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The overuse, misuse and need for a restrictive application of the legal concept of 'genocide': Lessons from the Russian-Ukrainian and Israeli-Palestinian conflicts

Dissertation to obtain a Master's Degree in Law,
in the speciality of International and European Law

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September, 2024

Anti-plagiarism statement

I hereby declare that the work I present is my own and that all my citations are correctly acknowledged. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offence.

(Matilde Pina Silva)

Dedication

To my grandfather, Artur, the motivation behind completing this dissertation, who makes me want to be a better person every day, and who has worked all his life to give his children and grandchildren the opportunity he didn't have to study.

To the people who marked my journey the most, Educator Marina Costa, Teacher Paulo Gomes and Professor Francisco Pereira Coutinho, thank you so much for the academic training accompanied by that of character, for understanding my moments of frustration, for your advice, trust, belief in my potential and for taking me where I was always meant to arrive.

Finally, to my friends, my companions on writing days and long nights, unwavering in every way.

Acknowledgements

I would like to express my heartfelt gratitude to my supervisor, Professor Francisco Pereira Coutinho, for his unwavering support from day 1. Since 2020, his deep knowledge and passion for the law have greatly influenced me and shaped my career. It was his innovative and open-minded approach to teaching that drove me to my first moot court competition. From that moment on, I learned what it is to love what you do. To study and apply international law "gives me life", as I usually say. From the very first class I attended with Professor Francisco, during my bachelor's degree, I knew that this was the path I wanted to follow. When the time came to choose a supervisor, there was no doubt in my mind, Professor Francisco was the only choice, and I was proven right. His career has been a constant source of inspiration, and I am deeply indebted to him for believing in me, encouraging me to seize various opportunities, and exemplifying what it means to be both an outstanding professional and a remarkable human being.

I would also like to thank my friends and colleagues at the University, and those from my various internships, as well as my many Moot Court partners and coaches over the years. Your help, encouragement, and our countless exchanges and late-night discussions were invaluable to my learning. Thank you for jumping into my wild and demanding ideas with me. I hope those Moot Courts, simulations, and events were as rewarding for you as they were for me. I'll always look back on those memories with much fondness and gratitude.

It would be remiss of me not to express my gratitude to Professor Patrícia Galvão Teles, whose trust in the younger generation of law students allowed me to attend the United Nations' 75th Session of the International Law Commission. The academic and inspiring atmosphere I experienced during my time in Geneva profoundly influenced my work, inspiring me to write the majority of this thesis on the United Nations grounds. Being surrounded by such renowned professionals motivated me to learn and grow, both as a person and as an academic.

Last but not least, I want to thank my parents. The constant support from my mother, no matter the endeavour, no matter the personal cost, the sacrifices and efforts demand my deepest and most heartfelt gratitude. Thank you for providing me, all my life, with a prosperous environment where I could thrive, for encouraging me to pursue opportunities abroad, and for your emotional support in what were some of the most challenging months of my life. Thank you for listening, and for letting me explain to you my examples, analogies, logic and arguments even when all you wanted were some peaceful nights watching your soap operas. Thank you for always making me believe in myself, and for teaching me to ‘never, ever, ever’ give up on a project or a commitment. You are the greatest example of strength and perseverance I will ever and have ever witnessed. Thank you for being such a good mother and always my number-one supporter.

To my dad, thank you for always being my role model and greatest inspiration to study hard and work even harder. Your support for my career and studies means much to me. I’m especially grateful for the moments when you pushed me to work harder, to focus, to give my best, to always be academically rigorous, and to pour everything I am into everything I do. Most importantly, thank you for encouraging me to finish this dissertation, I couldn’t have done it without your extra dose of motivation.

Way of citation

All legal citations and references throughout this dissertation are formatted per the Bluebook: A Uniform System of Citation, Law Review style.
The chosen language for this dissertation was English (British).

List of abbreviations

Art. - Article
Arts. Articles
GC - Genocide Convention
ICJ - International Court of Justice
ICC - International Criminal Court
ICTR - International Criminal Tribunal for Rwanda
ICTY - International Criminal Tribunal for the Former Yugoslavia
IHL - International Humanitarian Law
ILC - International Law Commission
MS - Member States
Para. - Paragraph
Pp. - Pages
Res. - Resolution
UN - United Nations
UNGA - United Nations General Assembly
UNSC - United Nations Security Council
USA - United States of America
USSR - Union of Soviet Socialist Republics
WWII - World War II

This thesis contains a total of 200000 characters.

Resumo

Esta dissertação analisa de forma crítica a evolução da interpretação e aplicação do conceito jurídico de "genocídio", à luz da guerra russo-ucraniana e o conflito israelo-palestiniano. O estudo aborda a tendência crescente para expandir o âmbito da Convenção para a Prevenção e Repressão do Crime de Genocídio, salientando os potenciais perigos da utilização excessiva e incorreta do termo.

Através de uma análise histórica pormenorizada, a investigação traça as origens da Convenção, sublinhando a sua pretensão de abordar apenas as atrocidades mais graves caracterizadas por uma intenção específica de destruir um grupo protegido. A dissertação argumenta que a manutenção da definição original, restritiva, é essencial para manter o peso jurídico do conceito.

Assim, a revisão da literatura explora o debate relativo ao alargamento da definição de genocídio e nota que, embora alguns defendam uma interpretação mais alargada, tal corre o risco de banalizar o termo "genocídio", garantindo que continua a ser uma designação significativa para o "crime dos crimes".

Os estudos de caso sobre a Ucrânia e a Palestina fornecem informações de ordem prática sobre esta questão. A análise do caso ucraniano sugere uma tendência preocupante para aplicar o rótulo de genocídio com um limiar mais baixo e com menos considerações jurídicas, pondo em evidência a necessidade fundamental de provas inequívocas da intenção de genocídio. Em contrapartida, a análise do caso israelo-palestiniano revela uma relutância dos Estados em invocar o conceito de genocídio, apesar de existirem provas mais substanciais e pareceres do Tribunal que indicam um risco substancial de genocídio. A subsequente comparação destaca a incoerência da resposta internacional e a influência de interesses geopolíticos na aplicação do conceito jurídico.

Em última análise, esta dissertação defende uma aplicação mais contida e precisa de "genocídio", reservando-o exclusivamente para os casos mais extremos e flagrantes de atrocidades em grande escala. O uso excessivo do termo não só dilui a

sua gravidade, como também corre o risco de o transformar num instrumento de conveniência política. Esta dissertação contribui para o atual discurso sobre a salvaguarda da integridade das normas jurídicas internacionais e sublinha a necessidade crítica de manter uma definição rigorosa no âmbito da Convenção sobre o Genocídio.

Palavras-chave: Genocídio; Ucrânia; Rússia; Gaza; Israel; Convenção para a Prevenção e Repressão do Crime de Genocídio.

Abstract

This dissertation critically examines the evolving interpretation and application of the legal concept of "genocide," particularly in light of the Russian-Ukrainian war and the Israeli-Palestinian conflict. The study addresses the growing trend towards expanding the scope of the Convention on the Prevention and Punishment of the Crime of Genocide, highlighting the potential dangers of overuse and misuse of the term.

Through a detailed historical analysis, the research traces the origins of the Convention, emphasising its intent to address only the gravest atrocities characterised by a specific intent to destroy a protected group. The dissertation argues that this original, restrictive, definition is essential to maintaining the term's legal weight.

Therefore, the literature review explores the debate surrounding the broadening of genocide's definition, noting that while some advocate for a more expansive interpretation, this risks diluting the term and politicising its use. The study underscores the importance of adhering to the Genocide Convention's stringent criteria to prevent the trivialisation of "genocide".

The case studies on Ukraine and Palestine provide practical insights into this issue. The analysis of the Ukrainian conflict suggests a worrying trend toward applying the genocide label with a lower threshold and with fewer legal considerations, underscoring the critical need for unequivocal evidence of genocidal intent. In contrast, the examination of the Israeli-Palestinian conflict reveals a reluctance by states to invoke the genocide label, despite more substantial evidence and Court opinions indicating a significant risk of genocide. The subsequent comparison highlights the inconsistent international response to the application of the legal concept of 'genocide.'

Ultimately, this dissertation advocates for a more restrained and precise application of the term 'genocide,' reserving it exclusively for the most extreme and

egregious cases of mass atrocities. Overuse of the term not only dilutes its gravity but also risks turning it into a tool of political convenience. This work contributes to the ongoing discourse on safeguarding the integrity of international legal norms and underscores the critical need to maintain a stringent definition within the Genocide Convention.

Keywords: Genocide; Ukraine; Russia; Gaza; Israel; Convention on the Prevention and Punishment of the Crime of Genocide

'When I use a word, it means just what I choose it to mean - neither more nor less', said Humpty Dumpty.'The question is whether you can make words mean so many different things', replies Alice.

- Through the Looking Glass, Lewis Carroll

Introduction

In 1968, Jean-Paul Sartre wrote that genocide was "as old as humanity",[1] and whilst that can be argued to be true, as the preamble to the Convention on the Crime of Genocide (GC) states "*that at all periods of history genocide has inflicted great losses on humanity*", it is also true that the term *per se* was coined in 1944 by Raphael Lemkin, in his book *Axis Rule in Occupied Europe*.[2] Since then, what Winston Churchill once called "*a crime without name*"[3] made a name for itself as the 'crime of crimes.'[4]

For many years, what was encompassed by the original definition of genocide and what should be transcribed into international law, was at the centre of endless discussions. Ultimately, consensus among States was achieved, leading to the adoption of an apparently unanimous definition, which can be found in the Genocide Convention:

> *"Article II*
>
> *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;*
>
> *(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. "*

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[1] Jean-Paul Sartre & Arlette Elkaïm-Sartre, On Genocide (1968), page 11.

[2] Leora Bilsky & Rachel Klagsbrun, The Return of Cultural Genocide?, 29 European Journal of International Law 373 (2018), page 376 [hereinafter: Bilksy & Klagsbrun, 2018].

[3] *Leo Kuper*, Genocide. Its political use in the Twentieth Century (New Haven: Yale University Press, 1981), p. 12. *in* Claus Kreß, The Crime of Genocide under International Law, 6 International Criminal Law Review 461 (2006), page 466. [hereinafter: Kreß, 2006].

[4] International Criminal Tribunal for Rwanda, The Prosecutor v. Jean Kambanda (Judgment and Sentence), Refworld (1998), page 463. [hereinafter: The Prosecutor v. Jean Kambanda, 1998].

The concept of genocide, although later reinforced in other legal frameworks,[5] and different court decisions,[6] remains a topic of ongoing discussion among academics. The disagreements revolve around the interpretation of particular terms within the definition, its scope, and the circumstances in which the definition is deemed applicable.

The war of aggression against Ukraine brought back to the never-settled discussion around 'genocide',[7] which was promptly followed by the war in the Gaza Strip. Now, it no longer suffices to disregard the theoretical discussion solely to legal scholars and academics, particularly when politicians carelessly make accusations of genocide.[8] The consequences are larger than increased attention to the conflict, and the trivialisation of the concept may impact its legal scope and application, which is the focal point of this dissertation.[9]

In 2009, Schabas wrote that the issue with genocide was, in the new millennium, no longer one of 'stretching the Convention' to apply to different cases and rather one of applying it to the cases it foresaw.[10] However, recent events beg to differ. Although, as Schabas noted, there has been a great development of international law to accommodate and prosecute other human rights violations, that previously would not find a legal path of their own,[11] the hierarchical approach developed over the years with regards to genocide, as the crime of crimes, has resulted that, for the victims, and the general public, nothing else will suffice or

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[5] Article 6.º, United Nations General Assembly, Rome Statute of the International Criminal Court, (1998), [hereinafter: Rome Statute, 1998].

[6] The Prosecutor v. Jean Kambanda, 1998; *Prosecutor* v. *Akayesu*, ICTR-96.4.T, Judgment, 2 September 1998; *Prosecutor* v. *Jelisić*, Judgment, IT-95-10-T, 14 December 1999; *Prosecutor* v. *Krstić*, Judgment, IT-98-33-A, 19 April 2004; *Prosecutor* v. *Stakić*, Judgment, IT-97-24-A, 2 March 2006; *Prosecutor* v. *Vidoje Blagojevic et al.*, IT-02-60-T, Judgment, 17 January 2005.

[7] William A Schabas, Genocide and Ukraine, Journal of International Criminal Justice, Vol. 20, 2022, pp. 843–857, page 844. [hereinafter: Schabas, 2022].

[8] Schabas, 2022, page 844.

[9] *Ibid,* pp. 843-857.

[10] William A Schabas, Genocide in International Law The Crime of Crimes, Cambridge University Press, 2009, page 10 [hereinafter: Schabas, 2009].

[11] *Ibid,* page 11.

seems to waddle their cries for justice.[12] This, therefore, has led to an attempt at forcibly extending the GC to apply to most crimes against humanity.[13]

Prior to delving into inquiries concerning the significance of maintaining a restrictive approach to the definition and allegations thereof, it is imperative to revisit the historical precedents associated with the term, how the legal conceptualisation of 'genocide' evolved, and what precisely constitutes 'genocide' today.

This dissertation follows the structure of the Convention itself, with an initial chapter on the historical roots of the crime and its development in International Law, including the drafting of the GC. Subsequently, the definition of genocide established in that instrument will render extensive thought and consideration.

This study aims to demonstrate that a broad and unrestrictive application of the GC is detrimental to its application and can produce unexpected negative effects. The growing pressure to extend the scope of the Convention through an expansive interpretation, or even, misinterpretation, will be addressed in the second half. Ultimately, an evaluation of two different ongoing situations with alleged genocide occurring or having occurred will apply the previously established criteria for interpretation.

The research methods employed throughout this dissertation were qualitative, particularly, the consultation of legal instruments and subsidiary means. This approach facilitated a nuanced exploration of the subject matter, enabling a thorough examination of the pertinent legal landscape and facilitating insightful findings.

The research question driving this dissertation is to explore the degree to which recent events and developments, particularly within the past two years (from 2022 to 2024), have expanded the interpretation of genocide. Ultimately, it will

[12] *Ibid,* page 10.

[13] *Ibid,* page 8.

provide research in support of the argument against such an expansion, with sources drawn from various periods.

The law and research are up to date as of August 2024.

2. Historical evolution of 'genocide'

2.1 Origins

In the aftermath of World War II (WWII), Raphael Lemkin, a Polish-Jewish lawyer, understood that "mass murder"[14] fell short of capturing the gravity of the atrocities of the Holocaust. The only legal texts available that would address similar crimes were the 1907 Hague Regulations, which were insufficient given they protected solely the individuals of the other State, instead of an affected group and exclusively during wartime.[15] Lemkin believed a more nuanced understanding was essential, the Holocaust was not merely indiscriminate killings from 'the enemy'; rather, it was rooted in considerations of race, nationality, and/or religion, constituting a deliberate endeavour to annihilate an entire segment of society along with its cultural fabric.[16]

Having reached this conclusion, Lemkin sought to assign the unprecedented crime a precise designation. The resultant term, "genocide," was a lexical amalgamation originating from the Greek root '*genus*,' connoting race, and the Latin suffix '*cide*,' denoting killing.[17] This terminological innovation ('killing a race') encapsulated the multifaceted atrocities that unfolded between 1939 and 1945. The author's original definition emphasised the "destruction of essential

[14] Raphael Lemkin, Genocide., 15 The American Scholar 227 (1946), page 227 [hereinafter: Lemkin, 1946].

[15] Bilksy & Klagsbrun, 2018, page 376.

[16] Lemkin, 1946, page 227.

[17] *Ibid,* page 228.

foundations" with the "aim of annihilating the groups themselves."[18] Although some of the literature chooses to highlight in these passages the cultural element, it is important to not overlook the other side of the coin. Lemkin's conception of genocide also entailed an intention, a plan to destroy a group. An idea at first approach, fairly simple, not necessarily mass murder, but an act committed with the intent to destroy a group, a nation.[19]

Genocide was, for Lemkin, a complex synergy of multiple factors, primarily sociological, meaning the destruction of other social groups, where the destruction of cultural symbols and institutions constituted genocide only if it imperilled the group's existence.[20] Thus, in the original conception, to determine if the crime had been perpetrated, it was crucial to find the intent, and the motive to destroy a particular group through the list of actions in Article II of the Convention.[21]

Lemkin's *Axis Rule in Occupied Europe* inspired a wave to outlaw and codify 'genocide' at the United Nations (UN) level.[22] Two years later, the General Assembly (UNGA) adopted Resolution 96(1), unanimously and without debate.[23] To fully comprehend the history behind the UNGA's Resolution 96(1), it is imperative to be aware and informed on the Trial of the Major War Criminals, an undertaking that may not find comprehensive resolution within this study but warrants consideration.[24]

The crimes it judged on that trial set the tone for what had to be included in a future definition of genocide. As the International Criminal Tribunal for Rwanda

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[18] Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (New York: Carnegie Endowment for International Peace, 1944), page 79, *in* Jeffrey S Bachman, Cultural Genocide (2019), page 27. [hereinafter: Bachman, 2019].

[19] *Ibid,* page 31.

[20] *Ibid,* page 31.

[21] Adam Jones, Genocide : a comprehensive introduction 55–93 (2017), page 89. [hereinafter: Jones, 2017].

[22] Bachman, 2019, page 21.

[23] Schabas, 2009, page 55.

[24] For further and comprehensive study of the origins of 'genocide' at the Nuremberg trials and before, *Schabas, 2009*, is recommended.

(ICTR) later said,[25] the crimes prosecuted by the Nuremberg Tribunal were constitutive of genocide. The Holocaust was the drive behind legislators and politicians to produce instruments to prevent and punish genocide.

Resolution 96(1) is interesting, most importantly, because it recognised that additional instruments were necessary to prevent genocide and called on Member States (MS) to enact legislation to do so.[26] Although a UNGA Res., and thus not formally a binding source of law, it may hold normative value, particularly when referring to the conditions of its adoption, authority and recognition.[27] This moment marked the beginning of genocide's "emancipation"[28] in international law. From Res. 96(1) on, it took only two years until the opening of the GC for signature.[29]

The preamble of UNGA Res. 96(1) exhibits discernible imprints of Lemkin's influence, notably in its reference to the "cultural" dimension of genocide,[30] the reference to 'other groups', its claim to codify customary principles, and the aim of universal jurisdiction.[31] The Resolution's most significant achievement was the successful fulfilment of its intended goal, specifically by incorporating a mandate for the Sixth Committee to draft a convention.[32]

The Sixth Committee's work produced the Convention on the Prevention and Punishment of the Crime of Genocide, which was open for signatures and ratification in 1948 and entered into force on the 12th of January 1951.[33]

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[25] Prosecutor v. Kambanda, 1998, para. 16.

[26] UNGA Resolution 96(1), 1946.

[27] Schabas, 2009, page 56.

[28] Kreß, 2006, page 466.

[29] Steven R. Ratner et al., The Genocide Convention after Fifty Years, 92 Proceedings of the Annual Meeting (American Society of International Law) 1 (1998), page 1. [hereinafter: Ratner et al., 1998].

[30] The preamble reads: "*Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations*", UNGA Res. 96(1), 1946.

[31] Schabas, 2009, pages 56, 57.

[32] *Ibid,* page 58.

[33] Kreß, 2006, page 467.

Nonetheless, the drafting of the GC was marked by intense discussions, leading some States to even question the necessity for a Convention at all.[34]

2.2 Article-by-article review

Article I serves as the foundational cornerstone upon which the subsequent provisions are constructed, delineating the Convention's overarching purpose: affirm genocide as a crime under international law,[35] and not only one of international humanitarian law (IHL).

While the initial segment of art. I affirms genocide as a crime under international law, whether in times of peace or war, the latter part prompts some questions.[36] Differently from the Res., the Convention holds a binding authority and imposes obligations on States and, as such, it necessitated a stronger approach. This rationale was articulated by the Belgian delegation when advocating for the inclusion of the obligation to "prevent and to punish" genocide in the final text.[37]

Although this reasoning holds merit, the GC ultimately fell short in elucidating and defining the parameters of 'prevention.' As Schabas duly noted, the debates, preparatory work, and documents surrounding the Convention offer no clarity on the scope of the obligation to prevent and its practical implementation.[38]

The drafting process of the Convention was "highly contentious,"[39] particularly in the following two articles, as they define genocide, enunciate the methods by which it can be perpetrated, and other acts punishable under the Convention. As the core elements of the GC, these were also the most heated issues

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[34] Schabas, 2009, page 79.

[35] *Ibid,* page 80.

[36] *Ibid,* page 81.

[37] *Ibid*.

[38] *Ibid*.

[39] Bachman, 2019, page 45.

of debate,[40] notably due to the lack of a precise delineation of "intent," prevention, protected groups, and the potential inclusion of cultural genocide.[41]

Initially, art. II sets out the elements of the crime, attributing it a specific intention ("intent to destroy, in whole or in part"), and defining those entitled to protection ("national, ethnical, racial, or religious group"). Thus, it provides for both a physical element (the *actus reus*) and a mental element (the *mens rea*).

However, the Convention's drafters never defined who exactly constituted a "national, ethnical, racial or religious" group, what can be considered "a part" of a group, or how to identify intention. Despite this, aiming for a fast consensus and eager to move on to other issues quickly,[42] in art. II, the drafters opted for including a list prohibiting actions that, with the specific intent, could be considered genocide:[43]

> *(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.*[44]

All of the aforementioned elements constitute the physical component (*actus reus*) of the crime of genocide. Notably, in certain instances, it is not necessary to demonstrate the actual outcome, but merely the execution of the act. This means that, for some, the imposition of measures itself is sufficient, regardless of their success, as in subparagraphs (c) and (d). Furthermore, the *actus reus* of a criminal act can be fulfilled through either commission or omission.[45]

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[40] Schabas, 2009, page 82.

