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Master Thesis

Definition of Genocide in Modern Times

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Abstract

Genocide is a crime unlike others and with the help of the 1948 Genocide Convention and its definition, it has received acknowledgement as its own crime in international law. The thesis takes us through Article II of the Genocide Convention analyzing the different elements that make up the definition. The aim of the thesis was to analyze the sustainability and applicability of the definition with the usage of various cases, further examining if the definition is suitable for modern times international law and politics. Accordingly, various relevant international relations concepts were discussed such as, globalization and its backlash and well as power politics. The topic is extremely relevant and crucial in our world today because there are various cases which are not acknowledged under the Genocide Convention due to the restrictions of the genocide definition. Among those are cases concerning groups that are subject to large hate and discrimination, and are not protected under the definition but satisfy all other elements of the crime. Through the discussion of the definition's elements, various cases from the ICTY, ICTR, and the ICJ were pulled in order to showcase the concluding arguments. Amongst those cases was The Prosecutor v. Akayesu, The Prosecutor v. Mladić as well as the Application of the Convention in Croatia v. Serbia. The thesis concluded that the elements of the definition; the dolus specialis, the protected group categorizations and the actus reus all showcased limitations in the definition's applicability. All in all, the thesis, through the definition's restraints, presents how the genocide definition does not reflect the needs of modern times. It is important for the definition to evolve and be updated but at the same time, still maintain its distinctive qualities in order for genocide to maintain its specified place in international law.

Keywords

Genocide – Responsibility – Intent – Protected Groups – International Law – *Dolus Specialis* – *Actus Reus* – Crime – ICTR – ICTY

Declaration of Authorship

1. The author hereby declares that he compiled this thesis independently, using only the listed resources and literature.

2. The author hereby declares that all the sources and literature used have been properly cited.

3. The author hereby declares that the thesis has not been used to obtain a different or the same degree.

Prague, Czech Republic … **01/08/2022** **Iskra Alikalfic**

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Abbreviations

UN – United Nations

UNSC – United Nations Security Council

RS – Rome Statute of the International Criminal Court

ICC – International Criminal Court

ICJ – International Court of Justice

ICTY – International Criminal Tribunal for Former Yugoslavia

ICTR – International Criminal Tribunal for Rwanda

ECCC – Extraordinary Chambers in the Courts of Cambodia

FRY – Federal Republic of Yugoslavia

BiH – Bosnia and Hercegovina

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Introduction

Genocide is not like any other crime and that is one of the main reasons why it firstly, has its own Convention codifying it as well as its own legal mechanisms. Accordingly, the international prohibition of genocide has the status of a jus cogens norm in international law[1] meaning it is a peremptory underlying rule which does not allow for deviations from this rule. When attributing individual or state responsibility to crimes of genocide, a numerous number of factors come into play that are very important in the extent of analyzing accountability. Amongst the definition's factors special intent is crucial and always necessary when analyzing cases of genocide because it is extremely hard to prove it. Alongside intent, the issue of the narrowness and specificity of protected group identification and categories within the definition will be thoroughly touched upon.

The primary source in discussing the genocide definition will be the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide[2] which has introduced the definition of genocide to international law. While primary focus of the thesis is the definition itself, both state responsibility within the Convention as well as individual criminal responsibility pertaining to Art. 25 in the Rome Statue of International Criminal Court[3], will be briefly discussed. There is a wide gap in opinions regarding the sustainability of the genocide definition mainly because of its failure to adjust to modern times. Therefore, the thesis seeks to provide an analysis of the definition's levels that stall in accountability taken for genocide with the help of various international relations concepts. These concepts include procedural issues such as power

[1] Report of the International Law Commission, Chapter V: Peremptory norms of general international law (*jus cogens*), United Nations General Assembly, A/74/10. https://legal.un.org/ilc/reports/2019/english/chp5.pdf

[2] Convention on the Prevention and Punishment of the Crime of Genocide, U.N.T.S, Vol. 78, p. 277, 9th December 1948, entered into force on 12th January 1951.

[3] Rome Statute of the International Criminal Court, 2187 U.N.T.S, entered into force on 1st July 2002.

politics, the concept of "new wars" and the role of international organizations, specifically the United Nations as well as the influence of globalization.

The research question asks **if the definition of genocide, presented by the 1948 UN Genocide Convention, reflects the needs of international law and international relations in the 21st century and why or why not?** Accordingly, the research hypothesis predicts that the definition of genocide used in international law does not fully reflect the needs of modern time international law and international relations. The prediction is on the basis that the definition has not been updated or adjusted to the evolving times of our world, which various cases over time will aid in showing, that is highlighting essentially the missing points that the definition lacks. Therefore, this then does not allow for full necessary responsibility to be taken.

To help answer the research question, as mentioned above, the thesis will resort to legal instruments as primary sources, that is e.g., the 1948 UN Genocide Convention as well as the Rome Statute and customary international law. Alongside these sources, case law will be used to support the explanation and analyses of aspects surrounding the definition, such as cases in international military tribunals like the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The Extraordinary Chambers in the Courts of Cambodia (ECCC) will also be referenced as their jurisdiction encompasses genocide to aid in the discussion surrounding the sustainability of the definition in modern times. The cases will help to show what is missing in the definition. Also, various scholars will be referenced, such as Verdirame, Schabas and Kaldor to assist in guiding the debate surrounding the definition's flaws.

The thesis aims to identify the essentials of international genocidal law and conduct a critical analysis on the definition used for genocide by the UN Genocide Convention, along with the support of various sources mentioned above. Additionally, international relations aspects will provide a deeper analysis on the effects that the definition's levels have and really how international politics play a large role in accountability of genocide through the definition. Looking at genocide in different layers allows us to specify the complexity of this crime even further and thus make more effective conclusions. The important missing points and flaws of the

definition that will be discussed will provide the basis towards a new approach to the definition of genocide, one that is crucial in the modern times.

The first chapter will focus on the fundamental features of genocidal international law. The various sources that will be used as well as its components will be explained and discussed here such as the UN Genocide Convention, specific cases from the ICTY and the ICTR, The Rome Statute[4]. Alongside individual criminal responsibility, state responsibility will be mentioned and connected to the sources. The background history of the 1948 Genocide Convention and its emergence after the Nuremberg trails will be explained.

Chapter two, three and four will be the careful analysis of main terms and mechanisms within the definition along with all its aspects. The crucial aspects of dolus specialis, group categories and the actus reus will be focused on which provide the base for discussing the definition's suitability in modern times. The focus on the intent to destroy is the most important aspect of the genocide definition in the UN Convention that causes various issues in interpretability and thus thoroughly impacts the meaning the definition holds in various cases. As the chapter will take the route of a critical analysis of the definition, various cases such as the Srebrenica genocide and specific cases regarding individual criminal responsibility will be used to support the explanations conducted from the analysis. Additionally, importance will be placed on various terminology within the definition that creates for wide discourse and dispute which will be backed by various sources such as Kabatsi and Levene.

Chapter five will focus on international relations aspects that connect to how the definition is constructed, interpreted and the importance that it holds. Concepts such as power politics and Mark Kaldor's idea of "new wars" will be discussed. The role of the United Nations and how it plays a large factor in the influence that the West has will also be touched upon as it impacts the elements of the definition within the Genocide Convention. The chapter will provide emphasis on how much accountability for the Holocaust was missed due to the absence of the

[4] Ibid, Article 25.

UN Genocide Convention at the time as well as why the gruesome genocide of the Holocaust was the turning point international law for genocide to become its own crime.

Throughout the thesis, description, analysis and comparison will be used as legal methodology to help in answering the research question. Description will be used for the sources as well as factual information such as individual features of various cases. Legal instrument of international law will be thoroughly analyzed with a primary focus on the critical analysis of the definition of genocide itself, in the Convention, the Rome Statue and in customary international law. The definition is identical across these instruments. Comparative analysis will also be the basis when discussing various cases in helping show elements that the definition is missing.

I chose this topic for my Master thesis because I found it extremely interesting how the elements of the definition of genocide can thoroughly impact the accountability taken for the crime. I also found it to be an important topic of study because the definition has not been updated or adjusted to our changing times in any way since its creation within the UN Convention in 1948. Accordingly, the crime of genocide is wide source of debate and is an extremely vital topic of discussion because it is a very particular and incredibly heinous crime that is to be prevented from ever occurring again. Unfortunately, this has been a large failure in the international world and thus is a topic of wide discussion, going back to the specific aspects regarding the definition itself. I have had experience with how the flaws of the definition have caused a large debate about what actually constitutes as genocide today in my own country, Bosnia and Hercegovina. Therefore, I believe it is an extremely relevant topic to analyze that definitely spans internationally.

Chapter I: Genocide Through the Lens of International Law

1.1 The origin of "genocide" as an international crime:

The term "genocide" firstly originated in1944 in the book Axis Rule in Occupied Europe by Raphael Lemkin.[5] The term has Greek origin with génos meaning race or people combined with an essence of the Latin word -cide meaning to kill.[6] Lemkin created this word mainly in response to the Holocaust as he assured it should be specific of other terms and crimes. Lemkin's definition of the term "genocide" was where national, ethnic, racial or religious groups were destroyed simply on the basis of their identity with that group, such as the Armenian massacre by the Ottoman Empire during World War I. Sir Winston Churchill stated "We are in the presence of a crime without a name" in a broadcast speech to the world in 1941 in regard to the WWII horrific German acts.[7] The strength that this term goes on to hold is widely debated through the years. The origin of the term genocide holds a lot of meaning because after the Holocaust's atrocities, it was placed as a singular crime under the Genocide Convention in international law.

The atrocities of WW2, especially regarding the Holocaust, urged the international community to react and address the problem of genocide straight on. The Holocaust was the genocide of European Jews by Nazi Germany during World War II, specifically between 1941 to 1945. The death rate consisted of six million Jews within German-occupied Europe. Various forms of murder were used, from mass shooting to extermination whilst being held hostage in

[5] Lemkin, Raphael, (1944), Axis rule in occupied Europe: laws of occupation, analysis of government, proposals for redress, *California Law Review,* 34(1), p. 271-272.

[6] Ibid, p. 271.

[7] Prime Minister Winston Churchill's Broadcast to the World about the Meeting with President Roosevelt, 24 August 1941, available at https://www.ibiblio.org/pha/timeline/410824awp.html as cited in Vasel, Johann J, 2019, In the Beginning, There Was No End, *The European Journal of International Law,* 29(4), p. 1053, (doi: 10.1093/ejil/chy087).

concentration camps.[8] The ethnic cleansing of Jews by Nazi Germany resulted in over two-thirds of the European Jewish population dead.

> "The definition's obvious revolutionary character tended not only to give it an aura of mystery — an act beyond the range of normal human behavior — but also to isolate it from other similar or related phenomena before or after the eruption of the Nazi genocide against European Jewry within the context of World War II in the middle of the 20th century."[9]

This genocide was truly unlike any other crime and thus the essence of its character needed to be further stressed. Additionally, it is not only the character that separates this crime but the notion that there is a special stigma connected with genocide. The fact that the UN Genocide Convention was created as a response to the needed separate responsibility for genocide raised its significance. In the Nuremberg trials, what is now understood as genocide was viewed by the lens of other crimes under international law which didn't place importance on it individually but instead combined it with other crimes such as enslavement and murder.[10] Additionally, both in the Nuremberg trials as well as the Tokyo trials, sexual and gender-based crimes were unfortunately to a large extent neglected unlike in the definition that we use today.[11] This significantly shows that the absence of the definition of genocide and essentially the absence of a

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[8] United Nations, *Charter of the International Military Tribunal – Annex to the Agreement fot he prosecution and punishment of the major war criminals of the European Axis ("London Agreement"),* 8 August 1945, ICJ.

[9] Huttenbach, Henry R, (1988), Locating The Holocaust On The Genocide Spectrum: Towards A Methodology Of Definition And Categorization*, Holocaust and Genocide Studies*, Vol. 3 Iss. 3, pg, 289, (doi: https://doi.org/10.1093/hgs/3.3.289).

[10]United Nations, *Charter of the International Military Tribunal – Annex to the Agreement fot he prosecution and punishment of the major war criminals of the European Axis ("London Agreement"),* 8 August 1945, ICJ.

[11] Moodrick Even Khen, Hilly B., 2013, Silence at the Nuremberg Trials: The International Military Tribunal at Nuremberg and Sexual Crimes against Women in the Holocaust, *Women's Rights Law Reporter*, Vol. 35, Available at https://ssrn.com/abstract=3407213

singular availability for the prosecution of just the crime of genocide halted a lot of more coherent responsibility for the Holocaust in the sense that a large chunk of actus reus was neglected. It's crucial to note that the extremity of the Holocaust and its recognition all around the world gained a ton of influence leading to the creation of the relevant instrument, the Genocide Convention. The Holocaust was an indescribable crime and a heinous occurrence that impacted a vast amount of people even years and years after. Additionally, the consequences of its occurrence provided a large amount of legal triumph in the sense that the emergence of the term genocide led to its definition within the UN Convention on the Prevention and Punishment of the Crime of Genocide which is used in international law.[12] The Genocide Convention was signed in 1948 and entered into force in 1951. As of July 2019, 152 states have ratified or acceded the Genocide Convention.[13] The same definition has been in use with no change regarding any elements of the definition since the Genocide Convention's construction in 1948 but domestic definitions of the crime are often wider in their scope of protection.

The crime of genocide is also a peremptory norm (ius cogens) in international law. The Vienna Convention on the Law of Treaties defines an ius cogens norm as "a norm accepted and recognized by the international community of States as whole as a norm from which no derogation is permitted and which can be modified only a subsequent norm of general international law having the same character".[14] This definition is now regarded as the general definition of a peremptory norm in international law. Amongst various other peremptory norms, the International Law Commission includes the prohibition of genocide as well.[15] Additionally,

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[12] Genocide Convention.

[13] United Nations. (n.d.). *United Nations Office on Genocide Prevention and the Responsibility to Protect*. United Nations. Retrieved April 12, 2022, from https://www.un.org/en/genocideprevention/genocide-convention.shtml#:~:text=The%20Genocide%20Convention%20has%20been,Asia%20and%206%20from%20America.

[14]Vienna Convention on the Law of Treaties, 1969, United Nations Treaty Series, 1155 (331), Art. 53.

[15] Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, 2019, Special Rapporteur, *International Law Commission*, Seventy-first session, A/CN.4/727, United Nations General Assembly.

the norm that is identified as such does need to fulfill certain conditions, the first being that is has to be a norm of general international law and thus is binding for all states.[16] Secondly, no derogation is allowed from the peremptory norm meaning it cannot be deviated from.[17] Jus cogens norms are at the top of the hierarchy of the norms of international law and thus give a lot of significance to the prohibition of genocide itself.[18] Article I of the Genocide Convention states that genocide is a crime that states must not only punish but also prevent. [19] The usage of the prohibition of genocide in various tribunals such as the ICTY and the ICTR strengthen the notion that it is of jus cogens character. The prohibition of genocide is also referred to in scholarly literature as such.[20] With customary international law in its backing, genocide is given a vast amount of importance. Nonetheless, it is being criticized for various reasons, e.g. the narrow scope of protected groups, and those "flaws" are to be analyzed here. It is important to mention that states are however allowed to broaden the definition in their own domestic practice, which many do, and thus can widen the protection in a more positive way that can serve as an inspiration for possible future development.

1.2: State Responsibility and Individual Responsibility

When it comes to the crime of genocide, both states and individuals can be responsible for it. Under Article IX of the Genocide Convention, accountability of states for genocide is related to dispute settlement in front of the ICJ.[21] Under Art. VI, in relation to Art. 25 of the

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[16] Verhoeven, S., & Wouters, J., 2005, The prohibition of genocide as a norm of ius cogens and its implications for the enforcement of the law of genocide. *International Criminal Law Review*, Vol. *5*, Iss. 3, pp. 402 (doi: https://doi.org/10.1163/1571812054940049).

[17] Ibid, p. 402.

[18] Ibid, p. 403.

[19] Genocide Convention, Art I.

[20] Ibid: Verhoeven, S., & Wouters, J, 2005.

[21] Genocide Convention, Art. IX.

Rome Statute, individual criminal responsibility for the crime of genocide is confirmed.[22] The interpretation, application and fulfilment of state responsibility as well as individual responsibility are essential in determining the definition's strength in a way because both identify the purpose of the definition's presence. Individual criminal responsibility and state responsibility are different, they are both independent, but one event can lead to both forms. Though, they are not codependent. Individual criminal responsibility was placed into customary international law after the Nuremberg and Tokyo trials meaning the individual criminal responsibility for these trials would not be possible since it did not exist then. Nonetheless, it is important to point out that the initial step for the crime of genocide, legally speaking, was adopting the definition in the UN Genocide Convention.

