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Groups Defined by Gender and the Genocide Convention

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A Lacuna in International Criminal Law?

In the course of human history, humankind has proven to be capable of performing the most horrendous acts towards itself. A locution ascribed to some of the worst of such atrocities is genocide. After the Holocaust, the international community started treating genocide as a substantive crime under international criminal law (ICL) rather than a regrettable consequence of state sovereignty. The crime of genocide is commonly regarded to be positioned at the apex of international criminality; it has been heralded in the jurisprudence of the International Criminal Tribunals as the “crime of crimes.”¹ As such, the crime of genocide currently prevails as a legal label with strong power to condemn and communicate value-based considerations of atrocity, displaying the intrinsic connection between law and politics in ICL.²

The crime is defined in Article II of the UN’s Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).³ It specifies certain acts intended to destroy, in part or in whole, a national, ethnical, racial, or religious group, as such, are condemned as genocide. The personal scope of application, however, has not always been limited to the enumerated collectives; that was a demarcation made during the Genocide Convention’s drafting process. Thereby, “genocidal” acts, committed with “genocidal” intent, when directed against other groups, such as groups defined by gender, are not considered to be genocide, at least departing from a “formalist,” as opposed to an “instrumentalist,” interpretation of Article II. This creates a discrepancy, perhaps even a lacuna, within the ICL system.

To exemplify the discrepancy, consider the following. A community is suffering from overpopulation. To gain control over its population size, it decides all families may have only one child for a period of time. The imagined community follows a dogmatic interpretation of primogeniture, meaning the child must be male. Consequently, all society-defined female children born during this period must be eliminated. While these circumstances may appear far-fetched, they are at the same time not too far removed from various sex-selection practices of some communities in the world today. The same conduct and intent directed against members of any of the enumerated groups in Article II would, with all likelihood, constitute genocide under international law. In turn, the victims would be labeled victims of genocide. Today, the same cannot be said for the girls in our narrative. Thereby, ICL distinguishes between the collectives and the deaths of their members through legal terminology of inclusion and exclusion. Does this current state of affairs emerge as problematic? Inspired by transnational feminist jurisprudence, this article delves deeper into this inquiry in the way it relates to groups defined by gender. Hannah Arendt explores a similar notion. The following statement can thereby serve as an illustrative point of departure.

If genocide is an actual possibility of the future, then no people on earth [...] can feel reasonably sure of its continued existence without the help and the protection of international law.⁴

To be clear, the purpose of this article is to investigate whether including groups defined by gender, as a protected group in the Genocide Convention, appears legally plausible.⁵ There is little sign today that the violent aspects of humankind are less forceful than they were when the Genocide Convention was first drafted in 1948. As such, the need to contemplate the current state of affairs concerning the groups the Convention protects is dire. Thereby, the purpose is, thus, not

¹ *Prosecutor v. Kambanda*, Trial Chamber Judgment, September 4, 1998, ICTR-97-23-S, para. 16.

² For more on this theme, see Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011).

³ United Nations, *General Assembly Resolution 260, Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948 (UN Doc. A/RES/260(III)).

⁵ Martti Koskenniemi, “What is Critical Research in International Law? Celebrating Structuralism,” *Leiden Journal of International Law* 29, no. 3 (2016), 732.

to argue for the extension of the protected groups to encompass the crime of genocide committed in a gender-related manner, but rather to probe the possibilities and problems with including such groups as a protected group pursuant to the Genocide Convention. From the outset, it should be borne in mind there is no common cross-cultural definition of gender. As such, gender's complex construction as an analytical category is often used with little contemplation and harbors some inherent difficulties. Seeking to remedy this issue, there is reason to further elaborate how gender is understood. This paper begins the longer discussion with a focus on "genocidal" acts against women, with an understanding that future research needs to be done on the implications of other groups defined by gender to the arguments made in the article. Notwithstanding, the conceptualization of gender in this article draws from Iris Marion Young's notion of "gender as seriality." Seriality is made up of individuals' ways of acting or being exposed to others' actions. The actions, thereby, are directed towards the same object and depend on material surroundings being caused by various structures. In turn, the structures are a consequence of collective actions and practices. Belonging to a series is not a deliberate choice, even if the separate actions in a series take place deliberately. A series is "a social collective whose members are unified passively by the objects around which their actions are oriented or by the objectified results of the material effects of the actions of the others."⁶ The view of gender as a "seriality" recognizes the uniqueness of persons in groups defined by gender, such as women, their interests, and the reality of gender hierarchies that surpass the confines of ethnic, cultural, and economic groups. To be specific, Young actualizes the concept of seriality to explain why women should not be presumed to constitute a singular group with common purposes. Yet, this point of departure threatens to lead to political lethargy. If women, or other groups defined by gender, do not share any interests, how can we conceptualize the disadvantages such persons suffer structurally? Young's response is to view women as a "self-alienated series," arguing "their womanliness will not be the only thing that brings them together, since there are other concrete details of their lives that give them affinity, such as their class or race position."⁷ Hence, it is the concept of seriality that allows us to see women, and other groups defined by gender, as a collective "without identifying common attributes that all women have or implying that all women have a common identity."⁸ Consequently, the concept of seriality allows us to see gender might well emerge as a parameter to delineate a group targeted for destruction "as such."

The Historical Origins of the Protected Groups in the Genocide Convention

During World War II, Raphael Lemkin coined the term "genocide" in *Axis Rule in Occupied Europe*.⁹ Etymologically, the neologism was a hybrid combining the Greek *genos* (race, tribe, or nation) and the Latin *cide* (killing). Prima facie, a verbatim interpretation appears to restrict the ambit of the concept to circumstances involving races, tribes, or nations. Indeed, in *Axis Rule*, Lemkin speaks of genocide as directed against national minorities.¹⁰ His conceptualization of genocide was, however, broader. He emphasized that "[i]f the destruction of human groups is a problem of international concern, then such acts should be treated as crimes under the law of nations."¹¹ In this regard, the concept of genocide was most likely conceived in a similar vein as a proposal Lemkin made in 1933. At that time, he proposed the crime of barbarity, covering acts of extermination perpetrated "out of hatred towards a racial, religious or social collectivity."¹² Following this logic, it is plausible Lemkin did not anticipate the concept of genocide to be limited to a select number of groups. Rather, the object and purpose from his point of view was likely to construct a locution for "actions

⁶ Iris Marion Young, "Gender as Seriality: Thinking about Women as a Social Collective," *Signs* 19, no. 3 (1994), 724.

⁷ *Ibid.*, 737.

⁸ *Ibid.*, 714.

⁹ Raphaël Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie, 1944).

¹⁰ *Ibid.*

¹¹ Raphaël Lemkin, "Genocide as a Crime under International Law," *American Journal of International Law* 41, no. 1 (1947), 146.

¹² *Ibid.*

subordinated to the criminal intent to destroy or cripple permanently a human group.”¹³ Such a perspective opens up for the inclusion of various human groups, such as groups defined by gender.

