diluted of substance; a logic that relates to the 'expressivist function' of genocide.<sup>175</sup> Legal constructions ought to reflect the broader social and political discourses in which they exist. Thus, there is commendable wisdom in not encompassing all 'arbitrary'

---

<sup>171</sup> David L. Nersessian, *supra* n. 41, p. 59f.

<sup>172</sup> William A. Schabas, *supra* n. 42, p. 132.

<sup>173</sup> This refers back to the discussion in Chapter 4.1.1.

<sup>174</sup> Code Penal Article 211-1 (France), Penal Code. C 2 Article 313 [Genocide] (Burkina Faso). Law No 8 - 98 (31 Oct 1998) C 1 Article 1 [Genocide] (Congo).

<sup>175</sup> See Dianne Marie Amann, 'Group Mentality, Expressivism, and Genocide', 2(2) *International Criminal Law Review* (2002), pp. 93-144, p. 93.

groups pursuant to the Genocide Convention. Likely, the drafters arrived to the same conclusion, seeing as they opted for enumerating four different groups as protected from genocide.

#### *4.3.2 The Exclusion of Political Groups from an E Contrario Perspective*

Bearing in mind that the Genocide Convention takes a different path than protecting any ‘arbitrary’ group, there is cause to ponder the premises for selecting the listed groups in Article II. Are they unique to those groups enumerated, or is it possible to extend them to other collectives in a similar manner? The very question takes for granted that the victim classes were determined on the basis of a ‘rational choice’ by the drafters, as opposed to a result of political deliberations made almost seventy years ago. In any case, different suggestions have been advanced for explaining the conceptual underpinnings of including the chosen groups. Here, the exclusion of political groups will be considered. It is my standpoint that the *ratio* for excluding a particular group from protection provides an *e contrario* solution to the reasoning for including other groups. Such an operation can be described as a dialectic process; the grounds for exclusion is the thesis, and the logic for inclusion the antithesis.<sup>176</sup>

The 1978 Genocide Study delineated the five principal arguments for the exclusion of political groups.<sup>177</sup> They were the following: ‘a) a political group has no stable, permanent, clear-cut characteristics, b) including political groups would preclude the acceptance of the Genocide Convention by a large number of States, because it would involve the UN in internal political struggles, c) such inclusion would create difficulties for legally established Governments in preventive actions against subversive elements, d) protection of political groups would bear way for protecting economic and professional groups under the Genocide Convention and e) the protection of political groups should be ascertained outside the Genocide’.<sup>178</sup>

---

<sup>176</sup> This draws from the philosophy of Friedrich Hegel. Some might, however, argue that ‘pragma-dialectical’ describes my approach better. See Hendrik Kaptein, ‘Legal Progress Through Pragma-Dialectics? Prospects Beyond Analogy and E Contrario’, 19(4) *Argumentation* (2005), pp. 497-507.

<sup>177</sup> Study of the Question of the Prevention and Punishment of the Crime of Genocide, prepared by Nicodème Ruhashyamiko, July 4, 1978, UN Doc. E/CN.4/Sub.2/416.

<sup>178</sup> *Ibid*, para. 80.

It therefore seems as if there were a multitude of traits which made the Sixth Committee construct political groups as excluded. I will more closely investigate points a)-b).<sup>179</sup> The most conspicuous argument for excluding political groups – and *e contrario* including other groups – is the argument of permanence and stability. Notwithstanding being neatly placed first in order in the 1978 Genocide Study’s chart, the ICTR in *Rutaganda* held that

It appears from the *travaux préparatoires* of the Genocide Convention, that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be ‘mobile groups’ which one joins through individual, political commitment. That would seem to suggest [...] that the Convention was presumably intended to cover relatively stable and permanent groups.<sup>180</sup>

Tracing back the debate in the Sixth Committee, some support for this view can be provided. Delegates furthering the cause for the exclusion of political groups from protection based their arguments on the essence, character or nature of the groups selected for inclusion. The Brazilian delegate opined that ‘political groups should not be included in the groups to be protected, since they lacked the necessary homogeneity and stability’.<sup>181</sup> Concurring, the Egyptian delegate found it ‘dangerous to extend protection to political groups in view of the frequent and inevitable changes of political opinion’.<sup>182</sup> Lastly, in the conclusion of the deliberations, the Polish delegate contended that ‘genocide is basically a crime committed against a group of people who had certain stable and characteristic features in common’.<sup>183</sup>

Stability and permanence *per se* are not satisfactory criteria for inclusion/exclusion, however. As noted in Section 4.2.1, many of the groups listed are not necessarily of such character. For instance, turning to the Universal Declaration of Human Rights (UDHR), an instrument adopted in the same temporal context as the Genocide Convention, Articles 15 and 18 ascertain that no one shall be denied the right to change their nationality or religion. Perhaps more importantly, however, is that in reality, the victims of genocidal acts have no

---

<sup>179</sup> I focus on these points since points c)-d) intersect to a large extent to point b). Point e) is in all essential aspects covered in Chapter 5 below.

<sup>180</sup> *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T. Judgment, 6 December 1999, para. 57.

<sup>181</sup> UN Doc. A/C.6/SR.63, p. 1291.

<sup>182</sup> *Ibid*, p. 1292.

<sup>183</sup> *Ibid*, p. 1310.

say whether they will be targeted by a perpetrator or not. The social dimension of stability and permanence is superseded by the *génocidaire's* intent to destroy a particular group.

A different explanation to the exclusion of political groups is a wholly practical one. As noted by the 1978 Genocide Study in point b), the exclusion of political groups was a means to enable a swift ratification of the Genocide Convention. Schabas argues in this regard that excluding political groups ‘was not a principled decision based on some philosophical distinction between stable and more ephemeral groups’,<sup>184</sup> but rather that historic victimisation is the relevant qualification.<sup>185</sup> In support for his claim, he holds that the drafters had the Armenian genocide and the Holocaust in mind during the drafting process.<sup>186</sup> This historical perspective is insufficient, however. Referencing practical reasons for determining certain groups for protection may be a plausible explanation for determining *specific* groups. Such explanations, however, can never exhaustively justify the scope of which groups to protect – atrocities on a genocidal scale are not limited to these four groups alone.

Accordingly, it is possible to draw conclusions relating to what constructs a group not worthy of protection, and *e contrario*, what constructs a group worthy of protection. The importance of the political aspect in the relation between ICL and the international society should not be understated. Since genocide constructs an *erga omnes* obligation on States, they will prove hesitant to label acts, however nefarious, as genocide. The historical example of Rwanda, where the atrocities committed towards the Tutsi almost fell short of being labelled genocide, serves to highlight the unwillingness. On this rationale, the *Jastrow Duck Rabbit* figure can be applied – law and politics can be viewed as part of the same ‘creature’.<sup>187</sup> For political groups, the absence of political impetus rendered them unworthy of protection. *E contrario*, the existence of political will rendered the enumerated groups protected. In similarity with political groups, the crux for considering gender groups lies in questions of an intrinsic political character. The counterargument, however, is the claim that ‘despite criticism that the enumeration of protected groups within the Convention is limited and restrictive, the

---

<sup>184</sup> William A. Schabas, *supra* n. 42, p. 133.

<sup>185</sup> *Ibid*, see Chapter 3 in particular.

<sup>186</sup> *Ibid*, p. 30.

<sup>187</sup> I first encountered this analogy in Andreas Moberg, *Om Villkorskláusuler* (Uppsala: Iustus, 2009). The figure was constructed by Joseph Jastrow and popularised by Ludwig Wittgenstein. See Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1953), p. 165 f.



final result is coherent.’<sup>188</sup> The notion is that the drafters sought to protect a certain typology of human groups, ‘national minorities’, and that the protected groups can not be considered as isolated islands, but rather an archipelago. The criticism is that each of the groups overlap and help define ‘a singular reality’.<sup>189</sup> From such a point of view, political groups and gender groups, are simply not the kind of human typology the Convention seeks to protect. Thereby, it may be conceded that there is no rational basis to move beyond the current scheme of the protected groups. However, the historical underpinnings of the concept of genocide contradict such an analysis profoundly. It is certainly not the only possible conclusion to draw. Resolution 96(1) encompassed a large number of collectives, the Secretariat’s Draft contained a non-exhaustive list of protected groups and political groups were scrapped in a close referendum by the Sixth Committee near the very end of the drafting process.<sup>190</sup> Bearing all this in mind, it is difficult to imagine the end-result being a collected, theoretical determination that other collectives were conceptually unfit within the framework. That does not mean that the protected groups *are not* an ‘ensemble construction’.<sup>191</sup> They do indeed overlap considerably. Although, a more feasible characterisation for the determination of the enumerated groups is that they were chosen on the basis of ensuring sufficient ratification of the treaty. In that, the drafters were successful, but it was nothing short of a political *choice*. Such a choice does not *per se* preclude gender groups from being conceptualised as a ‘protected group’ as a theoretical question.

#### 4.3.3 *The Common Factor for the Protected Groups*

All of the protected groups rest on one underlying premise. The groups are different, important, facets of individual identity. Associating with the protected groups can be assumed to be, for the individuals, paramount to the extent that the members of the groups should not be forced by means of physical or biological genocide to relinquish the affinity to their collectivity. This analysis is supported by the perception of ‘human groups’ as social constructs rather than scientific, quantifiable items. Indeed, bearing in mind the ‘subjective

---

<sup>188</sup> William A. Schabas, *supra* n. 42, p. 132.

<sup>189</sup> *Ibid*, p. 129-134.

<sup>190</sup> 29 voted in favour, 13 voted against with 9 abstentions.

<sup>191</sup> The locution is borrowed from Dianne Marie Amann’s analysis of the ICTY’s approach to the protected groups in *Krstić*. See Dianne Marie Amann, *supra* n. 175 and *Krstić*, *supra* n. 133, para. 555.

approach' discussed above, the scientific accuracy is irrelevant in ascertaining the crime of genocide. It is the perspective of the *génocidaire* that determines the group membership. There is no need whatsoever for the *génocidaire* to be rational in their targeting for destruction. For instance, notwithstanding that racial categorisation is discarded within a modern science discourse, it does not preclude a *génocidaire* from committing genocidal acts on that basis.<sup>192</sup> The sole parameter to ascertain is whether the perpetrator had a discriminatory intent to exterminate, in part or in whole, a group based on national, ethnical, racial or religious affinity.<sup>193</sup> It matters not that the group can be objectively defined as one of the four groups, or even that the group *de facto* existed. The institute that is the crime of genocide uses 'groups' as an analytical framework and the group that matters is purely conceptual. A group in the sense of the Genocide Convention can not be anything else than *ad hoc* in a specific context; construed as a product of *ex post* analysis employed by legal actors, in order to satisfy legal requisites.

The overarching rationale behind the protected groups can thus be described as the protection of individuals' right to take part and form a kind of collective and shared existence. Within a legal framework of 'applicable law', this operation becomes simplified. This is due to the fact that it is easier to speak in terms of acts directed at 'protected groups' in a court of law rather than acknowledging that the groups that we speak of do not exist in reality, but only as impromptu constructions. As such, they become a symbol for transgressions of an intrinsic value of human life. The legal construction of 'protected groups' can therefore, I argue, be perceived as a proxy for the rights of individuals to engage in different types of collectivity with freedom from being subject to genocidal acts. Hence, the 'crime of genocide' is best understood as an instrument that ascertains these imperative rights of individuals through taking care of a particular group. The systemic order can be compared to the international human rights system, where individual rights are of principal importance. The human rights system, on the other hand, rest on the premise that group rights are ascertained through individuals.<sup>194</sup> Seeing as the Convention's protected groups build on the

---

<sup>192</sup> William A. Schabas, 'The Genocide Convention at Fifty'. In *United States Institute of Peace Report 41* found at <http://www.usip.org/pubs/specialreports/sr990107.html#genocide2004-02-16> (accessed 15 September 2017).

<sup>193</sup> *Application of Genocide Convention—Merits* [2007] ICJ 1 para. 193.

<sup>194</sup> See Ian Brownlie, 'The Rights of Peoples in Modern International Law', 9(2) *Bulletin of the Australian Society of Legal Philosophy* (1985), pp. 104-119, p. 105.

effective exercise of human rights that can only be coherent in communion on a collective scale, it is plausible that the Genocide Convention follow a similar logic, albeit reversed.

#### 4.4 An *Ejusdem Generis* Approach to Gender Groups and the Protected Groups

With the foregoing section as a backdrop, I seek to employ the interpretative canon of *ejusdem generis*, to analyse if not the conceptual parameters of inclusion can be extended in a similar manner to gender groups, or if they are *sui generis* to the groups enumerated. The underlying premise is that if gender groups are of a similar kind, including gender groups within the Convention's legal protection under the same framework may appear plausible. The thesis encircles gender groups for three main reasons. First, gender rights are of a similar character to those of the enumerated collectives. Second, gender collectives often intersect and overlap with the enumerated groups. Lastly, there are ample examples of 'gendericides' as a matter of history.

##### 4.4.1 Gender Groups in Comparison to the Protected Groups

Bearing in mind the employed gender theory in the thesis, gender groups are highly volatile and temporal. Although used in reference to exclude political groups, stability and permanence can not adequately justify the inclusion of groups in the Genocide Convention. As argued above, not all of the enumerated groups are stable and permanent. Indeed, the conceptualisation of gender groups intersects to a large extent with how ethnical and racial groups are constructed. As follows from Chapter 3, the concept of ethnicity is hinged to parameters of common language or culture, whereas the concept of race to a criterion of 'hereditary physical traits'. Gender groups can be perceived as an amalgamation of these conceptualisations, drawing from Butler's gender theory. It is a socially constructed label, influenced by social and cultural preconditions. The notion that they are akin to each other is mirrored in other dimensions of ICL. In fact, gender groups are warranted equal treatment to ethnical and racial groups in, for instance, the Rome Statute.<sup>195</sup>

In similarity to the four enumerated groups, belonging to a gender group can be assumed to be an intrinsic value of social existence, an important facet of individuality.<sup>196</sup> Such a

---

<sup>195</sup> See Article 7(1)(h) of the Rome Statute of the International Criminal Court (17 July 1998), 2187 UNTS 90. (Prohibiting '[p]ersecution against [*inter alia*] racial, ethnical and gender groups').