1.3: The Definition of Genocide within the Genocide Convention:

Article II of the Genocide Convention[23] presents the definition of genocide in international law. It was later repeatedly used in statutes of various international criminal tribunals[24] and courts that prosecuted the crime of genocide, as well as other crimes. The definition is the basis for definitions of criminal offenses in domestic legal systems as well. Article II states:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;

[22] Rome Statute, Art. 25; Genocide Convention, Art. VI.

[23] Genocide Convention, Art II.

[24] UN Security Council, *Statute of the International Criminal Tribunal for Rwanda,* (as last amended on 13 October 2006), 8 November 1994, Art. 2; UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia,* (as amended on 17 May 2002), 25 May 1993, Art 4.2; UN Security Council, *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia*, 27 October 2004, Art. 4; UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 6.

(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."[25]

The definition presented by Article II includes various elements of the definition that are further to be discussed when trying to answer the research question. Special intent (dolus specialis), the protected group categories, actus reus and mens rea in general, all those aspects will be thoroughly touched upon. The exact same definition is used and applied across various international tribunals such as the Statute of the International Criminal Tribunal for the Former Yugoslavia, under Article IV.[26] Under Article II of the Statute of the International Criminal Tribunal for Rwanda, the definition of genocide is equal to its origin in the Genocide Convention.[27] Within the Rome Statute of the International Criminal Court, the definition is also identical, under Article 6.[28] Across many countries, domestic criminal codes have included the definition as well but with a wide array of differences, allowed in domestic law. For example, the legislation of 34 countries have actually broadened the protected groups within the definition such as including political groups.[29] The Czech Republic, for example, also criminalizes genocide against people belonging to a certain class.[30] Cultural differences, historical differences

[25] Genocide Convention, Art. II.

[26] UN Security Council, Statue of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993.

[27] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994.

[28] Rome Statute, Art. 6.

[29] Hoffmann, T, 2020, The domestic definitions of the crime of genocide: A dizzying diversity, *Opinio Juris*, Retrieved April 21, 2022, from http://opiniojuris.org/2020/06/17/the-domestic-definitions-of-the-crime-of-genocide-a-dizzying-diversity/

[30] Czech Republic, Criminal Code of 2009, 40/2009, available online at https://www.ejtn.eu/PageFiles/6533/Criminal%20Code%20of%20the%20Czech%20Republic.pdf, Section 400.

as well as local differences influence the regional approaches. Therefore, whilst internationally the definition is often limited, especially when compared to domestic definitions, and too narrow in a sense, domestically it can defy the perpetrators from relying on these limitations.[31]

The "intent to destroy in whole or in part" a protected group[32], so-called dolus specialis, is crucial because without the evidence backing it, the crime cannot be proclaimed a genocide. Whilst it might be a straightforward and specific way of identifying the crime of genocide, it is a high threshold, and its evidentiary requirements are highly demanding.

It is evident that each element of the definition connects to the next, meaning that when we talk about the dolus specialis, it connects directly to the protected groups that constitute the basis for that intent. Dolus specialis is a clear stated motive within the definition that is not present amongst other crimes. The notion that the intent to annihilate a specific group of people needs to be present is really important because it strongly emphasizes the motive of committing the crime, even if unsuccessful.

Another crucial dimension within the genocide definition in the Genocide Convention is the categorization of the victims in protected groups in order to determine the true aspects that constitute the intent in question. Under Article II of the Convention, national, ethnical, racial, or religious groups are the protected group categories.[33] That is, if the intent of, for example, killing is on the basis of the targets being part of these groups, then the acts may qualify as genocide. The protected groups included in the definition have not changed since the adoption of the Genocide Convention in 1948. The short list of these categories has caused a lot of debate amongst scholars in the field of international law and genocide-focusing literature. The debate has showcased a lot of focus on how constricted the categories are and essentially specific in a sense because it is not always straightforward to place people within one of these categories.

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[31] Ibid: Hoffman, The domestic definitions of the crime of genocide: A dizzying diversity, 2020.

[32] Genocide Convention, Art. II.

[33] Ibid.

Along with the array of categories that were discussed in 1948 and later, the already present groups will be analyzed below.

The actus reus of the definition is listed in subparagraphs a) to e) which specifically present the actions required for genocide to be constituted. It is clear that it is not a vast amount of actions and it will be analyzed whether the list is satisfactorily wide, as well as what is really meant by the terminology. Additionally, Article III of the Genocide Convention confirms that the following acts are to be punishable: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.[34] In some countries, additionally denial of genocide is a crime as well.

To aid in the critical analysis of the definition's viability, various case-law of international courts and criminal tribunals will be analyzed. Those judicial bodies include the International Court of Justice, International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), and Extraordinary Chambers in the Courts of Cambodia (ECCC).

The ICTR was established by the UN Security Council and it was seated in Arusha, Tanzania. ICTR was the first international tribunal that delivered verdicts for genocide and thus was the first to apply the definition of genocide as it is codified within the Genocide Convention, in 1995.[35]

The ICTY was created by the United Nations Security Council as well as a subsidiary organ, under chapter VII[36] as a response to the crimes that took place in the 1990s in the Former Yugoslavia. The tribunal was located in The Hague, the Netherlands. Even though the ICTR was

[34] Genocide Convention, Art. III.

[35] Ibid.

[36] Charter of the United Nations, Chapter VII: *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression,* October 24, 1945, ICJ.

the first to deliver verdicts regarding genocide, the ICTY was the first criminal tribunal created by the United Nations.[37]

The ECCC which is commonly referred to as the Cambodia Tribunal or the Khmer Rouge Tribunal, is a court that was established by the Cambodian government with the help of the United Nations in 2003.[38] The court is named the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea Extraordinary Chambers.[39] The key difference between the ECCC and other UN tribunals is that the trials are held in Cambodia using Cambodian staff and judges together with foreign personnel, which was a request from the government. In order to support the Cambodian legal system and due to the international nature of the crimes committed at the time, the UN's aid was there to help meet international standards of justice.[40] Even though the court was created by both the government and the UN, it is said to be independent of them and instead will "provide a new role model for court operations in Cambodia".[41]

In addition to the sources introduced above, the International Court of Justice's (ICJ) cases, such as the Bosnia and Herzegovina v. Serbia and Montenegro[42] will be referred to as well as the International Criminal Court's (ICC) sources regarding the charges of alleged genocide in Darfur.

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[37] Ibid.

[38] UN Security Council, *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia*, 27 October 2004, NS/RKM/1004/006.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro),* 26 February 2007, International Court of Justice, ISSN 0074-4441.

1.4: Additional sources for the contemporary debate on the suitability of the genocide definition:

The discourse surrounding the definition of genocide in international law and politics is widely public and has created wide dispute amongst scholars about the problems of the definition. Kabatsi's work "Defining or Diverting Genocide: Changing the Comportment of Genocide" provides insight into this debate as she identifies how there is no consensual bearing[43] in scholarly debate on the definition of the crime that has been termed the crime of all crimes, even though there is one in international law through the Genocide Convention. The work also provides a perspective regarding the various denials of genocide which once again pertains to the strength the definition's elements hold. The specific points of controversy of the definition in public debate are discussed allowing support of the hypothesis I have presented above. Levene's article "The Changing Face of Mass Murder: Massacre, Genocide and Post-Genocide" also provides insight into how narrow the definition is.[44] Levene provides the perspective that in order to come up with a more straight-froward approach to the definition, it will either be so tightly defined that an enormous amount of cases are excluded, or it would be so broad and thus would lose its significance of being a specific crime that is unlike the rest.[45] The debate regarding how the problems of the definition are identified and how they can essentially be fixed is long overdue as the definition has not evolved since its creation, but the spark of discourse is extremely relevant in identifying its sustainability. Huttenbach highlights that "what is needed is a system of definition and a methodology of categorization."[46] If we had categories that

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[43] Kabatsi, F., (2005), Defining or Diverting Genocide: Changing the Comportment of Genocide, *International Criminal Law Review*, Vol. 5, Iss. 3), pp. 387. (doi: https://doi.org/10.1163/1571812054940085.)

[44] Levene, M., (2002), The changing face of mass murder: massacre, genocide and post-genocide. *International Social Science Journal*, Vol. 54 Iss. 174, pp. 443-452. (doi:10.1111/1468-2451.00398).

[45] Ibid, pp. 447.

[46] Ibid: Huttenbach, Henry R, 1988, pp. 291.

correspond to the parameters of the definition of genocide, it would become easier to identify.[47] Accordingly, it would allow for easier prevention of genocide as well. The genocide definition's strictness creates troubles with correct identification which is severely seen across cases over time but the urge to improve the definition for easier identification of cases and a simpler mechanism for attributing responsibility is not present, even with the extensive scholarly debate. This highlights the debate between restrictive-ists vs. expansionists regarding the definition and also emphasizes the relevancy of differences in interpretation of the definition. As an example, the ECCC wanted to use a different interpretation of the definition in its court but the UN did not allow it.[48] Therefore, Article 4 of the Law Establishing the Extraordinary Chambers in the Courts of Cambodia gives the ECCC subject matter jurisdiction over genocide as defined in the Genocide Convention of 1948.[49] Thus, with respect to modern times and the evolvement of the international society, would it be respectable and applicable to evolve the definition and for it to encompass various changes? This will be further discussed in the following chapters, especially in regard to the flaws of the definition impacting its sustainability in modern times.

[47] Ibid, pp. 292.

[48]Sainati, T. E., (2012), Toward a Comparative Approach to the Crime of Genocide, *Duke Law Journal*, Vol. 62, Iss. 1, p. 168.

[49] Ibid.

Chapter II: The Specific Intent to Destroy:

2.1: Mens Rea and its Threshold

Mens rea in international criminal law is in broad terms a state of a guilty mind that a person has whilst committing a crime.[50] That is, the intent of the perpetrator regarding their actions. Mens rea is a component of criminal offenses, just like actus reus and is a vital part of the crime of genocide. The mens rea needs to directly correspond to the actus reus. Therefore, to be held responsible and liable of a crime, the mens rea corresponding to the actus reus needs to directly fit and be present. The same applies to international crimes and thus pertains to the fact that the evidence should be correspondingly present. The Rome Statute of the ICC, article 30 states:

> "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." [51]

The content of mens rea in relation to individual crimes is heavily debated, making it a tough aspect of discussion in crimes of genocide. Intent presented by the subjective element of mens rea is hard to prove because the evidence needs to be very specified and direct in attribution to the context and circumstance of each case. The concept of intent in most cases of genocidal law is the focal point pertaining to the state of mind and the acts of the perpetrator. Intent, in general, and dolus specialis (specific intent) are not the same because specified genocidal intent has a very outlined direction of its motive. The direction of the motive is identified by the genocide definition as directed towards one of the protected groups.[52] Below, elements surrounding

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[50] Elewa Badar, M., Marchuk, I., & Porro, S. (2015). Mens Rea, International Crimes. *Oxford Bibliographies in International Law*. https://doi.org/10.1093/obo/9780199796953-0122

[51] Rome Statute, Art. 30.

[52] Genocide Convention, Art. II.

specific intent will be discussed. The role specific intent holds in the genocide definition as a whole will be analyzed, and more specifically how dolus specialis relates to the other elements within the definition. Additionally, it is incredibly important to point out that intent in general, and even more so specific genocidal intent, has a very high threshold. "The gravity, magnitude, and complexity of core international crimes impose an obligation to carefully consider how various mens rea standards are applied and construed in the international law context."[53] Behind intent, there is a clear purpose on which the perpetrators' actions were done on. This allows crimes based on intent to be differentiated from other crimes. In terms of the crime of genocide, dolus specialis pushes it even further in distinction in international law.

2.2: Criminal Intent in General

Criminal intent presents to be the conscious decision that a perpetrator has when committing an unlawful act, that is the perpetrator purposefully acts this way with a goal of some effect or consequence. Intent, in general, differs in its definition across domestic legal systems. In Czech law, for example, negligence is also defined next to intent thus the terms are differentiated but there is some overlap in the terms such as the awareness that the perpetrator has. In Georgian domestic law, article 9 of the Criminal Code of Georgia states:

> "(1) An act committed with direct or indirect intent shall constitute an intentional crime.
> (2) An act shall be considered to have been committed with direct intent, if the person [who commits it] is aware of the unlawfulness of the act, foresees its unlawful consequences and desires those consequences, or foresees the inevitability of the occurrence of such consequences.
> (3) An act shall be considered to have been committed with indirect intent if the person was aware of the unlawfulness of his/her action, was able to foresee the occurrence of the

[53] Elewa Badar, M, Marchuk, I & Porro, S 2015, 'Mens Rea, International Crimes', *Oxford Bibliographies in International Law*, https://doi.org/10.1093/obo/9780199796953-0122, pp. 1.

unlawful consequences and did not desire those consequences, but consciously permitted them or was negligent about the occurrence of those consequences."[54]

Thus, Georgian state law clearly pinpoints both direct and indirect intent whilst other domestic legal systems do not explicitly state both terms. Within the Czech Criminal Code, the difference between direct and indirect intent is still clearly identified, but not as explicitly stated:

"(1) A criminal offence is committed intentionally if the offender

a) sought to violate or endanger, in a manner specified under criminal law, any interest protected by this Code, or

b) was aware that his/her conduct may cause such violation or endangering, and for the case he/she causes it, he/she understood it.

(2) Such understanding shall be understood also as the reconciliation of the offender with the fact that he/she may violate or endanger an interest protected by the Criminal Code in the manner stipulated in this Code."[55]

Thus, whilst the actual terms direct and indirect are not mentioned within the Czech law, they are both identifiable. Therefore, intent can be defined in various ways, presented through multiple state law definitions, but the crucial elements of the term involve the act being done with purpose and knowledge. "There are various modes of mens rea recognized in domestic legal systems but it is necessary to keep in that through sometimes the names are the same as in international criminal law, their content is sometimes not."[56] Intent can become hard to identify because its

[54] Georgia, Criminal Code of 1999, 2287, Parliament of Georgia, LHG, 41(48), available online at https://matsne.gov.ge/en/document/download/16426/157/en/pdf, Art. 9.

[55] Czech Republic, Criminal Code of 2009, 40/2009, available online at https://www.ejtn.eu/PageFiles/6533/Criminal%20Code%20of%20the%20Czech%20Republic.pdf, Section 15.

[56] Lipovsky, M., (2019), Mental Element (Mens Rea) of the Crime of Aggression and Related Issues. In: ŠTURMA, P. (ed.) *The Rome Statute of the ICC at Its Twentieth Anniversary*, Brill/Nijhoff: Leiden/Boston, ISBN: 978-90-04-37939-8, pp. 109.

applicability can vary in different cases and in different tribunals due to the differences in definition of the actual term. In Georgian law, for example, the concept of foreseeing is given a lot of emphasis. Even though the differences might be mild, they contribute in identifying the evidence that is applicable.

To define intent in international law, article 30 of the Rome Statute presents:

> " 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct.
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."[57]

Once again, a large emphasis is put on the knowledge and awareness needed to cause the actual consequence. Additionally, it is evident that intent in general is backed by a purpose and a motive for the conduct, but not one with a direct specification, such as the special intent required for crime of genocide.

2.3: Origin of Dolus Specialis and its Meaning

The vital element that distinguishes genocide from crimes against humanity as well as war crimes is the specific intent, that is dolus specialis. Genocide is a crime consisting of a double mental element which includes intent (dolus), for the underlying acts of Article II of the Genocide Convention, as well as the additional specialized specific intent, dolus specialis,

[57] Rome Statute, Art. 30.

regarding the aim of destruction of a particular protected group,[58] which will be discussed further in chapter III. It is hard to prove and judge accordingly but it makes genocide indicative in its own way. The Genocide Convention states this specialized form of intent, dolus specialis, is the specific intent to destroy a protected group in whole or in part, as such. [59] The ICJ, dealing with state responsibility, thoroughly deals with the mens rea, that is specific intent, of genocide, which aids in strongly identifying the features of what the term special intent to destroy means. Jurisprudence/case law of the ICTY and ICTR additionally provide guidelines on how to infer genocidal specific intent from facts and circumstances, in regard to individual criminal responsibility. The narrowness of the term, because of its direction towards the destruction of a specific group, limits what fits the genocide definition. There is no definitive interpretation available in the language or in the drafting history of the Genocide Convention[60] thus making international judicial institutions key in its analysis regarding particular cases. In the Prosecutor v. Jean Paul Akayesu case, the ICTR trial chamber stated:

> "The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realization of an ulterior motive, which is to destroy, in whole or part, the group of which the individual is just one element."[61]

As specific intent is vital in constituting genocide as an international crime and acts as the key facet necessary in determining genocide, it is also visible in the Rome Statute. The above-quoted article 30 of the Rome Statute says "unless otherwise provided"[62] and article 6 of the Rome

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[58] Ambos, K., (2009), What does 'specific intent to destroy' in genocide mean? *SSRN Electronic Journal*, *91,* pp. 833. DOI: https:/DOI:.org/10.2139/ssrn.1618682

[59] Genocide Convention, Art. II

[60] Simon, Thomas W, 1996-1997, Defining Genocide, *Wisconsin International Law Journal*, vol. 15, Iss. 1, pp. 244.