The concept of genocide was rapidly incorporated into legal vocabulary after World War II. To counteract impunity for Nazi crimes, the Allied forces held an International Military Tribunal (IMT) in Nuremberg. Pursuant to Articles 6(a)-(c) of the London Charter, the IMT was granted jurisdiction over three separate crimes; crimes against peace, war crimes, and crimes against humanity. Consequently, since it was not a part of the IMT Charter, the locution “genocide” did not appear in the judgments. It was, however, used in the indictments as well as the prosecutors’ closing arguments as an explanatory term. Even though none of the defendants were convicted of genocide in the Nuremberg trials, the judgments did explain acts which today would be defined as genocide. Thus, the early use of the concept of genocide set “the stage for the evolution of genocide into a separate criminal offence.”¹⁴

After the Nuremberg trials, a US military tribunal which operated pursuant to Control Council No. 10 (CC10) tried Nazi officials.¹⁵ In their jurisprudence, genocide started to materialize as a term with legal substance. Genocide, the Tribunal argued, was “the prime illustration of a crime against humanity.”¹⁶ Consequently, the Tribunal constructed genocide as a subcategory of the broader notion of crimes against humanity. The genocide convictions pursuant to CC10 therefore highlight the transformation of the locution “genocide” from an explanatory concept, to a part of legal terminology in the IMT proceedings, and then to a subset of crimes against humanity.

The end of World War II signaled the onset of the desire to prevent horrendous acts like the Holocaust from happening again, which in turn provided the momentum for international society to make considerable efforts towards unification. This post-war momentum led to the establishment of the UN. The adoption of an international legal instrument devoted to genocide ensued.¹⁷ The UN General Assembly (UNGA) was the first organ to actualize the matter within the new international order, and on December 11, 1946, it unanimously passed Resolution 96(1). The Resolution defined the crime of genocide as “the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.”¹⁸ Notably, the Resolution ascertains that “genocide is a crime under international law [...] whether the crime is committed on religious, racial, political or *any other grounds*.”¹⁹ Matthew Lippman labels this a liberal conceptualization,²⁰ with the philosophical underpinning that the use of violence to exterminate groups of human beings, on the sole basis of their affinity to a particular group, is despicable. Such a construction opens for a broad conception of genocide. As a matter of history, the core of the resolution could be extended to encompass gender collectives, apart from the currently enumerated ones. Since the Resolution, coupled with the explicit reference in the Genocide Convention’s preamble, was adopted unanimously and without debate, it is important as a matter of *opinio juris*.²¹ It has even been argued, through the phrasing in Resolution 96(1), other groups can be considered protected by a *jus cogens* norm, which prohibits genocide.²²

Resolution 96(1) requested the UN Economic and Social Council (ECOSOC) to prepare a draft convention on the crime of genocide, which in turn, instructed the Secretary-General to perform

¹³ *Ibid.*, 147.

¹⁴ David Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press, 2010), 8.

¹⁵ Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10* (Buffalo: WS Hein, 1949), 277–335.

¹⁶ *Ibid.*, 983.

¹⁷ William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2009), 29.

¹⁸ United Nations. *General Assembly Resolution 96(1). The Crime of Genocide*. December 11, 1946 (UN Doc A/BUR/50).

¹⁹ *Ibid.* Emphasis added.

²⁰ Matthew Lippman, “The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later,” *Arizona Journal of International and Comparative Law* 15, no. 8 (1998), 448.

²¹ Schabas, *Genocide in International Law*, 56.

²² Beth Van Schaack, “The Crime of Political Genocide: Repairing the Convention’s Blind Spot,” *Yale Law Journal* 106, no. 7 (1997), 2259–2263.

the same task.²³ The Secretariat's Draft was written by the Secretariat's Human Rights Division, assisted by, *inter alia*, Lemkin himself. The Secretary-General set about drafting a treaty that would, as far as possible, "embrace all points likely to be adopted, leaving it to the competent organs of the United Nations to eliminate what they did not wish to include."²⁴ The draft convention discarded the residual reference to "any other groups."²⁵ However, the Secretary-General noted that the list of protected groups was to be considered "not exhaustive."²⁶ The Secretariat's Draft thereby gives sufficient leeway in imagining collectives defined on the basis of gender as coherent with the other groupings. Nevertheless, the Secretary-General anticipated which groups to protect would be "the first general question which will have to be settled,"²⁷ thereby identifying the crux of which groups to include as a political dilemma. To deal with these issues, an ad hoc Committee was created.²⁸ Notably, the Committee considered it essentially within the competence of governments to answer the question of "[w]hat human groups should be protected? Should all human groups [...] be protected or only some of them?"²⁹ Eventually, the ad hoc Committee settled for the same category of protected groups as in the Secretariat's draft. The question of whether the enumerated groups were to be considered exhaustive was, however, a matter left undiscussed. The UN's Sixth Committee drafted the final text of the Genocide Convention, who likely felt it was important to complete the Convention swiftly, "before the memory of the barbarous crimes which had been committed faded from the minds of men."³⁰ Against this background, the Iranian delegate suggested "adopting a convention embodying all the points on which agreement was possible," leaving the more cumbersome problems for an "additional convention [to] settle."³¹ The draft convention by the Sixth Committee subsequently was unanimously adopted on December 9, 1948 by the UNGA and the same construction applies today.³²

The deliberations over which groups ought to be protected should be understood in its broader context. At its inception, it was imagined the spirit of the concept of genocide, illustrated by Lemkin's own writings and Resolution 96(1), would be applied on a wider scale. During the drafting process, the concept became restricted due to political compromise. Consequently, as constructed today, the scope of protection from genocide under ICL is limited to four "protected groups," instead of "actions subordinated to the criminal intent to destroy or cripple permanently a human group."³³ There is, thus, an evident disparity between genocide, as Lemkin imagined it, and the Genocide Convention, the latter being considerably more restrictive. It has been questioned whether the drafters were aware of making decisions of legislative character, rather than political ditto.³⁴ In this regard, Frank Chalk and Kurt Jonassohn note "the wording of the Convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it."³⁵ Consequently, "the Convention's list of protected groups has probably provoked more debate since 1948 than any other aspect of the instrument."³⁶

The Protected Groups

The Genocide Convention does not protect all human groups. As per the definition, the crime of genocide can only be committed against members of national, ethnic, racial, or religious collectives.

²³ United Nations. *Economic and Social Council Resolution 47(IV). Crime of Genocide*. March 28, 1947 (UN Doc E/325).

²⁴ United Nations, *Secretariat Draft. First Draft of the Genocide Convention*, June 17, 1947 (UN Doc. E/447).

²⁵ United Nations, *Economic and Social Council Resolution 77(V). Genocide*, August 6, 1947.

²⁶ United Nations, *Secretariat Draft. First Draft of the Genocide Convention*, June 17, 1947 (UN Doc. E/447).

²⁷ *Ibid.*

²⁸ United Nations, *Economic and Social Council Resolution 117(VI), Genocide*, March 3, 1948 (UN Doc. E/734).

²⁹ United Nations, *Ad Hoc Committee on Genocide: Summary Records* (April 5–May 10, 1948). UN Doc. E/AC25/SR.13.

³⁰ United Nations, *Proposal of the Delegation of the United States of America*, October 1, 1948 (UN Doc A/C6/208).

³¹ United Nations, *Sixty-Sixth Meeting*. October 4, 1947 (UN Doc. A/C.6/SR.66).

³² Schabas, *Genocide in International Law*, 83.

³³ Lemkin, *Genocide as a Crime*, 147.

³⁴ Nersessian, *Genocide and Political Groups*, 108.

³⁵ Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide* (New Haven: Yale University Press, 1990), 11.

³⁶ Schabas, *Genocide in International Law*, 117.

Thus, interpreting the crime as a departure from a “formalist” interpretation of the provision, genocide cannot be committed towards groups defined by gender. The victims, moreover, must be chosen based on their membership to such a collective with the intent to destroy the group “in whole or in part.” They are in this respect a means to an end.