<sup>196</sup> Ronald R. Garet, *supra* n. 145, pp. 1001-2.

resemblance is reflected within the scheme of international human rights law. Seeing as genocide is the ‘ultimate crime and the gravest violation of human rights it is possible to commit’,<sup>197</sup> such a comparison is fruitful. The enumerated groups can all be characterised by the rights that are granted through membership. That is, the right to existence in the property of a group member, be it on the basis of nationality, ethnicity, race or religion. The rights of gender groups follow a similar rationale, and essentially stem from an identification of oneself against a collective backdrop, coupled with the right to live a collective life as a member of that particular group. All major international human rights treaties prohibit discrimination on the basis of gender and/or sex.<sup>198</sup> The same holds true for all of the enumerated groups. Indeed, that is the case in the International Covenant on Civil and Political Rights (ICCPR), European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the UDHR.<sup>199</sup> It is not necessary to draw the finer contours of the substantive human rights here actualised. Genocide and ‘gendercide’ aim attention to the physical or biological destruction of a particular group. As such, they will always deal with the most severe infringements of fundamental human rights (such as the right to life). It is crucial not to exaggerate this aspect, however. It is not the transgression of these rights *per se* that merits the label ‘genocide’. Apart from these individual rights, genocide violates the group’s right to existence. Nonetheless, the protected groups depart from a perspective where paramount *collective* rights are transgressed through serious personal violence, which may necessitate treating the encroachment as genocide.<sup>200</sup> It is on the aforementioned substantive fundamental rights the protected groups build on, and the rights apply equally to gender groups. Hence, the continued exclusion of gender from the Genocide Convention is disparate with the international human rights structure. If, then, other groups that can be considered similar to gender groups have a right to existence, coupled with a right not to be refused that existence, groups on the basis of gender must do as well.

The characterisation of gender groups overlap considerably with national, ethnic, religious and racial parameters. Oftentimes, complexities arise in determining whether the targeting of a particular group builds on the traits of any of the enumerated groups, gender

---

<sup>197</sup> Benjamin Whitaker, *supra* n. 108, p. 5.

<sup>198</sup> Beth Van Schaack, *supra* n. 67, p. 2283.

<sup>199</sup> Article 2(1) ICCPR, Article 14 ECHR, Article 2 UDHR.

<sup>200</sup> David L. Nersessian, *supra* n. 41, p. 80.

traits, or if it is a mix between these parameters. Should a *génocidaire* seek to exterminate all ‘abled-bodied’<sup>201</sup> Bosnian Muslim men – would this be a ‘gendercide’ or a genocide enacted towards a protected group?<sup>202</sup> Whichever interpretation gains precedence, it is my analysis that ‘all genocides are gendered’.<sup>203</sup> The subjective approach merely requires that the genocidal acts are essentially based on any of the enumerated traits. A ‘gendered aspect’ of the genocide is simply sorted away as legally irrelevant. Should an attack be directed against able-bodied Bosnian Muslim men, then the ‘Bosnian’ and ‘Muslim’ labels are sufficient in ensuring the application of the Genocide Convention. The omission to protect gender groups has, however, more dimensions than merely ensuring application of a legal instrument in order to prevent impunity. As of now, a perpetrator can claim that a genocidal act was committed on gendercidal basis as a viable defence for the crime of genocide. In turn, the current construction of the protected groups, in fact, favours gender discrimination over, for instance, religious discrimination. Drawing from a feminist legal theory perspective, this is disparate with the commitment ‘to promote social progress’ as a cardinal value and specific purpose for the UN as an institution. Especially since it is through legal instruments, such as the Genocide Convention, this value is to be realised.<sup>204</sup> If the UN’s underlying engagement to ‘international social justice’, which has been argued to form the ‘essence of public international law in the second half of the 20<sup>th</sup> century’,<sup>205</sup> is to be taken seriously, there is great need to consider how gender groups fit in within this structure. The analysis demonstrates that gender collectives are of a similar kind to the protected groups. Consequently, it would not be striking to extend similar treatment to gender groups in the context of genocide.

---

<sup>201</sup> ‘Able-bodied’ is here to be read in the sense that they were able to be military combatants.

<sup>202</sup> This example is derived from Øystein Holter, who sketches a wider historical example of narratives from Rwanda, former Yugoslavia, East Timor and Chechnya. See Øystein Holter, ‘A Theory of Gendercide’, 4(1) *Journal of Genocide Research* (2002), pp. 11–38.

<sup>203</sup> Nicole Rafter and Kristin A. Bell, *Gender and Genocide*. Paper presented at the American Society of Criminology, Presidential Panel Sessions of 2013. [https://www.asc41.com/Annual\\_Meeting/2013/Presidential%20Papers/Rafter,%20Nicole-Bell,%20Kristin.pdf](https://www.asc41.com/Annual_Meeting/2013/Presidential%20Papers/Rafter,%20Nicole-Bell,%20Kristin.pdf) (accessed 25 September 2017).

<sup>204</sup> Charter of the United Nations (26 June 1945) 1 UNTS XVI (‘UN Charter’), preamble, para. 3.

<sup>205</sup> Otto Kimminich, ‘History of the Law of Nations Since World War II’ in Rudolf Bernhardt, et al, *Encyclopaedia of Public International Law* (New York: North Holland, 1993), pp. 252-262, p. 254.

#### 4.4.2 A Historical Reality

Gender groups have been subject to genocidal acts like few other collectives. Much due to the fact that the victims of such atrocities oftentimes have been women, these occurrences have taken the back seat in the history books. There is a plethora of historical examples of ‘gendercidal’ practices that fit the conceptual frame of genocide; witch-hunts in Early Modern Europe, Sati (i.e widow burning), dowry deaths and maternal mortality are but a few.

There are specific historical events where gender groups have been victimised as such. The Nanking Massacre, the Massacre of Bangladesh men in 1971, the École Polytechnique Massacre and the genocide in Srebrenica are all examples of where gender-specific elements have been highly prevalent in situations of mass killings.<sup>206</sup> ‘Gendercides’ are thus a historical reality, and seem to cry out for the application of the Genocide Convention. Such an assertion does not mean that other, non-enumerated human groups are subordinate to gender groups. Other collectives may fit the theoretical underpinnings of protecting certain human groups from genocide as well. They will not, however, be considered here. The fact that other human groups may be equally as appropriate candidates should not hamper the overarching discussion as it relates to gender groups, which is the focal point here. Ascertaining eligibility for other groups is a different question, and is not relevant for the issue of ‘gendercide’ in relation to genocide.<sup>207</sup>

#### 4.5 Concluding Remarks

As outlined by the foregoing analysis, gender groups are of a similar kind to the enumerated groups in Article II of the Genocide Convention. Thereby, similar treatment can be motivated for gender groups as for the enumerated groups in Article II of the Genocide Convention. The notion presupposes that the Genocide Convention provides relevant legal ‘tools’ to respond to ‘gendercides’. Is this accurate, or are there appropriate means to redress ‘gendercides’ in other dimensions in international law?

---

<sup>206</sup> See Gendercide Watch, *History of ‘Gendercide’*. Available at: [http://www.gendercide.org/what\\_is\\_gendercide.html](http://www.gendercide.org/what_is_gendercide.html) (accessed 20 October 2017).

<sup>207</sup> This argument draws heavily from David L. Nersessian, *supra* n. 41, pp. 81-85.

## 5 Analysis of Other International Law Instruments

The following chapter asks whether ‘gendericides’ already are appropriately responded to under existing international law instruments that cover similar interests to the Genocide Convention. In this regard, Schabas argues that atrocities committed ‘against groups not covered by Article II of the Genocide Convention are adequately addressed by other legal norms, in particular the prohibition of crimes against humanity.’<sup>208</sup> In a similar vein, the 1978 Genocide Study notes that other groups than the ones enumerated in Article II are sufficiently protected by ‘other international instruments, such as the [UDHR] and the [ICCPR]’.<sup>209</sup> In what follows below, I engage in a comparative analysis and ponder whether the interest of protecting gender groups ‘as such’ from physical and biological destruction is satisfied by the aforementioned instruments.

### 5.1 Crimes Against Humanity – An Adequate ‘Proxy’?

Genocide and crimes against humanity can be perceived as ‘sister crimes’. Both of the infractions were constructed against the historical backdrop of the Nazi acts of extermination during the Holocaust. Indeed, as noted in Chapter 2, the CC10 conceptualised genocide as a subcategory of crimes against humanity.<sup>210</sup> The two crimes currently have diverging *raison d’être*, and protect different values. A widespread or systematic attack on a gender group, because the members belong to that group, amounts to crimes against humanity. That is very different to an attack on a gender group because the members belong to that group paired with the intent to destroy the gender group ‘as such’.<sup>211</sup> National, ethnical, racial and religious groups are all protected from crimes against humanity, as well as the crime of genocide.<sup>212</sup> In

---

<sup>208</sup> William A. Schabas, *supra* n. 42, p. 171. Also, see ICC Ad Hoc Committee Report (6 Sep 1995), UN Doc A/50/22, para. 61.

<sup>209</sup> Study of the Question of the Prevention and Punishment of the Crime of Genocide, prepared by Nicodème Ruhashyamiko, July 4, 1978, UN Doc. E/CN.4/Sub.2/416, para. 87.

<sup>210</sup> See Section 2.3 in particular.

<sup>211</sup> Chile Eboe-Osuji (ed), *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (Leiden, Boston: Martinus Nijhoff Publishers, 2010), p. 168.

<sup>212</sup> Art 7(1) Rome Statute of the International Criminal Court (1998). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro (2007)) ICJ Judgment of 26 Feb 2007, para. 188.

case gender groups are subject to genocidal acts, only crimes against humanity can be applied, since there is no parallel crime for genocide committed on the basis of gender. This begs the question, is crimes against humanity adequate to describe criminal conduct seeking to destroy gender groups ‘as such’? I do not think so. Making reference to crimes against humanity as a surrogate for a ‘gendercide’ risks inadequately reflecting the content of the criminal categories. The socially constructed ‘label’ of a crime, to which the criminal conduct is attached, ought to mirror the culpability and seriousness of the offence in an appropriate manner.<sup>213</sup> Genocides will in the practical reality oftentimes satisfy the requirements for crimes against humanity. The same can not be said for the opposite relation, because of the *dolus specialis* of genocide. Constructing a ‘gendercide’ as a crime against humanity does not in any way demarcate the perpetrator’s overarching and specialised intent to destroy a specific group ‘as such’, which is far more culpable. A perpetrator of crimes against humanity aims to *murder*, whereas a *génocidiare* aims to *destroy a certain group*. The construction of genocide is thus much more specified in terms of *mens rea* in comparison to crimes against humanity. The same can be said for the prohibited acts of genocide. As follows from Chapter 3, only five specific acts can be qualified as genocide. Crimes against humanity could surely encompass those acts, but is not limited to them. The specificity the legal label of genocide offer is thus far more complete in describing ‘gendercidal’ conduct.

From a different perspective, labelling ‘gendercide’ as crimes against humanity confuses the personal scope of the crimes. While crimes against humanity are prohibited as a type of persecution against the *individual* attacked, genocide is the exact converse. Genocide is fundamentally an infraction directed towards groups, and the criminalisation thereof ascertains protection for certain ‘groups’ from physical and biological destruction. Crimes against humanity encompass violations of fundamental rights on an individual basis.<sup>214</sup> In case a ‘group’ will be covered by crimes against humanity, it will be purely ancillary to the individual. Therefore, crimes against humanity are unable to adequately describe attacks against groups. This distinction is of paramount importance, as David Luban notes:

Thus, whereas genocide is a crime directed at groups viewed as collective entities, with a moral dignity of their own, crimes against humanity are assaults on civilian populations viewed not as unified

---

<sup>213</sup> A closely related question is that of ‘fair labelling’.

<sup>214</sup> Robert Cryer *et al*, *supra* n. 100, pp. 229 and onwards.



metaphysical entities but simply as collections of individuals whose own human interests and dignity are at risk [...].<sup>215</sup>

The distinction between genocide and crimes against humanity is important in other aspects. They both entail an *erga omnes* obligation for the international society to intervene and prevent the atrocity occurring in a given situation. The obligation is, as noted by the ICJ, ‘legal, and not merely symbolic’.<sup>216</sup> When it comes to genocide, this obligation is actualised as soon as ‘the State learns of [...] the existence of a *serious risk* that genocide will be committed’.<sup>217</sup> This is in line with the conception of genocide as an inchoate offence directed towards the protected groups.<sup>218</sup> If gender groups are subject to genocidal acts, the obligation will not be activated at that temporal point. Only crimes against humanity can be applied in that case; and they do not invoke the *erga omnes* obligation until the attack has taken place. Thereby, the factual widespread or systematic attack directed against the gender groups must have taken place before the *erga omnes* obligation is triggered.

The way we label crimes has a deeper meaning than solely relating to parameters of culpability of the crime. It also expresses a form of hierarchy between the core international crimes, communicating the severity of one crime in relation to the others. Genocide stands at the ‘apex of international criminality’.<sup>219</sup> It is imagined to be the most heinous crime possible to commit – a *sui generis* offence. The moral condemnation implied with the locution ‘genocide’ is far more serious than any other international crime. The hierarchy amongst the international core crimes is less acute for national, ethnical, racial and religious groups. Both criminal constructions can be applied in a parallel manner. As a matter of criminal cumulation, a perpetrator can be sentenced to genocide as well as crimes against humanity.<sup>220</sup> This renders courts capable of distinguishing between attacks directed towards *individuals* on

---

<sup>215</sup> David Luban, ‘A Theory of Crimes Against Humanity’, 29(1) *Yale J. Int’l L.* (2004), pp. 85-167, p. 97.

