The Complexity of Identifying Genocide in the Midst of Bloodshed

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ABSTRACT

In the time since UN member states came together in 1948 to adopt the Convention on the Prevention and Punishment of the Crime of Genocide, the crime of genocide has been tragically perpetrated multiple times across the globe, often without those same member states taking meaningful action to prevent genocide or even categorise it as such. This thesis sets out to interrogate the premise that this failure to respond to such violence as it unfolds is simply due to a lack of political will amongst states, and to analyse whether it is instead better explained by the indeterminacy of the definition and elements of the legal crime of genocide itself.

To address this contention, the thesis proceeds along three core strands of research which illustrate the complexities involved in identifying the crime of genocide in the midst of violence utilising case studies of past and present accepted or alleged instances of genocide in Rwanda, Srebrenica, Darfur, Central African Republic, northern Iraq (Islamic State), Burundi, and South Sudan. The thesis examines firstly the contestations around the definition of genocide, due to competing legal and social understandings of what genocide entails, and secondly how these understandings impact on identifying the crime of genocide in the midst of violence. These two strands raise questions as to the utility of the genocide label as a means of prevention, with the nature of the definition of genocide often rendering it indeterminate in times of violence. Given this indeterminacy, the final strand of this thesis contends that, for the purposes of prevention, ongoing violence should be assessed under the more general rubric of atrocity crimes, and that the term genocide should instead be reserved for after a conflict has ended and a clearer analysis can be made by an international court or tribunal.

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Prosecutor v Kajelijeli (Trial Judgment) ICTR-98-44A-T (1 December 2003).

Prosecutor v Kambanda (Sentence) ICTR-97-23-S (4 September 1998).

Prosecutor v Kayishema and Ruzindana (Trial Judgment) ICTR-95-1-T (21 May 1999).

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INTERNATIONAL CONVENTIONS

Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945).

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951).

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002).

ABBREVIATIONS

ARCSS	Agreement on the Resolution of the Conflict in the Republic of South Sudan
AU	African Union
CNDD-FDD	National Council for the Defence of Democracy-Forces for the Defence of Democracy
CTSAMM	Ceasefire and Transitional Security Arrangements Monitoring Mechanism
DPKO	United Nations Department of Peacekeeping Operations
EAC	East African Community
ECOSOC	United Nations Economic and Social Council
EU	European Union
FRODEBU	Front for Democracy in Burundi
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IGAD	Intergovernmental Authority on Development
ISIS	Islamic State and Al-Sham

JMEC	Joint Monitoring and Evaluation Commission
MINUSCA	Multidimensional Integrated Stabilization Mission in the Central African Republic
MISCA	International Support Mission to the Central African Republic
NGO	Non-Governmental Organisation
PALIPEHUTU-FNL	Party for the Liberation of the Hutu People-National Forces of Liberation
RPF	Rwandan Patriotic Front
RtoP/R2P	Responsibility to Protect
SPLM/A	Sudan People's Liberation Movement/Army
SPLM/A-IO	Sudan People's Liberation Movement/Army-in-Opposition
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNIIB	United Nations Independent Investigation on Burundi
UNMISS	United Nations Mission in South Sudan
UPRONA	Union for National Progress

CHAPTER ONE: 'NEVER AGAIN', YET ALWAYS AGAIN

1.1 Introduction

In this introductory chapter, the rationale underlying the basis of this thesis pursuing this particular study of the topic of genocide will be presented. This chapter will address why this thesis is necessary to address issues within the current study and practice of genocide, in particular complexities related to genocide prevention. The goal of this chapter is to introduce the elements and topics that will be explored and analysed so as to provide a brief overview of the research and the direction and structure of the following chapters. This chapter will set out the aims and objectives of this thesis, and how they will be examined through a number of research questions that will address the different strands of this research topic. This chapter will explain and justify why these research questions and the research methods used to explore the topic have been selected and how they will aid this research in presenting vital information and evidence that will address the core concerns of this thesis. In pursuing this research the chapter will explore how this thesis fits within the wider body of study of genocide, and how the study of genocide presents some interesting areas of exploration for this thesis to further analyse which permits this research to proffer a contribution to the study of the utility of the genocide label, which will be one of the central aims and objectives of this research. To begin exploring the various elements of this research, this chapter will turn to focus on the subject of this thesis, the concept of genocide.

1.2 Confronting the Horror of Genocide

Humanity witnessed a 20th century that was marked by the massacre and attempted extermination of populations across the globe and a 21st century that continues to see an array of violent clashes involving significant civilian casualties spanning across the

globe. In amongst the continual bloodshed, one term has become synonymous with the most appalling horrors and crimes committed during this time; genocide. The term evokes memories of the death and destruction witnessed in the Holocaust, Rwanda, and Srebrenica in the last century and in Darfur, Sinjar, and now in Myanmar in this century.

There are many explanations for the phenomenon of genocide within the substantial body of literature on the subject from anthropological, economic, historical, philosophical, political, psychological, and social perspectives amongst others. While it may be possible to theorise the reasons why people may commit genocide or the conditions that could give rise to the commission of genocide, genocide as a crime continues to plague this world with recurring claims or evidence presented of the perpetration of genocide across the globe. Why is it that despite the moral outrage we feel, due to the powerful symbolic value of the term by virtue of its association and connotation with the Holocaust, when we hear that genocide may have been committed in a given situation, the threat of genocide still lingers without being adequately addressed more than seventy years after one of the worst genocides in the history of mankind? Is it that genocide as a crime can simply not be prevented or is there a flaw in the approach to genocide prevention due to the very concept of genocide? Could it be that genocide is simply a term that cannot be identified in the midst of violence due to how it was conceived as a concept and how it is now perceived by a variety of actors from different perspectives? Has the definition of genocide rendered the crime of genocide indeterminable in the midst of bloodshed? If genocide as a legal category is too complex to identify in the middle of bloodshed, should genocide still be employed as a term to characterise ongoing violence, or should we

instead utilise another term or terms to describe ongoing violence with the objective of preventing and responding to potential genocidal situations?

The utility of the genocide label as a preventative term is a key theme which will be at the foundation of this research. However it is important to note, before beginning to examine the potential flaws apparent in the definition of genocide which could conceivably impact on the response to genocide, that the response to genocide was not always so hopeless and demoralising. When the word itself was first crafted it was aimed at preventing the recurrence of genocide and protecting the world's population from harm and despair.

1.3 Criminalising the Act

The term genocide, while itself an age-old reality, is only a relatively recent word.[1] Raphael Lemkin, a Polish-Jewish lawyer who devoted his life's work to the protection of targeted groups, coined the term 'genocide' in 1944.[2] The word was inspired not only by the massacres of the Holocaust but by earlier atrocities committed against the Armenians and the Assyrians which sparked Lemkin's interest in the destruction of groups.[3] The word is an amalgamation of the Greek word 'genos', meaning race or tribe, and the Latin word 'cide', meaning killing.[4]

[1] Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Penguin 1981) 9; Raphael Lemkin, 'Introduction to the Study of Genocide' in Steven Leonard Jacobs (ed), *Lemkin on Genocide* (Lexington Books 2012) 20.
[2] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944).
[3] Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin* (Donna-Lee Frieze ed, Yale University Press 2013) xi–xii; Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 143.
[4] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 79.

In Lemkin's seminal work, *Axis Rule in Occupied Europe*, he defined genocide as 'the destruction of a nation or of an ethnic group.'[5] Lemkin outlined that genocide is 'directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.'[6] For Lemkin, genocide is a distinct crime from homicide as the victim of genocide is the group itself not the individual, and this is why Lemkin argued for a new term to describe this atrocity and for new laws to punish its perpetration.[7] To address the horror of genocide, Lemkin argued for an international treaty for the criminalisation of genocide and the inclusion of the crime in domestic criminal statutes of states, so as to cover genocide committed during peace time.[8] Lemkin believed that genocide was a matter for international powers and that the newly established United Nations (hereafter 'UN') should focus on the prevention and punishment of the crime in its initial work.[9]

The concept quickly took root in international circles in the aftermath of World War II, as the international community struggled for a term to describe the death and destruction of the Holocaust.[10] In 1948 the concept received international acceptance when the UN adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which came into effect in 1951.[11] The Genocide Convention is 'the

[5] ibid 79.
[6] ibid 79.
[7] ibid 79.
[8] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 90–95. See also Christian J Tams, Lars Berster, and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck 2014) 6.
[9] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 90–95. See also Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 48.
[10] Christian J Tams, Lars Berster, and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck 2014) 11.
[11] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951).

foundation of the international law of genocide and a political benchmark for the UN, states, NGOs, media and social movements in dealing with genocide.'[12] The Convention has a dual purpose as set out in its title; the first is to aid states in preventing the perpetration of genocide and secondly to criminalise the commission of genocide by setting out the definition of genocide and the means of punishing the perpetration of crime.

For such a historic agreement, the Genocide Convention is actually quite brief. There are only nineteen articles, with most provisions only consisting of a few lines. Furthermore Articles X to XIX of the Convention concern procedural and technical matters, such as the languages of the Convention and process of ratification, which are not relevant to punishing or preventing genocide. Therefore there are only nine substantive articles dealing with the crime of genocide. The focus of this thesis will be predominantly on the provisions within Article II of the Convention which lays out the definition of the crime of genocide, as an understanding of this article is crucial for addressing the difficulties of identifying genocide in the midst of violence which could conceivably impact on the response to genocide.

1.3(i) Defining the Crime

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;

[12] Martin Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* (Cambridge University Press 2013) 87.

(b) Causing serious bodily or mental harm to members of the group;

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

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Under this article, the crime of genocide is made up of the *actus reus* (physical act) and the *mens rea* (mental element).[13] The physical acts are those outlined in subsections (a)–(e) while the mental element is the intent to destroy the four recognised groups. This definition of genocide included within the Genocide Convention had changed significantly from the concept first proposed by Lemkin, however the underlying objective behind the definition and the Convention in general remained the same; a desire to protect groups from destruction. It is this article that is central to the application of the Genocide Convention as the failure to have a definition of genocide that is identifiable in the midst of violence dooms the Convention to be unenforceable and even irrelevant in the prevention of genocide. This is why this article is critical to this research, as an indeterminable definition of genocide raises the very question of its long term utility as a preventative mechanism in the midst of bloodshed.

[13] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 172, 176.

Furthermore this article underpins the whole Genocide Convention, as a failure to possess a definition of genocide that can be applied in the midst of violence jeopardises the enforcement of the rest of the provisions within the Convention. The other eight articles within the Genocide Convention, which are important for this study, set out the responsibility that states have for preventing and punishing the crime of genocide.

1.3(ii) Preventing and Punishing Genocide

Article I

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

This article is critical as it sets out the dual purpose of the Genocide Convention, to prevent and punish the crime of genocide, and the responsibility that states who ratify the Convention have to fulfil this purpose. This article also sets out that genocide is a crime under international law, a principle which recalls Lemkin's original assertion that genocide was a matter of international concern. Furthermore this provision was significant, as it stated the genocide could be committed during peace time as well as during times of war. At that time, war crimes and crimes against humanity could only be committed during an international armed conflict.[14] This permitted individuals and states the recourse to invoke the Genocide Convention in a situation that would not fully conform to the definition of an armed conflict.

Article III

The criminal acts under the Convention were set out in Article III which states that:

[14] Christian J Tams, Lars Berster, and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck 2014) 40.

> The following acts shall be punishable:
>
> (a) Genocide;
>
> (b) Conspiracy to commit genocide;
>
> (c) Direct and public incitement to commit genocide;
>
> (d) Attempt to commit genocide;
>
> (e) Complicity in genocide.

This article lists the five 'modes of conduct' by which an individual 'incurs criminal responsibility' under the provisions of the Convention.[15] Conspiracy, direct and public incitement, and attempt to commit genocide are acts which are 'considered to constitute the preliminary stages of genocide'.[16] This research is focussed on the commission of genocide under subsection (a), and the issue of identifying this crime with reference to the provisions of Article II.

Article IV

> Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

This provision is momentous as it ensured individuals, regardless of their standing in society, would be held accountable for the commission of genocide.[17] Heads of states would not be able to claim diplomatic immunity from prosecution and instead would be held responsible for their actions.[18]

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[15] ibid 157.
[16] ibid 157.
[17] ibid 191.
[18] Jeffrey S Morton and Neil Vijay Singh, 'The International Legal Regime on Genocide' (2003) 5 Journal of Genocide Research 47, 57.

Article V

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

This article sets out that genocide will not only be criminalised under international law but also under domestic statutes so as to ensure that states take responsibility for punishing genocide within their own jurisdiction. Requiring states to pass their own legislation strengthened the enforcement and effectiveness of the Genocide Convention and the responsibility to prevent and punish genocide.[19]

Article VI

> Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

While permitting states to undertake their own trials within their territory, this article also provided the basis for the establishment some decades later of the ad hoc tribunals for Rwanda and the former Yugoslavia, and the creation of the International Criminal Court which have helped to clarify the terms of the Convention.[20] As will be discussed later in the research, these institutions and the case law they have produced have been

[19] ibid 57.
[20] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 443, 454–455.

critical in clarifying the terms of the Convention and elucidating the definition and understanding of genocide.

Article VII

> Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.
>
> The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

This article further ensures states act to punish genocide by ensuring their compliance with extradition requests. Excluding genocide as a political crime ensured that perpetrators could not portray their acts as political violence as a means of avoiding extradition.[21]

Article VIII

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.

This article sets out that the UN is a critical actor in the prevention of genocide, and that states have recourse to the UN's means of responding to situations. As will be seen in following chapters, the UN and its actors and organs have played a key role in responding to genocide by establishing legal tribunals, setting up commissions of inquiry, and even in some case pronouncing that genocide has been perpetrated.[22]

[21] Jeffrey S Morton and Neil Vijay Singh, 'The International Legal Regime on Genocide' (2003) 5 Journal of Genocide Research 47, 58.
[22] ibid 58.

Article IX

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

This article is significant as it provides states with a recourse to hold another state or states responsible for committing an act of genocide. The designation of the International Court of Justice as the organ responsible for interpreting, applying, and fulfilling the provisions of the Convention was important for establishing a principal organ for adjudicating disputes between states. The case law of this institution has also been vital for clarifying the responsibility of a state under the Genocide Convention and how to define the crime itself.

1.3(iii) The Success of the Convention?

The adoption of the Genocide Convention was a historic moment in the brief history, at that time, of the UN and was meant to be a signal that the UN would respond to crimes of this nature. However the noble intentions of those who drafted the Genocide Convention did not initially translate into effective action.[23] In fact the Convention lay largely dormant for decades after its adoption with little reference made to it in the workings of the UN and the international community.[24] When political actors did use

[23] Paul Wilkinson, *International Relations: A Very Short Introduction* (Oxford University Press 2007) 125.
[24] Adam Jones, *Genocide: A Comprehensive Introduction* (Routledge 2006) xxi–xxii.

the word genocide, particularly during the Cold War period, it was mainly as a rhetorical tool to label the actions of their rival states as genocide.[25]

Genocide tragically rose again to prominence in the mid-1990s with the atrocities committed in the former Yugoslavia and Rwanda. This period witnessed the capacity to punish under the Genocide Convention prosper with the creation of international legal institutions to address the commission of crimes of international law in these respective situations as well as a growing body of case law covering individual and state responsibility for the commission of genocide. While the punishment potential of the Convention was gradually realised in the 1990s and 2000s, the other purpose of the Convention floundered.

Despite the lofty promise of the Genocide Convention to prevent the crime of genocide, it did not translate into states pursuing meaningful action to respond to genocide in Rwanda and Srebrenica. The international community was instead, particularly in the case of Rwanda, paralysed in the face of claims of genocide by endless debates over how to define genocide and how to apply the definition to violence. Rather than be the focal point in the prevention of genocide, the preventative potential of the Genocide Convention became an underutilised and even neglected resource in responding to ongoing cases potentially involving genocidal violence.

In the twenty-first century genocide continues to be a blight across the globe that the international community struggles to respond effectively to, from the Sudanese government's actions in Darfur, to the horrific acts of ISIS in the Sinjar Region on the border of Iraq and Syria, and to now the continued crimes of the Myanmar government in Rakhine State against the Rohingya people. The continued failure of states and

[25] Dominik J Schaller, 'From Lemkin to Clooney: The Development and State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 245, 246.

intergovernmental organisations to protect populations at risk of violence has meant that the international community's promise in the aftermath of the Holocaust to 'Never Again' bear witness to genocide has rung hollow over the last seventy years.

This failure to convert the obligation to prevent and punish the crime of genocide into an established practice in international law raises the question of the utility of the Genocide Convention as an instrument to prevent and respond to ongoing crimes with a genocidal dimension. This is not a novel or ground-breaking point of view; since the adoption of the Genocide Convention there have been questions raised amongst academics and activists about the effectiveness of the Convention. The failure to meaningfully realise the Convention's preventative purpose has led to criticism of the Convention's definition of genocide from within the academic and activist communities, and various attempts to redefine and reinterpret the crime for a changing world. There is now an ever growing interest into the crime of genocide which has expanded into its own field of genocide studies. The observations of those who have contributed to the study of genocide and this field of genocide studies are critical for illustrating not only the defects and deficiencies of the concept of genocide but also for highlighting further and future areas for exploration and research.

1.4 The Growth of Genocide Studies and Genocide Activism

The current state of genocide studies where there are a substantial body of books and research articles concentrated on the topic of genocide, a number of journals devoted to the study of genocide, a variety of academic conferences spread across the world, university degree programmes focussed on genocide, and scholarly institutions and organisations dedicated to genocide research is quite different to the original treatment

of genocide by the academic community.[26] In the aftermath of the adoption of the Convention it was only 'a handful of dedicated liberators, jurists, scholars and Holocaust survivors' that paid any sustained interest to the topic of genocide.[27] In fact genocide studies developed in the shadows of the study of the Holocaust, which dominated the meagre research into genocide.[28] This was the state of genocide studies for much of the 1940s to 1970s, where genocide was very much a fringe interest in academia.

Interest in the concept of genocide did eventually grow in the 1980s, mainly in response to the evidence of atrocities perpetrated against groups of people in the 1960s in Indonesia and Vietnam and in the 1970s in Bangladesh, Burundi, and Cambodia and the lack of effective international responses to these situations.[29] The initial fascination with the term genocide amongst academics was due to the Genocide Convention's preventative potential as it applied during times of war and peace which differentiated the crime from crimes against humanity and war crimes which required a nexus with war.[30]

The growth in interest was predominantly led by a small number of academics and scholars such as Leo Kuper, Vahakn Dadrian, Pieter Drost, Helen Fein, Henry

[26] Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 212–215; Colin Tatz, 'Genocide Studies: An Australian Perspective' (2011) 6 Genocide Studies and Prevention 231, 231; Dominik J Schaller, 'From Lemkin to Clooney: The Development and State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 245, 247.
[27] Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 149.
[28] Colin Tatz, 'Genocide Studies: An Australian Perspective' (2011) 6 Genocide Studies and Prevention 231, 232; Martin Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* (Cambridge University Press 2013) 26, 28.
[29] Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 151, 158.
[30] William A Schabas, 'The International Legal Prohibition of Genocide Comes of Age' (2004) 5 Human Rights Review 46, 46; William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 11.

Huttenbach, Irving Louis Horowitz, Israel Charny, Frank Chalk, Kurt Jonassohn, Barbara Harff, and Ted Gurr.[31] The dominant academics within the emerging field of genocide studies were not legal scholars but rather historians, sociologists, psychologists, and philosophers.[32] This burgeoning period of the discipline of genocide studies involved academics undertaking comparative studies of the crime of genocide, using the Holocaust and the above mentioned situations, to seek to address a number of topics such as whether genocide had been committed in past or recent situations of violence, the prevention of genocide, and the conditions that give rise to genocide.[33]

In conducting their research these researchers also began questioning why the Genocide Convention had not been employed to respond to violent situations across the globe which for them constituted the crime of genocide. In addressing this failure to respond, the focus quickly settled on the definition of genocide. The definition of genocide provided under Article II of the Genocide Convention was viewed by authors such as Chalk and Jonassohn as so restrictive, that it could not apply to any situation that had occurred since the Convention was adopted.[34] This failure of the Convention to adequately address systematic violations of human rights led to most academics

[31] Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 212–213; Colin Tatz, 'Genocide Studies: An Australian Perspective' (2011) 6 Genocide Studies and Prevention 231, 234; Daniel Feierstein, 'Leaving the Parental Home: An Overview of the Current State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 257, 257.

[32] Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 212, 223; Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 527, 573.

[33] Barbara Harff, 'No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955' (2003) 97 American Political Science Review 57, 57; Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 214.

[34] Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (Yale University Press 1990) 11. See also Johnathan Cina, 'Genocide: Prevention or Indifference (Part One)' (1996) 1 Journal of Conflict and Security Law 59, 70; Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 42.

studying the crime of genocide in this period to create a new definition of genocide, normally by expanding upon the elements included under the Convention, to apply to the situation or situations that they were researching.[35] Chalk contends that in creating new definitions academics believed that a new definition of genocide would contribute to being able to predict the crime of genocide and prevent it in the future.[36]

However there was and continues to be a lack of 'consensus' amongst academics over how the definition of genocide should be framed.[37] This has meant that there are a multitude of definitions employed by academics to describe the phenomenon of genocide.[38] These attempts to restructure the definition of genocide are not without criticism within the literature, where academics have argued that definitional debates distract from the issue of genocide prevention.[39] Jerry Fowler contends that this focus on applying the label of genocide by crafting a new definition of genocide to apply to past situations or debating the semantics of genocide means that academics can often get caught up on preventing the last genocide, rather than focussing on preventing the

[35] Meghna Manaktala, 'Defining Genocide' (2012) 24 Peace Review: A Journal of Social Justice 179, 181.
[36] Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 150–151.
[37] Daniel Feierstein, 'Leaving the Parental Home: An Overview of the Current State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 257, 258.
[38] See collection of predominant academic definitions in Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 350–355; Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 22–27.
[39] Israel Charny, 'Toward a Generic Definition of Genocide' in George Andreopoulos (ed), *Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press 1994) 81; Freda Kabatsi, 'Defining or Diverting Genocide: Changing the Comportment of Genocide' (2005) 5 International Criminal Law Review 387, 388; David M Crane, '"Boxed In": Semantic Indifference to Atrocity' (2008) 40 Case Western Reserve Journal of International Law 137, 145; Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 221; Hannibal Travis, 'On the Original Understanding of the Crime of Genocide' (2012) 7 Genocide Studies and Prevention 30, 43; Herbert Hirsch, 'Preventing Genocide and Protecting Human Rights: A Failure of Policy' (2014) 8 Genocide Studies International 1, 1, 4–5; Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (United States Holocaust Memorial Museum 2016) 30.

next genocide.[40] Despite this critique of genocide studies, new researchers to the field of genocide studies in the 1990s and 2000s continued to craft alternative definitions of genocide.

The area of genocide studies expanded significantly in the 1990s in the aftermath of the genocidal situations in Rwanda and the former Yugoslavia as the case law that emerged from the investigations in Rwanda and the former Yugoslavia prompted a flurry of studies into the elements of the crime and how the definition of the crime applied in practice.[41] This period also saw significant academic interest in the area of genocide prevention, as researchers began questioning why states and the international community did not respond to the violence in the new post-Cold War environment. Research on the failure to respond in Rwanda and in the former Yugoslavia, as well as in Darfur in the mid-2000s focussed on the lack of political will amongst states and the UN to respond to and prevent genocide.[42] The Genocide Convention was seen as failing to sufficiently motivate states to place genocide prevention and intervention as one of their key strategic goals.

While rooted in tragedy, the 1990s proved to be a boon to the area of genocide studies as the perpetration of genocide in Rwanda and the former Yugoslavia, as well as the question of genocide in Darfur in the mid-2000s meant that the word genocide entered the mainstream consciousness.[43] Non-governmental organisations devoted to raising awareness of situations of genocide and demanding action sprang up; as civil society

[40] Jerry Fowler, 'Diplomacy and the "G-Word"' (2003) 35 Case Western Reserve Journal of International Law 213, 213.
[41] Jeffrey S Morton and Neil Vijay Singh, 'The International Legal Regime on Genocide' (2003) 5 Journal of Genocide Research 47, 47.
[42] Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 216–220.
[43] ibid 215.

activists became pivotal actors in raising the public's awareness of genocide and ardent advocates of confronting genocide.[44] Activists play an important role in the prevention of genocide as the powerful rhetorical value of the genocide label can draw the attention of the general public to a situation of violence which can lead to the public placing pressure on politicians to react to claims of genocide.[45] These activists regarded genocide as a term that will grab the interest of the general public, as genocide is the most recognisable term to civil society actors and the public, and the use of word will lead to a mobilisation in response to violence.[46]

The 21st century, in particular, has seen the rise of 'anti-genocide activism', which places politicians under pressure to react to violence.[47] 'Never Again' has been a rallying call for advocates seeking an international community that it more willing to take action in response to international crimes.[48] Activists and academics began labelling situations as genocide with the 'hope … that the "G-word" would create public attention, exert moral pressure, and impose a legal obligation on Western

[44] Dominik J Schaller, 'From Lemkin to Clooney: The Development and State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 245, 247.
[45] Martin Mennecke, 'What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word"' (2007) 2 Genocide Studies and Prevention 57, 60; Alex de Waal, 'Genealogies of Transnational Activism' in Alex de Waal (ed), *Advocacy in Conflict: Critical Perspectives on Transnational Activism* (Zed Books 2015) 18.
[46] Jeffrey S Morton and Neil Vijay Singh, 'The International Legal Regime on Genocide' (2003) 5 Journal of Genocide Research 47, 47; Martin Mennecke, 'Genocide Prevention and International Law' (2009) 4 Genocide Studies and Prevention 167, 168; Jacques Sémelin, 'Around the "G" Word: From Raphael Lemkin's Definition to Current Memorial and Academic Controversies' (2012) 7 Genocide Studies and Prevention 24, 25; Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 205–206; Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (United States Holocaust Memorial Museum 2016) 31.
[47] Martin Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* (Cambridge University Press 2013) 1. See also Dominik J Schaller, 'From Lemkin to Clooney: The Development and State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 245, 247–248.
[48] Jide Nzelibe, 'Courting Genocide: The Unintended Effects of Humanitarian Intervention' (2009) 97 California Law Review 1171, 1171.

governments to take action to stop the genocidal violence.'[49] Civil society activists were aware of the power of the word amongst the general public as genocide was seen as the most evil act that could be committed.[50] The passing of the Convention in the aftermath of the Holocaust meant that in the opinion of some academics and activists the concept of genocide is 'synonymous with the apex of human evil.'[51]

This line of thinking, that genocide is the worst crime, has been scorned by some in academia who believe this approach minimises the severity of other international crimes such as crimes against humanity and war crimes.[52] Authors such as Peter Quayle contend that due to the rhetorical value attached to the genocide label in some cases atrocities described by academics and activists as genocide are actually legally crimes against humanity.[53] These academics argue that the concentration on the importance of the label genocide was due in part to a lacuna in the other international crimes.[54] While genocide is defined within the Convention, for a long time there was no corresponding equivalence for the concept of crimes against humanity or ethnic

[49] Martin Mennecke, 'What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word"' (2007) 2 Genocide Studies and Prevention 57, 60. See also Holly Burkhalter, 'Preventing Genocide and Crimes against Humanity' (2004) 98 Proceedings of the Annual Meeting (American Society of International Law) 41, 41.
[50] Dominik J Schaller, 'From Lemkin to Clooney: The Development and State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 245, 247–248.
[51] Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 359. See also Leo Kuper, 'Theoretical Issues Relating to Genocide: Uses and Abuses' in George Andreopoulos (ed), *Genocide: Conceptual and Historical Dimensions* (University of Philadelphia Press 1994) 31, 35; David Moshman, 'Conceptual Constraints on Thinking about Genocide' (2003) 3 Journal of Genocide Research 431, 439–440; Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (United States Holocaust Memorial Museum 2016) 35.
[52] David Moshman, 'Conceptual Constraints on Thinking about Genocide' (2003) 3 Journal of Genocide Research 431, 442–443; Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 The European Journal of International Law 669, 673; Christian Axboe Nielsen, 'Surmounting the Myopic Focus on Genocide: The Case of the War in Bosnia and Herzegovina' (2013) 15 Journal of Genocide Research 21, 30; Kurt Mills, *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute, and Palliate* (University of Pennsylvania Press 2015) 206–207.
[53] Peter Quayle, 'Unimaginable Evil: The Legislative Limitations of the Genocide Convention' (2005) 5 International Criminal Law Review 363, 365.
[54] ibid 366.

cleansing which left these crimes without a definitive understanding in international society.[55] However the last twenty years has seen crimes against humanity and ethnic cleansing rise in prominence as these crimes have been recognised in statutes, judgments from international courts and tribunals, and UN resolutions.[56] With these developments, researchers, such as William Schabas, have questioned the need to redefine the crime of genocide when these other terms may be more applicable.[57]

Notwithstanding these developments there is a certain 'allure' associated with the genocide label for academics and activists which is missing in the terms crimes against humanity and ethnic cleansing.[58] As David Luban states everyone, apart from 'a handful of international lawyers', views genocide as the crime of crimes.[59] The genocide label can also be of 'great emotional importance to victims.'[60] For victims of atrocities, genocide is the 'pinnacle of evil', and they use the word to draw attention to their plight as they have experienced the 'indifference of the outside world to their suffering.'[61] While the emotional importance of the genocide label to victims cannot

[55] Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 229.
[56] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 118–119; Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 216–217, 233; Martin Steinfeld, 'When Ethnic Cleansing is not Genocide: A Critical Appraisal of the ICJ's Ruling in *Croatia v. Serbia* in relation to Deportation and Population Transfer' (2015) 28 Leiden Journal of International Law 937, 941.
[57] William A Schabas, 'The "Odious Scourge": Evolving Interpretations of the Crime of Genocide' (2006) 1 Genocide Studies and Prevention 93, 97. See also Madeline Morris, 'Genocide Politics and Policy' (2003) 32 Case Western Reserve Journal of International Law 205, 210–211; Peter Quayle, 'Unimaginable Evil: The Legislative Limitations of the Genocide Convention' (2005) 5 International Criminal Law Review 363, 371.
[58] Madeline Morris, 'Genocide Politics and Policy' (2003) 32 Case Western Reserve Journal of International Law 205, 210.
[59] David Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report' (2006) 7 Chicago Journal of International Law 303, 306.
[60] Marianne L Wade, 'The Criminal Law between Truth and Justice' (2009) 19 International Criminal Justice Review 150, 153.
[61] Leo Kuper, 'Theoretical Issues Relating to Genocide: Uses and Abuses' in George Andreopoulos (ed), *Genocide: Conceptual and Historical Dimensions* (University of Philadelphia Press 1994) 31, 35; Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (United States Holocaust Memorial Museum 2016) 35.

be underplayed, research has shown that that the label genocide can be seen as a distraction to effective action to prevent genocide.[62]

With the symbolic value of the word potentially limiting the ability of states to respond to genocide, academics have been questioning the effectiveness of the genocide label and debating whether the genocide label should be employed in the midst of violence or should an alternative way and means of confronting the crime of genocide be utilised.[63] In one such proposal it was contended that in dealing with the failure of states to respond to ongoing claims of genocide due in part to its high moral value and its troublesome definition, states should to abandon the use of the term genocide in the midst of violence and instead genocide should be considered under an umbrella category of international criminal law, atrocity crimes.

1.5 Responding to Genocide through the Concept of Atrocity Crimes

David Scheffer, who served as the United States Ambassador-at-Large for War Crime Issues under the Clinton administration, advances the concept of atrocity crimes, an overarching term of international criminal law which encompasses the crimes of genocide, crimes against humanity, ethnic cleansing, and serious war crimes.[64] Scheffer argues that this new term atrocity crimes should be employed instead of the word genocide to characterise violence as it will 'liberate' governments and international organisations from tackling the tricky task of applying the legal definition of genocide to a given situation.[65] Scheffer contends that this new category of crimes is needed to replace the genocide label as his diplomatic experience led him

[62] Gareth Evans, 'Crimes against Humanity: Overcoming Indifference' (2006) 8 Journal of Genocide Research 325, 331.
[63] ibid 330.
[64] David Scheffer, 'Genocide and Atrocity Crimes' (2006) 1 Genocide Studies and Prevention 229, 237–238.
[65] ibid 229.

to view the word genocide as 'insufficient and even, at times, counterproductive' in responding to violence as the term has been applied to 'describe atrocities of great diversity, magnitude, and character' and is 'all too often [an] intimidating brake on effective responses.'[66] Scheffer argues that it should not matter whether genocide can be determined for states to act in response to violence, what should matter is that states actually respond and therefore the term atrocity crimes should be used by 'public officials, military officers, the media, and academics' to appropriately capture the scale of violence so as to ensure 'timely and effective responses'.[67] In justifying the inclusion of the three other crimes alongside genocide in the category of atrocity crimes, Scheffer highlights how the different crimes that comprise atrocity crimes have all been recognised by international courts and tribunals as serious crimes of international law which require a response.[68] This means therefore that there should be no difference in employing the atrocity crimes category rather than the term genocide as a means of preventing and responding to violence.

Scheffer's proposal has received mixed response from scholars and experts in the field. William Schabas agrees that the proposal has merit as the evidence of the treatment of the different crimes of international law by international tribunals and by states and the UN illustrates that there is no distinction in legal consequences between the crimes, and therefore a unified term would add more coherence and greater simplicity to prevention.[69] Martin Mennecke lends support to the concept of atrocity crimes by arguing that the suffering associated with mass atrocities should not be

[66] ibid 230.
[67] ibid 237.
[68] ibid 237.
[69] William A Schabas, 'Semantics or Substance? David Scheffer's Welcome Proposal to Strengthen Criminal Accountability for Atrocities' (2007) 2 Genocide Studies and Prevention 31, 31–36.

'measured in labels.'[70] Michael Bazyler approves Scheffer's proposal as a means of removing the stigma around the use of the term genocide which impacts on international responses to genocide.[71] Gareth Evans says there may be a benefit to utilising the term atrocity crimes in the midst of violence, and leaving the determination of the crime of genocide to international courts and tribunals.[72] Dan Kuwali also agrees that the term atrocity crimes should be used for 'policy discussion purposes' surrounding the response to a situation whilst leaving the determination of which crime is committed to international courts and tribunals.[73] On the other hand, a common argument amongst those who dismissed Scheffer's concept is that new words will not change the absence of political will to tackle genocide and other serious crimes.[74] Furthermore as discussed above, genocide is a powerful word for victims which means that a new label could be perceived as diminishing their suffering.

While 'atrocity crimes' is not without its shortcomings as a term to be employed to respond to violence, neither is the word genocide. In fact the flaws are more apparent with the word genocide, as discussed previously, as states have been reluctant to take action in response to claims and evidence of genocide and actors have faced difficulties in identifying the elements of the crime in an ongoing situation. Therefore this thesis as well as examining the utility of the definition of the crime of genocide as a means of prevention will also address the utility of

[70] Martin Mennecke, 'What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word"' (2007) 2 Genocide Studies and Prevention 57, 64.
[71] Michael J Bazyler, 'In the Footsteps of Raphael Lemkin' (2007) 2 Genocide Studies and Prevention 51, 54.
[72] Gareth Evans, 'Crimes against Humanity: Overcoming Indifference' (2006) 8 Journal of Genocide Research 325, 331.
[73] Dan Kuwali, 'Old Crimes, New Paradigms: Preventing Mass Atrocity Crimes' in Robert I Rotberg (ed), *Mass Atrocity Crimes: Preventing Future Outrages* (Brookings Institution Press 2010) 45.
[74] Martha Minow, 'Naming Horror: Legal and Political Words for Mass Atrocities' (2007) 2 Genocide Studies and Prevention 37, 37–38; Payam Akhavan, 'Proliferation of Terminology and the Illusion of Progress' (2007) 2 Genocide Studies and Prevention 73, 73–75.

employing the atrocity crimes category in confronting and preventing potential situations of genocide. The utility of the atrocity crimes label is a core research theme that will flow throughout this thesis, so it is important to clarify for the purposes of my research what is meant by the term atrocity crimes, who should use it, and when should it be employed.

1.5(i) What are the Atrocity Crimes?

I would agree with Scheffer that the term atrocity crimes should be used as an umbrella category to describe genocide, crimes against humanity, ethnic cleansing, and war crimes. This thesis will contend that these four types of crimes should be included for response and prevention purposes under the broader category of atrocity crimes, as while the elements that can comprise these crimes can vary in severity and scale and there are arguments surrounding the gravity of these crimes in the hierarchy of international criminal law, all four share several overlapping elements; particularly the acts that comprise the *actus reus* of the individual crimes. This means that some or all of them could be present in the same incident, which then leads to the difficulty of distinguishing these crimes in times when a prompt response is required to prevent or halt the violence. Including these four crimes under the banner of atrocity crimes would remove the focus off determining which specific crime was committed when seeking a response to a situation and place the focus solely on states to respond to each atrocity as each crime is of a serious nature in international criminal law.

Of the four crimes, ethnic cleansing is the only one not defined or included in an international criminal law statute. In particular it is not included under the Rome Statute of the International Criminal Court which governs the responsibility of

individuals for the perpetration of the three other crimes.[75] If individuals will not be convicted for ethnic cleansing, at least at the International Criminal Court, should the term be included under the banner of atrocity crimes? While it may not be defined in statute, the crime of ethnic cleansing has been recognised in the judgements of international courts and tribunals.[76] Furthermore the term is prevalent in policy discussions surrounding which crimes have been committed in various situations over the last number of decades, so if the term was omitted from the category of atrocity crimes it would mean that there would be gap in the understanding of international criminal law. This would be because there would be confusion surrounding whether a crime constituted an atrocity crime or an act of ethnic cleansing; this confusion may impact on states' response to a situation.

A key argument in favour of the inclusion of ethnic cleansing within the category of atrocity crimes is that states have accepted in adopting the Responsibility to Protect doctrine (hereafter 'RtoP') that they have a responsibility to protect citizens from the perpetration of ethnic cleansing alongside genocide, crimes against humanity, and war crimes.[77] Therefore the four crimes, regardless of whether they share some similarities or have distinct differences, are all crimes of a serious nature under international law which states have a duty to protect populations from experiencing. Utilising the atrocity crimes concept does not

[75] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) Article 6 (Genocide), Article 7 (Crimes against Humanity), and Article 8 (War Crimes).
[76] *Prosecutor v Stakić* (Trial Judgment) IT-97-24-T (31 July 2003) [519]; *Prosecutor v Krstić* (Appeals Judgment) IT-98-33-A (19 April 2004) [31], [33]; *Prosecutor v Blagojević and Jokić* (Appeals Judgment) IT-02-60-A (9 May 2007) [123]; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, [190]; *Prosecutor v Tolimir* (Trial Judgment) IT-05-88/2-T (12 December 2012) [739]; *Prosecutor v Tolimir* (Appeals Judgment) IT-05-88/2-A (8 April 2015) [202], [208]–[212]; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, [510].
[77] United Nations General Assembly Resolution 60/1 '2005 World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1, para. 138–139.

mean that all the crimes included within the remit have to be regarded as being of equal status or gravity in international law; rather the atrocity crimes category is used to show that regardless of the type of atrocity being committed, the international community has a responsibility to respond to serious violations of international criminal law.

1.5(ii) Utilising the Atrocity Crimes Category?

In advocating the use of the term atrocity crimes, I would argue that it should only be used as a non-judicial legal-political term by political actors, civil society actors, the media, academics, and anyone seeking a response to a given situation as a part of policy discussions surrounding how a state should respond to that particular situation. In practice it would mean that actors – be it state officials, intergovernmental officials, civil society organisations, members of the media, or victims of the violence – who are advocating that a state or intergovernmental organisation should respond to a situation would use the label atrocity crimes to characterise the violence. In employing this label they would refer to a state's responsibility to protect populations from all atrocity crimes rather than the specific crime, as this may end up involving difficulties of distinguishing the elements of the crime which allows states to evade their responsibilities to protect populations. The label would also be used when state, regional or intergovernmental organisations propose to take action, whether coercive or non-coercive, through the UN to respond to a situation.

The label would be used by these actors before violence breaks out, when conditions and factors that give rise to the perpetration of each atrocity crime are visible, and it would be employed in the midst of violence. This term 'in the midst of violence' and the similar terms 'an ongoing situation' and 'ongoing violence'

will be referred to throughout this study so as to reflect the different nature and forms of violence which are seen in the world currently. As the atrocity crimes label is a legal-political concept rather than a purely legal term, as discussed in Section 1.5(iv), it would not require a nexus with armed conflict in the way that war crimes specifically require, rather it would apply to diverse situations such as international armed conflict, internal armed conflict, internal armed conflict involving international actors, civil unrest, humanitarian crises, and political, social, and economic instability. Therefore in employing the terms 'in the midst of violence' and 'an ongoing situation' throughout this thesis, the point is to illustrate that evidence or threats of violence in situations which may not meet the legal definition of armed conflict are nonetheless regarded as settings in which atrocity crimes may occur which require an international response to prevent and halt.