[41] Topics further explored in section 3, page 20.

[42] Jones, 2017, page 61.

[43] Bilksy & Klagsbrun, 2018, page 390

[44] Genocide Convention, art. II, 1948.

[45] Schabas, 2009, pp. 197, 198.

This set of prohibitions might seem limiting and restrictive at first, instead, upon further consideration, the criteria are quite enlarged. The main limitation drawn from the first part of art. II is that any of the acts on this list, to be considered genocide, must have been committed with the intent to destroy, in whole or in part, one of the groups accounted for, and the literature is quite consensual in this regard.[46]

Looking closely at each of the paragraphs, historically, their reasoning can be mostly found in the atrocities committed in the Holocaust. Additionally, any of the actions listed in art. II must, in any case, be read presupposing the establishment of the *dolus specialis*, the intent to destroy that particular group, required in the first part of the article.[47]

The first paragraph is self-explanatory and direct, so much as to have been adopted with little discussion.[48] To kill a member of the group means exactly that. In the ICC Elements of Crimes, 'killing' is described as a synonym for 'caused death'.[49] It is not required that the killing should happen in a certain way, other than with the specific intention, and is thus a rather broad criterion. In the case of *Akayesu*, the ICTR delineated two essential criteria: firstly, the passing of the victim; and secondly, the causation of death by an unlawful act or omission.[50]

As the ICTR made to be understood in the same judgment, paragraph b) includes a vast array of actions, insofar as they provoke mental or bodily harm to members of the group.[51] The Secretariat's draft mentioned instances of mutilations and biological experiments, evoking the atrocities witnessed in Nazi concentration

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[46] Jones, 2017, page 91.

[47] International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (2007), para. 187. [hereinafter: ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007].

[48] Schabas, 2009, page 179.

[49] Article n.º 6(a)(1), Elements of Crimes, International Criminal Court, 2002. [hereinafter: ICC, Elements of Crimes, 2011].

[50] Schabas, 2009, page 179.

[51] International Criminal Tribunal for Rwanda, Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment (1998), para.731. [hereinafter: Prosecutor v. Akayesu, 1998].

camps. Later, subsequent deliberations leaned towards expressions such as 'impairing physical integrity,' 'infliction of physical injuries,' and 'pursuit of biological experiments.'[52]

Regarding "mental harm" in particular, it should, according to the Preparatory Committee Working Group, be understood as more than a minor or temporary impairment of mental faculties.[53] The ICTR Trial Chamber included in its interpretation not only the causes of "inhuman suffering", but also that degrading treatment and the deprivation of certain rights could be the causes of mental harm.[54] In the ICC's Elements of Crimes, it is described to possibly include, but not only, acts of torture, rape, sexual violence or inhuman treatment,[55] due to the mental consequences it can trigger, which was reinforced in *Akayesu*[56] and *Blagojević*.[57]

Paragraph c) is intended to reflect the scenarios and the conditions in the concentration, extermination camps and other forms of how the Holocaust took place. The Secretariat's draft attests to this, including a few examples: the lack of proper housing, clothing, food, hygiene, and medical care; excessive work or physical exertions; confiscation of property, looting, and denial of housing and supplies.[58]

Another wording to take into consideration in this particular subparagraph is "physical destruction". It very evidently stands out in comparison with the rest of the article, which makes no other mention of the type or characteristic of destruction. Kreß's understanding is that it must be read following the previous paragraphs, *i.e.*, it is not immediate killing (as in a)) and these are also not the

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[52] Schabas, 2009, page 181.

[53] Schabas, 2009, page 107.

[54] Kreß, 2006, page 480.

[55] Article n.º 6(b)(1), ICC, Elements of Crimes, 2011.

[56] Schabas, 2009, page 183.

[57] International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Blagojević (Case No: IT-02-60-T), Judgment (2005), para. 647, [hereinafter: Prosecutor v. Blagojević, 2005].

[58] Schabas, 2009, pages 188, 189.

'slow death measures' accounted for in b).[59] In *Akayesu*, the Chamber affirmed that it could mean it was not required that the methods of destruction be immediate, as long as they ultimately result in their physical destruction.[60]

The reason for the inclusion of paragraph d) '*Imposing measures intended to prevent births within the group'* is less addressed; however, Carpenter provided two possible interpretations. Firstly, and most evidently, the literal prevention of births in the group inevitably leads to biological extinction.[61] According to Schabas, it might stem from the Polish Supreme National Tribunal's finding of Auschwitz's director responsible for the sterilisation and castration, considering these a form of genocide.[62]

The second interpretation encompasses forced pregnancies and addresses how forced maternity and miscegenation can have a devastating impact on a community.[63] However, it is the choice of the wording 'within' that prompts the most reflection, as births in the group resulting from rape would, technically, not be covered by this paragraph. This leads to considering the perspective of births from genocidal rape, which has been insufficiently explored by the literature.[64]

One of the few reminiscences of Lemkin's definition of 'genocide' can be found in paragraph e), the outcome of a proposal from the Greek delegation,[65] which prohibits the forced transfer of children.[66] Although it may not be immediately recognised as genocide, it can serve as an indirect sociobiological and physical mechanism, subtly depleting the targeted group's youthful population. While this method may not display overt violence, it effectively undermines the

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[59] *Ibid,* page 482.

[60] *Ibid*.

[61] Robyn Charli Carpenter, Forced maternity, children's rights and the genocide convention: A theoretical analysis, 2 Journal of Genocide Research 213 (2000), page 218. [hereinafter: Carpenter, 2000].

[62] Schabas, 2009, page 198.

[63] Carpenter, 2000, page 222.

[64] *Ibid,* page 225.

[65] Carpenter, 2000, page 225.

[66] Bilksy & Klagsbrun, 2018, page 374.

group's demographic continuity, leaving it vulnerable to disintegration and threatening the group's survival.[67] It was a last-minute adoption and, although not having many precedents, some Nazi officials' statements were recovered to prove that the transfer/abduction of children could, in the long term, provoke disintegration.[68]

It was then discussed whether this list would be merely indicative of possible genocidal actions or not, but ultimately, it was agreed that it was to be interpreted in an exhaustive way.[69] By opting for an exhaustive list, the drafters signalled the need for a restrictive interpretation of cases.[70] It is also important to note that the acts listed in art. II of the Convention do not have a cumulative effect; each subparagraph stands independently. This principle was affirmed in the *Akayesu* case, where the Court held that any of the acts enumerated in art. II if committed with the requisite intent, constituted genocide without the need to be cumulative.[71]

Article III deals with criminal participation by listing five acts by which it is possible to incur criminal responsibility under the GC.[72] The first paragraph is the only one that refers to genocide *per se* and refers the interpreter back to art. II.

The following paragraphs are the 'any other acts' that the Convention refers to in arts. IV, V, VI, VII, VIII and IX. These establish criminal responsibility for acts that promoted and/or contributed to genocide or constituted the preliminary stages, reinforcing the GC's preventive facet.[73] All these 'other acts' are presented quite broadly and allow for some degree of interpretation which can be understood as a need to easily adapt the article to domestic legal systems.[74]

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[67] Carpenter, 2000, page 218.

[68] Schabas, 2009, pp. 204, 205.

[69] *Ibid*, page 82.

[70] Kreß, 2006, page 487.

[71] Prosecutor v. Akayesu, 1998, paras. 497, 499.

[72] Christian J Tams, Lars Berster & Björn Schiffbauer, The Genocide Convention 157–190 (2023), page 157. [hereinafter: Tams et al., 2023].

[73] Tams et al., 2023, page 157.

[74] *Ibid,* page 158.

Paragraph b) of art. III, "conspiracy to commit genocide," was put forward by the Secretariat, with the accompanying commentary suggesting that genocide typically involves some form of collaboration or agreement among individuals. However, further clarification was deemed necessary regarding the exact meaning of 'conspiring for genocide.' Delegates offered various proposals, reflecting a prevailing consensus that it involves an agreement between two or more individuals to commit a criminal act.[75]

The third paragraph was the most controversial of these provisions, as it, initially, recommended criminalising not only the 'direct incitement' but also all forms of propaganda to promote genocide or make it seem legitimate[76] and, thus, could affect freedom of expression.[77] The two poles of the debate were led by the United States of America (USA), advocating for the need to ensure freedom of expression, and the Union of Soviet Socialist Republics (USSR), advocating for the criminalisation of any propaganda that incited hatred against protected groups.[78] Only after long discussions did the majority of States agree to add the 'direct and 'public' criteria to the paragraph, anticipating that it would adequately encompass every State's aspirations.[79]

In contrast to its precursor, paragraph d) "attempt to commit genocide" stood out as a rare point of consensus. So, the consensus affirmed that an attempt was a 'preparatory phase or initial stage of the crime',[80] which, in any case, leaves some room for interpretation as to the degree of preparation and what the minimum threshold to amount to a triable attempt is.

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[75] *Ibid,* page 159.

[76] Tams et al., 2023, page 160.

[77] Schabas, 2009, page 82.

[78] Tams et al., 2023, page 160.

[79] *Ibid,* page 160.

[80] Tams et al., 2023, page 161.

Finally, 'complicity in genocide', unexpectedly raised divisions among MS, as its way into the Convention had been paved by UNGA Res. 96(1)[81] when it condemned "principals and accomplices"[82] for genocide. Ultimately, the *ad hoc* Committee's proposal 'complicity in any of the acts enumerated in this article' was replaced with a simplified version of 'complicity in genocide'.[83]

Article IV circumvents any immunities that public officials or private individuals may enjoy and claim to avoid criminal liability.[84] The debate was intense and resurfaced the idea of the creation of an international criminal Court that would prosecute State officials (the ICC would be established over 50 years after these discussions, in 2002).

In art. V, States agreed to enact the legislation needed to be able to prosecute and punish the crime of genocide within their own jurisdictions. The second part of the article specifically calls for penalties, however, for most MS that would be subintended from the requirement to adopt legislation to 'give effect to the provisions', namely the one calling for prevention and punishment. It was the USSR that made a point of clarifying this need, proposing it as an amendment, later approved.[85]

On the topic of prosecution, art. VI approaches it from both a national and international perspective. By explicitly adding that the competent Tribunal had to be from the State where the punishable act was committed, the Convention apparently rejects the hypothesis of universal jurisdiction for the crime of genocide.[86] Meanwhile, by giving the option to recur to an international court, it aimed to ensure that justice could be pursued at a global level, reinforcing accountability for acts of genocide.

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[81] *Ibid,* page 161.

[82] UNGA Res. 96(1), 1946.

[83] Tams et al., 2023, page 162.

[84] Schabas, 2009, page 83.

[85] *Ibid,* page 84.

[86] *Ibid*.

The provision in art. VI mandating trials to happen in the territory where the crime occurred, is due to the important need to eliminate the exception to extradition, acknowledged in many treaties and customary law, which allows individuals accused of political offences to resist extradition to another State.[87] Article VII's 'pledge to grant extradition', effectively precludes that for any crimes under art. III.

Article VIII affirms the inherent right that UN MS have to call upon the competent organs of the UN to intervene. Nevertheless, in theory, it also extends that right to States which are not UN MS, as long as they were parties to the GC. On a similar note, art. IX also grants the International Court of Justice (ICJ) jurisdiction in cases of dispute concerning the 'interpretation, application or fulfilment' of the Convention. Some degree of confusion with the subject of the GC is understandable, as art. IV provides for the punishment of individuals and, later, in art. IX, it addresses 'disputes between the Contracting Parties'. However, article IV is to be read in conjunction with art. V, *i.e.*, through national legislation, while art. IX gives jurisdiction to the ICJ on the disputes between States, and thus, the Convention deals with State, not individual, responsibility.

The Convention then addresses the more 'protocolar' clauses,[88] until it reaches the very interesting art. XII. At the time of drafting, many UN MS retained colonial dominions and, consequently, this apprehension from the MS of possibly being accused of genocide within their colonies led to the drafting of the "colonial clause," art. XII.[89] Bachman importantly drew attention to the nature of this article which, by allowing an exemption of the Convention's applicability to colonial territories, is contrary to its object and purpose, the *universal* eradication of

[87] *Ibid*.

[88] *Ibid*.

[89] Bachman, 2019, page 1.

genocide. As a result, thirteen States made reservations based on art. XII, exempting their colonies from the application of the Convention.[90]

2.3 International Evolution of the Convention

The GC can be seen as flawed and perhaps even too politicised for a legal instrument,[91] however, it is remarkable for several reasons.[92] First and foremost, it defines genocide (art. II), establishes it as a crime under international law (art. I), mandates prevention and punishment (arts. III, IV and V), and advocates for dispute resolution through the ICJ (art. IX).[93] Secondly, it combines three different branches of international law: international human rights law, international humanitarian law and international criminal law.[94] Thirdly and lastly, it has been stated by the ICJ that the Convention embodies a principle of general customary international law: the prohibition of genocide is *jus cogens*[95] and also an *erga omnes* obligation.[96] As of August 2024, the GC had been ratified by 153 States, however, as *jus cogens*, all States are bound by its main prohibition.[97]

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[90] United Nations, Status of Treaties, Depositary, United Nations Treaty Collection, treaties.un.org (1948), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en, (last visited June 2024).

[91] Irvin Erikson, Is Russia Committing Genocide in Ukraine?, Opinio Juris (2022), http://opiniojuris.org/2022/04/21/is-russia-committing-genocide-in-ukraine/ (last visited June 2024).

[92] Ratner et al., 1998, page 1.

[93] *Ibid,* page 1.

[94] *Ibid*.

[95] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 161; A *jus cogens* norm is *"A peremptory norm of general international law (which is) accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."*, conclusion 3, United Nations, International Law Commission, Draft conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), 2022.

[96] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Preliminary Objections, Order of 11 July 1996, ICJ, para. 31

[97] United Nations, Ratification of the Genocide Convention, un.org (2019), https://www.un.org/en/genocideprevention/genocide-convention.shtml (last visited Feb 13, 2024).

An important distinction to be drawn exists between the different instruments that address genocide. The GC, besides the characteristics above mentioned, serves as the legal foundation for condemning and addressing acts of genocide committed by States. On the other hand, the Rome Statute, the basis of the ICC, provides a framework for internationally prosecuting individuals, among other crimes, for genocide. The Rome Statute transposed into its art. 6, art. II of the GC, and complements it by ensuring individual criminal responsibility.[98] Lastly, the International Law Commission's (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts outline the legal consequences of a State's internationally wrongful act, which include acts of genocide.

Together, these legal instruments form a comprehensive framework for addressing genocide and establishing accountability, each with its distinct area of application. The GC, effective since 1951, takes centre stage, serving as both the blueprint for the development of legal frameworks surrounding genocide and the primary legal instrument for the crime of genocide with widespread adherence among States. Thereby providing a foundational pillar for international efforts to prevent and punish genocide. Although initially only incumbent upon States, with the enactment of the Rome Statute, effective in 2002, genocide assumed a dual international responsibility, subsequently extending to individuals.

Schabas also mentions the development of the Convention through the Draft Code of Crimes Against the Peace and Security of Mankind, prepared by the ILC in 1996. In the draft, some important topics are addressed, most relevantly, the distinction between genocide and crime against humanity.[99] The line drawn and that remains relevant to highlight is that crimes against humanity encompass a *broader* range of acts committed as part of a widespread attack directed against *any* civilian population, and do not require specific intent. These acts might include murder; extermination; enslavement; deportation or forcible transfer of population;

[98] Kreß, 2006, page 467.

[99] Schabas, 2009, page 91.

imprisonment or other severe deprivation of physical liberty; torture; rape; sexual slavery; persecution against an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds; enforced disappearance of persons; or other inhumane acts causing great suffering or serious injury to mental or physical health.[100] Distinct from genocide in its intent and motive, crimes against humanity are also not genocidal in their nature, because the victims may be chosen for other reasons besides those in art. II.[101]

The author further contends that significant advancements in the study, punishment, and prevention of genocide have emerged from the ICC itself.[102] The idea for a Tribunal with individual criminal jurisdiction was initially conceived during the drafting of the GC, but no consensus was reached, and it was only reignited in 1989, with the end of the Cold War.[103]

Prior to this, it is essential to note that the criminalisation of genocide was not solely within the purview of States. As affirmed by the ILC, crimes such as genocide "directly bind the individual and render individual violations to punishment."[104] The goal for the creation of the ICC was, then, larger than the original crimes that gave the impetus for the GC, it was an expansion also pushed by the Draft Code of Crimes Against the Peace and Security of Mankind.

The process culminating in the Rome Statute represents a pivotal moment in the recognition of genocide as a *jus cogens* norm for its wide ratification, which signified its acceptance and recognition by the international community.[105] Various documents and recommendations from the ILC affirm genocide's status as the

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[100] Article 2, International Law Commission, Draft articles on Prevention and Punishment of Crimes Against Humanity, 2019

[101] Kreß, 2006, page 499.

[102] Schabas, 2009, page 101.

[103] *Ibid,* page 102.

[104] 'Report of the Working Group on the Question of an International Criminal Jurisdiction', Yearbook 1992, Vol. II (Part 2), annex, p. 71, para. 102. *in* Schabas, 2009, page 102.

[105] Schabas, 2009, page 103.

"apex of the pyramid of international crimes,"[106] and a crime of "inherent jurisdiction"[107] for the ICC. Moreover, reproducing art. II, unchanged, in the Rome Statute, underscored the enduring significance of the GC's definition of genocide.

Article 30 of the Rome Statute sheds significant light on the mental component of genocide, pertaining to one's intent and knowledge thereof. Namely, it establishes what 'to have intent' and 'knowledge' means, allowing for a uniform application and interpretation of the mental element. Other Courts and Tribunals adjudicating cases of genocide can, naturally, leverage this clarification, thereby indicating that the Statute contributed to the evolution of genocide beyond the mere reproduction of an article, it provided substantive insights into its interpretation and significance.

Additionally, the creation of the Rome Statute gave rise to the accompanying instrument 'Elements of Crimes', which forms part of the applicable law for the ICC.[108] While initially intended to assist the Court in interpreting and applying its Statute,[109] this document ultimately expanded the understanding of genocide as a legal concept. The highlights of this elaboration on the constitutive elements of genocide are the imposition of a contextual element,[110] the examples for 'mental harm', 'conditions of life', and 'forcibly' which do not appear in the GC or the Rome Statute.

As briefly referenced, during the period between the drafting and establishment of the ICC, a devastating conflict unfolded in the former Yugoslavia. In response, a Commission of Experts, appointed by the UN Security Council (UNSC), identified numerous war crimes occurring in Bosnia by late 1992.[111] The

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[106] Report of the Working Group on a Draft Statute for an International Criminal Court', Yearbook, 1993; Report of the Working Group on a Draft Statute for an International Criminal Court', Yearbook, 1993, VOL. II (Part 2), as referenced *in ibid*.

[107] *Ibid*.

[108] Art.21(1)(a), Rome Statute (2002).

[109] Schabas, 2009, page 110.

[110] Articles n.º 6(b)(4); 6(c)(5); 6(d)(5); 6(e)(7), ICC, Elements of Crimes (2011).

[111] Schabas, 2009, page 112.

need to prosecute and hold accountable those responsible for such acts became increasingly evident and, in 1993, the UNSC established a Tribunal for the serious violations of international humanitarian law occurring in former Yugoslavia since 1991.[112] The *ad hoc* tribunal was to apply customary international humanitarian law, including the GC, which it considered to be embodied in the law applicable to international armed conflicts.[113] The ICTY ultimately provided some of the most extensive jurisprudence in interpreting and applying the GC.

In the following year, Rwanda itself submitted a request to the UNSC for the creation of an *ad hoc* tribunal with the mandate to prosecute and ensure accountability for the crime of genocide and other serious violations of international humanitarian law that had taken place in the country.[114] The fact that the mandate itself recognised that genocide might have occurred, further pushed the interpretation that genocide can take place within borders and does not require an international armed conflict.

The ICTR's largest contribution to the prosecution and prevention of genocide, besides providing the most elaborate case law on genocide, is the first-ever international conviction for genocide, issued by the Tribunal in September 1998.[115]

3. Dissecting the definition - Literature Review

Throughout this dissertation, the GC's definition will serve as the primary framework, prioritised over alternative definitions. Some scholars argue that this definition is unsuitable for academic inquiry due to its origin in a politicised process,[116] potentially constraining scholarly engagement. However, universally

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[112] UNSC, Resolution 808 (1993).

[113] Schabas, 2009, page 114.

[114] *Ibid*.

[115] Kreß, 2006, page 467.

[116] Bachman, 2019, page 2.

applying such logic would limit the applicability of legal documents and definitions, as all drafting and ratification processes inherently involve political considerations. This is not to dismiss or exclude interpretations of the definition, instead, diverse interpretations are welcomed to facilitate a nuanced understanding of various contexts. Nevertheless, the primary focus remains on elucidating the inherent meaning of the GC's definition itself, rather than replacing it with another definition. Maintaining a common discourse within the community of genocide scholars is beneficial, and the GC definition will serve as a foundational reference point for this discourse.[117]

Jones presented a comprehensive compilation of twenty-five scholarly definitions of genocide spanning the period from 1959 to 2014. Which offers a broad panorama that allows for a nuanced exploration of prevalent trends and the general evolution of scholarly perspectives on the subject.

From this sample, two mainstream interpretations arise. On the one hand, a "harder" position argues that genocide requires a strict application and minimal scope, while, on the other hand, a "softer" and lighter approach is driven by concerns over potential exclusions of situations deserving logical and moral consideration, as underscored by the author.[118] The criteria for considering a definition "soft" or "hard" is not presented, nonetheless, an attempt can be made considering the number of exclusionary characteristics necessary for the classification of an event as genocide.