[61] *The Prosecutor v. Akayesu,* 2 September 1998, Trial Judgement, para. 522.

[62] Rome Statute, Art. 30.

Statute, which contains the definition of the crime of genocide[63], indeed entails differently when it (by adopting the same definition of genocide as the Genocide Convention) requires dolus specialis. Specificity of dolus specialis lies exactly in the requirement of destroying an identified protected group of people because of their group identity. In the Croatia v. Serbia case, the ICJ stated:

> "The "specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" is the essential characteristic of genocide, which distinguishes it from other serious crimes."[64]

The specific intent to destroy (a national, ethnical, racial or religious group, as such) strongly reflects a purpose-based tendency which is mandatory for genocide. There must be a motive, that is a purpose, that amounts to the attempt of destroying a specific protected group. "Conversely, the reference to the particularly heinous character of genocide is not good enough an argument to accept the many flaws of the prevailing purpose-based approach to the word specific intent".[65] The purpose-based approach to the meaning of the word intent identifies the desire or purpose to destroy the protected group in whole or in part, as central to the definition.[66] Thus, the conscious intent is key. The purpose is sometimes hard to find within evidence and in some cases can be on the basis of a "relaxed evidentiary standard"[67] as Kress presents with the Court in the Akyesu case acknowledging that intent can be deduced from the context and various

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[63] Rome Statute, Art. 6.

[64] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Reports of Judgements, Advisory Opinions and Orders, ICJ Reports 2015, Judgement of 3 February 2015, para 132.

[65] Kress, Claus, 2006, The Crime of Genocide under International Law*, International Criminal Law Review 6*: 461–502, Koninklijke Brill NV, pp. 461.

[66] Kress, Claus, 2006, pp. 493.

[67] Kress, Claus, 2006, pp. 494.

acts.[68] Conversely, Kress discusses the knowledge-based approach which allows for the crime to be identified. This makes it hard to recognize in circumstances that are not as straightforward as the Mladić case and thus prevents the notion of easily identifying the crime. Easily identifying the crime of genocide would create progress because it would allow a more thorough outlook on prevention in the future. Nonetheless, this would create the issue of acts being convicted as genocide for which some would claim, the authors of the Convention would not have intended. The distinctiveness of the identification of genocide would be somewhat lost.

The ICTY, within the Judgment of the Kupreškić et. al case, regards special intent as "an extreme form of willful and deliberate acts designed to destroy a group or part of a group."[69] Thus, there must be a deliberate and conscious aim to establish specific intent. The willful and deliberate act is backed by the specific intent to destroy and can be hard to establish due to the specificity of the motive that is hidden behind the actions. Specific intent is difficult to prove, firstly because it is generally hard to prove mens rea and secondly because its direction towards a specific group is a very strict component of the definition, which does not allow any leeway in its applicability. Its narrowness holds legitimization of the crime. Since genocide is a crime unlike any other, the specified intent is unlike others too, especially others that it is usually mistaken for or compared to such as crimes against humanity.

> "The Court recalls that, in 2007, it held that the specific intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution (I.C.J. Reports 2007 (I), pp. 121-122, paras. 187-188).[70]

The narrowness of the dolus specialis strengthens the notion that the crime is unlike others but at the same time diminishes its applicability across different cases. While the Genocide Convention

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[68] *Prosecutor v. Akayesu,* para 523; Ibid: Kress, Claus, 2006, pp. 494.

[69] *The Prosecutor v. Kupreškić et. al,* Trial Judgement, IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia, January 14th, 2000, Art. 636.

[70] Ibid, Art. 139.

makes it clear what constitutes a genocide, its specificity makes the legal standard for genocide so narrow that it becomes hard to prove. Thus, whilst it is the narrowness of specific intent which makes genocide distinct, it limits the definition's applicability across a wide number of instances, which over time should evolve with the changing world.

Every action constituted as genocide must be done with the high standard that this motive holds within the definition. The necessary evidence which showcases the specific intent targeting a protected group holds a lot of significance. This is not to diminish the actual actus reus of genocide but the placement of importance of the motive behind the acts is crucial to identifying genocide as a singular and particular crime. Nonetheless, it is not so straightforward and clear to determine specific intent, as stated above, especially because the crime does not require the destruction to succeed.[71]

> "This Trial Chamber emphasizes that in view of the requirement of a surplus of intent, it is not necessary to prove a de facto destruction of the group in part and therefore concludes that it is not necessary to establish, with the assistance of a demographer, the size of the victimized population in numerical terms. It is the genocidal dolus specialis that predominantly constitutes the crime."[72]

Also, since the specified intent is a mental element, it is not always so evidently presented. Within each case, courts makes relevant judgements regarding the further features of the specific intent. It is important for courts to evaluate the individual situation and factual circumstances to then judge the proof of specific intent accordingly. In the Pre-Trial Chamber, the ICC in regard to the situation in Darfur, Sudan, stated:

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[71] *Prosecutor v. Milomir Stakic,* 31 July 2003, Trial Judgement, IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY), para. 522.

[72] Ibid.

> "Recognizing that express manifestations of specific intent to commit genocide are rare, international courts have repeatedly held that genocidal specific intent can be inferred from the factual circumstances of the crime." [73]

Additionally, in the ICJ's case Croatia v. Serbia, the Court emphasized that dolus specialis can be established through direct or indirect evidence thus not always being very straightforward and instead can be deduced or inferred through varied types of conduct.[74] Therefore, proving specific intent may vary according to the detailed nature of instances for each case and thus can differ in the way it is shown and identified. Accordingly, dolus specialis is particular to the crime of genocide and the above articles showcase that while it can be inferred in various ways from factual circumstances, the important aspect is reaching the necessary inference level.

2.4: The Meaning of "Destruction" of the Protected Group

The specific intent within the genocide definition is directly connected to the destruction of one of the protected groups due to their identity. The term to destroy is part of the mental element of the definition, meaning the destruction does not need to be materialized but the motive for destruction must be present.[75] The term to destroy is widely interpreted in accordance with the circumstance. For example, the ICTR relied on a very traditional approach to the term.

> "As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a

[73] Summary of Prosecutor's Application under Article 58, Situation in Darfur, Sudan, *Office of the Prosecutor, Pre-Trial Chamber I*, ICC-02/05, 14th July, 2008, para. 45.

[74] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia*), para 143.

[75] Van den Herik, L. (2012) The Meaning of the Word "Destroy" and its Implications for the Wider Understanding of the Concept of Genocide, *The Genocide Convention*. Leiden, The Netherlands: Brill | Nijhoff. doi: https://doi.org/10.1163/9789004221314_006, pp. 52.

> particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense."[76]

On the other hand, the ICTY took the interpretation in a different sense.

> "The physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community."[77]

Therefore, whilst the term is subject to interpretation and differences in its judgement, the significance it holds is relaying back to the specific intent for genocide. That is, the term to destroy presents the purpose of the motive and must be directed towards the relevant protected group. Since destruction corresponding to the specific intent can be presented in various ways, the definition's scope is not clearly identified within the definition itself but instead is judged accordingly by the courts. This can present some misalignment causing the definition's scope to be further debated because what works for one case may not work for another. Thus, as stated above, the narrowness of dolus specialis in terms of its purpose being directed towards a specified group present sa problem in the applicability of the definition as a whole because the specific intent is hard to prove. Nonetheless, it is important to note that, as presented above, courts vary in their interpretation of elements that relate to dolus specialis such as the term destruction. This does affect the definition's scope which can present as a further problem because it is not clearly identified but instead varies from case to case. This availability for the interpretation within the genocide definition terms can further halt its sustainability over time.

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[76] Yearbook of the International Law Commission, 1996, Report of the Commission to the General Assembly on the work of its forty-eighth session, Vol. II, Part Two, United Nations, pp.45, para. 12; Ibid, Van den Herik, L., 2012.

[77] *Prosecutor v. Radislav Kristić,* Aug. 2nd, 2001, Trial Chamber Judgement, IT-98-33-T, para. 574; Ibid: Van den Herik, L., 2012.

2.5: Destruction "In Whole or In Part"

Another element of the dolus specialis is that the protected groups are targeted with intent to destroy them "in whole or in part".[78] This leads us to analyzing how much of the group must be destroyed or intended to be destroyed for it to really amount to genocide. The in whole or in part phrase allows for genocide to be recognized regardless of if the group is destroyed fully or not. The purpose of this phrase takes us back to the aim and motive that the perpetrators hold. Genocide is based on the notion that the specific intent to destroy was there and through Article II of the Genocide Convention, we can identify that to claim genocide, the extent of the detriment that took place, e.g. meaning the amount of people killed, is not as relevant as the specific intent behind the perpetrators' actions. Thus, the element of in whole or in part of destroying the group presents that the range of detriment is not as vital as the motive needed to establish the crime. In the ICJ's case of Croatia v. Serbia, the Court stated that the notion of in whole or in part must essentially be assessed in accordance to the specific number of criteria for each situation and in regards to this case, "it held in 2007 that the specific intent must be to destroy at least a substantial part of the particular group."[79] Various aspects, such as the geographical scope as well as looking at the element in qualitative terms instead of quantitative, are to be considered.[80] Therefore, different factors are to be assessed for each case. The importance of this element is that it identifies that if the targeted part of the protected group is substantial to the overall group and essentially if the specific intent to destroy the alleged target is based on their group identity, then the aspect of in whole or in part within the definition is fulfilled. Therefore, an important aspect of the genocide definition is that the destruction of one of the protected groups does not necessarily have to occur and is specific to each case.

[78] Genocide Convention, Art. II.

[79] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Art. 198.

[80] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Art. 199 and Art. 200.

2.6: Proving the Dolus Specialis:

There are various obvious ways in identifying specific intent for genocide such as if the perpetrator or a state had an explicit plan to eliminate an entire group.[81] The Srebrenica genocide occurred in 1995 in Bosnia and Hercegovina, with over 8,000 Bosniak Muslim men and boys killed.[82] In various instances of individual criminal responsibility regarding the Srebrenica genocide, genocidal specific intent has been a pivotal point of discussion. It is possible to attribute genocidal specific intent directly or from a mixture of acts and context, but it is key that through the genocidal specific intent, the actions constitute a discriminatory nature towards a protected group. This is crucial when discussing individual criminal responsibility because the perpetrator has to be looked at individually and thus the mens rea of special intent is even more precise because it is only relevant for that individual. The Prosecutor v. Jelišić [83] case involved several counts of crimes against humanity and one count of genocide, pertaining to a Muslim group within the town of Brčko, Bosnia and Hercegovina. The Prosecutor failed to prove Jelišić's genocidal special intent beyond all reasonable doubt [84] but the Trial Chamber found that Jelišić was "not only perfectly aware of the discriminatory nature of the operation, but that he adhered to it fully". [85] The Chamber concluded that genocidal specific intent in its two forms, that is exterminating a large number of members of a group or pursuing a selective destruction targeting only certain members, was not evident in this case because the Prosecutor was not able

[81] May, L, (2010), Genocidal Acts: Destroying Groups in Whole or in Part. In Genocide: A Normative Account, *Cambridge: Cambridge University Press*, DOI:10.1017/CBO9780511807428.006, pp. 97.

[82] Hamza Karčić, (2015), Remembering by resolution: the case of Srebrenica, *Journal of Genocide Research,* Vol. 17, Iss. 2, 201, DOI: 10.1080/14623528.2015.1027078.

[83] *The Prosecutor v. Goran Jelišić,* Judgement, December 14th, 1999, International Criminal Tribunal for Former Yugoslavia, IT-95-10-T.

[84] Verdirame, G., (2000), The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals, *International and Comparative Law Quarterly 578*, Vol. 49, Iss. 3, pp. 587.

[85] *The Prosecutor v. Goran Jelišić*, para. 75.

to prove that Jelišić had a significant plan to destroy the Muslim Bosniaks.[86] Even with various testimonies, it was not enough. The Trial Chamber thus concluded that:

> "It has not been proved beyond all reasonable doubt that the accused was motivated by the dolus specialis of the crime of genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelišić must be found not guilty on this count.".[87]

The Trial Chamber established that the crucial aspect of dolus specialis was not proven, regardless of the showcased actions. Additionally, the court giving the accused the benefit of the doubt presents the strength that specific intent holds in the definition because even with the actus reus that do satisfy the definition, the charge of genocide is omitted due to the specifics of dolus specialis.

A clear portrayal of specific intent when it comes to individual responsibility presents the case of the Prosecutor vs. Mladić[88]. Ratko Mladić was the General for Republika Srpska and Commander of the Republika Srpska Main Staff during the Yugoslav Wars.[89] Mladić was charged for a various number of crimes of which one was genocide, specifically the Srebrenica genocide. Amongst various video recordings containing statements pertaining to wiping out the Bosniak Muslims as well as the leadership role Mladić held, forensic investigation also assisted in Mladić's conviction.[90] The ICTY thoroughly focused on the leadership role Mladić held and

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[86] *The Prosecutor v. Goran Jelišić*, para. 82.

[87] *The Prosecutor v. Goran Jelišić*, para. 108.

[88] *The Prosecutor v. Ratko Mladić,* 8 June 2021, Appeals Chamber, Judgment, International Residual Mechanism for Criminal Tribunals, ICTY, MICT-13-56-A.

[89] Vukušić, I., (2019), Film review: The Trial of Ratko Mladić, *Genocide Studies and Prevention: An International Journal*, Vol. 13, Iss. 3, pp. 181, DOI: https://DOI:.org/10.5038/1911-9933.13.3.1661.

[90] *The Prosecutor v. Ratko Mladić,* 8 June 2021, Appeals Chamber, Judgment, para 254.

how all decisions had to go through his command in order to be executed. A prime example of this is that, as the ICTY states:

> "With respect to Mladić's role in the transfers, the Trial Chamber found that Mladić gave several orders in relation to the displacement of the Bosnian Muslim civilians from Srebrenica, including the transportation of Bosnian Muslim civilians out of Potočari."[91]

Mladić's actions are used here as an example of the process of proving the dolus specialis. His aim was to eliminate the Muslim Bosnianks located in Srebrenica, through acts of killing as well as serious bodily and mental harm to members of the group.[92] The actus reus were markedly backed by the dolus specialis, as stated above. Therefore, because different aspects of the genocide definition used in international law clearly impact other aspects (mens rea impacts actus reus), Mladić's specific intent is clearly exposed through the led gruesome actions as well as directives towards the Muslim Bosnianks. Compared to the Jelisić case within the ICTY, the specific intent is a lot more evident. Nonetheless, the narrowness of the specific intent required for genocide, within the definition comes widely into play. The dolus specialis for the Mladić case is clearly identifiable through the responsibility taken by his planning and leadership, such as with Directive 7/1.[93] In the Jelisić case, it was not as straightforward and thus it was an acquittal in the case of genocide.

Another notion relevant for proving dolus specialis is that the actus reus must be done on the basis that a particular group is the target, and the motive is the destruction of that group "in whole or in part".[94] In ICJ's case of Croatia v. Serbia, Article 130 emphasizes:

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[91] *The Prosecutor v. Ratko Mladić,* para. 352.

[92] *The Prosecutor v. Ratko Mladić,* para. 418.

[93] *The Prosecutor v. Ratko Mladić,* para. 395.

[94] Genocide Convention, Art. II.

> "Genocide contains two constituent elements: the physical element, namely the act perpetrated or actus reus, and the mental element, or mens rea. Although analytically distinct, the two elements are linked. The determination of actus reus can require an inquiry into specific intent. In addition, the characterization of the acts and their mutual relationship can contribute to an inference of specific intent."[95]

Therefore, because dolus specialis is vital, the evidence is key even though parties might not agree on the nature of instances applicable to count as relevant evidence. Thus, actions can be used as inference of the specific intent to destroy.

The term genocide holds vast significance in our international society and international courts are incredibly cautious about claiming atrocities as such. This was clearly displayed in the Nahimana et. al case regarding the genocide in Rwanda.[96] The Prosecutor v. Ferdinand Nahimana, Jean Bosco-Baraygwizza and Hassan Negeze[97] clearly present evidence of genocidal special intent and how the charged allegedly targeted the Tutsis with the motive to destroy the group, in whole or in part. The evidence set forth is clear which urged the tribunal, beyond a reasonable doubt to identify that the perpetrators acted with the specific intent to destroy the Tutsi ethnic group, in whole to in part.[98] For this specific case, the media in the genocide in 1994 played a large role in the related legal question of what constitutes individual criminal responsibility for direct and public incitement to commit genocide.[99] Thus, through the broadcasts and radio, the specific intent to destroy, dolus specialis, was clearly displayed. "In ascertaining the specific intent of the Accused, the Chamber has considered their individual

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[95] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Art. 130.