Given the four enumerated groups are the sole beneficiaries of the protection granted by the Genocide Convention, it could be argued it is regrettable that there is no recognized definition for any of them in the Convention or elsewhere. However, it is near impossible to attribute a distinct meaning to them, as they intersect and overlap significantly. The International Criminal Tribunal for Rwanda (ICTR) Trial Chamber in *Akayesu*, however, set out to construct objective definitions for each of the four groups enumerated in Article II.³⁷ To determine whether a group fell within the ambit of the Convention, the ICTR required an “objective evaluation” of the group to see if it fit the scheme of the definitions they posed. The “objective approach” to the protected groups offered by the ICTR in *Akayesu* was gradually moved away from the jurisprudence of the International Criminal Tribunals. Later judgments employ a leaning towards subjective parameters.³⁸ The “subjective approach” refers to the perpetrator’s point of view of the victim group.³⁹ If the *génocidaire* defines the victim group as one of the protected groups of genocide, the victim group is such a group. The perpetrator’s perspective, thereby, becomes the defining element for the crime of genocide. It is, however, hard to reconcile this rationale with principles of legality. Foreseeability and specificity of criminal conduct are paramount parameters of the principle of legality, and it is difficult to imagine the subjective approach in fulfilling such requirements. Every *génocidaire* will differ in mind-set and will have a different perspective of their victims. As such, there will be a lack of a uniform measurement of victim groups. Employing a subjective approach is, however, coherent with the sociological processes leading up to genocide. Inherent in every act of genocide is the *génocidaire*’s prejudice against “the Other” group. The *génocidaire* identifies, distinguishes between, and stigmatizes the Other.⁴⁰ Subsequently, they seek to exterminate it. Within the context of sociology, the stigmatization of other groups is commonly referred to as “othering.”⁴¹ To some extent, through leaning on subjective parameters, this process is transplanted into the context of genocide law. The criticism directed against the subjective approach above, however, appears quite serious. There is reason to be wary of such drawbacks. At the same time, given such stigmatization cannot arise from a structural vacuum, the characteristics of the group can be identified in the penumbra of its sociohistorical context via the subjective perspective.

Protecting Human Groups in International Criminal Law

Dealing with groups in a legal context is arguably more complex than what prima facie may be expected, especially since groups exist without inherent meaning. All content is socially assigned through interpretation and argumentation. In legal discourse, this operation is achieved in the context of “applicable law.” Through legal vocabulary, the theoretical conception of a “group” is diminished to a formal description, stipulating requirements for determining inclusion or exclusion. The description then becomes a vessel for rights and obligations. In turn, such requirements must be applied to the “everyday reality.” Thereby, legal actors, such as judges and prosecutors, take active part in mobilizing specific discursive resources in establishing and creating a sense of legitimacy for the requirements that define the groups⁴²

Forcing human groups into legal conceptions requires cursory understandings of the groups in question. This is sometimes achieved by having group definitions revolve around quantifiable, “objective” markers, as if the groups were material objects. Indeed, that is what the ICTR sought to do in *Akayesu*. Such mechanisms prevail in the historical precedents of genocide. For instance, in the Nazi practices of extermination during the Holocaust, the Nazis had problems “parsing out a coherent legal definition for the Jewish community or even in identifying its members.”⁴³ The same difficulties in dealing with “types” of human groups actualize in a legal setting. Nevertheless, the

⁴¹ Antoine Holslag, “The Process of Othering from the ‘Social Imaginaire’ to Physical Acts: An Anthropological Approach,” *Genocide Studies and Prevention* 9, no. 1 (2015), 96.

⁴² Teun van Dijk, *Ideology: A Multidisciplinary Approach* (London: SAGE Publications, 1998), 225–262.

⁴³ Nersessian, *Genocide and Political Groups*, 51.

Convention opts for protecting four, clearly delimited, but narrowly construed human groups. The restrictive personal scope of the Convention has sparked critique from scholars as well as practitioners.⁴⁴ The criticism often emanates from creative interpretations of the treaty text or finding something new from the *travaux préparatoires* to solve the faulty Article II. The assertions seemingly aim to reach a predetermined conclusion of including a certain human group. Such an altruistic goal may be commendable. The jurisprudence, however, is not.

In the ICTR, questions dealing with the problem of whether the Tutsi could be considered a protected group pursuant to Article II of the Convention emerged. The Trial Chamber in *Akayesu* noted it was unquestionably “the Tutsi ethnic group which was targeted” by the Hutu majority government solely because of their affinity to the Tutsi group.⁴⁵ The categorization of the Tutsi as an ethnic group emanated from their history of being different from the Hutu created by previous colonial authorities as well as between the Rwandans themselves. This was not sufficient to fit the Tutsi within the scheme of an ethnic group in the sense of the Convention since, turning to the defining characteristics of ethnic groups, it becomes evident the Tutsi and the Hutu who massacred them share many traits. Disregarding the racial, or racist, considerations of the colonial authorities, they share the same language, religion, and essentially the same culture. This prompted the tribunal to scrutinize the theoretical underpinnings for protecting groups “as such.” The tribunal initially sought to establish “objective” definitions of each of the four groups enumerated in the Genocide Convention. Subsequently, the tribunal turned to the *travaux préparatoires* and determined the common denominator for the enumerated groups was membership, was normally unchallengeable by members, “who belong to it automatically, by birth, in a continuous and often irremediable manner.”⁴⁶ By continued reference to the *travaux préparatoires*, the tribunal took the position that it was “particularly important to respect the intention of the drafters of the Genocide Convention.”⁴⁷ This led the Trial Chamber to the conclusion that the drafters’ intention was “patently to ensure the protection of any stable and permanent group.”⁴⁸ Accordingly, the Trial Chamber in *Akayesu* deviated from a formalist reading of Article II and constructed the physical or biological destruction of a group “as such” as genocide, even if a victimized group fell outside the scope of the enumerated groups. That is, insofar the group is stable and permanent. Through an “instrumentalist” approach, the Tutsi was a protected group within the framework of the Convention.

There is reason to approach the jurisprudence in *Akayesu* with skepticism. The overarching goal with the judgment was likely to expand the groups encompassed by the Convention to fit into an “everyday reality” that had changed since the drafting of the Convention. However, the *travaux préparatoires* are scarcely so consistent that it is possible to discern just a single intent. Many states took part in the negotiations with many conflicting interests. Moreover, standpoints in treaty negotiations are hardly sources of binding international law. They may provide evidence for *opinio juris*, but as substantive legal sources, their use is limited. Additionally, recourse to preparatory works of international treaties may be had when the provision “leaves the meaning ambiguous” or “leads to a result which is manifestly absurd.”⁴⁹ In the case of the Genocide Convention, this becomes unlikely. Article II encompasses four groups. It would have surely followed from the treaty text if the manifest intent was to extend the protection of the Convention to all stable and permanent groups. If taken seriously, the “stability and permanence” criterion would mean the catalogization of groups in Article II is meaningless. Additionally, arguing for stability and permanence as the sole parameters worth protecting in groups is conceptually confusing. Dialectically, the tribunal argued that group members in a “redeemable manner” could not be “stable and permanent.” Many of the groups enumerated in the Convention do, however, allow redeemable group membership. It is possible to exit a religion. It is possible to terminate nationality. Ethnicity can be achieved through marriage and terminated through divorce.

⁴⁴ Schabas, *Genocide in International Law*, 117.

⁴⁵ *Prosecutor v. Akayesu*. Trial Chamber Judgment, September 2, 1998, ICTR-96-4-T, para. 124.

⁴⁶ *Ibid.*, para. 511.

⁴⁷ *Ibid.*, para. 516.

⁴⁸ *Ibid.*

⁴⁹ Articles 31 and 32(a)–(b) of the Vienna Convention on the Law of Treaties.