<sup>216</sup> Application of Genocide Convention—Merits [2007] ICJ 1, para. 438.

<sup>217</sup> *Ibid.*, para. 431. My emphasis.

<sup>218</sup> It follows from the title of the treaty, UN’s Convention on the Prevention and Punishment of the Crime of Genocide, that ‘prevention’ of genocide is of special value.

<sup>219</sup> *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S. Judgement and Sentence, 4 September 1998, para. 16.

<sup>220</sup> The Preamble to the Elements of Crimes, states that a conduct ‘may constitute one or more crimes’. The International Criminal Tribunals have often turned to ‘national’ jurisprudence in matters of criminal cumulation. See *Prosecutor v. Kupreškić*, Case No. IT-95-16-T. Judgment, 14 January 2000, para. 670-700.

a widespread and systematic scale, and conduct intended to exterminate *groups* of individuals. They can therefore pass judgments that more accurately describe the nature of the conduct, when directed towards any of the enumerated groups.

The same rationale does not apply for gender groups. Genocidal acts directed towards gender groups are either constructed as the inferior transgression crimes against humanity, or fall outside the ambit of ICL completely. Essentially, genocide and crimes against humanity have completely diverging reasons for being. At their core, they are two separate offences, dealing with different issues. The current scheme of the protected groups in the Genocide Convention communicates a value-based signal regarding which groups are more worthy to protect from the worst kind of criminality. Drawing from a feminist legal theory perspective, it dialectically expresses the worth of gender groups in relation to the four enumerated collectives in Article II. In essence, the Genocide Convention is a bearer of symbolic values. From such a perspective, the way we construct legal categorisations is paramount. Surely, it is possible to describe the Armenian Genocide and the Holocaust as episodes of ‘mass killings’. That categorisation would, however, be unsuccessful in capturing the whole picture of the atrocities committed and what the perpetrators set out to achieve. The same applies to ‘gendercide’. There is wisdom in communicating a total recognition of criminal conduct. It was a similar rationale that spurred the international society to construct genocide in the first place. Seeing as ‘gendercides’ have existed historically and, as I argue below, continue to occur, the omission to cover ‘gendercide’ as genocide has factual ramifications. As a matter of *de lege lata*, there is no specific expression that gender groups are warranted protection from physical and biological destruction ‘as such’. That leads to an odd result, meaning that the exact same conduct, coupled with the exact same intent committed towards members of gender collectives, for example women, will never be as serious as if directed towards any of the enumerated groups. Hence, crimes against humanity is not an adequate surrogate for genocide.

## 5.2 Human Rights Adjudicatory Bodies and Adjudication in the ICJ

### 5.2.1 Human Rights Adjudicatory Bodies

As mentioned above, the 1978 Genocide Study held that ‘other groups’ are sufficiently protected by the UDHR and the ICCPR. I do not concur. The former is a UNGA Resolution,

and the latter is a major human rights treaty.<sup>221</sup> None of these instruments seek to regulate criminal activities. The remedies available to adjudicate human rights violations largely depend on voluntary, *bona fides* participation by States already parties to the treaties. The enforcement paradigm within the context of international human rights law is that adjudication of human rights violations (such as those amounting to ‘gendericides’), may be subject to quasi-legal enforcement mechanisms. The end-result of such adjudication is essentially a ‘naming and shaming’ of the party in breach. There can be no individual or non-state responsibility for a certain violation in this context.<sup>222</sup> On that note, it is likely that States – although eligible for participation – who commit ‘gendericides’, would refrain from giving consent to the quasi-judicial bodies’ jurisdiction.

Without belittling the significance of these instruments, it should be made clear that the form of adjudication offered through the human rights structure is ill-fitting for dealing with the physical and biological destruction of a gender group. Seemingly, this kind of destruction would be placed on par, and approached through the same framework as laws preventing women from selling clan land.<sup>223</sup> However serious such violations of human rights may be, acts of ‘gendercide’ are far more abhorrent. Therefore, the current structure of human rights law fails to distinguish between, on the one hand, violations of human rights, and on the other hand, attacks with the intent of destroying the group, consequently constructing the group *per se* as a victim of the attack.<sup>224</sup> Such a distinction is of importance, because the latter characteristic *is* the defining trait of ‘gendercide’. Turning a blind eye to that aspect would mean not dealing with ‘gendericides’ at all. Solely relying on the human rights scheme as a substitute for a stand-alone crime of ‘gendercide’ would thus not provide an appropriate response.

---

<sup>221</sup> The legal status of UNGA Resolutions should be reiterated here: they are hardly binding sources of international law. They may provide evidence for *opinio juris*, but as substantive legal sources their use is limited.

<sup>222</sup> The notion that persons, and not ‘abstract entities’ could be held accountable in the context of ICL was novel in the IMT. See *Judgment of the International Military Tribunal, in The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, London, 1950, 447

<sup>223</sup> See *Ephrahim v. Pastory* [1990] LRC (Const) 747.

<sup>224</sup> Cf. David L. Nersessian, ‘Rethinking Cultural Genocide Under International Law’. In *Human Rights Dialogue: ‘Cultural Rights’ (Spring 2005)*. Available at: [https://www.carnegiecouncil.org/publications/archive/dialogue/2\\_12/section\\_1/5139](https://www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/5139) (accessed 2 November 2017).

### 5.2.2 Adjudication in the ICJ

The ICJ may entertain contentious cases, meaning legal disputes between States submitted to it by them, provided that both of the disputant States consent to the ICJ's jurisdiction. The ICJ solely settles legal disputes. Conversely, it does not ascertain individual criminal responsibility, or in any other way engage in criminal 'prosecution' of breaches of international law. Therefore, turning to the ICJ to adjudicate 'gendericides' is somewhat problematic. The fact that participation in ICJ proceedings is entirely based on consent makes it unsuitable for matters which essentially concerns criminal behaviour. It is a likely assumption to make that States who engage in 'gendericidal' acts will be reluctant to approve of the ICJ's jurisdiction. From a somewhat different perspective, in matters of the contentious cases, in contrast to the advisory proceedings, only States will be the possible disputants. *Ergo*, the ICJ will have no jurisdiction over individuals and non-state actors perpetrating 'gendericides', much like within the human rights scheme.<sup>225</sup> All these drawbacks render the mechanisms which ICJ offers inadequate to effectively respond to 'gendericides'. It could be argued that the absence of an 'effective enforcement' opens for an increasingly flexible system, which is not necessarily a disadvantage in a strongly politicised system. Nonetheless, this forum is improper to address international crimes; the ICJ was not tailored to engage in such issues.

### 5.4 Labelling Matters

Simply referring to other aspects of international law as a solution for 'genocide' constructs a peculiar world of beliefs. First of all, such an approach creates an imagined safety net, legitimising a conservative standpoint and in turn enables a perception that the protection of gender groups from genocidal acts are 'adequately addressed by other legal norms'.<sup>226</sup> It is, however, clear that the adjudicatory bodies the human rights treaties offer are ill-fitting to adjudicate criminal activities. The same holds true for the contentious cases in the ICJ. Neither the human rights adjudicatory mechanisms nor the ICJ were designed to deal with such issues to begin with. None of them can provide a viable response in lieu of a separate

---

<sup>225</sup> David L. Nersessian, *supra* n. 41, at. 198.

<sup>226</sup> See Section 5.1, William A. Schabas, *supra* n. 42, p. 171.

crime of ‘gendercide’. Indeed, as noted in *Kondewa*, when ‘the right to life is violated, certainly on the scale of genocide or massacre, only prosecution could be “effective” [...]’<sup>227</sup> as a redress to the infractions. If that argument is valid, it should be borne in mind that the current routes to prosecution in the context of ‘gendercides’ are practically non-existent. Apart from crimes against humanity, there are no international crimes available for application, and that criminal label available fails to appropriately describe the full nature of ‘gendercides’. Thus, currently, no ‘effective’ means of redress to ‘gendercides’ exist.

The omission to protect from ‘gendercides’ in the Genocide Convention entails a strange systemic application of ICL. Returning to the narrative constructed in the introduction – a community adopting a one-child policy, with the ancillary requirement that this one child *must* be male (meaning that all female children must be discarded). As follows from a formalist interpretation of Article II, we would currently label the murdered daughters, at ‘best’, victims of crimes against humanity. If we instead imagine that the community adopted a policy of infanticide in respect of babies who bear certain ‘hereditary physical characteristics’ (whatever that may be), we would label the killed babies victims of genocide, since they would be constructed as a part of a ‘racial group’.<sup>228</sup> The labels convey for us, the international society and the future, that the killed babies of the ‘racial group’ symbolise something bigger – genocide directed towards the ‘racial group’ itself. The murdered daughters, on the other hand, do not qualify for that symbolic treatment. Instead, ICL constructs that victim category as a victim of its individual gender affinity. The destruction of the gender group on a wider level, which indeed was the aim with the adopted policy in the imagined example, is left unnoticed by ICL. After this analysis, the relevant inquiry becomes whether criminal proscription under positive ICL is motivated to address ‘gendercides’. This will be done in the following chapter.

---

<sup>227</sup> *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A. Judgment, 28 May 2008, para. 41.

<sup>228</sup> Please see Chapter 3 above.

## 6 ‘Gendercide’ and International Criminal Regulation

The chapters above focus on the nexus between genocide and ‘gendercide’, and ponder how they fit together. The following chapter is forward-looking and asks the question of whether criminalisation of ‘gendercide’ is suitable *per se*. The evaluation will be carried out through general contemplations of the major theories of justification for international criminal regulation as well as the overarching aims of international criminal justice.

### 6.1 ‘Gendercide’ and ICL

The definition of a ‘gendercide’ elaborated above deviates from the definition of genocide only in one aspect; gender is not a protected group. The constituent act along with the perpetrator’s intent are identical to that of genocide directed towards any of the enumerated groups. There is nothing that suggests that the sociological and psychological underpinnings of genocidal human behaviour is different when gender groups are targeted instead of the four protected groups.<sup>229</sup> A conduct that can be described as ‘gendercide’ undoubtedly amounts to arduous violations of fundamental human rights. However, not all infractions of rights enunciated in human rights instruments are rendered criminal. Accordingly, viewing the crime of genocide as a rights-implementing institute is not the same as merely a detailed treatment of human rights violations. It is also a seminal description of an international crime. Although, just as the describing of certain conduct as violating international law does not make it so, also describing certain conduct as criminal under international law does not *ipso facto* make it an international crime.<sup>230</sup> The relevant inquiry becomes, is ‘gendercidal’ conduct sufficiently abhorrent to warrant criminalisation?

Before venturing further, there is reason to clarify what constitutes a crime in ICL more thoroughly. For the purposes here, international crimes are best understood as ‘breaches of international rules entailing the personal criminal liability of the individuals concerned’.<sup>231</sup> International crimes, moreover, cover a dimension which includes ‘all norms that establish,

---

<sup>229</sup> Ervin Staub, *The Roots of Evil – The Origins of Genocide and Other Group Violence* (Cambridge: Cambridge University Press, 1989), p. 8.

<sup>230</sup> This discussion is in all relevant aspects mirrored in the Study on Implementing Apartheid Convention (1981), UN Doc E/CN4/1426, see especially paras. 26-29.

<sup>231</sup> Antonio Cassese *et al*, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), p. 11.

exclude or otherwise regulate' individual criminal responsibility.<sup>232</sup> Essentially, it can be boiled down to prohibitions attached to a punitive system. From such a perspective, legal constructions 'operates as a means for articulation and nourishment of social values'.<sup>233</sup> These social values express desires; the legal constructs transform them into commitments. On a more conceptual note, criminalisation thus serves the protection of particular legal values.<sup>234</sup>

## 6.2 The Complexities in Characterising International Crimes

If the determining factor for the label 'international crime' is the value the prohibition protects – how does 'gendercide' relate to these values, and what are they to begin with? As a point of departure for these reflections, the preamble to the Rome Statute contains two noteworthy indicators. First, alluding to 'unimaginable atrocities that deeply shock the conscience of humanity' likely refers to the atrocious nature and wide scale of an act that elevates it to 'criminal'. Second, by virtue of making reference to 'such grave crimes [that] threaten the peace, security and well-being of the world' it denotes that considerations of broader geo-political safety are to be taken into account when characterising international crimes. I will examine these locutions immediately below.

### 6.2.1 'Unimaginable Atrocities that Deeply Shock the Conscience of Humanity'

The Preamble of the Genocide Convention notes that 'genocide has inflicted great losses on humanity'.<sup>235</sup> Hannah Arendt explores the same notion, stating that 'finally, and most important, there were objections to the charge itself, that Eichmann had committed crimes against "the Jewish People", instead of "against humanity" [...]'.<sup>236</sup> At heart of these ideas lie the conviction that the more atrocious the act, the more likely it is to be considered a crime of

---

<sup>232</sup> Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd edition (Oxford: Oxford University Press, 2014), p. 31.

<sup>233</sup> Dianne Marie Amann, *supra* n. 175, p. 95.

<sup>234</sup> This can be compared to the theory *Rechtsgutstheorie*, a theoretical point of departure not used in this essay, but nonetheless bearing close semblance to this argument. See Ernst-Joachim Lampe, 'Verbrechen gegen die Menschlichkeit [Crimes Against Humanity]' in Hans-Joachim Hirsch (ed), *Festschrift für Günther Kohlmann zum 70. Geburtstag [Homage Volume for Günther Kohlmann, on his 70th birthday]* (Köln: Verlag Dr. Otto Schmidt, 2003), pp. 147-176, pp. 147, 155.