Furthermore the word can be used as a term to warn of signs that violence may occur if there is evidence of a risk of violence occurring. The term is advantageous because as will be described in more detail in Chapter Four, the warning signs for the different atrocity crimes all share similar factors and conditions, which means it can often be hard to distinguish the crimes and identify which crime may be perpetrated before violence occurs. In fact as will be highlighted throughout this thesis, multiple violations of international criminal law may take place at the same time so a situation could be displaying warning signs of multiple crimes which means that genocide or the other atrocity crimes may not be identifiable at the time. As atrocity crimes would not have a distinct criminal legal definition, it would mean states do not have to wait for certain conditions or elements such as a certain level or scale or numbers involved of each

individual crime to be present to respond. In employing the atrocity crimes label before or in the midst of violence the focus would therefore be removed off predicting, identifying, and determining which crime was or will be committed, and instead the focus of actors would be on the response to the situation.

1.5(iii) Responding to Atrocity Crimes

The Responsibility to Protect doctrine should be the basis of the obligation for states to respond to atrocity crimes as it sets out the responsibilities of states to act through diplomatic or military means under the Charter of the United Nations in response to evidence or precursors of the four crimes included under the category of atrocity crimes.[78] This responsibility is similar to the responsibility that states have to respond to genocide under Article I and VIII of the Genocide Convention, but it ensures that states have a responsibility to act in response to a greater number of crimes and potentially greater number of situations than the Convention may apply in which shows the utility of the RtoP doctrine in responding to situations or threats of violence.

However the RtoP doctrine is only a 'soft law' political document adopted by the members states of the UN in the mid-2000s – unlike the Genocide Convention which is a binding legal treaty with seventy years of history, which means it could be argued that the responsibility to prevent (and punish) genocide is of greater importance than the broader RtoP as it is enshrined in treaty law and is a binding legal obligation rather than a political promise of action. It could also be argued that under the Genocide Convention any state could act under Article I to respond to genocide, whilst under the RtoP doctrine the responsibility to act is entrusted

[78] United Nations General Assembly Resolution 60/1 '2005 World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1, para. 138–139.

to the United Nations Security Council. In addressing these two potential arguments, it is important to note though that states have been reluctant to convert this obligation to prevent and respond into action and instead, as highlighted above, the Genocide Convention's promise of prevention has laid largely dormant with states taking little or no effective action to respond to claims or evidence of genocide. So while the Genocide Convention may contain a legal obligation to act, in distinction to the RtoP, it means nothing if states are willing to ignore this provision. The short history since the adoption of the RtoP doctrine, which will be discussed further in Chapter Four, shows that the application of the RtoP is also subject to whims of states. Therefore regardless of whether it is a legal or political/moral obligation to respond, the Genocide Convention and the RtoP are both dependent on political will, which means that supplementary proposals aimed at ensuring states take action to protect civilians need to be explored. This is why this thesis is proposing to focus on employing the atrocity crimes label to characterise ongoing violence if the application of the Genocide Convention in a given situation is complicated by issues of identifying and determining genocide.

Employing the term atrocity crimes to characterise violence or as a justification for a state/international response to a situation will not complicate the response of states, as the options that states have to respond to the four crimes will remain the same under the category of atrocity crimes as states will have recourse to Chapter VI and VII measures under the UN Charter as part of the RtoP doctrine. In fact rather than complicate the response, the use of the term atrocity crimes could benefit the response to a situation as it would address the difficulties surrounding invoking the genocide label, issues such as the stigma surrounding the word and the politicisation of the word which can often narrow the options available to

policymakers to respond to ongoing situations. Therefore employing the term atrocity crimes to characterise violence is beneficial as the concept of atrocity crimes would not face the same stigma as genocide so states should be freer to employ the term to characterise violence and make a policy decision on how to respond to a situation rather than feel like the label they apply to a situation will dictate the response, such as states regarding genocide as requiring a military response. Utilising the atrocity crimes label would ensure that there would be a wider scope of options, coercive and/or non-coercive, available to states to respond to violence, which would be beneficial to the prevention of genocide as this thesis will show that in responding to genocide there will not be one perfect response, rather different situations require different responses. This shows the utility of the atrocity crimes label as a term to be employed as a preventative label, a key theme that flows through the wider research on the utility of the genocide label.

While the atrocity crimes label would be replacing the specific definitions of genocide, crimes against humanity, ethnic cleansing, and war crimes as a term to apply in policy discussions concerning prevention and intervention before or in the midst of violence, this does not mean that these crimes will no longer apply or that atrocity crimes will become a crime of international criminal law rather the term will be confined to prevention and to policy discussions surrounding prevention.

1.5(iv) A Legal-Political Concept not a Judicial Term

This thesis is not advocating for a legal definition of atrocity crimes, rather the thesis is contending that the individual crimes that make up the umbrella category of atrocity crimes would still remain crimes of international law however these terms would not be employed to characterise violence while it is ongoing. Instead

the thesis will recommend that the question of which crime or crimes was/were perpetrated would be left until a competent international court or tribunal had the time, and the benefit of access to documentary evidence and witness testimonies to make a determination on the act and intent elements of the crime. This would mean that actors would not be rushed into a making a determination in the midst of a situation without a full comprehension of the reality of a situation, rather in the aftermath of a situation there would be a careful consideration of the evidence available to justices so as to arrive at a conclusion on the question of which crime was perpetrated. In recommending this policy change, it is important to concentrate on whether leaving the determination of genocide to a court and instead employing the atrocity crimes label would have an impact on the status and application of international criminal law, and whether it would have an effect on the underlying rules of international criminal law.

The principle of legality is central to the rule of law and the application of international criminal law as it requires that laws which are enacted are clear and precise and that the administration of justice is fair and impartial. There are several different strands to the principle of legality in international criminal law, which are set out under the Rome Statute of the International Criminal Court. Article 22(1) sets out the principle of *nullum crimen sine lege*, which states that 'a person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.' Under Article 22(2) it states that 'the definition of a crime shall be strictly construed and shall not be extended by analogy.' Article 24(1) sets out the principle of non-retroactivity, which states that 'no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.' The purpose of these articles and the rationale

underlying the principle of legality is to provide specificity and clarity to the law and its application so that 'people can know whether their planned course of action is acceptable or not.'[79]

With the principle of legality central to ensuring the rule of law, it is important that utilising the term atrocity crimes would not contribute to contravening any of the elements of this principle by introducing uncertainty into the application of law, in particular the application of the Rome Statute of the International Criminal Court which governs the responsibility of individuals for the perpetration of genocide, crimes against humanity, and war crimes. In advocating the use of the word atrocity crimes, this thesis is contending that the term atrocity crimes would purely be used in connection with prevention, and would have no relation to the punishment of the crimes committed in a situation. This would mean that the atrocity crimes label would not be in conflict with the principle of legality as an individual's responsibility for the violation of international criminal law would still be based on the existing statutes, including the Rome Statute. Individuals would not be held criminally responsible for perpetrating atrocity crimes, rather their conduct would be based on the existing laws which fall under the jurisdiction of a specific court, which would mean the principles of *nullum crimen sine lege* and non-retroactivity would not be infringed upon by employing the term atrocity crimes. Furthermore in advocating utilising the term atrocity crimes this thesis is not arguing for international judges to change or extend the meaning or definition of the individual crimes by analogy, rather these justices should continue to strictly construe the definition of the crimes under their jurisdiction. The atrocity crimes

[79] Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 18.

label would not change the status of international law or the clarity surrounding the application of law as while the atrocity crimes label may be used around policy discussions on prevention and response, individuals who perpetrate an atrocity crime or crimes would still know they could be held responsible for the perpetration of genocide, crimes against humanity, and war crimes.

While these crimes may not be used to characterise the behaviour of individuals and parties in ongoing violence, with the introduction of the concept of atrocity crimes it would in fact not be wholly different to the current state of the application of international criminal law. In that while political discussions between state and intergovernmental officials over which crimes may have been violated in an ongoing situation may involve these actors labelling the violence as a specific crime or crimes, this does not mean that an individual will not be prosecuted for committing other crimes which are not prevalent in discussion at this time. For instance, as will be discussed in relation to Rwanda, genocide was not a prevalent term in international discussion surrounding the response to the violence however this did not prevent the majority of case law in relation to the Rwandan Genocide involving indictments for genocide. This shows that regardless of what label is applied to a situation when it is ongoing, it will not affect the identification and determination of other crimes in an international court and tribunal. Therefore while employing the atrocity crimes label in the midst of violence may not refer to a general crime being committed, it will not hinder the prosecution and punishment of the crimes committed as the individual who perpetrated the crimes will remain accountable under the existing statutes of international criminal law.

1.5(v) A Practical and Useful Term for Prevention

This brief discussion on the concept of atrocity crimes has introduced how this research perceives and understands the atrocity crimes label and how it will be applied before and/or in the midst of violence as a preventative term in policy discussions around preventing and responding to violence. The benefits and advantages of this label have been signposted and pinpointed in this section, and will be highlighted in further chapters in reference to the difficulties associated with defining, interpreting, predicting, identifying, determining, preventing, and responding to the crime of genocide. The aim will be to show how these complexities of the genocide label can be addressed by adopting the atrocity crimes label as a preventative label. To address the key concern of this thesis, the utility of the respective labels as preventative terms to be employed in the midst of violence so as to respond to and prevent violence, this thesis will develop along a research approach that has been shaped by the research studies and critiques of the genocide label.

1.6 Research Approach

While it seems the majority of research on the subject of genocide questions the effectiveness of the term, the field of genocide studies continues to grow with research perspectives expanding every day. While always an interdisciplinary topic – with initial researchers of genocide coming from the fields of history, politics, sociology, philosophy, anthropology, psychology, and of course law – the area of genocide studies became inundated with researchers from a variety of different disciplines including economics, linguistics, geography, and medicine.[80] An ever expanding collection of research now covers diverse topics such as the psychological reasons

[80] Daniel Feierstein, 'Leaving the Parental Home: An Overview of the Current State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 257, 257; Adam Jones, 'Diffusing Genocide Studies, Defusing Genocides' (2011) 6 Genocide Studies and Prevention 270, 274.

people commit genocide, the economic conditions that give rise to the perpetration of genocide, the language and propaganda employed by perpetrators, the gendered nature of the acts, and the public health impact of genocide.

Nearly every case of mass violence has been studied under the banner of genocide studies. The study of genocide is not just concentrated on post-Convention situations of violence, rather there is a considerable amount of research conducted on historical case studies such as the Armenian Genocide, the Holodomor, the slave trade, and on colonial conquests in the Americas, Australia, Africa, and even here in Ireland. Ben Kiernan even published a book examining historical cases of genocide perpetrated all the way back to the time of Sparta.[81]

This illustrates that virtually every aspect of the crime of genocide is now being explored within the rubric of genocide studies, which makes it difficult for research such as this to make a new contribution to the study of genocide. Notwithstanding this the brief overview of genocide studies in this chapter has highlighted some interesting areas for exploration. Research has highlighted the flaws with the definition of genocide which impact on its applicability to violence across the globe. Research has also highlighted the significant issue of states lacking the political will to respond to genocide which has rendered the preventative potential of the Convention as ineffectual at best. However the research has highlighted that this lack of political will may be in fact due to the stigma surrounding the genocide label which limits the responses of states. Therefore the study of genocide studies has highlighted that there may be difficulties identifying genocide in the midst of violence due to a deficient definition of genocide that cannot be determined in the midst of violence

[81] Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (Yale University Press 2007).

and/or due to the symbolic nature of the genocide label which distracts from effective responses. This is a fruitful area for further discussion of genocide, and which provides the foundation of this research.

In addressing the utility of the genocide label as preventative term, the core research question of this thesis is focussed on the difficulty of identifying the crime of genocide in the midst of violence. This thesis is contending that in understanding why states and international actors fail to label situations as genocide it is of fundamental importance to examine the potential limitations of the genocide label as a term to be employed to prevent and respond to violence. The research aims to explore this contention that the genocide label may be ineffectual in preventing and responding to genocide by examining the potential complexities which may affect the international community's identification of elements of genocide in the midst of violence and application of the genocide label to an ongoing situation.

With the knowledge of the potential limitations of the genocide label, this thesis is taking a fresh approach to the study of genocide prevention by concentrating on the utility of states and international organisations characterising an ongoing situation as genocide, and questioning whether the international community should persist in using the genocide label in the midst of violence. In focussing on this question of the utility of applying the label in the midst of violence, the objective of this thesis is to provide a contemporary study of genocide prevention which is relevant to how states and international organisations confront claims of genocide. This is an intriguing research area as despite the growth of knowledge of the crime of genocide, the world continues to see claims of genocide in the seventy years since the adoption of the Genocide Convention.

The continued failure to confront genocide illustrates that new ways of thinking about and framing genocide need to be considered, including questioning whether to persist with using the genocide label in the midst of violence or instead looking to employ a term such as atrocity crimes to characterise ongoing violence. With the complexities, outlined in the overview of genocide studies, surrounding the genocide label, utilising an umbrella category may improve international responses to violence and efforts to prevent genocide in the first place. This research therefore has the objective of illustrating that issues of identifying genocide due to a problematic definition and understanding of genocide mean that the response to ongoing genocides or the prevention of potential genocides requires a new approach, and in this study a new term. To address this research objective, the study will develop along three key strands.

1.6(i) Defining the Crime

The first strand of this research will address the preliminary issue of which definition of genocide is to be applied in an ongoing situation, and the potential limitations of this definition in the midst of violence. The starting point of this analysis will be the legal definition of genocide presented within the Genocide Convention. The study will explore the provisions of the Convention for potential ambiguities in the definition of genocide which could conceivably impact on the international community using the legal definition to make a determination on whether the crime of genocide is being perpetrated in an ongoing situation.

However with the dissatisfaction, outlined in this chapter, within academia and civil society with the legal definition of genocide, it is clear that there are drawbacks with employing the Genocide Convention's definition of genocide. The thesis will explore whether the alternative definitions crafted by these actors to remedy the faults within

the Convention are more suitable to addressing the crime of genocide? Within the various definitions created since the adoption of the Genocide Convention, has a definition of genocide been presented that is more readily applicable to characterise ongoing violence? However it will be important to address the likelihood of the international community accepting or agreeing upon a new definition of genocide.

Furthermore with the existence of multiple definitions of genocide, it raises the valuable question of whether there has been a divergence between the legal definition of genocide as set out in the Genocide Convention and society's understanding of the crime of genocide. Is there a difference between the definition employed by international justices, UN diplomats, politicians, the media, academics, civil society, and the general public? If there is a divergence on the understanding of genocide held amongst different actors, what impact will this have on the international community's response to a claim of genocide?

This strand of the research is a critical issue as in responding to claims of genocide in the midst of violence, a coherent and precise legal definition of genocide is required to accurately answer whether the violence is genocidal in nature. A failure to possess a clear-cut legal definition of genocide that can be applied in an ongoing situation to make an authoritative finding about the existence of the crime of genocide dooms the legal categorisation of genocide to be ineffective or even worthless in situations with indications of genocidal violence.

1.6(ii) Identifying Genocide in the Midst of Violence

The second strand of the research is concentrated on the core research question of this study on the complexities surrounding identifying genocide in the midst of bloodshed, and the corollary issue of the efficacy of the genocide label as preventative term in the

midst of violence. To address this question this research will examine the difficulties with identifying the crime of genocide in the midst of violence due to the definition of genocide and the potential ramifications of a genocide finding on the response to a situation.

The research will examine how the legal definition has been interpreted and understood by international criminal courts and tribunals, commissions of inquiry, UN actors and bodies, and signatory states to the Convention. The interpretation of these actors is crucial for clarifying how the legal definition of genocide is applied in practice. Within these various actors' discussions of genocide, have flaws become apparent when seeking to apply the definition of genocide to ongoing violence? Are there significant issues within provisions of the definition of genocide which render it unidentifiable or indeterminable in the midst of bloodshed? If there are complications involved in applying the definition of genocide to an ongoing situation, what does this say about the utility of the genocide label as a means of prevention and response to deadly violence?

In addressing the potential complexities of applying the genocide label in the midst of violence, it is necessary to examine the role of states and international actors in the prevention of and reaction to genocide. The thesis will examine why states have often been averse to labelling a given situation as genocide despite claims that genocide is being perpetrated. An assumption within the academic and activist communities is that the main stumbling block to labelling violence as genocide is not a lack of knowledge of the perpetration of the crime but a lack of political will amongst states and intergovernmental organisations to take action in response to a claim of

genocide.[82] Is this assumption accurate, or is it the case that the failure to label situations as genocide can be traced back to faults within the definition of genocide which render the definition immobilised while violence is ongoing?

An important corollary matter to address is the *utility* of labelling a situation as genocide in the midst of violence. Even if genocide is identifiable, is it beneficial to the victims of a genocide to proclaim genocide is being perpetrated in ongoing violence? Is employing the genocide label in the midst of violence to characterise a situation an effective means of preventing and responding to genocide? Does labelling the situation as genocide lead to an effective response to protect a targeted population or could the labelling of a situation as genocide potentially reduce the options available to policymakers in addressing violence due to the stigma surrounding the concept of genocide? Does this symbolic value mean that actors and states are more unlikely to identify and label a situation as genocide in the interests of peace? If the genocide label proves to be a barrier to action, should we persist with seeking to identify the crime and employing the term in the midst of bloodshed or should we remove the focus off the genocide label?

This second strand of the research sits at the centre of this study, and the answers to the questions laid out in this section will go a long way to addressing whether the crime of genocide can be identified in the midst of violence and even if it can be identified should we label ongoing violence as genocide. If there are significant issues with the genocide label as a preventative term due to a flawed definition and/or the stigma attached to the label limiting the actions available to an actor to respond, it

[82] See discussion in Douglas W Simon, 'The Evolution of the International System and its Impact on Protection against Genocide' in Neal Riemer (ed), *Protection against Genocide: Mission Impossible?* (Praeger 2000) 34; Samantha Power, 'Raising the Cost of Genocide' (2002) 49 Dissent 85, 90; Eyal Mayroz, 'The Legal Duty to "Prevent": After the Onset of "Genocide"' (2012) 14 Journal of Genocide Research 79, 93.

raises the question of the long-term viability of the genocide label as a means of preventing and responding to genocide.

1.6(iii) Preventing and Responding to Genocide

The third strand of this study follows on from this stance that if the second strand of the research demonstrates that genocide cannot be identified as it is too arduous to pinpoint or too dangerous to proclaim, how should states and the international community prevent or respond to the potential situations of genocide. The key question to be addressed is whether the international community should continue to label ongoing situations as genocide, or instead look for a term or terms which are more acceptable or applicable to describe ongoing violence? Should the relevant institutional and diplomatic actors, as an alternative in responding to claims of genocide, refer to the umbrella term 'atrocity crimes' to describe an ongoing situation? Should the genocide label instead be reserved for after violence has ended and a clear determination of genocide can be made by an international court or tribunal? Would deferring a finding on genocide and instead employing a general label to characterise the violence remove the complexities of applying the genocide label in the midst of bloodshed?

However an important issue to be tackled would be the disadvantages associated with the label atrocity crimes, as genocide is an important label for victims of violence due to its symbolic value. Would employing the label diminish the suffering felt by the victims? Furthermore, would a new label even translate into effective action? Would states show any more willingness to act in response to atrocity crimes than they have for genocide? Will any new label sufficiently challenge the absence of political will that has marked the time period since the adoption of the Genocide Convention?

Nevertheless, the continued failure to prevent genocide is a sign that alternative ways of preventing and responding to genocide need to be explored.

This is why the third strand of this research is critical as it presents a promising way of approaching the study of the crime. If genocide cannot be identified in the midst of violence, due to a variety of factors, a different means of preventing and responding to genocide needs to be proposed. The label atrocity crimes provides this, by removing the focus off definitions and interpreting crimes in the midst of bloodshed, and putting the sole focus on prevention of and response to genocide which is what Lemkin first imagined when he created the concept of genocide and which was enshrined within the Genocide Convention.

To address this strand and the other strands of the thesis along with the key research questions outlined above, this study will combine a doctrinal approach to legal research with contextual and critical analysis of legal rules and practices, in analysing academic studies, case law of international courts and tribunals, and documentation and reports produced by governmental, intergovernmental, and non-governmental organisations.

1.7 Methodological Framework

This thesis will employ doctrinal legal analysis, which provides an analytical view of the development of the law and the reasoning underlying the law, as the thesis aims to examine how the concept of genocide was developed and how it is applied in practice.[83] Nearly all forms of legal research contain some elements of doctrinal analysis as the purpose of doctrinal research is to illuminate what is the law in regard

[83] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 19.

to a certain issue.[84] The approach of my research here is to conduct more than simply a description of the law though; in conducting doctrinal research one can critique the law by highlighting issues within the application of the law in courts and doctrinal research can proffer solutions for any issues identified and recommend reforms to the law.[85] This is crucial for this thesis in assessing the utility of applying the provisions of the Genocide Convention in the midst of violence as the thesis will not only examine what the law of genocide is but critique how the law is applied and identified in practice.

Conducting doctrinal research involves the examination of statutes and case law so as to understand the application of law, which is why this thesis will examine the provisions of the Genocide Convention, documents related to the drafting of the Convention, and the case law of international courts and tribunals.[86] The analysis of these primary sources will highlight how genocide has been defined and how the key elements of genocide have been identified and interpreted; this discussion will also highlight any ambiguities within the definition of genocide.[87] Doctrinal analysis will be central to addressing the first strand of this research as it helps in describing how genocide is defined in law, and it will also aid in addressing parts of the second strand

[84] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007) 64; Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment'* (Wiley-Blackwell 2008) 31; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 105.

[85] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 111; Rónán Kennedy, 'Doctrinal Analysis: The Real "Law in Action"' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 34.

[86] Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 3; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 106; Rónán Kennedy, 'Doctrinal Analysis: The Real "Law in Action"' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 30.

[87] See discussion of purpose of doctrinal research in Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 111.

of the research by examining how the law has been interpreted and identified in case law. The analysis of the primary legal sources, supplemented by secondary legal texts including academic studies on the Convention and the case law, will help illuminate the complexities of the genocide label which will aid this thesis in addressing the research questions set out above.

While the doctrinal approach to legal research will be important for providing the groundwork for this thesis by highlighting the state of the law of genocide, how the law is understood and interpreted in the Convention and by international justices, the doctrinal approach has its limitations which mean that this approach cannot fully address the research questions. A limitation of doctrinal research studies is that it often ignores non-legal factors such as the impact of society, politics, and economics on the application of law.[88] Doctrinal legal analysis views these issues as external to the operation of law, however law does not operate in a vacuum. External realties will influence and shape the direction and application of the law which means that doctrinal research is limited as doctrinal research 'ignores the role played by acts of subjective interpretation in the creation, identification, articulation and application of rules, and also in their practical implementation and justification.'[89]

These faults with doctrinal analysis can be addressed by employing socio-legal research methodology, which involves analysing law in its context, how it is shaped

[88] Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui(eds), *Research Methods for Law* (Edinburgh University Press 2007) 5; Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007) 44.

[89] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007) 113. See also Shane Kilcommins, 'Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 15–16.

by politics, economics, society, and international relations.[90] Incorporating a socio-legal methodology is beneficial to this research as it aims to highlight 'how legal rules, doctrines, legal decisions, institutionalised cultural legal practices work together to create the reality of law in action'.[91] Examining law through the lens of social context and social sciences provides a better 'understanding of what problems the law can solve and what social, economic and cultural factors it remains dependent upon.'[92] Conducting critical legal analysis allows this research to examine how the law of genocide has been treated in other disciplines, this is important as shown by the previous discussion that genocide has been examined by academics from a wide variety of disciplines. Genocide is a very much an interdisciplinary subject so employing a broader research methodology is important to understand not only the legal implications but also the political and social implications of utilising the genocide label as a means of prevention.

In employing a critical analysis of the legal rules and practices of the law of genocide, this methodology is ensuring that the research assesses the wider scope of the application of the law of genocide and how it has been and is influenced by the world around it and shaped by the actors applying the law; which will show how the law operates in action and reality. Extending the analysis beyond a legal analysis of statutes and case law will highlight the other factors that contributed to the emergence and development of the genocide label and the application of the Genocide

[90] Darren O'Donovan. 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 109.
[91] Reza Banakar, 'Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 139.
[92] Darren O'Donovan. 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 108.

Convention now.[93] Therefore in analysing the application of the genocide label in the midst of violence and to weigh up its utility as a preventative term it is important to understand the factors and conditions in society that impact and influence the development, interpretation, identification, and determination of genocide since its conception.

It is crucial to take this step in examining genocide through the socio-legal analysis as the law of genocide cannot be divorced from politics, even the creation of the concept genocide was influenced by the political situation surrounding Lemkin. The legal concept in the Genocide Convention is rooted in politics as it reflected the interests of the states that drafted the provisions. This thesis therefore cannot ignore the role that politics, society, history, and economics can play in determining whether the genocide label is applied in the midst of violence. The influence of these factors on the law of genocide will mean that there is always a subjective element when actors are faced with interpreting and applying the law of genocide, as there will be conflicting interpretations of the law.[94] There is not an objective meaning in law, rather actors will always have a choice in how the law is applied, or not applied as is often the case with genocide in least in relation to prevention. This means there will be an indeterminacy surrounding the application of the genocide label in a given situation, an idea that is pivotal to this thesis. That is why it is crucial to critically analyse the implementation and practice of the Genocide Convention not only in court rooms but in the words and actions of states, UN actors, and any other actor who uses the

[93] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007) 177.
[94] See discussion of limitations of doctrinal research methods in Shane Kilcommins, 'Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 15–16.

genocide label as a means of response. Analysing the subjective application of the law of genocide is important to this study so as to examine the utility of employing the genocide label as a preventative term in the midst of violence.

This is why this thesis will combine doctrinal research, with a critical legal analysis of the rules and practices of the law of genocide. This research will critically analyse how genocide has been defined, interpreted, identified, and studied in case law, research studies, academic works, the media, and state, intergovernmental, and nongovernmental reports, documents, speeches, press statements, meetings, and resolutions. In conducting a critical analysis of the application of the law of genocide this research is not collecting data through empirical research but rather is relying on data collected from these primary and secondary sources produced by states, intergovernmental organisations, nongovernmental organisation, political officials, international justices, lawyers, academics, researchers, the media, civil society groups, and victims groups so as to analyse how these bodies and actors have dealt with and confronted the issue of genocide. These primary and secondary sources will be critically analysed to examine how the actors, outlined above, have identified the elements of genocide, and the factors and conditions that impacted on and influenced these actors employing or in many cases not employing the genocide label to characterise ongoing violence.

While this research is concentrated on collecting information and data from an examination of primary and secondary sources, in assessing the complexities faced by actors in determining and identifying genocide it may have been beneficial for this research to conduct empirical research in the form of interviews. There is a limitation in concentrating on reports, documents, press statements, and case law

in that the motivation or the reasons behind the actors who use or do not use the genocide label or the difficulties faced by these actors in identifying the elements of genocide will not be fully discovered through examining primary and secondary sources. Therefore it may have been beneficial to conduct interviews with state and UN officials, members of international courts and justices, and investigators involved in finding evidence of genocide to discover the complexities faced by actors in identifying the elements of the crime and employing the genocide label to characterise violence.

However this thesis did not pursue this approach, due to doubts about ease of access to individuals to interview and questions over whether the information obtained from the interviews would have further illuminated the complexities of genocide beyond what was included in documents, reports, and speeches by these actors. In the primary sources produced by these actors they outline how the elements and signs of genocide can be identified before or in the midst of violence, so an interviews may not have provided further insight into identifying elements of the crime when it is already contained in case law and UN reports. Furthermore this thesis is not concentrating exclusively on the reasons underlying the use of the genocide label by these actors, rather it is aimed at examining if using the genocide label may improve a situation. Therefore interviews and any potential data collected from them would not have been central to addressing the research questions, rather an a critical examination of primary sources alongside examining the political environment of a situation would instead illustrate whether employing the genocide label in a situation is useful for preventive purposes.

Examining how actors have identified genocide in the midst of violence will aid this thesis in addressing the second strand of this research and the research

questions contained within this strand relating to the complexities faced by these actors in identifying genocide not only due to the legal elements of the crime but also the political and social environment surrounding the actors that make the determination and/or identification of genocide. Critically analysing how these actors arrived at their decisions on the question of genocide, whether it was strict legal interpretation or a careful balancing of wider political interests, will be pivotal to illustrating the utility of the genocide label as a preventative term, which is key to this thesis. A critical analysis of how the law of genocide operates in reality will show why this thesis is advocating for a reform of the approach to preventing and confronting the crime of genocide through employing the umbrella term, atrocity crimes, which will be central to addressing the third strand of this research on how to prevent genocide if the genocide is unsuitable in the midst of violence.

In engaging with a critical analysis of the rules and practices of the law of genocide through an examination of primary and secondary sources so as to address the questions outlined in this chapter, there are a number of case studies (principally the past and present situations in Burundi, the Central African Republic, Darfur, Rwanda, Sinjar, South Sudan, and the former Yugoslavian states) which will be explored to glean an understanding of genocide and its application in an ongoing situation.

1.7(i) Case Studies

Before justifying the selection of these particular ongoing and previous case studies of claimed or suspected genocide I would stress that as my research is primarily concerned with the response to ongoing situations, the thesis has not examined in detail the debates surrounding the application of the genocide label to historical

situations. The research is focussed on how actors define, interpret, and prevent the crime of genocide at the time it is occurring so as to assess the utility of the genocide label, rather than an analysis of whether it is appropriate or applicable to characterise historical atrocities as genocide. This has meant that current academic and government debates surrounding applying the genocide label to historical situations such as amongst other situations the colonial practices in Australia, Canada, and the United States, the actions of the German empire against the Herero people of Namibia, and the atrocities perpetrated against the Armenian people by the Ottoman empire have fallen outside the scope of this research. The findings of this thesis are limited therefore to the question of the utility of the genocide label as a means of response to an ongoing situation, rather than applying to an evaluation of the use of the genocide label as term to be used by survivors and victims for historical justice and accountability.

In assessing the utility of applying the genocide label to an ongoing situation, the aforementioned case studies have been chosen for this study because they highlight the variety of complexities involved in identifying genocide in the midst of violence. Rwanda, the former Yugoslavia, and Darfur have been selected for analysis due to the case law that emanated in the 1990s and 2000s of individual and state responsibility for the commission of genocide in these respective situations. The situations in Rwanda and the former Yugoslavia led to the establishment of ad hoc international criminal tribunals to prosecute those high-ranking individuals involved in the perpetration of violations of international criminal law, including genocide. The jurisprudence that emerged from these institutions was critical in clarifying the elements of genocide and elucidating on how the crime of genocide can be identified

from evidence and witness testimony, so the case law is crucial in illustrating how the definition of genocide is interpreted in the midst of violence.

The situation in the former Yugoslavia also resulted in two cases at the International Court of Justice examining a state's responsibility for the perpetration and prevention of genocide. In seeking to examine the issue of identifying genocide in the midst of violence, this thesis will be concentrated on whether genocide can be identified in the actions and behaviour of a state or non-state body so it is important to focus on how a court seeks to identify genocide in the actions of a state. The situation in Darfur is important from the point of view of examining the complexity of interpreting the crime due to the case of Omar Al Bashir, the former President of Sudan, at the International Criminal Court. The case is significant in that it was the first case concerning genocide at the International Criminal Court, and the discussion of genocide in this case is critical for illustrating the complexities of identifying genocide in practice.

The situations in Rwanda and Darfur are not only important for highlighting the difficulties of interpreting the definition of genocide in the case law, these case studies also highlight a variety of issues surrounding the complexity of preventing and responding to genocide. In particular the case studies of Rwanda, one of the UN's most tragic failings, and Darfur, which saw one of the largest civil society mobilisations in response to claims of genocide, have been selected for analysis so as to examine the role that political will plays on the response to a situation and the determination of genocide or the use of the genocide label by state actor. Alongside addressing how political will may constrain a state's response the discussion of genocide in these respective situations highlight the complexities faced by actors in predicting and identifying signs of genocide before or in the midst of violence due to

the issues of distinguishing the warning signs and elements of the crime of genocide from the other atrocity crimes.

Darfur, notably, shows the difficulties faced by state and/or UN created commissions of inquiry with examining and establishing evidence of violations of international criminal law in the midst of violence. The complexities of identifying signs and elements of genocide are never more apparent when these bodies examine in the midst of an ongoing situation whether genocide was perpetrated as not only seen by the separate UN and US investigations in Darfur, but also the UN investigations into the crimes committed in the Central African Republic and the Sinjar region on the Syria and Iraq border. These two situations have been chosen for this thesis as they are two relatively recent situations which involved UN mandated commissions of inquiry examining whether genocide was perpetrated in the respective situations. While illustrating the complexities faced by commissions of inquiries in identifying and distinguishing violations of international criminal law, the discussion of these situations will expand beyond to examine the response of states and international actors to claims and/or evidence of genocide potentially being perpetrated. The two case studies are both pivotal to this research as the commissions of inquiries arrived at two different conclusions on the question of genocide, in one investigation finding evidence that genocide may have been perpetrated by ISIS in the Sinjar region and in the other investigation finding that there was no reasonable basis to conclude genocide occurred in the Central African Republic. Therefore the wider discussions on the state responses to the respective situations will be illuminating with regard to the utility of the genocide label as a preventative term to be employed in the midst of violence.

The knowledge gained from the studies of these situations and the other case studies on the various complexities associated with employing the genocide label as a

preventative term will be employed to examine two ongoing situations which potentially involve the perpetration of genocide or signs that genocide may be perpetrated in the future. The examination of an ongoing situation is integral to this research as while the discussion of past cases of actual or suspected genocide can highlight the flaws of the genocide label, it is critical for this thesis to examine how these complexities affect the response to an ongoing situation so as to address whether in responding to evidence of signs or claims of genocide it is beneficial to employ the genocide label. It is important to apply the research findings on these case studies onto ongoing situations so as to provide a contemporary examination of the difficulties of applying the label genocide in the midst of violence and to highlight how these complexities are constant in every situation that involves the perpetration or the threat of the perpetration of genocide.

For the purposes of this research two African countries have been chosen, Burundi and South Sudan, so as to examine the complexities of identifying genocide. These two countries were primarily selected for this thesis due to the warnings over the last number of years from the primary UN actor dealing with genocide, the Special Adviser on the Prevention of Genocide, on the threat for these situations to develop and evolve into genocide.[95] This warning on the threat of genocide allows this thesis to examine the various strands of this research by examining how genocide has been defined, understood, predicted, identified, and responded to with regards to the response of the different actors involved in the respective countries. With a threat of genocide overhanging both countries, it is pivotal for this research to examine the advantages

[95] United Nations Security Council '7553rd Meeting' (9 November 2015) UN Doc S/PV.7553; United Nations 'Media Briefing by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide on his visit to South Sudan' (11 November 2016) Press Release; United Nations Security Council '7814th Meeting' (17 November 2016) UN Doc S/PV.7814, 4–6.

and disadvantages of labelling the situations as genocide so as to prevent and respond to the violence so as to the address the key concern of this thesis, the utility of genocide label as a means of prevention.

While the focus of this research may be concentrated on two African-based studies of genocide, the findings and conclusions will not specific to these situations but will rather be generalised to ongoing situations of violence that occur across the globe. For instance the findings in relation to these cases can be applied to the situation in Myanmar, a situation which has seen repeated claims that genocide is occurring over the last number of years. The situation in Myanmar may have been an interesting case study of the utility of the genocide label but limitations in terms of time available to conduct research, as the situation only developed in 2016-2017, meant that the research proceeded with the already selected research case studies of Burundi and South Sudan. While the situation of Myanmar has seen discussions on the question of genocide, these discussions are similar in nature to the other situations already under examination so the findings and conclusions in relation to the case studies in this thesis will be applicable to not only Myanmar but every situation involving a potential genocidal dimension. This is because it is central to this research to show how the complexities of genocide are constant no matter which situation the genocide label may be applied in as genocide will always be a flawed term for the identification and prevention of international criminal law. The discussion therefore of the respective circumstances and environment in the two countries is important in that while there has been violence perpetrated in both situations, the dimensions of the violence are typical of other ongoing situations in that they are multifaceted situations involving numerous actors competing for power and resources. Furthermore the levels of violence are typical of a lot of ongoing situations in that the threat levels of violence

are not constant, rather they can ebb and flow throughout. Due to lack of uniqueness of these situations the references to genocide in Burundi and South Sudan will be valuable in answering the research questions, and helping to tie this research together by showing how this research can be employed to examine the utility of employing the genocide label in different ongoing situations across the globe.

To conclude in conducting this research through the case studies of Burundi and South Sudan, along with the study of Rwanda, Darfur, the former Yugoslavia, the Sinjar region, and the Central African Republic the thesis is aimed at drawing out the various complexities involved in identifying genocide. Teasing out the issues with genocide within these case studies is crucial for addressing the fundamental concern of this research: whether genocide is a term that can be applied in the midst of violence. Assessing the utility of the genocide label as a preventative term to be employed in the midst of violence is not only important for the purposes of this thesis, it will also contribute further knowledge to the field of genocide studies.

1.8 Contribution of Thesis to Genocide Studies

While utilising the growing body of research previously conducted on the concept of genocide to structure the thesis and its arguments, this thesis will build on this knowledge by focussing in on the utility of the genocide label for the prevention of violence through an examination of the case studies outlined in the previous section. Contextualising the arguments with regard to the deficiencies of the term genocide by analysing the discussion of genocide in different situations, both past and ongoing, allows this research to provide a fresh approach to the study of genocide. This is because the research will discuss how and why the genocide label is complex to identify, and how the context surrounding the identification of genocide will always render the term difficult to identify. In pursuing this contention, this thesis will rely

on the indeterminacy argument; in that no matter the context there will be never be a clear answer as to whether genocide has been perpetrated. There will always be a level of uncertainty around the definition and the elements of genocide and the methods of preventing genocide. Subjective opinions of actors will always affect whether the genocide label is used to characterise violence or a situation, and this will apply whether it is an international court room, a UN forum, a government office, a nongovernmental organisation, or an investigative body. While the indeterminacy of law is a key debate within discussions of legal theory and jurisprudence, seldom is this argument used to critique the law of genocide, which makes this thesis a unique contribution to the study of the law of genocide. This is because this thesis will show that regardless of how genocide is conceptualised there will always be a level of indeterminacy surrounding the identification of the term in the midst of violence which renders genocide an unsuitable term for the prevention of ongoing violence.

The research will not simply act as a critique of genocide rather it will strive to offer a solution as to how genocide should be tackled and prevented in the midst of violence through the use of the term atrocity crimes. Atrocity crimes have been discussed in the literature, as discussed previously, however the argument for employing the label has rarely relied upon evidence of the utility of the label through an examination of case studies. The discussion of atrocity crimes accepts that the label would be beneficial without presenting clearly the arguments and evidence why the atrocity crimes label is needed and how it would resolve the difficulties faced in preventing and addressing genocide. This thesis will confront these issues by illustrating how the atrocity crimes label will remedy the complexities of defining, identifying, and preventing genocide through an analysis of the case studies, case law, and academic research on the subject of genocide.

The knowledge and evidence gained from this analysis of genocide and atrocity crimes will be significant to the study of genocide as it will contribute to the debate and argument in the existing literature by highlighting a different way to study and approach the prevention of genocide. In centring this research in the current debates surrounding the utility of the genocide and atrocity crimes labels, the thesis is drawing on the existing knowledge but seeking to expand and deepen the research on these issues and illustrate how these concepts can both coexist so as to be employed in the prevention and punishment of genocide. Therefore in pursuing this research along the three core strands, of i) defining the crime, ii) identifying and preventing genocide, and iii) how should genocide be prevented, contained within the research questions, this research aims to contribute to the study and debate surrounding genocide. This thesis will do this by showing how conducting critical and contextual analysis of a situation can illustrate that the label of genocide is not beneficial or effective in the prevention of violence and instead indicate that the term atrocity crimes needs to be utilised by actors so as to ensure a prompt response to ongoing violence. The different benefits for this approach to the study of genocide will flow throughout the body of this research.