Akayesu is not alone in its attempt to align the formalist “legal reality” with changing discourses of “everyday reality.” Shortly after the creative, instrumentalist interpretation in *Akayesu*, the Spanish Court of Appeals followed suit and deviated from a verbatim reading of the treaty text in the indictment of Augusto Pinochet. The Court argued that the concept of a national group, as it follows from the Convention, also encompasses political and social groups, and genocide should be approached in “social terms, without any need for a criminal law definition.”⁵⁰ From a different perspective, scholars have suggested introducing new victim categories under customary law.⁵¹

The narrow conceptualization of the protected groups under Article II of the Genocide Convention has thus sparked several arguments for introducing new victim categories within the framework for the crime of genocide. While the arguments may not withstand scrutiny, they highlight that the Genocide Convention is having difficulties answering contemporary challenges concerning the groups it protects in situations where utilizing it appears appropriate. Perhaps, the solution will not lie in extravagant readings of the treaty text or unearthing something from the *travaux préparatoires*. A more appropriate approach would be to ascertain if there is a more systemically plausible path to achieving these goals. Such an operation first requires disentangling the theoretical underpinnings for including certain groups while excluding others. The idea of expanding the list of protected groups is, however, not novel. It has been proposed that including new groups places a loose lid on the Pandora’s box of protecting human groups, and there is no “logical stopping point” if new groups were added.⁵² William Schabas assumes this formalist position, as opposed to an instrumentalist ditto, noting that the dilemma with introducing new groups is “the difficulty in providing a rational basis for such a measure,” arguing “if one group is to be included, why not the disabled, or other groups based on arbitrary criteria?”⁵³ One may as well ask the question, “indeed, why not”?

Some parties to the Convention have opted for a wider conceptualization of the protected groups as a matter of domestic law and include any groups defined on any arbitrary criterion.⁵⁴ The overarching rationale can be explained by the fact that any arbitrary group could, theoretically, be subject to genocidal extermination; notwithstanding which group this may be, such conduct is abhorrent and the group must be protected. The standpoint does have merit but does not withstand closer examination. Genocide is a *sui generis* crime, it is entirely unique, seeking to protect the human diversity of groups. To preserve the crime’s standing at the “apex of international criminality,” it cannot have a too wide scope of application. Such an order could effectively render the concept of genocide void of content, a logic that relates to the “expressivist function” of genocide.⁵⁵ Legal constructions ought to reflect the broader social and political discourses in which they exist. Thus, there is commendable wisdom in not encompassing all “arbitrary” groups pursuant to the Genocide Convention. It is likely the drafters arrived at the same conclusion, seeing as they opted to enumerate four different groups officially protected from genocide.

The common denominator for the protected groups is that they all reflect different, but important facets of individual identity. Associating with the protected groups can be assumed paramount to the extent the members of the groups should not be forced by means of physical or biological genocide to relinquish affinity to their collective. This analysis is supported by the perception of “human groups” as social constructs rather than scientific, quantifiable items. Indeed, bearing in mind the “subjective approach,” the scientific accuracy is irrelevant in ascertaining the crime of genocide. It is the perspective of the *génocidaire* that determines group membership. There is no need for the *génocidaire* to be rational in their targeting for destruction. The sole parameter to

⁵⁰ Reed Brody and Michael Ratner, *The Pinochet Papers – The Case of Augusto Pinochet in Spain and Britain* (London: Kluwer, 2000), 100.

⁵¹ Van Schaack, *Blind Spot*, 2259.

⁵² Nersessian, *Genocide and Political Groups*, 59.

⁵³ Schabas, *Genocide in International Law*, 132.

⁵⁴ Code Penal Article 211–1 (France), Penal Code. C 2 Article 313 [Genocide] (Burkina Faso), Law No 8–98 (31 Oct 1998) C 1 Article 1 [Genocide] (Congo).

⁵⁵ Dianne Marie Amann, “Group Mentality, Expressivism, and Genocide,” *International Criminal Law Review* 2, no. 2 (2002), 93.

ascertain is whether the perpetrator had a discriminatory intent to exterminate, in part or in whole, a group based on national, ethnical, racial or religious affinity. It matters not that the group can be objectively defined as one of the four groups, or even that the group *de facto* existed. The legal construction of genocide uses groups as an analytical framework and the group that matters is purely conceptual.

The rationale behind the protected groups can be described as the protection of individuals' right to take part and form a kind of shared and collective existence, be it deliberate or not. Within a legal framework of "applicable law," this operation becomes simplified, since it is easier to speak in terms of acts directed at "protected groups" in a court of law rather than acknowledging the groups we speak of do not exist, but only as *impromptu* constructions. As such, they become symbols for transgressions of intrinsic values of human life. The legal construction of the "protected groups" can therefore be perceived as a proxy for the rights of individuals to engage, or be coded, in different types of collectivity with freedom from being subject to genocidal acts. Hence, the "crime of genocide" is best understood as an instrument which ascertains these imperative rights of individuals through taking care of a particular group. The systemic order can be compared to the international human rights regime, where individual rights are of principal importance. The human rights system, on the other hand, rests on the premise that group rights are ascertained through individuals.⁵⁶ Given the Convention's protected groups build on the effective exercise of human rights that can only be coherent in communion on a collective scale, it is plausible the Genocide Convention follows a similar logic.

With this foregoing as a backdrop, we now employ the interpretative canon of *eiusdem generis*, meaning "of the same kind," to analyze if the conceptual parameters of inclusion can be extended in a similar manner to groups defined by gender, or if they are unique to the groups enumerated. The underlying premise is if such groups are of a similar kind, then including them within the Convention's legal protection under the same framework may appear plausible. Groups defined by gender are highly volatile and temporal.⁵⁷ Although used in reference to exclude political groups, stability and permanence cannot adequately justify the inclusion of groups in the Genocide Convention. Not all the enumerated groups are stable and permanent. Indeed, the conceptualization of groups defined by gender intersects largely with how ethnical and racial groups are constructed. The concept of ethnicity connected to a common language or culture, whereas the concept of race to a criterion of "hereditary physical traits."⁵⁸ Groups defined by gender can be perceived as an amalgamation of these conceptualizations, a socially constructed label, influenced by social and cultural preconditions. This similarity is mirrored in other aspects of ICL.⁵⁹ Similarly, to the enumerated groups, belonging to a group defined by gender can be assumed as an intrinsic value of social existence, an important facet of individuality. Such a resemblance is reflected within the scheme of international human rights law. Since genocide has been perceived as the "ultimate crime and the gravest violation of human rights it is possible to commit,"⁶⁰ such a comparison is relevant. The enumerated groups can all be characterized by the rights granted through membership; that is, the right to existence is the property of a group member, be it on the basis of nationality, ethnicity, race or religion. The rights of groups defined by gender follow a similar rationale; all the major international human rights treaties prohibit discrimination based on gender and/or sex, beyond the four enumerated groups. Genocide and gender-specific genocide focus on the physical or biological destruction of a particular group. As such, they will always deal with the most severe infringements of fundamental human rights. It is crucial not to exaggerate this

⁵⁶ See Ian Brownlie, "The Rights of Peoples in Modern International Law," *Bulletin of the Australian Society of Legal Philosophy* 9, no. 2 (1985), 105.

⁵⁷ Judith Butler, *Gender Trouble* (New York: Routledge, 1990), 7.

⁵⁸ See for instance, *Prosecutor v. Akayesu*. Trial Chamber Judgment, September 2, 1998, ICTR-96-4-T, para. 513, 514.