[96] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Judgement and Sentence, 3 December 2003, Appeals Chamber, ICTR-99-52-T.

[97] Ibid.

[98] Ibid, para. 969.

[99] Ibid, para. 32.

statements and acts, as well as the message they conveyed through the media they controlled."[100] This goes back to the notion that the large amount of widespread and straightforward evidence where the perpetrators showcased, in some way or another, the motive to annihilate the group is always crucial. Thus, once again, individual criminal responsibility regarding genocide, like in the Mladić case, shows that the specific intent must be clearly portrayed. With high leadership roles, genocide might more easily proven because the evidence might be more directly shown. Although the responsibility is not limited to high-ranking officials, evidence might present as more easily directed at them because of the leadership role they hold, for example, through control over media or through direct speeches. The role and control that Nahimana et. al had over the Radio Télévision Libre des Mille Collines which they used to convey Hutu extremist messages intensified the role and leadership they held in the genocide.[101] Following through the Judgment, various others who acted on their behalf were not sentenced to genocide because the specific intent was not as evident, even though the acts were committed on the same basis and against the same Tutsi ethnic group.[102]

> "The Chamber recognizes that a political party and its leadership cannot be held accountable for all acts committed by party members or others affiliated to the party. Nevertheless, the Chamber considers that to the extent that members of a political party act in accordance with the dictates of that party, or otherwise under its instruction, those issuing such dictates or instruction can and should be held accountable for their implementation."[103]

Therefore, others who hold responsibility for the actions recognized as genocide, as part of the Hutu political group, are not automatically regarded the same due to the specificity of dolus specialis that is crucial to be evidently portrayed. Instead, those that dictate the party are the ones

[100] Ibid, para. 957.

[101] Ibid, para. 489-490.

[102] Ibid. para 976.

[103] Ibid, para. 976.

held accountable. Thus, the specific intent to destroy the protected group is given a lot of relevance in the crime of genocide which reduces its applicability and sustainability, but at the same time does play a large factor in differentiating genocide from other crimes.

2.7: Specific Intent in Relation to State Responsibility

Individual criminal responsibility and state responsibility differ in various ways when it comes to genocide. When discussing state responsibility here, the main emphasis is placed on the obligations that a state has under Article I of the Genocide Convention[104] to prevent and punish a crime of genocide through appropriate and necessary means. Prevention must be thoroughly analyzed as it is something that should occur before the genocide and punishment refers to taking the appropriate means as described under Article IV of the Genocide Convention[105], by holding perpetrators responsible. Thus, states can be held responsible for lack of activity in relation to genocide through these means as well. Naturally, in addition to committing genocide themselves, states can also be held responsible if a perpetrator is acting on their behalf. In the ICJ case Bosnia and Herzegovina v. Serbia and Montenegro, the test of responsibility starts off with:

> "First, it needs to be determined whether the acts of genocide could be attributed to the Respondent on the basis that those acts where committed by its organs or persons whose acts are attributable to it under customary rules of State Responsibility."[106]

When discussing specific intent in accordance, it can be showcased through the perpetrator and accordingly it could be attributed to the perpetrator as acting on the state's behalf. Consequently, dolus specialis is then technically presented by the state but is showcased through the mens rea

[104] Genocide Convention, Art. I.

[105] Genocide Convention, Art. IV.

[106] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, Trial Judgement, para. 379.

and actus reus of the individual perpetrator. When the ICJ considers this case, it's important to note that, under paragraph 148:

> "The Convention is a standard international criminal law convention focussed essentially on the criminal prosecution and punishment of individuals and not on the responsibility of States. However, the Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs (a) to (e) of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals". [107]

Therefore, even though the Convention does not explicitly take into account state responsibility, through the above-mentioned mechanisms, that is responsibility to prevent or punish as well as responsibility through an individual acting under the state order, state responsibility for genocide can be portrayed and states can be held lawfully accountable. Nonetheless, it is hard to prove and carefully attribute a perpetrator's actions to be that of acting under the state's orders. For example, General Ratko Mladić who in relation to the Srebrenica genocide received substantial financial support from Serbia through the organ of Republika Srpska, himself was not considered an organ of Serbia (at the time the Federal Republic of Yugoslavia).[108] Thus, state responsibility in this case was not an option to consider as the Court judged him and his actions as not attributable to the FRY. On the other hand, Serbia was found responsible for failing to prevent the genocide of Srebrenica.[109] The obligation to conduct acts to prevent the genocide from occurring, within limits of everything legally possible,[110] is the aspect identified here. Thus, from

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[107] Ibid, para. 148.

[108] Ibid, para 388.

[109] United Nations. (2007, February 26). *UN World Court acquits Serbia of genocide in Bosnia; finds it guilty of inaction | | UN news*. United Nations. Retrieved July 30, 2022, from https://news.un.org/en/story/2007/02/210142-un-world-court-acquits-serbia-genocide-bosnia-finds-it-guilty-inaction

[110] Genocide Convention, Art. I.

Serbia's side, all actions to prevent the genocide from occurring were not evident. Therefore, Article I of the Genocide Convention which presents the responsibility of the state in international law to prevent and punish[111] the heinous act is the true element identified when discussing state responsibility for genocide. This responsibility that states hold allows further accountability to be taken for the crime and essentially enhances the role that the genocide definition and Convention, overall, play in international law. This is mainly because the aspect of prevention becomes further evident, thus placing more emphasis on future prevention.

2.8: Discussing the Applicability of Specific Intent

The specific intent to destroy in scholarly literature has sparked a wide amount of thought regarding its relevance within the definition. Essentially, international law, through the Genocide Convention's definition, has placed it as key in identifying the crime. Thus, the specific intent to destroy a protected group, shown as the mental element behind the actions is what is identifiable of genocide. The specific intent to destroy must clearly correspond to the target of a "national, ethnical, racial or religious group".[112] Thus, whilst dolus specialis is the key factor, it is crucial not to single out further specifics of the definition. The remaining parts of the mens rea, that is regarding the protected groups, will be dealt with in the following chapter.

The high threshold that specific intent holds identifies the crime of genocide as very specific. Its specificity requires more evidence and thus makes it harder to prove the intent, which then leads to limits in finding guilt in terms of individual responsibility. The high threshold fails to even recognize some cases because the specific intent to destroy can be applied but the result may be negative. Nonetheless, the stringent nature of the framing of specific intent within the definition is beneficial in the sense that it holds the substance of the crime of genocide being particular in its own sense. Kai Ambos states:

[111] Ibid.

[112] Genocide Convention, Art. II.

> "The 'specific intent to destroy' requirement turns genocide into 'an extreme and the most inhumane form of perscecution.' On the other hand, the ulterior specific intent distinguishes genocide from persecution and all other crimes against humanity and contributes to its particular wrongfulness and seriousness."[113]

Thus, specific intent can present the wrongfulness and seriousness that genocide consists of because it relates to a very narrow group of events. The sustainability of the definition as a whole is impacted by this because as dolus specialis is its key factor, in the sense that everything is centered around the special intent necessary to constitute genocide, it becomes hard to prove. The definition, over time, would not be as relevant in applicability because various cases would be harder to prove and instead would be classified under war crimes or crimes against humanity. The specific intent relevant to genocide interrupts the definition's evolvement over time because with it being so narrow, there is not much room for the term to expand to adjust to modern times. Additionally, the flaw of the Genocide Convention in not evolving since its draft diminishes the definition's ability to be maintained over time. Various cases will amount to differences that eventually would not be understood with the usage of specific intent to destroy in the definition today. For example, various massacres that are done with the motive of gaining territory or power but killing a protected group in the way are not constituted as genocide and thus specific intent is harder to identify and prove. Whilst justice would be served by being identified as a war crime or a crime against humanity, it would not allow for the massacres of specified groups in whole or in part to be constituted as genocide, with specific intent being necessary but not the primary basis of conviction. The primary basis of conviction should be presented through the inclusion of countless protected groups within the definition.

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[113] [113] Ambos, K. (2009), "What does 'specific intent to destroy' in genocide mean?", *International Review of the Red Cross*, Vol. 91, Iss. 876), DOI:10.1017/S1816383110000056, pp. 835-836.

Chapter III: Protected Groups within the Definition:

3.1: Origin of the Categories of Protected Groups

The aspect of protected groups within the Genocide Convention is another controversial element of the definition because it is so limited in the sense that it does not span across various group categories, such as political groups or gender groups who are subject to a vast amount of hate crime and discrimination in our world today. In some countries within genocide protection domestic law, the group coverage is more expanded and of course, relevant to the occurrences in their own states. The French penal code, for example, defines genocide as "the intentional destruction of any group based on arbitrary criteria"[114] and thus does not limit the protected groups. There has been wide discussion regarding the inclusivity of protected group categories. This has sparked wide debate in scholarly literature about the nature of which groups are to be protected versus which are not. The first draft of the Genocide Convention has included the same categories that are presented today, "national, racial, ethnical or religious groups" [115], and therefore has not been advanced since 1947. There were next proposals during the negotiations to expand the list but in the end, it has stayed as the initial draft. The terms were not constructed to include various other categories of groups as at the time because they mainly relied on constructing the definition on the basis of prior events that had occurred, such as the Holocaust.

3.2: National Group

Defining groups must involve an array of subjectivity because their meaning is judged in accordance to the social context.[116] The terms of protected groups are social constructs and not

[114] *The French Penal Code of 1994 as Amended as of January 1, 1999*, translated by Edward A. Tomlinson; with an introduction by Edward A. Tomlinson (Littleton, Colo.: Fred B. Rothman, 1999), Art. 211-1.

[115] First Draft of the Genocide Convention, Prepared by the UN Secretariat, May 1947, UN Doc. E/447.

[116] Schabas, W., 2009, Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, *ILSA Journal of International & Comparative Law*, Vol. 6, pp. 383.

scientific expression which was intended by the drafters of the Genocide Convention.[117] The understanding of labels of the group categories has evolved over time. Thus, they are to be judged socially and in relation to the specific context which creates a wide array of interpretation to how it is understood. "The drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to the construction of the other."[118] When Raphael Lemkin defined the term genocide, he defined it in relation to that being of a nation group. He wrote "Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[119] Thus, the encompassment of various categorizations of groups as target was not identified, making national groups the key starting point in developing others within the Genocide Convention. Since there is no real definition of what the Genocide Convention means as a national group, its understanding is highly dependent on the case, context and the tribunal. In the ICTR Akayesu case, a national group is defined as a collection of people who are perceived to share a legal bond based on citizenship, along with the reciprocity of right and duties.[120] It is based on the Nottebohm decision[121] which essentially does not define a national group but instead defines nationality thus this presents as a limitation of ICTR's particular identification. While the ICTR focuses on this definition of a national group, there is various other interpretations which can be reflected on within domestic legal systems. For example, the Spanish National Court rules that a national group is not only limited to a collection of people from the same nation but that it can also encompass a differentiated human group, who are

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[117] Ibid, pp. 385.

[118] Schabas, W., 2009, Genocide in International Law: The Crime of Crimes (2nd ed.). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511575556, pp. 130

[119] Irvin-Erickson, Douglas. *Raphaël Lemkin and the Concept of Genocide*, University of Pennsylvania Press, 2016. *ProQuest Ebook Central*, https://ebookcentral.proquest.com/lib/cuni/detail.action?docID=4718063, pp. 82.

[120] *The Prosecutor v. Akayesu,* 2 September 1998, Judgement, para. 512.

[121] *Nottebohm Case (Liechtenstein v. Guatemala)*, Judgment, 6 April 1995, International Court of Justice.

characterized by something, but still integrated into a larger community, such as foreigners residing in a common country.[122] Additionally, while the draft of the Convention was being put together, various states understood the term in multiple different ways. Sweden, for example, suggested that the term should not revolve around that of a formal existence of a state because if the state would cease to exist, the group would be unprotected.[123] Other states, such as Belgium, understood the term as pertaining only to a national minority.[124] It is important to point out that the drafters of the Genocide Convention never constructed the protected groups' list in regard to minorities and essentially, the fact that a group is a majority or minority is extraneous. Overall, the national group interpretation and what it encompasses is dependent on the court.

3.3: Racial Group

Under the ICTR within the Akayesu case, a racial group under the Genocide Convention is based on the conventional definition of a racial group. Thus, it is "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, nation or religious factors."[125]

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[122] *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdiccion de España para conocer de los crimenes de genocidio y terrorismo cometidos durante la dictadura chilena* [Order of the Criminal Chamber of the Spanish Audencia Nacional affirming Spain's Jurisdiction to Try Crimes of Genocide and Terrorism Committed during the Chilean Dictatorship], SAN, 5 Novemeber 1998 (appeal No. 173/98, Criminal Investigation No. 1/98), available at http://www.derechos.org/nizkor/chile/juicio/audi.html, Fifth.

[123] UN General Assembly Resolution, 13 October 1948, 3d Sess., 73d mtg. at 97, U.N. Doc.; E/794; Lisson, D., (2008), Defining "National Group" in the Genocide Convention: A Case Study of Timor-Leste. *Stanford Law Review*, *60*(5), 1459–1496. http://www.jstor.org/stable/40040391, pp. 1470.

[124] Ibid.

[125] *The Prosecutor v. Akayesu,* 2 September 1998, Judgement, para. 514.

3.4: Ethnic Group

An ethnic group under the ICTR Akayesu case is "generally defined as a group whose members share a common language or culture."[126] This encompasses a very broad spectrum of application and can be subjective in interpretation.

A case that is crucial in discussing the aspect of protected groups within the Genocide Convention's definition in a way that is thorough and applicable is ICJ's The Gambia v. Myanmar. "In the Court's view, the Rohingya in Myanmar appear to constitute a protected group within the meaning of Article II of the Genocide Convention." [127] Thus, the Rohingya in Myanmar fall under the provisions of the protected groups within the definition but the Kachin minority, for example, is disregarded. The Kachin minority is further discussed below. The Court does take each case separately to identify in what way the group constitutes one of the protected groups. In the case of the Rohingya, aspects pertaining to the ethnical protected group were identified and the Court also intended to promote ethnic reconciliation.[128] Thus, it becomes clear within the Court what is needed to constitute one of the protected categories in the definition. As mentioned in the prior chapter, the definition of genocide is based on the notion of intent to destroy, thus the motive has to be the destruction of the specified group because of their group identity. This ties deeply into the protected groups that are represented within the definition because firstly the categorization of the group should be correctly identified and accordingly the motive for killing that specific group should be evident too.

3.5: Religious Group

[126] *The Prosecutor v. Akayesu,* 2 September 1998, Judgement, para. 513.

[127] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2020, International Court of Justice, ISSN 0074-4441, para. 52.

[128] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2020, para. 73.

A religious group under the ICTR Akayesu case is defined as "one whose members share the same religion, denomination or mode of worship".[129] The Court thus determines which alleged religious groups fall under this classification. When looking at the religious group categorization, the Kachin minority is a prime example that could fulfill the protected groups within the definition but the intent to destroy may not be as straightforward. Stella Naw, a political analyst and writer states "It's a war where civilians are being systematically targeted by members of Burma Army ... [yet] the international community chooses to overlook it."[130] The Kachin minority targeted by the Burmese army, as a case in comparison with the ICJ case of Gambia v. Myanmar, clearly can showcase the limited applicability of protected group categories. Without specified protected groups, such as in the French penal code and instead focusing on general protected groups that are subject to hate crimes and discrimination, we could find a more vast outlook on various groups that are overlooked. Additionally, it's important to recognize that in order for a case to be claimed as genocide, it has to fulfill all elements of the definition. This makes it incredibly hard and specific in various instances. The Kachin minority group were not constituted as one of the protected groups under the Genocide Convention so no matter the intent, its applicability for the prosecution of genocide is not relevant because of the primary aspect of it not being a national, racial, ethnical or religious group. Therefore, the vast massacre is still present and the group terrors are not acknowledged by the international community, especially not through the Genocide Convention. Additionally, it is important to look at where the intent stems from. That is, does the Burmese army have the aim to destroy the Kachin minority or is it part of their path in a war over rich natural resources?

3.6: The Limits of "National, Racial, Ethnical or Religious Groups":

[129] *The Prosecutor v. Akayesu,* 2 September 1998, Judgement, para. 515.

[130] Hogan, L. (2018, May 14). *'Slow Genocide': Myanmar's Invisible War on the Kachin Christian minority*. The Guardian. Retrieved June 13, 2022, from https://www.theguardian.com/world/2018/may/14/slow-genocide-myanmars-invisible-war-on-the-kachin-christian-minority

The notion of including various groups subject to hate crimes needs be correctly done in a way that allows applicability for various cultural differences and interpretations. But, the inclusion of various groups should be handled with care and thought. In the English version of the ECCC Statute, the Law replaced the phrase "as such" referring to "group" in the Genocide Convention to "such as" but referring to "acts."[131] This additionally limits the group categories to those stated within the Genocide Convention definition. Accordingly, as Article IV of the ECCC Statute states, the Genocide Convention definition was applied.[132] Therefore, it is extremely hard to truly take into account and combine elements that would suit different cases of genocide in a way that would allow for the appropriate notion to work as well as keep the definition sustainable. Nonetheless, when discussing the factor of the limited group categories that constitute the intent for the heinous crime, a more encompassed availability of categories should be present. The case of the Khmer Rouge atrocities, discussed further below, is a prime example of this fault within the definition. Without the identity of a political grouping as well as a socio-economic grouping within the definition, not all the killings are accounted for and thus the genocidal intent (within the meaning of the Genocide Convention) of the offenders is not present in the required way.