1.9 Structure of the Study

The thesis consists of eight chapters which deal in various degrees with the different elements of identifying the term genocide in the midst of violence. The three core strands of this thesis are interwoven throughout the course of the eight chapters. The purpose of this introductory chapter has been to lay the foundations for the following chapters by setting out the key issues and questions which will be addressed throughout this research, and outlining the legal analysis that will underpin this study. This chapter has also briefly examined the development of the crime of genocide as a

legal concept, but also touched upon how the definition has been treated by the academic and activist communities.

Chapter Two will further examine this issue by charting the development of the concept of genocide from Lemkin's original understanding to debates within the UN system on drafting a definition to academic and activist reinterpretations of the crime for a changing world to current understandings of genocide in society. The core aim of this chapter is to consider the criminal law definition of genocide as well as other social conceptions of genocide when it comes to labelling violence. In this chapter the limitations of the variety of definitions and understandings of genocide will be presented, and how these deficiencies may impact on the identification of genocide in the midst of violence. Chapter Two will illustrate that it is only the legal definition of genocide as set out in the Genocide Convention which can be applied to violence due to its longstanding acceptance in international affairs. Furthermore this chapter will argue that even if the Convention's definition of genocide was changed it would not mean that the crime would be identifiable in the midst of genocide due to the indeterminacy of law, in that a new definition will be subject to the same political realities and contestations that confront the current criminal legal definition.

After highlighting why the Genocide Convention's definition of genocide is the only definition that can and will be applied to violence, Chapter Three will show how this legal definition of genocide has been interpreted by international courts and tribunals in judgments related to the atrocities in Rwanda, the former Yugoslavian states, and Darfur. This chapter will address whether any of the criticism of the definition resulted in the courts and tribunals changing or evolving the definition, or whether the intentions of the drafters of the Convention have been largely followed. Furthermore this chapter will examine the impact of prosecutions for genocide, in the case of

Darfur, on the pursuit of a peaceful resolution to a situation and the politics surrounding international justice. Chapter Three will also touch upon how the other crimes that constitute atrocity crimes have developed in international law and how the distinction between them and genocide is no longer so apparent. The aim of Chapter Three in examining the case law is to explore the issues with identifying the crime of genocide as the concept moves from a legal provision within the Convention to a word that can be applied within a criminal law institution. This chapter will indicate that despite these judicial interpretations there are still significant issues with identifying genocide in the midst of violence due to how the elements of the crime of genocide have been interpreted.

The difficulty of identifying genocide in practice will be further explored in Chapter Four by studying the measures undertaken to develop early warning systems for the detection of genocide before or in the early stages of a situation. The examination of early warning systems developed by academics, such as Barbara Harff, and within the UN's system will highlight the difficulties with identifying the crime of genocide in its incipient stages. Developing warning signals of genocide is important for the prevention of and response to genocide, if lacking clear distinct elements then early warning systems are doomed to failure. This discussion will show how the conditions that give to rise to genocide and early signs of genocide could also point towards the perpetration of the other atrocity crimes. This analysis is important for revealing not only the difficulties of distinguishing the elements in the midst of violence but also why the label of atrocity crimes is advantageous in the midst of violence. Chapter Four will show the increase in the recognition of preventing not only genocide but all 'atrocity crimes' through organs of the UN and the development and acceptance of the

doctrine of the Responsibility to Protect, which raises questions about the utility of the genocide label.

Chapter Four will also explore how issues such as respecting sovereignty and protecting a state's interest impact on the response to violence. By studying the international reaction to the atrocities in Rwanda, this chapter will also confront the key issue of whether the failure of states to respond to genocide is due to a lack of political will or the inapplicability of the definition of genocide. The study of Rwanda, one of the first internationally acknowledged genocides since the adoption of the Genocide Convention, will illustrate how even in confirmed cases of genocide it is difficult to identify elements of the crime or distinguish these elements from other crimes of international law. The response to Rwanda will also highlight how the label of genocide became the focus of the international community, rather than the prevention of the crime. The aim of this chapter is to illustrate not only the difficulties with identifying genocide due to a flawed definition but how the label of genocide can impact on the response to genocide. This shows the need for a unified term to remove the limiting nature of the genocide label.

The international response to genocide and the effectiveness of the genocide label will be further and more concretely examined in Chapter Five, with reference to UN investigations into the perpetration of genocide in the Central African Republic, Darfur, and into the actions of the Islamic State against the Yazidi population in Sinjar. A corresponding inquiry into Darfur conducted by the United States will also be studied to analyse any potential differences in how states and the UN reach a conclusion on the perpetration of genocide. The study of these inquiries will show how the crime of genocide is identified in practice; what definition is employed to characterise genocide and the difficulties of determining the crime. The responses to

these inquiries will show what effect if any a finding or non-finding of genocide will have on the response to genocide. The aim of Chapter Five is to explore the utility of labelling a situation as genocide in the midst of violence by examining responses or lack of responses to genocide, and to question whether genocide is an effective label for prevention. The failure to meaningfully address the crimes in Darfur, the Central African Republic, and Sinjar would raise the argument that atrocity crimes may be a better term to be employed in the midst of violence so as to remove the stigma around the genocide label which limits action.

In Chapter Six, the ongoing situations in Burundi and South Sudan will be explored to examine the complexities of identifying the crime of genocide in the respective countries. Burundi and South Sudan have been selected for analysis in this study due to the claims by domestic and international actors that these countries are at risk of genocidal violence. While the levels of violence and number of actors involved in the violence in the respective countries may differ, the two situations are similar as they both involve government parties accused of committing atrocities as a means of retaining power. Employing the methods and processes gleaned from Chapter Four and Chapter Five for determining the crime of genocide, this chapter will examine these two situations for indicators and signs of genocidal violence. Utilising reports and studies conducted in these countries by UN agencies and organs, international bodies, and researchers, this chapter will seek to address whether genocide can be identified in the midst of violence. With potential perpetrators of genocide playing a key role in the negotiation of an end to the violence, this chapter will also examine the utility of labelling the respective situations as genocide as a means of preventing the violence and resolving the situation. With the evidence of the case studies in this chapter and the previous chapters, this chapter aims to show that if the crime of

genocide is unidentifiable, due to either a deficient definition and/or the interests of peace, then there is a benefit to employing the label atrocity crimes for preventing and ending the suffering of civilians.

Chapter Seven will engage with the three core strands of the study and the research questions presented within that context, and will apply the knowledge and understanding gained from my analysis in the preceding chapters to address the key issues around determining genocide. In Chapter Seven, relying on the preceding research of case studies of case law, commissions of inquiry, and the role of different international and local actors, the various complexities surrounding the identification of genocide will be laid out so as to address whether genocide is a useful label to prevent and respond to ongoing violence. The discussion of these issues will answer the central research question of this study, of whether it is beneficial to label an ongoing situation as genocide as a means of preventing and responding to violence, and the corollary question of whether the label of atrocity crimes should be employed instead in the midst of bloodshed. Chapter Seven will discuss how a deficient and indeterminate definition, as shown by the research throughout this thesis, renders genocide a difficult term to employ in the midst of violence. The chapter will show how the atrocity crimes label can address these complexities of the genocide label, by highlighting the benefits of the atrocity crimes label that have been pinpointed throughout this research. Chapter Seven will argue that the atrocity crimes label is a more useful and effective term to be employed to characterise ongoing violence for the purposes of prevention and response, and therefore the question of genocide should be left until an international court or tribunal can determine the existence of genocide.

The thesis will conclude with Chapter Eight, in which the various threads of inquiry of this research will be tied together. Chapter Eight will set out again the research

questions contained with the three core strands of this research, and show how the thesis addressed each question through a discussion of the findings and conclusions discerned from the case studies and analysis of the primary and secondary sources discussed throughout the thesis. Chapter Eight will clearly show that the findings and conclusions of these research questions highlight the need for a new approach to preventing and responding to genocide. In examining the findings and conclusions, Chapter Eight will also present a series of recommendations for the different actors involved in the response to genocide, in how they should approach the prevention of genocide in the future through the use of the term atrocity crimes. In presenting these recommendations, this chapter will critique the current approach to preventing genocide in academia and policy circles and highlight how this thesis presents a distinct and viable option for a more effective means of preventing genocide. This will contribute to the debates and research surrounding genocide, and provides scope for further research of ongoing situations to strengthen the argument on the utility of the atrocity crimes label as a term to be employed in the midst of violence to prevent and respond to genocide.

1.10 Conclusion

This introductory chapter has, as it says, introduced the topic of this thesis, and the means and methods of how this thesis will research this topic. This chapter has highlighted some of the complexities involved in the concept of genocide, which have been explored in academia, and why further research is needed to address how these complexities impact on the identification of genocide and therefore on the prevention and response to genocide. In addressing these complexities the chapter has set out a number of research questions related to defining, identifying, and preventing genocide which will be explored to address the utility of the genocide label. The chapter has

also discussed the concept of atrocity crimes, and how this term may be employed to address the complexities of the genocide label if they are apparent in the research questions set out above. In researching the utility of these words as preventative terms to be utilised in the midst of violence, this chapter has shown how this research will proceed using an examination of a number of case studies and an analysis of the law of genocide and its practice and how this approach to the thesis will provide the evidence and information necessary to answer the research questions of this thesis.

To begin addressing the strands of the research in detail and to start providing answers to the research questions set out in this chapter, the thesis will proceed in Chapter Two to examine the first stand of this research by tracing the development of the concept of genocide from the work of one man to the concept as it exists in international law and institutions today.

CHAPTER TWO: THE EVOLVING DEFINITION

2.1 Introduction

In the previous chapter, the various strands of the research and research questions were set out and some of the complexities involved in applying the definition of genocide in the midst of violence were outlined. In this chapter these complexities will begin to be examined in more detail. In this chapter I will examine the various definitions of genocide that have been presented in the legal, political, activist, and academic spheres as despite the existence of the Convention, genocide is still an 'elusive' concept.[1] The adoption of the Convention on the Prevention and Punishment of the Crime of Genocide enshrined genocide as a legal concept, however the context of the formulation of the word, from the work of Lemkin and the organs of the UN, means that it is also an empirical, moral, and political concept which has different meanings and usages for various audiences.[2] This has meant aside from the definition set out within the Genocide Convention, there have been a proliferation of definitions to ascribe to the crime of genocide to address failings and flaws with the legal definition.

Within the various definitions proposed for one of the most heinous crimes in existence, is there a definition that can be or maybe more importantly should be applied in the midst of violence? Or, is it the case that the definition of genocide set out in the Convention is the only definition that will apply to characterise genocidal violence? And, if the Convention's definition is the only definition that will apply to ongoing situations, what are the limitations of this legal definition for the response to and prevention of genocide in the midst of violence? To address these questions, and

[1] Mark Levene, *Genocide in the Age of the Nation State – Volume 1: The Meaning of Genocide* (IB Tauris 2005) 21.
[2] Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 359.

to understand why genocide as a crime continues to interest researchers and activists this chapter will explore the different definitions that have been created and put forward to describe the crime of genocide. The central aim of this chapter is to address the first strand of this research which concerns which definition of genocide should be employed to characterise potential genocidal violence. This chapter will also touch upon the second and third strands of the research, by examining how the faults and ambiguities within the definition of genocide may impact on the identification and determination of genocide and by exploring what other terms could be employed to label violence if the genocide label is unsuitable as a preventative term in the midst of violence. To begin examining the definitions of genocide, and analyse which definition should be applied in the midst of violence it is important to understand how the crime developed from within the mind of one committed activist and academic.

2.2 The Emergence of a Word

As discussed in the previous chapter, the concept of genocide emerged from the research of Raphael Lemkin who devoted his life's work to the protection of groups and their identity from destruction. The creation of the term genocide was not the first time that Lemkin endeavoured to label a crime that Lemkin believed had blighted the world for centuries. In the 1930s, Lemkin originally promoted the idea of criminalising 'barbarity, the destruction of groups' and 'vandalism, attacks on culture and heritage.'[3] Barbarity was a forerunner for the concept that Lemkin would eventually term genocide, while vandalism would later be termed cultural genocide.[4] Lemkin found a lack of support for his new proposals at this time; a fact that would

[3] Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 157.
[4] Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 14.

not dissuade him then or in subsequent years when his ideas struggled to gain acceptance.[5] Lemkin's campaign to gain international recognition for the protection of the existence of groups would accelerate with the rise of the Nazi party.

The advent of Nazi rule and subsequent occupation of European countries led Lemkin to gather 'Nazi decrees and ordinances' so as to examine the underlying objectives behind the Nazi occupation.[6] Analysing his collection of documents, Lemkin could identify a pattern behind decisions being taken by the Nazis which pointed towards a coordinated plan to destroy groups held under German occupation.[7] Based in the US after fleeing Poland due to the Nazi occupation, Lemkin used his influence to write a memorandum for President Franklin D Roosevelt to persuade him to place the protection of groups as a central aim of US war policy.[8] This approach failed to gain traction so instead Lemkin turned towards the American public to gain support for his idea by writing a book to appeal to them to pressurise their political leaders.[9]

Using the substantial collection of documents he had gathered over the preceding years, Lemkin crafted a manuscript examining the techniques employed by the 'Germans' (Lemkin did not refer to Nazis, instead employing the term 'Germans') in

[5] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 22.
[6] Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 165–166. See also Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 26; Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin* (Donna-Lee Frieze ed, Yale University Press 2013) 76–78.
[7] Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin* (Donna-Lee Frieze ed, Yale University Press 2013) 76–78; Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 165–166.
[8] Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin* (Donna-Lee Frieze ed, Yale University Press 2013) 114; Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 176.
[9] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 28; Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin* (Donna-Lee Frieze ed, Yale University Press 2013) 115–116; Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 177.

dealing with groups in occupied countries.[10] It was in this study that Lemkin first invoked the concept that would define his life's work. Lemkin's tenacity to apply a label to the barbarity of World War II was due to Winston Churchill proclaiming, in 1941 in the face of the Nazi government's atrocities, that the world was 'in the presence of a crime without a name.'[11] Lemkin realised that his concept needed a new name, a term that could capture the unique and evil nature of the crime while simultaneously galvanising people to take action to prevent the crime.[12] As Lemkin says in *Axis Rule in Occupied Europe*, '[n]ew conceptions require new terms.'[13]

As referenced in Chapter One, Lemkin defined genocide as 'the destruction of a nation or of an ethnic group.'[14] Lemkin wrote that the crime of genocide does not imply the 'immediate destruction of a nation' but rather it signifies 'a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.'[15] For Lemkin the techniques of genocide, in this case employed by the Germans, included:

- Political (destruction of government and administration institutions and their replacement with the oppressor's institutions, disbanding political parties, modifying names of people, places, and things to the German form, and the removal of populations to colonise an area);

[10] Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 178–181.
[11] Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Penguin 1981) 12; Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 30.
[12] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 30, 41–42.
[13] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 79.
[14] ibid 79.
[15] ibid 79.

- Social (abolition of national law and the replacement with German law, and the deportation of clergy and intelligentsia to weaken resistance and opposition);
- Cultural (restricting the education of a national language, teaching the tenets of National Socialism, limiting a nation's cultural activities such as art, music, and theatre, and the destruction of cultural symbols, monuments, and institutions such as libraries, museums, and art galleries);
- Economic (destruction of economic existence through lowering standards of living, confiscation of property and money, and preventing people from working);
- Biological (preventing marriages, decreasing the birth rate, separating males from females by deporting men, and policies of under nourishing adults lowers the capacity of children born to starving parents to survive);
- Physical (rationing food which leads to a decrease in the health of people and an increase in the rate of mortality, endangering the health of individuals by depriving access to warm clothing and blankets, firewood, fuel, medicine, and fresh air by confining people to ghettos, and mass killing);
- Religious (forcing young people to renounce their religious affiliation in favour of joining Nazi youth organisations, and the destruction of religion by destroying property and persecuting church figures);

- Moral (destroy the moral fabric of a society by encouraging the moral debasement of a people by consuming alcohol, participating in gambling, and attending pornographic films and shows so as to weaken the resistance of the population.[16]

The aim of these actions would be the 'disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.'[17] Cultural genocide was an important topic for Lemkin as he believed that the crime of genocide was composed of two elements, the first was the destruction of the 'national pattern' of the oppressed group while the second was the imposition of the 'national pattern' of the oppressor.[18]

Lemkin stated that genocide could be perpetrated in peace time as well as in the midst of war which differentiated the crime from other international crimes specifically war crimes and the emerging crime of crimes against humanity.[19] For Lemkin it was critical that genocide was criminalised under domestic as well as international law to ensure that the crime could be enforced.[20] He contended that each state should have laws that protect 'minority groups from oppression because of their nationhood,

[16] ibid 82–90.
[17] ibid 79.
[18] Lawrence J LeBlanc, 'Development of the Rule on Genocide' in Samuel Totten and Paul R Bartrop (eds), *The Genocide Studies Reader* (Routledge 2009) 12; William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 32.
[19] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 93.
[20] ibid 93.

religion, or race' and that there should be 'provisions inflicting penalties' for those who perpetrate genocide.[21]

With the end of World War II, Lemkin believed that the 'world might be ready to listen' to his new term.[22] The newly established trials in Nuremberg would be the venue for Lemkin to gain support and recognition for his concept.[23] Genocide was included, under the heading of war crimes, in the indictments issued by the Nuremberg Tribunal.[24] Nuremberg would be the first time that leaders of a state faced an international trial for the crime of genocide.[25] On the first day of the Tribunal, when the French prosecutor, Pierre Mounier, read out the indictments he became the first person to use the term genocide in a court of law.[26] The defendants were accused of conducting 'deliberate and systematic genocide'; genocide was defined as the 'extermination of racial and religious groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups.'[27] Despite the early promise of genocide being mentioned on the first day of the Tribunals, a further 130 days of hearings passed without it being mentioned again.[28]

Lemkin believed that it was up to him to get the crime of genocide back into the Trials so he decamped himself to Nuremberg to harry prosecutors and even defence lawyers

[21] ibid 93.
[22] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 47.
[23] ibid 49.
[24] Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 188.
[25] ibid 276.
[26] ibid 280.
[27] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 43.
[28] Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 332.

to revive the discussion of genocide.[29] Genocide returned to the Nuremberg Trials when David Maxwell Fyfe, the deputy British prosecutor, in the midst of questioning one of the defendants, reminded him that he was charged with genocide as defined by Lemkin.[30] A couple of days later, one of the defence lawyers said that his client was not a *génocidaire*.[31] In his closing speech, the British Prosecutor, Hartley Shawcross, accused the defendants of pursing a policy of genocide, and described the patterns of genocide evident in the actions of the defendants.[32] The French and Soviet prosecutors followed in condemning the defendants for perpetrating genocide.[33] Despite the prosecutors referencing the crime of genocide; in the judgments of the eight justices from the Allied Powers, there was no mention of the crime of genocide.[34] No individual was found guilty of the crime of genocide which resulted in Lemkin calling it 'the blackest day' of his life.[35]

Lemkin did not let his disappointment at Nuremberg stop him, instead he travelled to New York to get genocide on the agenda of the United Nations General Assembly.[36] Lemkin had chosen a fertile period for gaining interest in genocide as images of the atrocities in the concentration camps were fresh in the minds of UN delegates.[37]

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[29] ibid 330, 334–336.
[30] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 50; Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 336–337.
[31] Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 342.
[32] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 43–42.
[33] Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 350, 357.
[34] ibid 366.
[35] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 50; Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 188, 369.
[36] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 51.
[37] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 52; Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge University Press 2012) 7.

Lemkin's message of the importance of protecting a group's identity resonated with diplomats who sought to take measures to prevent the recurrence of violence.[38] Building on the ground swell of support for his concept, Lemkin encouraged representatives from Cuba, India, and Panama to submit a draft resolution in support of genocide to the UN General Assembly.[39]

Lemkin's single-minded perseverance led to genocide entering the parlance of the international community, however in the seventy years since he created the term genocide, has its meaning in discourse changed drastically from his original concept? Has the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide and the discussions of genocide within the academic and activist communities led to the development of different and potentially conflicting understandings of genocide? Within these discussions on defining and interpreting the crime of genocide, has a definition of genocide been presented that is both applicable and identifiable in the midst of violence? To begin addressing these questions, this chapter will turn to examine the origination of the legal definition of genocide within the UN system and the potential ambiguities within this definition which could conceivably impact on the application of the Convention in the midst of violence.

2.3 Debating and Drafting the Definition within the United Nations

A reminder that the legal definition of genocide contained within the Genocide Convention is set out in Article II, which provides that:

[38] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 52–53.
[39] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 53; William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 52; Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin* (Donna-Lee Frieze ed, Yale University Press 2013) 122–123.

> 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.

As the definition of genocide is central to this research, it is important to understand the development of this definition within the organs of the UN. The record of the various drafting bodies highlights how the provisions within this article underwent substantial alterations during the drafting process.

2.3(i) General Assembly Resolution

The United Nations General Assembly was the first international body to define the crime of genocide in 1946.[40] The UN General Assembly defined genocide as a 'denial of the right of existence of entire human groups' and declared that genocide has been perpetrated when 'racial, religious, political and other groups have been destroyed, entirely or in part.' The resolution stated that the crime of genocide 'shocks the

[40] United Nations General Assembly Resolution 96(I) (11 December 1946).

conscience of mankind' and 'results in great losses to humanity in the form of cultural and other contributions represented by these human groups'. The UN General Assembly declared that genocide is a 'crime under international law' which private individuals and public officials can be held responsible for and states have a responsibility to punish. This definition is broader than the definition eventually adopted in the Convention as it includes political and other groups in the definition of genocide. The inclusion of other groups, in particular political groups, in the list of targeted groups became a contested issue for the different drafting bodies.

The resolution called upon the United Nations Economic and Social Council (hereafter 'ECOSOC') to draft a convention on the crime of genocide; the ECOSOC then instructed the Secretary-General of the UN to draw up a convention with the 'assistance of experts in the field of international and criminal law.'[41]

2.3(ii) The Secretariat Draft

The Secretary-General drafted, with the assistance of the Secretariat's Human Rights Division and three experts (including Lemkin), the first draft of the Convention.[42] This draft is historic, as it the first attempt at drawing up a convention to govern the crime of genocide. The drafters of the proposed convention undertook the first in-depth examination of the crime of genocide to identify key elements of the crime. The draft convention drawn up by the Secretariat defined genocide as a criminal act directed against racial, national, linguistic, religious or political groups with the purpose of destroying the group in whole or in part, or in preventing the preservation

[41] United Nations Economic and Social Council Resolution 47(IV) (28 March 1947) UN Doc E/437.
[42] United Nations Economic and Social Council 'Draft Convention on the Crime of Genocide' (26 June 1947) UN Doc E/447. See also Christian J Tams, Lars Berster, and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck 2014) 11.

or development of that group.[43] This definition of genocide includes many elements of the crime that would be eventually adopted in the Convention including acknowledging the importance of intent to the crime, adopting physical and biological acts of genocide, recognising that the partial destruction of a group amounts to genocide, and endorsing that acts of genocide are committed against national, racial, and religious groups.

The intent underlying the crime was an important element for the drafters in distinguishing genocide as the drafters stated they restricted genocide to the 'deliberate destruction of a human group' so as to make the crime of genocide distinct from other crimes in international law.[44] The drafters stated that atrocities committed during international or civil war do not amount to genocide unless the intention underlying the acts is to destroy a group.[45] Policies of forced assimilation and mass displacement were ascertained not to constitute the crime of genocide, as they were not aimed at the destruction of a group.[46]

The criminal acts of genocide recognised in the convention included physical genocide (acts that cause the death or injure the health of a group), biological genocide (prevention of births), and cultural genocide (brutal destruction of the specific characteristics of a group).[47] The acts of physical and biological genocide (group massacres or individual executions; deliberately inflicting conditions of life including a lack of proper housing, clothing, food, hygiene, and medical care and excessive work or physical exertion which are likely to result in the death of individuals; mutilations

[43] United Nations Economic and Social Council 'Draft Convention on the Crime of Genocide' (26 June 1947) UN Doc E/447, 5.
[44] ibid 15–17.
[45] ibid 23–24.
[46] ibid 24.
[47] ibid 5–7, 17.

and biological experiments; deprivation of means of living including confiscation of property, looting, curtailment of work, and denial of housing and supplies; forced sterilisation and compulsory abortions; segregation of the sexes; and restrictions on marriage) outlined in the draft convention are nearly identical to the acts subsequently included in Article II of the Genocide Convention.

The category of cultural genocide (forced transfer of children to another group; forced and systematic exile of individuals representing the culture of the group; prohibition of the use of the national language; and the destruction of a group's books, documents, monuments, objects and religious works) proved to be a contentious issue as two of the three experts, Henri Donnedieu de Vabres and Vespasian Pella, 'held that cultural genocide represented an undue extension of the notion of genocide'.[48] Lemkin argued in opposition that the destruction of a culture of a group was 'as disastrous for civilisation as the physical destruction of nations.'[49] He stated that a group 'cannot continue to exist unless it preserves its spirit and moral unity.'[50]

While the draft convention outlined that genocide can be committed against racial, national, linguistic, religious and political groups, Lemkin opposed the inclusion of political groups in the definition as this group lacks 'the permanency and the specific characteristics of the other groups'.[51] He also warned that the inclusion of political groups could risk the adoption of a convention as the world was 'deeply divided' on this issue.[52] Donnedieu de Vabres countered Lemkin's opinion, arguing 'that the exclusion of political groups might be regarded as justifying genocide in the case of

[48] ibid 26–27.
[49] ibid 27.
[50] ibid 27.
[51] ibid 22.
[52] ibid 22.

such groups.'[53] The disputes surrounding the inclusion of political groups and acts of cultural genocide would be replicated in the following months as the process to draft a convention moved forward.

The provisions proposed by the drafters formed the framework for future discussion on drafting a convention for the crime of genocide. The draft convention was submitted to the UN General Assembly by the Secretary-General after the ECOSOC called on member states to offer comments on the draft conventions.[54] A large majority of states did not provide comments on the draft convention,[55] so as to proceed more quickly with the drafting of a convention the UN General Assembly referred the matter of genocide back to the ECOSOC.[56]

2.3(iii) Ad Hoc Committee Draft

On instruction from the UN General Assembly, the ECOSOC established an ad hoc committee to draft a convention using the Secretariat's draft as a framework and to examine any comments on that draft convention from member states.[57] The committee comprised China, France, Lebanon, Poland, the United States of America, the Union of Soviet Socialist Republics, and Venezuela.[58] The committee defined genocide as 'deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members.'[59] The committee's definition of genocide has

[53] ibid 22.
[54] United Nations Economic and Social Council Resolution 77(V) (6 August 1947); United Nations General Assembly 'Draft Convention on the Crime of Genocide: Note by the Secretary-General' (25 August 1947) UN Doc A/362.
[55] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 63–66.
[56] United Nations General Assembly Resolution 180(II) (21 November 1947).
[57] United Nations Economic and Social Council Resolution 117(VI) (3 March 1948).
[58] ibid.
[59] United Nations Economic and Social Council, Ad Hoc Committee on Genocide 'Report of the Committee and Draft Convention drawn up by the Committee' (24 May 1948) UN Doc E/794, 13.

four elements: 1) a notion of premeditation, 2) an intent to destroy a human group, 3) the existence of a protected group, and 4) a motive to commit genocide.[60]

There was no unanimous support for all these elements, in particular the inclusion of political groups in the list of protected groups proved divisive. The representatives of Poland and the USSR argued that political groups 'lack the stability of the other groups'.[61] The representative of Venezuela stated that the inclusion of political groups would threaten the adoption of the convention as it was a controversial matter.[62] In the end four states voted in favour of the inclusion of political groups with three states opposing it.[63]

The acts of genocide (killing; impairing the physical integrity; measures or conditions of life aimed at causing death; and measures aimed at preventing births) included under the definition of genocide are physical and biological acts. The committee did also include cultural genocide in the draft convention, in a separate article, defining the crime as 'any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious beliefs.'[64] The inclusion of cultural genocide in the draft convention was subject to a thorough debate.[65] Those who favoured its inclusion including the USSR argued that the targeting of the specific cultural traits of a group is a means of destroying a group, in the same way as the physical and biological targeting of a group amounts to genocide.[66] In opposing its inclusion, representatives

[60] ibid 13–14.
[61] ibid 13.
[62] ibid 14.
[63] ibid 13–14.
[64] ibid 17.
[65] ibid 17.
[66] ibid 17.

including the US argued that cultural genocide was not on the same level as physical and biological genocide; acts which had 'shocked the conscience of mankind.'[67] It was argued that the crime of cultural genocide was more suited to a treaty concerning human rights and the protection of minorities.[68] Furthermore, similar to the inclusion of political groups, it was contended that the inclusion of cultural genocide within a convention would likely reduce the number of states willing to adopt the convention.[69] The article concerning cultural genocide was eventually adopted by four votes to three.[70]

The draft convention saw the first substantive reference to the question of motive behind the crime in the definition of genocide. A number of states felt a reference to motive was superfluous as the definition already specified the intent to destroy a group.[71] These states sought a compromise that would have recognised that genocide is committed for a number of reasons, which was rejected by the other states who felt that the definition should specify the motives.[72] The 'majority view was that the inclusion of specific motives was indispensable.'[73]

The Convention as a whole was supported by five states, with one state against the Convention and one state abstaining.[74] Poland abstained due to the unhappiness of their delegation with a number of the provisions within the draft convention, which they hoped would be remedied before the convention was adopted.[75] The

[67] ibid 17.
[68] ibid 17.
[69] ibid 17.
[70] ibid 19.
[71] ibid 14.
[72] ibid 14.
[73] ibid 14.
[74] ibid 50 (In favour: China, France, Lebanon, United States of America, and Venezuela; Against: Union of Soviet Socialist Republics; Abstaining: Poland).
[75] ibid 53.

representative of the USSR opposed elements of the convention as he felt that the convention would not be an 'effective instrument' in the prevention of genocide.[76] The strong minded opinion of the USSR delegation on the provisions of the convention would be seen again during the final stages of the adoption of the Genocide Convention.

While only comprising of seven members, the record of the ad hoc committee highlights the difficulty of finding a compromise on the creation of an effective treaty to prevent and punish the crime of genocide. The voting records on cultural genocide along with political groups highlighted that these elements were particularly divisive issues which might jeopardise the adoption of the Convention if they were respectively included or excluded. The ad hoc committee's draft convention was presented to the UN General Assembly by the ECOSOC.[77] The UN General Assembly referred the drafting of a convention to its Sixth Committee, which examines legal questions.[78] The outcome of the meetings of the Sixth Committee is the convention that is still in place today.

2.3(iv) The Sixth Committee

The starting point for the Sixth Committee was a discussion on the draft convention prepared by the ad hoc committee.[79] As stated previously in its work the Sixth Committee did adopt a number of elements of the crime of genocide that had been included in previous draft conventions such as the requirement of intent, acts of

[76] ibid 50–52.
[77] United Nations Economic and Social Council Resolution 153(VII) (26 August 1948).
[78] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 66.
[79] United Nations General Assembly Sixth Committee (63rd Meeting) 'Consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (30 September 1948) UN Doc A/C.6/SR.63.

physical and biological genocide, the whole or partial destruction of a group, and the protection of national, racial, and religious groups. Notwithstanding this the debates between the members of the Sixth Committee resulted in significant changes to the provisions of the ad hoc committee's draft convention and to the definitions of genocide provided in earlier drafts.[80]

One key element that was included in the ad hoc committee's definition, the notion of premeditation, was deleted by the Sixth Committee.[81] The provision on 'deliberate acts' in the draft convention was removed as it was felt by some states that the reference to premeditation was superfluous as the intention underlying the crime implied premeditation.[82] Another important discussion within the Sixth Committee was on the inclusion of a motive, which had been included within the draft convention of the ad hoc committee. Similar to the criticism of the inclusion of premeditation, a number of delegations within the Sixth Committee believed that the convention did not need to provide for a motive underlying the intent to destroy.

The representatives of Venezuela, Norway, Panama, Brazil, and the United Kingdom argued that the inclusion of motives was not important, as the aim of the convention was the prevention of the destruction of groups.[83] The representative of the United

[80] Christian J Tams, Lars Berster, and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck 2014) 11.

[81] United Nations General Assembly Sixth Committee (73rd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (13 October 1948) UN Doc A/C.6/SR.73, 90.

[82] United Nations General Assembly Sixth Committee (72nd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (12 October 1948) UN Doc A/C.6/SR.72, 83, 86, 87.

[83] United Nations General Assembly Sixth Committee (69th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (7 October 1948) UN Doc A/C.6/SR.69, 58, 61; United Nations General Assembly Sixth Committee (75th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (15 October 1948) UN Doc A/C.6/SR.75, 118; United Nations General Assembly Sixth Committee (76th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (16 October 1948) UN Doc A/C.6/SR.76, 127.

Kingdom stated that the inclusion of motives was limiting, as it allowed those accused of genocide to claim they did not commit an act on the grounds of one of the motives.[84] Other delegations including Lebanon, Egypt, the USSR, Iran, New Zealand, Yugoslavia, Czechoslovakia, Haiti, and the Dominican Republic believed that motive on a set of specified grounds was intrinsic to the crime of genocide as it set it aside from other crimes.[85] These delegates believed that if the reference to motives was deleted, it would mean crimes that are not connected to genocide would come under the rubric of genocide.[86]

To bridge the gap between the two viewpoints on motive, the Venezuelan representative proposed a compromise amendment which would see the deletion of a specific list of motives, and instead it would be replaced by the phrase 'as such'.[87] The Venezuelan delegate said this phrase meant that for genocide to be committed a group must be destroyed for being a group.[88] This phrase would still address motives implicitly, however it would ensure that the focus of the crime of genocide was on

[84] United Nations General Assembly Sixth Committee (75th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (15 October 1948) UN Doc A/C.6/SR.75, 118.

[85] United Nations General Assembly Sixth Committee (66th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (4 October 1948) UN Doc A/C.6/SR.66, 32; United Nations General Assembly Sixth Committee (72nd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (12 October 1948) UN Doc A/C.6/SR.72, 84; United Nations General Assembly Sixth Committee (73rd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (13 October 1948) UN Doc A/C.6/SR.73, 97; United Nations General Assembly Sixth Committee (75th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (15 October 1948) UN Doc A/C.6/SR.75, 118–119, 119–120; United Nations General Assembly Sixth Committee (76th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (16 October 1948) UN Doc A/C.6/SR.76, 121, 124, 125, 126.

[86] United Nations General Assembly Sixth Committee (75th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (15 October 1948) UN Doc A/C.6/SR.75, 118, 119.

[87] ibid 119.

[88] United Nations General Assembly Sixth Committee (77th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (18 October 1948) UN Doc A/C.6/SR.77, 131.

intention.[89] The Venezuelan representative also stated that this amendment would allow judges when dealing with cases of genocide to examine other motives, than those specified in the ad hoc draft convention (motives on the grounds of national or racial origin, religious belief, or political opinion).[90]

The US delegate supported the Venezuelan amendment as it would address the ambiguity of including motives within the definition when the focus of the convention should be on intention.[91] The USSR representative opposed the reference to 'as such' as he felt it was 'too vague and could lead to ambiguity' due to potential different interpretations.[92] For instance, the USSR representative believed that 'as such' meant that people were destroyed solely because they were a member of a group.[93] Despite the viewpoint that the Venezuelan amendment was ambiguous, it was eventually passed by 27 to 22 votes, with 2 abstentions.[94]

The debates within the Sixth Committee were often fractious, particularly around the inclusion of political groups in the list of enumerated protected groups. Representatives of states (including Belgium, Brazil, Dominican Republic, Egypt, Iran, Peru, Poland, the USSR, and Venezuela) disagreed with the inclusion of political groups for a number of reasons. Some delegates argued that political groups did not

[89] United Nations General Assembly Sixth Committee (76th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (16 October 1948) UN Doc A/C.6/SR.76, 124–125.
[90] United Nations General Assembly Sixth Committee (77th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (18 October 1948) UN Doc A/C.6/SR.77, 131.
[91] United Nations General Assembly Sixth Committee (76th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (16 October 1948) UN Doc A/C.6/SR.76, 123–124.
[92] ibid 127.
[93] ibid 126–127.
[94] United Nations General Assembly Sixth Committee (77th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (18 October 1948) UN Doc A/C.6/SR.77, 133.

have the stability or permanency of national, racial, or religious groups.[95] While it was acknowledged that people could change their membership of national and religious groups; membership of political groups was seen as easier to renounce than membership of a national or religious group.[96] Furthermore representatives argued that the inclusion of political groups would make it difficult for their state or a majority of states to support the convention.[97]

In opposition, delegates from Bolivia, Ecuador, El Salvador, Greece, the Netherlands, Sweden, and the US argued for the inclusion of political groups. These representatives stated that there was no reason for excluding political groups in comparison to the

[95] United Nations General Assembly Sixth Committee (63rd Meeting) 'Consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (30 September 1948) UN Doc A/C.6/SR.63, 6, 7; United Nations General Assembly Sixth Committee (64th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (1 October 1948) UN Doc A/C.6/SR.64, 19; United Nations General Assembly Sixth Committee (65th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (2 October 1948) UN Doc A/C.6/SR.65, 21; United Nations General Assembly Sixth Committee (66th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (4 October 1948) UN Doc A/C.6/SR.66, 31; United Nations General Assembly Sixth Committee (69th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (7 October 1948) UN Doc A/C.6/SR.69, 57, 58, 59, 61; United Nations General Assembly Sixth Committee (74th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (14 October 1948) UN Doc A/C.6/SR.74, 99, 100.

[96] United Nations General Assembly Sixth Committee (65th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (2 October 1948) UN Doc A/C.6/SR.65, 21; United Nations General Assembly Sixth Committee (66th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (4 October 1948) UN Doc A/C.6/SR.66, 31; United Nations General Assembly Sixth Committee (69th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (7 October 1948) UN Doc A/C.6/SR.69, 61; United Nations General Assembly Sixth Committee (74th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (14 October 1948) UN Doc A/C.6/SR.74, 99.

[97] United Nations General Assembly Sixth Committee (64th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (1 October 1948) UN Doc A/C.6/SR.64, 14; United Nations General Assembly Sixth Committee (69th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (7 October 1948) UN Doc A/C.6/SR.69, 58, 59, 60; United Nations General Assembly Sixth Committee (74th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (14 October 1948) UN Doc A/C.6/SR.74, 99, 107.

other groups and that failure to include this element would permit crimes be committed against this group without sanction.[98] Furthermore representatives stated that excluding political groups would be ignoring the intention of the General Assembly Resolution 96(I) which recognised genocide committed against political groups.[99] The first vote saw the retention of political groups in the provisions of the convention, and the extension of protection to ethnical groups while a proposed amendment by the United States to include economic groups within the list of protected group was withdrawn due to a lack of support for this provision.[100]

The progress of the Sixth Committee was laboured and arduous, and it was decided to form a smaller draft committee to consider the text of the convention as adopted by the Sixth Committee so as to draw a draft convention.[101] The delegates returned to the issue of political groups after preparing this draft convention, as a number of states said they would not be prepared to ratify the convention if political groups remained in the convention.[102] The US delegate who favoured the inclusion of political groups was willing to exclude the provision if it meant that more states were willing to ratify

[98] United Nations General Assembly Sixth Committee (74th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (14 October 1948) UN Doc A/C.6/SR.74, 98–99, 100, 101, 107, 108; United Nations General Assembly Sixth Committee (75th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (15 October 1948) UN Doc A/C.6/SR.75, 113, 114.

[99] United Nations General Assembly Sixth Committee (74th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (14 October 1948) UN Doc A/C.6/SR.74, 101, 102.

[100] United Nations General Assembly Sixth Committee (75th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (15 October 1948) UN Doc A/C.6/SR.75, 115.

[101] United Nations General Assembly Sixth Committee (104th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (13 November 1948) UN Doc A/C.6/SR.104; United Nations General Assembly Sixth Committee 'Report of Drafting Committee' (23 November 1948) UN Doc A/C.6/288; United Nations General Assembly Sixth Committee 'Draft Resolutions proposed by the Drafting Committee' (23 November 1948) UN Doc A/C.6/289.