⁵⁹ Article 7(1)(h) of the United Nations, *Rome Statute of the International Criminal Court*, July 17, 1998 and corrected by process-verbaux of November 10, 1998, July 12, 1999, November 30, 1999, May 8, 2000, January 17, 2001 and January 16, 2002 (UN Doc. A/CONF.183/9).

⁶⁰ United Nations, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide (The Whitaker Report)*, July 2, 1985 (UN Doc E/CN.4/Sub.2/1985/6), 5.

aspect, however. It is not the transgression of these rights per se that merits the label “genocide.” Apart from the individual rights, genocide violates the group’s right to existence. Nonetheless, the protected groups depart from a perspective where paramount collective rights are transgressed through serious personal violence, which may necessitate treating the encroachment as genocide.⁶¹ It is on the aforementioned substantive fundamental rights in which the protected groups build on, and the rights apply equally to groups defined by gender. Hence, the continued exclusion of gender from the Genocide Convention appears disparate with the international human rights structure. If other groups similar to such groups have a right to existence, together with a right not to be refused that existence, groups defined by gender must do too.

Often, complexities emerge in determining whether the targeting of a group builds on the traits of any of the enumerated groups, gender traits, or if it is a hybrid. Yet, the subjective approach merely requires the genocidal acts be essentially based on any of the enumerated traits. To that end, a gendered aspect of genocide is simply sorted away as legally irrelevant. Under these circumstances, a perpetrator can claim a genocidal act was committed on gender-specific basis as a viable defense for the crime of genocide. Thereby, the current construction of the protected groups favors gender discrimination over, for instance, religious discrimination. In a similar manner, surely, the current structure of the convention may, for example, take on gendered dimensions by preventing births or rape within an overarching group. Such arguments appear when we turn to historical genocides. For instance, the notion that the Tutsi or Bosnian Muslim groups were partly destroyed through rape because the rape victims (who were women) would be excluded from the collective appears to crystallize traits which undoubtedly oppress women inside the group. The assumption is the dissolution of the target group is, in part, the result of an internal process where group members take part in their own destruction. This is achieved through the belief of a gender *vis-à-vis* gender antagonism that augments the scheme of the *génocidaires*. To hold such traits as natural truths of ethnicity render them invisible and makes them harder to contest, as a consequence of being incorporated into the narrative of victimization. The incorporation may oversimplify, and even caricature, ethnicity and gender alike, through constructing Bosnian Muslim and Tutsi men as inherently prone to excluding rape victims.

Drawing from this analysis, it could be argued that the current scheme of the convention is disparate with the commitment “to promote social progress” as a cardinal value and specific purpose for the UN as an institution, especially since it is through legal instruments this value is to be realized.⁶² If the UN’s underlying engagement to “international social justice,” argued to form the “essence of public international law in the second half of the 20th century,”⁶³ is to be taken seriously, there is an urgent need to consider how groups defined by gender fit within this structure. The analysis shows gender collectives are of a similar kind to the existing protected groups. Consequently, it would not be out of place to extend similar treatment to groups defined by gender in the context of genocide.

Groups defined by gender have been subject to genocidal acts like few other collectives. There is a plethora of historical examples of gender-specific genocides. Witch-hunts in Early Modern Europe, widow burning (sati), female feticide, dowry deaths, the Massacre of Bangladesh men in 1971, and maternal mortality are all examples of where gender-specific elements have been highly prevalent in situations of mass killings.⁶⁴ Gender-specific genocides are thus a historical reality and seem to cry out for the application of the Genocide Convention. Such an assertion does not mean other, non-enumerated groups are subordinate to such groups. Other collectives may fit the theoretical underpinnings of protecting certain human groups from genocide as well. Surely, the political realities of reopening the convention would be difficult. Although, the fact that other human groups may be equally appropriate candidates should not hamper the overarching discussion as it relates to groups defined by gender, which is the focal point here. Ascertaining

⁶¹ Nersessian, *Genocide and Political Groups*, 80.

⁶² The UN Charter preamble, para. 3.

⁶³ Rudolf Bernhardt, *Encyclopaedia of Public International Law* (New York: North Holland, 1993), 252–262.

⁶⁴ *Gendercide Watch*, “History of ‘Gendercide’,” accessed May 3, 2019, http://www.gendercide.org/what_is_gendercide.html.

eligibility for other groups is a different question and is not relevant for the issue of gender in relation to genocide.

Crimes against Humanity – an Adequate Proxy?

The following section asks whether gender-specific genocides have been appropriately responded to under existing substantive crimes under international law. In this regard, Schabas argues that atrocities committed “against groups not covered by Article II of the Genocide Convention are adequately addressed by other legal norms, in particular [...] crimes against humanity.”⁶⁵

Genocide and crimes against humanity can be perceived as sister crimes. Both infractions were construed against the historical backdrop of the Nazi acts of extermination during the Holocaust. The two crimes currently have diverging *raison d'être* and protect different values. A widespread or systematic attack on a gender group, because the members belong to that group, amounts to crimes against humanity. That is very different from an attack on a gender group because the members belong to that group paired with the intent to destroy the gender group “as such.”⁶⁶ National, ethnical, racial, and, religious groups are all protected from crimes against humanity, as well as the crime of genocide. In case groups defined by gender are subject to genocidal acts, only crimes against humanity can be applied, since there is no parallel crime for genocide committed based on gender. Making references to crimes against humanity as a surrogate for a gender-specific genocide risks an inadequate reflection on the content of the criminal categories. The socially constructed label of a crime, to which the criminal conduct is attached, ought to mirror the culpability and seriousness of the offence appropriately. Genocides will often satisfy the requirements for crimes against humanity. The same cannot be said for the reverse, because of the *dolus specialis* of genocide. Constructing a gender-specific genocide as a crime against humanity does not demarcate the perpetrator’s overarching and specialized intent to destroy a specific group “as such,” which really is far more culpable. A perpetrator of crimes against humanity aims to murder, whereas a *génocidiare* aims to destroy a certain group. The construction of genocide is thus more specific in terms of *mens rea* in comparison to crimes against humanity. The same can be said for the prohibited acts of genocide. Only five specific acts can be qualified as genocide. Crimes against humanity could surely encompass those acts but would not be limited to them. The specificity which the legal label of genocide offers is thus far more complete in describing gender-specific genocidal conduct.

From a different perspective, labeling gender-specific genocide as crimes against humanity confuses the personal scope of the crimes. While crimes against humanity are prohibited as a type of persecution against the individual attacked, genocide is the opposite. Genocide is fundamentally an infraction directed towards groups, and the criminalization thereof ascertains protection for certain groups from physical and biological destruction. Crimes against humanity encompass violations of fundamental rights on an individual basis. In the case a “group” is covered by crimes against humanity, is purely ancillary to the individual. Therefore, crimes against humanity are unable to adequately describe attacks against groups.⁶⁷

The way we label crimes has a deeper meaning than solely relating to parameters of culpability of the crime. It also expresses a form of hierarchy between the core international crimes, communicating the severity of one crime in relation to the others. Genocide stands at the “apex of international criminality.”⁶⁸ It is imagined to be the most heinous crime possible. The moral condemnation implied with the locution “genocide” is far more serious than any other international crime. The hierarchy among the international core crimes is less acute for national, ethnical, racial, and religious groups. Both criminal constructions can be applied in a parallel manner. As a matter of criminal cumulation, a perpetrator can be sentenced for genocide as well as crimes against humanity. This renders courts capable of distinguishing between attacks directed towards

⁶⁵ Schabas, *Genocide in International Law*, 171.