A crucial factor that makes the crime of genocide further divergent from other crimes is that it is done on the basis of the victims' identity and most importantly the identity relating to a specific group. As stated, the four categories included under Article II encompasses national, ethnical, racial and religious groups.[133] Since the protected group categories are restricted to the four within the Genocide Convention, other groups that are outside the definition's scope, if the case, would not be claimed under genocide. Case 002[134], regarding the Cambodian genocide

[131] UN Security Council, *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia*, 27 October 2004.

[132] UN Security Council, *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia*, 27 October 2004, Article IV.

[133] Genocide Convention, Art. II.

[134] *Prosecutor v. Nuon Chea, Khieu Samphan*, 16 November 2018, 002/19-09-2007/ECCC/TC (Case 002/02), Trial Judgement, ECCC.

claims, strongly represents this issue of the definition. Within Vianney-Liaud's article, it is said that:

> "At the ECCC, the indictment of the last surviving Khmer Rouge senior leaders, known as "Case 002" includes very limited genocide charges, only with respect to crimes committed on two minority groups: the Cham and the Vietnamese."[135]

With respect to the responsibility for the crimes, this notion that the ECCC has not fully recognized the expanded understanding of genocide, disappoints many victims and non-state actors. The downfall of the limits of group categories within the genocide definition halt its sustainability in modern times because various groups are left unacknowledged and thus not judged accordingly, on the international level. Another major category that is missing from the definition when discussing the Cambodia case is the identity of socio-economic group which was a very evident cause of the killings by the Khmer Rouge. The Khmer very heavily targeted the educated, intellectual population because these civilians were usually opposed to the Khmer's motive of governing.[136] Vianney-Liaud points out that:

> "Forcibly transferred from cities to countryside, "new people" members were often targeted based on this identity. This group however, does not fall under the listed classification defined in the Genocide Convention as the distinction made by the Khmer Rouge was based on an individual's socioeconomic background." [137]

[135] Vianney-Liaud, M. (2018, August 29). *Emerging Voices: Controversy on the Definition of the Cambodian genocide at the ECCC*. Opinio Juris. Retrieved April 19, 2022, from http://opiniojuris.org/2014/08/20/emerging-voices-controversy-definition-cambodian-genocide-eccc/.

[136] Ibid.

[137] Ibid.

The groups within the definition are identified by common characteristics but there is no precise definition specific to what makes up each group.[138] The Trial Chamber regarding Case 002/02 stated "each of these concepts must be assessed in the light of a particular political, social and cultural context" [139] thus concluding that in each case, specified attributes are taken into account, but this does not expand the protected group categories. Even though each case is clearly analyzed and thus concluded whether to fit the specified categories, the broadening of categorization has not occurred since the draft of the Convention and therefore clearly limits the assessment. Case 002/02 clearly show the limits of the scope of the protected group categories because it shows how the biggest group that was targeted throughout the massacre is completely disregarded due to not fitting the categorization. Therefore, the case emphasizes how this flaw cannot sustain its application in today's international law and politics, because of the narrow scope surrounding the categorizations. It is important to mention that the crime does not go unpunished but instead is punished as a crime different from genocide. Even though in this sense justice prevails, the importance is that the applicability of the genocide definition is not satisfactory enough in various cases. Thus, as our world evolves, in terms of identifying a larger scope of groups based on for example sexual orientation, who are subject to a vast amount of hate, this should ideally create space for a wider array of categories to be included. The categories should be centered around those that are susceptible to hate crimes in today's day and age, and thus evolve accordingly. This way, the definition would have a more progressive outlook and thus be more sustainable in modern times.

The crimes of the Khmer Rouge involved the killing of various Cambodians who were part of a communist party within Cambodia known as the Communist Party of Kampuchea. This was an incredibly wide discussion within the United Nations during the 90s pertaining to if destroying one's own group would essentially qualify as genocide and on what basis within the

[138] Case 002/2, Trial Judgement, para. 795; Fry E., Sliedregt V. E., (2020), Targeted Groups, Rape and *Dolus Eventualis*: Assessing the ECCC's Contributions to Substantive International Criminal Law, *Journal of International Criminal Justice*, Volume 18, Issue 3, pp. 709, https://doi.org/10.1093/jicj/mqaa017

[139] Case 002/02, Trial Judgment, para. 6.

definition is this applicable. The Khieu Samphan and Nuon Chea, Case 002 presents only charges on the basis of genocide of the Vietnamese and Cham Muslim minority groups which widely did not encompass the large number of victims subject to the genocide of the Khmer Rouge.[140] It is important to note that other minorities as well as the opposing political group against the Khmer were also a target and were excluded from these charges. [141] The Khmer political group were identified as the opposing political group against the Khmer Rouge system of governing. Since the definition does not provide basis for this prosecution due to the political groups not being identified as one of the protected groups, the genocide was not charged on this basis. Thus, a large number of victims were left unacknowledged, that is in regard to the genocide. Nonetheless, the Khmer group can be clearly identified as a national group, no matter if it is a minority or majority of the population, thus satisfying the definition of genocide.[142] "The Khmer people constitute a "national group" within the plain meaning of Article II of the Convention, and such a conclusion is consistent with both logic and the language of the Convention itself."[143] We can note that there is no such requirement evident in the Genocide Convention that the victim group must be distinct from the perpetrator's own group. Thus, whilst the work of the Convention is clear in identifying the Khmer as a national group it is also clear that there is no notion regarding the distinctness from the group of the victim and that of the violator. Whilst the lack of clarity regarding what the various groups encompass as identifiable is present, a progressive element of the definition is the fact that it "does not exclude cases where the victims are part of the violator's own group."[144] Thus, whilst in this case, the Khmer group can be identified as a national group under the Convention, it being the same group as the perpetrator's own group does not disregard it either. When referring to the political group who

[140] Case 002/02, Trial Judgement, para. 16.

[141] Fry E., Sliedregt V. E., (2020), pp. 704.

[142] Hannum, H., (1989), International Law and Cambodian Genocide: The Sounds of Silence, *Human Rights Quarterly*, Vol. 11, Iss. 1, 82–138. https://doi.org/10.2307/761936

[143] Ibid, pp. 105.

[144] Quigley, J. (2006). The Genocide Convention: An International Law Analysis (1st ed.). Routledge. https://doi.org/10.4324/9781315557809, pp. 187.

purposefully opposed the Khmer government, there is no categorization under the protected groups' list available in order to charge these specific killings under genocide. As mentioned above, before the international community stepped forth in helping the ECCC with its international law-abiding mechanisms such as relying on the Genocide Convention for the definition of genocide, the ECCC constructed its own definition based on Cambodian law itself, cultural differences as well as a different interpretation of the definition's elements. The definition presented by the Genocide Convention is excessively narrow to show the Khmer Rouge's atrocities targeting groups not included within the definition. Therefore, the protected groups within the genocide definition do not encompass all groups necessary that are essentially victims to hate crimes and discrimination, as shown by Case 002/02. Thus, the scope of the protected group's list comes to show as inappropriate. With respect to modern times and the development of the international society, would it be respectable and applicable to evolve the definition to accompany various groups?

The utter flaw of the narrowness regarding protected groups within the definition is thoroughly showcased using the Khmer Rouge crimes as relevance. Other instances of alleged genocide should be reflected upon when considering that the definition's flaws should be corrected allowing for true accountability to be taken. A vital limit of the genocide definition is that the list of protected groups does not accompany groups based on sexual orientation and gender identity. These issues have been quite restrained from the legal arena and should be addressed in core international crimes, such as genocide. If the protected groups included a group based on sexual orientation and gender identity, the power of legal qualification in international law would strengthen the protection of a large number of victims that are part of these groups. The legal qualification, which would open the door for prosecution in terms of genocide of victims belonging to a sexual orientation group, would enhance the definition's sustainability with the changing times as well as enhance accountability. Since various crimes do not go unacknowledged and do qualify as hate crimes or crimes against humanity, enhancement of accountability refers to the crimes being identified as done on the basis of group identity. The killing of LGBTQ people by ISIS is a case petitioned by various organizations, such as a women's rights group Madre as well as the Organization for Women's Freedom in Iraq (OWFI), urging the ICC to prosecute ISIS and its fighters for killing people based on their gender, sexual

orientation and gender identity.[145] Another example which is very current in our world is the evidence presented for Russian hate crimes against LGBTQ people in the Republic Of Chechnya in North Caucasus.

> "Previous victims have described the brutal tactics used by Chechen law enforcement against LGBT people in the republic. One young Chechen man said he had been beaten with metal rods, subjected to electric shocks and verbally abused for his sexual orientation. Three young men were reportedly killed in that crackdown."[146]

The Russian LGBT network, an NGO which campaigns for equal rights of sexual minorities, has been adamantly dealing with this issue but justice and prevention has not been fully established. [147] Thus, as one of the primary aspects of the Genocide Convention is the actual prevention of genocide, expanding the scope of the genocide definition in terms of protected groups would aid immensely cases as such. When we can clearly see that over time, the LGBTQ have been a specific targeted group in terms of hate and discrimination, then we must evolve with the times by expanding the scope of the definition and allowing for charges of genocide in relation to groups as such. If the basis of intent is allegedly the killing of people because they fall within the LGBTQ community, then with the Convention's genocide definition encompassing groups based on sexual orientation, genocide charges could be brought in front of an international court. Unfortunately, with the limits that the definition presents in terms of the

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[145] The Human Rights and Gender Justice (HRGJ) Clinic of the City University of New York (CUNY) School of Law MADRE The Organization of Women's Freedom in Iraq (OWFI), (8 November 2017), "Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq and the Levant (ISIL) in Iraq."

[146] Roth, A. (2019, January 14). *Chechnya: Two dead and dozens held in LGBT purge, say activists*. The Guardian. Retrieved July 30, 2022, from https://www.theguardian.com/world/2019/jan/14/chechnya-two-dead-and-dozens-held-in-lgbt-purge-reports

[147] *Impact Campaign*. Welcome to Chechnya. (n.d.). Retrieved July 30, 2022, from https://www.welcometochechnya.com/partners

scope of the protected groups list, this cannot be the current case. Therefore, the restraint in scope significantly endanger various sexual orientation groups, among others not protected under the Convention, subject to large discrimination.

3.7: Toward a More Progressive Outlook

In various instances of domestic law, states have adjusted the definition of genocide to their own circumstances and thus many have changed the coverage of protected groups, some not even limiting it to categories, such as in the French penal code.[148] Various groups, such as political and gender-based groups, are not included in the Genocide Convention but are subject to a large amounts of discrimination creating a high need to be "protected", in a sense. Additionally, some domestic tribunals over time, have turned from defining groups objectively, that is depending on how the group is objectively defined, to taking a more comparative approach by "relying on the perception of the group's differentness"[149] and accordingly expanding the definition. Therefore, to meet the evolution that international politics and law has taken with a more forward-looking outlook, the inclusion of protected group categories should not be limited but instead should encompass the vast amount of identity groups in relation to urgency. This expansion would allow for prevention and punishment of more events based on genocide definition because a wider range of groups would be under the Genocide Convention's protection. Accordingly, an unlimited and specified version of the group categories would aid in further accountability taken for various massacres not constituted as genocide because of the current strictness regarding group categorization within the definition. Without the limit of categorization such as in the French domestic law regarding genocide,[150] the definition would gain a sense of legitimacy as not being only done on the basis of racial, ethnical, national or

[148] *The French Penal Code of 1994 as Amended as of January 1, 1999*, translated by Edward A. Tomlinson.

[149] Lingas, C., (December 2015), Defining the Protected Groups of Genocide Through the Case Law of International Courts, International Crimes Database Brief 18, pp. 2.

[150] *The French Penal Code of 1994 as Amended as of January 1, 1999*, translated by Edward A. Tomlinson, Art. 211-1.

religious identity but instead on group identity as a whole. This distinctiveness of the crime of genocide would not be lost with the expansion of group categories. If, for example, it corresponded to the French penal law genocide definition[151], it would actually allow a larger array of application but, at the same time, still be easily differentiated from other crimes because the aim to destroy is still on the basis of group identity. The Czech Criminal Code defines genocide with focusing on the four protected groups but also includes "class, or other similar group of people"[152]. Thus, it encompasses all the groups protected under the Convention but also refers to groups based on class or other similar groups of people. Now, it is hard to identify what can constitute as similar but that is up to the court. Nonetheless, the protected groups are expanded beyond the Convention's definition within the Czech domestic legal system, as well. The part stating "or other similar group of people"[153] truly reflects an openness in including other groups whilst still preserving the distinctiveness of the crime because the act is still conducted due to the victim's group identity. All in all, the definition as is now limits the accountability taken for the crime. This is mainly because it does not represent all identity groups subject to hate crimes but also does not reflect our world in law and politics today, since the definition has not evolved from its first draft in 1947. Nonetheless, it is important to note that the genocide definition, even being present and identifying genocide as its own crime, has progressed us a long way, but there is certainly more room for improvement.

[151] Ibid.

[152] Czech Republic, Criminal Code of 2009, 40/2009, available online at https://www.ejtn.eu/PageFiles/6533/Criminal%20Code%20of%20the%20Czech%20Republic.pdf, Section 400.

[153] Ibid.

Chapter IV: The Acts of Genocide:

4.1: Actus Reus of Genocide

Article II of the Genocide Convention[154] contains the actus reus of genocide which are either mental or physical acts that satisfy part of the genocide definition. The commission of one of the acts is enough to constitute genocide, assuming all other elements of the definition are met. These acts consist of:

> "(a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group." [155]

The five acts included in Article II[156] allow for a very specified notion of the crime because there are only five sub-paragraphs that show in what ways the intent for "destroying"[157] the protected group can be portrayed. Although all five acts of genocide are equally as important, sub-paragraph (b) will be largely emphasized as it can provide wide insight into imperfections of the definition.

4.2: A) Killing members of the group:

[154] Genocide Convention, Art II.

[155] Ibid.

[156] Genocide Convention, Art II.

[157] Ibid.

Sub-paragraph, "(a) killing members of the group"[158] is understandably the killing of individuals due to their group membership. Thus, it includes direct killing and actions causing death. When we take a look at it in relation to the other listed acts, it is the one that is most direct and easy to understand. Additionally, the other acts can also reflect onto the killing members of the group. For example, if "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part[159]" includes killing members of the group, both sub-paragraphs (a) and (c) would be satisfied. In ICTR's Akayesu case, killing members of the group is accepted as murder when death has been caused with the intention to do so.[160] Thus, the act refers to the actual physical destruction of group members. In accordance with the other elements of the definition, sub-paragraph (a) is understood as the direct murder of individuals belonging to a specified protected group.

4.3: B) Causing serious bodily or mental harm to members of the group:

Sub-paragraph "b) causing serious bodily or mental harm to members of the group"[161] is a hard element of definition to discuss because mental harm can very much be subjective in assessment and is hard to define. The ICTY in the Prosecutor v. Milomir Stakić case defined sub-paragraph b) as

> "inter alia, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable."[162]

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[158] Genocide Convention, Art. II.

[159] Ibid.

[160] *The Prosecutor v. Jean-Paul Akayesu,* 2 September 1998, Trial Judgement, International Criminal Tribunal for Rwanda (ICTR), ICTR-96-4-T, para. 500.

[161] Ibid.

[162] *Prosecutor v. Milomir Stakic*, 31 July 2003, Trial Judgement, para 516.

The ICTR in the Kayishema and Ruzidana case identified sub-paragraph b) as undertaking an action that might cause injury to the physical and mental fullness, that is of a person as a whole[163]. Additionally, it included that the term "serious" refers to both the bodily and mental harm and is dependent upon the extent to which physical or mental well-being is injured[164]. It is also very important to note that the Prosecution emphasized that "the harm caused need not bring about death but causes handicap such that the individual will be unable to be a socially useful unit or a socially existent unit of the group."[165] Now, it is of course more difficult to judge the essence of mental harm compared to physical harm. The ad hoc tribunals have expressed that there is not a specified list accounting to all the mental harm because the acts capable are essentially non-exhaustive and to be determined on a case-by-case basis using a common-sense approach.[166]

4.3.1: Seriousness of Bodily and Mental Harm

Levene has repeatedly emphasized that narrowing the definition to an extent will disallow for its proper usage but at the same time expanding it to be applicable in all cases defeats its purpose and the specificity that is needed for it be truly unlike any other crime.[167] Furthermore, the concept of serious bodily or mental harm has been discussed widely in relation to the Genocide Convention's flaws and more specifically the concept of mental harm has raised various issues in regard to what it really means and how it can be assessed correctly. Thus, it is

[163] *The Prosecutor v. Clement Kayishema and Obed Ruzidana,* 21 May 1999, Trial Judgement, International Criminal Tribunal for Rwanda (ICTR), para 106.