[102] United Nations General Assembly Sixth Committee (128th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (29 November 1948) UN Doc A/C.6/SR.128, 660, 661, 662, 663.

the convention.[103] The representatives ultimately voted to exclude political groups from the list of protected groups in the convention.[104]

What was meant by the destruction of a group was a particular area of concern for the representatives, and it received particular attention in the debates. One of the most contentious questions faced by the Sixth Committee was whether cultural genocide should be excluded from the convention. The delegate from Lebanon said that 'the physical and cultural aspects of the crime were … indivisible'.[105] The Ukrainian representative stated that cultural genocide should be included in the convention as it was a prelude to physical genocide.[106] The Venezuela delegate said that a group's existence could be threatened by not only physical destruction but also by the destruction of the traits of a group.[107] The Czechoslovakian representative said that a group may be destroyed either physically or by the destruction of the 'distinctive and permanent characteristics', and in either case 'the ensuing loss to humanity' was no less.[108] The representative of Pakistan argued that cultural genocide was the end goal of those who commit physical genocide, the aim was to destroy every characteristic of the group.[109] The representative of the USSR argued that excluding cultural genocide would be tantamount to condoning crimes against the culture of a group.[110]

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[103] ibid 661–662.
[104] ibid 663–664.
[105] United Nations General Assembly Sixth Committee (66th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (4 October 1948) UN Doc A/C.6/SR.66, 33.
[106] United Nations General Assembly Sixth Committee (65th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (2 October 1948) UN Doc A/C.6/SR.65, 27.
[107] United Nations General Assembly Sixth Committee (83rd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (25 October 1948) UN Doc A/C.6/SR.83, 196.
[108] ibid 205.
[109] ibid 193.
[110] ibid 202.

In opposition, representatives from Brazil, Canada, Denmark, India, Iran, New Zealand, South Africa, and Sweden argued that the provisions of the draft convention concerning cultural genocide were not clearly defined and therefore they could not support the inclusion of cultural genocide in the convention.[111] These delegates thought the question of cultural genocide should be dealt with by a treaty concerning protection of minorities. On the first vote concerning cultural genocide, the representatives voted to exclude it from the convention.[112] On the day the convention was being adopted, the USSR tabled an amendment to include cultural genocide in the convention.[113] The amendment was rejected, and the crimes of cultural genocide were excluded from the convention.[114] There was one crime that fell into the category of cultural genocide that was included in the acts of genocide and adopted by the representatives in the final provisions of the convention. The crime of the forced transfer of children to another group was viewed by delegates as being separate from cultural genocide.[115]

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[111] United Nations General Assembly Sixth Committee (64th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (1 October 1948) UN Doc A/C.6/SR.64, 13, 15; United Nations General Assembly Sixth Committee (66th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (4 October 1948) UN Doc A/C.6/SR.66, 31; United Nations General Assembly Sixth Committee (83rd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (25 October 1948) UN Doc A/C.6/SR.83, 197–198, 200–201, 203.

[112] United Nations General Assembly Sixth Committee (83rd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (25 October 1948) UN Doc A/C.6/SR.83, 206.

[113] United Nations General Assembly (178th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.178, 813–814.

[114] United Nations General Assembly (178th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.178; United Nations General Assembly (179th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.179.

[115] United Nations General Assembly Sixth Committee (82nd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (23 October 1948) UN Doc A/C.6/SR.82, 186–190.

With regard to other acts of genocide, the question of whether the forced removal or forced expulsion of a group constituted or should constitute genocide was debated at the Sixth Committee. An amendment was introduced by the Syrian representative to include in the acts of genocide 'any measures directed towards forcing members of a group to leaves their homes.'[116] This amendment was strongly opposed by representatives who did not view these measures as constituting genocide as the acts were not aimed at the physical destruction of the group.[117] The amendment was swiftly rejected.[118]

At the end of weeks of debating numerous amendments and proposals, the Sixth Committee adopted the draft convention by thirty votes to none, with eight abstentions.[119] The representatives put forward reasoned arguments for their support of the convention, and reasons why some of them chose to abstain on the vote. The delegation from the United States, who voted for the draft convention, declared that the convention was not 'perfect', a view shared by numerous delegations, notwithstanding this the United States representative believed the draft convention 'represented the best possible compromise' that could be reached by the Sixth Committee.[120] The French delegate stated that the text agreed, while not entirely

[116] ibid 184.
[117] ibid 184–185.
[118] ibid 186.
[119] United Nations General Assembly Sixth Committee (132nd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (1 December 1948) UN Doc A/C.6/SR.132 (In favour: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Egypt, France, Greece, India, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Peru, Siam, Sweden, Syria, United States of America, Uruguay, Venezuela; Abstaining: Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, Yugoslavia).
[120] United Nations General Assembly Sixth Committee (133rd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (2 December 1948) UN Doc A/C.6/SR.133, 704, 705, 707, 709, 710.

satisfactory, was likely the only text that would receive approval from the member states.[121]

The representative of the United Kingdom had abstained as he believed that the focus of the convention should be on states, and not individuals.[122] The Polish delegation abstained from the vote as it felt the convention did not adequately address preventative measures.[123] The representative from Yugoslavia abstained due to the exclusion of cultural genocide; arguing that cultural genocide was intrinsically linked with biological and physical genocide.[124] The representative of the USSR stated that his delegation had abstained from the vote as the draft convention omitted key provisions that the USSR wished to include, and that when the convention came before the General Assembly the USSR would seek to introduce new amendments to the convention.[125]

The records of the drafting process highlight that the definition of genocide was subject to a thorough examination and debate, but it also shows that the resulting definition contained with the Genocide Convention was the outcome of a political compromise.[126] This political compromise was due to states being mindful that the provisions of the Convention would not be used 'to criticise or to condemn their

[121] ibid 707.
[122] United Nations General Assembly Sixth Committee (132nd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (1 December 1948) UN Doc A/C.6/SR.132, 701–702.
[123] United Nations General Assembly Sixth Committee (133rd Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (2 December 1948) UN Doc A/C.6/SR.133, 706.
[124] ibid 707–708.
[125] ibid 704.
[126] Jeffrey S Morton and Neil Vijay Singh, 'The International Legal Regime on Genocide' (2003) 5 Journal of Genocide Research 47, 60; Stuart D Stein, 'Conception and Terms: Templates for the Analysis of Holocausts and Genocides' (2005) 7 Journal of Genocide Research 171, 184; Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 39, 43–44.

conduct.'[127] In particular, as highlighted, the discussions around the inclusion of acts of cultural genocide and the recognition of a political group involved substantial negotiation and compromise as states were fearful that their domestic policies (including acts of assimilation and limiting or repressing the participation of political groups) concerning political groups and/or cultural groups could be regarded as genocide. These domestic considerations ultimately saw these provisions excluded from the Genocide Convention, however it was necessary to ensure that the Convention was adopted by as many states as possible. So while political compromise left a less than perfect definition and Convention for many states, the debates and negotiations did secure the drafting of a Convention to address a heinous crime.

2.3(v) Embracing the Genocide Convention

The Sixth Committee submitted a report of its activities and the recommended draft convention to be adopted to the General Assembly, which was discussed by the General Assembly on the 9th of December 1948.[128] As promised, the delegation from the USSR tabled a number of amendments to the draft convention.[129] As already discussed the General Assembly rejected the reintroduction of the provision on

[127] Matthew Lippman, 'A Road Map to the 1948 Convention on the Prevention and Punishment of the Crime Genocide' (2002) 4 Journal of Genocide Research 177, 179.
[128] United Nations General Assembly Sixth Committee 'Report of the Sixth Committee' (3 December 1948) UN Doc A/760; United Nations General Assembly (178th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.178; United Nations General Assembly (179th Meeting) 'Continuation of the discussion on the draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.179.
[129] United Nations General Assembly (178th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.178, 812–815.

cultural genocide, in addition the General Assembly voted against the USSR's amendment to link genocide with fascism, Nazism, and other race theories.[130]

With the General Assembly dismissing the proposed amendments, it was left to vote on the draft convention as presented by the Sixth Committee. Before the final vote, the delegations were given one last chance to share their opinions on the convention. Representatives once again restated how the convention while not perfect was a compromise which as the representative from Iran argued would not endanger the 'principle that the existence of racial, religious or national groups was as sacred as the life of an individual.'[131]

Nearly two years had passed from the UN General Assembly Resolution 96(1) of 1946 to the 9th of December 1948 when the UN General Assembly voted on the adoption of the draft convention of the Sixth Committee.[132] In that period, there had been numerous meetings and a number of different drafts of the convention drawn up. After all the time and effort put into crafting a treaty to address one of the worst crimes in existence, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by fifty six votes to none with no abstentions.[133] The Convention

[130] United Nations General Assembly (179th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.179, 847–850.
[131] United Nations General Assembly (178th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.178, 820–829; United Nations General Assembly (179th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.179, 831–839, 844.
[132] United Nations General Assembly (179th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.179, 851.
[133] In favour: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Saudi Arabia, Siam, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Venezuela, Yemen, Yugoslavia.

transformed the concept of genocide from an academic term to a promise of action from states across the world.[134]

The adoption and eventual ratification of the Genocide Convention unfortunately did not translate into states pursuing immediate and effective action to prevent and punish the crime of genocide. Rather as outlined in Chapter One, there were only sporadic references to genocide at state level where often it was states using the rhetorical value of the genocide as propaganda in a proxy war with rival states. Genocide did return to the courtroom when Adolf Eichmann was charged in Israel with 'Crimes against the Jewish People', a crime which was based on the Genocide Convention's definition of genocide, for his role in planning and executing the Holocaust.[135] However the preventative potential of the Convention largely floundered with atrocities perpetrated in Bangladesh, Burundi, Cambodia, and Indonesia amongst others in the decades after the adoption of the Genocide Convention. The failure to meaningfully respond to these situations, as well as the symbolic power of the genocide label to characterise a state's act/failing and to describe the suffering of a victimised group, stimulated academic interest in the concept of genocide and led to various efforts to redefine and rework the definition of genocide for a changing world.

2.4 Rethinking Genocide

The brief summary of the state of genocide studies in Chapter One highlighted that the topic of genocide was of marginal interest in academia for much of the decades following the passing of the Convention. There were only a small number of

[134] Linda Melvern, 'Rwanda and Darfur: The Media and the Security Council' (2006) 20 International Relations 93, 93.
[135] *The Attorney General of Israel v Adolf Eichmann* (1961) 36 ILR 5 (District Court). See also William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 426; Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge University Press 2012) 116–117.

individual studies into the situations in Armenia, Bangladesh, Burundi, Cambodia, Indonesia, Nigeria, Paraguay, the Soviet Union, Sudan, Uganda, and Ukraine.[136] It was only in the 1980s when a revival in the concept of genocide began as academics started paying sustained interest to the Convention.[137]

Academic interest in the concept of genocide was resurrected by the work of Leo Kuper; whose research triggered an eruption of studies into the crime of genocide, and specifically on the definition of genocide.[138] As the Genocide Convention had not been applied to any case of genocide since its inception, the first studies of the crime of genocide by academics took a highly critical approach to the legal definition of genocide contained within the Convention.[139] The uncertain nature of the definition, combined with the failure to enforce the Genocide Convention, prompted studies of the definition, and various attempts to improve upon the definition contained within the Convention.[140]

From the research and work of academics and scholarly organisations it is clear that genocide has meant something different to them than what is set out in the legal definition. The academic attempts to shape or more accurately reshape the concept of

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[136] Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 212, 213; Colin Tatz, 'Genocide Studies: An Australian Perspective' (2011) 6 Genocide Studies and Prevention 231, 232.
[137] Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 4.
[138] Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Penguin 1981). See also Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 212–215; Dominik J Schaller, 'From Lemkin to Clooney: The Development and State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 245, 247.
[139] Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (Yale University Press 1990) 11; Jonathan Cina, 'Genocide: Prevention or Indifference (Part One)' (1996) 1 Journal of Conflict and Security Law 59, 70; Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 370; Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 42.
[140] Yusuf Aksar, 'The "Victimized Group" Concept in the Genocide Convention and the Development of International Humanitarian Law through the Practice of *Ad Hoc* Tribunals' (2003) 5 Journal of Genocide Research 211, 214.

genocide, is due to their desire to apply the label genocide to their own research. Frank Chalk states that when 'defining a field for research, the needs of social scientists and historians differ from those of international legal authorities.'[141] With the emerging field of genocide studies primarily composed of historians, philosophers, psychologists, and sociologists rather than legal researchers it has meant that these academics, and those who subsequently came to bolster the field of genocide studies, have been more willing to rework the definition of genocide without any thought for the legal consequence.[142] This has led to a proliferation of definitions of genocide, as numerous academics have crafted an alternative definition of genocide that should be applied to label violence.

In the respective studies of Scott Straus and Adam Jones they document the leading definitions crafted by Kuper,[143] Pieter Drost,[144] Vahakn Dadrian,[145] Jack Nusan Porter,[146] Irving Louis Horowitz,[147] Henry Huttenbach,[148] Helen Fein,[149] Israel

[141] Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 150.
[142] William A Schabas, 'The International Legal Prohibition of Genocide Comes of Age' (2004) 5 Human Rights Review 46, 46.
[143] Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Penguin 1981) 86 (Defined genocide as a 'crime against a collectivity, taking the form of massive slaughter, and carried out with explicit intent.').
[144] Pieter Drost, *The Crime of the State (Volume 2) Genocide* (AW Sijthoff 1959) 125 (Defined genocide as 'the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such.').
[145] Vahakn Dadrian, 'A Typology of Genocide' (1975) 5 International Review of Modern Sociology 201, 201 (Defined genocide as 'the successful attempt by a dominant group, vested with formal authority and/or with preponderant access to the overall resources of power, to reduce by coercion or lethal violence the number of a minority group whose ultimate extermination is held desirable and useful and whose respective vulnerability is a major factor contributing to the decision for genocide.').
[146] As quoted in Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 24 (Jack Nusan Porter defined genocide as 'the deliberate destruction, in whole or in part, by a government or its agents, of a racial, sexual, religious, tribal or political minority.').
[147] Irving Louis Horowitz, *Taking Lives: Genocide and State Power* (Transaction Books 1980) 17 (Defined genocide as 'a structural and systematic destruction of innocent people by a state bureaucratic apparatus.').
[148] Henry Huttenbach, 'Locating the Holocaust on the Genocide Spectrum: Towards a Methodology of Definition and Categorization' (1988) 3 Holocaust and Genocide Studies 289, 295 (Defined genocide as 'the destruction of a specific group within a given national or even international population.').
[149] Helen Fein, *Genocide: A Sociological Perspective* (Sage 1993) 24 (Defined genocide as 'sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through

Charny,[150] Yehuda Bauer,[151] Ward Churchill,[152] Steven Katz,[153] Isidor Wallimann and Michael Dobkowski,[154] and Frank Chalk and Kurt Jonassohn,[155] to address the horrors of genocide.[156] While not the only definitions presented within academia to describe the crime of genocide, these definitions highlight the flaws within the legal definition of genocide and the desire within the genocide studies community to possess a definition that is more easily applied to situations of violence.

The debate on the definition of genocide takes a number of different forms; some of the common arguments are that the definition is too narrow or too broad.[157] Scholars, such as Israel Charny, have argued that the definition of genocide should be expanded to include all forms of mass violence against a group.[158] Chalk and Jonassohn employ

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interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim.').

[150] Israel Charny, 'Toward a Generic Definition of Genocide' in George Andreopoulos (ed*), Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press 1994) 75 (Defined genocide as 'the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims.').

[151] Yehuda Bauer, 'Comparison of Genocides' in Levon Chorbajian and George Shirinian (eds), *Studies in Comparative Genocide* (St Martin's Press 1999) 36 (Defined genocide as 'a purposeful attempt to eliminate an ethnicity or a nation, accompanied by the murder of large numbers of the targeted group.').

[152] Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present* (City Lights Books 1997) 432 (Defined genocide as 'the destruction, entirely or in part, of any racial, ethnic, national, religious, cultural, linguistic, political, economic, gender, or other human group, however such groups may be defined by the perpetrator.').

[153] Steven Katz, *The Holocaust in Historical Context: The Holocaust and Mass Death before the Modern Age, Volume I* (Oxford University Press 1994) 131 (Defined genocide as 'the actualisation of the intent, however successfully carried out, to murder in its totality, any national, ethnic, racial, religious, political, social, gender or economic group, as these groups are defined by perpetrator, by whatever means.').

[154] As quoted in Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 25 (Walliman and Dobkowski defined genocide as 'the deliberate, organised destruction, in whole or in large part, of racial or ethnic groups by a government or its agents.').

[155] Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (Yale University Press 1990) 23 (Defined genocide as 'a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator.').

[156] See Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 350–355; Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 22–27.

[157] Uwe Makino, 'Final Solutions, Crimes against Mankind: On the Genesis and Criticism of the Concept of Genocide' (2001) 3 Journal of Genocide Research 49, 58.

[158] Israel Charny, 'Toward a Generic Definition of Genocide' in George Andreopoulos (ed*), Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press 1994) 91.

a broad definition of genocide so as to examine 'many cases of mass killing' under the rubric of genocide studies.[159] On the opposite end of the argument are a number of scholars, such as Steven Katz, who argue that the Holocaust is the only true genocide.[160] These scholars argue that the atrocities of the Holocaust can never be compared to any other situation, and any attempt to compare is a means of lessening the horrors of the Holocaust.[161] The arguments about the uniqueness of the Holocaust highlight the symbolic value of the word genocide for labelling the suffering of a population, and why academics are keen to redefine genocide to draw upon the symbolism of the word so as to apply to the situation or situations they are studying.

In critiquing the definition of genocide, some scholars criticise aspects of the Convention's definition while others outright reject the definition contained within the Convention.[162] Whilst scholars acknowledge the limitations of the Convention's definition, they still use it as a benchmark for the examination of the definition of genocide.[163] A common academic approach to conceptualising genocide recognises the deficiencies within the Genocide Convention and crafts an alternative definition of genocide to label violence. The main critiques of the definition of genocide contained within the Convention centre on the failure to include additional elements

[159] Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 150.
[160] Steven Katz, *The Holocaust in Historical Context: The Holocaust and Mass Death before the Modern Age, Volume I* (Oxford University Press 1994).
[161] See discussion in Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 149; Michael Freeman, 'The Theory and Prevention of Genocide' (1991) 6 Holocaust and Genocide Studies 185, 186; Daniel Blatman, 'Holocaust Scholarship: Towards a Post-Uniqueness Era' (2015) 17 Journal of Genocide Research 21, 22–25.
[162] Meghna Manaktala, 'Defining Genocide' (2012) 24 Peace Review: A Journal of Social Justice 179, 184.
[163] Martin Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* (Cambridge University Press 2013) 87.

such as a wider range of protected groups and acts of genocide within the definition of genocide.

With regard to the exclusion of groups from the Convention, a common argument amongst scholars is that as the legal definition of genocide is restricted to the intentional destruction of a national, ethnical, racial, or religious groups; it diminishes violence against groups which have been excluded from the definition. In particular, the omission of political groups has been labelled as the Convention's 'blind spot'.[164] Kuper, who kick-started the revival in the study of the concept of genocide, states that while he supports the definition of genocide contained within the Convention there is no reason to omit political groups from the list of protected groups.[165] Drost, who conducted one of the first critiques of the Convention in 1959, argues that the exclusion of political, economic, social, and cultural groups leaves a 'loophole' for governments to avoid their duty under the Convention to protect civilians.[166] Chalk bemoans the exclusion of social and political groups from the definition as it ignores crimes committed against members of different social classes in the Soviet Union, the Nazi crimes against disabled people and people of a different sexual orientation, and the actions of the Khmer Rouge against political opponents amongst other atrocities of the 20th century.[167]

[164] Beth Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) 106 Yale Law Journal 2259. See also Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 151; Helen Fein, 'Genocide: A Sociological Perspective' (1990) 38 Current Sociology 1; Peter Quayle, 'Unimaginable Evil: The Legislative Limitations of the Genocide Convention' (2005) 5 International Criminal Law Review 363, 370.
[165] Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Penguin 1981) 39.
[166] Pieter Drost, *The Crime of the State (Volume 2) Genocide* (AW Sijthoff 1959) 122.
[167] Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 151.

In redefining genocide academics such as Katz, Ward Churchill, and Jack Nusan Porter have sought to broaden the list of protected groups to include cultural, economic, gender, LGBTQ, linguistic, political, social, and tribal groups.[168] A number of scholars including Kuper, Fein, Drost, and Huttenbach do not specify the groups included in their definition, rather they refer generally to the concept of a group or collectivity.[169] Drost argues that genocide should not be restricted to applying to a number of groups and instead it should apply to all groups of people as people are members of many different groups.[170] Huttenbach states that the groups do not need to be specified, as the 'list can never be complete'.[171]

Academics have also argued for an expansion of the acts that constitute genocide. Isidor Wallimann and Michael Dobkowski state that the crime of genocide includes not only 'mass murder but also forced deportation (ethnic cleansing), systematic rape, and economic and biological subjugation.'[172] Jack Nusan Porter contends that the crime of genocide comprises acts of 'starvation, forced deportation, and political, economic and biological subjugation' alongside acts of mass killing.[173] On the matter

[168] Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Penguin 1981) 9–10; Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 151; Steven Katz, *The Holocaust in Historical Context: The Holocaust and Mass Death before the Modern Age, Volume I* (Oxford University Press 1994) 131; Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present* (City Lights Books 1997) 432; Mohammed Abed, 'The Concept of Genocide Reconsidered' (2015) 41 Social Theory and Practice 328, 339; Jack Nusan Porter as quoted in Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 24.

[169] Pieter Drost, *The Crime of the State (Volume 2) Genocide* (AW Sijthoff 1959) 122–123; Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Penguin 1981) 86; Helen Fein, 'Defining Genocide as a Sociological Concept' (1990) 38 Current Sociology 8, 24; Robert Melson, *Revolution and Genocide: On the Origins of the Armenian Genocide and the Holocaust* (University of Chicago Press 1992) 26; Henry Huttenbach, 'Locating the Holocaust on the Genocide Spectrum: Towards a Methodology of Definition and Categorization' (1998) 3 Holocaust and Genocide Studies 289, 297; Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 193–194.

[170] Pieter Drost, *The Crime of the State (Volume 2) Genocide* (AW Sijthoff 1959) 122–123.

[171] Henry Huttenbach, 'Locating the Holocaust on the Genocide Spectrum: Towards a Methodology of Definition and Categorization' (1988) 3 Holocaust and Genocide Studies 289, 295.

[172] As quoted in Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 25.

[173] As quoted in Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 24.

of cultural genocide, academics such as Yehuda Bauer, Martin Shaw, and Ward Churchill contend that genocide is not just the physical destruction of a group but also the elimination of the cultural identity of a group.[174]

While a number of definitions provided by academics have sought to expand the elements of genocide, several definitions have overly focussed on elements of the crime or in some cases omitted elements of the Genocide Convention's definition. For instance, while the Genocide Convention lists a number of acts comprising the crime of genocide, numerous genocide scholars including leading academics such as Kuper, Charny, Chalk and Jonassohn, Harff and Gurr, Levene, and Jones have focussed their definitions exclusively on the act of killing as constituting the crime of genocide.[175] For these academics, genocide is identifiable by a large number of victims and is exclusively linked to murder and killing. However genocide is not 'synonymous with mass killing'; a clearer reading of the Genocide Convention would show that the Convention does not state victims have to die for the crime of genocide to be perpetrated, in fact only subsection (a) of Article II mentions the act of killing.[176] Shaw argues that undue focus in academia on the act of killing and on the act of physical harm has narrowed the concept of genocide, by reducing the importance of

[174] Yehuda Bauer, 'The Place of the Holocaust in Contemporary History' in Jonathan Frankel (ed), *Studies in Contemporary Jewry, Volume 1* (Indiana University Press 1984) 213–214; Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present* (City Lights Books 1997) 433; Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 195.
[175] Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Penguin 1981) 86; Barbara Harff and Ted Gurr, 'Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases Since 1945' (1988) 32 International Studies Quarterly 359, 360; Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (Yale University Press 1990) 23; Israel Charny, 'Toward a Generic Definition of Genocide' in George Andreopoulos (ed), *Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press 1994) 75; Mark Levene, *Genocide in the Age of the Nation State – Volume 1: The Meaning of Genocide* (IB Tauris 2005) 35; Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 32, 39.
[176] Adrian Gallagher, *Genocide and its Threat to Contemporary International Order* (Palgrave Macmillan 2013) 23.

the other material acts that can lead to the destruction of a group identified in the Convention.[177]

Academics have also debated whether the crime of genocide requires the intent to be a 'total genocide', where all the victims die. This debate stems from the mention of '*in whole or in part*' in the Convention. In Katz's definition of genocide, the intent behind the crime must be to destroy the 'totality' of a group.[178] This was an attempt to link the crime of genocide inextricably with the Holocaust as the Holocaust is viewed as a total genocide due to the high number of victims. This definition was subject to criticism by his fellow academics who criticised his view of the Holocaust as a total genocide considering that Hitler did not target every Jewish person across the world for extermination.[179] There will never be a total genocide as in every case of accepted or suspected genocide, there have always been survivors.[180] In creating his own definition of genocide, Adam Jones amended Katz's definition to remove the reference to the totality of a group and replaced it with the requirement that the intent must be to 'murder in whole or in substantial part.'[181] This definition aligns with the majority of academics who refer to the term mass murder in their studies.[182]

Furthermore, intent is central to the definition of genocide contained within the Convention, but it has had a mixed reaction in literature. Some scholars are willing to include it as part of their definition but others completely omit any notion of

[177] Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 41, 46, 50.
[178] Steven Katz, *The Holocaust in Historical Context: The Holocaust and Mass Death before the Modern Age, Volume I* (Oxford University Press 1994) 131.
[179] Kurt Jonassohn with Karin Solveig Björnson, *Genocide and Gross Human Rights Violations: In Comparative Perspective* (Transaction Publishers 1998) 132; David Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report' (2006) 7 Chicago Journal of International Law 303, 312.
[180] Christopher W Mullins and Dawn L Rothe, 'Darfur and the Politicization of International Law: Genocide or Crimes against Humanity?' (2007) 31 Humanity & Society 83, 97.
[181] Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 32.
[182] ibid 29.

intentionality in the crime of genocide.[183] Israel Charny is one scholar who rejects completely the concept of intent, instead concentrating his definition on the notion of mass killing.[184] Wallimann and Dobkowski also question the inclusion of intention.[185] Tony Barta is another academic who does not concentrate on the notion of genocide, rather he focuses on the structural factors that give rise to genocide.[186] For Huttenbach the intent underlying the crime is a secondary concern, what is important for the crime of genocide is the outcome; that people have died.[187]

This viewpoint has been subject to criticism. Chalk states that genocide does not appear without intent.[188] Guenter Lewy argues that the role of intent in the crime of genocide is crucial as evidence of large scale loss of life is not sufficient to make a finding that genocide has occurred.[189] The consensus in academia is that genocide involves the intentional destruction of a group.[190] In the definitions of genocide presented by Drost, Kuper, Bauer, Fein, Katz, Horowitz, and Chalk and Jonassohn

[183] See discussion in Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 154–157; Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 350–355; Meghna Manaktala, 'Defining Genocide' (2012) 24 Peace Review: A Journal of Social Justice 179, 182.
[184] Israel Charny, 'Toward a Generic Definition of Genocide' in George Andreopoulos (ed), *Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press 1994) 75.
[185] Isidor Wallimann and Michael N Dobkowski, 'Introduction' in Isidor Wallimann and Michael N Dobkowski (eds), *Genocide and the Modern Age: Etiology and Case Studies of Mass Death* (Syracuse University Press 1987) xvi.
[186] Tony Barta, 'Relations of Genocide: Land and Lives in the Colonization of Australia' in Isidor Wallimann and Michael N Dobkowski (eds), *Genocide and the Modern Age: Etiology and Case Studies of Mass Death* (Syracuse University Press 1987) 238.
[187] Henry Huttenbach, 'Locating the Holocaust on the Genocide Spectrum: Towards a Methodology of Definition and Categorization' (1988) 3 Holocaust and Genocide Studies 289, 294.
[188] Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 158.
[189] Guenter Lewy, 'Can there be Genocide without the Intent to Commit Genocide' (2007) 9 Journal of Genocide Research 661, 671.
[190] Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 350–355, 364; Guenter Lewy, 'Can there be Genocide without the Intent to Commit Genocide' (2007) 9 Journal of Genocide Research 661, 661–662; Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (United States Holocaust Memorial Museum 2016) 31; Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 49.

they refer to intent,[191] or to other similar terms such as 'deliberate destruction',[192] 'planned destruction',[193] 'sustained purposeful action'[194] and 'structural and systematic destruction'.[195]

Alongside the various attempts to redefine genocide, there has been a 'proliferation' of '-cide' terms to describe violence against civilians in recent years.[196] The idea behind the creation of these concepts is to link their '-cide' with the moral outrage surrounding the crime of genocide.[197] These concepts include auto-genocide (mass murder of a group to which the perpetrators are also members of),[198] classicide (mass killing of social classes),[199] democide (state-led mass murder of any person),[200] ecocide (destruction of an environment which places the existence of people under threat),[201] ethnocide (suppression of a group's culture),[202] gendercide (the gender-selective killings of males or females in a situation),[203] and politicide (the destruction

[191] Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Penguin 1981) 86 (refers to 'explicit intent'); Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (Yale University Press 1990) 23; Steven Katz, *The Holocaust in Historical Context: The Holocaust and Mass Death before the Modern Age, Volume I* (Oxford University Press 1994) 131.
[192] Pieter Drost quoted in Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 350.
[193] Yehuda Bauer, 'The Place of the Holocaust in Contemporary History' in Jonathan Frankel (ed), *Studies in Contemporary Jewry, Volume 1* (Indiana University Press 1984) 213–214.
[194] Helen Fein, 'Defining Genocide as a Sociological Concept' (1990) 38 Current Sociology 8, 24.
[195] Irving Louis Horowitz, *Taking Lives: Genocide and State Power* (Transaction Books 1980) 17.
[196] Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 84.
[197] Colin Tatz, 'Genocide Studies: An Australian Perspective' (2011) 6 Genocide Studies and Prevention 231, 233.
[198] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 138.
[199] Martin Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge University Press 2005) 17.
[200] RJ Rummel, *Democide* (Transaction Publishers 1992) 36.
[201] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 235.
[202] Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 86–87.
[203] Mary Anne Warren, *Gendercide: The Implications of Sex Selection* (Rowman and Allanheld 1985) 22; Adam Jones, 'Gendercide and Genocide' (2000) 2 Journal of Genocide Research 185; Adam Jones, *Gendercide and Genocide* (Vanderbilt University Press 2004) 185–186; Adam Jones, *Genocide: A Comprehensive Introduction* (Routledge 2006) 325–331.

of a political group).[204] However the spread of '-cide' concepts has only added to the confusion surrounding the meaning of the concept of genocide.[205]

This section has illustrated that genocide studies has been saturated by academics seeking to advance their own understanding of genocide. As William Schabas remarks, it 'seems as if there are as many definitions of genocide as there are scholars working in the field.'[206] While there are numerous academics researching within the rubric of genocide studies there is a lack of uniformity in academia regarding the definition of genocide.[207] The above discussion highlights how contested the definition of genocide is, and how alternate definitions do not neatly fit into an overarching category as academics will often differ on how they conceptualise acts of genocide, the groups protected, and the intent element amongst others. The only thing most genocide studies scholars agree upon is the uselessness of the Convention's definition.[208] This means that there is no prevailing academic definition of genocide though, rather there is an overflowing pool full of definitions that is continually being added to with each new academic study. What does this leave us with? A multitude of definitions which contradict each other, which means that an agreed upon understanding of genocide is an impossible task.[209]

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[204] Barbara Harff and Ted Gurr, 'Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases since 1945' (1988) 32 International Studies Quarterly 359, 360; Barbara Harff, 'No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955' (2003) 97 American Political Science Review 57, 58.
[205] Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 98.
[206] William A Schabas, 'Commentary on Paul Boghossian, "The Concept of Genocide"' (2010) 12 Journal of Genocide Research 91, 97.
[207] ibid 97.
[208] Uwe Makino, 'Final Solutions, Crimes against Mankind: On the Genesis and Criticism of the Concept of Genocide' (2001) 3 Journal of Genocide Research 49, 58; David Moshman, 'Conceptual Constraints on Thinking about Genocide' (2003) 3 Journal of Genocide Research 431, 437; Daniel Feierstein, 'Leaving the Parental Home: An Overview of the Current State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 257, 257.
[209] Jacques Sémelin, 'Around the "G" Word: From Raphael Lemkin's Definition to Current Memorial and Academic Controversies' (2012) 7 Genocide Studies and Prevention 24, 26.

What effect, if any, have these scholarly debates had on the understanding of genocide held amongst the general public, in particular civil society activists and non-governmental organisations? When individuals label a situation as genocide, are they applying the legal definition of genocide as set out in the Genocide Convention or are they employing a social understanding of genocide? Have the various scholarly definitions provided here had more of an impact on civil society than the legal definition has had?

2.4(i) A Divergence in Understanding

Since the adoption of the Convention there has been an increased use of the word genocide by academics and activists, however the term has often been loosely applied to describe conflicts and situations which differ in nature and magnitude, and which do not correspond with the provisions of the Genocide Convention. For example the desire amongst academics to utilise the genocide label for their own individual research has meant that nearly every episode of mass violence has been labelled as genocide over the past number of decades.[210] This has meant that the general public along with many academics have equated genocide with mass murder, and nearly every situation which involves a large number of casualties has been termed genocide.[211]

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[210] Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 349–359 (Provides a list of a claimed cases of genocide in academia; lists the conflicts in the Amazon, Burma, Chechnya, Chile, China, the Democratic Republic of Congo, East Timor, Guatemala, Kosovo, Iraq, Sri Lanka, Sudan, the United States, and the colonisation of Africa, Australia, and the Americas); Adam Jones, *Genocide: A Comprehensive Introduction* (Routledge 2006) 24, 25–26, 70–76, 124–137, 185–202 (labels the Atlantic Slave Trade, the sanctions imposed by US and Great Britain on Saddam Hussein's Iraq in the early 90s, the European colonial conquest of the Americas and the treatment of the indigenous population, and the Soviet Union's treatment of its citizens, the Khmer Rouge actions in Cambodia, as genocide).

[211] Marko Milanović, 'State Responsibility for Genocide' (2006) 17 The European Journal of International Law 553, 556; Israel W Charny, 'The Definition of Genocide' in Samuel Totten and Paul R Bartrop (eds), *The Genocide Studies Reader* (Routledge 2009) 36; Dominik J Schaller, 'From Lemkin

Furthermore even incidents and situations that do not involve violence have been labelled as genocide, Scott Straus documents how over the course of 12 months at an American university campus fliers and posters referred to 'cutbacks in an ethnic studies department, incarceration rates of African Americans, and even George W Bush's election' as genocide.[212] Abortion, AIDS, animal cruelty, environmental pollution, family planning, immigration, nuclear warfare, and urban planning have all been termed genocide as well by members of activist communities.[213] Kurt Jonassohn states that the 'term genocide is now widely misused to denote almost anything that an observer is violently opposed to, whether or not anyone is being killed.'[214] Lois Presser contends that in these argued cases of genocide, activists do not care about the 'accuracy' of their statement but instead want to label the act as the worst crime imaginable.[215] Genocide has become associated with the worst crime in existence, and the powerful rhetorical and symbolic value of the genocide label has meant that academics and activists want to label the situations they are studying or advocating as genocide.[216]

However in using the term genocide activists are often guilty of oversimplifying a situation by focussing on one issue or narrative which is 'most catchy' to the general

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to Clooney: The Development and State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 245, 246; Mohammed Abed, 'The Concept of Genocide Reconsidered' (2015) 41 Social Theory and Practice 328, 335.

[212] Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 349.

[213] Kurt Jonassohn, 'Prevention without Prediction' (1993) 7 Holocaust and Genocide Studies 1, 5; Samuel Totten and Paul R Bartrop (eds), *The Genocide Studies Reader* (Routledge 2009) x–xi; Uğur Ümit Üngör, 'Studying Mass Violence: Pitfalls, Problems, and Promises' (2012) 7 Genocide Studies and Prevention 68, 70.

[214] Kurt Jonassohn, 'Prevention without Prediction' (1993) 7 Holocaust and Genocide Studies 1, 5.

[215] Lois Presser, *Why We Harm* (Rutgers University Press 2013) 31. See also Mark Levene, *Genocide in the Age of the Nation State – Volume 1: The Meaning of Genocide* (IB Tauris 2005) 37.

[216] David Moshman, 'Conceptual Constraints on Thinking about Genocide' (2003) 3 Journal of Genocide Research 431, 439–440; Stuart D Stein, 'Conception and Terms: Templates for the Analysis of Holocausts and Genocides' (2005) 7 Journal of Genocide Research 171, 174.

public and this oversimplified understanding of a situation can be detrimental to an affected population as activists advocate supposed easy solutions which are in reality not achievable by governments as the activists have ignored 'the broader context and underlying issues which contribute to the problem.'[217] Furthermore civil society is a 'fickle entity' as its interest in a situation can be guided by what is receiving attention in the media, and this interest can easily fade away when a situation disappears from media coverage.[218]

Notwithstanding this the powerful symbolic nature of the genocide label has meant that academics and civil society actors are more willing than the UN and its member states to label a situation as genocide, without any thought for legal repercussions, so as to attract attention to a cause.[219] For instance, Alex de Waal admits that his labelling of the situation in the Nuba Mountains in Sudan in the mid-1990s as genocide was a tactical means of drawing attention to an 'unknown' situation.[220] He believed at the time that using the word would 'grab headlines' in the same manner as the genocide in Srebrenica.[221] In this century, the labelling of the situation in Darfur as genocide meant that it received more attention from activists and the media than the situation in the Democratic Republic of Congo, despite the latter situation involving a greater level of violence.[222]

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[217] Casey Hogle, Trisha Taneja, Keren Yohannes, and Jennifer Ambrose, 'Conclusion: Reclaiming Activism' in Alex de Waal (ed), *Advocacy in Conflict: Critical Perspectives on Transnational Activism* (Zed Books 2015) 274.
[218] Nicholas Wheeler, 'The Political and Moral Limits of Western Military Intervention to Protect Civilians in Danger' (2001) 22 Contemporary Security Policy 1, 5.
[219] Mark Levene, *Genocide in the Age of the Nation State – Volume 1: The Meaning of Genocide* (IB Tauris 2005) 2–3.
[220] Alex de Waal, 'Writing Human Rights: And Getting it Wrong' (2016) 41 Boston Review 26, 26.
[221] ibid 29–30.
[222] Kurt Mills, *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute, and Palliate* (University of Pennsylvania Press 2015) 206–207.

This symbolic value of the genocide label can not only be significant for raising awareness of a situation within the wider public but can be a means of castigating a state for the crimes it committed. In 1967 the International War Crimes Tribunal, a body composed of 'writers, politicians, philosophers, scientists and lawyers' created by Bertrand Russell and chaired by Jean-Paul Sartre, proclaimed that the US perpetrated genocide in Vietnam.[223] In defining the crime of genocide, Sartre included elements of cultural genocide; for him 'the destruction of the national character, culture, customs and even language of a group constituted genocide' as 'it destroyed social structures and prevented religious and cultural life.'[224] While having no legal effect, as the body was non-governmental and non-judicial in nature, Sartre was drawing upon the symbolism of the word genocide to compare the US actions in Vietnam to the Holocaust as means of denouncing the actions of the US government.[225] The significance of the word genocide is therefore driving this divergence between the legal understanding of genocide and the social understanding of genocide as academics and activists push to associate their situation with the pinnacle of evil, even if it does not correspond to the legal definition.

The divergence in understanding of the crime of genocide can be seen not only in the understanding of the crime held amongst academics, activists, and the general public but also in how the crime has been treated by states, in particular two separate investigations into the colonial practices of the Australian and Canadian governments

[223] Matthew Lippman, 'Genocide: The Crime of the Century: The Jurisprudence of Death at the Dawn of the New Millennium' (2001) 23 Houston Journal of International Law 467, 495; Marcos Zunino, 'Subversive Justice: The Russell Vietnam War Crimes Tribunal and Transitional Justice' (2016) 10 International Journal of Transitional Justice 211, 211; Cody J Foster, 'Did America Commit War Crimes in Vietnam' *The New York Times* (1 December 2017).
[224] Marcos Zunino, 'Subversive Justice: The Russell Vietnam War Crimes Tribunal and Transitional Justice' (2016) 10 International Journal of Transitional Justice 211, 219.
[225] Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge University Press 2012) 132–133.

respectively.[226] The two inquiries determined that the practice of forced removal of children from indigenous groups and the assimilation of these groups into society amounted to genocide.[227] However both inquiries rather than examine how the policy of forced removal and assimilation would lead to the physical or biological destruction of a group, rely instead on the cultural destruction of a group for determining genocide had been committed.