<sup>235</sup> The Genocide Convention, Preamble, 278.

<sup>236</sup> Hannah Arendt, *supra* n. 5, p. 233.

international concern. It is likely such a rationale the Rome Statute bridges to with its ‘first’ remark. The idea of a conduct ‘shocking’ the international conscience should not, I argue, be read as a nominal criterion, but rather a conceptual portrayal. Most often, the inquiry of whether a conduct shocks the international conscience is answered against the backdrop of how widespread and abhorrent the conduct at issue is. For the purposes here, it is not necessary to delineate the exact ontology of the doctrine. Suffice it to say, ‘gendericides’ are interlaced with widespread violations of human rights of the most severe form – conduct that certainly can be said to shock the international conscience.

To illustrate the foregoing, the ‘gendercide’ framework lends itself quite well to describe the contemporary discriminating discourses towards women and girls in India. Ranging from the close of the 20th century and onwards, the imbalance of the ratio between the sexes in the populace of India has sparked ample interest. It is a complex situation concerning female children before birth, at birth and during the first years of childhood. In a 2008 report from India’s National Institute of Public Cooperation and Child Development, it was noted that in many regions in India

[s]ons are desired for reasons related to kinship, inheritance, marriage, identity, status, economic security and lineage. A preference for boys cuts across caste and class lines and results in discrimination against girls even before they are born.<sup>237</sup>

Even though progress within the Indian society is made in regards to female literacy and increasing participation of women in different facets of economic and social life, girls are still being subject to a serious personal violence.<sup>238</sup> Girls in India’s impoverished areas in particular are at risk of being disposed of by their families directly after birth.<sup>239</sup> *Inter alia*, the families lace infant girls’ food with pesticides, force grains of poppy seed or rice husks down their throats, stuffing their mouths with black salt or urea, starving them to death,

---

<sup>237</sup> NIPCCD. *A Socio-Cultural Study of the Declining Sex Ratio in Delhi and Haryana*. (New Delhi: National Institute of Public Cooperation and Child Development, 2008). Available at: <http://nipccd.nic.in/reports/esratio.pdf> (accessed 30 November 2017).

<sup>238</sup> T.V Sekher and Neelambar Hatti Sekher (eds), *Unwanted Daughters: Gender Discrimination in Modern India* (New Delhi: Rawat Publications, 2010), p. 16.

<sup>239</sup> Gita Aravamudan, *Disappearing Daughters: The Tragedy of Female Foeticide*. (New Delhi: Penguin Books, 2007), p. 39.



suffocating them with a wet towel or a bag of sand, rubbing poison on the mother's breast so that the child is poisoned as she is nursed, or burying the child alive.<sup>240</sup> In consequence, female infanticide and other dowry related murders have brought about a gross number of women being selected for destruction for many decades. UNICEF has estimated that nearly fifty million women are 'missing' in India.<sup>241</sup> The destruction of girls and women on this scale can be understood as gender as a way of systematising social life, and is a product of an intersection of multiple parameters. Socio-economic aspects, such as high dowry costs, combined with religious traditions, the lack of personal autonomy of women due to unequal power structures between men and women are contributing factors.<sup>242</sup> The occurrences in India fall squarely within the definition of a 'gendercide' this thesis employs.

The characteristics of the violated rights in the 'Indian gendercide' renders it tenable to construct 'gendercide' as a separate crime. It follows from Section 4.4.1 that 'gender' as a concept bears high relevance within the broader scheme of international human rights. Indeed, the conduct at issue ultimately concerns the right to life. The right, in itself, is *sine qua non* in relation to all other substantive human rights.<sup>243</sup> For international law to, on one hand, protect individuals from gender-based discrimination, but, on the other, refrain from labelling the physical and biological destruction of gender groups an international crime constructs a systemic divergence. That is not all, however. The conduct also violates the group of girls' claim to existence. Taken together, 'gendercide' is the ultimate form of gender discrimination, which emanates into serious personal violence that must be regarded to 'shock the international conscience'.

### 6.2.2 'Threats to Peace and Security'

The historically construed close connectivity between international crimes and their purportedly negative impact on international peace and security calls for further examination. It has been opined by Kenneth Anderson that ICL 'and the ICC are efforts to address the

---

<sup>240</sup> Society for the Protection of the Girl Child. *An Overview of Gendercide and Daughter Abuse in India* (New Delhi: Society for the Protection of the Girl Child, 2011). Available at <http://bit.ly/2BHkvth> (accessed 23 November 2017), p. 3.

<sup>241</sup> *Ibid.*, p. 1.

<sup>242</sup> *Ibid.*, p. 2.

<sup>243</sup> 'Study (Second) on Genocide' (2 Jul 1985), UN Doc E/CN4/Sub2/1985/6, para. 17.

“unstable” world’.<sup>244</sup> The notion is supported with prior UNSC Resolutions in juxtaposition to its role under Article 39 of the UN Charter (perhaps Chapter VII in general), which is to determine any ‘threat to peace’. Bearing in mind the characteristics of the entity that is the UNSC, whatever evaluations it makes, will always be inherently political. Notwithstanding complexities that may arise in that nexus, the UNSC has, as a historical matter, considered certain conduct to be a ‘threat to peace’, and has warranted criminal prosecution. The creations of the ICTR and ICTY exemplify this.<sup>245</sup> It should be noted that conduct on the scale of the genocides in Rwanda and the former Yugoslavia does not *ipso facto* amount to a ‘threat to peace’. However, all violations of fundamental human rights on a wide scale has the potential to be considered a ‘threat to peace’ by the UNSC.

Similar to the notion of ‘shocking the international conscience’, there is no need to draw the finer contours of the current paradigm of the UNSC’s mandate. Departing from the backdrop of Chapter VII of the UN Charter, the UNSC may use ICL to act in answer to certain conduct that gives rise to severe infractions to fundamental human rights. ‘Gendecides’ are coherent with these discourses, seeing as committing gendecidal acts stays in line with the archetypical meaning of genocide; serious personal violence on a widespread level. The ‘Indian gendecide’ provides support for this claim. The gross number of girls ‘missing’ can be regarded as a ‘threat to international peace’. Granted, it could be argued that the ‘Indian gendecide’ is a local issue. It is, however, a form of social sundering with connotations to the global sphere. The destruction does not necessarily ‘stay’ in India. It may create ramifications for the international society in the form of, for example, refugees from the gendecidal conduct, or other spill-over effects that may arise in a globalised world. In turn, this opens for tension between States, which very well may emanate into conflict. Conjointly, ‘gendecides’ can be considered a threat to international peace, and may motivate criminal prohibition.

---

<sup>244</sup> Kenneth Anderson, ‘The Rise of International Criminal Law: Intended and Unintended Consequences’, 20(2) *European Journal of International Law* (2009), pp. 331-358, p. 333.

<sup>245</sup> UNSC Res 827 ‘Tribunal (Former Yugoslavia)’ (25 May 1993), UN Doc S/RES/827 and UNSC Res 955 ‘Tribunal (Rwanda)’ (8 November 1994), UN Doc S/RES/955.

### 6.3 The Problems of Criminalising in the International Arena

The conceptual and philosophical underpinnings of proscribing crimes and taking punitive actions can not easily be encircled. However difficult to define in the abstract, what is attempted here is not to provide a finite answer to ‘what’ justifies a crime in the international arena. This section explores whether constructing ‘gendercide’ as an international infraction stays true to the dominant theories of legitimising international criminal regulation.

It is, notwithstanding the above mentioned, safe to posit that the overall aims with the international criminal justice system are quite different from the ditto in a domestic context. The Rome Statute speaks of the main ambition with ICL being to ‘end to impunity for the perpetrators of the [most serious crimes of concern to the international society as a whole] and thus to contribute to the prevention of such crimes’.<sup>246</sup> Although, the idea behind criminalising and prosecuting separate offences on an international level may serve a plethora of different interests. In this regard, the ICTY has elaborated that retribution and deterrence are of specific importance.<sup>247</sup> It has also asserted the relevance of denunciation and rehabilitation of offenders,<sup>248</sup> along with other, broader objectives.<sup>249</sup> Bearing in mind the nexus between ICL and the global political life, there is also an aspiration with the international criminal justice system to reconcile post-conflict societies, achieve peace, and to record history. There is, in other words, a lot going on when these goals are weighted against each other. This ‘weighing’ operation underlines the complex interconnectivity between formalism and instrumentalism within the field of ICL; whether legal philosophy should assimilate ethical standards or confine itself to an analysis of the ‘law as it stands’. Employing a legal positivist vocabulary, it is the perennial tension between *de lege lata* and *de lege ferenda*. It is not unexpected that the debate concerning ‘gendercide’ tends to reproduce this tension (or perhaps confusion) between what ICL *is* and what it *ought* to be.<sup>250</sup> It should be emphasised that it is not suggested here that ‘gendercide’ should or should not be an international crime. The question here, rather, is whether it could reach a point of

---

<sup>246</sup> Cf. the Preamble to the Rome Statute, see para. 5.

<sup>247</sup> See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A. Judgment, 24 March 2000, para. 185.

<sup>248</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S. Judgment, 2 December 2003, para. 85.

<sup>249</sup> See Robert Cryer *et al*, *supra* n. 100, p. 30.

<sup>250</sup> Cf. Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Leiden, Boston: Martinus Nijhoff Publishers, 2012), p. 221.

recognition as an international crime, departing from the perspective of developments in legal thought on the subject of justifying international criminal regulation.

### 6.3.1 Retribution and Deterrence

On the major themes of justifying criminalisation in the international arena, retribution is oftentimes referred to as of prime importance.<sup>251</sup> Retribution is in this context to be defined so as ‘not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes’.<sup>252</sup> Thereby, a retributive interest focuses on the ‘necessity of punishing those who have violated societal norms’,<sup>253</sup> and not an unmitigated form of *lex talionis*.<sup>254</sup> There are difficulties with attaining retributive effect in an international setting. International crimes are concerned with the most horrendous kind of human behaviour, and whatever the punishment, it is hard to imagine it ever being proportionate to the offence. There is a risk of the punitive outcomes seeming puny when compared to the actual infractions committed. ‘Merely’ hanging Adolf Eichmann appears disparate to all the million lives he was ultimately responsible for taking.<sup>255</sup>

In juxtaposition to retribution, deterrence is also deemed important in justifying international criminal regulation.<sup>256</sup> Deterrence is in this context to be understood as ‘punishment imposed to prevent both the offender and the population more generally from engaging in prohibited conduct’.<sup>257</sup> Given this rationale, punishment and prosecution are used as a means to an end, seeking to prevent new transgressions from being committed. It moreover functions on two specific levels; to deter the perpetrator from committing the same crime again, and to deter society in general from committing the same offence.<sup>258</sup> Problems

---

<sup>251</sup> Mirjan Damaska, ‘What Is the Point of International Criminal Justice?’, 83(1) *Chicago-Kent Law Review* (2008), pp. 329-365, p. 331.

<sup>252</sup> *Aleksovski*, *supra* n. 247, para. 185.

<sup>253</sup> Robert Cryer *et al*, *supra* n. 100, p. 30.

<sup>254</sup> ‘An eye for an eye, a tooth for a tooth’. See *ibid*, p. 31.

<sup>255</sup> Hannah Arendt, *supra* n. 5, p. 159.

<sup>256</sup> Mirjan Damaska, *supra* n. 251, p. 331.

<sup>257</sup> Robert Cryer *et al*, *supra* n. 100, p. 32.

<sup>258</sup> Stanley A. Cohen, ‘An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment’, 27(1) *McGill Law Journal* (1981), pp. 73-91, p. 75.

emerge from this conceptualisation as well. It is worth noting that the construction of deterrence departs from a liberal perspective, viewing human beings as capable of choosing rationally.<sup>259</sup> This thesis, inspired by, post-modern tradition, takes the position that ‘rationality’ is merely a chimaera. The choices of human beings and the perception of ‘rationality’ is the result of a dynamic social process. Undoubtedly, the atrocities committed in the Holocaust were more often than not committed by ‘simple’ humans; not monsters. From today’s perspective, their choices can without a shadow of a doubt be characterised as irrational, evil even, but due to the tangibility of social goods, the choices viewed in their time and place were socially favourable.

These conceptual complexities aside, the relation between a hypothetical, separate crime of ‘gendercide’ and these parameters is somewhat problematic. It could be argued that such a construction would fit squarely within these underpinnings. ‘Gendercide’ is indeed culpable enough, I believe, to be punished as a matter of *ex post*. The nature of the conduct, moreover, is sufficiently abhorrent that it is worth deterring the general public from. Stopping the analysis here is, however, too superficial. The inherent *modus operandi* of ‘gendercides’ will not seldom involve homicide, which already is criminalised. It is not a reasonable assumption to make that hypothetical *génocidaires* of ‘gendercides’ will refrain from genocidal acts, simply due to the legality of their conduct. Thus, these goals can not not be said to be furthered to a discernible, cumulative extent by introducing a stand-alone crime of ‘gendercide’.