Throughout the assessment, the majority of definitions pointed towards a softer definition of genocide, with 20 out of 25 definitions presenting five or fewer harshening characteristics. It is crucial to underscore that characteristics deemed "hardening" must possess an exclusionary nature to be regarded as such. For example, definitions that consider solely "successful attempts"[119] or that it be part of

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[117] Helen Fein (1988), as quoted *in* Jones, 2017, page 92.

[118] *Ibid,* page 88.

[119] Vahakn Dadrian (1975), *in ibid,* page 66.

a "State policy"[120] or ideology are harsher than those which make no mention of or do not link genocide to a particular idea. Criteria that expand the potential scope, such as those pertaining to the persecuted group, are inherently classified as "softening" characteristics. Definitions that include terms such as "any group"[121] or "a collectivity"[122] without specifying any characteristics are softer than those definitions which limit to particular groups (be them economic, religious, ethnic, etc).[123]

The benchmark for comparison consistently revolved around the GC's definition. Article II, above all others, requires particular attention and reflection. First and foremost, it provides a diverse plethora of possible genocidal actions, which are very soft.[124] In the first instance, the MS opted for a closed definition for the protected groups, the way through which the acts must be committed, and allowing for only five courses of action. In a second instance, the options broadened significantly the scope of the application, as the act of killing was not even a requirement at all.[125]

Against this background, an academic definition may be deemed 'hard,' yet if it encompasses a broader scope than the GC's definition, it should be considered 'soft'. Thus, the majority is a softer definition. The classification here presented is, naturally, not rigid and there are elements of both 'soft' and 'harsh' criteria in almost all gathered examples, as there are in the GC.[126] Nevertheless, its relevance persists as it offers a unique lens through which to comprehend the enduring ambiguity surrounding the conceptualisation of genocide in theoretical discourse.

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[120] Barbara Harff and Ted Gurr (1988), *in ibid,* page 74.

[121] Helen Frein (1988), *in ibid,* page 73.

[122] Henry Huttenbach (1988), *in ibid,* page 75.

[123] Barbara Harff and Ted Gurr (1988), *in ibid,* page 74.

[124] *Ibid,* page 61.

[125] *Ibid*.

[126] Jones, 2017, page 88.

It is known that most scholars deem the GC's definition harsh and advocate for its enlargement. A significant amount of divergencies were identified among the acts that can be considered genocidal, from "any act" that places the group at risk of existence[127] to "deliberate (…) organised (…) mass murder (…) deportation (…) systemic rape (…) economic or biological subjugation".[128] The consensual idea is that the victims are minorities, part of a collective, which can be defined either by the perpetrator[129] or beforehand, by the definition's author.[130]

One concerning trend observed, however, was the gradual relaxation of definitions over time. The sample provided covered the main theoretical definitions from 1959 to 2014; however, as time progressed, the less harsh and less specific the definitions became. Particularly regarding the victim group, digressing from ideological or ethnic characteristics and more into the group's "essential defenselessness"[131] and some even referring only to "civilians."[132]

This is indicative that as scholarly discourse evolved, there has been a gradual shift towards broader and more inclusive definitions of genocide. However, while the broadening of the definition of genocide may seem inclusive, it threatens the specificity of the term. Encompassing a wide array of actions or groups under the umbrella of genocide, risks confusing true genocidal atrocities with other crimes, with less strict criteria,[133] such as extermination or persecution.[134]

Moreover, genocide possesses such distinct characteristics that adopting a broader or subjective interpretation would, not only, disregard the deliberate limitations imposed by the drafters, but would also redefine genocide as a crime of

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[127] Helen Frein (1988), *in ibid,* page 73.

[128] Isidor Wallimann and Michael N. Dobkowski (1987), *in ibid,* page 72.

[129] Frank Chalk and Kurt Jonassohn (1990), *in ibid,* page 76.

[130] Barbara Harff and Ted Gurr (1988), *in ibid,* page 74.

[131] Israel Charny (1994), *in ibid,* page 79.

[132] Jacques Sémelin (2005), *in ibid,* page 83.

[133] Kreß, 2006, page 464.

[134] Schabas, 2009, page 13.

"group destruction based on a discriminatory motive."[135] What makes genocide so specific, heinous and thus difficult to achieve is its precise intent and the specific attributes of both the targeted group and the perpetrated actions. As the ICTY *Krstić* Appeals Chamber stated, the crime of genocide sticks out among others for its "special condemnation and opprobrium."[136]

Broadening the definition leads to a slippery slope where genocide and war crimes could mean the same thing.[137] This lack of precision not only undermines the severity of genocide but also trivialises the suffering of its victims. State-wise, the broader and more uncertain the definition, the less likely States are to accept responsibility for it.[138] If any conflict or atrocity can labelled as genocide, the distinctiveness of genocidal acts will diminish, making it harder to ensure State responsibility, adequate prosecution, and diminishing the elevated degree of stigma correctly associated with the crime.[139] Secondly, by misusing the term, it becomes harder to distinguish between different degrees of atrocities, potentially undermining the integrity of the criminal proscription.[140]

In conclusion, regardless of the impulse to broaden the definition of genocide, it is crucial to recognise the unintended consequences of such actions. Rather than diluting the term, efforts should be focused on upholding its specificity and ensuring that justice reaches those who have truly experienced genocide. Only through precise and informed discourse can such heinous crimes be effectively addressed and prevented.

3.1- Defining a group

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[135] Carpenter, 2000, page 474.

[136] Kreß, 2006, page 463.

[137] Schabas, 2009, page 7.

[138] *Ibid,* page 10.

[139] *Ibid*.

[140] Ratner et al., 1998, page 3.

At its inaugural meeting, the UNGA aptly compared genocide to homicide, stating that 'Genocide is a denial of the right of existence of entire human groups, as homicide is a denial of the right to live of individual human beings.'[141] While this comparison appears straightforward, the concept of a 'group' remains nebulous.[142] Even with the exhaustive list provided in art. II,[143] identifying the protected groups poses a significant challenge.

As noted by Schabas, the term "groups" features prominently in key Conventions, *ad hoc* Tribunals, case law, and customary law,[144] despite its contentious nature and the challenge of achieving a consensual definition. Additionally, given the common preconception that the GC primarily concerns the protection of minorities, it is reasonable to question why "group" was favoured over "minority." Schabas explains it was for two major motives, firstly, settling for 'minority' could be felt as limiting, even more, the scope of the GC. Secondly, the drafters understood the key idea that either a majority or minority, could fall victim to genocide. Thus, the term "group" was flexible enough, encompassing both majorities and minorities.[145]

In contrast, the groups protected by the Convention are not subject to flexibility. These are characterised by unifying, natural and permanent factors, beyond the control of the members of the group.[146] Simultaneously, as Carpenter well notes, groups are not "out there",[147] as homogeneous units, easily identifiable. Building from these notions, the Convention drafters aimed to encompass only cohesive and enduring collectives, mostly defined by birth and lacking (easy) means

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[141] UNGA Res. 96(1), 1946.

[142] Carpenter, 2000, page 225.

[143] Kreß, 2006, page 473.

[144] Schabas, 2009, page 122.

[145] *Ibid,* page 123.

[146] Natan Lerner, Group Rights and Discrimination in International Law, Dordrecht, Boston and London: Martinus Nijhoff, 1990, pp. 30–1. *in,* Schabas, 2009, page 123.

[147] Carpenter, 2000, page 221.

of exit.[148] National, ethnic, racial or religious characteristics, were, ultimately, the final choices. The record shows, however, that some were more consensual than others, particularly, there was not much doubt as to racial and religious groups, while the term "national" raised some questions.[149] Discussion around these groups was expected and is still understandable as they are, conceptually, imprecise *a priori*.[150]

Nonetheless, some ideas become clear from these choices. Firstly, none require a mutual feeling of belonging together, nor does the group need to be a minority within a State, or even to live within one defined territory. Secondly, as long as the group meets certain thresholds regarding numeral strength and stability and falls within one of the categories in art.II, it can be considered a protected group, affirms the record of the Sixth Committee.[151]

What the jurisprudence has confirmed is that there is a very strong subjective element in group identification and classification. The Trial Chambers of the ICTR and, then, of the ICTY both adopted subjective approaches to the identification of the group, *i.e.*, the group exists as conceived by the perpetrator.[152] Groups often lack clear distinctions and may only appear as cohesive entities in the face of persecution, influenced by the perpetrator's imposition of a "mutual vulnerability,"[153] which fosters a sense of unity among disparate individuals.

Research shows that the ICTR defined an ethnic group as 'a group identified as such by others, including perpetrators of the crimes.[154] Similarly, in *Rutaganda*, the Trial Chamber emphasised that membership in a group, for the purposes of the

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[148] *Ibid,* page 474.

[149] Schabas, 2009, page 121.

[150] *Ibid,* page 124.

[151] Carpenter, 2000, page 475.

[152] *Ibid,* pp. 126, 127.

[153] Carpenter, 2000, page 219.

[154] International Criminal Tribunal for Rwanda, Prosecutor v. Kayishema et al. (Case No. ICTR-95-1-T), Judgment (1999), para. 98. [hereinafter: Prosecutor v. Kayishema, 1999].

GC, is primarily subjective rather than objective.[155] In the *Jelisić* trial, the ICTY Chamber underscored that the stigmatisation of a group as a distinct national, ethnic, or racial unit by the community is pivotal in determining whether a targeted population constitutes such a group in the eyes of the alleged perpetrators.[156] Likewise, in *Brdanin*, it was emphasised that the relevant protected group may be identified subjectively through the stigmatisation of the group by the perpetrators, based on its perceived national, ethnic, racial, or religious characteristics. In this instance, the Chamber also added that victims may also perceive themselves as belonging to the aforementioned group.[157]

Although this subjective route is appealing and seems to brush off many of the questions regarding the identification of the victimised group by Courts and Tribunals, the Appeals Chamber in *Rutaganda* sought to rectify this interpretation and added that a subjective approach, on its own, was not sufficient to determine the victim group as a sole criterion.[158] In *Brdanin*, the Chamber also affirmed that this determination should not only be made on a case-by-case approach but that it must also balance both subjective and objective criteria.[159]

Drawing from the scholarly literature, it is evident that a crucial aspect in the quest for objective criteria lies in the interplay among the four groups delineated in the GC and does not work in an exclusionary manner. This perspective highlights the importance of examining how these groups complement each other, rather than solely relying on the perceptions of perpetrators. As Schabas explains, these terms work as 'corner posts that delimit an area within which a myriad of groups is covered'.[160]

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[155] International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Rutaganda (Case No. ICTR-96-3-T), Judgment (1999), para. 56. [hereinafter: Prosecutor v. Rutaganda, 1999].

[156] International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Jelisić (Case No. IT-95-10-T), Judgment (1999), para. 70. [hereinafter: Prosecutor v. Jelisić, 1999].

[157] International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Brdanin (Case No. IT-99-36-T), Judgment (2004), para. 683. [hereinafter: Prosecutor v. Brdanin, 2004].

[158] Prosecutor v. Rutaganda, 1999, para. 57.

[159] Prosecutor v. Brdanin, 2004, para. 684.

[160] Schabas, 2009, page 129.

The persistent challenge involves the delineation of the group, necessitating an exploration of its inclusive and exclusive criteria. As the Court affirmed in the *Bosnia and Herzegovina v Serbia and Montenegro* 2007 judgment, the characteristics described in art. II must be positively present, *i.e*, the group must have those national, ethnic, religious or racial factors and not be identified by the lack of them.[161] A perspective that international Courts have persistently reinforced, stating that it is a matter of 'whom those people are, not whom they are not',[162] which is to a large extent also accepted in the academic discourse.

Political groups were also a big issue within the Committee and their exclusion renders much discussion until today.[163] Some scholars argue that it is a contradiction to have excluded political groups while, at the same time, having included religious and racial groups, argued to be, at their core, political.[164] Yet, this argument is inherently flawed. While religion and race may be viewed as political constructs, their significance transcends mere political categorisation. Rather, they serve as foundational elements within many societies and even entire nations. Race and religion encompass more than mere political ideologies; they are deeply ingrained societal characteristics that extend beyond the realm of politics.

While they may indeed be wielded as political instruments, their enduring significance and multifaceted nature elevate them beyond political concepts. Moreover, art. II does not prevent the characterisation of an act as genocide simply because it was politically motivated. As Ratner et al. demonstrate, the motive was, can be, and almost always is political.[165] Only the targeted group cannot be,[166] this was, for example, the case for the Muslim men in Bosnia. There too was a political-

[161] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 193.

[162] *Ibid,* para. 193.

[163] Schabas, 2009, page 121.

[164] Jones, 2017, page 58.

[165] Recognised as genocide by several entities, namely the Dutch Parliament (2005); the Supreme Iraqi Criminal Tribunal (2007); the Iraqi Supreme Court (2010); the Swedish and Norwegian Parliaments (2012); the UK Parliament (2013); the National Assembly of South Korea (2013); and the Higher Regional Court (Oberlandesgericht) of Munich, Germany (2015).

[166] Ratner et al., 1998, page 13.

military need to dominate that geographical area, but the way chosen to do so is what constituted genocide.

Moreover, given the enduring and intrinsic nature of factors beyond individual agency, it is understandable why political groups were excluded from the scope of the GC. The Court in the *Bosnia and Herzegovina v Serbia and Montenegro* 2007 judgment, stated, specifically, that this exclusion demonstrated that the drafters' goal was to create legal protection for well-established, immutable characteristics.[167] Schabas circles back to the etymology of genocide to underline that it is not meant to refer to just any group, or even to groups defined based on political views, economic or social status.[168] The inclusion of political groups would broaden the scope to encompass additional groups delineated by volatile and arbitrary criteria. According to the ICJ, such an expansion of the definition would result in an incoherent and unrestricted framework for both defining and applying the concept of genocide.[169]

The discourse on the four groups afforded protection under art. II naturally leads to an examination of the necessary magnitude to surpass the minimum threshold for constituting "a part", triggered by the Convention's phrasing of "*destroy, in whole or in part, a (…) group."*

The literature on the meaning of "*in part*" reveals a prevailing agreement that it does not mean that intentionally committing one harmful act to destroy a small number or just one member of a group could be considered genocide. It is consensual and reaffirmed by jurisprudence that it must mean a substantial part of the group, at least, in that particular geographical area.[170] Respectively, the complete destruction of the group from the globe cannot be the benchmark from which to determine genocide.[171] As the ILC affirmed, and the ICJ quoted, "It is not

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[167] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 194.

[168] Schabas, 2009, page 132.

[169] *Ibid*.

[170] Kreß, 2006, page 490.

[171] *Ibid,* page 489.

necessary to intend to achieve the complete annihilation of a group from every corner of the globe".[172]

In the *Bosnia and Herzegovina v Serbia and Montenegro* case, the ICJ, drawing on various decisions of the ICTY and some commentary from the ILC on the draft Code of Crimes against the Peace and Security of Mankind,[173] synthesised and provided three criteria through which to assess the question of the 'part' of the group.[174]

As a first criterion, the Court emphasised the requirement for this portion to be "substantial." With this wording, the ICJ recalled the *Krstić* 2004 judgment where it elaborated that a 'substantial part' of the group should be enough to provoke an impact on the group, as a whole. Such criterion, the Court added, is intended to reflect the massive proportions of the crime and the Convention's concern on how the destruction of 'the part' can undermine the overall survival of the group.[175] The substantiality factor has been subsequently supported by subsequent different jurisprudence and is widely accepted in the literature as a base criterion.

Alternatively, the Court contemplated the possibility that this "part" could denote an emblematic segment of the larger group, or one crucial to its continued existence, thus adding a qualitative criterion.[176] To provide an example, in the Srebrenica genocide, the targeted group were the Bosnian Muslim men of military age in Eastern Bosnia. This group, although numerically not a substantial part of the group, held immense strategic importance to the Bosnian Serb leadership and could influence the outcome of the war. As the Trial Chamber underlined, the importance of that community in Srebrenica was not captured only by quantitative factors, but

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[172] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 199.

[173] *Ibid,* para. 198.

[174] *Ibid,* para. 200.

[175] International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Krstić (Case No.: IT-98-33-A), Judgment (2004), para. 8 [hereinafter: Prosecutor v. Krstić, 2004].

[176] International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment (2015), para.142. [hereinafter: ICJ, Croatia v. Serbia, 2015].

also qualitative, it was a crucial group of people whose destruction would, ultimately, have erased the entire region of its Muslim population.[177]

Since the wording "substantial part" could be perceived as insufficient and subjective, the Court emphasised that its determination should be made on a case-by-case basis, taking into consideration the different circumstances of the case[178] and the criteria it provided.[179] That assessment should consider the substantive quantitative factors, weighted with qualitative criteria, alongside evidence related to the geographic concentration and significance of the targeted group segment.[180] As such, the third criterion the Court provided was geographical, *i.e.*, the perpetrator's activity and control over a determined area, as well as the possible extent of their reach need to be considered.[181]

In the Srebrenica case, the ambit of the genocidal intent was limited to that municipality's area. In the *Krstić* trial, the defence argued that the portion of Bosnian Muslim victims of the targeting did not reach the substantiality requirement because, quantitatively, the Muslims of Srebrenica were a small part of the Muslim community within Bosnia and Herzegovina (about 2.9%, out of 40% of the whole country's population).[182] The Tribunal, however, emphasised that considering the strategic importance of the region of Srebrenica and the concentration of the targeted group within this specific geographic area, the Bosnian Muslim population there residing constituted a substantial part of the group.[183]

This balance between quantitative, qualitative and geographical factors is a delicate assessment that requires caution upon approach,[184] given it could affect the

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[177] Prosecutor v. Krstić, 2004, para. 15.

[178] *Ibid,* para. 14.

[179] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 200.

[180] ICJ, Croatia v. Serbia, 2015, para. 142.

[181] Prosecutor v. Krstić, 2004, para. 13.

[182] *Ibid,* paras. 17,18.

[183] *Ibid,* para. 22.

[184] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 199.

definition of genocide by enlargement. Through emphasising the necessity of the substantiality measurement tools in different judgments thereafter, the ICJ underscored two significant conclusions. Firstly, it reaffirmed the validity of this method in contributing to the evaluation of genocide. Secondly, it signified the ICJ's demarcation from the expansion of the definition theory, perceiving it as an undesirable trajectory.

The majority of publications on the topic also agree that an objective interpretation of groups as defined in art. II is essential to avoid turning genocide into an unspecified crime. Additionally, as the ICJ stated in 2007, and then recalled in 2015, the intent to destroy these four particular groups is specific to genocide, distinguishing it from other crimes.[185] To sustain and defend that the GC should be interpreted in a broader sense other than that specifically worded is also contrary to art. 31st of the Vienna Convention on Law of the Treaties, which states that (any) international agreement, must be interpreted in good faith, following the ordinary meaning of the terms of the treaty, reconstituting the original intention.[186]

The original intention of art. II, unlike what some scholars argue, is not Lemkin's definition of 'a group', but rather the one decided when drafting the GC. Still, Lemkin's conceptualisation of genocide is characterised by the targeting of "national groups," while also encompassing acts aimed at the destruction of cultural and societal aspects of these groups. Consequently, many revisionist academics advocate for the incorporation of cultural genocide into contemporary interpretation.

3.2 - Cultural Genocide?

For Lemkin, the essence of genocide included a cultural aspect. It was a crime aimed at erasing a particular group of people on all levels, including its

[185] ICJ, Croatia v. Serbia, 2015, para. 139.

[186] *Ibid,* para. 138.

cultural identity.[187] Although there is some discourse advocating for the recognition of cultural genocide as a stand-alone method of genocide,[188] International Courts and Tribunals have always opted not to do so.[189]

At the time of drafting, the Secretariat proposed three types of genocide: physical; biological; and cultural.[190] The latter was an intense topic of disagreement, being deleted with twenty-five votes to sixteen, with four members abstaining.[191] The records reveal that the main argument for the inclusion of such an article (mainly supported by the communist and Middle Eastern blocks)[192] was that 'cultural genocide' was almost always an earlier stage for the physical or biological genocide that follows.[193] According to this argument, cultural and biological/ physical genocide are complementary crimes. However, this perspective also reveals a distinct interpretation as to why 'cultural genocide' was recognised as genocide.

Genocide is not divided into separate categories such as cultural; biological; or physical genocide; rather, it is a single crime that can manifest through either physical or biological destruction. Cultural destruction alone does not qualify as genocide because its impact on groups, on their people, although severe, is not equivalent to that of physical or biological destruction. Unfortunately, as Schabas stated, human rights law encompasses many crimes and offences, however, establishing the degrees of crimes is a natural process.[194] In the case of genocide, it

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[187] Bilksy & Klagsbrun, 2018, page 374.

[188] Jones, 2017, page 3.

[189] Schabas, 2022, page 848.

[190] Schabas, 2009, page 74.

[191] Johannes Morsink, Cultural Genocide, the Universal Declaration, and Minority Rights, 21 Human Rights Quarterly1009 (1999), page 1028 [hereinafter: Morsink, 1999].

[192] Morsink, 1999, page 1035.

[193] *Ibid,* page 1029.

[194] Schabas, 2009, page 10.

is the 'crime of crimes' due to its particularities.[195] As the ICTR affirmed in *Kambanda*, the crime of genocide belongs at the apex of the criminal pyramid.[196]

This statement does not imply that cultural destruction is anything less than a serious transgression, indeed, it constitutes a crime against humanity.[197] The gravity of this offence has also been underscored in multiple instances, such as the *Kupreškić et al.* 2000 case; the *Bosnia and Herzegovina v Serbia and Montenegro*, 2007 case; and in ICC's *Prosecutor v Al Mahdi*, 2015.[198] In all instances, the common reading was that crimes against humanity share a common root with genocide, indicating their severity and warranting adequate punishment.[199] However, the two are then bifurcated due to genocide's specificities. It is crucial to distinguish between these two offences, with genocide being the focus of our current discussion.