The Australian inquiry stated that the practice of absorption and assimilation amounts to genocide as it aimed to destroy the 'cultural unit.'[228] The inquiry states that the objective of this policy was 'the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of Indigenous peoples.'[229] The Canadian inquiry determined that the crime of cultural genocide encompassed the 'destruction of those structures and practices that allow the group to continue as a group.'[230] The acts of cultural genocide include land seizure, forced transfers of populations, restriction of movement, suppression of language, and prohibition of cultural beliefs such as spiritual practices.[231] These acts are intended to

[226] Australian Human Rights and Equal Opportunity Commission, 'Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (1997); Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada' (2015).
[227] Australian Human Rights and Equal Opportunity Commission, 'Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (1997) 190; Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada' (2015) 1, 54–56, 133.
[228] Australian Human Rights and Equal Opportunity Commission, 'Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (1997) 237.
[229] ibid 237.
[230] Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada' (2015) 1.
[231] ibid 1.

destroy the 'political and social institutions' of a group and prevent the transmission of culture from one generation to the next.[232]

In proving that the respective governments possessed an intent to destroy underlying their actions the two inquiries focussed on the policy of assimilation as proof of an intent to destroy a group. This argument that cultural assimilation amounts to genocide relies directly upon the work of Lemkin who had included cultural assimilation in his definition of genocide.[233] However the practice of cultural assimilation and the idea of cultural genocide had been deliberately excluded from the Convention by the drafters of the document.[234] The Canadian inquiry does actually acknowledge that cultural genocide is not included under the provisions of the Convention.[235]

The labelling of the policy of forced removal and assimilation as genocide might provide the victims and descendants of the victims with a symbolic acknowledgement of their suffering, however absorption and assimilation are not crimes under the Convention. This attempt to stretch the Convention's definition of genocide to include elements of attacks on culture only adds to the confusion surrounding genocide in society as it associates genocide with cultural genocide. As these are two prominent inquiries, it will result in an even further divide between the legal definition of genocide and society's understanding of what elements are comprised in the definition of genocide.

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[232] ibid 1.
[233] Australian Human Rights and Equal Opportunity Commission, 'Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (1997) 235, 237.
[234] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009), 211–213.
[235] Truth and Reconciliation Commission of Canada, 'Canada's Residential Schools: The Legacy' (2015) 125.

In the seventy years since Raphael Lemkin created the term genocide its meaning in discourse has changed drastically from Lemkin's original concept and from the legal definition provided in the Convention.[236] Genocide is now 'much more than a word' it is 'a label which can have tremendous impact.'[237] The divergence between the legal understanding of genocide and society's understanding is not a new phenomenon, since the adoption of the Genocide Convention it is clear that society had a wider understanding of genocide that what was conceptualised within the Convention. This divergence is driven by the work of academics and activists who in rethinking and reinterpreting the definition of genocide have created different notions of what encompasses genocide, and which has translated into the understanding of genocide held amongst the general public.[238] Within the public's imagination, genocide is associated with generalised mass violence and is regarded as the worst crime in existence. A genocide declaration has also been equated with intervention by activists. This perception of genocide could potentially affect the response of the international community to claims of genocide as actors will be pressurised to label the violence as genocide and take action to halt the violence. The effect of the social understanding of genocide on the international response to genocide will be explored further in the following chapters.

Before exploring this issue, the thesis will examine whether with a clear desire amongst academics and activists for a less restrictive definition of genocide and with

[236] Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 36.
[237] Marianne L Wade, 'The Criminal Law between Truth and Justice' (2009) 19 International Criminal Justice Review 150, 154.
[238] Kurt Jonassohn, 'Prevention without Prediction' (1993) 7 Holocaust and Genocide Studies 1, 5; Peter Quayle, 'Unimaginable Evil: The Legislative Limitations of the Genocide Convention' (2005) 5 International Criminal Law Review 363, 364; Marko Milanović, 'State Responsibility for Genocide' (2006) 17 The European Journal of International Law 553, 556; Marianne L Wade, 'The Criminal Law between Truth and Justice' (2009) 19 International Criminal Justice Review 150, 152.

the flaws apparent in the Genocide Convention's definition of genocide, should the Convention's definition of genocide be revisited?

2.5 A New Definition?

Why should the legal definition of genocide not be changed? The current definition 'excludes numerous cases of organised mass violence, which together amount to a death toll even greater than that of genocide cases.'[239] Is it not right therefore to properly describe the suffering of populations from tragedies such as war, famine, slavery, and colonialism as genocide? Is their suffering less than the victims of genocide as intentional exterminatory killing? Does their membership of political, social, economic, gender, and other groups mean that they are less important than ethnic groups or racial groups? Is the destruction of a group's culture and cultural existence not sufficiently serious enough for attention? These are salient questions in the study of genocide, and ones which researchers have been confronting within the rubric of genocide studies since the adoption of the Genocide Convention. They are not easy questions to dismiss, as genocide's association with the worst crimes in existence means that the genocide label is extremely important for victims of violence to characterise their suffering.

However it must be acknowledged that a new definition of genocide would not mean that any new groups which would fall under the definition would receive greater protection in international affairs. The evidence from Rwanda, the former Yugoslavia, Darfur, the Sinjar region, and Myanmar illustrates that genocidal acts have been continually perpetrated since the Convention was adopted, ethnic and racial groups

[239] Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 370.

are no more immune from violence than political or social groups.[240] A new definition will not exist in a vacuum, instead it will continue to be influenced by state and economic interests. Therefore however genocide is redefined or reconceptualised, it will not translate into effective action to prevent and respond to genocide in the current climate of international relations. Even if states could agree to a new definition, there is no guarantee that the new definition would not be subject to the same ambiguities that plague the current definition as a level of indeterminacy within the provisions is necessary to ensure that states accept a treaty. Due to this indeterminacy the elements of a new definition could continue to be unidentifiable in the midst of violence. Particularly as the definitions of genocide presented in academia contain some of the flaws that academics say hinder the ability to identify genocide in ongoing situations including the difficulty of identifying intent. Therefore a new definition is not a panacea for all the faults and deficiencies with the legal label of genocide.

Furthermore while there may be compelling arguments to amend or completely rewrite the definition of genocide, the main issue to be addressed in seeking to redefine genocide is how probable is it that the international community will agree to revise the Genocide Convention. This is a question that is often overlooked by genocide academics, who in offering a new definition of genocide neglect to discuss the legal practicalities of how the international community would revise the definition of genocide.[241]

Under Article XVI of the Genocide Convention a state can request to revise the Convention, however no state has ever proposed to revise the Convention under this

[240] Lisa Cherkassky, 'Genocide: Punishing a Moral Wrong' (2009) 9 International Criminal Law Review 301, 302.
[241] William A Schabas, 'The International Legal Prohibition of Genocide Comes of Age' (2004) 5 Human Rights Review 46, 46.

article. The UN did undertake inquiries into potentially revising the Convention in the 1970s and 1980s; with the Sub Commission on Prevention of Discrimination and Protection of Minorities appointing Special Rapporteurs to examine the Convention. In the first report presented in 1978, the Special Rapporteur, Nicodème Ruhashyankiko, reported that if the Genocide Convention was revised, he would advise that political and other groups would not be added as it would prevent states becoming party to the Convention.[242] Furthermore the Special Rapporteur stated that these groups were already protected under statutes of international law.[243] In a further report by a new Special Rapporteur, Benjamin Whitaker, it was recommended to expand the list of protected groups to include sexual (men, women, and different sexual orientations) and political groups.[244] Despite these recommendations, no effort was made by the UN to revise the definition.

The Convention has been adopted without any changes in the statutes of the Rwandan and former Yugoslavian ad hoc tribunals, and in the Rome Statute of the International Criminal Court.[245] In fact there was very little discussion at the Rome Conference of revisiting the definition of genocide.[246] Cuba was the only state to discuss expanding the scope of the definition, with the inclusion of political and social groups in the

[242] United Nations Economic and Social Council 'Study of the Question of the Prevention and Punishment of the Crime of Genocide' (4 July 1978) UN Doc E/CN.4/Sub.2/416, para. 87.
[243] ibid para. 87.
[244] United Nations Economic and Social Council 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide' (2 July 1985) UN Doc E/CN.4/Sub.2/1985/6, para. 30, 36.
[245] William A Schabas, 'The "Odious Scourge": Evolving Interpretations of the Crime of Genocide' (2006) 1 Genocide Studies and Prevention 93, 97.
[246] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 107.

protected groups.[247] This suggestion received no traction, and the crime of genocide was left untouched in the final document of the Rome Conference.[248]

Therefore the likelihood that the UN would agree to review the Convention is slim, and furthermore there is an even slimmer chance that the UN would get agreement on revisions to the text.[249] The records of the drafting bodies, and in particular the ad hoc committee which only included seven representatives, highlights the difficulty of finding a compromise on the creation of an effective treaty to prevent and punish the crime of genocide. It would be an even greater challenge now to agree upon a new definition as the UN General Assembly's membership has trebled since 1948. The chances of the international community enforcing the Convention are greater than the odds of the international community being able to decide on a new treaty.[250]

The continued permanency of the Convention has led a number of genocide scholars, including William Schabas, to dismiss any attempt to redefine genocide beyond the legal definition provided by the Genocide Convention.[251] These scholars accept that there are faults within the Genocide Convention but argue that it is the only accepted definition; pointing out the fact that states have made no attempt to change the legal definition of genocide despite the numerous chances they have had to amend the definition, and therefore it should be followed.[252] While this definition excludes

[247] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Committee of the Whole) 'Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.l and Corr.l)' (17 June 1998) UN Doc A/CONF.183/C.1/SR.3, para. 100.
[248] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 107–110.
[249] Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 45.
[250] Kenneth J Campbell, *Genocide and the Global Village* (Palgrave 2001) 22.
[251] William A Schabas, 'The "Odious Scourge": Evolving Interpretations of the Crime of Genocide' (2006) 1 Genocide Studies and Prevention 93, 97.
[252] Jacques Sémelin, *Purify and Destroy: The Political Uses of Massacre and Genocide* (Hurst and Thompson 2007) 21.

additional elements such as attacks on the culture of a group and recognition of political and others groups, these elements have been subsumed under the category of crimes against humanity with the Rome Statute of the International Criminal Court.[253]

The passing of the Rome Statute has meant that a number of academics who questioned the definition of genocide abandoned their push for a new definition, as many of the elements they campaigned to be included within the definition of genocide were now included within the category of crimes against humanity.[254] This is not a universal opinion in academia as researchers such as Mark Levene, Martin Shaw, Daniel Feierstein, and Donald Bloxham continue to present definitions of genocide that are distinct from the Genocide Convention's definition.[255] However while academics and activists can 'develop all of the alternative definitions they wish', there is still only one definition recognised by states and international courts.[256] As Kenneth Campbell argues 'there is only one universally accepted legal definition of genocide upon which effective international prevention, suppression, and punishment can be authoritatively based.'[257]

In conclusion despite longstanding criticisms of the Convention's definition and the determination amongst academics and activists to redefine the definition, the definition of genocide contained within the Genocide Convention has remained untouched over the decades since the Convention was adopted which means that it is

[253] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 164–165; Payam Akhavan, 'Cultural Genocide: Legal Label or Mourning Metaphor' (2016) 62 McGill Law Journal 243, 248–249.
[254] Daniel Feierstein, 'Leaving the Parental Home: An Overview of the Current State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 257, 259.
[255] See discussion in Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 26–27.
[256] Samuel Totten and Paul R Bartrop (eds), *The Genocide Studies Reader* (Routledge 2009) 35.
[257] Kenneth J Campbell, *Genocide and the Global Village* (Palgrave 2001) 21.

the definition which will continue to apply to a situation which potentially involves genocidal violence.[258] The durability of the Convention is remarkable but are the provisions sufficient for identifying genocide in an ongoing situation and taking action to prevent the perpetration of genocide?

2.6 Identifying the Convention's Definition in the Midst of Violence

From a reading of Article II of the Convention and academic critiques of this definition of genocide there are a number of ambiguities within the provision which would potentially impact on the identification of genocide in the midst of violence. The discussion of academic definitions within Section 2.4 of this chapter illustrates some of the uncertainties within academia with this article including questions over how is an intent to destroy established or proved,[259] is the definition restricted to the four named groups,[260] is the definition of acts of genocide restricted to the acts outlined in (a)–(e),[261] and what does in whole or in part mean;[262] does it imply that there is a numerical limit of victims.[263] These ambiguities reflect the compromises that were

[258] Guglielmo Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 International and Comparative Law Quarterly 578, 578; William A Schabas, 'Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide' (2008–2009) 61 Rutgers Law Review 161, 190.

[259] Jonathan Cina, 'Genocide: Prevention or Indifference (Part One)' (1996) 1 Journal of Conflict and Security Law 59, 64; Barbara Harff, 'No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955' (2003) 97 American Political Science Review 57, 58; Jeffrey S Morton and Neil Vijay Singh, 'The International Legal Regime on Genocide' (2003) 5 Journal of Genocide Research 47, 56.

[260] David Moshman, 'Conceptual Constraints on Thinking about Genocide' (2003) 3 Journal of Genocide Research 431, 444; Ernesto Verdeja, 'The Political Science of Genocide: Outlines of an Emerging Research Agenda' (2012) 10 Perspectives on Politics 307, 309.

[261] David Moshman, 'Conceptual Constraints on Thinking about Genocide' (2003) 3 Journal of Genocide Research 431, 444.

[262] Michael Freeman, 'The Theory and Prevention of Genocide' (1991) 6 Holocaust and Genocide Studies 185, 187; Matthew Lippman, 'Genocide: The Crime of the Century: The Jurisprudence of Death at the Dawn of the New Millennium' (2001) 23 Houston Journal of International Law 467, 524–525; William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 276.

[263] Jonathan Cina, 'Genocide: Prevention or Indifference (Part One)' (1996) 1 Journal of Conflict and Security Law 59, 64; Scott Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide' (2001) 3 Journal of Genocide Research 349, 367.

necessary to guarantee that the Convention was passed and adopted, however it left significant questions over identifying genocide in the midst of violence.

If these elements are difficult to identify in the midst of violence it raises the utility of seeking to determine genocide in an ongoing situation. If determining the existence of an intent to destroy and establishing the 'part' of a group destroyed is too complex of a task in an ongoing situation for observers and monitors, should the genocide label continue to be employed to characterise ongoing violence. Rather it is not more effective for international response and prevention to employ an umbrella term such as atrocity crimes. The research in this chapter has shown the benefits of using the term atrocity crimes as a deficient definition has proved to be extremely problematic for researchers and activists.

The research has illustrated that the definition of genocide is flawed with ambiguities and uncertainties strewn throughout Article II. Employing the label atrocity crimes would address some of these flaws as the focus would be removed off seeking to identify these vague elements in the midst of violence, and instead leave the identification of genocide to a competent international court and tribunal. This court or tribunal would then have the benefit of time and access to contemporaneous documents and witness statements to make a determination on genocide. Utilising the term atrocity crimes would remove the focus off trying to pinpoint the elements of a flawed definition in an ongoing situation, and instead place the focus of attention back on prevention and punishment.

This chapter has highlighted that this would be an advantageous approach as genocide is a complex crime to identify, not only due to a deficient definition but also the understanding of genocide held amongst the general public. The symbolic value

attached to the genocide label, due to its association with the Holocaust and other tragic atrocities, has meant that the focus of academics and activists is often on employing the term genocide without any appreciation for whether the circumstances of the situation meet the elements of the crime. This connation of genocide as the worst crime in existence could prove problematic for states in responding to genocide, as the focus of the response becomes centred on whether genocide is determined rather than whether the response is effective. Too often the flawed definition and understanding of genocide has meant that researchers can spend more time debating the provisions of Article II and redefining the concept of genocide so as to characterise a situation as genocide, rather than examining how to prevent genocide in the first place and to meaningfully convert a state's duty under the Convention into reality. The label of atrocity crimes would remove the highly charged symbolism of the genocide word in the midst of violence, and instead ensure that focus was on prevention and response rather than definitional debates.

While atrocity crimes is not a perfect concept in preventing and responding to crimes, the fact that with no appetite to revisit the definition of genocide new approaches need to be examined and utilised for confronting the crime of genocide. The label atrocity crimes would remedy a lot of the faults raised with the definition of genocide in this chapter by removing the complexities of identifying and employing a flawed definition and understanding of genocide which could hinder or completely prevent any effective response. The goal of research into the crime of genocide and the area of genocide studies should be the prevention of genocide, and any idea that advances the preventative potential of the Genocide Convention should be explored. Whether atrocity crimes is the term that can address the deficiencies within the definition of

genocide and the Genocide Convention is a central question that will be explored in the following chapters.

2.7 Conclusion

This chapter has explored the first strand of the research, and the research questions contained within and has addressed the key aim of this chapter by arguing that the legal definition of genocide as set out in the Genocide Convention is the only internationally accepted definition that will apply to eliminatory violence. Therefore in the following chapters when examining the complexities of identifying and determining genocide, the thesis will be concentrated on the Convention's definition of genocide under Article II when conducting examinations of the case studies and case law. However in examining the discussions surrounding the definition of genocide within the political, academic, and activist spheres, ambiguities and deficiencies within the legal definition have been pinpointed which will be further explored in the following chapters as the discussion of the second and third strand of the research develop. This chapter has highlighted some initial complexities that could conceivably impact on the identification and determination of genocide; complexities which raise the utility of the genocide label as a term to be employed to respond to and prevent the occurrence of genocide.

Before turning to examine this question, it is important to note that while this chapter has illustrated that this definition of genocide is flawed, the interpretation of the crime of genocide is not restricted to the text of the Convention. The interpretation of the crime has undergone a period of evolution over the past twenty five years as a number of judicial decisions have contributed to fleshing out the provisions and giving life to

the meaning of the Convention.[264] Looking at these judgments, has the definition of genocide remained tied to the Genocide Convention, or have the academic attempts to rethink the crime had an impact on expanding the elements of the crime? Has the definition of genocide moved closer to a social understanding of genocide or have the international courts and tribunals affirmed the work of the drafters of the Convention? Furthermore within the jurisprudence of these courts, has a definition of genocide been advanced which is identifiable and applicable in the midst of bloodshed, or is the definition still plagued by ambiguities that render it unidentifiable in ongoing violence?

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

CHAPTER THREE: REVIVING THE ELEMENTS OF THE CRIME

3.1 Introduction

In addressing the utility of the genocide label as preventative term, the last chapter began examining the various strands and research questions of this thesis and established that the legal definition of genocide contained with the Genocide Convention is the only definition that will apply to situations of violence. The previous chapter highlighted some deficiencies within this definition that could impact on the identification of genocide due to the ambiguity of the elements of genocide. This chapter will further explore the complexities of the genocide label by examining how the definition has been interpreted in international courts and tribunals. The Convention on the Prevention and Punishment of the Crime of Genocide was given a new lease of life in the mid-1990s by being placed at the centre of the international community's attempt to punish the most heinous crimes in international law. The International Criminal Tribunal for Rwanda (hereafter 'ICTR'), the International Criminal Tribunal for the former Yugoslavia (hereafter 'ICTY'), the International Criminal Court (hereafter 'ICC'), and the International Court of Justice (hereafter 'ICJ') became key institutions in dealing with violations of international criminal law by individuals and by states.

In examining the case law of these international criminal law institutions the core aim of this chapter is to address the second strand of the research which concerns the complexities of identifying the crime in practice. This chapter will do this by examining whether within the jurisprudence of these international institutions have the international justices provided us with an interpretation and understanding of the Convention's definition which is more readily identifiable in an ongoing situation of violence? Or is it the case that despite the judicial clarifications we are no closer to

possessing a definition of genocide which can be accurately applied to violence in the midst of a situation? The knowledge gained from addressing these questions will help highlight the flaws that may impact on the identification of genocide in the midst of violence. Furthermore in exploring the wider context of the case law in this chapter, the examination of the case studies will highlight the potential complexities of pursuing justice in the midst of violence. To examine these complexities of the identification and determination of genocide, this chapter will begin by focussing on the first conviction for the crime of genocide from an international criminal tribunal.

3.2 The International Criminal Tribunal for Rwanda

The United Nations Security Council established the ICTR in November 1994, after the violence in Rwanda had ceased and the perpetrators had fled the country or been detained.[1] The full title of the statute for the ICTR, *the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994*, highlighted that the primary focus of the ICTR would be on prosecuting the crime of genocide. The definition of genocide in Article 2(2) of the ICTR Statute, set out in the UN Security Council resolution establishing the ICTR, was adopted, without any changes, from Article II of the Genocide Convention. The ICTR shared an Appeals Chamber with the International Criminal Tribunal for the former Yugoslavia which has helped ensure a uniform approach to serious violations of international

[1] United Nations Security Council Resolution 955 (8 November 1994) UN Doc S/RES/955.

humanitarian law.[2] Since it began its operations in 1995 the ICTR has indicted ninety three individuals, with the majority of cases concerning the commission of genocide. The ICTR was first called upon to address the crime of genocide in the case of *Akayesu*,[3] and the Trial Chamber's judgment is an important starting point as it is the first time an international court examined the elements of the crime of genocide.

3.2(i) Akayesu*: A Remarkable Judgment*

The Trial Chamber analysed every ingredient of the crime so as to formulate a definition of genocide that could be applied to the crimes committed in Rwanda. The essential elements of the crime of genocide were conceptualised within two categories; the physical acts, *actus reus,* and the mental intent, *mens rea*.[4] Before exploring the culpability of Jean-Paul Akayesu, a bourgmestre of the Taba commune, the Trial Chamber concluded genocide had been committed in Rwanda as acts of genocide including widespread killings and acts causing serious bodily harm were committed with the intent to destroy the Tutsi, a protected ethnic group.[5] The Trial Chamber determined that genocide took place in Rwanda due to the meticulous organisation of the massacre.[6] Evidence of the intent to destroy the Tutsi underlying the acts of genocide was manifest in the deliberate targeting of Tutsi, lists of Tutsi being compiled, training of militia, media propaganda, and speeches, slogans, and songs of

[2] Payam Akhavan, 'The Crime of Genocide in the Jurisprudence of the ICTR' (2005) 3 Journal of International Criminal Justice 989, 990; Arto Kantonen, *Rwanda Crisis and Genocide in Case Law of Rwanda Tribunal* (University of Helsinki 2006) 14.
[3] *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998).
[4] ibid [116]–[117].
[5] ibid [126].
[6] ibid [126].

the extremists.[7] The Trial Chamber did stress that the fact genocide was committed in Rwanda had no bearing on the individual guilt of the accused.[8]

Physical Acts

The Trial Chamber considered first the material elements of the crime of genocide under Article 2(2) (a)–(e) of the ICTR statute. The Trial Chamber clarified that 'killing members of a group' under Article 2(2) (a) amounted to 'homicide with the intent to cause death.'[9] With regard to Article 2(2) (b) the Trial Chamber determined that 'causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.'[10] The Trial Chamber listed torture, inhumane and degrading treatment, and persecution as examples of acts which cause serious bodily or mental harm.[11] Sexual violence, including rape, also constituted genocide for the Trial Chamber as it viewed these acts as causing serious bodily and mental harm to the victim/s.[12] *Akayesu* was the first judgment to recognise rape as an element of the crime of genocide.

In considering the provision under Article 2(2) (c) concerning deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part, the Trial Chamber held that the acts of 'subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement' would meet the criteria for this provision.[13] These acts would not have to lead to the immediate death of individuals

[7] ibid [118]–[126].
[8] ibid [129].
[9] ibid [501].
[10] ibid [502].
[11] ibid [504].
[12] ibid [731].
[13] ibid [505].

but would ultimately lead to their destruction.[14] Measures intended to prevent births under Article 2(2) (d) within the group were determined to include 'sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.'[15] The Trial Chamber in addition stated that the measures intended to prevent births may also be mental, in that the effects of the trauma lead a person to not procreate.[16] The crime of forcibly transferring children from one group to another under Article 2(2) (e) includes not only the act of forcibly transferring children but also any 'threats or trauma which would lead to the forcible transfer of children from one group to another.'[17]

Mental Intent

The Trial Chamber determined that the crime of genocide was distinct from other crimes due to its requirement of special intent or *dolus specialis*, 'which demands that the perpetrator clearly seeks to produce the act charged.'[18] The special intent of the crime of genocide according to the Trial Chamber is the intent to destroy in whole or part one of the protected groups.[19] The Trial Chamber stressed that the group must be the target of the attack, individuals must be selected because of their membership of a protected group and not due to their individual identity.[20] Thus according to the Trial Chamber the 'victim of the crime of genocide is the group itself.'[21]

The Trial Chamber had to tackle the tricky issue of defining a group, a provision which had long been the subject of criticism due to the exclusion of political, gender,

[14] ibid [505].
[15] ibid [507].
[16] ibid [508].
[17] ibid [509].
[18] ibid [498].
[19] ibid [498].
[20] ibid [521].
[21] ibid [521].

economic, ideological, linguistic, and cultural groups. The Trial Chamber determined, after examining the *travaux préparatoires* of the Convention, the intention of the drafters of the Convention was to restrict the definition to 'stable' groups.[22] 'Stable' groups were permanent groups which were determined by birth.[23] The Trial Chamber argued that the four protected groups shared the common feature that membership in the group 'would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.'[24] This definition would exclude mobile groups, such as political and economic groups, which an individual can join.[25]

The Trial Chamber judged that it should respect the intention of the drafters of the Convention and ensure the protection of any stable and permanent group.[26] The Trial Chamber defined a national group as 'a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.'[27] An ethnic group was defined as 'a group whose members share a common language or culture.'[28] The Trial Chamber stated that the definition of a racial group is 'based on the hereditary physical traits often identified with geographical region, irrespective of linguistic, cultural, national or religious factors.'[29] A religious group was defined as a group 'whose members share the same religion, denomination or mode of worship.'[30]

[22] ibid [511].
[23] ibid [511].
[24] ibid [511].
[25] ibid [511].
[26] ibid [516], [701].
[27] ibid [512].
[28] ibid [513].
[29] ibid [514].
[30] ibid [515].

The Trial Chamber was confronted with determining whether the Tutsi were an ethnic group under the statute, a task which proved difficult in justifying. The Trial Chamber acknowledged that the Tutsi did not have a distinct language or culture from the Hutu.[31] The distinction between Hutu and Tutsi was based on lineage rather than ethnicity.[32] The Trial Chamber took an objective approach to determining the Tutsi were an ethnic group, ruling that identity cards introduced during colonial times and used during the Genocide to separate the Tutsi at roadblocks were an indicator that the Tutsi were a distinct group recognised in Rwandan society.[33] Ethnicity was also recognised in the Constitution and statutes of Rwanda.[34] Witnesses before the Trial Chamber also identified themselves by reference to their ethnic group.[35] The Tutsi were also recognised as an ethnic group by those committing the murders.[36] The Trial Chamber concluded that the Tutsi were targeted due to their membership of an ethnic group.[37]

After establishing that the Tutsi were a protected group under the statute, the Trial Chamber faced the complex task of proving that Akayesu possessed the intent to destroy the Tutsi. On the question of establishing the intent to destroy in the actions of Akayesu, the Trial Chamber stated that without a confession from the accused it is nearly impossible to prove that the accused possessed the specific intent to destroy a group.[38] The Trial Chamber declared that it could infer specific intent from the 'scale of atrocities committed, their general nature, in a region or a country, or furthermore,

[31] ibid [170].
[32] ibid [81].
[33] ibid [83], [123], [170], [702].
[34] ibid [170].
[35] ibid [171], [702].
[36] ibid [171].
[37] ibid [124]–[125], [702].
[38] ibid [523].

the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups'.[39] Later on in the judgment the Trial Chamber declared intent can also be inferred 'from all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even perpetrators.'[40]

The totality of the evidence against Akayesu helped the Trial Chamber reach its decision that Akayesu possessed the intent to destroy the Tutsi and therefore was criminally responsible for the crime of genocide.[41] The Trial Chamber sentenced Akayesu to life imprisonment for his conviction for the crime of genocide, a decision which was affirmed on appeal.[42]

The Legacy of Akayesu

Akayesu took his place in history by becoming the first individual to be convicted of the crime of genocide under the criminal framework established by the Genocide Convention. His conviction was swiftly followed by Jean Kambanda, interim prime minister during the genocide, who became the first ever former head of state convicted of genocide.[43] Over the next eighteen years, a further forty four accused have been convicted of genocide, and had their convictions upheld on appeal. Over this time, the ICTR has brought to justice key figures involved in planning the genocide and spreading the extremist ideology including prominent military leaders, politicians,

[39] ibid [523].
[40] ibid [728].
[41] ibid [734].
[42] *Prosecutor v Akayesu* (Sentence) ICTR-96-4-S (2 October 1998) Verdict; *Prosecutor v Akayesu* (Appeals Judgment) ICTR-96-4-A (1 June 2001) Disposition.
[43] *Prosecutor v Kambanda* (Sentence) ICTR-97-23-S (4 September 1998).

governmental officials, businessmen, religious figures, and members of the media. These historic judgments have largely adopted the elements of genocide as set out by the Trial Chamber in *Akayesu*, however in a number of cases the Trial and Appeals Chambers of the ICTR have clarified the provisions and expanded on the definitions presented in *Akayesu*.

3.2(ii) Clarifying the Convention

Physical Acts

In addressing physical and mental harm amounting to genocide, the Appeals Chamber in *Seromba* determined that examples of serious bodily harm are 'torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.'[44] The Appeals Chamber stated that serious mental harm is 'more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat.'[45] The Trial Chamber in *Kayishema and Ruzindana* clarified the conditions which could amount to deliberately inflicting conditions calculated to bring about the destruction of a group under Article II (c); by declaring that 'lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion … rape, the starving of a group of people, reducing medical services below a minimum, and withholding sufficient living accommodation for a reasonable period' would lead to the 'slow death' and destruction of a group.[46]

The ICTR had to tackle the controversial issue of whether acts of 'cultural genocide' (in the sense of destroying the fabric of a group through the destruction of its cultural bonds, rather than killing its members) were included in the crime of genocide or

[44] *Prosecutor v Seromba* (Appeals Judgment) ICTR-2001-66-A (12 March 2008) [46].
[45] ibid [46].
[46] *Prosecutor v Kayishema and Ruzindana* (Trial Judgment) ICTR-95-1-T (21 May 1999) [115]–[116].

whether the definition was confined to physical and biological genocide. In *Semanza*, the Trial Chamber said that the drafters of the Genocide Convention 'unequivocally chose to restrict' the definition to physical and biological genocide.[47] In the case of *Seromba* the Trial Chamber definitively stated that '[t]he notion "destruction of the group" means the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.'[48]

Mental Intent

A key issue to be addressed by the Trial and Appeals Chambers was the difficulty of determining the existence of a group. The Trial Chamber in *Semanza* highlighted the difficulty of identifying a group, '[t]he Statute of the Tribunal does not provide any insight into whether the group that is the target of an accused's genocidal intent is to be determined by objective or subjective criteria or by some hybrid formulation.'[49] The Trial Chamber in *Kayishema and Ruzindana* determined that a group could be subjectively identified by those in the group (self-identification) or by others, including the perpetrators of the crimes (identification by others).[50] The Trial Chamber in *Rutaganda* stressed that the determination of a group depended not only on objective and subjective criteria but on the 'political, social and cultural context.'[51] The Trial Chamber in *Semanza* supported this approach by stating that determining whether a group was protected under Article 2 should be 'assessed on a case-by-case basis by reference to the objective particulars of a given social or historical content,

[47] *Prosecutor v Semanza* (Trial Judgment) ICTR-97-20-T (15 May 2003) [315].
[48] *Prosecutor v Seromba* (Trial Judgment) ICTR-2001-66-T (13 December 2006) [319].
[49] *Prosecutor v Semanza* (Trial Judgment) ICTR-97-20-T (15 May 2003) [317].
[50] *Prosecutor v Kayishema and Ruzindana* (Trial Judgment) ICTR-95-1-T (21 May 1999) [98].
[51] *Prosecutor v Rutaganda* (Trial Judgment) ICTR-96-3-T (6 December 1999) [56].

and by the subjective perceptions of the perpetrators.'[52] The Trial Chamber in *Bagilishema* sought to reconcile the objective and subjective approaches by declaring:

> The Chamber notes that the concepts of national, ethnical, racial, and religious groups enjoy no generally or internationally accepted definition. Each of these concepts must be assessed in the light of a particular political, social, historical, and cultural context. Although membership of the targeted group must be an objective feature of the Society in question, there is also a subjective dimension. A group may not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of Society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.[53]

The Trial Chamber's approach in *Bagilishema* of combining subjective evidence with objective facts as a means of establishing group membership has become the accepted approach in the ICTR, and this hybrid formulation has been adopted into the approach of the ICTY.

[52] *Prosecutor v Semanza* (Trial Judgment) ICTR-97-20-T (15 May 2003) [317].
[53] *Prosecutor v Bagilishema* (Trial Judgment) ICTR-95-1A-T (7 June 2001) [65].

The Trial and Appeals Chamber had to tackle the issue of whether the crime of genocide required a numerical threshold. The confusion is centred on the precise meaning of the phrase 'destroy in whole or in part' in the statute of the ICTR. In *Muvunyi* the Trial Chamber stated that there was no upper or lower limit of victims,[54] while the Trial Chamber in *Muhimana* ruled that 'the phrase "destroy in whole or in part a[n] ethnic group" does not imply a numeric approach.'[55] The Trial Chamber in *Bagilishema* considered that 'the intention to destroy must target at least a substantial part of the group.'[56] In *Kajelijeli*, the Trial Chamber stated that '[a]s has been explained in judgments of this Tribunal, in order to establish an intent to destroy "in whole or in part", it is not necessary to show that the perpetrator intended to achieve the complete annihilation of a group from every corner of the globe. Nevertheless, the perpetrator must have intended to destroy more than an imperceptible number of the targeted group.'[57]

The ICTR has emphasised the importance of intent, in *Kambanda* the Trial Chamber stated that 'genocide is unique because of its element of *dolus specialis* (specific intent).'[58] The ICTR though has recognised the difficulty of establishing intent, the Appeals Chamber in *Gacumbitsi* acknowledged that it is unlikely that an accused will admit to possessing genocidal intent, intent therefore must be inferred from the evidence.[59] The Appeals Chamber in *Nahimana, Barayagwiza, and Ngeze* stated that

[54] *Prosecutor v Muvunyi* (Trial Judgment) ICTR-2000-55A-T (12 September 2006) [479].
[55] *Prosecutor v Muhimana* (Trial Judgment) ICTR-95-1B-T (28 April 2005) [514].
[56] *Prosecutor v Bagilishema* (Trial Judgment) ICTR-95-1A-T (7 June 2001) [64].
[57] *Prosecutor v Kajelijeli* (Trial Judgment) ICTR-98-44A-T (1 December 2003) [809].
[58] *Prosecutor v Kambanda* (Sentence) ICTR-97-23-S (4 September 1998) [16].
[59] *Gacumbitsi v Prosecutor* (Appeals Judgment) ICTR-2001-64-A (7 July 2006) [40].

genocidal intent will be inferred if is the 'only reasonable inference from the totality of the evidence.'[60]

In establishing the intent of the accused, the Trial and Appeals Chambers have examined the conduct of the accused and identified a number of patterns that can be analysed to determine if the accused possessed the requisite intent to destroy a group. In *Kayishema and Ruzindana,* the Trial Chamber declared that intent could be inferred from the 'word or deeds' of the accused and 'by a pattern of purposeful action' undertaken by the accused.[61] The Trial Chamber considered that evidence of 'the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing' was proof that the accused had sufficient intent to destroy a group.[62] The Trial Chamber in *Seromba* provided a comprehensive list of facts and circumstances which the Chamber could examine to determine if the accused possessed intent, the list includes but is not limited to:

> (a) The general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others;
>
> (b) The scale of atrocities committed;
>
> (c) Their general nature;
>
> (d) Their execution in a region or a country;

[60] *Nahimana, Barayagwiza, and Ngeze v Prosecutor* (Appeals Judgment) ICTR-99-52-A (28 November 2007) [524].
[61] *Prosecutor v Kayishema and Ruzindana* (Trial Judgment) ICTR-95-1-T (21 May 1999) [93].
[62] ibid [93].

(e) The fact that the victims were deliberately and systematically chosen on account of their membership of a particular group;

(f) The exclusion, in this regard, of members of other groups;

(g) The political doctrine which gave rise to the acts referred to;

(h) The repetition of destructive and discriminatory acts;

(i) The perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.[63]

The *Seromba* test was adopted by the Trial and Appeals Chamber, and it is the standard used to determine if an accused had the requisite intent to destroy a group.

Other Elements

The Trial and Appeals Chambers have had to examine several issues about the elements of the crime of genocide that do not appear in the statute of the ICTR. The Trial and Appeals Chambers have addressed the question of whether the crime of genocide requires a plan or policy. The Trial Chamber in *Kayishema and Ruzindana* ruled that a plan or policy was not an element of the crime of genocide, however it stated that it would not be 'easy to carry out a genocide without a plan or organisation.'[64] Furthermore the Trial Chamber stated that the existence of a plan or policy 'would be strong evidence of the specific intent requirement for the crime of genocide.'[65] The Trial and Appeals Chamber also examined whether motive is an element of the crime. The Appeals Chamber in *Kayishema and Ruzindana* determined

[63] *Prosecutor v Seromba* (Trial Judgment) ICTR-2001-66-T (13 December 2006) [320].
[64] *Prosecutor v Kayishema and Ruzindana* (Trial Judgment) ICTR-95-1-T (21 May 1999) [94].
[65] ibid [276].

that 'criminal intent (*mens rea*) must not be confused with motive.'[66] The Trial Chamber in *Muvunyi* declared that an accused can be found guilty of genocide even if his personal motivation went beyond the intent to commit genocide.[67] On the question of premeditation, the Trial Chamber in *Semanza* held that premeditation is not an element of the crime.[68]

3.2(iii) A Pioneering Role

The ICTR has played a pioneering role in international criminal law, it was the first international court to convict a person for the crime of genocide and convict a former head of state.[69] The ICTR has held leading figures in the planning and organising of genocide accountable for their crimes which sent a signal that politicians and public figures can no longer act with impunity.[70] The ICTR has made an immense contribution to the understanding of the Genocide Convention by breathing life into its provisions.[71] The ICTR was faced with interpreting and defining a crime which had been overlooked since the UN adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. In its workings the ICTR did not restrict or widen the scope of the definition of genocide, or attempt any signification modification of the Convention's definition of genocide.[72] Instead through its judgments, the ICTR has clarified ambiguities in the provisions of the Convention,

[66] *Prosecutor v Kayishema and Ruzindana* (Appeals Judgment) ICTR-95-1-A (1 June 2001) [161].
[67] *Prosecutor v Muvunyi* (Trial Judgment) ICTR-2000-55A-T (12 September 2006) [479].
[68] *Prosecutor v Semanza* (Trial Judgment) ICTR-97-20-T (15 May 2003) [319].
[69] James Meernik, 'Proving and Punishing Genocide at the International Criminal Tribunal for Rwanda' (2004) 4 International Criminal Law Review 65, 66; Erik Møse, 'Main Achievements of the ICTR' (2005) 3 Journal of International Criminal Justice 920, 934–935.
[70] Erik Møse, 'Main Achievements of the ICTR' (2005) 3 Journal of International Criminal Justice 920, 932–933.
[71] Payam Akhavan, 'The Crime of Genocide in the Jurisprudence of the ICTR' (2005) 3 Journal of International Criminal Justice 989, 990.
[72] Larissa van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff 2005) 270.

and its work leaves us more knowledgeable about the elements of the crime of genocide.[73]

3.3 The International Criminal Tribunal for the former Yugoslavia

The UN Security Council established the ICTY in May 1993, in the midst of armed conflict across the territories of the former Yugoslavia.[74] The ICTY has indicted 161 individuals (including heads of state, prime ministers, government ministers, prominent military leaders, and mid-level political and military officials) over the course of its investigation into crimes across the situations in the former Yugoslavia. The ICTY has focussed its attention on war crimes and crimes against humanity, with 23 of the 161 indictments including charges against individuals for the commission of genocide. Only six of these individuals have been convicted of genocide with the rest of the cases leading to acquittals, plea agreements to lesser charges, an individual being transferred to a national jurisdiction or individuals passing away before their case has come to trial. While there is a low rate of convictions for genocide in the ICTY, the judgments of the tribunals can illuminate the understanding of genocide.