### 6.3.2 Denunciation, Rehabilitation and Other Broader Goals

Proscribing a stand-alone crime of ‘gendercide’ would especially support the denunciative function of international criminal regulation. The incremental value of acknowledging ‘gendercide’ as a separate offence lies in the accuracy of the criminal label, to see certain acts for what they are and to provide the tools for the international society to morally, normatively and judicially denounce that type of conduct. That ‘symbolic’ feature has been ever-present in the international criminal justice system. Returning to the historical picture of the post-war proceedings in Nuremberg, it was in their jurisprudence individual responsibility in ICL first was constructed. The underlying logic follows the same scheme today; ‘crimes against

---

<sup>259</sup> Farooq Hassan, ‘The Theoretical Basis of Punishment in International Criminal Law’, 15(1) *Case W. Res. J. Int’l L.* (1983), pp. 39-60, pp. 48-9.

international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can provisions of international law be enforced.’<sup>260</sup> Whatever criticism may be directed towards these proceedings (too few charges, lack of due process and so forth),<sup>261</sup> it is nonetheless clear that it paved the way for new discursive routes for international criminal justice, especially with the construction of individual criminal responsibility. These proceedings express an intimate emblematic feature; the international society coming together to denounce an atrocity in unison. Such a symbolic dimension is still relevant for international criminalisation. Proscribing a crime of ‘gendercide’ enables the international society to internalise the wrongdoing before the perpetrator, the victims and for the globalised world.<sup>262</sup> Prosecuting ‘gendercides’ would raise awareness of the issue, and denounce that type of conduct in the international arena. Conversely, if ‘gendercides’ are not tried, the international society sends a message that the conduct is acceptable – and for whatever reason allowed to prolongate.

There is also the promise of ICL as a path to rehabilitation of offenders into society.<sup>263</sup> This aim, albeit noble, is difficult to imagine bearing much weight, especially in the context of ‘gendercides’. Although, it could be argued that the prosecution of perpetrators of ‘gendercides’ would turn them away from a reality composed of gender-based prejudice and thereby provide a ‘moral word’ for them, on a personal level.

The ICTY also stressed other, broader goals that emanate from an international criminal justice system. First, it noted that it provides routes for victim recognition by virtue of enabling them to see that ‘justice is being done’.<sup>264</sup> Proscribing a separate offence of ‘gendercide’ will not, *stricto sensu*, further that goal. The victims will not be alive to bear witness of such balancing of the scales. However, in an emblematic sense of victim recognition, the current order does not acknowledge the victims’ narratives of what kind of atrocity they have been subject to. Thereby, proscribing a separate crime of ‘gendercide’

---

<sup>260</sup> Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22*, London, 1950, p. 447.

<sup>261</sup> See Christian Tomuschat, ‘The Legacy of Nuremberg’, 4(4) *J. Int’l Crim. Just.* (2006), pp. 830-844, p. 832.

<sup>262</sup> *Prosecutor v. Kordić & Čerkez*, Case No. ICTY-95-14/2-A. Appeal Judgment, 17 December 2004, para. 1080.

<sup>263</sup> *Ibid.*, para. 1079.

<sup>264</sup> Robert Cryer *et al*, *supra* n. 100, p. 37.

would undoubtedly mend that. For instance, through such a legal construction, the voices of the girls in the ‘Indian genocide’ are transposed into the ICL discourse, appropriately considering their narratives.

Second, the ICTY opined that the international criminal justice system ‘creates a dependable historical narrative for the context’.<sup>265</sup> I believe that a trial or the ICL system is not the appropriate setting at all to determine ‘the’ correct historical interpretation. That is because there are no ‘correct’ historical interpretations. Such complexities aside, international prosecution can provide *a* historical narrative. Proscribing a crime of ‘genocide’ would tell the tale that the international society condemns the physical and/or biological destruction of gender groups. There is merit to considering the legacy of the age we live in.

Third, there is empirical research that shows that ‘the ICTY and the ICTR have significantly contributed to peace building in post-war societies, as well as introducing criminal accountability into the culture of international relations’.<sup>266</sup> There is reason to believe that the proscription of a separate crime of ‘genocide’ would contribute to post-conflict reconciliation, particularly in terms of heightening awareness of ‘genocidal’ practices on a local level. It would provide opportunities for promoting cultural transformation as a result of past atrocities, potentially infusing new social values in society at large. That form of transitional justice is particularly relevant in the context of ‘genocides’, seeing as they are the result of social beliefs and prejudices.<sup>267</sup>

### 6.3.3 Does ‘Genocide’ Fit the Conceptual Bases of International Criminal Regulation?

As a point of departure, it should be conceded that the foregoing discussion to a large extent has been speculative. As such, it may call for more research, particularly in relation to the ‘inputs/outputs’ of criminalisation. The limitations inherent in the method, however, renders such empirical questions unanswered here.<sup>268</sup> Nonetheless, viewed against the backdrop of

---

<sup>265</sup> Antonio Cassese, ‘Reflections on International Criminal Justice’, 9(1) *J. Int'l Crim. Just.* (2011), pp. 271-280, p. 273.

<sup>266</sup> Payam Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities’, 95 *Am. J. Int'l L.* 7 (2001), p. 9.

<sup>267</sup> This argument is essentially mirrored in Erin Daly, ‘Transformative Justice: Charting a Path to Reconciliation’, 12(1) *Int'l Legal Persp.* (2001-2002), pp.73-184, pp. 73-5.

<sup>268</sup> Please view Sections 1.5.4 and 7.2.

the major theories of justifying criminalisation in the international arena, I would like to conclude that there are no theoretical obstacles for constructing a stand-alone crime of ‘gendercide’. Such a construction would further the discussed aims of the international criminal justice system – some to a larger degree than others. Thereby, it is coherent with the theoretical underpinnings of criminalisation in ICL. In particular, such a construction denounces more accurately the egregious act of physical or biological destruction of a gender group, and chronicles a phenomenon which oftentimes will amount to infraction of fundamental human rights on an extensive scale. Indeed, since ‘recognising the challenges of, and obstacles to, the effective investigation and prosecution of sexual and gender-based crimes’ has been a core aim for the ICC since 2014, it seems particularly tenable to perceive a stand-alone crime of ‘gendercide’ as in line with criminal regulation in ICL.

#### 6.4 A Battlefield For Hegemonic Interests

The foregoing sections discuss whether criminalisation of ‘gendercide’ is suitable in and of itself. This question has been answered affirmatively. What does this tell us? First of all, the continued omission of including ‘gendercides’ within the ambit of the Genocide Convention ought to, from today’s perspective, be characterised as a *choice*. Ultimately, the current construction, the ‘choice’ made, relates back to the junction between formalism and instrumentalism. Systemically, the Genocide Convention’s construction of the protected groups in Article II is ‘formalist’ in the sense of proposing a certain *a priori* formal matrix of social space. It leans on a token ‘ahistorical’ formal framework defining the legal terrain within which the moot and endless game of contingent inclusions and exclusions occur.<sup>269</sup>

Departing from the notion that proscribing a separate crime of ‘gendercide’ is coherent with the major theories of international criminal regulation, it highlights that the Genocide Convention is in reality cast in an ‘empty container’.<sup>270</sup> The content of the crime of genocide is not predetermined. What ‘genocide’ will mean, what the term will include and what it will exclude (that is, to the extent which and the way women, religious groups, national groups, disabled people and so forth are included or excluded in this structure), is always the result of

---

<sup>269</sup> Judith Butler, Ernesto Laclau and Slavoj Žižek (eds), *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (London: Verso, 2000), p. 110.

<sup>270</sup> The locution ‘empty container’ is borrowed from Slavoj Žižek, see in particular his documentary movies *The Pervert’s Guide to Ideology* and *The Pervert’s Guide to Cinema*.



contingent hegemonic struggle.<sup>271</sup> The empty container emerges as a ‘battlefield’ for hegemonic interests. This battlefield does not set out to reach some fixed content as its ultimate point of arrival, but only has *itself* as an objective, demarcated by the ‘empty container’ that is ‘genocide’. Inherent in the struggle for hegemony, each position of interest seeks to impose its own rationale of inclusion/exclusion, and to denounce other interests as conceptually untrue. That is, advocating that ‘the interest of pursuing protection of marginalised gender groups is most in line with the concept of genocide’ or ‘the four groups enumerated are the only theoretical correct determination of the crime of genocide’. All these rationales are ‘politically salient, not structurally static’.<sup>272</sup> The jurisprudence in the Genocide Convention opts for a culture of formalism. While this may not be adverse *per se*, such a formalist approach risks giving the appearance of the content in the instrument that is the Genocide Convention as determinate and ‘ahistorical’ when that is not the case.

How are we, then, to view the ‘ahistorical’ status of the crime of genocide? I would like to argue that an ‘empty container’ with no determinate meaning signifies only the existence of meaning in itself, in lieu of absence thereof.<sup>273</sup> Seen from this perspective, the crime of genocide is an institution that has no definite, determinate function, but only a negative one of expressing the actuality of the institution as such, instead of its in-existence. Following a Hegelian logic, such a rationale can be characterised as a direct embodiment of the ideological function of painting a ‘neutral’ picture in which all social antagonism is wiped out. Therefore, the ‘hegemonic battlefield’ is a struggle of how the ‘empty container’ is to be determined, and which political interests allowed to signify it. A similar notion is explored in Chapter 2. In the same way the ‘silence’ concerning gender groups in the drafting process speaks, the absence of gender groups in the legal construction of the protected groups does, too. The interest of protecting gender groups from physical and biological destruction is not considered politically relevant; this expresses a counter-hegemonic position. This is, however, not static or determinate, but politically changeable. After having done this analysis, we can now turn to the constructive level, and discuss potential ramifications emanating from the current construction of the crime of genocide.

---

<sup>271</sup> *Ibid*, p. 90, 110.

<sup>272</sup> This argument is derived from Judith Butler, Ernesto Laclau and Slavoj Žižek (eds), *supra* n. 269, p. 110.

<sup>273</sup> See *ibid*, pp. 113-115.

## Part III: Constructive Theory

### 7 A Place for Gender?

#### 7.1 Is it Theoretically Plausible to Include Gender Groups as Protected?

In the following section, I will put emphasis on some aspects, reflections and conclusions on the theoretical plausibility of including gender groups as a protected group in the Genocide Convention. The undertaking will be carried out through exposing potential ramifications of the omission to include gender groups as a protected group under Article II of the Genocide Convention, inspired by reasoning from feminist legal theory and post-modern research in ICL. The underlying premise is that the ramifications emerge as problematic in the sense that they provide support for the claim that the Genocide Convention is unnecessarily narrow concerning the groups it grants protection; in particular to gender groups. Thereby, by virtue of their existence, the problems enable a hypothetical inclusion of gender groups as protected to appear theoretically plausible. It should yet again be underlined that my ‘constructive’ approach does not carry the pretence that what is needed is to ‘construct’ additional policies and rules. I do not intend to advocate ‘let us just criminalise gendercide as genocide already!’. Rather, I seek to contribute to a better understanding of what transpires beneath the façade of the implementation and application of Article II of the Genocide Convention – particularly in relation to gender groups.<sup>274</sup>

##### *7.1.1 The ‘Expressivist’ Function and the Legitimacy of the Construction of Genocide*

Simply expanding the Genocide Convention is a problematic venture. Indeed, ‘[d]iluting the definition, either by formal amendment of its terms or by extravagant interpretation of the existing text, risks trivialising the horror of the real crime when it is committed’.<sup>275</sup> This is a legitimate apprehension. Stuart Stein opines that the analysis of scholars probing ‘other-cides’

---

<sup>274</sup> This argument is heavily inspired by Martti Koskenniemi. In this regard, see Martti Koskenniemi, *supra* n. 6, p. 730. Also, see above Section 1.2.

<sup>275</sup> William A. Schabas, *supra* n. 42, p. 133. See also Dianne Marie Amann, *supra* n. 175, p. 95 (‘Extending protection to too many groups could upset the singular status of the proscription against genocide; denying it to deserving groups could undermine the tribunal’s authority’).

often [is] directed toward, or ends with, establishing that the mass killing cluster under consideration meets the definitional parameters of genocide, however defined. [...] What I wish to indicate is that establishing ‘genocidal credentials,’ or, in some cases their absence, is often considered to be of paramount importance, or necessary, by their authors.<sup>276</sup>

I do not seek to establish such ‘genocidal credentials’. The backdrop produced in Parts I-II attempts to highlight that the omission to protect gender groups under the Genocide Convention is an unreasonable restriction. The definition of ‘gendercide’ elaborated herein deviates from the definition of the crime of genocide in only one aspect; in terms of the protected groups. The analysis is faithful to the core concept of genocide, and only advocates the application of genocide in its prototypical meaning – to cover acts intended to destroy a human group ‘as such’. The thesis thereby joins those scholars who argue that the failure to encompass other groups than the four enumerated has caused the Convention to become ‘conceptually confused’.<sup>277</sup>

It is commonplace to argue that too wide a conceptualisation may render the crime of a genocide, in the eyes of the public, as less serious, or diminish the value-based signals it sends. However, the very same danger to the legitimacy of the legal construct may emerge if it is too narrow in its scope. If that is the case, the construction runs a risk of undermining what Dianne Marie Amann calls the ‘expressivist’ function of criminalising genocide, given that legal constructions reflect the broader social and political discourses in which they operate.<sup>278</sup> As such, it is of paramount importance that the way genocide is judicially constructed corroborates with the social and political reality in which it exists. Should there be a discord, the crime risks losing legitimacy as it may be seen as outdated and arbitrary. That is why the argument that the drafters of the Genocide Convention wanted to encompass ‘national minorities’, and that the enumerated groups are different faces of that concept, must be disregarded. Even if the drafters wanted to protect national minorities, it does not mean that the content of the Genocide Convention is determinate. The intention of the drafters almost seventy years ago can not justify the choices we make concerning the crime of genocide today. Referring to intellectual distinctions on a theoretical level obscures the fact

---

<sup>276</sup> Stuart Stein, ‘Geno- and Other Cides: a Cautionary Note on Knowledge Accumulation’, 4(1) *Journal of Genocide Research* (2002), pp. 39-63, p. 44.

<sup>277</sup> Matthew Lippman, *supra* n. 64, p. 505.