⁶⁶ Chile Eboe-Osuji, ed., *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (Leiden, Boston: Martinus Nijhoff Publishers, 2010), 168.

⁶⁷ David Luban, “A Theory of Crimes Against Humanity,” *Yale Journal of International Law* 29, no. 1 (2004), 97.

⁶⁸ *Prosecutor v. Kambanda*, Trial Chamber Judgment, September 4, 1998, ICTR-97-23-S, para. 16.

individuals on a widespread and systematic scale, and conduct intended to exterminate groups of individuals. They can, therefore, pass judgments that more accurately describe the nature of the conduct, when directed towards any of the enumerated groups. Genocidal acts directed towards groups defined by gender, however, either are constructed as the inferior transgression crimes against humanity or fall outside the ambit of ICL completely. At their core, genocide and crimes against humanity are two separate offences dealing with different issues. The current scheme of the protected groups in the Genocide Convention communicates a value-based signal regarding which groups are worthier of protection from the worst kind of criminality. Dialectically, it expresses the worth of groups defined by gender in relation to the four enumerated collectives in Article II. Essentially, the Genocide Convention is a bearer of symbolic values. As such, the way we construct legal categorizations is of paramount importance. It is possible to describe the Armenian Genocide and the Holocaust as episodes of “mass killings.” That categorization, however, would be unsuccessful in capturing the whole picture of the atrocities. The same applies to gender-specific genocides. There is wisdom in communicating a total recognition of criminal conduct. A similar rationale spurred international society to construct genocide in the first place. Given gender-specific genocides have existed historically, the omission to cover gender-specific genocides from genocide has factual ramifications. As a matter of *de lege lata*, there is no specific expression that groups defined by gender are warranted protection from physical and biological destruction “as such.”

The omission to protect from gender-specific genocides in the Genocide Convention entails a strange systemic application of ICL. Returning to the narrative in the introduction, through a formalist interpretation of Article II, the murdered daughters are, at best, currently labeled victims of crimes against humanity. If the imagined community instead adopted a policy of infanticide towards babies who bear certain “hereditary physical characteristics,” we label the babies killed victims of genocide, since they would be constructed as a part of a racial group.⁶⁹ The labels convey for us, the international society, and the future, that the babies of the racial group symbolize something bigger, namely genocide directed towards the “racial group” itself. The murdered daughters, on the other hand, do not qualify for that symbolic treatment. The destruction of women more broadly is left unnoticed by ICL.

A Space for Gender in the Genocide Convention?

The continued omission of gender-specific genocides within the ambit of the Genocide Convention ought to, from today’s perspective, be characterized as a choice. Ultimately, the current construction, the “choice,” relates to the junction between formalism and instrumentalism. Instrumentalism and formalism signify two opposite sensibilities of what it means to be an international lawyer, and two cultures of professional practice in the ICL sphere; which relates to the question of whether legal philosophy should assimilate ethical standards or confine itself to an analysis of black letter law. Systemically, the Genocide Convention’s construction of the protected groups in Article II is “formalist” in the sense of proposing a certain a priori formal matrix of social space; it leans on a token ahistorical formal framework defining the legal terrain within which an open and endless game of contingent inclusions and exclusions occur.⁷⁰ Yet, the notion of genocide is not predetermined; what it will mean, what this term will include, and what it will exclude (that is, to which extent women, gays, trans people, and so forth, are included or excluded within its structure) will always be the result of contingent hegemonic struggle.⁷¹ This highlights that the Genocide Convention, in reality, is an empty signifier which emerges as a battlefield for hegemonic interests, that does not seek to reach some fixed content as its ultimate point of arrival, but only has itself as an objective, demarcated by the empty signifier that is genocide. While the formalist jurisprudential culture in the Genocide Convention may not be adverse per se, it risks giving the appearance of the content in the instrument, that is, the Genocide Convention, as determinate and

⁶⁹ *Prosecutor v. Akayesu*, Trial Chamber Judgment, September 2, 1998, ICTR-96-4-T, para. 514.

⁷⁰ Judith Butler, Ernest Laclau and Slavoj Žižek, eds., *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (London: Verso, 2000), 110.

⁷¹ *Ibid.*, 90, 110.

ahistorical when it is not so. Rather, an empty signifier with no determinate meaning signifies only the existence of meaning in itself, instead of absence thereof.⁷² Seen from this perspective, the crime of genocide is an institution that has no definite, determinate function, but only a negative one of expressing the actuality of the institution as such, instead of its non-existence. Following a Hegelian logic, such a rationale can be characterized as a direct embodiment of the ideological function of painting a “neutral” picture within which all social antagonism has been wiped out. The current construction of the protected groups therefore appears to express a position of which groups that are politically warranted protection “as such.” Thus, the interest of protecting groups defined by gender from physical and biological destruction is not considered politically motivated. This is, however, not a static position, but instead, politically changeable. After having analyzed this, potential ramifications emanating from the current construction of the crime of genocide can now be discussed. The underlying premise is that the issues emerge as problematic in the sense they provide support for the claim that the Convention is unnecessarily narrow concerning the groups it grants protection; in particular with groups defined by gender. Thereby, by virtue of their existence, the problems enable a hypothetical inclusion of groups defined by gender as protected to appear theoretically plausible. This approach does not carry the pretense that what is needed is to construct additional policies and rules. Rather, it seeks to contribute to a better understanding of what transpires beneath the façade of the implementation and application of Article II of the Genocide Convention.⁷³

Simply expanding the Genocide Convention is problematic. Indeed, “[d]iluting the definition, either by formal amendment of its terms or by extravagant interpretation of the existing text, risks trivializing the horror of the real crime when it is committed.”⁷⁴ This is a legitimate apprehension. Stuart Stein opines that the analysis of scholars probing “other-cides” “is often directed toward, or ends with, establishing that the mass killing cluster under consideration meets the definitional parameters of genocide, however defined.”⁷⁵

As indicated above, the article does not seek merely to establish such genocidal credentials. The backdrop produced here attempts to highlight that the omission of protect groups defined by gender under the Genocide Convention is an unreasonable restriction. The definition of a gender-specific genocide elaborated herein deviates from the definition of the crime of genocide in only one aspect; in terms of the protected groups. The analysis is faithful to the core concept of genocide and advocates the application of genocide only in its prototypical meaning, to cover acts intended to destroy a human group “as such.” The article thereby joins the scholars, arguing that the failure to encompass groups other than the four enumerated has caused the Convention to become “conceptually confused.”⁷⁶

It is a common argument that too wide a conceptualization of genocide may diminish the value-based signals the crime sends. However, the very same danger to the legitimacy may emerge if the construction is too narrow in its scope. If that is the case, the construction runs a risk of undermining, what Dianne Marie Amann calls, the expressivist function of criminalizing genocide, given that legal constructions reflect the broader social and political discourses in which they operate.⁷⁷ As such, it is of paramount importance that the way genocide is judicially constructed corroborates with the social and political reality in which it exists. Should there be a discord, the crime risks losing legitimacy as it may be viewed as outdated and arbitrary. Thereby, the argument that the drafters of the Genocide Convention wanted to encompass “national minorities,” and the enumerated groups are different faces of that concept, must be disregarded. Even if the drafters wanted to protect national minorities, the intention of the drafters almost seventy years ago cannot justify the choices we make concerning the crime of genocide today. Referring to intellectual

⁷² Ibid., 113-115.

⁷³ Martti Koskeniemi, *Critical Research in International Law*, 730.

⁷⁴ William Schabas, *Genocide in International Law*, 133. See also Amann, *Expressivism*, 95.