[164] Ibid.

[165] *Prosecutor v. Clement Kayishema and Obed Ruzindana*, 21 May 1999, Trial Judgement, para 107.

[166] *The Prosecutor v. Clement Kayishema and Obed Ruzidana,* 21 May 1999, Trial Judgement, para. 108-113.

[167] Levene, Mark (2002), pp. 447.

relevant in the sustainability of the definition as a whole because it is one of the crucial aspects that raises concern in its applicability. The act of serious mental and bodily harm presents the notion again of what is technically meant by this? Do other phrases such as mental anguish, humiliation, mental distress and discrimination make up the act of mental harm?[168] Additionally, since the definition is carefully constructed and every word is chosen with intention behind it, how are we certain what the scope of "seriousness" is within the definition? How do we really know what the label of "serious" presents as such? It significantly can capture any conduct capable of causing such harm to a form of such "seriousness". Additionally, through international law much is to be determined and understood in view of the context of each case of genocide, but then the strictness that the definition as a whole encompasses might be tarnished in a sense. Whilst the definition is strict as a whole, focusing on sub-paragraph b) allows a more open understanding of genocide because through it acts such as sexual violence can be included.[169] The drafting of the Genocide Convention caused significant dispute amongst officials regarding the wording of Article II(b). China's delegate was first to propose the inclusion of it at all to the ad hoc committee because of the Japanese use of narcotics against the Chinese population in WWII.[170] Others opposed this idea and the concept of mental harm was not included in this amendment draft.[171] China reiterated the request at the Sixth Committee claiming that the effects of Japan's acts were "no less destructive"[172] than the Holocaust gas chambers and thus the Genocide Convention should be created of universal scope encompassing various ways that constitute the intent of killing a protected group.[173] India's delegate further

[168] Gorove, S. (1951), The Problem of Mental Harm in the Genocide Convention, *Washington University Law Quarterly*, Vol. 2, pp. 174.

[169] *Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, para 417.

[171] Ibid.

[172] General Assembly, 3rd Session. Official Records, Part I Sixth Committee, Summary Records of Meetings (September 21-December 10, 1948), 81st Meeting, A A_C.6_SR.61-140-EN, pp. 175.

[173] Gorove, S., (1951), pp. 178.

proposed the inclusion of mental harm which was adopted as part of the Sixth Committee amendment.[174]

At the beginning of the Genocide Convention's drafting, a threshold was not included because it was always in relation to and limited to specific acts. Now, because all acts could not amount the same extent, a qualitative threshold was put forth to limit the act. There was also debate within the Sixth Committee between the words grievous vs. serious but in the end, it was concluded that serious would amount to less ambiguity in courts and thus less challenges in interpretation.[175] Therefore, whilst the phrasing was thoroughly thought out, it can be still subject to wide interpretation and misunderstanding into what the breadth of the threshold requirement of "serious harm" essentially is.

4.3.2: Limits of Article II(b)

Article 6(b) of the Elements of Crimes of the Rome Statute of the International Criminal Court describes "Genocide by causing serious bodily or mental harm as:

1. The perpetrator caused serious bodily or mental harm to one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

[174] General Assembly, 3rd Session. Official Records, Part I Sixth Committee, Summary Records of Meetings (September 21-December 10, 1948), 81st Meeting, A A_C.6_SR.61-140-EN, pp. 179.

[175] General Assembly, 3rd Session. Official Records, Part I Sixth Committee, Summary Records of Meetings (September 21-December 10, 1948), 81st Meeting, A A_C.6_SR.61-140-EN, pp. 179.

4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."[176]

These elements present a more thorough outlook of the definition, technically the same one as the one within the Genocide Convention, but from the viewpoint of specifically the actus reus of seriously bodily or mental harm. Mens rea remains incredibly important but the focus of this chapter is the actus reus.

The actus reus of serious bodily or mental harm can encompasses a number of things and allows for a wide range of actions to constitute it as such. As much as this can be incredibly beneficial in taking responsibility for the actions of genocide, it becomes hard to determine when it is relevant because the contextual analysis of each case has to be further expressed unlike in other sub-paragraphs. For example, sub-paragraph a) killing members of the group, it is essentially straightforward to analyze what constitutes it, unlike what constitutes as serious mental harm. The Srebrenica genocide, when looking at it more thoroughly, was committed against men but also women and children. Even though women and children were not killed or physically destroyed, they suffered a large amount of mental and physical abuse over the time period, through rape and sexual violence on a large scale.[177] Similarly, the Rwanda genocide included large-scale violence against women including sexual violence which would ultimately account under the actus reus of serious bodily or mental harm.[178]

The International Criminal Tribunal for Rwanda conducted numerous trials regarding crimes of rape and sexual violence as genocide.[179] In regard to the crimes of rape and sexual

[176] Elements of Crimes, 2010, International Criminal Court, ISBN No. 92-9227-232-2, Article 6 (b).

[177] *The Prosecutor v. Vidoje Blagojević and Dragan Jokić,* 17 January 2005, Trial Judgement, ICTY, IT-02-60-T, para. 650- 652.

[178] *The Prosecutor v. Jean-Paul Akayesu,* September 2nd1998, Trial Judgement, para. 598.

[179] *The Prosecutor v. Jean-Paul Akayesu,* 2 September 1998, Trial Judgement, para. 731.

violence being under the genocide definition, the actus reus of serious bodily or mental harm is an element under which this can satisfy the genocide, assuming all other requirements are met.[180].The circumstances of determining this depends on each case but examples of sub-paragraph b) have included torture, inhumane or degrading treatment as well as sexual violence.[181] The ICTR Appeals Chamber did not specifically address the definition of "serious bodily or mental harm" but has addressed examples of serious bodily harm including torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.[182] It has also stated that serious mental harm includes "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat."[183] Additionally, bodily or mental harm is an actus reus of genocide thus it must be of a serious nature in a sense that it threatens the destruction of a group in whole or in part[184]. The Krstic Trial Chamber in 1998 stated that in regard to the Akayesu Judgement:

> "Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life." [185]

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[180] *The Prosecutor v. Jean-Paul Akayesu,* 2 September 1998, Trial Judgement, para. 731.

[181] *The Prosecutor v. Jean-Paul Akayesu,* 2 September 1998, Trial Judgement, para. 504, para 731.

[182] *The Prosecutor v. Athanase Seromba,* 12 March 2008, Trial Judgement, International Criminal Tribunal for Rwanda (ICTR), ICTR-2001-66-A, para. 46.

[183] Ibid.

[184] Genocide Convention, Art. II

[185] *Prosecutor v. Radislav Krstić*, 2nd August 2001, Trial Judgement, International Criminal Tribunal for Former Yugoslavia (ICTY), IT-98-33-T, para. 513.

Thus, regardless of its lasting effects, it is to be judged the same, that is if all other conditions of the definitions are fulfilled. The Prosecutor v. Akayesu case is also vitally relevant since it was the first conviction of sexual violence and rape as crimes of genocide. The Akayesu Trial Chamber has stated:

> "For purposes of interpreting Article 2(2) (b) of the Statute, the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution."[186]

This significantly shows that since Article II(b) is broad in a sense it allows for no limitation which is beneficial for wider prosecution but at the same time can cause an unidentified boundary of what to take into account. Regardless, sexual violence and rape is a vital aspect of what has been included in cases under Article II(b), such as the Akayesu case[187].

When it comes to discussing sexual violence and rape as an act of genocide, the ICJ case of Bosnia and Herzegovina v. Serbia and Montenegro[188] presents as another prime example in identifying what it really means under Article II(b) and discussing if this is relevant to modern times. In cases of individual responsibility regarding the atrocities in Bosnia and Hercegovina such as the Prosecutor v. Krstic[189] and the Prosecutor v. Blagojevic[190], the Trial Chambers found that actions of the individuals who were part of the Bosnian Serb forces satisfied Article II(b) of the Genocide Convention. This was on the basis of execution of victims as well as their families

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[186] *The Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, para. 504.

[187] *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, para. 731.

[188] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, Trial Judgment, I.C.J. Reports, pp. 43.

[189] *Prosecutor v. Radislav Krstić*, 2 August 2001, Trial Judgement.

[190] *Prosecutor v. Vidoje Blagojevic* (Trial Judgement), International Criminal Tribunal for Former Yugoslavia (ICTY), January 27th 2005, IT-02-60-A.

who were separated from them due to forced displacement.[191] The corresponding serious mental harm that resulted such as severe trauma and PTSD additionally played a role in Srebrenica fulfilling the definition. When it comes to state responsibility however in the ICJ case of Bosnia and Herzegovina v. Serbia and Montenegro[192], the rapes and sexual violence that was committed on the territory of Bosnia and Hercegovina is not regarded as genocide. All in all, the Bosnia and Herzegovina v. Serbia and Montenegro[193] case allows for clear identification of serious bodily and mental harm, with serious mental harm significantly presented by displacement and trauma and thus shows the vast ways Article II (b) can be portrayed.

4.3.4: Interpretation of Article II(b)'s Sustainability

The Genocide Convention was created to punish and prevent the crime of genocide with the aim of ensuring it does not occur in the future and the actus reus of serious bodily and mental harm has provided flexibility here. Understanding "serious bodily or mental harm" under Article II(b) of the Genocide Convention[194] allows for understanding the sustainability of the definition in today's international law and politics. Firstly, it is a step forward globally in a way because it has provided a progressive understanding of the crime. This is presented through the fact that it encompasses acts of sexual violence, as such, and thus is not only judged on the basis of the intent of "killing" protected groups. The case of Prosecutor v. Akayesu[195] in the ICTR as being the first judgment of sexual violence under the crime of genocide was a vast turning point in the elements that Article II(b) is presented to encompass. Even though some notions of Article II(b) are not clearly defined and thus differently interpreted, such as the threshold of "serious", Article

[191] Ibid: *Prosecutor v. Radislav Krstić (Trial Judgment), 2001; Prosecutor v. Vidoje Blagojevic (Trial Judgement), 2005.*

[192] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007.

[193] Ibid.

[194] Genocide Convention, Art. II.

[195] *The Prosecutor v. Akayesu,* Trial Judgement, 1998.

II(b)[196] provides a wide range in which the crime of genocide can be presented and thus its applicability is relevant. The vast scope that Article II(b) encompasses from acts of torture to displacement to sexual violence permits understanding various acts that constitute the crime that is genocide. Since the specifics of the actus reus are not clearly presented, it allows various courts to analyze it on a case-by-case basis. This is beneficial to vast amounts of situations that can be involved under this act but the sub-paragraph still has its distinct flaws. Whilst its availability in interpretation progresses the definition's applicability, it can also confuse and misconstrue what the sub-paragraph really means and entails. All in all Article II(b), shown through several cases, is sustainable in some sense because it encompasses various acts that present incredible damage to victims based on their group identity, with the intent to destroy the group in whole or in part. But, with no clear definition of it within the Convention, it is left to too much interpretation of what it entails. Thus, this aspect can showcase a flaw in its contradictory sustainability in modern day international law and politics.

4.4: (C) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

Sub-paragraph (c) also varies in interpretation and thus in its meaning across different courts, mainly because it can be showcased in various different ways. In the Akayesu case, the Trial Chamber notes that "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction."[197]Additionally, para. 506 includes "inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement."[198] Thus, whilst this act can bring about murder, it is not a necessary component thus it can be presented in many other ways

[196] Genocide Convention, Art. II.

[197] *The Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, para. 505.

[198] *The Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, para. 506.

as identified above by the ICTR. The ICTY, on the other hand, in the Zdravko Tolimir identified sub-paragraph (c) examples as

> "inter alia, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion."[199]

It is also important to point out that acts that constitute physical or biological destruction are to be differentiated from the mere dissolution of a group.[200] Dissolution of a group, through forcible transfer for example, by the perpetrator would account to cultural genocide which is not part of the Genocide Convention.[201] Now, if this act was supported by the physical or biological destruction of the group, as described above, or included any of the other actus reus, assuming all other elements of the definition were satisfied, then it would be appliable for genocide[202]. Therefore, sub-paragraph (c) does amount to differences in meaning allowing differences in applicability across cases. This can present as an advantage of the genocide definition because its scope allows in creating room for adjustment, through its applicability, as our world evolves. Nonetheless, its wide availability for interpretation might present as a disadvantage mainly because it is not clearly defined the same across cases and courts.

4.5: (D) Imposing measures intended to prevent births within the group:

[199] *The Prosecutor v. Zdravko Tolimir,* 12 December 2012, Trial Judgement, IT-05-88/2-T, ICTY, para. 740.

[200] *The Prosecutor v. Zdravko Tolimir,* Trial Judgement, para. 741.

[201] Ibid.

[202] *The Prosecutor v. Zdravko Tolimir*, Trial Judgement, para. 742.

Within the Akayesu case, sub-paragraph (d) is "construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages[203]." Now, within this sub-paragraph, it is important to take a look at how it can be determined that births are prevented within the group. The Chamber regarding the Akayesu case stated that:

> "In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group."[204]

Additionally, the Chamber identified that the measures imposed can either be physical or mental.[205] For example, if someone is raped and subsequently does not want to procreate, then that satisfies sub-paragraph (d).[206] Since trauma is a mental element, this is an example used by the Chamber that presents as an example of a mental measure imposed. Once again, as some of the other sub-paragraphs, there is interpretation open to the Courts of how to define as well as identify the imposition of measures intended to prevent births within the group. Not only are the measures not specified but also the intent to prevent births within the group must be clearly portrayed as such. Thus, it is not just the action of imposing measures such as those mentioned above in the Akayesu but also must be supported by the motive to prevent births within the group. Within the ICJ Bosnia and Hercegovina v. Serbia and Montenegro case, BiH claimed that sub-paragraph (d) could be satisfied because:

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[203] *The Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, para. 507.

[204] Ibid.

[205] *The Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, para. 508.

[206] Ibid.

> "forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months".[207]

The Court did not find this satisfactory as there was no evidence in support. This showcases how it can be hard to determine if forced separation could be identified as being purposefully done to prevent births within the group. The Court also discusses how in instances of sexual assault of Bosnian Muslim men, it was allegedly done to prevent them from having more Muslim children.[208] Nonetheless, the Court did not find secondary sources for it as enough evidence. All in all, it was very difficult to present supporting evidence for Bosnian Serbs committing acts that would amount to sub-paragraph (d).[209] Thus, since sub-paragraph (d) allows for different representations of the actual act, then it can be very hard to essentially prove it and essentially determine the crime as genocide, assuming all other elements are met. Not only are the measures represented in various different ways but also the prevention of births within the group can be hard to directly show.

4.6: (E) Forcibly transferring children of the group to another group

Sub-paragraph (e), the forceable transfer of children of one group to another group is a very unique element of the genocide definition as it provides the specific protection of children which is not signified within other acts of the genocide definition. It is incredibly important to define force when discussing the standard for sub-paragraph (d). The Preparatory Commission for the ICC stated:

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[207] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 355.

[208] Ibid, para. 357.

[209] Ibid, para. 361.

> "The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment."[210]

Therefore, the term force does not only encompass direct force, instead, it can also be presented in other ways, as stated above. Additionally, we have to look at the definition as a whole because in addition to dolus specialis being present through this act, the child victims referred to must satisfy one of the four protected group categories as well. Within the Akayesu case, sub-paragraph (e) is understood as direct acts of forcible physical transfer, but also acts resulting in threats or trauma which would then result in the forcible transfer of children from one group to another[211]. A very current topic is the transferring of Indigenous children in North America and Australia to residential schools. It involves "kidnapping, trafficking, removal, and identity changes of children of particular groups."[212] Various scholars and victims have expressed that in various cases the definition of genocide could be applied under sub-paragraph (d).[213] A factor that makes sub-paragraph (d) very hard to apply is relating to the fact that the definition concerns only four protected groups and so it doesn't take into account the forcible transfers of children from groups not protected under the definition. Ruth Amir also points out that "The onus of specific intent is highly restraining because forcible transfers of children are often justified as stemming from benevolent motives, such as protection and civilization."[214] This is not to disregard that forcible transfer of children can account for a crime against to humanity [215] but when looking specifically at the genocide definition, sub-paragraph (d), it becomes hard to

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[210] Elements of Crimes, 2010, Art. 6(e).

[211] *The Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, para. 509.

[212] Amir, Ruth, (2015), Killing Them Softly: Forcible Transfers of Indigenous Children, *Genocide Studies and Prevention: An International Journal*, Vol. 9: Iss. 2, pp. 41.