<sup>278</sup> See Dianne Marie Amann, *supra* n. 175, p. 93.

that the question of which groups to protect is, essentially, a political one. Genocide instrumentalises values and interests that are sustained by beliefs about the world. It is problematic when the values and interests allowed to permeate the Genocide Convention is in divergence with those expressed in the ‘new’ world.

Notably, as times change, ‘reality’ and discourses regarding what is worth protecting change with it. It is understandable why gender groups were not included at the drafting of the Convention. In the mid-1940s, amidst the smouldering ruins of the Second World War, the concepts of gender equality, gender discrimination and gender *per se* were not widely regarded as interests worthy of protection.<sup>279</sup> The current discourses in international law do not, however, carry the same lethargy towards gender issues. Gender is covered in all major human rights treaties. The current construction of the protected groups can thereby be said to be in divergence to the international human rights system. The important point to draw here is that the inclusion of gender groups in the international human rights system underlines political ambition to combat gender-based discrimination. It is reasonable to assume that such political will to protect gender groups from genocide exists, too. There is, however, a clash between the interest of combating gender-based discrimination on a genocidal level and the interest of States to limit the *erga omnes* obligation of genocide. How are we to view this ‘clash’ between political impetus and the State reluctance on the basis of the *erga omnes* obligation? The answer, I believe, lies in the ‘expressivist’ function of genocide. For the crime to retain its legitimacy, it must fit changing social and political trajectories. Thereby, it is necessary to calibrate the crime of genocide in relation to the changing discourses so they corroborate, inasmuch it is possible, to ensure that the believability in the judicial construct is preserved. An inclusion of gender groups as protected under Article II could support such an undertaking.

### 7.1.2 *The Impact on How Contemporary Atrocities Are Dealt With*

There is little, if any, sign today that genocides are on the wane. As argued above, it is important that the construction of genocide sustains anchoring in social development. The ‘gendericidal’ practices in India studied in Section 6.2.1 fulfil both the *mens rea* and *actus reus* requirements of the crime of genocide in all aspects but one; that of the protected groups.

---

<sup>279</sup> Simone de Beauvoir, *The Second Sex* (New York: Vintage Books, 1952), is often regarded as the starting point for second-wave feminism. For perspective, this seminal contribution was not published until 1949.

However, in the world today, the ‘Indian gendercide’ – and more broadly serious personal violence directed towards women – can be one of two things. It can either never be genocide, because gender is not categorised within the canon of Article II, or it can only be genocide if gender is ancillary to a national, racial, ethnical or religious group. This is problematic on two levels. First, the ‘failure to protect [...] other groups compromises the integrity of the Treaty and unreasonably restricts the scope of the crime of genocide’.<sup>280</sup> Second, in terms of victim recognition, the current order does not acknowledge the victims’ experiences of what kind of atrocity they have been subject to. It is not unrealistic that ‘gendercides’ could emerge in other places. The ‘Indian gendercide’ is hardly unique. The practices in impoverished areas in China during its one-child policy were virtually identical.<sup>281</sup> Right now, the State failing to protect transgender persons in Russia from being persecuted accentuate the vulnerability that may emanate from one’s gender.<sup>282</sup> These narratives reflect a form of victimisation that ought to be accounted for in ICL for it to be *à jour* with contemporary atrocities. An inclusion of gender groups as protected under the Genocide Convention could promote such a venture.

### 7.1.3 The ICL System Is Substantively Gendered

The gendercide framework actualises chiefly in respect to women, as it is women who most commonly are exposed to ‘gendercidal’ practices, much due to structural positions of inequality. That is, for example, the case in the ‘Indian gendercide’. Fundamentally, the issue of ‘gendercide’ concerns women’s rights and women’s right to existence. The current construction of genocide renders this ‘women’s issue’ unworthy of protection. Thereby, it brushes aside the narratives of atrocities suffered by women. In that, it provides proof that the ICL system is gendered by being based on the realities of male lives.<sup>283</sup> The groups worthy of protection in the Genocide Convention (and the ancillary group members) are gendered to

---

<sup>280</sup> Matthew Lippman, *supra* n. 64, p. 507.

<sup>281</sup> Susan Tiefenbrun, Christie J. Edwards, ‘Gendercide and the Cultural Context of Sex Trafficking in China’, 32(3) *Fordham Int’l L.J.* (2009), pp. 731-780, p. 732.

<sup>282</sup> Cf. Brian Kritz, ‘The Global Transgender Population and the International Criminal Court’, 17(1) *Yale Hum. Rts. & Dev. L.J.* (2014), pp. 1-38, p. 3.

<sup>283</sup> For more on this theme, see Matilda Arvidsson, *The Subject in International Law: The Administrator of the Coalition Provisional Authority of Occupied Iraq and its Laws* (Lund: Lund University, 2016) and Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law* (Manchester: Manchester University Press, 2000).

suit atrocities that has befallen men. Such a construction is problematic. The ICL system, and the canon of protected groups in the Genocide Convention, are the creations of human beings, with its ultimate concern being individual behaviour. It is thought of in terms of a neutral construction that is to be 'equitably' applied, or just as the result of a rational decision; but it is not so. ICL is permeated by the choices between contesting values and policy interpretations. Drawing from feminist legal theory, the absence of women in genocide law produces a narrow and insufficient jurisprudence that legitimises the unequal position of women worldwide rather than facing it; sustaining patriarchal structures. In consequence, the experiences of women are denied access to the continued shaping of ICL, its aims and its content. If one believes that such an order is politically and morally cumbersome; constructing gender groups as protected within the Genocide Convention could serve as a first step in combating such structures.

Resolving these issues should not be faced with over-confidence to the effects of policy changes. A construction that accounts for the experiences of women living such atrocities does not automatically mean that women, or other marginalised gender groups, have gained access to the ICL system on a larger scale. More acute is rather which interests that are allowed to permeate the 'types' of people regarded as worthy of protection in a legal discourse. These problems go beyond how policies are phrased. Currently, however, in the words of the feminist scholar Catharine MacKinnon, 'atrocities committed against women are either too human to fit the notion of female or too female to fit the notion of human'.<sup>284</sup>

#### *7.1.4 The Creation of (Stereo)Types*

The element of targeting a particular group is of central interest within the genocide discourse. In consequence, ICL has had to enter into the precarious domain of elaborating what constitutes these groups in the first place. The problem here is that groups are social phenomena and can not be described, quantified or measured as were they material objects. Trying to do so is how typologies of humans are socially constructed. Inherent in this process is a 'search for coherence', hinged to vague indicators of group affinity, open for interpretation in and of themselves.<sup>285</sup> It does not require a lot of thinking to realise that these

---

<sup>284</sup> Catharine MacKinnon, 'Rape, Genocide and Women's Human Rights', 17(1) *Harvard Women's Law Journal* (1994), pp. 5-16, p. 7.

<sup>285</sup> Aviam Soifer, *supra* n. 140, p. 4.

social procedures enable stereotypes, which arise from processes of categorisation, where simplicity and order is attempted to be introduced where there is complexity and nearly random variation.<sup>286</sup> The thought that different ‘races’ or ‘ethnic’ groups exist in an objective manner is a heavily outdated notion. ICL has, quite cleverly, solved that issue by virtue of constructing the subjective approach in matters of group identification. Still, complexities ensue. First, it has been argued that the socially constructed labels ‘race’ and ‘ethnicity’ were created in the 20<sup>th</sup> century to support undertakings of colonisation and domination.<sup>287</sup> Thereby, if such collectives exist as quite vicious social constructs, should ICL protect them ‘as such’, instead of labelling them historically constructed collectives? The genocide in Rwanda underlines these complexities. The genocide itself affirmed colonialist claims; that the Tutsi is an ethnic group. Despite prosecuting the Hutu *génocidaires* and thereby ‘protecting’ the Tutsi group, the post-genocide government shied away from acknowledging that ethnicity itself lies at the heart of the problem.<sup>288</sup>

Secondly, there is the problem that ICL may reinforce characteristics that are oppressive *per se* within these groups, which can emanate from an attempt to protect certain groups. The intersection of gender to this rationale is highly relevant here. Turning to historical genocides, the notion that the Tutsi or Bosnian Muslim groups were destroyed through the use of rape because the rape victims (who were women) would be excluded from the collective appears to crystallise traits that undoubtedly oppress women inside the group. The assumption here is that the dissolution of the target group is, in part, the result of an internal process where the group members take part in its own destruction. This is achieved through the belief of a gender *vis-a-vis* gender antagonism that augment the scheme of the *génocidaires*. To hold such traits as natural truths of ethnicity render them invisible and makes them harder to contest, as a consequence of being incorporated in the narrative of victimisation. The

---

<sup>286</sup> Henri Tajfel, *Human Groups and Social Categories: Studies in Social Psychology* (Cambridgeshire: Cambridge University Press, 1981), p. 132.

<sup>287</sup> Frédéric Mégret, ‘International Criminal Justice: A Critical Research Agenda’ in Christine Schwöbel (eds) *Critical Approaches to International Criminal Law: An Introduction* (New York: Routledge, 2014), pp. 17-54, p. 40.

<sup>288</sup> Nigel Eltringham, ‘The Past Is Elsewhere: The Paradoxes of Proscribing Ethnicity in Post-Genocide Rwanda’ in Scott Straus and Lars Waldorf, eds. *Remaking Rwanda* (Madison: University of Wisconsin Press: 2011), pp. 269-282.

incorporation may oversimplify, even caricature ‘ethnicity’ and gender alike, through constructing Bosnian Muslim and Tutsi men as inherently prone to exclude rape victims.<sup>289</sup>

The complexities above show that applying and approaching the categorisation of people always creates *types*. In dealing with different types of human beings, there is the inherent risk of creating stereotypes, which may reproduce oppressive traits and operate to sustain *status quo* orderings. This relates to the theoretical plausibility of including gender groups within the ambit of the Genocide Convention in the sense that an addition of ‘gender’ to the canon of protected groups would add a dimension to the ‘face’ of the protected groups. In that, the addition could expand the imagined victim subject(s), diminishing the risk of constructing stereotypes due to a narrowly construed legal framework.

#### *7.1.5 The Tension Between Formalism and Instrumentalism*

The current legal architecture of the protected groups in the Genocide Convention highlights the tension between formalism and instrumentalism within ICL. The schism is important in answering what the crime of genocide, and more broadly ICL, is for. In this regard, Martti Koskenniemi notes that,

[f]rom the instrumental perspective, international law exists to realise objectives of some dominant part of the [international society]; from the formalist perspective, it provides a platform to evaluate behaviour, including the behaviour of those in dominant positions. The instrumental perspective highlights the role of law as social engineering, formalism views it as an interpretative scheme.<sup>290</sup>

The current order in the international society ‘is not one of pre-established harmony or struggle but of both cooperation and conflict simultaneously’.<sup>291</sup> Thereby, ‘[a] form and a process is needed that channels interpretative conflicts into peaceful avenues’.<sup>292</sup> There are quite substantial problems inherent in pragmatic instrumentalism. There is ‘the extreme case of the “war against terrorism” to canvas the slippery slope from anti-formal reasoning to

---

<sup>289</sup> Frédéric Mégret, *supra* n. 287, p. 41.

<sup>290</sup> Martti Koskenniemi, *supra* n. 3, p. 255.

<sup>291</sup> *Ibid.*, p. 249.

<sup>292</sup> *Ibid.*



human rights violation'.<sup>293</sup> As such, it seems appropriate to opt for a prevailing view of legal formalism in lieu of an instrumental ditto.

The prevalent formalist conceptualisation of the crime of genocide can thereby be understood as a form of protection from the imposition of objectives of some dominant part of the international society. However, a too formalist approach is a recipe for indifference and may risk turning the judicial construction stale. Formalism needs to be followed with a waking appreciation of its political underpinnings. There is thus reason to move beyond the dichotomy of formalism *vis-à-vis* instrumentalism in order to strike a balance between the different interests that ICL represent.<sup>294</sup> A starting point for such a quest could be to recognise ICL as a 'political project', acknowledging openly the 'battlefield for hegemony'.<sup>295</sup>

Inherent is the realisation that there is no fixed set of objectives, purposes or principles that can be unearthed 'outside' or externally from ICL *per se*.<sup>296</sup> Instead, these objectives can not be anything than those of different legal actors with different hegemonic quests. ICL, and the crime of genocide, is an instrument, but what it is an instrument for can not be settled in isolation from the political processes of which it is a complex part of. That is why the objectives of ICL and its criminal constructions, moreover, is *ICL in itself*, and as a promise of 'justice'. ICL and justice are connected in the conduct of legal actors, 'paradigmatically in the legal judgement'.<sup>297</sup> The judgment, however, is insufficient to 'bridge' positive law and justice. Therefore, in the rift between ICL and justice lies the inevitable realm of politics law. It must be so, or else law becomes sheer positivity. That is why the question of whether including gender groups under the Genocide Convention is theoretically plausible should be addressed for what it is. It is not about objectives from diplomatic instruments or academic treatises, it is a question of political struggle. In turn, the 'true' inquiry becomes; is it politically motivated to protect gender groups from genocide? That, I would like to argue, should be answered affirmatively – and it is this rationale that renders an inclusion of gender groups as protected under the Genocide Convention to appear theoretically plausible.

---

<sup>293</sup> *Ibid*, pp. 249-250.

<sup>294</sup> Cf. Mikael Baaz, 'Human Rights or Human Wrongs? Towards a "Thin" Universal Code of Human Rights for the Twenty-first Century', 20(2) *Juridisk Tidskrift* (2008/2009), pp. 411-433.

<sup>295</sup> Cf. Martti Koskenniemi, *supra* n. 3, p. 263.

<sup>296</sup> *Ibid*, p. 263.

<sup>297</sup> *Ibid*, p. 263-264.