⁷⁵ Stuart Stein, “Geno- and Other Cides: A Cautionary Note on Knowledge Accumulation,” *Journal of Genocide Research* 4, no. 1 (2002), 44.

⁷⁶ Lippman, *Fifty Years Later*, 505.

⁷⁷ Amann, *Expressivism*, 93.

distinctions on a theoretical level obscures the fact that the question of which groups to protect is, essentially, a political one. Genocide instrumentalizes values and interests sustained by beliefs about the world. It is problematic when the values and interests allowed to permeate the Genocide Convention are in divergence with those expressed in the contemporary world.

Notably, as times change, “reality” and discourses regarding what is worth protecting change too. It is understandable why groups defined by gender were not included at the drafting of the Convention. Post-World War II, the concepts of gender equality, gender discrimination, and gender per se were not widely regarded as interests worthy of protection within the international society. However, current discourses in international law are not equally lethargic towards gender issues. As stated previously, all major human rights treaties cover sex and/or gender. The current construction of the protected groups can therefore be said to be incompatible with the international human rights system. The important point to draw here is the inclusion of groups defined by gender in the international human rights system which underlines political ambition to combat gender-based discrimination. It is reasonable to assume that such political will to protect such groups from genocide also exists. There is thus a clash between the interest of combating gender-based discrimination on a genocidal level and the interest of states to limit the *erga omnes* obligation of genocide. The solution to this clash between political impetus and the state reluctance, because of the *erga omnes* obligation, lies in the “expressivist” function of genocide. For the crime to retain its legitimacy, it must fit changing social and political trajectories. Thereby, it is necessary to calibrate the crime of genocide in relation to changing discourses, so they corroborate, inasmuch it is possible, to ensure the credibility of the judicial construct is preserved. There is reason to believe that the inclusion of groups defined by gender as protected under Article II could support such an undertaking. Against this background, we can now turn away from the more overarching questions and discuss the current state of affairs of the protected groups as it concerns groups defined by gender more concretely.

The current construction of the protected groups provides support for the claim that the ICL system is substantively gendered. Fundamentally, the issue of gender-specific genocide often concerns women’s rights and women’s right to existence.⁷⁸ The contemporary genocide discourse thus renders this “women’s issue” unworthy of protection. Thereby, it brushes aside the narratives of atrocities suffered by women. In that, it provides proof that the ICL system is gendered by being based on the realities of male lives.⁷⁹ The groups worthy of protection in the Genocide Convention are gendered to suit atrocities that have befallen men. The ICL system, and the canon of protected groups in the Convention, is the creation of human beings, with its ultimate concern being individual behavior. It is thought of in terms of a neutral construction that is to be equitably applied, or as a rational institute, but it is not so. ICL is imbued by the choices between contesting values and policy interpretations. The absence of women in genocide law produces a narrow and insufficient jurisprudence that legitimizes the unequal position of, for instance, women worldwide rather than facing it. In consequence, the experiences of women are denied access to the continued shaping of ICL, its aims, and its content. If one believes such an order is politically and morally cumbersome, constructing groups defined by gender, as a protected group within the Genocide Convention, could serve as a first step in combating such structures. Resolving these issues should not be faced with overconfidence to the effects of policy changes. A legal construction which accounts for the experiences of women facing such atrocities does not automatically mean that marginalized groups defined by gender have gained access to the ICL system on a larger scale. Rather, a more acute perception would be which interests are allowed to permeate the types of people regarded as worthy of protection in a legal discourse. These problems go beyond how policies are phrased.

As touched upon previously, the current legal architecture of the protected groups in the Genocide Convention highlights the tension between formalism and instrumentalism within ICL.

⁷⁸ Mary Anne Warren, *Gendercide: The Implications of Sex Selection* (Maryland: Rowman and Littlefield, 1985), 22; Adam Jones, *New Directions on Genocide Research* (London: Routledge, 2012), 40.

⁷⁹ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law* (Manchester: Manchester University Press, 2000).

The schism is important in answering what the crime of genocide, and more broadly ICL, is for. In this regard, Martti Koskenniemi notes,

[f]rom the instrumental perspective, international law exists to realise objectives of some dominant part of the [international society]; from the formalist perspective, it provides a platform to evaluate behaviour, including the behaviour of those in dominant positions. The instrumental perspective highlights the role of law as social engineering; formalism views it as an interpretative scheme.⁸⁰

The current order in the international society “is not one of pre-established harmony or struggle but of both cooperation and conflict simultaneously.”⁸¹ Thereby, “[a] form and a process is needed that channels interpretative conflicts into peaceful avenues.”⁸² There are substantial problems inherent in pragmatic instrumentalism. There is the extreme case of the “war against terrorism to canvas the slippery slope from anti-formal reasoning to human rights violation.”⁸³ As such, it seems appropriate to opt for a prevailing view of legal formalism instead of an instrumental ditto.

The prevalent formalist conceptualization of the crime of genocide can thereby be understood as a form of protection from the imposition of objectives of some dominant part of the international society. However, a too formalist approach is a recipe for indifference and may risk making the judicial construction outdated. Formalism needs to be followed with a waking appreciation of its political underpinnings. There is, thus, reason to move beyond the dichotomy of formalism *vis-à-vis* instrumentalism to strike a balance between the different interests that ICL represent.⁸⁴ A starting point for such a quest could be to recognize ICL as a political project, acknowledging openly the battle for hegemony.⁸⁵ Inherent is thereby the realization that there is no fixed set of objectives, purposes, or principles that can be unearthed externally from ICL in itself.⁸⁶ Instead, these objectives cannot be anything than those of different legal actors with different hegemonic quests. ICL, and particularly the crime of genocide in international law, is an instrument; yet, as an instrument it cannot be considered in isolation, set apart from the political processes of which it is a complex part. That is why the objectives of ICL and its criminal constructions, moreover, is ICL in itself; and as a promise of “justice.” ICL and justice are connected in the conduct of legal actors, “paradigmatically in the legal judgment.”⁸⁷ The judgment, however, is insufficient to bridge positive law and justice. Therefore, in the rift between ICL and justice lies the inevitable realm of politics law. It must be so, or else law becomes sheer positivity. That is why the question whether including groups defined by gender under the Genocide Convention is theoretically plausible should be addressed for what it is. It is not about objectives from diplomatic instruments, it is a question of political struggle. Hence, the true inquiry becomes, is it politically motivated to protect groups defined by gender from genocide?

Concluding Remarks

The Genocide Convention acknowledges some facets of collective life are constitutional for human identity to the extent freedom from physical and biological destruction is warranted to ensure their existence “as such.” At its core, ICL is a consent-based system. Its survival is dependent upon states accepting not only its jurisprudence, but also the moral and political ramifications thereof. The concept of a gender-specific genocide, and its interconnectivity with genocide, ostensibly emerge as problematic for international society as a whole and ICL in a systemic manner. The complexities

⁸⁰ Koskenniemi, *The Politics of International Law*, 255.

⁸¹ *Ibid.*, 249.

⁸² *Ibid.*

⁸³ *Ibid.*, 249–250.

⁸⁴ Mikael Baaz, “International Law is Different in Different Places: Russian Interpretations and Outlooks,” *International Journal of Constitutional Law* 14, no. 1 (2016), 275.

⁸⁵ Koskenniemi, *The Politics of International Law*, 263.

⁸⁶ *Ibid.*, 263.