At the time of drafting and voting, the Pakistani delegation contended that, for certain groups, the destruction of spiritual life could be considered more significant than life itself.[200] While this argument holds validity, it lacks objectivity and overlooks other human rights instruments specifically designed to protect cultural and religious life, such as the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights.

Morsink maintained that it was this exact logic that led to the deletion of 'cultural genocide' from the GC. Particularly, that the twenty-five countries (mostly Latin and north-Atlantic States)[201] were not against the protection of cultural groups but, rather, that there was a widespread belief that the Convention was not the right

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[195] *Ibid,* page 14.

[196] *Ibid,* page 11.

[197] International Criminal Court, Case Information Sheet, Situation in the Republic of Mali, Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, (2015).

[198] International Criminal Court, Case Information Sheet, Situation in the Republic of Mali, Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, (2015).

[199] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 188.

[200] Morsink, 1999, page 1033.

[201] *Ibid,* page 1041.

instrument for such protection.[202] To substantiate this intention, the author presents evidence that these States issued 'promissory notes' on the creation of a similar article for the Declaration of Human Rights. This gesture indicated their full commitment to protecting cultural groups and their acknowledgement and recognition of the need for such measures.[203]

Nonetheless, the question about its deletion keeps returning to debate. Pro-cultural genocide scholars argue that the crime of genocide entails a 'multidimensional process'[204] and that the maintenance of cultural institutions and identity is fundamental for the survival of a group.[205] The problem with this reasoning is that cultural genocide, on its own, does not hold in front of Courts and escapes the original intention of the drafters to limit the scope of events that this instrument could cover.

As international law evolved and other instruments that touched upon the protection of human rights and the rights of protected groups emerged, the idea of 'cultural genocide' increasingly became an academic theory. This phenomenon happened through different elements and different times, such as the replacement of "ethnocide and cultural genocide" for "the right not to be subjected to forced assimilation or destruction of their culture" in the UN Declaration on the Rights of Indigenous Peoples.[206] Although Nović argues that this deletion is significant of an intent to recognise cultural genocide as a term and as a legal concept, it is more likely to be a recognition from the legal entities and drafters of the impossibility of cultural genocide, as a stand-alone crime.

The scholarly discourse was, consequently, divided into two different camps and the ILC, naturally, published its interpretation of the matter. As stated in its

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[202] *Ibid,* page 1028.

[203] *Ibid,* page 1042.

[204] Elisa Nović, Physical-biological or socio-cultural "Destruction" in genocide? Unravelling the Legal Underpinnings of Conflicting Interpretations, 17 Journal of Genocide Research 63 (2015), page 77 [hereinafter: Nović, 2015]; Christopher Powell & Julia Peristerakis *in* Bachman, 2019, page 2.

[205] Bachman, 2019, page 4.

[206] Nović, 2015, page 64.

1996 Draft Code of Crimes Against the Peace and Security of Mankind, the word "destruction" should only be interpreted in its physical or biological sense.[207] This reading and others alike are often considered to be on the conservative side of the interpretation of the Convention. On the other side of the field are the so-called 'post-liberal scholars,' whose argument is rooted in the recognition that genocide, caused by the destruction of a collectivity, might not even involve homicide.[208]

This, however, is refutable on different grounds. Firstly, it naturally depends on the interpretation of the word "destroy" and on the intention of the drafters of the Convention in choosing this word. Secondly, while it is true that the destruction of a collectivity might not involve killing, how genocide might occur in that fashion is already stated in the Convention. Nović sustains that a shift in how 'cultural genocide' should be assessed happened in the *Krstić* judgment. From the act in itself, such as the destruction of cultural sites (*actus reus*), to a mental element of the crime (*mens rea*), *i.e.*, the intent behind the destruction.[209] The author poses that, because this *dolus specialis* is what distinguishes, at the core, genocide from other war crimes or crimes against humanity, attacks on cultural or religious sites, or symbols of the targeted group should attest to the intent of physically destroying the group.[210]

In that same judgment, although the ICTY ultimately considered that genocide should be understood in the physical-biological sense of destruction, the Trial Chamber conceded that a cultural element could contribute to the evidence of the overall genocidal intent.[211] In a subsequent ruling, the Appeals Chamber established a correlation between the historical background and traditions of a group to its identification.[212] Nović contends that by drawing these connections, the

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[207] *Ibid*.

[208] *Ibid,* page 66.

[209] *Ibid,* page 64.

[210] *Ibid,* pp. 65, 66.

[211] *Ibid,* page 65.

[212] *Ibid,* page 68.

Court tacitly acknowledged a cultural dimension within the concept of genocide. Again, this acknowledgement has never been disputed. Rather, both legal sources and jurisprudence recognise that the context in which genocide occurs inherently involves cultural considerations as previously evidenced by the identification of groups based on religious affiliations. The examples presented by Nović fail to demonstrate that the complete or partial destruction of the protected groups can occur solely through the destruction of cultural elements and bonds, which is what cultural genocide would entail.

The core misjudgment of post-liberal and pro-expansion scholars is that the original definition excludes the cultural aspect in its totality. That is not accurate, as different Courts have affirmed, those elements are just not enough on their own to achieve the threshold held by 'the crime of crimes'. The cultural elements are usually included in the broader context of the crime and might help prove or identify cases of genocide, however, the destruction of religious sites, *per se*, for example, is not genocide.

In 2016, the International Criminal Court rendered a judgment where, post-ICTY and ICTR, it could have addressed a hypothetical "cultural genocide," in the case of *Al Mahdi*. At question, were the attacks against historic monuments and religious buildings in Mali, in 2012. Presented with this argument, the Court preferred to address it as "cultural destruction."[213] This precise wording was not accidental and underscored that while those offences may not fit the *technical* definition of genocide, alternative avenues for redress and legal proceedings are available. In this particular case, Mr Al Mahdi was found guilty, as a co-perpetrator, of a war crime for intentionally directing attacks against historic monuments and religious buildings.[214] Furthermore, the coherence of this decision with precedents established a decade earlier, and indeed preceding that period, underscores the

[213] Bilksy & Klagsbrun, 2018, page 373.

[214] International Criminal Court, Case Information Sheet, Situation in the Republic of Mali, Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, (2015).

notion that the prevailing interpretation of the law has not undergone significant alteration, unlike what Nović contended, in 2015.

Al Mahdi's decision and others alike highlight the delineation of genocide as inherently physical and biological, and the assertion that its scope should be confined to the parameters established during the drafting of the GC maintaining a restrictive application. Even in *Krstić*, the Prosecutor presents its argument to the Court stating that, while aware that the destruction of Mosques is not equal to genocide, it is a 'factor in the matrix,' which is how 'cultural genocide' should be approached.[215]

Genocide was conceptualised to go *beyond* indiscriminative killings, beyond war and beyond what was already coded in the Hague Conventions. It was meant to be applied to situations where the *intent* was to destroy, physically or biologically, a national, ethnic or religious group *because* of those characteristics. It is not by targeting any civilian population, but by methodically selecting the victims, through one or more of the forms predicted by art. II, *aiming* at its total or partial destruction, that the crime of genocide is committed.

3.3 - Meaning of destroy

As has been highlighted, one of the main arguments of most pro-expansion scholars is through the interpretation of art. II, particularly what the word "destroy" must mean and that it must be distinct from the act of killing members of the group.[216] Article II of the GC underscores that genocide inherently involves acts aimed at the destruction of a group. This notion of destruction is central to evaluating the intent behind the act,[217] which is crucial for distinguishing genocide from other forms of human rights and international humanitarian law violations, crimes against humanity, and war crimes.

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[215] Nović, 2015, page 74.

[216] *Ibid,* page 66.

[217] Kreß, 2006, page 461.

Kreß argues that the interpretation of the term "destroy" is the most important concept in defining the scope of the crime of genocide, challenging the predominant emphasis on the *dolus specialis*. The author poses that the primary goal of the prevention and punishment of genocide is to protect certain groups, in light of their contributions to civilisation, and thus a campaign leading to the destruction of such a group must speak directly to that goal.[218] Which often, leads to the misinterpretation of the term "destroy," extending to notions of cultural genocide.

Aware of the different interpretations, the drafters of the Convention still chose the word "destroy" over alternatives such as eradication, annihilation, or erasure. Behind this choice, there were two possible intentions: either to refer to the dissolution of the group as a cultural and social entity or specifically to the physical destruction of its members.[219]

As previously discussed, targeting a group by attacking its culture does not equate to committing genocide against that group. Consequently, the term "destruction" requires a different interpretation and the first option is discarded. Kreß posits that, because of the words 'as such' at the end of art. II, "destroy" should encompass all potential outcomes of comprehensive campaigns exhibiting a pattern of one or more prohibited acts, extending beyond mere killing.[220]

In *Croatia v Serbia*, the Chamber clarified that international law confines the definition of genocide to acts causing physical and biological destruction.[221] This interpretation underscores that genocide pertains strictly to physical and biological annihilation. While this interpretation might initially appear to narrow the definition, it actually broadens the concept of destruction by including the biological implications of acts that do not involve killing group members. Ultimately, the Court's interpretation provided a clearer understanding of

[218] *Ibid,* page 486.

[219] *Ibid,* page 488.

[220] *Ibid,* page 489.

[221] Croatia v. Serbia, 2015, para. 136.

"destruction" within the genocidal context: the physical and/or biological *disintegration* of a protected group, in which the ways to do so might vary.[222]

Here, the choice of "disintegration" over other possible terms is rooted in the flexibility of the word. Disintegration can encompass both physical elements (such as killing members) and more long-term strategies that, while not involving direct killing, ultimately lead to the group's disappearance (such as the forced transfer of children).

In *Blagojević* the Court assessed the meaning of 'destroy' in the context of genocide and recalled the ILC's position on the matter. In 1996, the Commission stated that destruction was physical or biological, and it did not mean the erasure of a particular group's national, linguistic, religious, cultural or other identity.[223] This affirmation was referenced by the Court to mark a distance from 'cultural genocide'. Regarding the less direct physical and biological elements of genocide, such as forcible transfers, the Court referenced Judge Shahabuddeen's opinion in the *Krstić* Appeals Chamber and agreed that although 'mere displacement' does not amount to genocide, it can constitute genocide if it results in the dissolution of the group and is carried out with the intent to destroy the group as a distinct entity.[224]

Furthermore, the Court elaborated that the destruction of a group also meant that it should no longer be able to reconstitute itself, especially when its traditions, internal relationships, external relationships with other groups, or connections to the land were severed. This clarification does not recognise cultural genocide but instead explains the scope of physical and biological destruction.[225] In other words, destruction encompasses more than just the immediate idea of obliteration and brutal eradication, it includes subtler nuances, being reasonable to consider it synonymous with "disintegration".

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[222] Kreß, 2006, page 487.

[223] Prosecutor v. Blagojević, 2005, para. 657.

[224] *Ibid,* para. 660.

[225] *Ibid,* para. 666.

3.4. - Meaning of intent

The very first condition for genocide presented in art. II is that the acts must be carried out with the "intent to destroy". After covering what "to destroy" entails, who the protected groups are, and what can be considered genocide, it is now relevant to address the meaning of intent. Unquestionably, all true crimes require proof of intent,[226] as it can be the differentiating factor for different degrees and types of crime. In this case, could mean the difference between the existence of genocide or some other crime.[227]

When looking for a definition of intent, the Rome Statute was the first to attempt to codify the mental element of the crime (*mens rea*),[228] thus offering a valuable framework. According to art. 30 of the Rome Statute, a person possesses intent when they mean to engage in the conduct and are aware of the potential consequences of their actions (*dolus generalis*).[229]

However, the wording in art. II created a clear dependency, stating that "(…) genocide means any of the following acts committed *with intent to* destroy (…)", *i.e.*, there is no genocide without the "intent to destroy".[230] Thus general intent alone would be insufficient in addressing the goal-oriented facet of genocide.

Accordingly, the pivotal *Akayesu* judgment was the first to affirm genocide's double mental element, stating that, in addition to the general intent, it had a special intent *(dolus specialis*).[231] The *dolus specialis* is, as the Darfur Report stated, "aggravated criminal intent,"[232] implying that the perpetrator consciously desired

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[226] Schabas, 2009, page 256.

[227] *Ibid,* page 257.

[228] *Ibid,* page 242.

[229] Art. 30(2), Rome Statute, 1998.

[230] Schabas, 2009, page 257.

[231] Prosecutor v. Akayesu, 1998, para. 498.

[232] Kreß, 2006, page 493.

and sought the destruction of a group selected based on its national, ethnical, racial or religious characteristics.

On an individual level, the concept of intent can be framed through two different approaches: the purpose-based approach[233] and the knowledge-based approach.[234] The core differentiator between these being whether, to establish intent, the perpetrator is required to have *purposefully* aimed to destroy the group (this being the highest level of *mens rea*), or if it is enough that the perpetrator *knew*[235] that their actions would likely result/contribute to the group's destruction.[236]

The "purpose-based approach" requires that the acts be committed with the personal desire to actively contribute to genocide. It was vastly supported by the ICTR and the ICTY jurisprudence and focuses entirely on the individual's intent and personal motives.[237] Repeatedly, these two Courts rejected the Prosecution's attempts to charge individuals with genocide based on their knowledge of events. In *Jelisić*, the Court reached two conclusions. Firstly, it sustained that even if the targets were part of the targeted group, without purpose, without that *dolus specialis*, those killings were arbitrary and not constitutive of genocide.[238]

Secondly, it distinguished between motive and specific intent, underlining that motive (political power/advantage, economic gain) does not preclude the *dolus specialis*.[239] In *Krstić*, it was highlighted that the ILC agreed with such an interpretation and that genocide's definition required "a particular state of mind", a *dolus specialis* that the absence of intent did not confer.[240] In *Sikirica*, it was added that this special element of intent distinguished genocide, as a crime against

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[233] *Ibid*.

[234] *Ibid*.

[235] "Knowledge", according to art. 30 of the Rome Statute, means *'awareness that a circumstance exists or that a consequence will occur'* and will be used accordingly throughout this dissertation.

[236] Kreß, 2006, pages 493, 494.

[237] Schabas, 2009, page 242.

[238] Prosecutor v. Jelisić, 1999, para. 108.

[239] *Ibid,* para. 108.

[240] Prosecutor v. Krstić, 2001, para. 571.

humanity, from persecution and that it was the most consistent with the GC and Rome Statute.[241] The same line of arguments was mirrored in *Kambanda*[242] and *Blagojević*, where it specifically stated, "*It is not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group. The destruction, in whole or in part, must be the aim of the underlying crime(s)*".[243]

For many years, international Courts rejected the knowledge-based approach, excluding a more nuanced version of intent. However, although the case law is purpose-based, this approach is not immune to criticism,[244] for example, a subordinate individual could distance himself from the crime on the basis of 'following orders'. This defence was widely recurred to in the ICTY and ICTR trials of subordinate personnel. Another big criticism pointed out by the literature is the impossibility of proving special intent. To prove that someone consciously desired to achieve something, unless explicitly expressed,[245] access to their state of mind and private thoughts is needed, which is impossible. The knowledge criteria, thus, aims to overcome the unrealistic requirement of proving a 'state of mind', which should suffice for non-principal perpetrators and ensure the conviction of all those involved.[246]

Although there had been a clear reluctance to apply the "knowledge-based approach", it slowly made its way into courtrooms and solidified itself in the literature. By 1996, the ILC mentioned in its annual report that "genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide",[247]

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[241] Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan Kolundzija (Case No.: IT-95-8-T), Trial Chamber, Judgment (2001), para. 232. [hereinafter: Prosecutor v. Sikirica et al., 2001].

[242] The Prosecutor v. Jean Kambanda, 1998, para. 16.

[243] Prosecutor v. Blagojević, 2005, para. 656.

[244] Kreß, 2009, page 461.

[245] Prosecutor v. Akayesu, 1998, para. 523.

[246] Prosecutor v. Krstić, 2004, para. 491.

[247] UN Doc. A/51/10, p. 45.

meaning that a subordinate should not be able to avoid a conviction for genocide just because they were not aware of the full plan and, personally, did not have genocide as a purpose.

The 2004 *Krstić* Appeals are one of the few instances where the Court comes closer to the knowledge-based approach. Stating that the fact that there is no individual intent for genocide does not exclude criminal responsibility, it only means the individual is not the principal perpetrator.[248] The *Krstić* Trial Chamber also underscored the necessity of distinguishing between "collective" and "individual" intent, a differentiation facilitated by the knowledge-based approach.[249] This bifurcation arises from the emphasis on the collective goal and the broader context inherent in the knowledge-based perspective. The Court emphasised that the gravity and scale of genocide presuppose a large-scale plan involving multiple individuals. While individual intent does not need to explicitly align with the "overall genocidal plan," it is sufficient for the individual to further the genocidal campaign with knowledge of the collective objective. Consequently, collective intent possesses an impersonal, objective existence (the overarching genocidal plan) and can be inferred from patterns of conduct, even in the absence of a formally documented plan.[250]

Another relevant moment was in *Popović*, one of the later cases in the ICTY. Here, the Chamber found Vujadin Popović guilty of genocide not only because of his actions and participation in massive killings but also because of his knowledge of events and circumstances.[251] So, although Kreß and other authors[252] present these two approaches in a dichotomous manner, they are complementary and not mutually exclusive and the criteria for their application are not uniform.

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[248] Prosecutor v. Krstić, 2004, para. 491.

[249] Kreß, 2006, page 495.

[250] *Ibid,* page 496.

[251] Prosecutor v. Vudajin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević (Case No.: IT-05-88-T), Trial Chamber, Judgment (2010), para. 1178. [hereinafter: Prosecutor v. Popović et al., 2010].

[252] Schabas, 2009, page 242.

From his understanding, Kreß proposed a definition of genocidal intent wherein "intent" signifies that "the perpetrator committed the prohibited act with the knowledge of furthering a campaign targeting members of a protected group with the realistic goal of destroying that group in whole or in part."[253] However, this definition appears to disregard the original, and jurisprudentially supported, purpose-based interpretation of intent. To combine both perspectives and reflect their complementary nature, a more suitable definition of genocidal intent would be: "intent means that the perpetrator committed the prohibited act with the knowledge *and/or purpose* of furthering a campaign targeting members of a protected group with the realistic goal of destroying that group in whole or in part."

The absence of direct evidence often presents a significant challenge in proving genocide. In *Croatia v Serbia*, the ICJ affirmed that "To infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question."[254] This means that, when concluding from indirect evidence and an overall plan, there can be no doubt that genocide is the overall collective goal of the perpetrators.

As a result, evaluating genocidal intent necessitates a comprehensive approach that may extend beyond the knowledge-based and purpose-based methodologies to ensure a thorough exclusion of alternative interpretations. In 1996, the Trial Chamber in *Karadžić* and *Mladić* outlined three guidelines for assessing genocide's *dolus specialis*:[255]

1. The general political doctrine of the aggressor;
2. The repetition of discriminatory and destructive acts;
3. The perpetration of acts which violate or are perceived by the aggressor as violating the foundations of the group, whether or not they constitute

[253] Kreß, 2006, page 498.

[254] ICJ, Croatia v. Serbia, 2015, para. 148.

[255] ICTY Case No. IT-95-5-R61 & No. IT-95-18-R61, Karadžić and Mladić, Decision of Trial Chamber I, Review of Indictment Pursuant to Rule 61, 11 July 1996, para. 94.

the enumerated acts prohibited in genocide definition, and so long as they are part of the same pattern of conduct.

These criteria were later also applied by the Guatemalan Historical Clarification Commission[256] and provide an interesting framework for assessing intent. The first parameter was applied by the ICTY's Trial Chamber to refer to the State's project/the Serb Democratic Party's plan. As such, it can be concluded that party programs, and State policies which can include different actors and State bodies can, in conjunction, construe an "overall genocidal goal", *i.e.*, intent. Although these are not 'legal ingredients of the crime,'[257] they can assist in proving the existence of the specific intent.

The frequency of the execution of acts in art. II of the GC contributes to the context in which genocide happens. As the Appeals Chamber in *Jelisić* affirmed, genocide can be inferred from different facts and circumstances, such as the general context. The systematic performance of culpable acts directed against the same group, which can only happen on a particular scale, contributes to the aim to destroy, in whole or in part, a national, ethnical, racial or religious group.[258]

4. Overuse, misuse and the need for restrictive application

4.1 - Overuse, misuse

While it is 'cliché' to say that genocide is 'very hard to prove',[259] it is important to stress that genocide should be hard to prove because of its strict nature, which is not perceived as a problem but rather welcomed as an inherent

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[256] Jan Perlin, The Guatemalan Historical Clarification Commission Finds Genocide, 6 ILSA Journal of International & Comparative Law 389 (2000), page 402.

[257] International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Jelisić (Case No. IT-95-10-A), Judgment (2001), para. 48. [hereinafter: Prosecutor v. Jelisić, 2001].

[258] Prosecutor v. Jelisić, 2001, para. 47.

[259] Schabas, 2022, page 855.

characteristic of such a heinous crime.[260] Being 'hard to prove' does not mean it is impossible, rather, it underscores the necessity for absolute certainty when determining the guilt of an individual or a State in committing the crime of crimes.

For fifty years, the Eichmann case decisions were the only convictions for crimes commited in peacetime, based on the GC.[261] Then the ICTR judgements were issued, and genocide was found to have been committed. These trials marked a significant surge in genocide litigation, with cases being put forward at the ICJ, the European Court of Human Rights and many national Courts.[262] Later, the Darfur Commission was established and published its findings, the UN appointed a Special Adviser for the Prevention of Genocide, and an immense amount of scholarly research on genocide was published. The ICTY opted for being extra-cautious and hesitant with the accusations of genocide. The majority resulted in acquittals and found the accused guilty of different crimes.[263]

However, in some of the cases where it found genocide, the ICTY issued what was arguably the most expansive interpretation of the Convention.[264] The Tribunal's Trial Chamber affirmed that the existence of a formal plan or policy to commit genocide was not a prerequisite for the commission of the crime. To explain its reasoning, the Chamber affirmed that the existence of a plan or policy may be an important factor to prove *dolus specialis*, but that it was not an absolute need for genocide to happen.[265] Theoretically, this would imply that an individual acting independently, without State involvement, could still be responsible for committing or attempting to commit genocide.[266]

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[260] Kreß, 2006, page 500.