## 7.2 Suggestions for Further Research

It falls outside the scope of the thesis to provide policy recommendations or to suggest what practically ‘should’ be done. I have made such a decision in order to not having my work reduced to *just* a proposal. I could have suggested that the ‘best way forward’ is to create an Optional Protocol to the Genocide Convention that States could ratify, if they wanted to. That, I will not do. The purpose of the thesis is to investigate whether including gender groups as a protected group in the Genocide Convention is theoretically plausible. My hope is that pointing to the theoretical plausibility of including gender groups as protected in the Genocide Convention provides a meaningful contribution as concerns the application of the concept of genocide to gender groups. Notably, such an investigation is achieved without making policy claims. As an ancillary contribution, I wish to contribute to future research of similar issues. As such, I will provide suggestions for further research, justified by my study.

Throughout, the thesis has underlined close nexus between ICL and politics. The suggestions will continue in a similar vein. First, an interesting quest would be to ponder the relation between ‘gendercide’ as a theoretical framework and civil-society-based resistance. Actualising ‘gendercide’ against the backdrop of resistance could, more than studying the interconnectivity between genocide and gender, uncover strategies of the negotiation of gendered norms. The research could, ultimately, contribute with knowledge about how resistance can achieve social change. Such a point of departure could be very fruitful in the setting of the Genocide Convention, as it surely can be used as a tool for resistance.<sup>298</sup> Against this background, it could also prove beneficial to deviate from the paradigmatic form of studying genocide, which is essentially people sitting in libraries reading what other people in libraries have written. There is reason for future research to employ a ‘multisited ethnography’; to study the phenomenon in various spaces. This could sketch a nuanced picture of what ‘gendercides’ are, and how people who live them perceive them. Lastly, it is my contention the analytical framework developed herein is generalisable. Thereby, I believe it capable of being applied onto other collectives. It would be interesting to further challenge the underpinnings of the four enumerated groups as *sui generis*, through actualising people with disabilities, or perhaps groups based on sexual orientation in light of this discussion.

---

<sup>298</sup> This could, for example, occur through the same mechanisms as the Russell Vietnam War Crimes Tribunal. Cf. Marcos Zunino, ‘Subversive Justice: The Russell Vietnam War Crimes Tribunal and Transitional Justice’, 10(2) *International Journal of Transitional Justice* (2016), pp. 211-229.

## 8 Completion

The Genocide Convention acknowledges that some facets of collective life are constitutional for human identity to the extent that freedom from physical and biological destruction is warranted to ensure their existence ‘as such’. At its core, ICL is a consent-based system. Its survival is dependent upon States accepting not only its jurisprudence – but also the moral and political ramifications thereof. The concept of ‘gendercide’, and its interconnectivity with genocide, ostensibly emerge as problematic for the international society as a whole and ICL in a systemic manner. The complexities surfaced here are of a wholly political character. That is not inherently detrimental, but ICL should be responsive enough to handle contemporary challenges. If it does not, it runs a risk of throwing a shade of illegitimacy over the entire system. In the same way that the criminal label ‘murder’ can not accurately communicate the atrocities transpired in the Holocaust, it can not accurately describe ‘gendercide’. With that said, it should not be interpreted that introducing a ‘new’ crime of ‘gendercide’ is a cure-all for such dilemmas. Not at all. There is reason to stress that, even though ‘gendercide’ fits the theoretical underpinnings of international criminal regulation, these issues ought not to be faced with over-confidence to the effects of policy changes. A construction that accounts for the reality of such conduct does not automatically render the issue of ‘gendercide’ resolved. ICL is an insufficient system to cure all the woe in the world. Nor should it be anticipated to be able to. The law, and perhaps especially ICL, will always provide inadequate tools for dealing with genocide. Indeed, in the words of Hannah Arendt:

For these crimes, no punishment is severe enough. It may as well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems.<sup>299</sup>

Notwithstanding the imperfections of ICL, there is reason to do something rather than nothing. Apathy, too, takes its toll. The omission to protect gender groups from genocide is a *choice*. This political choice is purchased at the cost of lost legitimacy of ICL. That is a price, as it stands today, it can not afford to pay. Let us return to the narrative in the introduction; the

---

<sup>299</sup> Hannah Arendt to Karl Jaspers, *Hannah Arendt-Karl Jaspers Correspondence 1926-1969*, ed. Lotte Kohler and Hans Saner, (New York: Mariner Books 1992), p. 54.

community who adopted a one-child policy, with the ancillary requirement that this one child must be male. Legal terminology of inclusion and exclusion transforms and renders the victim group less worth protecting than national, ethnical, racial and religious groups. The attack on the group – the girls of the community – remains unseen.

Drawing from feminist legal theory, the current construction of the protected groups in the Genocide Convention provides substantial proof for the gendered nature of the ICL system by being based on the realities of male atrocities. Furthermore, it explicates a systemic favouritism of gender discrimination over discrimination on the basis of nationality, ethnicity, race or religion. In the end, the omission to protect gender groups from genocide represents a lacuna within ICL. If one believes that this lacuna ought to be filled, an inclusion of gender groups as protected in the Genocide Convention appears theoretically plausible. After all, to quote Raphael Lemkin, ‘if the destruction of human groups is a problem of international concern, then such acts should be treated as crimes under the law of nations’.<sup>300</sup>

---

<sup>300</sup> Raphael Lemkin, *supra* n. 49, p. 146.

# Bibliography

## Books

- Aravamudan, Gita. *Disappearing Daughters: The Tragedy of Female Foeticide*. New Delhi: Penguin Books, 2007.
- Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil*. New York: Viking Press, 1963.
- Arvidsson, Matilda. *The Subject in International Law: The Administrator of the Coalition Provisional Authority of Occupied Iraq and its Laws*. Lund: Lund University, 2016.
- Asp, Petter, Ulväng, Magnus and Jareborg, Nils. *Kriminalrättens grunder [The Foundations of Criminal Law]*. Uppsala: Iustus förlag, 2010.
- Baaz, Mikael, Lilja, Mona and Vinthagen, Stellan (eds). *Researching Resistance and Social Change: A Critical Approach to Theory and Practice*. London: Rowman and Littlefield, 2017.
- Baaz, Mikael. *The Use of Force and International Society*. Stockholm: Jure Förlag AB, 2017.
- Beauvoir, Simone de. *The Second Sex*. New York: Vintage Books, 1952.
- Bull, Hedley and Watson, Adam (eds). *The Expansion of International Society*. Oxford: Clarendon Press, 1984.
- Butler, Judith. *Gender Trouble*. New York: Routledge, 1990.
- Butler, Judith, Laclau, Ernesto and Žižek, Slavoj (eds). *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*. London: Verso, 2000.
- Brody, Reed and Ratner, Michael. *The Pinochet Papers – The Case of Augusto Pinochet in Spain and Britain*. London: Kluwer, 2000.
- Cassese, Antonio, Acquaviva, Guido, Akande, Dapo, Baig, Laurel, Bing, Jia Bing, Cryer, Robert, Dé, Urmila, Gaeta, Paola, Geneuss, Julia and Gustafson, Katrina. *The Oxford Companion to International Criminal Justice*. Oxford: Oxford University Press, 2009.
- Chalk, Frank and Jonassohn, Kurt (eds). *The History and Sociology of Genocide*. New Haven: Yale University Press, 1990.

- Charlesworth, Hilary and Chinkin, Christine. *The Boundaries of International Law*. Manchester: Manchester University Press, 2000.
- Cryer, Robert, Friman, Håkan, Robinson, Darryl and Wilmshurst, Elizabeth. *An Introduction to International Criminal Law and Procedure*. Cambridge UK: Cambridge University Press, 2014.
- Dahlberg-Larsen, Jørgen. *Pragmatisk Retsteori* (København: Jurist & Økonomforbundets forlag, 2001).
- Drost, Pieter N. *The Crime of State: Vol. II – Genocide*. Leiden: A.W Synthoff, 1959.
- Eboe-Osuji, Chile. *International Law and Sexual Violence in Armed Conflicts*. Leiden, Boston: Martinus Nijhoff Publishers, 2012.
- Eboe-Osuji, Chile (ed). *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*. Leiden, Boston: Martinus Nijhoff Publishers, 2010.
- Fairclough, Norman. *Analysing Discourse: Textual Analysis for Social Research*. New York: Routledge, 2003.
- Feldman, Ilana and Ticktin, Miriam (eds). *In the Name of Humanity: The Government of Threat and Care*. London: Duke University Press, 2010.
- Guibernau, Montserrat and Rex, John. *The Ethnicity Reader: Nationalism, Multiculturalism and Migration*. Oxford: Polity, 1997.
- Gunnarsson, Åsa and Svensson, Eva-Maria. *Genusrättsvetenskap*. Lund: Studentlitteratur, 2009.
- Haraway, Donna. *Simians, Cyborgs and Women. The Reinvention of Nature*. New York: Routledge, 1991.
- Jones, Adam. *Gendercide and Genocide*. Nashville: Vanderbilt University Press, 2004.
- Jones, Adam. *New Directions in Genocide Research*. London: Routledge, 2012.
- Kittichaisaree, Kriangsak. *International Criminal Law*. Oxford: Oxford University Press, 2001.

- Kohler, Lotte and Saner, Hans (eds). *Hannah Arendt-Karl Jaspers Correspondence 1926-1969*. New York: Mariner Books, 1992.
- Korling, Fredric and Zamboni, Mauro. *Juridisk metodlära [Legal Methodology]*. Lund: Studentlitteratur, 2013.
- Koskeniemi, Martti. *The Politics of International Law*. Oxford: Hart Publishing, 2011.
- Lacey, Nicola. *Unspeakable Subjects – Feminist Essays in Legal and Social Theory*. Oxford: Hart Publishing, 1988
- Lemkin, Raphael. *Axis Rule in Occupied Europe*. Washington: Carnegie, 1944.
- Luhmann, Niklas. *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft [Social Structure and Semantics. Studies on the Knowledge Sociology of Modern Society]*, 3rd edition. Frankfurt am Main: Suhrkamp, 1989.
- Lundquist, Lennart. *Demokratins Vaktare [The Guardians of Democracy]*. Lund: Studentlitteratur, 1998.
- Lundquist, Lennart. *Det vetenskapliga studiet av politik [The Scientific Study of Politics]*. Lund: Studentlitteratur, 1993.
- Moberg, Andreas. *Om Villkorsklausuler*. Uppsala: Iustus, 2009.
- Nersessian, David L. *Genocide and Political Groups*. Oxford: Oxford University Press, 2010.
- Novic, Elisa. *The Concept of Cultural Genocide: An International Perspective*. Oxford: Oxford University Press, 2016.
- Schabas, William A. *Genocide in International Law*. Cambridge UK: Cambridge University Press, 2009.
- Sekher, T.V and Hatti, Neelambar (eds). *Unwanted Daughters: Gender Discrimination in Modern India*. New Delhi: Rawat Publications, 2010.
- Soifer, Aviam. *Law and the Company We Keep*. Cambridge: Harvard University Press, 1995.
- Staub, Ervin. *The Roots of Evil – The Origins of Genocide and Other Group Violence*. Cambridge: Cambridge University Press, 1989.

- Tajfel, Henri. *Human Groups and Social Categories: Studies in Social Psychology*. Cambridgeshire: Cambridge University Press, 1981.
- Taylor, Telford. *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10*. Buffalo: WS Hein, 1949.
- Totani, Yuma. *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*. Cambridge: Harvard University Asia Center, 2009.
- Van Dijk, Teun A. *Ideology: A Multidisciplinary Approach*. London: SAGE Publications, 1998).
- Warren, Mary Anne. *Gendercide: The Implications of Sex Selection*. Maryland: Rowman and Littlefield, 1985.
- Werle, Gerhard and Jessberger, Florian. *Principles of International Criminal Law*, 3rd edition. Oxford: Oxford University Press, 2014.
- Wittgenstein, Ludwig. *Philosophical Investigations*. Oxford: Blackwell, 1953.
- Yudell, Michael. *Race Unmasked: Biology and Race in the Twentieth Century*. New York: Columbia University Press, 2014.

## Chapters

- Eltringham, Nigel. 'The Past is Elsewhere: The Paradoxes of Proscribing Ethnicity in Post-Genocide Rwanda'. In Straus, Scott and Waldorf, Lars. *Remaking Rwanda*. Madison: University of Wisconsin Press, 2011, pp. 269-282.
- Glavå, Mats and Petrusson, Ulf. 'Illusionen om rätten! – juristprofessionen och ansvaret för rättskonstruktionerna [The Illusion of Law! – The Lawyer's Profession and the Responsibility for the Legal Constructions]'. In Askeland, Bjarte and Bernt, Jan-Fridthiof (eds), *Erkjennelse og engasjement: minneseminar for David Roland Doublet (1954-2000) [Recognition and Engagement: Memorandum of David Roland Doublet (1954-2000)]*. Bergen: Fagbokforlaget, 2002, pp. 109-151.
- Kimminich, Otto. History of the Law of Nations Since World War II. In *Encyclopaedia of Public International Law* by Rudolf Bernhardt (eds). New York: North Holland, 1993, pp. 252-262.



Laban Hinton, Alexander. 'The Dark Side of Modernity'. In Laban Hilton, Alexander (ed) *Annihilating Difference: The Anthropology of Genocide*. Berkeley: University of California Press, 2002, pp. 1-43.

Lampe, Ernst-Joachim. 'Verbrechen gegen die Menschlichkeit [Crimes Against Humanity]'. In Hirsch, Hans-Joachim (ed). *Festschrift für Günter Kohlmann zum 70. Geburtstag [Homage Volume for Günther Kohlmann, on his 70th birthday]*. Köln: Verlag Dr. Otto Schmidt, 2003. pp. 147-176.

Mégret, Frédéric. 'International Criminal Justice: A Critical Research Agenda'. In Schwöbel, Christine (ed). *Critical Approaches to International Criminal Law: An Introduction*. New York: Routledge, 2014, pp. 17-54.