⁸⁷ *Ibid.*, 263–264.

surfaced here are of a wholly political character. That is not inherently detrimental, but ICL should be responsive enough to handle contemporary challenges. If it does not, it runs the risk of throwing a shade of illegitimacy over the entire system. In the same way the criminal label “murder” cannot accurately communicate the atrocities of the Holocaust, it cannot accurately describe a gender-specific genocide. This should not be interpreted that introducing a “new” crime of gender-specific genocide would be a panacea for such dilemmas. Even though a gender-specific genocide fits the theoretical underpinnings of international criminal regulation, these issues should not be tackled with over-confidence to the effects of policy changes. A construction that accounts for the reality of such conduct does not automatically render the issue of gender-specific genocides resolved. ICL is an insufficient system to cure all the woes in the world. Nor should it be expected to be able to do so. The law, and perhaps especially ICL, will always provide inadequate tools for dealing with genocide. Indeed, in the words of Arendt, “for these crimes, no punishment is severe enough. It may as well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems.”⁸⁸

Notwithstanding the imperfections of ICL, there is reason to do something rather than nothing. Apathy, too, takes its toll. The omission to protect groups defined by gender from genocide is a choice. This political choice is purchased at the cost of lost legitimacy of ICL. That, as it stands today, is a price it cannot afford to pay. Returning to the narrative in the introduction, legal terminology of inclusion and exclusion transforms and renders the victim group less worthy of protection than national, ethnical, racial, and religious groups. The attack on the group, the girls of the community, remains unseen. In the end, the omission to protect such groups from genocide represents a lacuna within ICL. If one believes this lacuna ought to be filled, an inclusion of groups defined by gender as protected in the Genocide Convention appears theoretically plausible. After all, to quote Lemkin, “if the destruction of human groups is a problem of international concern, then such acts should be treated as crimes under the law of nations.”⁸⁹

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Bibliography

- Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil*. New York: Viking Press, 1963.
- Amann, Dianne Marie. “Group Mentality, Expressivism and Genocide.” *International Criminal Law Review* 2, no. 2 (2002), 93–144. [Doi: 10.1163/157181202400454709](https://doi.org/10.1163/157181202400454709)
- Baaz, Mikael. “International Law is Different in Different Places: Russian Interpretations and Outlooks.” *International Journal of Constitutional Law* 14, no. 1 (2016), 262–276.
- Bernardt, Rudolf. *Encyclopedia of Public International Law*. New York: North Holland, 1993.
- Brody, Reed and Michael Ratner. *The Pinochet Papers – The Case of Augusto Pinochet in Spain and Britain*. London: Kluwer, 2000.
- Brownlie, Ian. “The Rights of Peoples in Modern International Law.” *Bulletin of the Australian Society of Legal Philosophy* 9, no. 2 (1985), 104–119.
- Butler, Judith. *Gender Trouble*. New York: Routledge, 1990.
- Butler, Judith, Ernest Laclau and Slavoj Žižek, eds. *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*. London: Verso, 2000.
- Chalk, Frank and Kurt Jonassohn. *The History and Sociology of Genocide*. New Haven: Yale University Press, 1990.

⁸⁸ Lotte Köhler and Hans Saner, eds., *Hannah Arendt–Karl Jaspers Correspondence 1926–1969* (New York: Mariner Books 1992), 54.

⁸⁹ Lemkin, *Genocide as a Crime*, 146.

- Charlesworth, Hilary and Christine Chinkin. *The Boundaries of International Law*. Manchester: Manchester University Press, 2000.
- Eboe-Osuji, Chile, ed. *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*. Leiden, Boston: Martinus Nijhoff Publishers, 2010.
- Gendercide Watch. "History of 'Gendercide'." Accessed May 3, 2019. http://www.gendercide.org/what_is_gendercide.html.
- Holslag, Antoine. "The Process of Othering from the 'Social Imaginaire' to Physical Acts: An Anthropological Approach." *Genocide Studies and Prevention* 9, no. 1 (2015), 96–113. [Doi: 10.5038/1911-9933.9.1.1290](https://doi.org/10.5038/1911-9933.9.1.1290)
- Jones, Adam. *New Directions in Genocide Research*. London: Routledge, 2012.
- Köhler, Lotte and Hans Saner, ed. *Hannah Arendt–Karl Jaspers Correspondence 1926–1969*. New York: Mariner Books, 1992.
- Koskenniemi, Martti. *The Politics of International Law*. Oxford: Hart Publishing, 2011.
- . "What is Critical Research in International Law? Celebrating Structuralism." *Leiden Journal of International Law* 29. No. 3 (2016), 727–735. [Doi: 10.1017/s0922156516000285](https://doi.org/10.1017/s0922156516000285)
- Laban Hinton, Alexander, ed. *Annihilating Difference: The Anthropology of Genocide*. Berkeley: University of California Press, 2002.
- Lemkin, Raphaël. *Axis Rule in Occupied Europe*. Washington: Carnegie, 1944.
- . "Genocide as a Crime under International Law." *American Journal of International Law* 41, no. 1 (1947), 145–151.
- Lippman, Matthew. "The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later." *Arizona Journal of International and Comparative Law* 15, no. 8 (1998), 415–514. [Doi: 10.4324/9781351157568-2](https://doi.org/10.4324/9781351157568-2)
- Lingaas, Caroline. "Defining the Protected Groups of Genocide Through the Case Law of International Courts, 2015." *ICD Brief 18 December 2015*.
- Luban, David. "A Theory of Crimes Against Humanity." *Yale Journal of International Law* 29, no. 1 (2004), 85–167.
- Nersessian, David. *Genocide and Political Groups*. Oxford: Oxford University Press, 2010.
- Schabas, William. *Genocide in International Law*. Cambridge: Cambridge University Press, 2009.
- Stein, Stuart. "Geno- and Other Cides: A Cautionary Note on Knowledge Accumulation." *Journal of Genocide Research* 4, no. 1 (2002), 39–63. [Doi: 10.1080/14623520120113892](https://doi.org/10.1080/14623520120113892)
- United Nations. *Ad Hoc Committee on Genocide: Summary Records (April 5–May 10, 1948)*. UN Doc. E/AC25/SR.13.
- . *Economic and Social Council Resolution 47(IV). Crime of Genocide*. March 28, 1947 (UN Doc E/325).
- . *Economic and Social Council Resolution 77(V). Genocide*. August 6, 1947.
- . *Economic and Social Council Resolution 117(VI). Genocide*. March 3, 1948 (UN Doc. E/734).
- . *General Assembly Resolution 96(1). The Crime of Genocide*. December 11, 1946 (UN Doc A/BUR/50).
- . *Proposal of the Delegation of the United States of America*. October 1, 1948 (UN Doc A/C6/208).
- . *Secretariat Draft. First Draft of the Genocide Convention*. June 17, 1947 (UN Doc. E/447).
- . *Sixty-Sixth Meeting*. October 4, 1947 (UN Doc. A/C.6/SR.66).
- van Schaack, Beth. "The Crime of Political Genocide: Repairing the Convention's Blind Spot." *Yale Law Journal* 106, no. 7 (1997), 2259–2292. [Doi: 10.2307/797169](https://doi.org/10.2307/797169)
- van Dijk, Teun. *Ideology: A Multidisciplinary Approach*. London: SAGE Publications, 1998.
- Taylor, Telford. *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10*. Buffalo: WS Hein, 1949.
- Warren, Mary-Anne. *Gendercide: The Implications of Sex Selection*. Maryland: Rowman and Littlefield, 1985.
- Young, Iris Marion. "Gender as Seriality: Thinking about Women as a Social Collective." *Signs* 19, no. 3 (1994), 713–738. [Doi: 10.1086/494918](https://doi.org/10.1086/494918)