[261] William A Schabas, The Contribution of the Eichmann Trial to International Law, 26 Leiden Journal of International Law 667 (2013), page 667. [hereinafter: Schabas, 2013].

[262] Schabas, 2013, page 671.

[263] William A Schabas, The "Odious Scourge": Evolving Interpretations of the Crime of Genocide, 1 Genocide Studies and Prevention 93 (2006), page 97. [hereinafter: Schabas, 2006].

[264] *Ibid,* pp. 97, 98.

[265] *Ibid,* page 98.

[266] *Ibid*.

This decision would have set a precedent that slightly hindered the original interpretation and encouraged the expansive trend, making applying these criteria even harder.[267] However, the idea of genocide in a vacuum lost arguably all its traction after later jurisprudence and the majority of academic development,[268] agreed that genocide required a larger context and, indeed, should have an overall plan to support it.[269]

The Trial Chamber in *Blagojević*, nonetheless, still determined that the forced displacement of children, women and the elderly could also constitute genocide, but not based on the future consequences of how the forced transfer might affect the biological continuation of the group. Rather, it argued so on the grounds that such displacement could have been done in a way intended to cause a traumatic experience that, under specific circumstances, would meet the threshold for causing serious mental harm as outlined in art. 4(2)(b) of the GC. The Bosnian Muslims' displacement was a pivotal element in the larger scheme of the attack on the Srebrenica enclave and to disintegration of the Bosnian Muslim population therein. The Trial Chamber concluded by pointing out that the perpetrators intended the forced transfer to cause serious mental harm, thus fulfilling the criteria.[270]

With such increased attention, the term 'genocide' gained prominence outside of the legal sphere, underscoring its inherently strong political connotations. As Mennecke notes, the political discussions around whether an atrocity constitutes genocide are deeply connected to the legal obligations enshrined in the GC, particularly the duty to prevent genocide.[271]

Originally, this duty was believed to carry a substantial legal and political burden on States, leading to cautiously considering the implications of its usage. In

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[267] Schabas, 2013, page 676.

[268] Kreß, 2006, page 496.

[269] Prosecutor v. Akayesu, 1998, para. 732.

[270] Schabas, 2006, page 101.

[271] Martin Mennecke, What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word," 2 Genocide Studies and Prevention 57 (2007), page 59. [hereinafter: Mennecke, 2007].

the initial development of the concept of 'genocide' it was not farfetched to assume that an accusation of genocide against a State would imply significant "preventive" action for the accusing State. Consequently, the decision to characterise a situation as genocide was as much a matter of legal interpretation as it was of political strategy.

Nowadays, States may adopt a more discretionary approach to invoking 'genocide,' without necessarily committing to intervention.[272] States understanding and perspective shifted precisely due to the legal expansion of the term, which led to its overuse and misuse throughout time. Before Rwanda, the only legal precedent regarding genocide was, as mentioned, the controversial Eichmann case, where physical extermination was understood as a requirement for genocide and where deportation and persecution were labelled as crimes against humanity.[273]

The situation in Rwanda in 1994 offers a compelling case for analysis, as it marked a shift in States' perspective on the duty to prevent. As the genocide began, approximately 800,000 people were murdered in 100 days.[274] Within weeks, the UNSC voted to retreat from the country and amid negotiations for agreements, Rwanda was left unsupported.[275] The situation in Rwanda before the genocide was known to the UN, however, although States were aware of their duty to prevent, they confined themselves to public statements, diplomatic exchanges, and initiatives for a ceasefire. At the UN level, the USA led the campaign to discourage an intervention. Action was particularly expected from the Americans for many reasons, but mostly due to their influence and power.[276]

Despite this, their absence in the prevention of the Tutsi genocide can be mostly attributed to two contextual factors. Firstly, the recent memory of the USA

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[272] Mennecke, 2007, page 60.

[273] Schabas, 2013, page 673.

[274] Dylan Lee Lehrke, The Banality of the Interagency: U.S. Inaction in the Rwanda Genocide, JSTOR439 (2012), page 439. [hereinafter: Lehrke, 2012].

[275] Lehrke, 2012, page 440.

[276] David A. Johnson, US Intervention with Genocide: Case Study of Rwanda Genocide, (2010), page 1.

military failure in Somalia cast a long shadow, making American intervention in another African conflict politically and militarily unappealing. Secondly and most critically, there was a prevailing belief among the USA and other States that labelling a conflict as genocide would trigger an obligation to prevent it under international law.[277] This is obvious from the Clinton administration's statements regarding the Rwandan situation where the official position was that 'acts of genocide' had occurred, but not genocide *per se*. More specifically, the White House spokesperson, in 1994, recognised that there were obligations linked to the use of the term and that was the reason why it would not refer to a genocide.[278]

Genocide is not a sudden event. Although it is not easy to distinguish each phase, it unfolds in stages, there is a before, during, and after the atrocities.[279] If the duty to prevent genocide were as binding as States feared, delaying intervention, with knowledge of the events, could have been more detrimental to themselves than refraining from involvement and the accusation of genocide. In Rwanda, the fear of triggering unwanted legal obligations resulted in the most rapid and devastating instance of mass killings of the last century.

Almost simultaneously, the Bosnian conflict challenged States with the same dilemma, to use or not to use the term genocide. As Glanville also concluded, there was a deep belief during the 1990s that it had larger obligations and that it would spark unwanted social and political pressures.[280]

After the events in Rwanda, many scholars and activists criticised States for their failure to intervene and address the atrocities. The critics pinpointed the error in the initial failure to recognise and acknowledge the events as genocide. Arguing, specifically, that States were at fault for their reluctance to use the term 'genocide,'

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[277] Luke Glanville, Is "genocide" still a powerful word?, 11 Journal of Genocide Research 467 (2009), page 467. [hereinafter: Glanville, 2009].

[278] Glanville, 2009, page 472.

[279] Mennecke, 2007, page 59.

[280] Glanville, 2009, page 472.

and that this was a denial of the events which contributed significantly to the lack of effective response and intervention.[281]

In 2004, the crisis in Sudan was the target of a drastically different approach, with long-lasting negative impacts. Almost too prematurely, in an attempt to correct past inaction, governments rushed to and repeatedly labelled the conflict as 'genocide.'[282] The immediate aftermath of such action revealed a notable lack of legal international consequences. States were not legally obliged to act to prevent the atrocities, and some States' failure to explicitly label the situation as genocide led only to accusations of denial from civil society.[283] Despite persistent and widespread calls for official recognition of the events as genocide, these appeals failed to gather substantial additional international support and to compel the Sudanese government to halt its campaign.[284]

However, once States realised that there were truly no legal obligations arising from unilateral accusations, their rhetoric became fearless.[285] Facing internal pressure for action, the USA intentionally described the situation in Darfur as genocide while simultaneously denying new legal obligations. By doing so, it both eased domestic pressure and could claim to have taken action, on an international level.[286] Secretary of State Colin Powell explicitly stated that the USA recognised no additional obligations arising from the GC and that it was not concerned with the term used. This speech marked a pivotal moment in the erosion of the normative power of 'genocide'.[287]

At the same time, when asked about further action, President Bush asserted that by labelling the conflict as a genocide, the subsequent lack of international

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[281] Mennecke, 2007, page 63.

[282] *Ibid,* page 60.

[283] *Ibid,* page 63.

[284] *Ibid,* pp. 60, 61.

[285] *Ibid,* page 61.

[286] Glanville, 2009, page 478.

[287] *Ibid,* page 468.

efforts was because other States refused to do so. Particularly, Bush emphasised how "words matter," and how labelling the Darfur crisis as genocide was significant on its own.[288] Nevertheless, a critical analysis of this speech reveals that the American administration effectively sidestepped an issue it preferred not to address while simultaneously attempting to avoid the appearance of inaction. There is broad consensus that Washington could have made a greater effort, particularly within the UNSC, to advocate for the deployment of non-African troops in Darfur, to protect civilians, apply sanctions, authorise no-fly zones, or others, it just did not want to.[289]

From these two very different cases of Rwanda and Darfur, it becomes clear that it is not about having more actors and States labelling a conflict as genocidal, but rather that doing so is no longer a decisive step to stop mass killings.[290] Evidently, the term genocide is still powerful but it has lost much of its weight.[291] The overuse and constant accusations without significant legal obligations resulted in the devaluation of the term.[292] While it is still a strong accusation to make to another State, it has no immediate consequences.[293] This approach became a recurring pattern in State conduct, where accusations of genocide were made without being followed by decisive action to halt the atrocities. Such behaviour undermined both the legal authority and the political normative power of the concept.[294]

From a legal standpoint, it is essential that the concept of genocide maintains its perceived rarity and gravity for two key reasons. First, as a criminal law concept, genocide demands strict interpretation and a precise definition, Courts should

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[288] *Ibid,* page 478.

[289] *Ibid,* pp. 480, 481.

[290] Mennecke, 2007, page 63.

[291] *Ibid,* page 60.

[292] Menno T Kamminga, The Scope for and the Significance and Desirability of the Use of the Term "Genocide" by Politicians: Joint Advisory Report by the Netherlands Advisory Committee on Issues of Public International Law and the External Advisor on Public International Law (March 2017), 65 Netherlands International Law Review 83 (2018), page 98. [hereinafter: Netherlands Report, 2018].

[293] Mennecke, 2007, page 61.

[294] Glanville, 2009, page 482.

always favour a conservative application. Second, its relative infrequency, especially when compared with crimes against humanity or war crimes, is preserved precisely because of its narrowly defined legal parameters.[295] It matters that genocide is not as common as other crimes because although international law does not recognise a hierarchy of crimes, genocide is often perceived as the crime of crimes and carries a unique stigma, at least *de facto*, if not *de jure*.[296]

As such, the concern with the devaluation of 'genocide' arises in the context of a normative hierarchy of some sort. A vast discussion exists about the existence of a hierarchy but, as Schabas asserted, the issue lies not in the legal framework itself, where there is no formal hierarchy, but in the realms of symbolism and semantics.[297] If genocide is to maintain its status as the most egregious of crimes, embodying society's ultimate condemnation, it must be distinguished from other crimes in the way that premeditated murder is from intentional homicide.[298]

Genocide holds this unique status because, as emphasised in the commentary of the GC, a narrow definition is crucial to prevent its conflation with other crimes and to facilitate broad ratification.[299] At the time of writing, James Crawford and other drafters of the convention recognised genocide as the most heinous crime under international law, warning that any expansion of its definition would trivialise its gravity.[300] The existing definition, while deliberately narrow, is not excessively so, as demonstrated by the successful prosecution of genocide in several cases. The rarity of the crime reflects its intended purpose to describe atrocities of an unprecedented nature.[301] Therefore, maintaining this narrow definition preserves the

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[295] Beitel van der Merwe, Reflections on the trivialisation of genocide: Can we afford to part with the special stigma attached to genocide?, 29 South African Journal of Criminal Justice 116 (2016), page 117. [hereinafter: van der Merwe, 2016],

[296] van der Merwe, 2016, page 116.

[297] Schabas, 2009, page 14.

[298] *Ibid,* page 14.

[299] *Ibid,* page 61.

[300] *Ibid,* page 104.

[301] *Ibid,* page 133.

term's significance and the weight of its condemnation, ensuring that genocide remains the "crime of crimes."

Legally, the idea of a hierarchy of crimes has been rejected, and no Court or Tribunal has ever directly recognised genocide as legally more important than other crimes in the Rome Statute.[302] The Appeals Chamber on the ICTR, however, when analysing the gravity of the offences, endorsed the Trial Chamber's affirmations that genocide was the "crime of crimes", stating that it was not necessarily wrong. The Appeals Chamber was of the opinion that referring to 'genocide' as "the crime of crimes" was a statement of general appreciation as it is, in fact, a crime of the most extreme gravity and specific heinousness because of its *dolus specialis*.[303] Therefore, the issue of trivialisation emerges when there is an underlying normative hierarchy, the maintenance of which is perceived as crucial.[304]

Van der Merwe approached this issue by distinguishing between judicial trivialisation and extra-judicial trivialisation.[305] The author refers to judicial trivialisation as the process in which Courts, Tribunals, or legal bodies weaken the originally strict definition of genocide through broad interpretations of which actions or events qualify as genocide. In this way, precedents are set that allow certain conduct to be considered genocide, although not originally intended to.[306] The notorious decision in the ICTY for the *Blagojević* case, but also in the ICRT *Akayesu* decisions, are the perfect example of judicial trivialisation.[307] Additionally, as Schabas points out, there is a judicial trend in decisions for a broader interpretation, which can undermine genocide's speciality.[308]

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[302] van der Merwe, 2016, page 119.

[303] Prosecutor v. Kayishema et al. (Case No. ICTR-95-1-A), Appeals Chamber, Judgment (2001), para. 367.

[304] van der Merwe, 2016, page 117.

[305] *Ibid,* page 116.

[306] *Ibid,* pp. 118, 119.

[307] *Ibid,* page 124.

[308] Schabas, 2006, page 98.

Extra-judicial trivialisation, on the other hand, involves the inappropriate and arbitrary use of the term "genocide" outside of legal contexts and with no legal support. This misuse often occurs in the political and public discourse, as above mentioned, when the term is applied to mass atrocities or human rights violations that do not meet the strict legal definition of genocide.[309] As Schabas affirmed, politicians are making accusations of genocide on the basis of 'common sense'.[310] This could also be the case in instances of calls for the recognition of terms such as 'politicide', 'cultural genocide', 'ecocide', or when the victim group does not match the ones protected in the GC, and especially when the specific intent is absent in the conflict.[311] Another prime example is the previously mentioned situation in Darfur, Sudan.

Many were the voices calling for the recognition of a genocide in Sudan, amid the 2004 crisis. Consequently, an International Commission of Inquiry was established and entrusted with the task of producing a report on the situation. The Commission's findings, however, did not correspond to popular beliefs. The report particularly held that the Sudanese government had not pursued a policy of genocide and that genocidal intent, the *dolus specialis*, was non-existent.[312] Other crimes and other concerning situations were highlighted in the report, particularly that it could be the case that some members of the government might share such intent, but that was the matter for a competent court.[313] As far as the government was concerned, the Commission found it to not be aiming for the destruction of a protected group, under the GC.

After the publishing of the report, the UNSC referred the situation to the ICC and most international actors held back on the previously loud calls for genocide

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[309] van der Merwe, 2016, page 119.

[310] Schabas, 2022, page 488.

[311] van der Merwe, 2016, page 128.

[312] Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc S/2005/60, para. 518.

[313] *Ibid.*

and adopted a language indicative that it was a label to be determined by a judicial body.[314] Nearly two decades later, regardless of the work of the Commission, the situation in Darfur remains unresolved, under the ICC's investigative umbrella. Notably, it was the first time that a sitting President, Omar Al Bashir, was wanted by the ICC with two arrest warrants, the latter one including charges based on the crime of genocide.

The popularity of the term 'genocide' outside of the legal realm occurs because, as the author explains, genocide is a crime that is both a social phenomenon and a specific crime for which individual criminal responsibility can be incurred.[315] Therefore, there is an evident gap between society's perception and a strong legal analysis. This tension between the flexible social interpretation and the rigid legal meaning results in the mentioned trivialisation.[316]

Victims, activists and interested parties seem to have found a bridge between invoking 'genocide' to refer to their particular cause and gains in awareness and international attention.[317] Nearly two decades ago, Alberto Costi anticipated the significant role digital media and online platforms would play in our lives, particularly in influencing the international community's response to global crises. On the 60th anniversary of the GC, Costi argued that mass atrocities had already begun to dominate the digital media landscape to such an extent that labelling them as genocide was required to sufficiently shock public opinion and, in turn, trigger international action.[318]

That there is a level of influence from the public and political sphere to the legal one, is a high possibility. The degree to which these can influence each other, *i.e.*, how extra-judicial trivialisation can influence a subsequent judicial

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[314] Mennecke, 2007, page 64.

[315] van der Merwe, 2016, page 121.

[316] *Ibid,* page 122.

[317] *Ibid,* page 129.

[318] Alberto Costi, The 60th Anniversary of the Genocide Convention, 39 Victoria University of Wellington Law Review 831 (2008), page 849.

trivialisation is what carries particular concern. Recently, in the Russian-Ukrainian case, the arbitrary use of 'genocide' by Russian officials has given Ukraine a plausible case at the ICJ.[319]

4.2 - The need for restrictive application

The necessity of a restrictive judicial application of the term "genocide" should be evident, as an expansive interpretation contradicts both the intended narrow definition and the principle of legality, which mandates that crimes be interpreted narrowly. Moreover, as previously mentioned, an expansive interpretation also hinders the normative hierarchy on which 'genocide' stands. Furthermore, a judicial broad interpretation of the definition in the Convention risks violating the principle of fair labelling, which requires that convictions accurately reflect the nature and severity of the offences committed.[320]

Directly opposed to those principles is the fundamental legal maxim of interpreting a legal norm in the way which will allow it the maximum effect possible.[321] These two principles friction, particularly due to the conflict between the narrowly defined, historically conservative legal conceptualisation of genocide and the powerful, often emotional and enduring stigma associated with it.[322]

This stigma while simultaneously perpetuated, is also increasingly endangered by the actions of politicians, journalists, victims, minority groups, human rights organisations, and non-governmental organisations. Naturally, international Courts play a crucial role in preserving the distinctive stigma associated with genocide. As van der Merwe asserted, international criminal law does not operate in isolation from the broader context, it must recognise the

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[319] Schabas, 2022, page 844.

[320] van der Merwe, 2016, page 136.

[321] Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc S/2005/60, para. 494.

[322] van der Merwe, 2016, page 138.

international community's perception of genocide as the gravest of crimes, avoid broadening its interpretation and aim to provide clearer parameters.[323] Moreover, as genocide is a criminal law concept, the legal maxim which should prevail for its interpretation is not *ut res magis valeat quam pereat*, but rather *nullum crimen sine lege*, meaning that it should be interpreted restrictively. Upholding this perception is central to the objectives of the GC, and any legal interpretation of the crime should reflect this understanding.[324]

To explore this issue, in 2018, the Netherlands commissioned an advisory report on the "Significance and Desirability of the Use of the Term 'Genocide' by Politicians." The report aligns with van der Merwe's perspective, emphasising that it is 'inherent' to international law for States to engage in discourse on such matters.[325] However, it also stressed that governments and parliaments should use the term 'genocide' with some degree of caution and exercise a level of restraint.[326] This is crucial not only to safeguard the State's credibility, ensuring that it refrains from making grave accusations and employing legal terminology without substantive evidence, but also to prevent the phenomenon of extra-judicial trivialisation.[327] Politically, the misuse of genocide can also translate into an abuse of the duty to prevent it enshrined in the Convention. A recent example of the misuse of the term "genocide" occurred when Russia justified its invasion of Ukraine, in 2022, by alleging that it was acting to prevent a genocide in the Donbas region. Russia claimed that, under the GC's duty to prevent and the principle of Responsibility to Protect, it was compelled to intervene militarily in Ukraine.[328] This case exemplifies not only the misuse but also the manipulation of the concept

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[323] *Ibid.*

[324] *Ibid,* page 139.

[325] Netherlands Report, 2018, page 89.

[326] *Ibid,* page 90.

[327] *Ibid,* page 91.

[328] Noëlle Quénivet, The Conflict in Ukraine and Genocide, 25 Journal of International Peacekeeping 141 (2022), page 141. [hereinafter: Quénivet, 2022].

of genocide, demonstrating how the term has been rendered sufficiently flexible to support various States' agendas.

In any case, when done appropriately, the Dutch report also recognised that political determinations of genocide can push for international cooperation, as the term 'genocide' still carries a "strong moral and political appeal to other actors".[329] Advocating for a restrictive application of genocide is not synonymous with arguing for the exclusive use of the term by judicial bodies. On the contrary, timely political recognition of genocide can facilitate international cooperation and support necessary interventions, whether for prevention or assistance and ensure a subsequent fair judicial approach.[330] However, for this to be effective, States must avoid the practice of labelling 'each and every crisis' as genocide.[331] States must find a balance, recognising that the overuse and misuse of the term will ultimately render it redundant and diminish its normative significance.[332]

5. Case Studies

The issue of the overuse and misuse of the term 'genocide' has been markedly evident in recent years, particularly with the Russian invasion of Ukraine, and the escalation of the Israeli-Palestinian conflict. The increased frequency of applying the term reflects a broader trend where high-profile conflicts become the focal point of intense international scrutiny, which justifies their choice for the subsequent analysis. The conflicts in Ukraine and Gaza have dominated global headlines and international discussions, further highlighting the complex interplay between media attention, political agendas, and the legal application of the term 'genocide.'

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[329] Netherlands Report, 2018, page 97.

[330] *Ibid*.

[331] van der Merwe, 2016, page 121.

[332] Glanville, 2009, page 482.

In this section, a detailed examination of two case studies will be presented to evaluate the application of the term 'genocide' in contemporary conflicts. Such analysis will begin by revisiting and clarifying the previously discussed definition of genocide that will guide the analysis.

For both cases, an overview of existing knowledge and the positions articulated by the ICJ will be provided, as well as an assessment regarding whether the situation could qualify as genocide, under the strict application of the definition. This analysis will include a review of media reports to identify any indications of *dolus specialis*, the ICJ and ICC's advisory opinions and arrest warrants related to the cases, alongside an examination of the victim group to determine if it would align with the criteria in the GC and jurisprudence.