3.3(i) Evolving the Crime

Physical Acts

The ICTY has largely adopted the descriptions of material acts provided in the judgments of the ICTR, and has affirmed the judgments of the ICTR by ruling that the definition of genocide does not apply to acts of cultural genocide.[75] In *Tolimir*, the

[73] James Meernik, 'Proving and Punishing Genocide at the International Criminal Tribunal for Rwanda' (2004) 4 International Criminal Law Review 65, 66.
[74] United Nations Security Council Resolution 827 (25 May 1993) UN Doc S/RES/827.
[75] *Prosecutor v Krstić* (Trial Judgment) IT-98-33-T (2 August 2001) [580]; *Prosecutor v Stakić* (Trial Judgment) IT-97-24-T (31 July 2003) [515]–[519]; *Prosecutor v Brđanin* (Trial Judgment) IT-99-36-T (1 September 2004) [689]–[692]; *Prosecutor v Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, and Pandurević* (Trial Judgment) IT-05-88-T (10 June 2010) [810]–[819]; *Prosecutor v Tolimir* (Appeals Judgment) IT-05-88/2-A (8 April 2015) [230]; *Prosecutor v Karadžić* (Trial Judgment) IT-

Appeals Chamber had to address whether the destruction of mosques in Srebrenica and the surrounding area was an act that inflicted on the Bosnian Muslims conditions of life calculated to bring about its destruction. The Appeals Chamber ruled that the destruction of mosques was an act of cultural genocide, and as cultural genocide is excluded from the statute, therefore the crime of destruction of mosques is not covered by Article 4(2) (c) of the ICTY statute, which covers the crime of genocide.[76]

The acts that do meet the threshold under Article 4(2) (c) include 'deprivation of food, medical care, shelter or clothing, lack of hygiene, systematic expulsion from homes, or subjecting members of the group to excessive work or physical exertion.'[77] When examining whether an act deliberately inflicts on a group conditions of life calculated to bring about its physical destruction in whole or in part, the Trial Chamber in *Popović et al.* stated that it would examine the objective probability that the act would lead to the physical destruction of the group.[78] To assess this probability the Trial Chamber would examine factors such as 'the nature of the conditions imposed, the length of time that members of the group were subjected to them and characteristics of the targeted group like vulnerability.'[79]

The Trial and Appeal Chambers of the ICTY have also ruled that forcible deportation or transfer of a population, ethnic cleansing, does not constitute an act of genocide, however these crimes can be evidence of an intent to physically destroy a group.[80]

95-5/18-T (24 March 2016) [553]; *Prosecutor v Mladić* (Trial Judgment) IT-09-92-T (22 November 2017) [3435].

[76] *Prosecutor v Tolimir* (Appeals Judgment) IT-05-88/2-A (8 April 2015) [230].

[77] ibid [228].

[78] *Prosecutor v Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, and Pandurević* (Trial Judgment) IT-05-88-T (10 June 2010) [816].

[79] ibid [816].

[80] *Prosecutor v Stakić* (Trial Judgment) IT-97-24-T (31 July 2003) [519]; *Prosecutor v Krstić* (Appeals Judgment) IT-98-33-A (19 April 2004) [31], [33]; *Prosecutor v Blagojević and Jokić* (Appeals Judgment) IT-02-60-A (9 May 2007) [123]; *Prosecutor v Tolimir* (Trial Judgment) IT-05-88/2-T (12

The Trial Chambers of the ICTY have held that the act of deportation, along with acts of sexual violence and forceful interrogations, can lead to serious mental harm under Article II (b).[81] Furthermore survivors of mass executions may suffer serious mental harm due to the 'fear of being captured', 'having their identification documents taken away from them', 'the separation' from family, 'the sense of utter helplessness and extreme fear for their family and friends' safety as well as for their own safety', seeing the 'killing fields covered with bodies', witnessing the 'executions of relatives and friends', and the 'mental anguish of lying still, in fear, under the bodies – sometimes of relatives or friends – for long hours'.[82]

Mental Intent

The Trial and Appeals Chambers have emphasised the importance of specific intent, in *Jelisić* the Trial Chamber stated that it is the '*mens rea*' of the crime 'which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law.'[83] Attacks which have encompassed the *actus reus* of genocide against groups in regions and territories in the former Yugoslavia have been found not to constitute genocide as they have lacked the intent to destroy a protected group, rather the intent was to forcibly create an ethnically homogenous state.[84] In the case of *Brđanin*, there was a considerable amount of evidence of killing,

December 2012) [739]; *Prosecutor v Tolimir* (Appeals Judgment) IT-05-88/2-A (8 April 2015) [202], [208]–[212].

[81] *Prosecutor v Krstić* (Trial Judgment) IT-98-33-T (2 August 2001) [513]; *Prosecutor v Stakić* (Trial Judgment) IT-97-24-T (31 July 2003) [516]; *Prosecutor v Brđanin* (Trial Judgment) IT-99-36-T (1 September 2004) [690]; *Prosecutor v Blagojević and Jokić* (Appeals Judgment) IT-02-60-A (9 May 2007) [646].

[82] *Prosecutor v Blagojević and Jokić* (Trial Judgment) IT-02-60-T (17 January 2005) [647].

[83] *Prosecutor v Jelisić* (Trial Judgment) IT-95-10-T (14 December 1999) [66].

[84] *Prosecutor v Stakić* (Trial Judgment) IT-97-24-T (31 July 2003) [554]; *Prosecutor v Brđanin* (Trial Judgment) IT-99-36-T (1 September 2004) [976]–[978], [981]–[982]; *Prosecutor v Stakić* (Appeals Judgment) IT-97-24-A (22 March 2006) [56]; *Prosecutor v Karadžić* (Trial Judgment) IT-95-5/18-T (24 March 2016) [2596]–[2605], [2614]–[2626], [6000].

acts causing serious bodily or mental harm, and acts deliberately inflicting upon the group conditions calculated to bring about its physical destruction.[85] Notwithstanding the large-scale nature of atrocities, Brđanin was acquitted of the charge of genocide as he lacked the intent to destroy a group.[86] The case of *Brđanin* highlights the crucial role that intent plays in the crime, and how someone involved in widespread atrocities will not receive a genocide conviction unless the specific intent to destroy is manifest in the crimes committed.

Convictions for genocide have been restricted to individuals involved in the incidents at Srebrenica. In Srebrenica, there was both extensive evidence of the crimes committed, as an estimated 7,000-8,000 Bosnian Muslim men were systematically murdered in mass executions by the Bosnian Serb Army while women, children, and the elderly were expelled from Srebrenica, and evidence of an intent to destroy underlying these actions.[87] In establishing the existence of a protected group, the Trial Chamber in *Brđanin* stated that '[t]he correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria.'[88] The Trial Chamber in *Krstić* held that 'the Genocide Convention does not protect all types of human groups'; rather the Convention only applies to national, ethnical, racial, and religious groups.[89] In identifying the victims of the crimes of the Bosnian Serbs, the Trial Chamber in *Stakić* determined that the victim groups could not be defined in negative terms such as 'non-Serbs'.[90] The Bosnian Muslims were

[85] *Prosecutor v Brđanin* (Trial Judgment) IT-99-36-T (1 September 2004) [739].
[86] ibid [989]–[991].
[87] *Prosecutor v Krstić* (Trial Judgment) IT-98-33-T (2 August 2001) [6]–[95]; *Prosecutor v Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, and Pandurević* (Trial Judgment) IT-05-88-T (10 June 2010) [841]–[847]; *Prosecutor v Tolimir* (Trial Judgment) IT-05-88/2-T (12 December 2012) [751]–[759]; *Prosecutor v Mladić* (Trial Judgment) IT-09-92-T (22 November 2017) [3540]–[3544].
[88] *Prosecutor v Brđanin* (Trial Judgment) IT-99-36-T (1 September 2004) [554].
[89] *Prosecutor v Krstić* (Trial Judgment) IT-98-33-T (2 August 2001) [559]–[560].
[90] *Prosecutor v Stakić* (Trial Judgment) IT-97-24-T (31 July 2003) [512].

recognised as a distinct national group by the Trial Chamber in *Krstić*.[91] The Yugoslav Constitution of 1963 recognised Bosnian Muslims as a 'nation' and the Trial Chamber in *Popović* relied on this evidence to determine that the Bosnian Muslims were a protected group under the statute.[92]

In determining whether the Bosnian Muslims were a protected group, the Trial and Appeals Chambers had to confront the questions of whether the Bosnian Muslims of Srebrenica constituted a substantial part of the wider Bosnian Muslim population and whether genocide had to be perpetrated throughout a country or could it be restricted to a particular area. On the latter point, the Trial Chamber in *Jelisić* held that 'genocide may be perpetrated in a limited geographic zone.'[93] On the first question, the Trial Chamber in *Krstić* declared that the perpetrators do not have to target the entire group for destruction but rather target a distinct part of the group.[94] The Trial Chamber in *Jelisić* stated that the intention to destroy has to 'affect either a major part of the group or a representative fraction thereof, such as its leaders.'[95] The Trial Chamber in *Jelisić* added that a smaller number of victims may be targeted as the impact of their disappearance would harm the survival of the group.[96] In *Stakić*, the Trial Chamber declared that it was not necessary to determine the 'size of the victimised population in numerical terms.'[97] In determining whether a targeted part of a group is substantial the Trial Chamber in *Popović et al.* stated that it would consider a number of factors apart from the numeric size of the group; the factors are the prominence of the targeted

[91] *Prosecutor v Krstić* (Trial Judgment) IT-98-33-T (2 August 2001) [559]–[560].
[92] *Prosecutor v Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, and Pandurević* (Trial Judgment) IT-05-88-T (10 June 2010) [840].
[93] *Prosecutor v Jelisić* (Trial Judgment) IT-95-10-T (14 December 1999) [83].
[94] *Prosecutor v Krstić* (Trial Judgment) IT-98-33-T (2 August 2001) [590].
[95] *The Prosecutor v Jelisić* (Trial Judgment) IT-95-10-T (14 December 1999) [81].
[96] ibid [82].
[97] *Prosecutor v Stakić* (Trial Judgment) IT-97-24-T (31 July 2003) [522].

part of the group within the whole group, whether that targeted part was emblematic of the group, and if the targeted part of group is essential to the survival of the group.[98]

The ICTY judges held that the Bosnian Muslims of Srebrenica constituted a substantial part of the targeted group, due not to the numeric size of the group but due to the strategic importance that Bosnian Serbs attached to Srebrenica, and the prominence of Srebrenica to Bosnian Muslims and the international community as Srebrenica was a UN safe zone.[99] In *Karadžić*, the Trial Chamber held that the attack on 'every able-bodied Bosnian Muslim male from Srebrenica' constituted an intent to destroy the Bosnian Muslim group in Srebrenica as it affects the group's ability to sustain itself.[100]

When inferring intent, the Trial Chamber in *Brđanin* stated that inference can be drawn when it is 'the only reasonable inference available on the evidence.'[101] The ICTY inferred the intent to destroy the Bosnian Muslims in the incidents at Srebrenica from a number of factors: i) the long-term impact the elimination of the men of Srebrenica would have on the survival of the community;[102] ii) the targeting of military-aged men;[103] iii) forcible transfer;[104] iv) the existence of a plan or policy;[105] v) the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct;[106] and vi) statements of the accused.[107]

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[98] *Prosecutor v Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, and Pandurević* (Trial Judgment) IT-05-88-T (10 June 2010) [832].
[99] *Prosecutor v Krstić* (Appeals Judgment) IT-98-33-A (19 April 2004) [15]–[17]; *Prosecutor v Karadžić* (Trial Judgment) IT-95-5/18-T (24 March 2016) [5672]; *Prosecutor v Mladić* (Trial Judgment) IT-09-92-T (22 November 2017) [3554].
[100] *Prosecutor v Karadžić* (Trial Judgment) IT-95-5/18-T (24 March 2016) [5669]–[5671].
[101] *Prosecutor v Brđanin* (Trial Judgment) IT-99-36-T (1 September 2004) [970].
[102] *Prosecutor v Krstić* (Appeals Judgment) IT-98-33-A (19 April 2004) [28]–[29].
[103] ibid [26]–[27].
[104] ibid [24], [31], [33].
[105] *Prosecutor v Brđanin* (Trial Judgment) IT-99-36-T (1 September 2004) [980].
[106] ibid [983]–[984].
[107] ibid [985]–[987].

Other Elements

In *Jelisić*, the Appeals Chamber held that that 'a plan or policy is not a legal ingredient of the crime' of genocide however 'in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases.'[108] The Appeals Chamber in *Jelisić* also stated motive is not an element of the crime, and the fact that a perpetrator may possesses the motive to gain political power or economic advantage does not preclude them from also possessing the specific intent to destroy a group as such.[109] These declarations illustrate the consistency between the ICTY and the ICTR in elucidating the crime of genocide.

3.3(ii) A Critical Contribution

Whereas the ICTR was primarily concerned with the crime of genocide, the ICTY had a greater focus on war crimes and crimes against humanity perpetrated in a diverse number of conflicts over a number of years. It was less clear whether the crime of genocide had been committed in the territory of the former Yugoslavia. The ICTY has made a monumental contribution to the interpretation and application of the Genocide Convention.[110] In particular, the Tribunal's judgments relating to the crimes committed in Srebrenica have provided us with valuable information on the issues of genocide being committed in a limited geographical territory and the question of how to assess the substantial part of a group. These cases highlight the crucial role which intent plays in the crime, and how someone involved in widespread atrocities will not

[108] *Prosecutor v Jelisić* (Appeals Judgment) IT-95-10-A (5 July 2001) [48].
[109] ibid [49].
[110] Matthew Lippman, 'Genocide: The Crime of the Century: The Jurisprudence of Death at the Dawn of the New Millennium' (2001) 23 Houston Journal of International Law 467, 506; Cynthia Sinatra, 'The International Criminal Tribunal for the Former Yugoslavia and the Application of Genocide' (2005) 5 International Criminal Law Review 417, 426; Janine Natalya Clark, 'Elucidating the *Dolus Specialis*: An Analysis of ICTY Jurisprudence on Genocidal Intent' (2015) 26 Criminal Law Forum 497, 531; Michelle Jarvis and Alan Tieger, 'Applying the Genocide Convention at the ICTY' (2016) 14 Journal of International Criminal Justice 857, 877.

receive a conviction for genocide unless the specific intent to destroy is manifest in the crimes committed. In addition, the Trial and Appeals Chambers largely supported the findings of the ICTR, in relation to interpreting the definition of genocide, which has helped to create a consolidated jurisprudence on the crime of genocide which is beneficial when confronting the question of whether genocide is being perpetrated in an ongoing situation.

While the case law of the ICTR and ICTY is significant for identifying the key elements of the crime of genocide; in seeking to identify genocide in the midst of violence, it may be difficult, without the benefit of a judicial investigation, to divine the intent to destroy a group in the actions of an individual perpetrator. Therefore it is beneficial in seeking to identify genocide in an ongoing situation to focus on how an international court establishes the intent to destroy a group in the actions of a state/non-state actor.

3.4 The International Court of Justice

The ICJ was established as the principal judicial organ of the UN under Chapter XIV of the Charter of the UN.[111] Article IX of the Genocide Convention gives jurisdiction to the ICJ to settle disputes between states in relation to the 'interpretation, application or fulfilment' of the Genocide Convention, and in particular to settle disputes concerning the responsibility of states for genocide.[112] Fourteen cases have been taken under Article IX, however only two of the cases reached the stage where the ICJ had

[111] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) Chapter XIV, Article 92.

[112] Convention on the Prevention and Punishment of the Crime of Genocide, Article IX. See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, [147]; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, [124].

to make a judgment.[113] The ICJ was first called upon to address the question of state responsibility for genocide in the case of *Bosnia and Herzegovina v Serbia and Montenegro*.[114] While primarily concerned with the question of state responsibility for genocide, the judgment of the ICJ has helped clarify the elements of the crime of genocide.

3.4(i) Bosnia and Herzegovina v Serbia and Montenegro

The case commenced in 1993, when Bosnia and Herzegovina alleged that the Federal Republic of Yugoslavia (respondent amended to Serbia and Montenegro in 2003) had directly or through its surrogates violated the Genocide Convention.[115] The surrogates in questions were the Republika Srpska,[116] a Bosnian Serb established territory in Bosnia and Herzegovina,[117] and the Army of the Republika Srpska, the Vojska Republike Srpske (VRS).[118] In response the Government of Serbia and Montenegro submitted firstly that genocide had not occurred and that if it had been perpetrated it was not committed by organs of the Federal Republic of Yugoslavia.[119] The ICJ only delivered its judgment in February 2007, which highlights the protracted nature of international justice.

The Court considered that the obligation to prevent genocide under Article I of the Genocide Convention also placed a corresponding obligation on states to not commit, 'through their organ or persons or groups whose conduct is attributable to them', an

[113] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 499.
[114] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43.
[115] ibid [1], [66].
[116] ibid [237].
[117] ibid [233], [235].
[118] ibid [238].
[119] ibid [66].

act of genocide under Article III.[120] In order to address whether the Government of Serbia and Montenegro was responsible for genocide, the Court had to firstly establish that atrocities had taken place, secondly it had to see if these atrocities were covered by Article II of the Genocide Convention, and whether the perpetrators of these atrocities had the required intent to destroy a protected group.[121] The ICJ declared that a state can be found responsible for the commission of genocide even if an individual connected with a state has not been convicted of the crime of genocide in an international court or tribunal.[122]

In conducting its examination of the crime of genocide, the ICJ relied upon and largely adopted the findings of the ICTY and ICTR for establishing the elements of genocide. With regard to the acts of genocide, the ICJ affirmed the approach of the ICTY finding that ethnic cleansing is not an act of genocide but that evidence of acts of ethnic cleansing can be 'indicative of the presence of specific intent'.[123] In discussing protected groups, the ICJ held that acts must be directed against a recognised group, and not a category such as 'non-Serbs'.[124] The Court supported the rulings related to substantiality in the case law of the ICTR and ICTY, by stating that the part of the group targeted for destruction 'must be significant enough to have an impact on the group as a whole.'[125] With regards to intent to destroy a group in a geographically limited area the Court once again reaffirmed the approach of the ICTY, by highlighting that it is well accepted in the jurisprudence of the ICTY that the intent to destroy can be restricted to a territory.[126] The ICJ affirmed the rulings from the ICTR and ICTY

[120] ibid [165]–[166], [179].
[121] ibid [242].
[122] ibid [182].
[123] ibid [190].
[124] ibid [193]–[196].
[125] ibid [198].
[126] ibid [199].

on the importance of the specific intent to destroy a group in distinguishing the crime of genocide, and emphasised that '[g]reat care must be taken in finding in the facts a sufficiently clear manifestation of that intent.'[127] In establishing the intent to destroy, the ICJ looked at whether there was a 'concerted plan' to commit genocide and/or there was 'persuasive and consistent evidence for a pattern of atrocities' perpetrated against a group which would indicate this intent.[128]

In addressing the commission of genocide, the ICJ examined in detail the extensive evidence of killings and atrocities committed across Bosnia and Herzegovina, including in towns and concentration camps for evidence of an intent to destroy underlying these atrocities.[129] Relying on the judgments of the ICTY, the ICJ was unable to establish, apart from the incidents at Srebrenica, that these acts were committed with the intent to destroy a group.[130] The Court concluded that the evidence of the killing of members of the protected group across the territory of Bosnia and Herzegovina fulfilled the requirement of the material element of killing under Article II (a) of the Genocide Convention. The Court turned towards the judgments of the ICTY to establish whether these killings were committed with the intent to destroy the Bosnian Muslim group. Leaving aside the atrocities committed in Srebrenica, there were no convictions for the crime of genocide in any of the cases of the ICTY dealing with atrocities across Bosnia and Herzegovina.[131] With an absence of convictions of genocide for crimes committed in the concentration camps and

[127] ibid [187]–[189].
[128] ibid [242], [373], [376].
[129] ibid [245]–[275].
[130] ibid [277], [296]–[297], [319], [328], [334], [354].
[131] ibid [277].

villages across Bosnia and Herzegovina, the Court could not conclusively establish that the killings were committed with the intent to destroy.[132]

The Court addressed whether acts deliberately inflicting conditions of life upon a group calculated to bring about its physical destruction under Article II (c) had been committed in Bosnia and Herzegovina.[133] The Court firstly determined that the encirclement, shelling, and starvation during the siege of Sarajevo while evidence of conditions of life that can bring about the physical destruction of a group; the acts lacked the requisite intent to destroy.[134] The Court also concluded that the deportation and expulsion of Bosnian Muslims lacked the intent to destroy the group.[135] The Court had to address whether the destruction of historical, religious, and cultural property amounted to imposing conditions of life that would lead to the physical destruction of a group.[136] This issue brought up the question of whether acts of cultural genocide were included in the Genocide Convention, the Court following the jurisprudence of the ICTY declared that 'the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal acts within the meaning of Article II of the Genocide Convention.'[137] However attacks against cultural property and heritage can be 'considered as evidence of an intent to physically destroy the group.'[138] Lastly the Court had to examine if the experience of the detention camps that operated in Bosnia and Herzegovina inflicted upon the group conditions of life that would bring about its

[132] ibid [277].
[133] ibid [320]–[354].
[134] ibid [328].
[135] ibid [334].
[136] ibid [335]–[344].
[137] ibid [344].
[138] ibid [344].

physical destruction.[139] The Court determined that the acts committed in the camps were not committed with the intent to destroy a group.[140]

In concluding its examination of material acts, the Court had to examine if the totality of evidence of acts committed under Article II demonstrated that there was an overall plan to commit genocide.[141] The Court stated it would only recognise a pattern of conduct as evidence of a plan to destroy a group if the pattern of conduct could only point to the existence of an intent to destroy.[142] In reviewing the case law of the ICTY, and in particular the acquittals for genocide – save for the case of Srebrenica, the Court could not identify a pattern of conduct that would lead it to believe that an overall plan existed to destroy the Bosnian Muslims.[143]

With reference to the ICTY case law, the Court determined that 'the acts committed at Srebrenica falling within Articles II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such.'[144] The Court quoting the Trial Chamber's and Appeals Chamber's judgments in *Krstić*, determined that 'the acts committed at Srebrenica falling within Articles II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such'.[145] Relying on the judgments of *Krstić* and *Blagojević and Jokić*¸ the Court determined that over 7,000 Bosnian Muslim men were killed in Srebrenica, which met the conditions for the act of killing under Article II (a).[146] The Court also concluded,

[139] ibid [345]–[354].
[140] ibid [354].
[141] ibid [370]–[376].
[142] ibid [373].
[143] ibid [374]–[376].
[144] ibid [296]–[297].
[145] ibid [296]–[297].
[146] ibid [290].

with reference to *Krstić* and *Blagojević and Jokić*, that the material act of causing serious bodily and mental harm under Article II (b) was committed against 'those who were about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them.'[147]

After concluding that acts of genocide had been perpetrated in Srebrenica, the ICJ determined that the Government of Serbia and Montenegro did not possess the intent to destroy 'either on the basis of a concerted plan, or on the basis that the events … reveal a consistent pattern of conduct which could only point to the existence of such intent.'[148] Furthermore, the ICJ held that the acts perpetrated in Srebrenica could not be attributed to the Government of Serbia and Montenegro as the genocide was not committed or directed by organs of the state.[149] The ICJ did however conclude that the Government of Serbia and Montenegro had 'violated its obligation to prevent' under Article I of the Genocide Convention in the genocide in Srebrenica, as the Government knew that genocide was a possibility and had the 'means' to prevent the genocide but 'manifestly refrained from using them.'[150]

3.4(ii) Croatia v Serbia

The case commenced in 1999 when Croatia alleged that the Former Republic of Yugoslavia (respondent amended to Serbia in 2006) had breached directly or through persons for whose conduct it is responsible the Genocide Convention.[151] The Government of Serbia counterclaimed that the Government of Croatia had violated the Genocide Convention in the Republic of Serbian Krajina, a Serb territory in

[147] ibid [290].
[148] ibid [376].
[149] ibid [413]–[415].
[150] ibid [450].
[151] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, [2], [51], [52].

Croatia, during the same time period.[152] The final judgment in the case was delivered on the 3rd of February 2015.

In addressing the crime of genocide, the Court began by examining the precise meaning of the provisions of the Genocide Convention. The Court accepted the definitions of the material acts of genocide provided in the case law of the ICTY and in the case of *Bosnia and Herzegovina v Serbia and Montenegro*.[153] One key issue the Court addressed was the meaning and scope of the intent to destroy.[154] Croatia argued that the intent to destroy is not limited to the physical destruction of the group, but 'includes also the intent to stop it from functioning as a unit.'[155] Serbia argued that intent to destroy is only concerned with physical destruction.[156] The Court referring to the drafting of the Convention determined that the scope of the crime of genocide was restricted to physical and biological destruction of a group.[157] The Court also addressed the issue of how to establish that the targeted part of the group is substantial, the Court stated that it would 'take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group.'[158]

In examining the evidence, the ICJ started with the claim by the Government of Croatia. The Government of Croatia's allegations relate to acts committed by *Jugoslovenska Narodna Armija (JNA)* (Yugoslav People's Army), and a number of defence and paramilitary groups which the Court termed 'Serb forces.'[159] The

[152] ibid [51], [52].
[153] ibid [154]–[166].
[154] ibid [133].
[155] ibid [134].
[156] ibid [135].
[157] ibid [136].
[158] ibid [142].
[159] ibid [69], [204].

Government of Croatia alleged that the Government of Serbia was responsible for these groups at that time. The Government of Croatia asserted that the JNA and the Serb forces perpetrated acts under Article II (a) to (d) with the intention of destroying a protected group.[160] The Court identified the protected group under the Convention as the Croats, a national or ethnical group.[161]

The ICJ established that there was extensive evidence of killings and acts causing serious bodily or mental harm committed throughout Croatia.[162] A number of the arguments put forward by Croatia with regards to acts causing conditions of life calculated to bring about a group's physical destruction were held to not come under the scope of Article II (c), such as the systematic expulsion from homes and forced displacement,[163] restrictions on movement,[164] forced wearing of insignia of ethnicity,[165] looting of property belonging to Croats,[166] and the destruction and looting of the cultural heritage.[167] The Court determined that 'Croatia failed to establish that acts capable of constituting the *actus reus* of genocide, within the meaning of Article II (c) of the Convention, were committed by the JNA and Serb forces.'[168] Croatia also failed to provide evidence that JNA and Serb forces took measures in order to prevent births within the Croat group under Article II (d).[169]

Having establishing that the Serb forces perpetrated acts under Article II (a) and (b), the ICJ then moved to examine whether these acts were committed with the intent to

[160] ibid [206].
[161] ibid [205].
[162] ibid [295], [360].
[163] ibid [376]–[377].
[164] ibid [380].
[165] ibid [382].
[166] ibid [385].
[167] ibid [389].
[168] ibid [394].
[169] ibid [400].

destroy the Croats.[170] In addressing the potential existence of an intent to destroy, the ICJ examined the pattern of conduct of the Serb forces to see if the only reasonable inference which could be drawn from the evidence is that the Serb forces possessed the intent to destroy the Croats.[171] After examining the evidence submitted by the Government of Croatia, the ICJ concluded that Croatia did not prove that the only reasonable inference which could be drawn from the pattern of conduct of the Serbian forces was that they intended to destroy the Croat people.[172] The ICJ relied on the case law of the ICTY, pointing out that no individual has been indicted for genocide against the Croat population.[173] As Croatia could not provide evidence of genocide being committed, the ICJ did not have to address the question of the responsibility of the Government of Serbia under the Genocide Convention.[174]

After dismissing the claim of Croatia, the ICJ turned its attention to the counterclaim of Serbia.[175] The ICJ determined that acts of genocide under Article II (a) and (b) had been directed at the Serbian population by the Croatian forces, and the question again was whether the intent to destroy was present in these acts.[176] The ICJ concluded that the pattern of conduct did not conclusively point towards a campaign of genocide.[177] The ICJ held that the material acts which were factually proved were not committed on such a scale to point towards the only inference being that the Croatian forces intended the destruction of the Serbs in Croatia.[178] The ICJ concluded that the

[170] ibid [401]–[402].
[171] ibid [407].
[172] ibid [440].
[173] ibid [440].
[174] ibid [442].
[175] ibid [443]–[515].
[176] ibid [499].
[177] ibid [511].
[178] ibid [512].

'existence of the *dolus specialis* has not been established', and therefore Serbia's claim was dismissed.[179]

3.4(iii) A State's Responsibility for Genocide

The role of the ICJ is of a great importance as the ICJ has established that a state is not only responsible for punishing and preventing the crime of genocide, there also exists an obligation on a state not to perpetrate the crime of genocide as nowhere in the Genocide Convention did it explicitly say that a state could be held responsible for committing genocide.[180] The impact of these judgments is momentous as it expands the notion of state responsibility for genocide, while establishing the ICJ as an effective recourse for states to seek remedies against another state for violations of the Genocide Convention.

The two cases, while concerning state responsibility under the Convention, have added to our understanding of how the definition of genocide is applied to violence. The two cases, in following the jurisprudence of the ICTY and ICTR, have provided a consistent interpretation of the elements of the crime of genocide.[181] Despite the wishes in academia, the activist community, and amongst victims for an expanded definition of genocide, the ICJ followed the jurisprudence of the ICTR and ICTY in applying the definition of genocide as contained within Article II of the Convention.[182] The cases show however the arduous task of establishing that genocide took place,

[179] ibid [515], [522].
[180] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 491, 512–513, 516–517.
[181] William A Schabas, 'Whither Genocide? The International Court of Justice Finally Pronounces' (2007) 9 Journal of Genocide Research 183, 185.
[182] William A Schabas, 'Whither Genocide? The International Court of Justice Finally Pronounces' (2007) 9 Journal of Genocide Research 183, 185; Caroline Fournet, 'The *Actus Reus* of Genocide in the *Croatia v. Serbia* Judgment: Between Legality and Acceptability' (2015) 28 Leiden Journal of International Law 915, 915–916, 920–921.

and the difficult process of assigning responsibility for genocide to a state.[183] Furthermore the protracted nature of the cases highlights, along with the judgments of the ICTR and ICTY, how justice can be delayed until long after the incidents have taken place. If justice for victims of genocide is delayed for years, is there any utility to labelling their suffering as genocide in the midst of violence? The work of the ICC in addressing genocide in an ongoing situation, is beneficial for examining the impact of a genocide determination by an international criminal institution in the midst of violence.

3.5 The International Criminal Court

On the day that the UN General Assembly adopted the Genocide Convention, it also voted to request that the International Law Commission study the question of establishing an international criminal tribunal for prosecuting individuals for the crime of genocide.[184] The progress of the development of a draft statute for an international tribunal was slow.[185] The long-drawn out discussions eventually resulted in a diplomatic conference held in Rome in 1998; which included representatives from 160 states, over 20 intergovernmental organisations, 14 bodies of the UN, and over 200 NGOs.[186] The outcome of this conference was the ICC which was established by the

[183] Marko Milanović, 'State Responsibility for Genocide' (2006) 17 The European Journal of International Law 553, 603; Stephen A Kostas and Andrew B Loewenstein, 'Divergent Approaches to Determining Responsibility for Genocide' (2007) 5 Journal of International Criminal Justice 839, 846; Ines Gillich, 'Between Light and Shadow: The International Law against Genocide in the International Court of Justice's Judgment in *Croatia v. Serbia* (2015)' (2016) 28 Pace International Law Review 117, 159–160.

[184] United Nations General Assembly (179th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.179. See also Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 146.

[185] Yves Beigbeder, *International Justice against Impunity: Progress and New Challenges* (Martinus Nijhoff Publishers 2005) 151–152; William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 101–107.

[186] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 107.

Rome Statute of the International Criminal Court in 1998, which entered into force in 2002.[187]

The jurisdiction of the ICC is complementary to national criminal jurisdictions.[188] The Court cannot undertake cases which are already being investigated or prosecuted by a state, unless the state is unwilling or unable to investigate or prosecute domestically.[189] The ICC can investigate international crimes in three situations: 1) when a state refers itself to the ICC;[190] 2) when the United Nations Security Council refers the case to the ICC;[191] and 3) when the ICC Prosecutor has initiated an investigation.[192] When the Prosecutor initiates an investigation they can seek information from states, organs of the United Nations, intergovernmental and non-governmental organisations, and other reliable sources.[193] If the Prosecutor believes there is enough evidence to warrant an investigation they can request the Pre-Trial Chamber of the ICC to authorise their investigation.[194] The Pre-Trial Chamber has the power to issue a warrant for the arrest of an individual based on the evidence gathered during the Prosecutor's investigation.[195]

The ICC is responsible, under the Rome Statute, for adjudicating cases of individuals who violate serious international crimes.[196] The provisions of the Rome Statute grant the ICC jurisdiction over the crime of genocide,[197] crimes against humanity,[198] war

[187] Rome Statute of the International Criminal Court 1998.
[188] ibid Article 1.
[189] ibid Article 17(1) (a).
[190] ibid Article 13(a) and Article 14.
[191] ibid Article 13(b).
[192] ibid Article 13(c).
[193] ibid Article 15(2).
[194] ibid Article 15(3).
[195] ibid Article 58(1).
[196] ibid Article 1.
[197] ibid Article 6.
[198] ibid Article 7.

crimes,[199] and the crime of aggression.[200] The definition of the crime of genocide in Article 6 is adopted word for word from the Genocide Convention. The ICC is supported in its understanding of the crime of genocide under Article 9 which outlines an ancillary text the 'Elements of Crimes' which 'shall assist the Court in the interpretation and application' of the crimes under its jurisdiction.[201] The Elements of Crimes expand on the definition in the statute and provide the ICC with an in-depth analysis of the provisions in Article 6.[202] The Elements of Crimes state that the material elements of the crime of genocide require that: i) the perpetrator committed the act; ii) the person or persons targeted by that act belonged to a particular national, ethnical, racial or religious group; iii) the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and iv) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.[203]

The ICC was first called upon to examine the crime of genocide when the UN Security Council referred the situation in Darfur, Sudan to the Prosecutor of the ICC, which was the first ever referral to the ICC by the UN Security Council.[204] After conducting an investigation to identify particular individuals who may have violated the Rome Statute, the Prosecutor submitted a request to the Pre-Trial Chamber of the ICC to issue an arrest warrant for Omar Al Bashir, the then President of Sudan for committing genocide under Article 6 of the Rome Statute as well as war crimes and crimes against

[199] ibid Article 8.
[200] ibid Article 8 *bis*.
[201] ibid Article 9(1).
[202] International Criminal Court, *Elements of Crimes* (2001) 2–4.
[203] ibid 2–4.
[204] United Nations Security Council Resolution 1593 (31 March 2005) UN Doc S/RES/1593. See also Matthew Happold, 'Darfur, the Security Council, and the International Criminal Court' (2006) 55 International and Comparative Law Quarterly 226, 226.

humanity.[205] The Prosecutor did not accuse Al Bashir of physically perpetrating a crime, but of using the powers of the state to commit the crimes.[206] It was submitted that Al Bashir, as the President of the Republic of Sudan and the Commander in Chief of the Armed Forces, was at the centre of the hierarchical state structure and had absolute control.[207] The Prosecutor alleged that Al Bashir intended to destroy groups within Darfur, and to achieve this aim he used the organs of the state alongside militia to target civilians in towns and villages across Darfur.[208]

3.5(i) The Arrest Warrant of Omar Al Bashir

The Pre-Trial Chamber of the ICC undertook two separate examinations into the crime of genocide due to originally failing to apply the correct standard of proof to issue an arrest warrant for the commission of genocide. The evidentiary grounds for the issuance of an arrest warrant is 'reasonable grounds to believe', which is a lower threshold of proof than the standards of proof required to charge or convict an individual.[209] In determining whether the evidentiary standards of proof were met, the Pre-Trial Chamber examined the elements of the crime of genocide and has largely adopted the jurisprudence of the ICTR and ICTY.

Physical Acts

The Pre-Trial Chamber has not diverged from the findings of the previous tribunals on the acts that comprise the *actus reus* of genocide.[210] The Pre-Trial Chamber did

[205] *Situation in Darfur, The Sudan* (Summary of Prosecutor's Application under Article 58) ICC-02/05-152 (14 July 2008) [1].
[206] ibid [39].
[207] ibid [40]–[44].
[208] ibid [10].
[209] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir") ICC-02/05-01/09-73 (3 February 2010) [30].
[210] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09-94 (12 July 2010) [19]–[40].

state, when examining the material elements of genocide, that the acts of genocide are identical to the acts of crimes against humanity.[211] The Pre-Trial Chamber determined that evidence of the crimes against humanity of murder, extermination, forcible transfer of population, torture, and rape can be relied upon to show that acts of killing under Article 6 (a), acts causing serious bodily or mental harm under Article 6 (b), and conditions of life deliberately afflicted to bring about physical destruction under Article 6 (c) had been perpetrated in Darfur. However, as stated by the Pre-Trial Chamber, the difference between these two crimes is the intent to destroy a protected group.

Mental Intent

As Al Bashir was head of the government, the Pre-Trial Chamber focussed on whether the Government of Sudan possessed the intent to destroy.[212] In examining the intent to destroy, the Pre-Trial Chamber adopted a similar approach to the ICTR and ICTY by analysing the nature and extent of the acts committed, public statements and documents indicating a policy to commit genocide, and whether the government had a strategy to deny and conceal the atrocities committed.[213] On the basis of the evidence, the Pre-Trial Chamber, in its second examination of the situation, determined that there were reasonable grounds to conclude that the Government of Sudan deliberately targeted citizens based on the membership of three separate ethnic

[211] ibid [20], [27], [35].
[212] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (4 March 2009) [147]–[151].
[213] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (4 March 2009) [164]; *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09-94 (12 July 2010) [16]–[17].

groups; the Fur, the Masalit, and the Zaghawa communities.[214] The three groups were recognised by the Pre-Trial Chamber as distinct ethnic groups as each had its own language and customs.[215]

One interesting element addressed was whether the crime of genocide requires a contextual element as Article 9 of the 'Elements of Crime' outlines that the acts of genocide under the Genocide Convention 'must have taken place in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group.'[216] While this contextual element is not included within Article 6 of the Rome Statute, which mirrors the provisions of Article II of the Genocide Convention, the Pre-Trial Chamber determined that there is no contradiction between the definition of genocide and the requirement of a contextual element.[217] Furthermore the case law of the ICTR and ICTY has shown that in establishing the intent to destroy underlying the acts of genocide the tribunals have examined the wider context of which the acts of an individual have been perpetrated. Therefore there is no divergence in the approach of the ICC and the ad hoc tribunals in determining the existence of genocidal intent.

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[214] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09-94 (12 July 2010) [10]–[12].

[215] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (4 March 2009) [137]; *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09-94 (12 July 2010) [9].

[216] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (4 March 2009) [123].

[217] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (4 March 2009) [132]; *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09-94 (12 July 2010) [13].

3.5(ii) A Momentous Judgment?

On the 12th of July 2010, nearly two years after the Prosecutor initially submitted the application for an arrest warrant, the Pre-Trial Chamber found that there were reasonable grounds to believe that Al Bashir acted with the specific intent to destroy the Fur, Masalit, and Zaghawa ethnic groups.[218] The Pre-Trial Chamber declared that the attacks were 'large in scale, systematic and followed a similar pattern'; and were part of similar conduct directed at the targeted group.[219] On the foot of this conclusion, the Pre-Trial Chamber issued an arrest warrant for Al Bashir for: i) genocide by killing, within the meaning of Article 6 (a) of the Rome Statute; ii) genocide by causing serious bodily or mental harm, under Article 6 (b) of the Statute; and iii) genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction, as set out in Article 6 (c).[220] This followed on from an earlier decision, in which an arrest warrant had also been issued against Al Bashir for committing war crimes and crimes against humanity.[221]

The case of *Omar Al Bashir* is historic, as it was the 'first case involving the alleged crime of genocide before the ICC' and Al Bashir also became the first ever head of state to be issued with an arrest warrant by the ICC.[222] However the issuance of the arrest warrant did not lead to Al Bashir being brought to justice. Instead he remained the President of Sudan in the aftermath of the Pre-Trial Chamber's judgment and flouted his arrest warrant. The failure to enforce the arrest warrant illustrates that a

[218] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09-94 (12 July 2010) [4]–[5], [43].
[219] ibid [16].
[220] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-95 (12 July 2010).
[221] *The Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Warrant of Arrest) ICC-02/05-01/09-1 (4 March 2009).
[222] Manisuli Ssenyonjo, 'The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan' (2010) 59 International and Comparative Law Quarterly 205, 208.

charge of genocide does not automatically lead to action. The fact that Al Bashir has not been brought to justice opens up important questions on the utility of genocide prosecutions in the midst of violence.

3.6 The Politics of Justice

While the past twenty five years has seen a monumental shift in international justice with individuals being indicted and convicted of violating international criminal law, it has also raised questions on the utility of prosecuting prominent individuals in the midst of violence when an investigation or court case could potentially jeopardise a peace process and prolong a situation. There is an argument that the pursuit of peace should come before the pursuit of justice.[223] In this scenario, domestic and international investigations would be deferred until after a peaceful resolution can be obtained. Alternatively there is an argument that a peaceful resolution of a situation can only be achieved through justice and accountability for the victims of atrocities.[224]

With the creation of the ICC we have seen an increased focus on this 'peace versus justice' dilemma as the court has to maintain a delicate balance between the two interests in its involvement in situations.[225] The Rome Statute declares that a

[223] Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 178; Juan E Méndez and Jeremy Kelley, 'Peace Making, Justice and the ICC' in Christian De Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 480–481.