[213] Ibid.

[214] Ibid, pp. 44.

[215] Rome Statute, Art. 7(d).

incorporate. Thus, all in all, it becomes hard to encompass differing cases that would amount to sub-paragraph (d) under the genocide definition.

4.7: Concluding Actus Reus of Genocide

Since the acts of actus reus vary in their application, in terms of some being straightforward and others not so much, with differences in interpretation and deviations in definitions, we can see that the genocide definition itself does not present the unambiguousness we need in modern law and politics. Throughout this chapter, the different actus reus have been discussed and touched upon. Sub-paragraph (b) was heavily focused on as it is primary in vast ambiguity in terms of where it is applicable. Various terms within the actus reus such as "serious" and "force" have also been touched upon because the genocide definition itself does not explicitly say how these terms are to be understood and meant. Therefore, courts have a big influence on how the meanings perceived and accordingly what evidence can be attributed to their specific understanding. Thus, as each actus reus is discussed, we can see missing aspects of the definition that make genocide harder to prove. Also, the actus reus present holes of the definition because they leave interpretation of various terms and specified acts up to the courts, which diminish consistency in applicability of the genocide definition.

Chapter V: International Relations within the Legal Definition of Genocide

5.1: Relevant International Relations Elements regarding the Definition

The definition of genocide and the Genocide Convention is severely impacted by international relations aspects. It also goes the other way in the sense that various international relations mechanisms strongly impact the definition's elements and its sustenance in today's world. Globalization and its backlash, the role of international organizations especially the United Nations, as well as power politics are important features that severely affect the definition's sustainability in modern times. The severity of genocide is of course gruesome, but its effects hold onto to the future because the clear hatred and discrimination towards a protected group will never be forgotten. Thus, through the above-mentioned elements we can better understand the further effect of genocide, that is further from a law perspective. This violation of human rights still impacts how these identity groups are affected today. Therefore, the responsibility taken for the crime of genocide has a huge imapct on the community and most importantly national but also international politics because it is a severe crime that targets people on the basis of their group identity.

5.2: Globalization and its Impact on the Genocide Definition

Globalization, a neo-liberal concept, is presented through the growing interdependence of states through economies, cultures, trade as well as flows of people and information. George Ritzer defines globalization as "an accelerating set of processes involving flows that encompass ever-greater numbers of the world's spaces and that lead to increasing integration and interconnectivity among those spaces."[216] We can look through this increase in integration from a state-centric point of view. Over the last decades, it has been on a wide rise and thus has

[216] Ritzer, G., (2007), "The Blackwell Companion to Globalization*",* Blackwell Publishing Ltd., Chp. 1, Introduction.

severely affected various channels of multilateralism. Globalization has an effect on various avenues of international politics and is a very large emergence in our world. With the rise of globalization, states have come together on a higher level more than ever before causing higher dependency on one another also on various non-state actors. Thus, as the world has evolved into becoming more interconnected and states amount to relying on each other more and more, various aspects of international law should evolve accordingly. In a sense, concepts in international law should further reflect the multilateral expansion. This leads us to the role that the genocide definition plays in today's modern world in regard to the concept of globalization.

As our society becomes more interconnected, the chance of problems and war become higher because what one country or group does immediately affects others. This is extremely important when discussing the genocide definition because its specificities have further effects than only on the directly impacted population. The claim of genocide affects a states' opportunities in our multilateral world as well as its reputation in the international community. Globalization has enabled and expanded the work of various actors that are part of the international system, which essentially identifies these actors have impact in our international system. Various genocidal cases have brought the issue of human rights to wider attention as our world has increasingly globalized. In some ways globalization has accelerated ethnic conflicts and the Rwandan genocide is a prime example. "Taking place during an era of globalization, the Rwandan genocide has challenged scholars to identify the role and failure of human rights given the increase in efforts on the issue by both state and non-state actors."[217] Globalization has allowed non-state actors to have more of a voice and be more present in international obligations.

> "Non-governmental actors take advantage of globalization in post-genocide Rwanda. In an era where non-governmental institutions have increased in numbers, as well as mobility, most of these organizations are looking for causes that reflect their objectives. Human rights organizations see postgenocide Rwanda as an opportunity to call attention to the causes and effects of genocide in global affairs. With an increase in cross-border

[217] Shine, S., (2014), The Globalization of Human Rights in Post-Genocide Rwanda, *Bridges: A Journal of Student Research*: Vol. 8, Iss. 8, Art. 5, pp. 55.

> interactions, these actors have the required platform to further their causes. Health Development Initiative (HDI) was awarded the opportunity to expand their objective, benefitting from globalization through volunteer work and its connections with other international organizations like GYC and the United Nations (www.hdirwanda.org). These prominent global connections give HDI the opportunity and support to make other connections with other organizations that have objectives dedicated to human rights."[218]

Thus, globalization has reflected a benefit for non-state actors. They can take advantage of effectively shaping accountability of human rights during the post-genocide era, especially shown in the case of Rwanda. Through globalization, larger aid[219] has become available to such organizations from various countries allowing the expansion of ways in which accountability for genocide is taken, beyond the Genocide Convention's legal mechanisms.

> "Unlike state actors, non-state actors have links with the global human rights system. Organizations such as the United Nations and its numerous affiliates, Amnesty International (AI), AVEGA, HRW, and GYC help with the preservation of human rights in Rwanda. With non-state actors in states, the international influence weighs heavily on the government, whether negatively or positively. As in the case of Rwanda, non-state actors have effectively shaped the human rights account during the post-genocide era."[220]

State power plays a large role in the concept of globalization so groups that act in its opposition are at the result of large conflict in many instances. Kaldor and Luckham point to globalization sparking "new wars" in our world that are essentially masked by genocide, ethnic cleansing, terrorism, etc. The idea they present is that these new arising conflicts in some cases present as retaliation to the globalization of our world.[221] This sparks the idea of globalization backlash and

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[218] Ibid, pp. 60.

[219] Ibid.

[220] Ibid, pp. 59.

[221] Kaldor, M. and Luckham, R, (2001), Global Transformations and New Conflicts, *IDS Bulletin,* Vol. 32, Iss. 02, pp. 57.

the fight back against the converging of values, motives and ideas in our international community, which will be touched upon below.

Another point of view that we can take in terms of how globalization affects genocidal acts is through Zygmunt Baumann and Hariz Halilovich's perspective:

> "To paraphrase Baumann, genocide might not be directly caused by globalization – genocidal violence is usually very local and regional in its scope (Halilovich and Adams 2011) – however, neither is "liquid modernity" immune to the crime of all crimes. If anything, globalization typified by modern information and communication technologies has made us more aware of genocidal acts taking places in different corners of the globe, which in turn should make us all feel not just unconformable about having this knowledge, but also responsible to stop genocide."[222]

Therefore, this makes us as a multilateral world have a greater sense of accountability that should be taken for actions such as genocide occurring around the world. Since states, subject to the Genocide Convention, already have a lawful obligation to prevent and punish acts of genocide[223], globalization makes this an easier avenue and thus should allow it to be a more straightforward action. With globalization, our world is more exposed to cases of genocide and thus various states have higher knowledge and can take larger action when it comes to the act being prevented or punished. Globalization has presented as beneficial in making the world know more about genocide as a whole through the actions such as the establishment of different tribunals or the creation of the Genocide Convention which caused various states to come together and take necessary steps. For example, the punishment and request for accountability of the Cambodian genocide by Gambia through the reliance on the Genocide Convention. With the rise in globalization and larger connect-ability between states especially on issues such as

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[222] Halilovich H., (2017), Globalization and Genocide. In: *Farazmand A. (eds): Global Encyclopedia of Public Administration, Public Policy, and Governance. Springer*, https://doi.org/10.1007/978-3-319-31816-5_1304-1

[223] Ibid, Genocide Convention, Art I.

genocide, the definition's halt in evolvement does not reflect the vast avenues that globalization opened within the international society. An increase in inclusivity and applicability would allow the act to be better identifiable and would be adjusted to this shift in our world. This would make the definition more sustainable over time. Additionally, as globalization makes it easier for states to come together, the definition should be adjusted to accommodate various recommendations presented by various states. Even though each state has a vote within the UN General Assembly, the connection allowed through globalization can present a larger avenue for support of various propositions from developing states especially. All in all, genocide has occurred during both times of low global togetherness (e.g. The Holocaust) and also at the time of a peak in globalization (e.g. Rwandan genocide, Bosnian genocide).[224] Thus, it is not made out that globalization causes a surge in genocide but rather that its effect in concert with large domestic factors contribute to the "perpetration of genocidal violence in the developing world."[225]

5.3: A Note Regarding Globalization Backlash

It is incredibly important to understand that various scholars[226] have argued that an increase in globalization pushes states apart because of the conflict that might occur from asymmetric dependencies. These asymmetric dependencies usually occur when one state relies more on another than vice versa. The dependency factor is incredibly important when discussing genocide because as integration has increased, dependency between states has become a natural phenomenon. In order to be interconnected, we must rely on one another in various mechanisms. Stefanie Walter defines, very generally, globalization backlash as

> "a significant decrease in public, parti-san, or policy support for globalization. This rather general conceptualization allows us to explore the backlash both with regard to the

[224] Hiebert, M.S., (2011), The Role of Globalization in the Causes, Consequences, Prevention, and Punishment of Genocide, *Globalization and Human Rights in the Developing World,* pp. 194.

[225] Ibid.

[226] Schneider, G., Barbieri, K., Gleditsch, N., (2003), "Globalization and Armed Conflict. Faculty Publications", pp. 8.

different dimensions of globalization (economic, political, and social/cultural) and with regard to different relevant groups of actors (voters, political inter-mediaries, and governments)."[227]

Exploring globalization backlash can be done through various avenues but our focus is state-centric and in relation to the crime of genocide. Therefore, we can present both arguments. As presented above, globalization which has resulted in states becoming more integrated, in attribution with various other factors such as domestic issues, can trigger a surge in conflicts causing violations such as genocide to occur. On the other hand, the rise in globalization has presented the concept of globalization backlash so it is pushing states apart due to asymmetric dependencies. This, then, is causing increases in conflict, resulting in violations such as genocide to occur, because the power dynamics of states is heavily targeted and threatened. Since through asymmetric dependency, states become more vulnerable as they have opened up and rely on other states more and more, war becomes a larger likelihood. Asymmetric dependencies result in one state being taken advantage which can cause conflict and can lead to genocide as a specified group is heavily targeted with intent. The Cambodian genocide, under the governing of Pol Pot, presents as an example of the government fighting back against globalization and desiring full state sovereignty. The further atrocities that took place by the Khmer against its own people, who were opposed to the government's leading, resulted in genocide. Therefore, on both sides, globalization and its backlash can be analyzed as playing a factor in a surge of conflicts resulting in the higher need of human rights protection and specifically, genocide prevention.

5.4: Mark Kaldor's Idea of "New Wars"

Kaldor has identified the idea of "new wars" as encompassing networks of both state and non-state actors and identifying that most of the violence is directed towards civilian

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[227] Walter, S., (2021), The backlash against globalization, *Annual Review of Political Science*, Vol. 24 Iss. 1, https://doi.org/10.1146/annurev-polisci-041719-102405, pp 422.

populations.[228] New wars, as Kaldor explains it, blur the line between the internal and external aspects of a state emphasizing how the state can be weak. He also relates the idea of extremist identity politics within new wars[229] because it identifies how a state turns against its own people thus confusing the identity of the state and its people as a whole. Kaldor emphasizes that "new wars" are a "mixture of war, crime and human rights violations"[230], such as genocide. He also identifies:

> "The main point of the distinction between new and old wars was to change the prevailing perceptions of war, especially among policy makers. In particular, I wanted to emphasize the growing illegitimacy of these wars and the need for a cosmopolitan political response – one that put individual rights and the rule of law as the centrepiece of any international intervention (political, military, civil or economic)."[231]

Kaldor's ideas show that the state centric perspective on security, that is highlighted through realist ideology, can be flawed in a lot of situations because the state starts turning against its own citizens, instead of actually protecting them. Kaldor also connects the idea of globalization, that is "the intensification of global interconnectedness" with the concept of "new wars."[232] As globalization has become heightened throughout the 90s and 2000s, the concept of state sovereignty and autonomy has been decreasing and essentially has been a large fear for many states because of the high dependency resulting from globalization. Kaldor states that "The new wars arise in the context of the erosion of the autonomy of the state and, in some extreme cases, the disintegration of the state. In particular, they occur in the context of the erosion of the

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[228] Kaldor, M, (2012), "New & and Old Wars: Organized Violence in a Global Era" (3rd ed.), Stanford University Press.

[229] Ibid, pp. 94.

[230] Ibid, pp 12.

[231] Ibid, pp. 3.

[232] Ibid, pp. 4.

monopoly of legitimate organized violence."[233] Thus, whilst globalization can be connected to heightening the occurrence of "new wars", in our analysis, it is important to take a look at how this all comes together to have an influence on genocide and its definition. When states turn their back on civilians, in genocide's case, based on their group identity, the concept of "new wars" becomes very much evident. This is clearly portrayed in the Khmer Rouge atrocities because the Khmer eradicated their own people. In Case 002/02, it is judged how the targeting of Khmer Republic Soldiers and Officials was present as well targeting Buddhists who were also part of the Khmer Republic.[234] Additionally, the Rwandan genocide with the targeting of Tutsis who make up the local population is another instance that clearly portrays the idea of new wars.[235] Therefore, in various instances, states going against its own people is presented through cases of genocide. This connects to the notion that the genocide definition should be reconceptualized to encompass the various changes our world has taken especially in how wars are perceived. The prevention of genocide should be perceived differently in the sense that it is not only preventing genocide from occurring externally but also putting light on preventing genocide internally, and not only by states but also allowing non-state actors to have this responsibility in some sense. Kaldor's concept of "new wars" reinforces the point that the Genocide Convention should adjust to the evolving times and therefore does not satisfy certain aspects of our modern world. The realist idea that security is a state-centric notion encompassing that states are the ones protecting their citizens from war, crime and human rights violations has become hard to grasp when genocide of civil populations has been done by the state itself.

5.5: Role of the United Nations as an International Organization

The creation of the Genocide Convention as well as the usage of the definition in international law throughout various tribunals all starts with the role that the United Nations plays. Firstly, the Genocide Convention was the first human rights treaty adopted by the United

[233] Ibid, pp. 5.

[234] Case 002/02, 16 November 2018, Trial Judgement.

[235] *The Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, para. 110.

Nations General Assembly (UNGA), Thus its significance is vast and the light that was put on by the international community on atrocities during WW2 never occurring again gave the Convention even further significance. As the UN is the leading international organization that governs various aspects of our international community, its role in international law is immense. Additionally, the UN's role surrounding the genocide definition stems back to how the UNGA first codified genocide as an independent crime under the Genocide Convention. Its vast influence is also shown through the fact that it played a role in the construction of the genocide definition, which has not been updated since the draft. The construction of the definition, which as shown above impacts the applicability in various cases of genocide, is very vital and therefore the UN's role regarding its construction holds large implications. This leads us into the analysis of power politics in regard to the Genocide Convention's construction as well as its place in international law today.

> "The General Assembly, therefore, affirms that genocide is a crime under international law which the civilized world condemns and for the commission of which principals and accomplices – whether private individual, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable."[236]

Thus, the UN holds this notion above the signees of the Convention which essentially elevates its power over them, not only in the international community, but also in relation to the specifics of genocide, such as stepping in to create necessary tribunals when needed. The creation of separate tribunals such as the ICTY and ICTR also presents the UN's large power in genocidal law. Guglielmo Verdirame has stated that "in addition (to the significance given to the Genocide Convention), a method for the judicial application of the dolus specialis in genocide has been crystallized by the ad hoc Tribunals."[237] The specificity and applicability of the crime was

[236] The Crime of Genocide, (1947), UN General Assembly, 1st session, 1946, London and Flushing Meadow, N.Y, A_RES_96(I), Art. 95 (I).

[237] Verdirame, G., (2000), pp. 588.

increased through the creation of these ad hoc tribunals, which allows for greater accountability to be taken for the crime. Focusing specifically on the ICTY's existence, it has created a higher pedestal for responsibility taken and has been especially strong in regard to prosecutions in response to the Srebrenica genocide. With its existence, the recognition of the genocide is spread wider, and not only internationally but domestically, within BiH, has generated more responsibility and acknowledgement, than present prior to its creation. This leads us into the current discussion regarding the denial of Srebrenica as a genocide and instead being labelled as a "crime against humanity".