In conducting this analysis, this dissertation does not presume to undertake the role of judicial bodies, nor does it claim to possess the comprehensive access to evidence required for such determinations. Rather, the objective is to engage in a scholarly evaluation based on the information available within the public domain and existing legal frameworks.

As explored in subsection 2.2, the acts which will be taken into account are the ones directly recognised by the Convention and by previous International Courts and Tribunals' decisions, particularly: unlawfully killing members of the group; and deliberately impairing the physical and mental well-being of the members. Lastly, genocide by forced transfer of children will also form part of the study.

The crime of genocide has, as mentioned, a doble mental element, not only does it carry the general intention, but also a specific intent to commit the crime.[333] The explicit guidelines discussed and presented in subsection 3.4 will serve as a basis for the following assessments.

[333] Prosecutor v. Akayesu, 1998, para. 498.

To 'destroy', for the effects of the Convention, should be interpreted in its physical or biological sense.[334] It can also be interpreted as the *disintegration* of a protected group, and such reading will be the one subsequently applied.

In sum, for genocide to take place, those acts must be commited with the *intent* to destroy, physically or biologically, a national, ethnic or religious group *because* of those characteristics.

5.1 - Ukraine

On November 24, 2022, Russia invaded Ukraine, triggering a series of breaches of international law and, since then, both sides have accused each other of committing genocide.[335] Among experts, opinions are diverse, some sustain that Russia is conducting a genocide in Ukraine, others disagree, and some refrain from drawing conclusions based on insufficient information.[336]

Despite the ongoing debate among experts regarding whether genocide is occurring in Ukraine, the legal proceedings at the ICJ have taken a different direction. Currently, the allegations of genocide before the ICJ are surprisingly against Ukraine. When initiating the offensive that has led to the largest conflict in Europe in decades,[337] Russia justified its actions by using 'genocide' as a pretext.[338]

Russia claimed that Ukraine had perpetrated acts of genocide in the Lugansk and Donetsk regions, located within the Donbas area. Building on this premise, the Russian Federation subsequently recognised these oblasts as independent entities and formalised this recognition by signing two treaties of friendship and mutual assistance with the so-called Donetsk People's Republic and Lugansk People's

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[334] Nović, 2015, page 64.

[335] Schabas, 2022, page 843.

[336] Quénivet, 2022, page 142.

[337] ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, para. 76. [hereinafter: ICJ, Ukraine v. Russia, Provisional Measures, 2022].

[338] Quénivet, 2022, page 142.

Republic. Two days later, Russia initiated a 'special military operation', based on art. 51 of the UN Charter and on those treaties,[339] intending to prevent and punish said genocidal acts and the right to self-defence of these "States".[340]

In the period following the invasion, multiple high-ranking Russian officials, including the head of State, publicly asserted that the 'special operation' was intended to protect millions of individuals supposedly victimised by Ukraine. The Russian Federation articulated its objectives as the 'demilitarisation and denazification of Ukraine.' Notably, when questioned about the legitimacy of these claims, the Russian Ambassador to the European Union invoked the term genocide, stating, "We can turn to the official term of genocide as coined in international law. If you read the definition, it fits pretty well."[341]

This remark underscores the deliberate misuse of 'genocide' by Russian officials to legitimise their actions and frame the conflict within the severe context of preventing genocide, a strategy facilitated by the extra-judicial trivialisation of 'genocide' phenomena. In addressing these statements and the recognition that they lack legal consequences, Russia asserted in its preliminary objections that "the use of the term 'genocide' in certain public statements made by Russian officials cannot by itself be viewed as an invocation of the Applicant's responsibility under the Convention",[342] which demonstrates that extra-judicial trivialisation has permeated legal proceedings.

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[339] ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. The Russian Federation: 32 States intervening), Preliminary Objections, 2 February 2024, para. 31. [hereinafer: ICJ, Ukraine v. Russia, Preliminary Objections, 2024].

[340] ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. The Russian Federation), Institution of Proceedings, Application instituting proceedings, order of 27 February 2022, para. 2. [hereinafter: ICJ, Ukraine v. Russia Federation, Institution of Proceedings, 2022]; Francisco Pereira Coutinho, *A Agressão Russa à Ucrânia e o Direito Internacional: Uma Tragédia em Quatro Atos (The Russian Aggression to Ukraine and International Law: A Tragedy in Four Acts)*, 10 SSRN Electronic Journal 4 (2023), page 11.

[341] Vladimir Chizhov, Russian Ambassador Chizhov: Nord Stream 2 Is Not dead, It's a Sleeping Beauty, Euractive (2022), https://www.euractiv.com/section/global-europe/interview/russian-ambassador-chizhov-nord-stream-2-is-not-dead-its-a-sleeping-beauty/ (last visited Aug 22, 2024).

[342] ICJ, Ukraine v. Russia, Preliminary Objections, 2024, para. 41.

This narrative was used to gather domestic and international support for the invasion, positioning Russia as a defender against mass atrocities. However, the unfolding events on the ground revealed a far more complex and devastating conflict, characterised by widespread destruction, humanitarian crises, and a series of violations of international law.[343]

Interestingly, Ukraine perceived Russia's argument as an opportunity to subject it to the jurisdiction of the ICJ. Given that Russia does not accept the ICJ's jurisdiction over most wrongful acts, including aggression, Ukraine identified a dispute concerning the interpretation and application of the GC as a means to extend the ICJ's jurisdiction to address Russia's camouflaged aggression.[344]

Ukraine's argument possesses a dual aspect: firstly, it contends that it has not committed genocidal acts in the Donbas, seeking a formal declaration from the Court affirming that it bears no responsibility for genocide and has not breached the GC. Secondly, by securing such a declaration, Ukraine aims to challenge and ultimately invalidate Russia's asserted legal justification for the 'special military operation' in Ukraine.[345] Albeit the Court may lack the jurisdiction to directly declare the aggression unlawful under international law, it possesses the capacity to invalidate its legal basis, thereby indirectly leading to that outcome.[346]

Russia's argument is largely unsupported and lacks factual and evidentiary foundation, consequently, the argument does not merit serious consideration as a potentially admissible case against Ukraine. However, should evidence eventually be presented in an attempt to justify subsequent actions, it is worth noting that the Court has previously addressed similar matters in the *Bosnia and Herzegovina v Serbia and Montenegro* case. In it, the Court affirmed that actions for the prevention

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[343] ICJ, Ukraine v. Russia, Provisional Measures, 2022, para. 17.

[344] Iryna Marchuk & Aloka Wanigasuriya, Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ, Journal of Genocide Research 1 (2022), page 256. [hereinafter: Marchuck & Wanigasuriya, 2022].

[345] ICJ, Ukraine v. Russia, Preliminary Objections, 2024, para. 108.

[346] Michael Ramsden, Strategic Litigation in Wartime: Judging the Russian Invasion of Ukraine through the Genocide Convention, 56 Vanderbilt Journal of Transnational Law 181 (2023), page 188. [hereinafter: Ramsden, 2023].

and punishment of genocide must be carried out "within the limits permitted by international law."[347]

Russia's actions clearly fall outside the permissible scope under international law. Russia not only violated the principle of non-aggression, and of good faith, abusing its rights under a treaty but there was also no genocide to prevent.[348] Any duty to prevent genocide can only arise when there is an actual genocide or serious risk thereof.[349] Even if, hypothetically, a genocide was occurring and Russia was acting under the responsibility to protect, it was not authorized to launch a military operation in Ukraine, as only the UNSC could authorize such action, under Chapter VII.[350]

Only the right to self-defence exempts wrongfulness in the use of force, which is why Russia's subsequent argument was under Article 51, UN Charter, on behalf of the two so-called "new States". Firstly, the unilateral recognition of these Republics does not grant them legitimate statehood and, secondly, even if such recognition was sufficient, these entities were not victims of an armed attack. In any case, the false 'genocide' argumentative route is no stranger to Russia as, in 2008, it similarly invoked unsubstantiated genocide allegations against Georgia, concerning the South Ossetians.[351] This is, however, the first case based on a "false claim of genocide" in the history of the ICJ.[352]

Interestingly, in the institution of proceedings, Ukraine sparked the idea that it could eventually go further and submit a claim against Russia for genocide against Ukrainians, as a protected group under the Convention.[353] The argument

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[347] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 430.

[348] Ramsden, 2023, page 188.

[349] *Ibid,* page 187.

[350] Quénivet, 2022, page 144; UNGA Resolution 60/1. 2005 World Summit Outcome, UN Doc. A/Res/60/1, October 24, 2005, para. 139.

[351] Marchuck & Wanigasuriya, 2022, page 257.

[352] *Ibid,* page 256.

[353] *Ibid,* page 268.

advanced is that it appeared that Russia was committing acts of genocide in Ukraine by intentionally killing and inflicting serious injury on Ukrainian nationals (*actus reus*), along with the President and high officials' rhetoric denying the existence of Ukrainian people (*mens rea*), which the agents for Ukraine considered indicative of Russia's *dolus specialis*.[354]

With time, this embryonic idea planted in 2022 by Ukraine, gained a considerable amount of supporters, both in the academic and political realms. As the conflict intensified, several offensives were conducted by Russia against civilian buildings, cultural heritage sites, shelters, schools and hospitals. A month into the war, Russian forces bombed a maternity hospital in the city of Mariupol, which triggered a series of accusations of genocide towards Russia.[355] This event marked a pivotal moment in shaping public opinion, leading to a significant increase in allegations of genocide. From Ukraine's President Volodymyr Zelensky and Parliament to USA President Joe Biden, along with the parliaments of Estonia, Latvia, Lithuania, Colombia, the United Kingdom, Prime Minister Boris Johnson, and Canada's House of Commons, numerous international actors employed the term extensively, often without sufficient legal consideration.[356]

By March 2022, the ICJ issued its order on Ukraine's request for provisional measures regarding the February Application instituting proceedings against Russia. In it, the Court not only affirmed that it is unlikely that the Convention would allow the use of force to prevent genocide in another State, but also that because this aggression has resulted in numerous casualties in Ukraine, the displacement of over one and a half million Ukrainians, and has exposed Ukraine's population to considerable vulnerability (lacking food, electricity and water in some regions), it meets a serious condition of urgency and an 'acute risk of aggravation'.[357] Nonetheless, when addressing the 'real and imminent risk' at hand, the Court does

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[354] ICJ, Ukraine v. Russia, Institution of Proceedings, 2022, para. 24.

[355] Quénivet, 2022, page 141.

[356] Marchuck & Wanigasuriya, 2022, page 269.

[357] ICJ, Ukraine v. Russia, Provisional Measures, 2022, paras. 68, 70.

not reference a risk for genocide,[358] as it later would do in the provisional measures in the case of *South Africa v Israel*.[359] This is particularly telling of the degree of the atrocities happening and the plausibility that genocide might be occurring, or not, in these areas. Additionally, it is also revealing that the provisional measures that the ICJ agreed to order in this case were not all those that Ukraine requested, but rather only those which aimed at mitigating the dispute.[360]

It was shortly after the provisional measures were ordered that the discovery of mass graves containing the bodies of civilians in the Bucha and Kharkiv regions further fueled the genocide discourse, prompting the Ukrainian Parliament to issue a decree recognising the actions of the Russian military and leadership as genocide.[361]

Given the surge in genocide allegations for Ukraine, a critical evaluation of their legitimacy is essential. It is crucial to assess whether the situation meets the threshold for genocide or if these atrocities are more accurately characterized as war crimes and crimes against humanity. The emphasis on genocide in Ukraine must be carefully examined to ensure that it is justified and not a result of a broader inclination to fit these actions within the strict legal framework of genocide.

To evaluate Ukraine's potential claim of genocide, it is essential to conduct a thorough analysis of each element of the legal definition as it applies to this specific case. The initial step in this process is to determine whether Ukrainians qualify as a protected group under the established legal framework. As such, for Ukrainians, as a whole, to be considered a protected group under the GC, it must be either as a national protected group or an ethnic one. As defined in *Akayesu*, a national group is a 'collection of people perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties'.[362] When it comes to an

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[358] *Ibid,* para. 77.

[359] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 24 January 2024, para. 61.

[360] ICJ, Ukraine v. Russia, Provisional Measures, 2022, para. 86.

[361] Marchuck & Wanigasuriya, 2022, page 269.

[362] Prosecutor v. Akayesu, 1998, para. 512.

ethnic group, it must be proven that the members share a similar culture, language, and other characteristics.[363]

Still, it is within the broader Donbas region, rather than across all of Ukraine, that the biggest atrocities have been reported. Similarly to Crimea, this region holds a notably high proportion of Russian-speaking and ethnically Russian populations. To understand these ties, in 2018, Sasse and Lackner conducted a survey to compare attitudes and identities across all of Donbas. The conclusion was that although the group reported mixed identities, Ukrainian citizenship was the most prevalent. Still, at the time the study was conducted, after the 2014 war, it was reported that the Lugansk and Donetsk regions under Russian control reported the highest shift towards a Russian identity.[364] This analysis thus suggests that there are distinctions between the population in the Donbas region and the rest of Ukraine. The primary difference appears to be that individuals in Donbas may "feel more Russian," which conflicts with the notion of targeting Ukrainians as an ethnic group.

However, as established in the *Kayishema* judgment, group membership is determined by the perception of the perpetrators.[365] Consequently, if Ukrainians are to be considered a protected group under the GC, it must be on the basis of nationality. Otherwise, a distinction would need to be drawn between victims who consider themselves to be Russian and those who identify as Ukrainian. To date, no evidence has emerged to suggest that the violence has been discriminatory in a way that targets specific subsets of Ukrainians, which supports the interpretation that Russia would be selecting victims based on their official identification as Ukrainians. As a group defined by nationality, "Ukrainians" meet the criteria of stability and permanence necessary for protection under the Convention.[366]

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[363] Prosecutor v. Akayesu, 1998, para. 512.

[364] Gwendolyn Sasse & Alice Lackner, War and identity: the Case of the Donbas in Ukraine, 34 Post-Soviet Affairs 139 (2018), page 153.

[365] Prosecutor v. Kayishema, 1999, para. 98.

[366] Quénivet, 2022, page 147.

Having established that Ukrainians can be considered a protected group under the GC, it is essential to identify the specific actions under scrutiny. While the atrocities mentioned earlier are deserving of condemnation, their scale alone may be insufficient to constitute genocide. As articulated by the Court in *Bosnia and Herzegovina v Serbia and Montenegro*, targeting members of a group solely because of their group identity is insufficient, there must be a demonstrable intent to destroy the group, in whole or in part.[367]

Unlike what Marchuk and Wanigasuriya affirm, while the devastation and loss of life in Mariupol are undeniable, the argument that these acts alone prove genocide is difficult to accept.[368] The bombings of civilian structures, such as the Mariupol theatre and maternity hospital, indeed lack clear military objectives and are reprehensible, however, such actions, illegal as they are, do not automatically meet the legal threshold for genocide as defined by international law.

To classify an act as genocide, it is not sufficient to point to the scale of destruction or the brutality of the attacks. The GC requires clear evidence of an intent to destroy, in whole or in part, the protected group. The distinction lies in the difference between acts that are part of a broader military strategy, albeit indiscriminate, and those that specifically aim to eradicate a group's existence and continuity. In this context, while the violence in Mariupol was extreme, it alone does not demonstrate the specific genocidal intent required by law.

To ascertain whether Russia's actions can be interpreted as exhibiting genocidal intent, the broader context must reveal the existence of a plan or policy embodying the necessary *dolus specialis*. Russia's potential "general plan" may be characterized as "denazification," as articulated in President Putin's article "On the Historical Unity of Russians and Ukrainians" and further elaborated in the editorial "What Russia Must Do with Ukraine," published by the state-owned news station RIA Novosti. This editorial arguably represents the most comprehensive plan for

[367] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 187.

[368] Marchuck & Wanigasuriya, 2022, page 273.

genocide that the Russian Federation has issued to date. It explicitly declares that the process of denazification inevitably involves "the rejection of the large-scale artificial inflation of the ethnic component in the self-identification of the population." The plan advocates for the destruction of Ukrainian "Nazis," a term applied also to "a significant number of common people" who are deemed "guilty of being passive Nazis and Nazi accomplices."[369] However, it is crucial to note that this plan has not seen extensive application in reality. Instead, Russia's actions in Ukraine appear more aligned with military objectives, such as securing control over the land route to Crimea and other strategic interests, rather than executing a systematic plan for genocide. Instead, more substantial evidence of intent can be found in actions that are directly aimed at undermining the future existence of a group, such as the forcible transfer of children.

Unlike general military operations, this act carries a particular intent of severing the continuity of a group by forcibly assimilating its youngest members into another national identity. Moreover, in the Ukrainian case, the forced transfer of children is the one criterion which presents the highest and most concerning numbers. Although estimates vary significantly, from the Ukrainian side, President Zelensky has spoken of 200,000 Ukrainian children forcibly transferred to Russia. Whereas, from Russia, this number is proudly enhanced to 570,601 children 'evacuated' from Ukraine.[370]

Independently of the exact figures, the occurrence of a systematic, extensive practice of the forcible transfer of children in Ukraine is a reasonable conclusion.[371] The reports and evidence which attest to this process are vast, and the Prosecutor's Office of the ICC reported the forced transfers of 'at least hundreds of children'.[372] This led the ICC to issue arrest warrants for President Vladimir Putin and Russian

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[369] Yulia Ioffe, Forcibly Transferring Ukrainian Children to the Russian Federation: a Genocide?, 25 Journal of Genocide Research 1 (2023), page 326. [hereinafter: Ioffe, 2023]. Ioffe, 2023, page 342.

[370] *Ibid*.

[371] *Ibid,* page 315.

[372] *Ibid,* page 327.

Commissioner for Children's Rights Maria L'vova-Belova, specifically for the crimes of unlawful deportation of children, and unlawful transfer of population (children) under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.[373]

The evidence, thus, suggests that there has been a deliberate and organised effort by Russian authorities to forcibly transfer Ukrainian children, potentially indicating a broader, coordinated plan in that regard.[374] According to the ICC, indirect intent can be established when a "manifest pattern of similar conduct"[375] is directed at a particular group, implying the existence of a premeditated plan or policy. The ICTY has also recognised that a systematic pattern of conduct over time "may provide sufficient evidence of intent."[376] This is especially the case when accompanied by official policy and legal measures, which can provide substantial evidence of an overall genocidal plan. The repeated and systematic nature of these 'evacuations', coupled with official statements and legislative measures, such as President Vladimir Putin's offer to enact domestic legislation to facilitate the granting of Russian nationality to these children,[377] could be seen as supporting the existence of a concerted policy aimed at integrating them into Russian society.

Although the forced transfers of children might not target the entire Ukrainian population, to be genocidal, it must significantly impact a 'substantial' segment of the group. In the *Krstić* judgment, the Court elaborated on that concept, affirming that a substantial part of the group was defined as one that impacts the whole group's overall survival.[378] Additionally, in the *Srebrenica* case, the Court noted that the importance of a targeted segment could outweigh its numerical size.[379] For instance, the Bosnian Muslim men of military age, though not a

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[373] *Ibid,* page 316.

[374] *Ibid,* page 340.

[375] Article n.º 6(a)(4); 6(b)(4); 6(c)(4) ICC, Elements of Crimes, 2011.

[376] Prosecutor v. Kayishema, 1999, para. 93.

[377] Ioffe, 2023, page 325.

[378] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 200.

[379] ICJ, Croatia v. Serbia, 2015, para. 142.

substantial numerical percentage of the entire group, were deemed crucial due to their strategic importance.[380] The same logic could be applied to the Ukrainian children, who have the potential to be regarded as a substantial crucial part of the group's physical and biological survival.

However, as per the Court's reference to Judge Shahabuddeen's opinion in the *Krstić Appeals Chamber*, the 'mere displacement' does not amount to genocide, by itself, unless it results in the dissolution of the group and is carried out with the intent to destroy it as a distinct entity.[381] Additionally, in the *Blagojević* judgement, the Trial Chamber stated that to achieve physical or biological destruction of the group by forced transfers, these must be done in a way that the group can no longer reconstitute itself.[382] In the Ukrainian case, it is improbable that the forcible transfer of children would meet such a threshold for genocidal intent for a few reasons.

Firstly, regarding the substantiveness of the 'part of the group', although the interpretation that these children could be seen as causing an impact on the overall group is legitimate, in the Bosnian case, the ICJ deemed the targeted group (Bosnian Muslim men of military age) as 'substantial' due to their strategic importance in the broader context of the conflict. The elimination of this group was seen as a calculated effort to undermine the overall military capability of Bosnia and thus change the outcome of the war and the entire country.[383] The Court in *Krstić* also added that the goal of destroying that partial group in Srebrenica existed because there was the belief and high probability that the protected group would "never reestablish itself on that territory",[384] which was the intent of the campaign.

Conversely, applying this reasoning to the Ukrainian situation would require a significant extension of the concept of 'substantial part'. The forcible transfer of children from regions under occupation would not necessarily precipitate the

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[380] Prosecutor v. Krstić, 2004, para. 15.

[381] Prosecutor v. Blagojević, 2005, para. 660.

[382] *Ibid,* para. 666.

[383] Prosecutor v. Krstić, 2004, para. 15.

[384] Prosecutor v. Krstić, 2001, para. 597.

dissolution of the Ukrainian people as a whole. In the Srebrenica case, the targeted group had a critical impact on the nation's defence and survival,[385] whereas the displacement of children from occupied areas in Ukraine does not present a comparable threat to the continuity and existence of the entire Ukrainian population. The impact of such transfers, while concerning, does not align with the substantial and strategic nature required to substantiate a claim of genocide under the ICJ's established criteria.