Sartre, Jean-Paul. 'On Genocide'. In Falk, Richard A., Kolko, Gabriel and Lifton, Robert Jay (eds). *Crimes of War* New York: Random House, 1971, pp. 534-550.

## Articles

Akhavan, Payam. 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities'. In 95(1) *American Journal of International Law* (2001), pp. 7-31.

Amann, Dianne Marie. 'Group Mentality, Expressivism and Genocide'. In 2(2) *International Criminal Law Review* (2002), pp. 93-144.

Anderson, Kenneth. 'The Rise of International Criminal Law: Intended and Unintended Consequences'. In 20(2) *European Journal of International Law* (2009), pp. 331-358.

Baaz, Mikael. Human Rights or Human Wrongs? Towards a 'Thin' Universal Code of Human Rights for the Twenty-first Century. In 20(2) *Juridisk Tidskrift* (2008/2009), pp. 411-433.

Bednar, Nicholas R. and Penland, Margaret. 'Asylum's Interpretative Impasse: Interpreting Persecution and Particular Social Group Using International Human Rights Law'. In 26(1) *Minnesota Journal of International Law* (2017), pp. 145-188.

Brownlie, Ian. 'The Rights of Peoples in Modern International Law.' In 9(2) *Bulletin of the Australian Society of Legal Philosophy* (1985), pp. 104-119.

- Beres, Loui Rene. 'Justice and Realpolitik: International Law and the Prevention of Genocide'. In 33(1) *American Journal of Jurisprudence* (1988), pp. 123-160.
- Carpenter, Charli. 'Beyond "Gendercide": Incorporating Gender into Comparative Gendercide Studies'. In 6(4) *The International Journal of Human Rights* (2002), pp. 77-101.
- Cassese, Antonio. 'Reflections on International Criminal Justice'. In 9(1) *Journal of International Criminal Justice* (2011), pp. 271-280.
- Cohen, Stanley A. 'An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment'. In 27(1) *McGill Law Journal* (1981), pp. 73-91.
- Cosmides, Leda, Tooby, John and Kurzban, Robert. 'Perceptions of Race'. In 7(4) *Trends in Cognitive Sciences* (2003), pp. 173-179.
- Daly, Erin. 'Transformative Justice: Charting a Path to Reconciliation'. In 12(1) *International Legal Perspective* (2001-2002), pp. 73-184.
- Damaska, Mirjan. 'What Is the Point of International Criminal Justice?' In 83(1) *Chicago-Kent Law Review* (2008), pp. 329-365.
- Garet, Ronald R. 'Communitarity and Existence: The Rights of Groups'. In 56(5) *Southern California Law Review* (1983), pp. 1001-1078.
- Harff, Barbara and Gurr, Ted Robert. 'Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases Since 1945'. In 32(3) *International Studies Quarterly* (1988), pp. 351-371.
- Hassan, Farooq. 'The Theoretical Basis of Punishment in International Criminal Law'. In 15(1) *Case Western Journal of International Law* (1983), pp. 39-60.
- Holslag, Anthonie. 'The Process of Othering from the "Social Imaginaire" to Physical Acts: an Anthropological Approach'. In 9(1) *Genocide Studies and Prevention* (2015), pp. 96-113.
- Holter, Øystein. 'A Theory of Gendercide'. In 4(1) *Journal of Genocide Research* (2002), pp. 11-38.

- Kaptein, Hendrik. 'Legal Progress Through Pragma-Dialectics? Prospects Beyond Analogy and E Contrario'. In 19(4) *Argumentation* (2005), pp. 497-507.
- Koskenniemi, Martti. 'What is Critical Research in International Law? Celebrating Structuralism'. In 29(3) *Leiden Journal of International Law* (2016), pp. 727-735.
- Kritz, Brian. 'The Global Transgender Population and the International Criminal Court'. In 17(1) *Yale Human Rights and Development Law Journal* (2014), pp. 1-38.
- Lemkin, Raphael. 'Genocide as a Crime under International Law'. In 41(1) *American Journal of International Law* (1947), pp. 145-151.
- Luban, David. 'A Theory of Crimes Against Humanity'. In 29(1) *Yale Journal of International Law* (2004), pp. 85-168.
- Lippman, Matthew. 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later'. In 15(2) *Arizona Journal of International and Comparative Law* (1998), pp. 415-514.
- MacKinnon, Catharine. 'Rape, Genocide and Women's Human Rights'. 17(1) *Harvard Women's Law Journal* (1994), pp. 5-16.
- Moberg, Andreas. 'Liv'. In 8(1) *No Foundations: An Interdisciplinary Journal of Law and Justice* (2011), pp. 135-141.
- Moi, Toril. 'Vad är en kvinna? Kön och genus i feministisk teori [What is a woman? Sex and Gender in Feminist Theory]'. In 35(1) *Res Publica* (1995), pp. 71-158.
- Nersessian, David L. 'The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention'. In 36(2) *Cornell International Law Journal* (2003), pp. 293-328.
- Ratner, Steven R. 'The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity'. In 92(1) *American Society of International Law Proceedings* (1998), pp. 1-2.
- Schabas, William A. 'Genocide and Political Groups by David L. Nersessian [Reviews]'. In 21(1) *Finnish Yearbook of International Law* (2010), pp. 345-352.

Stein, Stuart. 'Geno- and Other Cides: A Cautionary Note on Knowledge Accumulation'. In 4(1) *Journal of Genocide Research* (2002), pp. 39-63.

Tiefenbrun, Susan and Edwards, Christie J. 'Gendercide and the Cultural Context of Sex Trafficking in China'. In 32(3) *Fordham International Law Journal* (2009), pp. 731-780.

Tomuschat, Christian. 'The Legacy of Nuremberg'. In 4(4) *International Criminal Justice* (2006), pp. 830-844.

Van Schaack, Beth. 'The Crime of Political Genocide: Repairing the Convention's Blind Spot'. In 106(7) *Yale Law Journal* (1997), pp. 2259-2292.

Webb, John. 'Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the former Yugoslavia'. In 23(2) *Georgia Journal of International and Comparative Law* (1993), pp. 377-408.

Zunino, Marcos. 'Subversive Justice: The Russell Vietnam War Crimes Tribunal and Transitional Justice'. In 10(2) *International Journal of Transitional Justice* (2016), pp. 211-229.

## International Treaties

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), annex, (1951) 82 UNTS 279 ('IMT Charter').

Charter of the United Nations (26 June 1945) 1 UNTS XVI ('UN Charter').

Convention on the Prevention and Punishment of the Crime of Genocide. UNGA Res 260 (III) (9 December 1948) 78 UNTS 277 ('Genocide Convention').

European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 218 UNTS 262 ('ECHR').

Statute of the International Court of Justice (26 June 1945) 1 UNTS XVI.

International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171 ('ICCPR').

Rome Statute of the International Criminal Court (17 July 1998), 2187 UNTS 90 ('Rome Statute').

Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 ('VCLT').

### National Legislation

Code Penal, Article 211(1) (France).

Law No 8-98 (31 Oct 1998), C1, Article 1 [Genocide] (Congo).

Penal Code C2, Article 313 (Burkina Faso)

### UN Documents and Resolutions (appearing chronologically)

UNGA Resolution 96(1) 'The Crime of Genocide' (11 December 1946) UN Doc A/BUR/50.

ECOSOC Resolution 47(IV) 'Crime of Genocide' (28 March 1947) UN Doc E/325.

Opinion of the Committee on the Progressive Development of International Law and Its Codification (17 Jun 1947) UN Doc E/447.

ECOSOC Resolution 77(V) 'Genocide' (6 August 1947).

ECOSOC Resolution 117(VI) 'Genocide' (3 March 1948) UN Doc E/734

Ad Hoc Committee on Genocide: Summary Records (5 April–10 May 1948) UN Docs E/AC.25/SR.13.

Basic Principles of a Convention on Genocide Submitted by the Delegation of the Union of Soviet Socialist Republics' (7 April 1948) UN Doc E/AC25/7.

'Draft articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China' (16 April 1948) UN Doc E/AC.25/9.

'Prevention and Punishment of Genocide—Comments by Governments on the Draft Convention Prepared by the Secretariat' (19 April 1948) UN Doc E/623/Add2.

'Proposal of the Delegation of the United States of America' (1 October 1948) UN Doc A/C.6/208.

'USSR: Amendments to the draft convention on genocide (E/794)' (4 October 1948), UN Doc A/C.6/215/Rev1.

‘Sixty-Sixth Meeting’ (4 October 1948), UN Doc A/C.6/SR.66.

‘Universal Declaration of Human Rights’ UNGA Res 217-A (III) (10 December 1948), UN Doc A/810.

ILC, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, U.N. Doc. A/CN.4/SER.- A/1950/Add.1 (1950).

Draft Code of Offences Against the Peace and Security of Mankind (1954) UN Doc A/CN.4/SERA/1954.

Study of the Question of the Prevention and Punishment of the Crime of Genocide, prepared by Nicodème Ruhashyamiko, July 4, 1978, UN Doc. E/CN.4/Sub.2/416.

‘Study on Implementing Apartheid Convention’ (1981) UN Doc E/CN.4/1426.

‘Benjamin Whitaker, “Revised and updated report on the question of the prevention and punishment of the crime of genocide”.’ UN Doc E/CN.4/Sub.2/1985/6, 2 July 1985.

UNSC Resolution 827 ‘Tribunal (Yugoslavia)’ (25 May 1993) UN Doc S/RES/827.

UNSC Resolution 955 ‘Tribunal (Rwanda)’ (8 November 1994) UN Doc S/RES/955.

‘ICC Ad Hoc Committee Report’ (6 September 1995) UN Doc A/50/22.

‘Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996’, UN Doc. A/51/10.

### International Case Law (appearing chronologically)

*Prosecutor v. Alstötter et al.* (1947) 3 TWC 1 (US Military Tribunal at Nuremberg–Case No 3) (*Justice [USMT 1947]*).

Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, London, (1950).

*Nottebohm*, Judgement of 6 April [1955] ICJ Reports.

*Prosecutor v. Akayesu*, Case No. ICTR-94-4-T. Judgment, 2 September 1998.

*Prosecutor v. Kambanda*, Case No. ICTR-97-23-S. Judgment and Sentence, 4 September 1998.

*Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T. Judgment, 21 May 1999.

*Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T. Judgment, 6 December 1999.

*Prosecutor v. Jelisić*, Case No. ICTY-95-10-T. Judgment, 14 December 1999.

*Prosecutor v. Kupreškić*, Case No. IT-95-16-T. Judgment, 14 January 2000

*Prosecutor v. Aleksovski*, Case No. ICTY-95-14/1-A. Judgment, 24 March 2000.

*Prosecutor v. Krstić*, Case No. ICTY-98–33-T. Judgment, 2 August 2001.

*Prosecutor v. Kajelijeli*, Case No. ICTR-98–44A-T. Judgment and Sentence, 1 December 2003.

*Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S. Judgment, 2 December 2003

*Prosecutor v. Kordić and Čerkez*, Case No. ICTY-95-14/2-A. Appeal Judgment, 17 December 2004.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro (2007)) ICJ Judgment of 26 February 2007.

*Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A. Judgment, 28 May 2008.

## Reports

NIPCCD. *A Socio-Cultural Study of the Declining Sex Ratio in Delhi and Haryana*. New Delhi: National Institute of Public Cooperation and Child Development, 2008. Available at: <http://nipccd.nic.in/reports/esratio.pdf>, accessed 30 November 2017.

Society for the Protection of the Girl Child. *An Overview of Gendercide and Daughter Abuse in India*. New Delhi: Society for the Protection of the Girl Child, 2011. Available at: <http://bit.ly/2BHkvth>, accessed 23 November 2017.

UNESCO, *Four Statements on the Race Question*. Paris: UNESCO, 1969. Available at: <http://unesdoc.unesco.org/images/0015/001577/157732eb.pdf>, accessed 14 October 2017.

## Websites

Gendercide Watch. History of 'gendercide'. Available at: [http://www.gendercide.org/what\\_is\\_gendercide.html](http://www.gendercide.org/what_is_gendercide.html), accessed 20 October 2017.

HeinOnline, database. Available at: <https://home.heinonline.org/>, accessed 21 December 2017.

Lingaas, Caroline. 'Defining the Protected Groups of Genocide Through Case Law of International Courts, 2015'. In *ICD Brief 18 December 2015*, pp. 1-18, accessed 10 October 2017.

Nersessian, David L. 'Rethinking Cultural Genocide Under International Law'. In *Human Rights Dialogue: 'Cultural Rights' (Spring 2005)*. Available at: [https://www.carnegiecouncil.org/publications/archive/dialogue/2\\_12/section\\_1/5139](https://www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/5139), accessed 2 November 2017.

Rafter, Nicole and Bell, Kristin A. 'Gender and Genocide'. Paper presented at the American Society of Criminology, Presidential Panel Sessions of 2013. Found at: [https://www.asc41.com/Annual\\_Meeting/2013/Presidential%20Papers/Rafter,%20Nicole-Bell,%20Kristin.pdf](https://www.asc41.com/Annual_Meeting/2013/Presidential%20Papers/Rafter,%20Nicole-Bell,%20Kristin.pdf), accessed 25 September 2017.

Schabas, William A. 'The Genocide Convention at Fifty'. In *United States Institute of Peace Report 41*. Found at: <https://www.usip.org/sites/default/files/sr990107.pdf> 2017-09-15, accessed 15 September 2017.

UN Case Law Database, database. Available at: <http://cld.unmict.org/>, accessed 18 October 2017.



I, Filip Hassellind, first registered on the Master's thesis course, 30 ECTS, fall semester 2017. I have not been registered on the course previously, or participated in any examinations before this one.