[224] Paola Gaeta and Lyne Calder, 'The Impact of Arrest Warrants Issued by International Criminal Courts on Peace Negotiations' in Laurence Boisson de Chazournes, Marcelo G Cohen, and Jorge E Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers 2013) 51.

[225] Matthew Brubacher, 'The Development of Prosecutorial Discretion in International Criminal Courts' in Edel Hughes, William A Schabas, and Ramesh Thakur (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (United Nations University Press 2007) 152; Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism' (2009) 31 Human Rights Quarterly 624, 625; Kenneth A Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court' (2009) 22 Leiden Journal of International Law 99, 100; J Michael Greig and James D Meernik, 'To Prosecute or Not to Prosecute: Civil War Mediation and International Criminal Justice' (2014) 19 International Negotiation 257, 258–259.

prosecutor can chose not to pursue a case or investigation if they believed it did not 'serve the interests of justice.'[226] The Security Council also has the power under Article 16 to postpone an investigation or prosecution for twelve months.[227] The reasoning underlying this intervention into judicial affairs was that it would allow the Security Council to pursue its 'primary responsibility' of maintaining peace and security.[228] Therefore a judicial inquiry and the 'demands of justice' could be set aside to give precedence to achieving peace through talks or treaties.[229] Notwithstanding this the former Prosecutor of the ICC, Luis Moreno Ocampo, and the current Prosecutor, Fatou Bensouda, have stated that they do not consider the demands of peace in conducting their work.[230] Ocampo stated that there can be no political compromise on the accountability of individuals for violations of international law.[231]

[226] Rome Statute of the International Criminal Court 1998, Article 53(1) (c). See also Annalisa Ciampi, 'The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute' (2008) 6 Journal of International Criminal Justice 885, 892; Kenneth A Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court' (2009) 22 Leiden Journal of International Law 99, 103–104; Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 160.

[227] Rome Statute of the International Criminal Court 1998, Article 16. See also Annalisa Ciampi, 'The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute' (2008) 6 Journal of International Criminal Justice 885, 888–891; Lutz Oette, 'Peace and Justice, or Neither?: The Repercussions of the *al-Bashir* Case of International Criminal Justice in Africa and Beyond' (2010) 8 Journal of International Criminal Justice 345, 350–351; Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 170.

[228] Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 170.

[229] ibid 170.

[230] Luis Moreno Ocampo, 'The International Criminal Court – Some Reflections' (2009) 12 Yearbook of International Humanitarian Law 3, 6; Fatou Bensouda, 'International Justice and Diplomacy' *The New York Times* (19 March 2013). See also Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 573; Kenneth A Rodman, 'Justice as a Dialogue Between Law and Politics: Embedding the International Criminal Court within Conflict Management and Peacebuilding' (2014) 12 Journal of International Criminal Justice 437, 438; Michael A Newton, 'A Synthesis of Community-Based Justice and Complementarity' in Christian De Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 131.

[231] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014) 131.

Bensouda does however contend that the pursuit of justice and accountability can have a 'positive impact' on peace and stability within a country.[232]

Notwithstanding the positive impact that criminal justice can have on a situation, the arrest warrant for Al Bashir failed to deliver either justice or peace to Darfur and Sudan. The case of Al Bashir reflects this peace versus justice dilemma: rather than sparking international action to prevent and punish the crime of genocide, the arrest warrant sparked inaction on the part of UN Security Council members and also sparked criticism of the warrant from African and Middle Eastern governments, the African Union (hereafter 'AU'), China, and Russia.[233] These actors argued that the arrest warrant jeopardises any hope for sustained peace in Sudan and instead potentially risks prolonging that situation and deepening the level of violence perpetrated against civilians.[234] The dissatisfaction amongst a number of states in Africa and the Middle East with the warrant has led to these states disregarding the

[232] Fatou Bensouda, 'International Justice and Diplomacy' *The New York Times* (19 March 2013). See also Juan E Méndez and Jeremy Kelley, 'Peace Making, Justice and the ICC' in Christian De Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 494.

[233] Alexis Arieff, Rhoda Margesson, and Marjorie Ann Brown, 'International Criminal Court Cases in Africa: Status and Policy Issues' in Harry P Milton (ed), *International Criminal Court: Policy, Status and Overview* (Nova Science Publishers 2009) 8, 13–14; Victor Peskin, 'The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur' (2009) 4 Genocide Studies and Prevention 304, 307, 319–320; Kurt Mills, '"Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34 Human Rights Quarterly 404, 422, 432–433; James Meernik, 'Public Support for the International Criminal Court' in Dawn L Rothe, James Meernik, and Þórdís Ingadóttir (eds), *The Realities of International Criminal Justice* (Martinus Nijhoff Publishers 2013) 323; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014) 156–157.

[234] Alexis Arieff, Rhoda Margesson, and Marjorie Ann Brown, 'International Criminal Court Cases in Africa: Status and Policy Issues' in Harry P Milton (ed), *International Criminal Court: Policy, Status and Overview* (Nova Science Publishers 2009) 8, 13–14; Victor Peskin, 'The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur' (2009) 4 Genocide Studies and Prevention 304, 307, 319–320; Kurt Mills, '"Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34 Human Rights Quarterly 404, 422, 432–433; James Meernik, 'Public Support for the International Criminal Court' in Dawn L Rothe, James Meernik, and Þórdís Ingadóttir (eds), *The Realities of International Criminal Justice* (Martinus Nijhoff Publishers 2013) 323; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014) 156–157.

warrant's application by permitting Al Bashir to travel to these countries without them honouring their obligation under the ICC statute to arrest him.[235]

The arrest warrant has also been criticised by human rights activists and international organisations for its potential to endanger humanitarian operations in internally displaced persons camps.[236] On the other hand the Prosecutor's actions in seeking an arrest warrant for Al Bashir has received praise from human rights activists and international organisations, as it illustrates that those who commit crimes under the Rome Statute can no longer act with impunity.[237] The reaction to the arrest warrant highlights how contested the quest for international justice is amongst actors, even by those who are motivated by humanitarian goals.

With the failure of the arrest warrant to bring either peace or justice to the people of Darfur, it is understandable that the ICC's pursuit of justice has been subject to criticism.[238] However, Michael Struett is correct in reminding us that it was Al Bashir and not the ICC who was committing violence against civilians and restricting

[235] Victor Peskin, 'The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur' (2009) 4 Genocide Studies and Prevention 304, 308; Matthew Gillett, 'The Call of Justice: Obligations under the Genocide Convention to Cooperate with the International Criminal Court' (2012) 23 Criminal Law Forum 63, 64–65; James Meernik, 'Public Support for the International Criminal Court' in Dawn L Rothe, James Meernik, and Þórdís Ingadóttir (eds), *The Realities of International Criminal Justice* (Martinus Nijhoff Publishers 2013) 323; Manisuli Ssenyonjo, 'The Rise of the African Union's Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders' (2013) 13 International Criminal Law Review 385, 389–394; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014) 156–157; Johan D van der Vyver, 'The Al Bashir Debacle' (2015) 15 African Human Rights Law Journal 559, 562, 565–569.

[236] Roberta Cohen, 'Reconciling R2P with IDP Protection' in Sara E Davies and Luke Glanville (eds), *Protecting the Displaced: Deepening the Responsibility to Protect* (Martinus Nijhoff Publishers 2010) 47–48; Kenneth A Rodman, 'Justice as a Dialogue between Law and Politics: Embedding the International Criminal Court within Conflict Management and Peacebuilding' (2014) 12 Journal of International Criminal Justice 437, 456–458.

[237] Alexis Arieff, Rhoda Margesson, and Marjorie Ann Brown, 'International Criminal Court Cases in Africa: Status and Policy Issues' in Harry P Milton (ed), *International Criminal Court: Policy, Status and Overview* (Nova Science Publishers 2009) 2–3; Kurt Mills, *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute, and Palliate* (University of Pennsylvania Press 2015) 187.

[238] Lutz Oette, 'Peace and Justice, or Neither? The Repercussions of the *al-Bashir* Case of International Criminal Justice in Africa and Beyond' (2010) 8 Journal of International Criminal Justice 345, 364.

humanitarian aid.[239] Stanton argues as well that if the prosecutor did not charge Al Bashir then he would have been ignoring the evidence of atrocities committed and condoning Al Bashir's impunity.[240] The Sudanese government was not cooperating with the international community before the issuance of the arrest warrant so it is unlikely that the arrest warrant had a substantial impact on the peace process.[241]

Notwithstanding this the case of Al Bashir illustrates that support for international justice is undermined when an arrest warrant potentially affects peace negotiations, the deliverance of humanitarian aid, and which leads to the alienation of key regional states.[242] In fact the involvement of the ICC in Darfur highlights that labelling a situation as genocide and indicting individuals for the crime severely narrows the options states have to respond to that situation.[243] Particularly, when a state which commits genocide remains in power it is difficult to receive cooperation in prosecuting individuals in international courts.[244] If you do seek to indict combatants and leaders in an ongoing situation you potentially risk prolonging that situation and deepening the level of violence perpetrated against civilians.[245] If a state or actor is branded as

[239] Michael J Struett, 'Why the International Criminal Court Must Pretend to Ignore Politics' (2012) 26 Ethics & International Affairs 83, 86.
[240] Alex de Waal and Gregory H Stanton, 'Should President Omar al-Bashir be Charged and Arrested by the International Criminal Court? An Exchange of Views' (2009) 4 Genocide Studies and Prevention 329, 334. See also Samantha Nutt, *Damned Nations: Greed, Guns, Armies and Aid* (McClelland & Stewart 2011) 179.
[241] Lutz Oette, 'Peace and Justice, or Neither?: The Repercussions of the *al-Bashir* Case of International Criminal Justice in Africa and Beyond' (2010) 8 Journal of International Criminal Justice 345, 348–349; Kurt Mills, 'R2P and the ICC: At Odds or in Sync' (2015) 26 Criminal Law Forum 73, 84; Alana Tiemessen, 'The International Criminal Court and the Lawfare of Judicial Intervention' (2016) 30 International Relations 409, 418.
[242] Leslie Vinjamuri, 'Deterrence, Democracy, and the Pursuit of International Justice' (2010) 24 Ethics & International Affairs 191, 196, 206.
[243] Kenneth A Rodman, 'Why the ICC Should Operate Within Peace Processes' (2012) 26 Ethics & International Affairs 59, 65–66; Ekkehard Strauss, 'Reconsidering Genocidal Intent in the Interest of Prevention' (2013) 5 Global Responsibility to Protect 129, 132.
[244] David Wippman, 'Can an International Criminal Court Prevent and Punish Genocide' in Neal Riemer (ed), *Protection against Genocide: Mission Impossible?* (Praeger 2000) 87.
[245] Marrack Goulding, 'Deliverance from Evil' (2003) 9 Global Governance 147, 151; Alexis Arieff, Rhoda Margesson, and Marjorie Ann Brown, 'International Criminal Court Cases in Africa: Status and Policy Issues' in Harry P Milton (ed), *International Criminal Court: Policy, Status and Overview* (Nova

genocidal, it potentially removes the option of seeking a political compromise to a situation and instead states are left with the option of military intervention.[246] However what actions are taken is dependent on the political will of states, rather than the interests of justice.

The failure to enforce Al Bashir's warrant showed the gulf between seeking accountability and attaining justice, a chasm that has to be bridged by the political will of states to take diplomatic and/or coercive action in support of the warrant.[247] However those who seek accountability and justice are forced as argued by Akhavan to contend with a 'culture of impunity' that has marked the UN's experience of violence.[248] Although the international community has spoken about the importance of accountability and justice, it 'rarely fortifies its words with actions.'[249]

While the response to violations of international law is selective, international law itself is intrinsically selective. Not every situation that involves the perpetration of a crime of international law will end up before a court of justice, rather the application of justice will be selective. In particular the UN Security Council, is selective in

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Science Publishers 2009) 22; Martin Mennecke, 'Genocide Prevention and International Law' (2009) 4 Genocide Studies and Prevention 167, 169; Victor Peskin, 'The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur' (2009) 4 Genocide Studies and Prevention 304, 310–311; Marianne L Wade, 'The Criminal Law between Truth and Justice' (2009) 19 International Criminal Justice Review 150, 157.

[246] Alex de Waal, 'Reflections on the Difficulties of Defining Darfur's Crisis as Genocide' (2007) 20 Harvard Human Rights Journal 25, 31.

[247] Paola Gaeta and Lyne Calder, 'The Impact of Arrest Warrants Issued by International Criminal Courts on Peace Negotiations' in Laurence Boisson de Chazournes, Marcelo G Cohen, and Jorge E Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers 2013) 57; David Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11 Journal of International Criminal Justice 505, 508; Kurt Mills, *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute, and Palliate* (University of Pennsylvania Press 2015) 202.

[248] Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism' (2009) 31 Human Rights Quarterly 624, 652.

[249] David Scheffer, 'Reflections on Contemporary Responses to Atrocity Crimes' (2016) 10 Genocide Studies International 105, 107. See also Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism' (2009) 31 Human Rights Quarterly 624, 652.

applying law as despite the wide ranging crimes committed throughout the 1990s across various countries of the world, the UN Security Council only established institutions to address the crimes in Rwanda and the former Yugoslavia.[250] In fact the administration of justice can be seen as a form of 'victor's justice'; in that the crimes of the victorious party who hold onto or gain power are immune from prosecution.[251]

The enforcement of law 'resides with a war's winning coalition or a winning coalition on the UN Security Council.'[252] An example can be the Nuremberg and Tokyo tribunals where the focus was entirely on the crimes of the Axis powers, while ignoring any violations of international law perpetrated by the Allied powers.[253] With the ICTR, significant crimes committed by the Tutsi in Rwanda were not prosecuted by the tribunal.[254] The victorious parties of a conflict can dictate the nature of justice as they can withhold support, political and financial, from a court.[255] Or they could decide that there should be no trials at all. This means that 'international laws are enforced only when states are subjugated to those laws by more powerful states.'[256] When a party is defeated, such as the Hutu extremists in Rwanda, or becomes an international pariah, such as the former Serbian government in the former Yugoslavia, it is easier to administer justice as it less complex in getting agreement between the powerful states of the UN on the need to prosecute these crimes. This encapsulates

[250] James Meernik, 'Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia' (2003) The Journal of Conflict Resolution 140, 145.
[251] See discussion in James Meernik, 'Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia' (2003) The Journal of Conflict Resolution 140, 144–145.
[252] ibid 145.
[253] Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4 Journal of Human Rights 213, 214.
[254] ibid 216–217.
[255] ibid 214.
[256] James Meernik, 'Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia' (2003) The Journal of Conflict Resolution 140, 145.

the nature of international justice as 'international justice is the product and subject of international politics.'[257]

The establishment of the ICC has not challenged the inherent political nature of international justice as while actors at the ICC are keen to stress that the court does not act in a political manner in its work, it is very hard to divorce the law from the political realm, as the ICC is a political creation.[258] The nature and structure of the ICC means that it is highly dependent on state cooperation in its workings.[259] The actor at the ICC that is most likely under threat from the influence of politics is the Prosecutor as the process of proceeding with a case is a decidedly political act, however the decision to not undertake a case is also highly political act.

The Prosecutor has been reluctant to challenge the leading states by undertaking investigations into situations that directly concern the actions of states such as the US in Afghanistan and Iraq, and Russia in Georgia.[260] This has meant that the ICC has largely concentrated its work in Africa, where there were less competing interests of major states. However this focus on Africa led several African countries and members of the AU to argue in response to the arrest warrant of Al Bashir that his case was

[257] ibid 145.
[258] Luis Moreno Ocampo, 'The International Criminal Court – Some Reflections' (2009) 12 Yearbook of International Humanitarian Law 3, 6–7; Sarah MH Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 European Journal of International Law 941, 942–943; Henrietta JAN Mensa-Bonsu, 'The ICC, International Criminal Justice and International Politics' (2015) 40 Africa Development 33, 38; Kurt Mills, *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute, and Palliate* (University of Pennsylvania Press 2015) 211; Alana Tiemessen, 'The International Criminal Court and the Lawfare of Judicial Intervention' (2016) 30 International Relations 409, 420–421.
[259] Sarah MH Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 European Journal of International Law 941, 943, 963; Kenneth A Rodman, 'Justice as a Dialogue Between Law and Politics: Embedding the International Criminal Court within Conflict Management and Peacebuilding' (2014) 12 Journal of International Criminal Justice 437, 441–442; Kurt Mills, *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute, and Palliate* (University of Pennsylvania Press 2015) 211.
[260] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014) 185–186. See also Benjamin Schiff, 'The ICC's Potential for Doing Bad When Pursuing Good' (2012) 26 Ethics & International Affairs 73, 75.

further proof that the ICC unjustly targets African countries while ignoring the crimes of the major powers.[261] While the interests of major states guide which situations are investigated, when an investigation has already been initiated and in particular has received the support of the Security Council, the Prosecutor has been more willing to ignore the concerns of major states and act independently from their interests.[262] This is illustrated by the Prosecutor seeking an arrest warrant for Al Bashir in opposition to the will of certain states as the Security Council had already granted the Prosecutor the responsibility for investigating the situation in Darfur.[263]

Notwithstanding this, international law is inherently political; it is impossible to apply law in a vacuum without any interference of political interests. The politicisation of law can be witnessed in the manner in which states and non-state actors have used institutions such as the ICC and ICJ to pursue a political agenda. When a state initiates a case against another state or non-state actor it is an inherently 'political act.'[264] An allegation of genocide can have a 'strategic value' for a state, as a charge of genocide by one state against another can be used as a means of attracting diplomatic as well as military support.[265] In addition, a charge of genocide can be used by one side to distort

[261] Victor Peskin, 'The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur' (2009) 4 Genocide Studies and Prevention 304, 307; Lutz Oette, 'Peace and Justice, or Neither?: The Repercussions of the *al-Bashir* Case of International Criminal Justice in Africa and Beyond' (2010) 8 Journal of International Criminal Justice 345, 359; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014) 151, 189; Carsten Stahn, 'Justice Civilisatrice? The ICC, Post-Colonial Theory, and Faces of "the Local"' in Christian De Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 59.
[262] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014) 186.
[263] ibid 186.
[264] Nikolas Rajković, 'On "Bad Law" and "Good Politics": The Politics of the ICJ *Genocide* Case and Its Interpretation' (2008) 21 Leiden Journal of International Law 885, 889.
[265] Nikolas Rajković, 'On "Bad Law" and "Good Politics": The Politics of the ICJ *Genocide* Case and Its Interpretation' (2008) 21 Leiden Journal of International Law 885, 890, 908; Sarah MH Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 European Journal of International Law 941, 949; Phillip Kastner, 'Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations' (2014) 12 Journal of International Criminal Justice 471, 474; Alana Tiemessen, 'The

the international community's view of a situation and affect the ICC's or ICJ's approach to a case.[266]

The administration of international justice shows how intrinsically linked international law and international politics are, as every decision to pursue or not pursue prosecutions is the result of a deliberate choice of an actor (state, organisation, or individual) rather than a strict application of international law. This means that the application of the Genocide Convention to each situation is not just dependent on an actor identifying the elements of the crime in the midst of violence but also dependent on the interests of the actors making the determination or the context of the determination. Even when justice is administered the decisions of the ICTR, ICTY, ICC, and ICJ were rendered years and even in some cases more than a decade after the events under examination. Therefore the application of the Convention will be inherently incoherent and inconsistent; however this reflects the nature of international law and justice.

For now though, it is important to note that the failure to enforce the arrest warrant in the case of Al Bashir illustrates that a charge of genocide does not automatically lead to action. A finding of genocide will not halt atrocities or induce a perpetrator to hand themselves over to the mechanisms of justice. An arrest warrant for genocide will not lead to states automatically pursuing justice and accountability for the victims of atrocities. If even an arrest warrant for genocide does not result in action, should we

International Criminal Court and the Lawfare of Judicial Intervention' (2016) 30 International Relations 409, 414.

[266] Vojin Dimitrijević and Marko Milanović, 'The Strange Story of the Bosnian *Genocide* Case' (2008) 21 Leiden Journal of International Law 65, 66; Nikolas Rajković, 'On "Bad Law" and "Good Politics": The Politics of the ICJ *Genocide* Case and Its Interpretation' (2008) 21 Leiden Journal of International Law 885, 891; Sarah MH Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 European Journal of International Law 941, 949–952; Alana Tiemessen, 'The International Criminal Court and the Lawfare of Judicial Intervention' (2016) 30 International Relations 409, 420.

continue to use the label of genocide as a preventive term in the midst of violence? However while not bringing Al Bashir to justice or delivering accountability to the people of Darfur, the jurisprudence of the ICC along with the jurisprudence of the ICTR, ICTY, and ICJ has added to the knowledge of genocide and identifying the elements of the crime in the midst of violence.

3.7 Applying the Legal Interpretation to Ongoing Violence

The re-emergence in the 1990s of the legal prohibition on genocide has changed the landscape of international law. The legal definition of genocide originally conceptualised under the Convention on the Prevention and Punishment of the Crime of Genocide has continually evolved due to the judgments of the ICTR, the ICTY, the ICC, and the ICJ. The judgments of these international courts and ad hoc tribunals have addressed ambiguities and complexities in the provisions of the Genocide Convention. In conducting their examination of genocide, these legal institutions have followed the wishes of the drafters of the Convention by not expanding the definition to include additional elements, including acts of cultural genocide and a wider scope of groups covered, proposed since the adoption of the Convention. The wishes in academia and wider society for a new and different understanding of genocide have not been followed by the courts and tribunals or by the drafters of the statutes for these institutions. In following strictly the provisions within Article II of the Convention the case law outlined in this chapter has created a common definition of genocide, there is a little variety in interpretation between the different courts nevertheless the basic elements of the crime of genocide have become accepted in the jurisprudence. While it is beneficial for the prevention and response to violence that there is only one definition of genocide that is observed and recognised by international courts and tribunals, the complexities in identifying the elements of genocide that were raised by

academics and activists continue to plague the definition of genocide. The jurisprudence of the international courts and tribunals illustrates that the difficulty of identifying each of the elements of genocide in the midst of violence varies in complexity.

Establishing the *actus reus* was not particularly difficult in the judgments of the ad hoc tribunals and international courts, as there was widespread evidence of the crimes committed across the territories of Rwanda, Darfur, and in Srebrenica. The case law expanded the scope of the acts under Article II (a)–(e) of the Genocide Convention, by outlining what crimes were encompassed under these provisions.[267] One of the most historic aspects of the jurisprudence of the courts and tribunals is the widespread recognition that sexual violence and rape can be an act of genocide that causes serious bodily and mental harm.[268] The case law has been important as well in highlighting what crimes are not included in the definition. The legal definition is restricted to physical and biological genocide, which excludes acts of cultural genocide.[269] The acts of genocide are generally visible in the midst of a situation, particularly the act of killing, therefore identifying the *actus reus* is the most accessible task in determining if genocide is being perpetrated in a situation. The difficulty of affixing the genocide

[267] Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge University Press 2012) 50–51; Christian J Tams, Lars Berster, and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck 2014) 125, 126.

[268] Guglielmo Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 International and Comparative Law Quarterly 578, 595–596; Erik Møse, 'Main Achievements of the ICTR' (2005) 3 Journal of International Criminal Justice 920, 935.

[269] Cécile Tournaye, 'Genocidal Intent Before the ICTY' (2003) 52 International and Comparative Law Quarterly 447, 454; William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 216–219; Larissa van den Herik, 'The Meaning of the Word "Destroy" and its Implications for the Wider Understanding of the Concept of Genocide' in Harmen van der Wilt, Jeroen Vervliet, Göran Sluiter, and Johannes Houwink ten Cate (eds), *The Genocide Convention: The Legacy of 60 Years* (Martinus Nijhoff Publishers 2012) 58.

label to a situation is due to the problems of ascertaining the existence of a group and establishing the presence of the *dolus specialis* in the actions of an accused.

It has to be established that the target of the crime is the group, an individual is targeted due to their membership of a group.[270] The courts and ad hoc tribunals have continually stressed that the definition of genocide is restricted to national, ethnical, racial, and religious groups.[271] In determining whether a group is protected under the Genocide Convention, an exploration of the case law of the tribunals and courts show that they 'have consistently identified victim groups of genocide based on objective evidence of contemporaneous legal recognition of groups, subjective evidence of the victims themselves and subjective evidence demonstrated through stigmatisation by the perpetrators.'[272] The courts and ad hoc tribunals have held that the substantial nature of the group can be determined by not only the number of people targeted, but also the importance of the individuals targeted to a group's existence and whether a segment of a population or a population in a limited geographic area targeted is representative of a larger group.[273] Even if you ascertain the existence of a group the legal determination of the crime of genocide hinges on establishing that the accused possessed the specific intent to destroy a group.

[270] Devrim Aydin, 'The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts' (2014) 78 The Journal of Criminal Law 423, 438.
[271] Claus Kreß, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review 461, 473–474; Christian J Tams, Lars Berster, and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck 2014) 114.
[272] Rebecca Young, 'How do we know them when we see them? The Subjective Evolution in the Identification of Victim Groups for the Purpose of Genocide' (2010) 10 International Criminal Law Review 1, 14.
[273] Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge University Press 2012) 48–49.

The ad hoc tribunals, the ICJ, and the ICC have all stated that the *dolus specialis* is the 'defining element which distinguishes genocide from other crimes'.[274] The proof of genocidal intent is one of the hardest aspects of identifying the crime of genocide.[275] The ICTR, ICTY, and ICC have inferred intent on an individual level by analysing factors such as 'the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts.'[276] The ICJ used two alternative methods to determine whether a state possessed the specific intent to destroy, the first was based on identifying a 'concerted plan' to commit genocide while the second method was based on establishing a 'consistent pattern of conduct'.[277]

This chapter has shown that the ICJ along with the ICC, ICTY, and the ICTR have provided us with a greater understanding of identifying the intent to destroy within the actions of an accused, be it an individual or a state. Despite the considerable growth of our knowledge of the crime of genocide, there are still a significant number of issues which make a genocide determination in the midst of violence a difficult decision. The jurisprudence of the international courts and tribunals illustrates some of the issues raised in academia with the definition of genocide remain, in particular the difficulty of establishing evidence of an intent to destroy. Establishing the intent to

[274] Amabelle C Asuncion, 'Pulling the Stops on Genocide: The State or the Individual?' (2009) 20 The European Journal of International Law 1195, 1212.
[275] Claus Kreß, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review 461, 486; Devrim Aydin, 'The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts' (2014) 78 The Journal of Criminal Law 423, 437; Janine Natalya Clark, 'Elucidating the *Dolus Specialis*: An Analysis of ICTY Jurisprudence on Genocidal Intent' (2015) 26 Criminal Law Forum 497, 501.
[276] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 266.
[277] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, [376]; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, [143], [145].

destroy in the actions of an accused is the most critical barrier to be overcome in making a legal determination of genocide in the midst of violence.

While this chapter has presented the means of establishing the specific intent, it has highlighted the difficulties faced by judges even after the situation has ended to identify this intent. The complexity of determining genocidal intent is even greater when faced with the issue of identifying genocide in the midst of a situation. Identifying the intent to destroy as violence rages on is a substantially different task to the investigation that a court can conduct into a situation after it has finished. An international court or tribunal has the benefit of contemporaneous documents, witness testimonies, and time to assess the weight of evidence before making a determination. Therefore while the jurisprudence of the international courts and ad hoc tribunals has been extremely beneficial in instructing us on how to identify genocide when a situation has ended, it is less clear what the case law can teach us about identifying the definition in an ongoing situation.

The complexity of identifying the elements of genocide, in particularly the intent to destroy, in the midst of violence, has steered this research to focus on the utility of the genocide label in ongoing situations as a means of prevention and response. With a deficient definition of genocide, even with the judicial interpretations outlined in this chapter; should the genocide label continue to be employed in the midst of bloodshed or should an alternative label, atrocity crimes, be used instead to characterise ongoing violence leaving the determination of genocide to a competent court or tribunal? Is there any utility to persisting with the genocide label?

Legally there is no difference between claiming that genocide or the other atrocity crimes are being perpetrated as crimes against humanity, war crimes, and ethnic

cleansing have been recognised in the statutes and judgments of the ad hoc tribunals and the international courts. Crimes against humanity and war crimes have been central to the work of the ICTY, and have featured heavily in the cases in front of the ICC. The major difference between the crimes is not in their legal nature but in their symbolical and rhetorical value, as genocide has been associated with the worst crimes in existence and has been regarded by wider society as the most evil violation of international criminal law.

At first it looked as if the international courts supported the viewpoint that genocide sits at the apex of international criminal law, when the Trial Chamber at the International Criminal Tribunal for Rwanda in *Kambanda* declared genocide as the 'crime of crimes' when sentencing the former prime minister of Rwanda.[278] However only three years later the Appeal Chamber at the same tribunal in *Kayishema and Ruzindana* determined that no hierarchy existed in the international crimes under its jurisdiction as these crimes were all serious violations of international law.[279] After the initial missteps the ad hoc tribunals for Rwanda and the former Yugoslavia have consistently taken the approach of not ranking the international crimes.[280] With the 'historic boundaries' between the atrocity crimes in terms of gravity 'largely disappeared' over the years due to the judgments of courts and tribunals this means that there is little 'meaningful distinction between the various' crimes.[281] Therefore while there may be a 'symbolic value' to victims to have their suffering labelled as

[278] *Prosecutor v Kambanda* (Sentence) ICTR-97-23-S (4 September 1998) [16].
[279] *Prosecutor v Kayishema and Ruzindana* (Appeals Judgment) ICTR-95-1-A (1 June 2001) [367].
[280] Barbora Holá, Catrien Bijleveld, and Alette Smeulers, 'Consistency of International Sentencing: ICTY and ICTR Case Study' (2012) 9 European Journal of Criminology 539, 543.
[281] William A Schabas, 'Semantics or Substance? David Scheffer's Welcome Proposal to Strengthen Criminal Accountability for Atrocities' (2007) 2 Genocide Studies and Prevention 31, 35–36. See also Madeline Morris, 'Genocide Politics and Policy' (2003) 32 Case Western Reserve Journal of International Law 205, 207.

genocide, there is 'no legal consequence anymore' in terms of severity in describing a situation as genocide rather than crimes against humanity or ethnic cleansing.[282]

This should mean that the attraction to reworking the definition of genocide should be at an end with the development in the concepts of crimes against humanity and ethnic cleansing.[283] The crimes are all of a serious nature which require an international response. When genocide is singled out as the apex crime, it only increases the incentive to apply or not apply the genocide label to a given situation.[284] Activists and academics should realise that any distinction in legal status and applicability that might have once existed between these crimes and genocide has largely dissipated over the last twenty years, and that the continued fixation on the genocide label is not the solution to prompting a state to prevent atrocities.

3.8 Conclusion

In setting out this chapter, the aim has been to highlight how the definition of genocide has been interpreted in international courts and tribunals with regards to cases involving individual and state responsibility and to investigate whether there are ambiguities within the elements of the crime that affect the identification of genocide in the midst of violence. The discussion is this chapter has developed along the second strand of the research and has shown the complexity of identifying the different elements of the crime, in particular the element of the intent to destroy which becomes more problematic to identify when examining ongoing situations of violence.

[282] William A Schabas, 'Preventing the "Odious Scourge": The United Nations and the Prevention of Genocide' (2007) 14 International Journal on Minority and Group Rights 379, 395. See also Peter Quayle, 'Unimaginable Evil: The Legislative Limitations of the Genocide Convention' (2005) 5 International Criminal Law Review 363, 371; John Quigley, 'Genocide: A Useful Legal Category?' (2009) 19 International Criminal Justice Review 115, 129.
[283] William A Schabas, *Genocide in International Law: The Crime of Crimes Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 118–119.
[284] David Moshman, 'Conceptual Constraints on Thinking about Genocide' (2003) 3 Journal of Genocide Research 431, 440–441.

Furthermore the research has shown how the term genocide and case law concerning the perpetration of genocide can impact on the determination of genocide by a political and/or legal actor due to the stigma surrounding the term. The key argument for this chapter is that these complexities in identifying genocide in case law and employing the term genocide in a criminal institution mean that the genocide label is unsuitable for the prevention of genocide in ongoing situations as it complicates the response. In proposing this contention under the second strand of the research, this chapter has had to confront the third strand of the research and the utility of employing the atrocity crimes label to remedy the faults and deficiencies within the genocide label.

This chapter has shown that with the crimes of genocide, war crimes, crimes against humanity, and to a lesser extent ethnic cleansing all enshrined in international law; utilising the term atrocity crimes would remove the potential complexities of identifying the elements of genocide in the midst of violence and instead ensure the focus is on the response and prevention of these acts. This would be beneficial to those who strive for a more responsive international community, as while this chapter has illustrated that we have a much clearer idea of what encompasses the legal definition of genocide, it is less clear whether this enhanced legal definition has made it possible to identify the crime of genocide in the midst of violence. There is no simple answer to this question, to address this issue the following chapters will examine how international actors have identified or sought to identify genocide in an ongoing situation and the complexities faced by these actors in responding to and preventing genocide.

CHAPTER FOUR: THE TROUBLED HISTORY OF PREVENTION

4.1 Introduction

Following on from the last chapter in which the various complexities involved in identifying and determining genocide within a criminal law institution were set out, this chapter will turn to examine the complexities faced by actors in seeking to identify signs of genocide before violence breaks out or in the midst of violence and to examine the steps taken by actors to respond to genocidal violence. While there have been great strides made in punishing the crime of genocide, the preventative aim of the Genocide Convention has languished in the seventy years since the passing of the Convention. The aim of this chapter is to explore whether the fact that states have often been reluctant or slow to respond to claims of genocide can be traced back to flaws within the definition and understanding of genocide which can affect both identifying the signs of genocide and employing the genocide label in the midst of violence.

This chapter will address this aim by exploring the international response to Rwanda and the measures adopted in the aftermath to address both how to identify the warning signs of genocide and how better to prevent similar violence in the future. Following on from Chapter Three, this chapter further develops the second strand of this research on the complexities involved in identifying and determining genocide, but also touches more on the third strand of this research on the utility of employing the atrocity crimes label in the midst of violence by examining the development and practice of the Responsibility to Protect doctrine. Before commencing further examination on the flaws that affect the identification and determination of genocide, the chapter will start by examining some of the factors within international politics and international

relations that have impacted on the prevention of genocide and which have often led to a lack of reaction to genocide.

4.2 Responding to Genocide

Since the adoption of the Genocide Convention states have been reluctant to take action to prevent or intervene in situations of violence, despite the promise of action under the Convention. This failure to convert the Convention's promise of action into reality reflects the nature of international relations as while the prevention of violence is one of the key aims of the UN, prevention is probably the wrong word to use to describe the actions of the UN in responding to violent situations.[1] Instead the practice and work of the UN is defined by a culture of a reaction, if there is a reaction at all.[2] For a time it looked as if the normative prohibitions of genocide would challenge this attitude of inconsistent and selective responses which had dominated the international legal landscape for centuries. Why did this early promise fail to materialise into tangible preventative policies and actions?

In the aftermath of World War II, governments came together to form an international community which would prevent atrocities, such as those seen during World War II, ever occurring again.[3] The introduction of the concept of genocide by Raphael Lemkin therefore came at the right time as the international community witnessed the

[1] Hitoshi Nasu, 'Operationalizing the "Responsibility to Protect" and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict' (2009) 14 Journal of Conflict & Security Law 209, 211; Kofi Annan, *We the Peoples: A UN for the 21st Century* (Paradigm Publishers 2014) 86.

[2] W Michael Reisman, 'Acting before Victims become Victims: Preventing and Arresting Mass Murder' (2008) 40 Case Western Reserve Journal of International Law 57, 59–60; Nina HB Jørgensen, '"The Next Darfur" and Accountability for the Failure to Prevent Genocide' (2012) 81 Nordic Journal of International Law 407, 409.

[3] Rama Mani, 'Peaceful Settlement of Disputes and Conflict Prevention' in Sam Daws and Thomas Weiss (eds), *The Oxford Handbook on the United Nations* (Oxford University Press 2007) 300; Richard Goldstone, 'International Criminal Court and Ad Hoc Tribunals' in Sam Daws and Thomas Weiss (eds), *The Oxford Handbook on the United Nations* (Oxford University Press 2007) 465; Valerie Epps and Lorie Graham, *International Law: Examples & Explanations* (Aspen Publishers 2011) 311.

significant faults with sovereignty in the aftermath of the Holocaust.[4] The Genocide Convention challenged this unrestrained notion of state sovereignty, as under Article I states undertake to prevent the crime of genocide.[5] It was anticipated by the drafters that this new Convention would inspire states to regard sovereignty as encompassing a right to take action to prevent violence with a genocidal dimension rather than wait to punish perpetrators after a violent situation has culminated with numerous victims. The Genocide Convention alongside powerful international instruments such as the Charter of the United Nations were created to offer the greatest protection to peace and security across the world by recognising that the right of sovereignty is not absolute.[6] Bound by these international obligations, member states of the UN joined together to say 'never again' to genocide.[7]

This hope of a new way of conducting international relations did not fully materialise with the introduction and criminalisation of the concept of genocide. Why did the Convention fail to translate into meaningful action to prevent genocide, could it be solely due to states protecting their own interests or are there issues with how states should act to prevent and respond to genocide under the Genocide Convention?

[4] Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 617–618.
[5] Bruce Cronin, 'The Tension between Sovereignty and Intervention in the Prevention of Genocide' (2007) 8 Human Rights Review 293, 295; Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (United States Holocaust Memorial Museum 2016) 3.
[6] Charter of the United Nations 1945; Convention on the Prevention and Punishment of the Crime of Genocide 1948. See also Nicholas Wheeler, 'The Political and Moral Limits of Western Military Intervention to Protect Civilians in Danger' (2001) 22 Contemporary Security Policy 1, 3; Conor Foley, *The Thin Blue Line: How Humanitarianism Went to War* (Verso 2008) 48.
[7] Carly Fowler and Jeremy Sarkin, 'The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learned from the Role of the International Community and Media during the Rwandan Genocide and the Conflict in the Former Yugoslavia' (2010) 33 Suffolk Transnational Law Review 35, 35.

For a Convention which contains the word prevention in its title, there is scant reference to prevention within its provisions.[8] Article I which sets out the duty of states to prevent genocide was adopted without much disagreement by the Sixth Committee at the UN, however this lack of debate meant that there is no guideline as to how a state would meet this duty.[9] Article VIII is the only article which expressly deals with prevention, as it calls upon the organs of the UN to take action in response to the crime of genocide.[10] However it does not specify what actions the UN should pursue in responding to a claim of genocide, which leaves room for a number of different interpretations of this provision.[11] Does the article require the UN to use military force under Chapter VII of the UN Charter or could diplomatic measures under Chapter VI of the Charter be used to prevent genocide? The ambiguity of this provision left states uncertain as to what steps they had to take in response to a finding of genocide. This ambiguity would be exploited in the future by states unwilling to take any measure of action in response to claims of genocide.

[8] Jerry Fowler, 'Diplomacy and the "G-Word"' (2003) 35 Case Western Reserve Journal of International Law 213, 214.

[9] United Nations General Assembly Sixth Committee (67th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (5 October 1948) UN Doc A/C.6/SR.67; United Nations General Assembly Sixth Committee (68th Meeting) 'Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]' (6 October 1948) UN Doc A/C.6/SR.68. See also William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 81; Eyal Mayroz, 'The Legal Duty to "Prevent": After the Onset of "Genocide"' (2012) 14 Journal of Genocide Research 79, 81; Christian J Tams, Lars Berster, and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck 2014) 37.

[10] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 533.

[11] Jerry Fowler, 'A New Chapter of Irony: The Legal Implications of the Darfur Genocide Determination' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 127, 129–130; Payam Akhavan, 'Preventing Genocide: Measuring Success By What Does Not Happen' (2011) 22 Criminal Law Forum 1, 13; Ekkehard Strauss, 'Reconsidering Genocidal Intent in the Interest of Prevention' (2013) 5 Global Responsibility to Protect 129, 133.