Moreover, the reliability of the figures reported concerning the forcible transfer of Ukrainian children remains questionable. Various sources have presented divergent estimates, casting doubt on their accuracy. When considering more credible and unbiased sources, such as the ICC, the evidence was not found to be sufficient to support a charge of genocide. Instead, the Court issued arrest warrants for President Putin and Commissioner Lvova-Belova under the classification of "war crimes".[386] This distinction underscores the Court's assessment that, at the moment, these acts do not meet the threshold necessary to substantiate a claim of genocide required by legal standards.

Secondly, the *dolus specialis* here is only demonstrative that Russia is aware of the inevitable consequences of its actions, however, that is not sufficient to meet the Court's threshold. As stated in *Kambanda*[387] and *Blagojević*, "*It is not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group. The destruction, in whole or in part, must be the aim of the underlying crime(s)*".[388] In this light, interpreting the statements made regarding the deportation of Ukrainian children as proof of genocidal intent would stretch the definition beyond its intended scope. While these

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[385] Prosecutor v. Krstić, 2004, para. 15.

[386] International Criminal Court, Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, International Criminal Court (2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (last visited Aug 23, 2024).

[387] The Prosecutor v. Jean Kambanda, 1998, para. 16.

[388] Prosecutor v. Blagojević, 2005, para. 656.

actions may demonstrate an awareness of the potential consequences, awareness alone is insufficient to establish intent. For the forced transfer of children to qualify as genocidal, it must be shown that the outcome, the destruction of the group, was the primary reason behind their implementation, not merely a foreseeable consequence.

It is also important to note that for some criminal acts, proof of the act itself is not sufficient and it is necessary to provide evidence that it is a "substantial cause" of the outcome. Thus, even with evidence, it is essential to establish that the acts directly contributed to the intended outcome, of which there is no evidence in this case.[389] This suggests that while the forced transfer of Ukrainian children is severe, it does not undoubtedly meet the strict legal criteria required to prove the intent to destroy the group in whole or in part, essential for a finding of genocide.

Although the overall genocidal plan to destroy Ukraine through the forced transfer of its children does not yet appear to meet the threshold necessary, to assess the mental element, it is also possible to resort, on an individual level, to the purpose-based approach, which may provide an interesting route. While more challenging to quantify, it would be supported by statements from various high-ranking Russian officials regarding the forcible transfer of children.

In one of many examples, Andrey Kartapov, a member of the Russian Duma, advocated for the removal of Ukrainian children from occupied territories for reeducation in Russian military boarding schools. Kartapov asserted that this initiative was aimed at 're-educating' Ukrainian children to counter what he described as 'Ukrainian Nazism.' Additionally, Commissioner L'vova-Belova repeatedly announced on her official website the intention to proceed with these 'evacuations'.[390] Such declarations suggest an intent to implement these measures, thereby reinforcing the argument of a targeted genocidal purpose.

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[389] Schabas, 2009, page 177.

[390] Ioffe, 2023, page 325.

This approach also examines the rhetoric and public statements of State authorities to infer intent. In the Ukrainian context, public statements by Russian officials, including those by President Putin and Commissioner Lvova-Belova, can be scrutinized for evidence of intent. However, it is important to distinguish between statements that reflect a hostile or anti-Ukrainian tone and those that explicitly call for the destruction of the group as such, dehumanising it. While these statements may demonstrate an awareness of the potential consequences of the actions, they do not necessarily indicate a primary intent to destroy the Ukrainian group. Rather, these statements are more accurately characterised under art. III(c) of the GC as direct and public incitement to commit genocide.[391]

When analysing the specific claims in Russian statements, they seem more focused on the elimination of Ukraine as a linguistic or cultural identity.[392] As Schabas underlines, this implicitly acknowledges that Russia's intent is not the *physical* destruction of Ukrainians, further distancing these acts from the legal definition of genocide.[393] Jurisprudence in this regard stems, in great part, from the *Stakić* trial judgement, where the Court determined that the use of hateful terminology must be assessed in the relevant context and that is it not enough to demonstrate *dolus specialis*.[394] Rather the rhetoric the Court did consider emphasised the 'direct' criterion, such as direct instructions to engage in one of the acts in art. II of the Convention, for the intended outcome.[395] Although the possibility of inferring intent from such statements, simultaneously with changes in the State policy and action is possible,[396] they would not, *a priori*, allow for an unquestionable inferral of genocide intent.

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[391] Schabas, 2022, page 852.

[392] *Ibid,* page 853.

[393] *Ibid,* page 848.

[394] Prosecutor v Milomir Stakić (Case No.: IT-97-24-T), Trial Chamber, Judgement (2003), para 554.

[395] Schabas, 2022, page 853.

[396] International Criminal Tribunal for Rwanda, Prosecutor v. Mikaeli Muhimana (Case No. ICTR- 95-1B-T), Judgement and Sentence (2005), para. 496.

The assertions of genocide, particularly those not directly linked to the forced transfer of children, may be misplaced and stretch the concept beyond its intended scope. This reflects the broader trend of misapplying the term "genocide," a consequence of its frequent overuse by political entities and actors. Many of these assertions are based on the rhetoric and public statements made by Russian officials, however, an anti-Ukrainian tone alone does not constitute genocide.

Ultimately, recognising genocide based on the deportation of children would be unprecedented in international law. Additionally, the Court has previously suggested that, when there are clearer opportunities for destroying the group in whole or in part which are not taken, it is difficult to draw intent.[397] Therefore, it is also not possible to affirm that from the forced deportation of children, genocide is the only possible inference.[398] It would be reasonable to interpret these acts and conduct as war crimes, crimes against humanity and violations of human rights. Should international courts or tribunals affirm that genocide occurred based on the forced deportation of children, it will significantly reshape the legal boundaries, and lower the threshold for the application of the term.

To conclude, it appears that the perception of an ongoing genocide in Ukraine has been heavily influenced by political rhetoric and calls for recognition rather than by a rigorous legal assessment. As Schabas stated, most of those allegations of genocide emphasise the five punishable acts, disregarding the chapeau of the article, particularly, the requirement for specific intent. While most, if not all, of those acts appear to be happening in Ukraine, the legal criteria for genocide demand a level of specificity and intent that may not yet be fully satisfied in this case.[399]

5.2 - Palestine

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[397] Schabas, 2022, page 851.

[398] *Ibid,* page 850.

[399] *Ibid,* page 848.

The 'promised land' that would become Israel has been a fertile ground for disputes long before the State's creation, in 1948. The Israeli-Palestinian conflict, rooted in the late 19th century with the rise of national movements like Zionism and Arab nationalism,[400] has seen numerous confrontations over the years. However, recent developments have escalated the situation to one of the deadliest confrontations in Palestine's history.[401]

On October 7, 2023, Hamas launched a large-scale, coordinated attack on Israel, which provoked the death of more than a thousand civilians, the devastation of several towns and neighbourhoods, and the abduction of 240 Israelis and migrant workers.[402] This event marked not only a significant escalation and reignition of the violence in the conflict but also a strategic move by Hamas. As Shaw interestingly pointed out, Hamas ironically initiated its own genocidal assault by deliberately provoking Israel into launching a massive retaliatory campaign.[403]

In response to the attack, Israel invoked Article 51 of the UN Charter, asserting its right to self-defence. While it is beyond the scope of this study to determine whether Israel's claim to self-defence against a non-state armed group is legally permitted, it is crucial to explore the implications of this claim. First, it is essential to recall that genocide can occur in both war and peacetime. Thus, while invoking Article 51 may justify the use of force, it does not exempt any State from the prohibition on genocide.[404] Secondly, and most relevantly in this particular case,

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[400] Muhammad Alfian Maulana, Comparative Analysis of Western Nations' Actions in Russia-Ukraine and Israel-Palestine Conflicts, 7 Nation State: Journal of International Studies 29 (2024), page 35. [hereinafter: Maulana, 2024].

[401] UNRWA, 2023 Is the Deadliest Year for Palestinians, X (formerly Twitter), (2024), https://x.com/UNRWA/status/1740711696396644715 (last visited Aug 27, 2024).

[402] Raz Segal & Luigi Daniele, Gaza as Twilight of Israel Exceptionalism: Holocaust and Genocide Studies from Unprecedented Crisis to Unprecedented Change, Journal of Genocide Research 1 (2024), page 2. [hereinafter: Segal & Daniele, 2024].

[403] Martin Shaw, Inescapably Genocidal, Journal of Genocide Research 1 (2024), pages 3, 4. [hereinafter: Shaw, 2024].

[404] Schabas, 2009, page 395.

as the ICJ stated in The Wall Advisory Opinion, self-defence claims do not apply to threats emanating from territories under Israel's effective control.[405]

Regardless of whether Israel was acting in the exercise of legitimate self-defence or not, as the occupying power, it held the right to the restoration of public order. Even in such a scenario, the situation in Gaza escalated to unprecedented levels of humanitarian crisis and destruction. Israel's Defence Minister immediately ordered a "total siege" on Gaza, cutting off food, water, fuel, and medical supplies.[406] By October 13th, the World Health Organization had already issued warnings about the dire conditions faced by civilians, who were trapped without any safe refuge due to closed borders and ongoing airstrikes. The UN body further emphasised that the decision to cut off basic means of substance, without adequate shelter, would increase the risk of disease for children, adults, and the elderly.[407]

Despite these warnings, airstrikes on Gaza continued, and by April 22nd, the Palestinian death toll had reached 34,151, with 1.9 million internally displaced refugees (over 82% of the population).[408] In response, Israeli supporters pointed out that humanitarian aid, although admittedly late and insufficient, had been allowed into Gaza. Further arguing that the facilitation of such aid demonstrated a lack of genocidal intent in Tel Aviv's actions, framing the events in Gaza as a humanitarian disaster resulting from war and regulated by international humanitarian law.[409] Additionally, during the November 2023 temporary ceasefire, Israel agreed to allow increased humanitarian aid into Gaza.[410] However, it is crucial to underscore that permitting humanitarian aid is not a discretionary act but a legal obligation for

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[405] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 139.

[406] Elyse Semerdjian, Gazification and Genocide by Attrition in Artsakh/Nagorno Karabakh and the Occupied Palestinian Territories, Journal of Genocide Research 1 (2024), page 17. [hereinafter: Semerdjian, 2024].

[407] Sultany, 2024, page 15.

[408] Statista Research Department*, Topic: Gaza Strip,* Statista, (2024).

[409] Eva Illouz, Genocide in Gaza? Eva Illouz Replies to Didier Fassin, Jews, Europe, the XXIst Century (2023), https://k-larevue.com/en/genocide-in-gaza-eva-illouz-replies-to-didier-fassin/ (last visited Jun 25, 2024).

[410] Sultany, page 22.

Israel, irrespective of any ceasefire and according to UNSC Resolution 2417, it is unlawful to use starvation of civilians or to deny them humanitarian access as a method of warfare.[411]

During the first months, most of the mainstream political commentary, statements and media discourse aligned with Israel, describing the situation in Gaza as a consequential outcome of war in a densely populated urban area. The rhetoric focused on the proportionality of particular strikes and withheld from considering the probability of genocide.[412] In the legal sphere, the panorama was split. In October, more than 800 scholars and practitioners from the fields of international law, conflict studies, and genocide studies signed a public statement, cautioning against the potential for genocide being committed by Israeli forces against Palestinians in the Gaza Strip.[413] Conversely, over 150 scholars specialising in Holocaust studies condemned Hamas' actions, arguing that the indiscriminate attack on Israel was punishing its citizens for being Jewish, which, they asserted, triggered a global surge in antisemitism.[414]

The dynamics shifted on December 29th, when South Africa initiated legal proceedings against Israel for allegedly breaching the GC.[415] To submit the request for proceedings and provisional measures, South Africa claimed to be acting based on its own obligations under the GC, *i.e.*, the duty to prevent genocide, underscoring the *jus cogens* nature of the prohibition of genocide and the *erga omnes* obligations owed under the Convention.[416]

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[411] UNSC, Resolution 2417, May 24, 2018, paras. 4-6.

[412] Sultany, 2024, page 2.

[413] Public Statement: Scholars Warn of Potential Genocide in Gaza, TWAILR: Third World Approaches to International Law Review (2023), https://twailr.com/public-statement-scholars-warn-of-potential-genocide-in-gaza/ (last visited Aug 8, 2024).

[414] Shaw, 2024, page 1.

[415] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Institution of Proceedings, Application instituting proceedings and request for the indication of provisional measures, 29 December 2023, para. 1. [hereinafter: ICJ, South Africa v. Israel, Request for Provisional Measures, 2023].

[416] ICJ, South Africa v. Israel, Request for Provisional Measures, 2023, para 4.

This move challenged the prevailing pro-Israeli narrative that focused on war and war crimes, redirecting the discourse towards allegations of genocide.[417] In its submission, South Africa commenced its argument by underscoring the importance of context in assessing a case of genocide. Emphasising that Israeli actions and dehumanising rhetoric must be assessed within the framework of a "75-year-long apartheid, its 56-year-long belligerent occupation of Palestinian territory and a 16-year-long blockade of Gaza".[418] Ultimately, South Africa's argument posed that, against a backdrop of longstanding "apartheid, expulsion, ethnic cleansing, annexation, occupation, and discrimination," coupled with the persistent denial of the Palestinian people's right to self-determination, Israel has, particularly since October 7th, failed to prevent genocide and has not prosecuted the direct and public incitement to genocide.[419]

Additionally, it argued that Israel had engaged in and continued to engage in genocidal acts against the Palestinian people in Gaza. These acts included the killing of Palestinians, causing severe bodily and mental harm, and deliberately inflicting conditions designed to bring about their physical destruction as a group. South Africa further emphasised that genocidal intent was evident in statements made by Israeli officials at the highest levels, including the President, Prime Minister, and Minister of Defence, as well as through the conduct of Israel's military operations in Gaza. It highlighted how these operations involved the sustained bombardment of one of the world's most densely populated areas, the destruction of homes, infrastructure, and essential services, coupled with the denial of basic humanitarian aid, had pushed the population to starvation and famine, a reading later agreed with by fifteen out of the sixteen ICJ Judges in the case.[420]

At the time of South Africa's submission to the Court, Israel's actions had resulted in the deaths of over 21,110 Palestinians, including 7,729 children, and the

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[417] Sultany, 2024, page 2.

[418] ICJ, South Africa v. Israel, Request for Provisional Measures, 2023, para 2.

[419] *Ibid,* para 4.

[420] Sultany, 2024, page 17.

injury of over 55,243 others, allegedly constituting acts that could be characterised as genocidal under international law.[421] According to Palestinian Health Authorities and *Reuters* that number has doubled, reaching 40,000 casualties, as of August 2024.[422]

In January 2024, the ICJ issued the first provisional measures in the case opposing South Africa and Israel. The Court 'recalled' Israel of its obligations under the GC.[423] In evaluating the plausibility of the rights at stake, the Court acknowledged a "real and imminent risk" of genocide,[424] and ordered six provisional measures, including the prevention of the commission of genocide, preventing and punishing incitement to genocide, and allowing humanitarian assistance.[425]

By March 2023, the ICJ issued a second provisional measures order, at South Africa's request, which was largely motivated by Israel's lack of compliance with the first order, including not allowing humanitarian assistance in Gaza.[426] Between the first order and the second, the Court concluded that "the catastrophic living conditions of the Palestinians in the Gaza Strip had further deteriorated, in particular in view of the prolonged and widespread deprivation of food and other basic necessities to which the Palestinians in the Gaza Strip have been subjected."[427]

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[421] ICJ, South Africa v. Israel, Request for Provisional Measures, 2023, para 4.

[422] Reuters, Gaza Death toll: How Many Palestinians Has Israel's Campaign killed?, Reuters (2024), https://www.reuters.com/world/middle-east/gaza-death-toll-how-many-palestinians-has-israels-campaign-killed-2024-07-25/ (last visited Aug 28, 2024).

[423] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 24 January 2024, para. 78. [hereinafter: ICJ, South Africa v. Israel, January Provisional Measures, 2024].

[424] ICJ, South Africa v. Israel, January Provisional Measures, 2024, para. 61.

[425] *Ibid,* paras. 78-82.

[426] Sultany, 2024, page 6.

[427] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 28 March 2024, para. 18. [hereinafter: ICJ, South Africa v. Israel, March Provisional Measures, 2024].

When compared, the March provisional measures reflected a growing judicial consensus regarding the strength of South Africa's genocide case against Israel, marking a notable shift from the January order.[428] This evolving agreeance among the Judges suggests that South Africa's case gained traction in the Court, which is telling when considering the traditionally high threshold required to establish genocidal intent.

In May 2024, the ICJ issued a third provisional measures order, which also gathered broad consensus among the Judges. This order specifically instructed Israel to "immediately halt its military offensive", to prevent further deterioration of the conditions of life in Rafah and Gaza, which could lead to the physical destruction of the Palestinian group, "either in whole or in part."[429] These orders reflect a significant legal acknowledgement of the potential for genocidal outcome, thereby increasing the credibility of South Africa's claims against Israel.

However, to ensure a rigorous and unbiased analysis, it is crucial to apply the same evaluative criteria used in the previous assessment of Ukraine's case. Although there is substantial legal support for the claims against Israel, employing consistent criteria will guarantee a fair evaluation of the legitimacy of the genocide allegations and uphold the integrity of this study.

As such, it is first required to determine whether Palestinians qualify as a protected group under the GC. South Africa addressed the issue in its December request, categorising Palestinians as "a distinct national, racial, and ethnic group."[430] According to the definition in *Akayesu*, a national group is a "collection of people perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."[431]

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[428] ICJ, South Africa v. Israel, January Provisional Measures, 2024, para. 86; ICJ, South Africa v. Israel, March Provisional Measures, 2024, para. 51.

[429] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 24 May 2024, para. 50. [hereinafter: ICJ, South Africa v. Israel, May Provisional Measures, 2024].

[430] ICJ, South Africa v. Israel, Request for Provisional Measures, 2023, para 1.

[431] Prosecutor v. Akayesu, 1998, para. 512.

However, Palestinian citizenship, with corresponding institutions and rights, has been in a complex and contested state since 1948. With the establishment of the State of Israel, Palestinians were dispersed beyond the borders of their country.[432] This dispersal, coupled with the lack of an independent Palestinian State, has complicated the legal recognition of Palestinians as a national group in the traditional sense.

Nonetheless, even under Israeli occupation, the Palestinian population in Gaza, the West Bank, and East Jerusalem has retained a distinct national consciousness, characterised by a shared history, cultural heritage, and a continuous claim to self-determination.[433] This enduring sense of national identity is reinforced by the existence of the Palestinian Authority, established following the Oslo Accords, which, despite its limited sovereignty, serves as a form of governance representing the Palestinian people in these territories.[434] Even though the characterisation of Palestinians as a distinct national group may be subject to debate, unless seen as an Israeli minority, particularly given the absence of full statehood, its definition as a distinct ethnic group under the GC is still possible.

In *Kayishema*, the Trial Chamber defined an ethnic group as "a group identified as such by others, including the perpetrators of the crimes"[435] and Israel's policies and rhetoric undoubtedly portray Palestinians as a distinct ethnic group, differentiated by cultural, religious, and linguistic markers. Furthermore, the Court's reasoning in *Bosnia and Herzegovina v Serbia and Montenegro*, defining a group as a matter of identifying "who those people are, not who they are not,"[436] further supports the inclusion of Palestinians within this category. Given these considerations, it is possible to consider the Palestinians a protected ethnic group under the GC.

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[432] John Quigley, The Case for Palestine (2005), page 62.

[433] *Ibid*, page 74.

[434] *Ibid,* page 217.

[435] Prosecutor v. Kayishema, 1999, para. 98.

[436] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 193.

It is now necessary to examine the specific actions through which Israel is being accused of committing genocide. The UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied Since 1967, Francesca Albanese, published her report 'Anatomy of a Genocide', in March 2024, as the second advisory opinion was issued. This report meticulously details and highlights the different ways through which genocide may be happening against the Palestinian people. The rapporteur emphasised that genocide was a process rather than a single act, requiring to take into account also the past of Gaza and the Israeli settlement.[437] In the case of the Palestinian population, the most evident strategies employed by Israel include the killing of civilians, infliction of serious bodily and mental harm, and the deliberate imposition of life-threatening conditions designed to bring about the group's physical destruction, either in whole or in part.[438]

In her extensive analysis, Albanese argues that Israel has strategically employed IHL as a "humanitarian camouflage"[439] to justify actions that may constitute genocide.[440] This tactic involves distorting the protective intent of IHL to legitimise severe violence against Palestinian civilians is particularly evident in Israel's use of concepts such as "human shields, collateral damage, safe zone, evacuations."[441] By blurring the line between civilians and combatants, Israel undermined the fundamental IHL principles of distinction and proportionality.[442]

Particularly, under IHL, the use of civilians as human shields is a war crime. However, Albanese's report reveals that Israel has reversed this principle, routinely categorising Palestinian civilians in Gaza, particularly those who remain in their homes or seek refuge in hospitals and shelters, as human shields and "accomplices"

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[437] Francesca Albanese, *Anatomy of a Genocide - Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied since 1967 to Human Rights Council - Advance Unedited Version (A/HRC/55/73)*, United Nations | The Question of Palestine (2024), para. 8. [hereinafter: Albanese, 2024].

[438] Albanese, 2024, paras. 23, 28, 40.

[439] *Ibid,* para. 87.

[440] *Ibid,* para. 55.