> "The majority of those engaged in genocide denial are active in the political sector. This includes leaders and member of political parties, as well as current and former public officials. Media accounted for the second highest occupational field of individuals and organizations engaged in denial."[238]

The sheer value that this discussion holds in today's world strongly reflects the importance of the Genocide Convention but also flaws within it. The current Croatian President Zoran Milanovicć has been condemned for questioning the seriousness of Srebrenica and its label of genocide by the international community and law.[239] Additionally, Milorad Dodik, the current member of the Presidency of Bosnia and Hercegovina and the leader of Republika Srpska, rejects Srebrenica as genocide. Dodik has stated that

> "the labelling by the Peace Implementation Council (of Srebrenica as genocide) steering board members of the nature of the massacre in Serebrenica is completely arbitrary and

[238] Mehmedović A., Šakić K., Cvjetićanin T., (2021), "Srebrenica Genocide Denial Report 2021", The Srebrenica Memorial, pp. 20.

[239] TRTWorld. (2021, December 7). *Croatian President Condemned for Downplaying Srebrenica Genocide*. Croatian president condemned for downplaying Srebrenica Genocide. Retrieved July 19, 2022, from https://www.trtworld.com/magazine/croatian-president-condemned-for-downplaying-srebrenica-genocide-52403

> unacceptable. This attempt to limit the freedom of thought and expression, unknown in modern democracies, is very worrying."[240]

Thus even 20 years later, these individual acts strongly impact views of the public, specifically through uses of the media and further propaganda.

> "The most notable outlets in this respect are the Montenegrin right-wing portal IN4S and the portal of the Serbian Telegraph, Republika. Despite frequent violations of media codes, 9 these outlets are partially financed with public funds accessed through a number of local government projects in Serbia."[241]

This has caused a rise in the tension between the various national and religious groups within the country of BiH and shows how even with the ICTY trials and the UN's influential position, the discourse has not fully changed. Therefore, whilst the UN's position prompts genocidal law on a higher platform in the international community, there is still cases such as the above discussed. This has a large influence on the domestic politics and national public within countries. Therefore, the Genocide Convention and the genocide definition must evolve accordingly in order to limit such denial of genocide. This is not to say that the Convention and the definition are the primary cause of the denial being this blatantly possible, but instead that both the Convention and the definition can evolve to create a push for limiting denial as such. This is precisely referring to the holes of the definition discussed in prior chapters which would improve its sustainability and the Convention's as a whole.

Currently, the Genocide Convention is ratified by 152 states[242] thus it holds vast importance in international law and is widely respected in accordance to prosecuting crimes of

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[240] Arslanagic, S, (2018), *Dodik Again Denies Srebrenica genocide*. Balkan Insight. Retrieved July 19, 2022, from https://balkaninsight.com/2010/12/03/dodik-slams-international-community-for-referring-to-srebrenica-massacre-as-genocide/

[241] Mehmedović A. et. al., (2021), pp. 21.

[242] United Nations, *The Genocide Convention*, United Nations Office on Genocide Prevention and the Responsibility to Protect. Retrieved July 19, 2022, Available at:

genocide. The fact that it was the primary source used in the ICTY, which clearly identified that the heinous actions that occurred in Srebrenica in 1995 constitute genocide[243], should hold a large amount of value in international law and politics. Unfortunately, those who lead the accused today, with their acts of strongly omitting Srebrenica as genocide, show that accountability has not truly been taken to the extent it needs to. We can notice how because the genocidal definition itself is flawed, as shown in the analysis within the previous chapter, it has created room for the ability of this discourse surrounding omission of the genocide to be present. Additionally, the absence of an apology and the absence of the recognition of this crime by the perpetrators themselves, over 20 years later, also strongly reflect the issue of how the definition is not clearly constructed to accommodate the politics and needs of our world today. Dr. Waqar Azmi states:

> "We need to be very clear: what happened in Srebrenica in 1995 was a genocide. Two courts, the International Court of Justice (ICJ) and, the International Criminal Tribunal for the former Yugoslavia (ICTY) have ruled that genocide was committed in Srebrenica. The ICTY, over a 24-year period, heard over 4,000 witness testimonies, and convicted 16 people of genocide and other crimes committed in Srebrenica."[244]

Dodik and Vučić show a strong message of ignorance by turning a blind eye to the label of Srebrenica as genocide and use this as a political tactic to hold their public support, especially because Ratko Mladić was considered a hero by the Serbian public. Additionally, the strong

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https://www.un.org/en/genocideprevention/genocide-convention.shtml#:~:text=Status%20of%20membership,Asia%20and%206%20from%20America.

[243] *Prosecutor v. Radislav Krstić*, 2 August 2001, Trial Judgement, para. 52, para. 4., para. 595.

[244] Khan, A. (2018, August 16). *Remembering Srebrenica Comments on the Denial of the Srebrenica Genocide*. Remembering Srebrenica. Retrieved July 19, 2022, from https://srebrenica.org.uk/news/remembering-srebrenica-comments-on-the-denial-of-the-srebrenica-genocide

impact a label of genocide has on a country's population affects a lot of its power politics in today's multilateral world and affects many of its various connections. The incredible backlash from the international community that should have been evident in the 1990s after the Srebrenica genocide would have additionally strengthened the accountability taken for the crime. This is extremely applicable in our world today because we need to hold countries and regimes accountable for their actions, not only through international law but also through discourse as well as international connections and partnerships.

5.6: State Power Behind the UN

The P5 within the UNSC hold a very powerful position within international politics. Thus, behind the power that the UN holds, various states hold this power too, accordingly mainly through the UNSC. It is actually the P5 who have the greatest responsibility for preventing genocide. The P5 generally have veto power within the UNSC allowing a larger threshold of force in their hands. But, since under the Genocide Convention, all states must use all means to prevent or punish genocide, vetoing goes against this notion. Therefore, the P5 have a duty not to veto when it comes to genocide.

> "Moreover, in light of their voting powers under the UN Charter, in particular their veto rights under Article 27(3), China, France, Russia, the UK, and the US have overwhelming, if not absolute, control over the Security Council as a result of their P5 status, and are therefore in a position, 'unlike that of any of the other States parties to the Genocide Convention', to either discharge, or disable, the Security Council's considerable capacity to effectively influence these genocidal actors."[245]

This showcases not only the UN's strength as a whole when it comes to discussing genocide but also the large influence that the great powers hold. The US presents as a crucial and special

[245] Heieck, J., (2018), The P5's duty to prevent genocide under the Genocide Convention, *A Duty to Prevent Genocide: Due Diligence Obligations Among the P5*, Edward Elgar Publishing, pp. 13-71, 4.2.2.

example here because in addition to it being a permanent member of the UN Security Council, it has been a vast controller of Western ideology, which has larger influence in our international politics than does Eastern ideology. When the United States interfered in the Bosnian War with the urge of the Dayton Accords[246], it pushed the UN to see the mass atrocities and thus establish the ICTY. Without the push from the US, it would have been very hard for the establishment of a separate tribunal for former Yugoslavia and thus the international recognition. The power structure, for a long time, has been centered around the US and in terms of the Genocide Convention, they held a large voice. "U.S. Senators were called upon to endorse the Convention on the grounds that America had "long been a symbol of freedom and democratic progress to peoples less favored," and because it was time to outlaw the "world shocking crime of genocide."[247] Thus, whilst the UN has a large role in genocidal law and politics, the US is right behind with not only influence as a P5 but also as a democratic symbol and as a state seen in history that acts a figure for leadership towards progression in the modern world. This also plays in the notion of power politics. The big players such as the United States give meaning and notice to what they believe is of interest but also what they believe deserves justice. They have the power to control the focus of the international community. This allows failures of the US, as a state with a large voice in genocidal law and politics, to be concealed because, for example, it maintains strong relations with states who have committed genocide, such as Myanmar. This focus can also conceal various failures of the UN, as an international organization, in preventing or punishing genocide.

Another prime tribunal that showcases the UN power and specified state power is the establishment of the ECCC. Without the UN, the ECCC would not hold the legitimacy that it does today especially if it only relied on the Cambodian legal system which is frail and

[246] Dayton Peace Agreement, 30 November 1995, United Nations General Assembly: Security Council, A/50/79C.

[247] Power, S., (1999), The United States and Genocide Prevention: No Justice without Risk. *The Brown Journal of World Affairs*, Vol. 6, Iss. 1, Available at: http://www.jstor.org/stable/24590218, pp. 19.

ultimately would not succeed in providing the accountability needed.[248] When discussing the Cambodian genocide, from an international relations point of view, it is incredibly important to point out the vast amount of foreign aid that came from China in support of the Khmer Rouge. The utmost aid was meant to be for economic and military interests but actually instead financed a large amount of the killings.[249] It is important to process this because China is a member of the P5 so its powerful role in this case comes from a biased position. This is similar to the case of FRY financing Republika Srpska during the Srebrenica genocide.[250] The Khmer Rouge were radical communists whose prime motives were mainly Khmer ultranationalism, and agrarian society as well as establishing a classless communist state that would function on the basis of a rural agrarian economy.[251] This strongly shows Marxist viewpoints because the Khmer Rouge were incredibly determined to establish a society that completely rejects the free market and capitalism, opposite from the West ideals. At the time, with globalization and modernization on the rise, this was in a sense taking the country back in time and a large amount of people (targeted as a political group against the government) were against the regime and the Khmer's system of governing. The Khmers' aim was to completely turn Cambodia away from the Western world and essentially away from the notion of a freedom-led state.

> "On behalf of the Cambodian Government and people, we write to ask you for the assistance of the United Nations and the international community in bringing to justice

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[248] Vianney-Liaud, M., (2018, August 29), *Emerging voices: Controversy on the definition of the Cambodian genocide at the ECCC*, Opinio Juris.

[249] Abuza, Z., (1993), The Khmer Rouge Quest for Economic Independence. *Asian Survey*, Vol. 33, Iss. 10, pp. 1010-1021.

[250] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 388.

[251] Zucker, E. M., (2016), *Cambodia: The rise and fall of the Khmer Rouge Regime,* Asia Pacific Foundation of Canada, pp. 4-22.

those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979."[252]

The Khmer Rouge Tribunal shows a different perspective when discussing the powerful function that the UN has in regard to genocidal law. This is mainly because it had requested assistance from the United Nations to establish the tribunal. Thus, not only can the power of the UN be portrayed through its actual assistance but also through the fact that the Cambodian government and people saw the UN as an international organization fundamental for ECCC establishment. They essentially saw the UN as a prime avenue for prosecuting the crime of genocide during the Khmer Rouge's ruling in a way that would establish further accountability and responsibility than a domestic tribunal would. This represents the recognition that the UN holds in the international community and the strength it has in international law. Therefore, the UN's role as a dominant international organization has signified the crime of genocide, not only as its own crime but through the creation of various tribunals as well as the backup of various powerful states such as the US, into a crime unlike any other. Thus, under the Genocide Convention, the definition must be a reflection of the path that the UN's role has opened in terms of wider accountability and responsibility for the crime.

5.7: Concluding International Relations Concepts

The countless number of examples of the failure of preventing genocides since the employment of the treaty ,such as the Rwandan genocide, is only a glimpse of the faults of the international community. Thus, it is not only faults in the Genocide Convention and the definition itself that have halted the commitment to never again repeat history but also the behind-the-scenes mechanisms which were outlined throughout this chapter. These mechanisms were clearly showcased through the various elements of international relations. These elements included the rise of globalization and its backlash, Kaldor's concept of "new wars" and roles

[252] General Assembly Security Council, United Nations, 53rd Session, *Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, A/53/850, March, 16th 1999, pp.6.

regarding power. Through these elements, we were able to analyze the role of the UN as well as the role of powerful states standing behind the UN. All in all, the discussed elements of international relations have thoroughly impacted the genocide definition's stance in modern times, significantly through the notion of power.

Conclusion

The aim of this thesis was to analyze how the genocide definition reflects the needs to modern times, through aspects of international relations and of course, law. The analysis carefully reflected upon different elements of the definition. The careful analysis of the definition showed the its downfalls and how over time, these downfalls have had large impacts. At the same time, the thesis also reflected why different elements of the definition are placed as they are and not only the negative effects this might have on the responsibilities for different cases of genocide but also the benefits it presents when differentiating genocide from other crimes.

The first part of the thesis, that is the introduction, guides us into how the thesis will be constructed. It also presents how the discussion and analysis will be guided throughout the thesis along with presenting some of the supporting evidence.

Chapter I of the thesis introduces the emergence of the term genocide and accordingly the meaning that has been attributed to it since Raphael Lemkin's construction.[253] The Genocide Convention is also touched upon, reflecting on the importance it holds and how it began. The chapter also introduces the genocide definition and its elements as well as necessary aspects in international law that relate to it, such as individual vs. state responsibility. All in all, Chapter I provides a leeway into the analysis of specific components of the definition as well as the Convention, further explored in Chapter II.

The next section of the thesis takes us through the genocide definition's elements, one by one, analyzing their meaning and the effect they have on the definition's sustainability and applicability. It involves three chapters, each focusing on particular and important components of the definition.

[253] Lemkin, Raphael, (1944) p. 271-272.

Chapter II starts off with analyzing the dolus specialis of genocide and how the specific intent to destroy is the primary aspect of the genocide definition. The chapter also portrays the actual meaning of intent, in general and what differentiates it from dolus specialis. Whilst it is discussed what dolus specialis means, cases are also reflected on regarding how it can be proven. ICTY's Mladić case as well as ICTR's Nahimana et. al case are used to showcase the mechanisms of proving dolus specialis. Various other pieces of the definition work together with specific intent and are also discussed within this chapter, such as the term "destruction". A close analysis of how dolus specialis is hard to be prove, due to its narrowness, is conducted whilst also mentioning that it is a primary aspect that differentiates genocide from other crimes, such as war crimes and crimes against humanity. Accordingly, as the specific intent to destroy must be directed towards one of the protected groups within Article II of the Genocide Convention[254], it is further analyzed in Chapter III.

Chapter III focuses on the protected group categories within the genocide definition. The chapter analyzes how the different protected groups are defined and how, because the Genocide Convention does not present a clear outline of what is meant by each group, such a national group for example, the true meanings are subject to the courts, in regard to each case. An analysis is conducted regarding the scope of these group categories protected under the Convention and how this influences the definition's applicability. As our world evolves, the definition must as well. The chapter reflects on how various groups that are subject to a large amount of hate crime and discrimination today, such as the LGBTQ community, are not encompassed in the genocide definition. All in all, it is identified that due to the limited scope of the protected group categories, the definition's applicability is halted and the evolvement of the definition is necessary, in response to the changing times. Domestic law, such as the French penal code[255], is reflected upon to showcase how the protected groups under the French genocide definition are not limited but still make the crime of genocide distinct.

[254] Genocide Convention, Art. II.

[255] *The French Penal Code of 1994 as Amended as of January 1, 1999*, translated by Edward A. Tomlinson, Art. 211-1.

Chapter IV analyzes the actus reus of genocide, that is the meanings of each act and how it is subject to interpretation based on the court and the case in question. Bodily and mental harm, sub-paragraph (b) of the definition, is analyzed more thoroughly because it is not as straightforward in terms of what it can encompass. The ICTR's Akayesu case is referenced throughout the chapter and used in support of the argument that the unclear identification of what each act means presents as a problem. This is mainly because what can be applicable in one instance may not be in another, thus causing contradictions. Therefore, chapter IV analyzes a vital component of the definition, the actus reus. It concludes that the availability of interpretation, due to the acts not being clearly defined within the Convention, limits the definitions' applicability because what can be defined as suitable in one instance may not be in another.

Chapter VI of the thesis ties in international relations concepts to the above-mentioned analyses. Globalization and its backlash, Mark Kaldor's idea of "new wars" as well as power politics are discussed. The concepts are discussed in relation to the affect they have on genocide definition as well as the Genocide Convention. Further, the chapter focuses on the concept of power and the influence the UN as well as states have on the definition of genocide in international law. All in all, it is concluded that globalization and its backlash should be reflected in the evolution of the genocide definition, Kaldor's idea of "new wars" pushes us away from a state-centric view of protecting its citizens, especially seen with genocide, and finally, the immense power that the UN and the West hold restrict the definition's applicability and sustainability over time.

All the cases within the thesis show how the important components of the definition present downfalls of the definition whilst also acknowledging how they present the distinctiveness of the crime. Once the Genocide Convention was constructed, genocide, as a crime, was given the importance in international law that it needed, for prosecution to be available and responsibility to be further taken. Now, almost 75 years later, the definition is the same. Therefore, it should be adjusted and should evolve to counter the flaws that we have seen from its applicability since the Convention's adoption. Now, it is evident that we have a long way to go to fully determine what is suitable for the definition's sustainability and applicability

to be improved. As shown throughout the thesis, various cases should be reflected back upon and domestic law definitions can be referred to, too. The definition's evolvement can be reflected through, for example, encompassing other groups within the protected group categories. All things considered, the genocide definition does not fully reflect the needs of modern time international law and international relations, to the extent that it should. As outlined in the thesis, this is mainly due to certain aspects being too narrow as well as other aspects not being explicitly defined, in order to allow its applicability to expand but still keep the crime of genocide distinct.

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