[441] *Ibid.*

[442] *Ibid,* para. 56.

to terrorism.[443] This recharacterisation not only justifies indiscriminate attacks on civilian areas but also strips these civilians of their protected status under IHL, effectively turning all of Gaza into a military target.[444]

Furthermore, the report underscores that proportionality assessments, essential to lawful military operations under IHL, are rendered meaningless if civilians are systematically categorized as combatants or collateral damage.[445] This deliberate conflation facilitates the broader genocidal strategy of inflicting conditions of life calculated to bring about the physical destruction of the Palestinian population.[446] These conditions, as Albanese notes, are not just collateral consequences of war but are part of a calculated effort to weaken and ultimately destroy the Palestinian people.[447]

Regarding acts of genocide by "killing members of the groups", the UN Special Rapporteur highlighted that the death toll had surpassed 1.5% of the entire population, from which 70% were women and children. Albanese also reported that Israel failed to prove that the remaining 30%, adult males, were lawful targets. Adding that, for these men to be lawful targets, as Israel affirms, that would imply that all adult males killed were active Hamas combatants. Consequently, this would mean that Israel is assuming 'fighter status' by default and indiscriminately targeting members of the protected group.[448]

On causing serious bodily or mental harm to the members of the group, the report noted that most of the civilians in Gaza have now experienced severe levels of violence, deprivation of basic goods, and famine.[449] Further remarking that, due to the shortages of medical supplies, medical procedures such as amputations

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[443] *Ibid,* paras. 60, 65, 78.

[444] *Ibid,* para. 62.

[445] *Ibid,* para. 72.

[446] *Ibid,* para. 94.

[447] *Ibid,* para. 61.

[448] *Ibid,* para. 25.

[449] *Ibid,* para. 28.

without anaesthetics, including on children, had been happening.[450] All these, coupled with homelessness, emotional and material loss, and endless humiliation contribute to "indelible trauma"[451] and could be interpreted by the ICJ as evidence of genocidal acts.

Consensus surrounding Israel's actions in Gaza as constituting genocide is particularly evident in the focus on the use of starvation and the creation of unsustainable living conditions. The report by Albanese draws significant attention to how Israel's blockade of essential resources (food, water, and medical supplies) has not only caused immediate and widespread harm but has also established conditions that threaten the long-term survival of the Palestinian population.

Still, it is regarding paragraph c) of art. II of the GC (deliberately inflicting on the group conditions of life) that the ICJ has given a larger margin to infer and consider the possibility of a genocide occurring in Gaza. In its March provisional measures order, the Court affirmed that the living conditions of Palestinians in the Gaza Strip were 'catastrophic' and were in continuous deterioration, particularly regarding "the prolonged and widespread deprivation of food and other basic necessities".[452] Adding that the risk of famine was no longer a risk, but a reality,[453] which was an impact of the war and ongoing restrictions on aid delivery.[454]

The Court explicitly emphasised the critical issue of starvation as a method of genocide, highlighting Israel's decision to cut off food, water, electricity, medical supplies, and humanitarian assistance in Gaza.[455] Noting that the absence of viable alternatives for the delivery of these essential resources through land routes exacerbated the life-threatening conditions imposed on the Palestinian

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[450] *Ibid,* para. 31.

[451] *Ibid,* para. 32.

[452] ICJ, South Africa v. Israel, March Provisional Measures, 2024, para.18.

[453] *Ibid,* para. 21.

[454] *Ibid,* para. 20.

[455] Sultany, 2024, page 4.

population.[456] In his separate opinion, Judge Nolte concurred with this assessment, recognizing the weaponisation of starvation and affirming that such measures reflect a 'plausible risk of a violation of relevant rights under the GC.'[457]

Academic perspectives also align with the understanding that Israel's actions in Gaza may constitute genocide, particularly through the concept of "genocide by attrition."[458] Scholars have pointed out that the systematic deprivation of essential resources, such as food, water, and medical care, mirrors historical examples like the German Hunger Plan during WWII, and what ICC's first Prosecutor affirmed regarding Darfur.[459] Together, these findings illustrate a broad and growing consensus that Israel's actions in Gaza, particularly the deliberate creation of life-threatening conditions through starvation and resource deprivation, may represent a method of genocide. As Judge Yusuf emphasizes in his separate opinion, "The Court has now sounded the alarm, with all indicators of genocidal activities in Gaza flashing red".[460]

The International Criminal Court has demonstrated agreement with this argument. When issuing the request for the arrest warrants for Israeli and Hamas officials, Prosecutor Karim Khan listed "starvation of civilians as a method of warfare" as one of the Israeli crimes in Gaza.[461] However, said agreement is considerably more limited, as the arrest warrants were issued based on "war crimes, and not on 'genocide'.

This is because, as Schabas pointed out, most recent wars have been marked by war crimes and atrocities, including bombings of urban areas and killings of civilians, yet that is not evidence that all those wars aimed to disintegrate physically

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[456] ICJ, South Africa v. Israel, May Provisional Measures, 2024, para. 35.

[457] *Ibid*, Separate Opinion of Judge Nolte, para. 6.

[458] Semerdjian, 2024, page 3.

[459] *Ibid,* page 21.

[460] ICJ, South Africa v. Israel, May Provisional Measures, 2024, Separate Opinion of Judge Yusuf, para. 12.

[461] International Criminal Court, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine (2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state (last visited Aug 31, 2024).

or biologically the other party to the conflict.[462] And, as previously established, to classify an act as genocide, it is not enough to turn to a large scale of destruction or the brutality of the attacks, clear intent to destroy is required. Therefore, the next step is to assess whether it is plausible to infer genocide's *dolus specialis* behind Israel's actions.

According to the ICC, indirect intent is demonstrated when there is a "manifest pattern of similar conduct"[463] aimed at the group, suggesting the need for a premeditated plan or policy. As affirms the UN Special Rapporteur Albanese, in the case of Gaza, these patterns and policies exist not only in the present context but also historically, having been perpetuated for many years and.[464] Moreover, as the ICTY has also recognised, a systematic pattern of conduct over time "may provide sufficient evidence of intent".[465] Accordingly, in Gaza, the continuous and organised nature of the attacks may demonstrate a level of planning and policy implementation that supports the inference of indirect intent. The overall context of these actions, combined with their scale and systematic execution is probable to fulfil the indirect criteria for genocidal intent.[466]

On an individual level, intent can, as previously determined, be assessed through a knowledge-based approach and/or a purpose-based approach. The knowledge-based approach involves inferring indirect intent from the overall context, scale, and systematic nature of the conduct, *i.e.*, if the perpetrators know that their actions are contributing to that specific outcome, and proceed anyways.

The purpose-based approach, on the other hand, mostly examines the rhetoric and public statements of state authorities to infer intent. This method considers how dehumanising language and incitement to violence contribute to

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[462] Schabas, 2022, page 856.

[463] Article n.º 6(a)(4); 6(b)(4); 6(c)(4) ICC, Elements of Crimes, 2011.

[464] Albanese, 2024, para. 10.

[465] Prosecutor v. Kayishema, 1999, para. 93.

[466] Sultany, 2024, page 7.

understanding the perpetrator's objectives.[467] Statements from high-ranking Israeli officials could provide significant circumstantial evidence of genocidal intent if they show a 'direct' incitement criteria. Examples in the Special Rapporteur's Report show that they do. Statements such as President Isaac Herzog's that "*an entire nation out there...is responsible*"; and Prime Minister Benjamin Netanyahu's references to Palestinians as "*Amalek*", and "*monsters*," reflect a dehumanising mindset and present a direct incitement to genocide. The reference to Amalek, in particular, evokes a biblical call for the destruction of an enemy. Minister of Defense Yoav Gallant's declaration of intent to ensure that "*Gaza will never return to what it was*" further indicates a goal of irreversible destruction, among other statements.[468]

The key question here is whether any other reasonable interpretation of the overall plan or policies can be made. As the Court required in *Croatia v Serbia*, there must be no doubt as to the conclusion of intent, genocidal intent must be the only inference that could reasonably be drawn.[469]

Moreover, insights from the Guatemalan Historical Clarification Commission provide a pertinent reference for evaluating intent. The Commission observed that, when confronted with various strategies to address the insurgency, the Guatemalan State deliberately chose the option that inflicted the highest toll on non-combatant civilians, despite possessing the capability to differentiate between combatants and civilians.[470] When applied to Israel's conduct, this observation is notably relevant. The deliberate obstruction of humanitarian aid and essential resources, such as food, clean water, and medical supplies, appears to disproportionately impact non-combatants relative to any military objectives. This pattern of conscious and deliberate behaviour may be interpreted as evidence of a

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[467] International Criminal Tribunal for Rwanda, Prosecutor v. Mikaeli Muhimana (Case No. ICTR- 95-1B-T), Judgement and Sentence, (2005), para. 496.

[468] Albanese, 2024, para. 49.

[469] ICJ, Croatia v. Serbia, 2015, para. 148.

[470] Jan Perlin, The Guatemalan Historical Clarification Commission Finds Genocide, 6 ILSA Journal of International & Comparative Law 389 (2000), page 407.

calculated intent. Nonetheless, the situation has undergone various phases, with the siege on Gaza being imposed, lifted, and reinstated, which attests to its dynamic and volatile nature.

Assessing genocidal intent, therefore, requires a balanced approach that goes beyond the knowledge-based or purpose-based methodologies. Including the broader context, the political doctrine of the aggressor and a repeated pattern of discriminatory and destructive acts must be considered to exclude any other reasonable interpretations.[471]

Still, despite substantial evidence of the *actus reus* and *mens rea* presented by South Africa, and the findings of the UN Rapporteur, the ICC, much like in the Ukrainian case, is attempting to pursue charges of war crimes and crimes against humanity against Prime Minister Netanyahu.[472] This decision also raises important questions about whether these actions might instead constitute crimes such as ethnic cleansing or apartheid, rather than genocide.

While the concept of ethnic cleansing is not formally recognised as a distinct crime under international law, it is typically prosecuted under other categories of international crimes. Labelling Israel's actions as ethnic cleansing does not preclude them from also being classified as genocide. As affirmed by the ICJ in *Bosnia and Herzegovina v Serbia and Montenegro*, a situation characterised as "ethnic cleansing" can constitute genocide if it meets the criteria outlined in art. II of the GC, specifically the commission of acts listed therein, coupled with the intent to destroy, in whole or in part, a protected group.[473]

On the other hand, the crime of apartheid holds a clear legal definition as a crime against humanity. As outlined in the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Rome Statute, it

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[471] ICTY Case No. IT-95-5-R61 & No. IT-95-18-R61, Karadžić and Mladić, Decision of Trial Chamber I, Review of Indictment Pursuant to Rule 61, 11 July 1996, para. 94.

[472] International Criminal Court, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine (2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state (last visited Aug 31, 2024).

[473] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, 2007, para. 190.

encompasses acts such as imposing living conditions intended to destroy a racial group or enacting legislative measures to systematically exclude a racial group from participating in the political, social, economic, and cultural life of the country.[474]

The ICJ has also considered that the concept of apartheid may indeed align with the situation in Gaza. As stated in its July 2024 advisory opinion, there is a systematic separation between the Palestinian population and Israeli settlers in the occupied territories of Palestine. This segregation happens both in a physical and juridical manner, making the advent of apartheid evident.[475]

However, the situation of apartheid might not fully capture the extent and gravity of the atrocities being committed. As demonstrated, the events do not just exclude Palestinians from the political, social, economic or cultural life of Israel, they are very likely producing conditions of life deliberately designed to bring about its physical destruction in whole or in part.

Although considering apartheid as a prosecutorial avenue for Israel's actions is an option, that approach may not accurately reflect the severity and intent of the crimes observed and careful evaluation is required. In contrast to the Ukrainian case, where there is some room for legal interpretation regarding genocidal intent, the situation in Gaza leaves less room for alternatives. The assessments made by the ICJ thus far also suggest a perception that goes beyond the ICC's reading, indicating a strong likelihood of genocide in addition to an apartheid or ethnic cleansing. Consequently, while these alternatives exist, they fail to capture the full scope of the situation in Gaza. Although mounting evidence increasingly points towards the likelihood of genocide, because it is not possible to affirm that genocide is the 'only inference possible' it will remain uncertain until the Court officially rules on the matter. Nonetheless, it can be confidently stated that Israel will almost certainly be found guilty of, at least, incitement to genocide.

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[474] Art. 7(j)(2)(h), Rome Statute, 1998.

[475] ICJ, Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, 19 July 2024, paras. 224-228.

5.3 - *Concluding overview*

Joseph Borrell, the European Union's High Representative for Foreign Affairs and Security Policy, recently underscored the importance of avoiding double standards in international conflicts,[476] a principle he acknowledged had been compromised by the European Union's differing responses to the events in Ukraine and Palestine.[477] These statements brought to light a broader issue central to the analysis of these case studies: the inconsistent application of international norms, particularly of 'genocide', as a concept.

Naturally, no two cases of genocide are identical,[478] however, comparing the international community's response to conflicts in Ukraine and Gaza reveals distinct disparities in how these situations were addressed and classified, particularly when considering the legal and political implications of labelling such conflicts as genocide. In Ukraine, the international response was relentless and decisive, with strong economic sanctions and military support against Russia, which was also banned from international organisations and events.[479] As Schabas and other scholars highlighted, 'military attacks on civilian populations elsewhere do not generate the same excitement as Russia's.'[480]

It might be for that reason, that the response to the Israeli-Palestinian conflict, particularly in Gaza, has been far less consistent.[481] Despite the patterns of rhetoric and violence being even higher, the international community has been hesitant to label Israel's actions as genocide.[482] This hesitancy reflects a broader

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[476] European Union External Action Service, *Defense: Speech by High Representative/Vice President Josep Borrell at Forum Europa*, EEAS (2024), https://www.eeas.europa.eu/eeas/defense-speech-high-representativevice-president-josep-borrell-forum-europa_en (last visited Aug 31, 2024).

[477] Awad Slimia & Mohammad Fuad Fuad Othman, The Double Standards of Western Countries toward Ukraine and Palestine "Western Hypocrisy," 30 Central European Management Journal 476 (2022), page 480. [hereinafter: Slimia & Othman, 2022].

[478] Semerdjian, 2024, page 17.

[479] Ramsden, 2023, page 182.

[480] Schabas, 2022, page 855.

[481] Maulana, 2024, page 39.

[482] *Ibid,* page 46.

pattern of double standards in international law, where geopolitical interests often influence the application of legal principles. As Sultany observed, the prevalent discourse since October 2023, shared by both specialists and non-specialists, was that genocidal intent was of an exceedingly high threshold and, thus, unlikely to be met in the context of Israel's actions in Gaza.[483]

Conversely, only a few months before, the international opinion was swift to declare that a genocide was unquestionably happening in Ukraine.[484] Russia was condemned for committing genocide by multiple European leaders,[485] statements of 'genocide' were echoed numerous times, and some States even took legislative action to sustain such affirmations.[486] So, if the Ukrainian conflict was, for some States, such an obvious case of genocide, then the same treatment would have been expected towards Gaza.

The arbitrary application of the label genocide, driven by geopolitical interests rather than objective legal criteria, not only undermines trust in the international legal system but also dilutes the power and significance of the term.[487] If the label is used inconsistently, it risks becoming a tool of political convenience rather than a meaningful designation of the 'crime of crimes'.

It is also revealing to observe the disparity in international engagement between two significant cases before the ICJ. The case concerning Ukraine, which does not address allegations of genocide directly, has seen the intervention of 32 States. While, in contrast, the case against Israel, brought by an African nation, has attracted only 6 intervening States, with only one European State among them (Türqiye, Spain, Mexico, Libya, Colombia, Nicaragua). This may reflect not only a geopolitical bias but also the potential overuse of "genocide allegations" in the

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[483] Sultany, 2024, page 5.

[484] Schabas, 2022, page 845.

[485] *Ibid,* page 846.

[486] *Ibid,* page 847.

[487] Khoitil Aswadi, The Souble Standards of International Law: a Comparative Study of the Conflict in Ukraine and Palestine, 2 Tirtayasa Journal of International Law 71 (2023), page 76. [hereinafter: Aswadi, 2023].

Ukrainian case, especially when the term "genocide" is applied inconsistently across different contexts.[488] On the other hand, it is also important to consider that the case concerning Ukraine is not one of alleged genocide, whereas the South African one is. This might explain why States may feel more comfortable intervening in a contend on aggression and invasion, than in a case concerning a possible genocide.

This criticism resonates with a broader pattern of bias, particularly in how Western countries address conflicts involving Israel. Often, criticisms of Israel are labelled as antisemitism, which not only suppresses legitimate discourse but also removes attention from potential violations of international law. A clear manifestation of this bias is the USA's extensive history of vetoing UNSC resolutions critical of Israel (between 1972 and 2021, it issued at least 53 such vetoes).[489]

Some argue that Israel's position is supported by the global sympathy derived from the historical trauma of its people.[490] While this empathy is justified, it must not cloud the impartial evaluation of Israel's actions in the current context and sustain a pro-Israel bias.[491] The international community must separate the collective historical suffering of Jewish people from the specific legal scrutiny of Israel's conduct as a State.

The disparate treatment of conflicts underscores a troubling inconsistency in the application of international norms. This double standard not only undermines the integrity of international law but also highlights the need for objective and unbiased assessment in addressing violations and ensuring justice globally.

In sum, addressing these disparities is crucial for reinforcing the credibility and impartiality of international law, ensuring that all cases of alleged violations receive equitable attention and scrutiny. Ultimately, the comparison of these

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[488] Marchuck & Wanigasuriya, 2022, page 262.

[489] *Ibid.*

[490] Slimia & Othman, 2022, page 481.

[491] Aswadi, 2023, page 77.

conflicts illustrates a troubling pattern where geopolitical interests overshadow the consistent application of international concepts, particularly of 'genocide'.

This analysis and the case studies have thus revealed that while there is a growing trend to apply the label of genocide more broadly this expansion is not always rooted in a consistent or legally sound framework. Instead, it is often influenced by political motivations, which threatens to dilute the term's significance and undermine its legal efficacy. By examining these recent cases, this research highlighted the necessity of preserving the strict legal definition of genocide to ensure that it remains a powerful tool for justice rather than a catch-all phrase for various forms of atrocity.

6. *Conclusion*

This dissertation aimed to demonstrate that a broad and arbitrary application of the GC is detrimental to the legal application of the concept of 'genocide' and can produce negative effects. The research question which drove this dissertation was to explore the degree to which recent events and developments have expanded the interpretation of genocide, if at all.

In order to answer such a question, the study began by exploring the historical context of the GC, tracing its origins to Raphael Lemkin's conception of genocide. Lemkin's vision of genocide as a crime aimed at the physical or biological destruction of a group was foundational in the drafting of the Convention. The subsequent review of the Convention's articles individually revealed its issues and shortcomings. Key challenges included defining intent and protected groups and addressing topics such as how the Convention addresses cases of forced pregnancies and miscegenation.

The literature review highlighted ongoing debates about the definition of genocide, with some scholars advocating for an expanded interpretation. However, this dissertation emphasised the risks associated with broadening the definition, including the potential dilution of the term's specificity and the risk of

politicisation. The discussion around the possible inclusion of 'cultural genocide' revealed that while cultural destruction is significant, it does not meet the strict criteria for genocide. This distinction reaffirmed the importance of preserving the Convention's precise definition and avoiding the expansion of the term to include cultural elements.

A key focus of the study was the notion of genocidal intent. Article II of the GC directly requires a specific intent to destroy a protected group. The analysis found that genocidal intent involves both general and specific elements, with judicial interpretations emphasizing the need for *dolus specialis*. This nuanced understanding is vital for accurately addressing and prosecuting genocide.

Considering the research findings, this dissertation applied the clarified conceptualisation of genocide to the conflict in Ukraine and the Israeli-Palestinian conflict. The Ukrainian case highlighted the complexities of applying the genocide label in contemporary crises. Despite significant international focus and claims of genocide, the evidence did not undoubtedly establish the specific intent required by international law. Regarding the Israeli-Palestinian conflict, particularly the recent escalation in Gaza, the analysis presented a different set of challenges. The severe humanitarian crisis and the lack of consideration of genocide against Israel prompted legal international responses, including South Africa's requests at the ICJ. The study concluded that the evidence of severe harm is substantial and, thus, reveals a high probability that the application of the genocide label would be accurate. However, the study also found that because genocide is not the only possible inference (as war crimes and apartheid are also possible), a genocide label still demands careful consideration.

The final discussion brought light to significant double standards and inconsistencies in the application of international norms. The analysis highlighted how geopolitical interests often overshadow objective legal criteria, affecting the impartiality in applying concepts like genocide. This inconsistency undermines the

credibility of international law and emphasises the need for equitable treatment and consistent application of legal principles across different conflicts.

Ultimately, it is possible to answer positively to the research question. The double standards in the application of the concept of 'genocide' have been effectively demonstrated, alongside the trend for expansively applying the label, which, although still in development, is already noted in the legal realm. Clues for such an expansion have begun to show, as the case for a 'false claim of genocide' presented by Ukraine against Russia proves; that politically invoking 'genocide' no longer carries any legal consequences for State parties; and that, in academia, there is very concerning trend for the broadening of the term. However, the effects of arbitrary and inconsequential accusations of genocide from the political sphere in the legal field can't be fully measured as of yet. Moreover, it has also been demonstrated that the trend for the overuse of the term 'genocide' in the contemporary era, has been noted by both Judges of the ICJ and the academia.

Still, this dissertation has contributed to the discourse on genocide by reinforcing the need for a conservative and restrictive application of the term. By focusing on maintaining rigorous standards, the study supports the idea that an expansive interpretation risks undermining the term's significance and legal authority.

It is important to admit that this research faced limitations in terms of depth and breadth, which may have impacted the analysis. Given the character constraints and the ongoing condition of the case studies, a more in-depth exploration of certain aspects was not feasible. Future research should aim to address these limitations and further investigate the implications of expanding the genocide definition.

In the end, while the temptation to label every atrocity as genocide grows, it is crucial to remember that a 'genocide' label is not a consolation prize for the victims of war and crimes against humanity and should not be presented as such, ensuring it retains its legal weight and moral significance.

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