While it was unclear what action should be taken under the Convention to respond to genocide, the behaviour of states ensured for a long time that there was no action taken to respond to claims or evidence of genocide. The notion of genocide prevention which was so prominent in the minds of diplomats when they adopted the Convention quickly disappeared into the vacuum of politics and state interests.[12] This is despite the principal aim of the UN being to 'maintain international peace and security.'[13] However coupled with this responsibility is the duty to respect the sovereignty of states.[14]

The UN and its member states have to maintain a delicate balancing act between respecting sovereignty and protecting the rights of individuals whose rights and protections are abdicated by a given state.[15] This creates an uneasy relationship between keeping the peace across the world while also respecting the right of states to govern themselves.[16] The tension between sovereignty and humanitarian protection can be 'boiled down to a single core question: Should sovereignty and the basic order

[12] Samuel Totten and Paul R Bartrop, 'The United Nations and Genocide: Prevention, Intervention, and Prosecution' (2004) 5 Human Rights Review 8, 9; Deborah Mayersen, 'Current and Potential Capacity for the Prevention of Genocide and Mass Atrocities within the United Nations System' (2011) 3 Global Responsibility to Protect 197, 199; Adrian Gallagher, *Genocide and its Threat to Contemporary International Order* (Palgrave Macmillan 2013) 104.
[13] Charter of the United Nations 1945, Article 1(1).
[14] ibid Article 2(1).
[15] Gerd Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (Polity Press 2007) 142; Isaac Terwase Sampson, 'The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing their Convergence and Divergence on Intervention' (2011) 16 Journal of Conflict & Security 507, 508.
[16] Jennifer M Welsh, 'Introduction' in Jennifer M Welsh (ed), *Humanitarian Intervention and International Relations* (Oxford University Press 2004) 1; Adam Roberts, 'The United Nations and Humanitarian Intervention' in Jennifer M Welsh (ed), *Humanitarian Intervention and International Relations* (Oxford University Press 2004) 97; Karen A Mingst and Margaret P Karns, *The United Nations in the 21st Century* (3rd edn, Westview Press 2007) 11–12, 205; Emma McClean, 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13 Journal of Conflict & Security Law 123, 125; Ian Hurd, 'Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World' (2011) 25 Ethics & International Affairs 293; Julie Mertus, 'Is it Ever Reasonable for One State to Invade another for Humanitarian Reasons? The "Declaratory Tradition" and the UN Charter' in Cindy Holder and David Reidy (eds), *Human Rights: The Hard Questions* (Cambridge University Press 2013) 332–339.

it brings to world politics be privileged over the rights of individuals, or should it be overridden in certain cases, so as to permit intervention for the purpose of protecting those fundamental rights.'[17]

This uneasy relationship manifests itself through the work of the UN as the primacy of sovereignty has often resulted in a lack of response to violence.[18] On the other hand the right of sovereignty is not absolute and states have acted, with and without the consent of a state, under the provisions of the Charter to address gross human rights violations which have been recognised as threats to international peace and security.[19] However there is an inherent selectivity with the situations as the question of whether a state will take an interest in preventing or intervening in a situation of violence, involving genocide or another crime, is dependent on whether the state possesses sufficient political will to take action.[20]

A state will balance competing domestic and international interests before deciding whether to become involved diplomatically or militarily in a situation. Violence in peripheral regions often fails to engage the 'strategic, economic, and diplomatic interests' of the influential states.[21] Even if a situation does concern the interests of a state, there may be competing interests at stake which need to be balanced before a decision on intervention is reached. This can be due to the strategic partnerships which

[17] Alex J Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press 2009) 9.
[18] Aristotle A Kallis, 'Eliminationist Crimes, State Sovereignty and International Intervention: The Case of Kosovo' (1999) 1 Journal of Genocide Research 417, 428.
[19] William A Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge University Press 2000) 498–499; Nicholas Wheeler, 'The Political and Moral Limits of Western Military Intervention to Protect Civilians in Danger' (2001) 22 Contemporary Security Policy 1, 3; Conor Foley, *The Thin Blue Line: How Humanitarianism Went to War* (Verso 2008) 48.
[20] Kenneth J Campbell, 'The Role of Individual States in Addressing Cases of Genocide' (2004) 5 Human Rights Review 32, 36; Karen A Mingst and Margaret P Karns, *The United Nations in the 21st Century* (3rd edn, Westview Press 2007) 79.
[21] Martin Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* (Cambridge University Press 2013) 126.

states maintain with the perpetrators or allies of the perpetrators of the crimes.[22] Thus a state's intervention either unilaterally/in a coalition or under the UN banner is often not motivated by a purely humanitarian concern of protecting civilians but by a desire to pursue its vital interests.[23] Ultimately the application of the genocide label to a situation is a 'political calculation' on behalf of states.[24]

Therefore fulfilling the Convention's preventative potential is dependent on the member states of the UN possessing the political will to get involved in a situation of violence and provide financial and logistical support for any operation within a region of violence.[25] However the UN's response to violence is often dictated by the interests of the UN Security Council's Permanent Five, who have a stranglehold over the UN's mechanisms of intervention.[26] Intervention is contingent on the interests of the Permanent Five aligning on the question of intervention and prevention, otherwise there is a deadlock and inaction.[27] Totten argues that the dominance of the Permanent Five in the response to violent situations ensures the Permanent Five assume a 'God-like role' in 'deciding who will live and who will die.'[28]

While political will dictates whether there will be a response to a situation, the presence or absence of political will does not mean that genocide is readily identifiable

[22] Samuel Totten and Paul R Bartrop (eds), *The Genocide Studies Reader* (Routledge 2009) 361.
[23] Douglas W Simon, 'The Evolution of the International System and its Impact on Protection against Genocide' in Neal Riemer (ed), *Protection against Genocide: Mission Impossible?* (Praeger 2000) 17; James Pattison, *Humanitarian Intervention and The Responsibility to Protect: Who Should Intervene?* (Oxford University Press 2010) 153.
[24] Michael J Kelly, '"Genocide" – The Power of a Label' (2007–2008) 40 Case Western Reserve Journal of International Law 147, 162.
[25] Karen A Mingst and Margaret P Karns, *The United Nations in the 21st Century* (3rd edn, Westview Press 2007) 123.
[26] Eyal Mayroz, 'The Legal Duty to "Prevent": After the Onset of "Genocide"' (2012) 14 Journal of Genocide Research 79, 93.
[27] Martin Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* (Cambridge University Press 2013) 126.
[28] Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 219.

in the midst of violence. The difficulties of identifying the different elements of the crime, outlined in the previous chapters, are not addressed by states willing to act in response to genocide. Therefore there are complexities in responding to and preventing genocide due to not only how states perceive and respond to the genocide label, but also the difficulties associated with recognising signs of genocide in ongoing situations as a result of a flawed definition of genocide. The complexities of the label genocide are exemplified by the tragic case of the Rwandan Genocide where not only was the reluctance of states and the UN Security Council to take action in response to a claim of genocide never more apparent as states avoided the use of the word genocide in case it created an obligation on them to intervene; there were also challenges faced by actors in identifying the elements of the crime in the midst of violence. While clearly occurring before the case law that has clarified the elements of genocide, the case of Rwanda illustrates the difficulties of identifying the Convention's definition of genocide in the midst of violence that continue to be evident in the current understanding of genocide.

4.2(i) The Failure to Act in Rwanda

Nearly fifty years on from the international community's powerful declaration that 'Never Again' would international actors remain passive in the face of genocide, the world once again experienced the crime of genocide. Over the course of 100 days '800,000 Rwandan men, women and children were brutally murdered in an orgy of violence almost beyond the capacity of the human heart to contemplate.'[29] It was one of the fastest killing sprees in history, with a rate of killing that outpaced the

[29] Romeo Dallaire, Nishan Degnarain, and Kishan Manocha, 'The Major Powers on Trial' (2005) 3 Journal of Criminal Justice 861, 861.

Holocaust.[30] Tutsi and moderate Hutu were slaughtered out in the open while the international community remained on the side-lines.[31] The failure of the UN in Rwanda was 'one of the most shameful, painful and defining moments' in its history.[32] An independent inquiry established in 1999 to understand why the UN had failed in its duty to protect the people of Rwanda found that the UN and its member states should have been aware of the risk of genocide.[33] The Independent Inquiry determined the UN system failed in Rwanda due to a lack of political will amongst member states, in particular members of the Permanent Five, to respond to the bloodshed.[34] Therefore the major lesson from the tragic case of Rwanda for the Independent Inquiry was the need to have the political will to intervene.[35] Hearings by the US and Belgium governments came to a similar conclusion.[36]

This conclusion has been echoed by many researchers of the Rwandan Genocide, who believe that there was enough evidence available to the international actors before the outbreak of violence and in the early stages of the bloodshed to make a finding that a genocidal campaign was taking place.[37] These researchers lay the blame for the UN's

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[30] Alan Kuperman, *Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press 2001) 16.
[31] Bruce Jentleson, *American Foreign Policy: The Dynamics of Choice in the 21st Century* (4th edn, WW Norton & Company 2010) 481; Nesam McMillan, 'Regret, Remorse and the Work of Remembrance: Official Responses to the Rwandan Genocide' (2010) 19 Social & Legal Studies 85, 87.
[32] Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press 2006) 357.
[33] United Nations Security Council 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda' (16 December 1999) UN Doc S/1999/1257, 38, 42.
[34] ibid 3, 43–44.
[35] ibid 43.
[36] Belgian Senate, 'Commission d'enquête parlementaire concernant les événements du Rwanda' (1997); United States House of Representatives, 'Rwanda's Genocide: Looking Back—Hearing before the Subcommittee on Africa of the Committee on International Relations, House of Representatives, 108th Congress, Second Session, April 22nd, 2004' (Serial No. 208-96, 2004).
[37] Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999); Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003); Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (Verso 2004); Romeo Dallaire, Nishan Degnarain, and Kishan Manocha, 'The Major Powers on Trial' (2005) 3 Journal of Criminal Justice 861; Andrew Wallis, *Silent Accomplice: The Untold Story of France's Role in the Rwandan Genocide* (IB Tauris & Ltd Co 2006);

failure to act on these warning signals on the lack of political will amongst key member states and actors within the UN system. The common view is that the 'the world bore silent and shameful witness to its own apathy.'[38] Is this view that the Rwandan Genocide could have been prevented by the UN and the UN Security Council possessing the political will to intervene correct in light of the information available to the actors at the time? Or should we examine the potential difficulties faced by the international community in identifying warnings signs of genocide before the outbreak of violence and the complex task of determining genocide in the midst of the bloodshed?

Identifying Precursors of Genocide

The role of the past in the Rwandan Genocide cannot be understated. The history of the Hutu and the Tutsi ethnic groups created the narrative of ancient tribal hatred which pervaded top level discussion of Rwanda before and during the genocide.[39] Was this a mistaken view of Rwandan history, were the Hutu and Tutsi always pitted against each other? To an extent they were in the colonial and post-independence era due in part to colonial policies, but it rarely led to large-scale bloodshed. The violence witnessed in the civil wars while ethnic in nature was never part of a coordinated plan to exterminate the Tutsi.[40] Throughout the history of Rwanda there were no concrete signs that a genocidal campaign was being planned. When the early 1990s saw a flare up of ethnic tensions in Rwanda, for the international community it was seen as part of the longstanding ethnic hatred between the Tutsi and the Hutu. International actors

Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (2nd edn, Zed Books 2009).

[38] Ramesh Thakur, 'Humanitarian Intervention' in Sam Daws and Thomas Weiss (eds), *The Oxford Handbook on the United Nations* (Oxford University Press 2007) 396.

[39] Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (Yale University Press 2007) 562.

[40] Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (Pluto Press 1995) 28.

were conditioned to see violence in Rwanda as a revival of ethnic hatred and not a prelude to genocide.[41] Gérard Prunier observes that unless one had a full understanding of the complexities of the Rwandan society it would have been hard to predict that a genocidal campaign would be launched.[42] While the narrative of tribal hatred was mistaken, Rwanda had been beset by over thirty years of ethnic tension when the UN became involved in a peacekeeping mission in the country which clouded the Secretariat and UN Security Council's view of the situation.

The UN had a presence on the ground in the form of a peacekeeping mission which had been deployed to the country in October 1993. The UN Security Council had established the United Nations Assistance Mission for Rwanda (hereafter 'UNAMIR') to oversee the implementation of the Arusha Accords, a peace agreement which introduced a power-sharing government with the Tutsi-led Rwandan Patriotic Front (hereafter 'RPF') which had been at war with the Hutu-led government.[43] UNAMIR was mandated to monitor the ceasefire, establish demilitarised zones, and contribute to the security within a weapons-free zone in the capital, Kigali.[44] The restrictive mandate of UNAMIR meant that the peacekeeping force could not engage militarily with local forces. Thus, tragically, international troops which had the potential to intervene were bystanders when the killings spread across the country.

[41] David Scheffer, 'Lessons from the Rwandan Genocide' (2004) 5 Georgetown Journal of International Affairs 125, 126.
[42] Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Hurst & Company 1995) 211.
[43] United Nations Security Council Resolution 872 (5 October 1993) UN Doc S/RES/872.
[44] United Nations Security Council Resolution 872 (5 October 1993) UN Doc S/RES/872, Point 3. See also Vicenç Fisas, *Blue Geopolitics: The United Nations Reform and the Future of the Blue Helmets* (Pluto Press 1995) 80; Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999) 132; Fred Grünfeld and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (Koninklijke Brill NV 2007) 41–42.

Peace had apparently come to Rwanda after the signing of the Arusha Accords. It was not an easy path to peace but for the international community there seemingly existed parties who were committed to the peace process.[45] Rwanda was seen as an easy mission within the UN which would only last for a short duration, so the Security Council only equipped it with a basic peacekeeping mandate.[46] However from the start UNAMIR was struggling.[47] When UNAMIR was deployed, it was under-resourced and ill-equipped.[48] UNAMIR lacked any intelligence capabilities, which would have aided it in gathering information on the likelihood of the implementation of the Arusha Accords.[49]

In the view of the Independent Inquiry, the time period before the outbreak of genocide was a crucial opportunity for the international community to observe precursors to genocide. The Independent Inquiry notes that the divisions created by the Arusha Accords were an indicator that genocidal violence was a possibility.[50] The Arusha Accords failed to neutralise the extremist elements within the Hutu community, as they still had a central role within the two most powerful institutions of the state, the

[45] Howard Adelman and Astri Suhrke, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management* (Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda 1996) 26; Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999) 130–131; Andrew Wallis, *Silent Accomplice: The Untold Story of France's Role in the Rwandan Genocide* (IB Tauris & Ltd Co 2006) 67.
[46] Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (Verso 2004) 66, 88; Linda Melvern, 'The Security Council in the Face of Genocide' (2005) 3 Journal of International Criminal Justice 847, 848; Linda Melvern, 'The UK Government and the 1994 Genocide in Rwanda' (2007) 2 Genocide Studies and Prevention 249, 251.
[47] Carly Fowler and Jeremy Sarkin, 'The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learned from the Role of the International Community and Media during the Rwandan Genocide and the Conflict in the Former Yugoslavia' (2010) 33 Suffolk Transnational Law Review 35, 35, 53.
[48] ibid 53.
[49] Howard Adelman and Astri Suhrke, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management* (Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda 1996) 36; Stephen Kinzer, *A Thousand Hills: Rwanda's Rebirth and the Man who Dreamed it* (Wiley 2008) 122.
[50] United Nations Security Council 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda' (16 December 1999) UN Doc S/1999/1257, 42.

government and the army.[51] The Independent Inquiry states that these clear divisions in Rwandan society alongside evidence of 'killings, serious ethnic tension, militia activities and the import and distribution of arms' should have been connected with the warning signs which were present before the outbreak of violence.[52]

The UN and its member states were well aware of the extremist elements in Rwanda which were advocating reprisals against the Tutsi.[53] Their response was to use diplomacy to coerce the government into respecting the Arusha Accords and the installation of the transitional government.[54] The Security Council had put its trust in the peace process, and relied on the Arusha Accords and the peacekeeping force to deliver peace to Rwanda.[55] Before the genocide started, the UN was taking the conventional approach to Rwanda by using diplomacy to bring peace to the country. With the information we now have, we know it was the wrong approach. The International Inquiry contends that if more attention had been paid to these warning signs then the international actors would have been able to spot that the violence was evidence of a genocidal campaign unfolding.[56] In detailing the failure of the UN to

[51] Howard Adelman and Astri Suhrke, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management* (Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda 1996) 25; Tom Dannenbaum, 'War and Peace in Rwanda' in Kristen Eichensehr and W Michael Reisman (eds), *Stopping Wars and Making Peace: Studies in International Intervention* (Koninklijke Brill NV 2009) 110.
[52] United Nations Security Council 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda' (16 December 1999) UN Doc S/1999/1257, 42–43.
[53] Fred Grünfeld and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (Koninklijke Brill NV 2007) 64, 118.
[54] Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999) 156, 173–174; Fred Grünfeld and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (Koninklijke Brill NV 2007) 125–126.
[55] Fred Grünfeld and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (Koninklijke Brill NV 2007) 126; Matthew Levinger, 'Why the U.S. Government Failed to Anticipate the Rwandan Genocide of 1994: Lessons for Early Warning and Prevention' (2016) 9 Genocide Studies and Prevention 33, 45.
[56] United Nations Security Council 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda' (16 December 1999) UN Doc S/1999/1257, 41.

connect the warning signs of genocide, the Independent Inquiry paid considerable attention to a cable sent by the force commander of UNAMIR, Romeo Dallaire.[57]

Most academics who argue that the international actors knew genocide was occurring will point to this fax sent by Dallaire to Maurice Baril, military adviser to the Secretary-General, and to Kofi Annan, the Under-Secretary-General of the UN Department of Peacekeeping Operations (hereafter 'DPKO') on the 11th of January 1994.[58] In the fax, Dallaire reported that an informant had come forward with information of a plan to exterminate Tutsi. The informant said that he had been ordered to register Tutsi across Rwanda with the aim of exterminating them. The informant said that the Hutu militias could kill 1,000 Tutsi in twenty minutes, and that he could point UNAMIR to supplies of weapons which the militias had been stockpiling. In the fax, Dallaire outlined a planned raid on the weapons cache over the next 36 hours.

The response from the DPKO was immediate; they ordered Dallaire not to take any action to raid the arm caches as raids were not permitted under the mandate of UNAMIR.[59] The DPKO did not share the fax with the Secretary-General or the Security Council, preferring Dallaire to handle the matter on the ground.[60] Dallaire

[57] ibid 10–12.
[58] Fax from Major-General Romeo Dallaire to United Nations Headquarters (11 January 1994). See also Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999) 18, 172–173; Helen Fein, 'The Three P's of Genocide Prevention: With Application to a Genocide Foretold—Rwanda' in Neal Riemer (ed), *Protection against Genocide: Mission Impossible?* (Praeger Publishers 2000) 56; Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 343–345; Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (Verso 2004) 96–100; Adam LeBor, *'Complicity with Evil': The United Nations in the Age of Modern Genocide* (Yale University Press 2006) 167–170; Andrew Wallis, *Silent Accomplice: The Untold Story of France's Role in the Rwandan Genocide* (IB Tauris & Ltd Co 2006) 74–75.
[59] United Nations Security Council 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda' (16 December 1999) UN Doc S/1999/1257, 11.
[60] Fred Grünfeld and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (Koninklijke Brill NV 2007) 104.

was instructed to inform the President of Rwanda of the threat.[61] It is understandable why the DPKO told Dallaire to bring the information to the President of Rwanda, as UNAMIR was meant to be an impartial monitoring force.[62] The international community had placed far too much faith in the Arusha Accords, their optimism blinded them to the threats to peace which were manifesting themselves in Rwandan society.[63] The focus on diplomacy to enforce the Arusha Accords meant that killings were seen as stumbling blocks on the road to peace.[64] They were not seen for what they were, the preliminary stages of a genocidal campaign. The refusal to share this fax had a devastating impact on Rwanda, but was it clear from the fax that genocide was being planned?

While the training of militias, the stockpiling of weapons, and the listing of names all point towards a campaign of extermination being planned; Dallaire did not express full confidence in the information, stating at the end of the fax that a possibility of a trap existed.[65] The doubts over the plan of extermination expressed by both the informant and Dallaire did enough for the DPKO to not treat the fax as seriously as it should have, and resulted in the fax never reaching the UN Security Council.[66] It is important to note that the Rwandan Genocide did not operate in a vacuum. The reports from the ground were going to the DPKO, which was managing numerous situations

[61] ibid 100.
[62] Ian Hurd, *International Organizations: Politics, Law, Practice* (Cambridge University Press 2011) 142.
[63] Roland Paris, 'Post-conflict Peacebuilding' in Sam Daws and Thomas Weiss (eds), *The Oxford Handbook on the United Nations* (Oxford University Press 2007) 415.
[64] David Scheffer, 'Lessons from the Rwandan Genocide' (2004) 5 Georgetown Journal of International Affairs 125, 127.
[65] Fax from Major-General Romeo Dallaire to United Nations Headquarters (11 January 1994) para. 11.
[66] Touko Piiparinen, 'Beyond the Mystery of the Rwanda "Black Box": Political Will and Early Warning' (2006) 13 International Peacekeeping 334, 338; Karel Kovanda, 'The Czech Republic on the UN Security Council: The Rwandan Genocide' (2010) 5 Genocide Studies and Prevention 192, 196.

around the world.[67] It was not the first fax which the DPKO had ever received which declared killings as a possibility, during this period the DPKO was receiving similar information from its other missions.[68] It is a hard task to monitor every situation around the world for signs that a genocidal campaign is being planned.[69] The speed of the violence witnessed in Rwanda also complicated the task faced by analysts as 'events happened much faster than analysts could interpret them.'[70]

With all the information available to us now on the genocide, it is easier to see warning signals which pointed to the planning of genocide.[71] However, at the time the dots were never connected by those in positions of power due to the failure of UN actors to share information and a lack of definitive evidence of genocide. The inability to understand the intentions of actors in a particular localised context was the weakness of the UN infrastructure during the genocide. A lot of the warning signals which arose from Rwanda such as militia training and the spread of weapons pointed towards the resumption of a civil war rather than a genocidal campaign.[72] Concrete evidence of something contrary to the narrative was needed to persuade policymakers that Rwanda was threatened by genocide.

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[67] Howard Adelman and Astri Suhrke, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management* (Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda 1996) 69.
[68] Fred Grünfeld and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (Koninklijke Brill NV 2007) 103–104.
[69] Samuel Totten, 'The Intervention and Prevention of Genocide: Sisyphean or Doable' (2004) 6 Journal of Genocide Research 229, 229.
[70] Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999) 640.
[71] Gregory H Stanton, 'Could the Rwandan Genocide have been Prevented?' (2004) 6 Journal of Genocide Research 211, 211–212.
[72] Alan Kuperman, *Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press 2001) 104.

Determining Genocide In the Midst of Violence

The genocide began on the 6th of April 1994, after a plane crash resulted in the death of the Rwandan President Juvénal Habyarimana, and quickly spread across the country as Hutu comprised government forces, militias, and civilian mobs went from house to house rooting out the Tutsi.[73] The genocidal violence was sparked by the resentment felt by Hutu extremists towards the Arusha Accords.[74] The primary response to the violence came from the RPF who resumed their combat with government forces so as to reach areas besieged by violence. The RPF's return to warfare gave the impression to a number of international actors that what was being witnessed in Rwanda was the resumption of the type of civil war unrest which had beset Rwanda since its independence.[75]

In the first few weeks of the violence, the future of UNAMIR dominated the agenda of the UN Security Council.[76] Seldom did their attention turn to the actual killings. On the 21st of April, the UN Security Council took its first action since the outbreak of the genocide when it voted to reduce UNAMIR to a skeleton force with a reduced mandate to call for a ceasefire and a return to the Arusha Accords.[77] The UN saw itself as a mediator in the Rwandan conflict, and withdrew its forces when that task became impossible with the outbreak of violence. The first few days of the genocide were crucial to the response of the UN to the situation; firm evidence from the ground pointing to a campaign of genocide would have forced the hand of the UN. Lacking

[73] Adam Jones, *Genocide: A Comprehensive Introduction* (Routledge 2006) 238.
[74] Paul J Magnarella, 'The Background and Causes of the Genocide in Rwanda' (2005) 3 Journal of International Criminal Justice 801, 813.
[75] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 347; Paul D Williams, 'The Peacekeeping System, Britain and the 1994 Rwandan Genocide' in Phil Clark and Zachary Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst & Company 2008) 61.
[76] Michael Barnett, *Eyewitness to Genocide: The United Nations and Rwanda* (Cornell University Press 2002) 105–106.
[77] United Nations Security Council Resolution 912 (21 April 1994) UN Doc S/RES/912.

a confirmation of anything other than ethnic killings and a civil war, the UN withdrew as it felt it had no prominent role to play. It was a fundamental misunderstanding of what was happening in Rwanda combined with a reluctance to intervene which led to the UN refusing to support any intervention.

This decision to reduce UNAMIR is seen by academics and international actors as a critical moment in the response to the genocide.[78] Critics of this inaction believe that the UN Security Council possessed the knowledge of the crime of genocide at this point, and that if the UN Security Council members possessed the will to intervene, then the genocide could have been halted at this stage. However could it be definitively stated that genocide was occurring when the UN Security Council made their decision? At the time the UN voted to reduce UNAMIR, genocide was not a prevalent term in international discussion. In fact only one actor publicly stated that the killings were genocide in the first three weeks of the violence.[79] On the 13th of April, the RPF claimed in a letter to the UN Security Council that the murders were part of a genocidal campaign.[80] The claim was treated as dubious by the UN Security Council members as the RPF was in the midst of a civil war with the government.[81]

On the other side the interim government established in the aftermath of the plane crash was claiming that the killings were a backlash to the assassination of Habyarimana.[82] The government also claimed that the killings were connected with

[78] Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Hurst & Company 1995) 275–276; Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 369; Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (Verso 2004) 215–216; Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (2nd edn, Zed Books 2009) 195–196.
[79] Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (Pluto Press 1995) 60.
[80] Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (Verso 2004) 198.
[81] Alan Kuperman, *Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press 2001) 31.
[82] Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (2nd edn, Zed Books 2009) 154.

the renewed civil war.[83] It is important to note that Rwanda was one of the non-permanent members on the Security Council during the genocide, which allowed it to influence the direction of the discussion of the Rwandan conflict.[84] This allowed the interim government to conduct a campaign of disinformation amongst international actors.[85]

The situation on the ground was complex, it was not just a genocidal campaign which began on the 7th of April; it was also the outbreak of a military coup, a slew of targeted political assassinations, and the renewal of a civil war.[86] All these events only added to the confusion both on the ground and at the UN.[87] The confusion about the situation on the ground can be highlighted by the reports which Dallaire was providing to the Secretariat. A communication from Dallaire to the Secretariat on the 8th of April stated that there was an ethnic dimension to the violence, but stopped short of calling the violence genocide.[88] However in a report on the 15th of April, Dallaire identified the violence as coming from both sides of the conflict.[89] A fax by Dallaire to the Secretariat on the 17th of April portrayed the killings as being organised by a militia

[83] Brian Martin, 'Managing Outrage over Genocide: Case Study Rwanda' (2009) 21 Global Change, Peace & Security 275, 289.
[84] Adam Roberts, 'Proposals for UN Standing Force: A Critical History' in Vaughan Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press 2008) 109; Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (2nd edn, Zed Books 2009) 181.
[85] Véronique Tadjo, *The Shadow of Imana: Travels in the Heart of Rwanda* (Heinemann 2002) 32.
[86] Howard Adelman and Astri Suhrke, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management* (Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda 1996) 40; Matthew Levinger, 'Why the U.S. Government Failed to Anticipate the Rwandan Genocide of 1994: Lessons for Early Warning and Prevention' (2016) 9 Genocide Studies and Prevention 33, 50.
[87] United Nations Security Council 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda' (16 December 1999) UN Doc S/1999/1257, 35.
[88] Paul D Williams, 'The Peacekeeping System, Britain and the 1994 Rwandan Genocide' in Phil Clark and Zachary Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst & Company 2008) 48.
[89] Alan Kuperman, *Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press 2001) 25.

which was distinct from the interim government.[90] The Secretary-General in his report to the Security Council on the 20th of April stated that the killings appeared to have both an ethnic and political element.[91] The media by and large was treating the conflict as a flare-up of ethnic hatred, its reporting helped inform the approach of the UN.[92]

Thus, even Dallaire struggled before the 21st of April to term the killings as genocide, and he was the most senior UN official closest to the ground.[93] When the Secretariat was receiving intelligence of this nature, how could the Secretary-General have been in a position to tell the Security Council that genocide was occurring in Rwanda? The intelligence showed a lack of centralised organisation and intention on the part of the interim government.[94] In the first few weeks of the violence, no international actor could convincingly state that the killings in Rwanda were genocide. They knew the killings were ethnically motivated but did not have definitive proof of an intent to exterminate an entire race.

A major weakness of the response was that genocide was never contemplated by those in the international community. Karel Kovanda stated that 'the Rwanda events fell so dramatically out of the normal curve of nations' possible behaviours that one instinctively refused to believe them.'[95] This is one of the major issues with identifying genocide, in that genocide as a concept is so beyond the comprehension of

[90] Touko Piiparinen, 'Beyond the Mystery of the Rwanda "Black Box": Political Will and Early Warning' (2006) 13 International Peacekeeping 334, 343.
[91] Bjørn Willum, 'Legitimizing Inaction towards Genocide in Rwanda: A Matter of Misperception?' (1999) 6 International Peacekeeping 11, 20.
[92] Romeo Dallaire, Nishan Degnarain, and Kishan Manocha, 'The Major Powers on Trial' (2005) 3 Journal of Criminal Justice 861, 877.
[93] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 358.
[94] Touko Piiparinen, 'Beyond the Mystery of the Rwanda "Black Box": Political Will and Early Warning' (2006) 13 International Peacekeeping 334, 344.
[95] Karel Kovanda, 'The Czech Republic on the UN Security Council: The Rwandan Genocide' (2010) 5 Genocide Studies and Prevention 192, 208.

actors.[96] The concept of genocide is largely associated with the Holocaust, and that form of highly mechanised genocide blinded the international community to the fact that genocide could be committed in a poor country with weapons as simple as a machete.[97]

It was not until the end of April and the beginning of May that international actors began labelling the violence as genocide.[98] It was only at this time it became more evident that a genocidal campaign was underway.[99] On the 29th of April, Oxfam became the first international actor to publically acknowledge that what was happening in Rwanda was genocide.[100] Subsequently Dallaire used the term for the first time at the end of April.[101] However despite the greater recognition of the ethnic nature of the violence, the UN Security Council shunned the word genocide. The United States, in particular, deliberately avoided the use of the term genocide for the violence which was ravaging Rwanda as the US administration believed that employing the term to describe the violence would require them to take action in response under the provisions of the Genocide Convention.[102]

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[96] Romeo Dallaire, Nishan Degnarain, and Kishan Manocha, 'The Major Powers on Trial' (2005) 3 Journal of Criminal Justice 861, 876.
[97] Howard Adelman and Astri Suhrke, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management* (Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda 1996) 68.
[98] Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999) 636–640.
[99] Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (2nd edn, Zed Books 2009) 197–206.
[100] Linda Melvern, 'The UK Government and the 1994 Genocide in Rwanda' (2007) 2 Genocide Studies and Prevention 249, 253.
[101] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 358.
[102] Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Hurst & Company 1995) 274–275; Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 359–361; Gregory Stanton, 'Could the Rwandan Genocide have been Prevented?' (2004) 6 Journal of Genocide Research 211, 219–220; Luke Glanville, 'Rwanda Reconsidered: A Study of Norm Violation' (2006) 24 Journal of Contemporary African Studies 185, 192; Adam LeBor, *'Complicity with Evil': The United Nations in the Age of Modern Genocide* (Yale University Press 2006) 177; Luke Glanville, 'Is "Genocide" still a Powerful Word' (2009) 11 Journal of Genocide Research 467, 468, 471–472; William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 529.

The reluctance of the US to get involved in Rwanda stemmed from its engagement in Somalia the previous year.[103] A UN Security Council-sanctioned US-led peace enforcement mission in Somalia led to the deaths of 18 US soldiers.[104] The murder of the US servicemen shocked the American public particularly as there was footage of the body of one of the soldiers being dragged through the streets of Mogadishu.[105] Somalia and Mogadishu were not only important incidents in US history; they became symbols and slogans for future US action abroad, cautionary tales for future administrations.[106] The experience of the US in Somalia conditioned its response to the conflict in Rwanda.[107] In the aftermath, America adopted an anti-interventionist approach to UN missions unless it was in America's interests.[108] This led to the US developing the 'Mogadishu Line', a line that the US was determined not to cross so as to avoid putting US forces in danger.[109] Rwanda was the first test of this new approach.[110]

The US as the world's superpower at the time had enormous influence in dictating the approach of the United Nations.[111] France also was a key player in the response to the violence as the French government had a strong relationship with the ruling Hutu government; '[v]irtually from the moment of the RPF invasion in 1990 to the end of the genocide almost four years later, the French were the Rwandan government's

[103] Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (Pluto Press 1995) 48.
[104] Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (Verso 2004) 70.
[105] ibid 70.
[106] William Shawcross, *Deliver us from Evil: Peacekeeping, Warlords and a World of Endless Conflict* (Touchstone 2000) 122.
[107] Richard Falk, *The Costs of War: International Law, The UN, and World Order after Iraq* (Routledge 2008) 14.
[108] Jeffrey Haynes, Peter Hough, Shahin Malik, and Lloyd Pettiford, *World Politics* (Pearson 2011) 652.
[109] William Shawcross, *Deliver us from Evil: Peacekeeping, Warlords and a World of Endless Conflict* (Touchstone 2000) 122.
[110] Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (Pluto Press 1995) 50.
[111] Romeo Dallaire, Nishan Degnarain, and Kishan Manocha, 'The Major Powers on Trial' (2005) 3 Journal of Criminal Justice 861, 867.

closest ally militarily, politically, and diplomatically.'[112] Reluctant to intervene, the US and France, along with the UK and China, resisted any attempt by other members of the UN Security Council to label Rwanda as a genocide in the first few weeks of the violence.[113] This was despite a recognition by representatives of non-permanent members of the UN Security Council; Argentina, Czech Republic, New Zealand, and Spain, that genocide was being perpetrated and that the UN members were bound to act under their obligations within the Genocide Convention.[114]

The opposition of the permanent five to intervention meant that a statement issued by the UN Security Council on April 30th condemning the violation of international law failed to mention the word genocide.[115] The internal disputes amongst the members of the UN Security Council over the use of the term genocide meant little or no action was taken to respond to the bloodshed, this inertia led to hundreds of thousands dying while the UN 'dawdled' over definitional debates.[116] Even when the UN Security Council voted to deploy a more robust peace keeping force to the region in the middle

[112] African Union 'Rwanda: The Preventable Genocide' (2000) para. 12.4.
[113] Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999) 638–639; Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Flamingo 2003) 161; Romeo Dallaire, Nishan Degnarain, and Kishan Manocha, 'The Major Powers on Trial' (2005) 3 Journal of Criminal Justice 861, 864, 868–869, 874; Linda Melvern, 'The UK Government and the 1994 Genocide in Rwanda' (2007) 2 Genocide Studies and Prevention 249, 253; Paul D Williams, 'The Peacekeeping System, Britain and the 1994 Rwandan Genocide' in Phil Clark and Zachary Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst & Company 2008) 53–54; Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (2nd edn, Zed Books 2009) 203; William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 548.
[114] Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999) 639; Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (Verso 2004) 219–220; Linda Melvern, 'The Security Council in the Face of Genocide' (2005) 3 Journal of International Criminal Justice 847, 858; Adam LeBor, *'Complicity with Evil': The United Nations in the Age of Modern Genocide* (Yale University Press 2006) 177; David Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (Oxford University Press 2009) 189-190; Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (2nd edn, Zed Books 2009) 202; William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 547–548.
[115] United Nations Security Council 'Statement by the President of the Security Council' (30 April 1994) UN Doc S/PRST/1994/21.
[116] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 549.

of May, it failed to use the word genocide.[117] In addressing the violence, the UN Security Council stated 'the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constitutes a crime punishable under international law.' The UN Security Council's resolution was couched in the terms of the Convention without saying the word genocide.[118]

The first acknowledgement from within the UN that the genocide has been committed came at the end of May, after representatives of the Secretary-General presented a report based on their visit to Rwanda.[119] Their report confirmed that Rwandan civilians were being systematically targeted in areas under the control of the interim government by government forces and militias.[120] The report concludes that on the basis of evidence of large scale killing of members of an ethnic group, 'there can be little doubt that it constitutes genocide'.[121] Finally, the UN Security Council used the word genocide on the 8th of June when it passed a resolution acknowledging 'acts of genocide' had been perpetrated.[122] However, by this stage the genocide was nearly over, as the RPF had gained control of the majority of the country and driven Hutu extremists into neighbouring countries.

A Complex Failure

This thesis is not disputing the claim that the member states had no political will to intervene in Rwanda, rather it is arguing that the evidence of genocide was not strong enough to override the will of the member states. The ability to respond to future

[117] United Nations Security Council Resolution 918 (17 May 1994) UN Doc S/RES/918.
[118] Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999) 644.
[119] United Nations Security Council 'Report of the Secretary-General on the Situation in Rwanda' (31 May 1994) UN Doc S/1994/640, para. 1–2. See also United Nations Security Council 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda' (16 December 1999) UN Doc S/1999/1257, 26.
[120] United Nations Security Council 'Report of the Secretary-General on the Situation in Rwanda '(31 May 1994) UN Doc S/1994/640, para. 5–7.
[121] ibid para. 36.
[122] United Nations Security Council Resolution 925 (8 June 1994) UN Doc S/RES/925.

genocides is not dependent on political will alone but rather the ability to detect warning signals of genocide and identifying genocide in the midst of violence. The ability to predict the outbreak of genocide or distinguish acts of genocide from other crimes is not a straightforward task, as shown by the Rwandan case.

Rwanda had a complex history of ethnic violence which developed into a multifaceted situation with a civil war breaking out alongside the deliberate targeting of Tutsi civilians. While with the benefit of hindsight and extensive documentary evidence it is clear that this targeting was part of a plan or policy to destroy the Tutsi group, in the midst of violence it is a substantially different task to ascertain what were the intentions underlying these actions. As Kuperman argues, it is easy to spot the signs of genocide when you retrospectively examine the conflict.[123] At the time it is a lot harder to judge if a particular incident will lead to genocide. A lot of the warning signals which arose from Rwanda such as militia training and the spread of weapons pointed towards the resumption of a civil war rather than a genocidal campaign.[124] How can the international community predict when a civil war will descend into a genocide?[125]

The intentions of people are hard to judge, but this is exactly what has to be discovered if the international community believes a genocidal campaign is underway as the international courts and tribunals have confirmed that the specific intent to destroy a protected group is central to the crime of genocide.[126] The inability to understand the motivations of actors who are a thousand miles away from you was the weakness of

[123] Alan Kuperman, *Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press 2001) 103.
[124] Alan Kuperman, *Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press 2001) 104.
[125] Samuel Totten, 'The Intervention and Prevention of Genocide: Sisyphean or Doable' (2004) 6 Journal of Genocide Research 229, 229.
[126] Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (Pluto Press 1995) 9.

the international community during the genocide. Knowing the motivations of the actors was a near impossible task for the people on the ground such as Dallaire and the rest of the UNAMIR contingent.

What have we learnt from the example of the Rwandan Genocide? We have learnt that genocide is a complicated concept; difficult to diagnose beforehand and hard to comprehend in the midst of violence. Focussing on political will ignores the greater issue of not being able to identify warning signals or connect warning signals before the outbreak of violence. The failure to address this issue compromises the UN's involvement in violent situations across the globe as it will once again fail to realise what is actually happening on the ground. Therefore a central issue in the prevention of genocide is whether or not the UN will be able to identify the crime of genocide in future situations or will it sadly, as the Rwandan case, not fully understand the violence until after the fact?

4.3 Signs of Genocide

Developing the preventative component of the Genocide Convention hinges on the assumption that it is possible to identify indicators of genocide before the outbreak of violence and/or recognise signs of genocide in the midst of violence. A country or region does not suddenly explode into genocidal bloodshed without evidence of violence being a possibility.[127] However the task of determining whether a situation will 'creep towards or explode into a genocidal situation' is not straightforward.[128] This has meant that predicting signs of genocide at an early stage so as to mount an

[127] René Lemarchand, 'Disconnecting the Threads: Rwanda and the Holocaust Reconsidered' (2002) 4 Journal of Genocide Research 499, 509.
[128] Samuel Totten, 'The Intervention and Prevention of Genocide: Sisyphean or Doable?' (2004) 6 Journal of Genocide Research 228, 229.

effective preventive strategy 'has proved to be one of the most challenging tasks confronting the United Nations.'[129]

4.3(i) Forecasting the Risk of Genocide

Theories over why people commit genocide and/or the conditions that give rise to genocide from a criminological, economic, historical, philosophical, psychological, and sociological perspectives amongst many other perspectives have been a keenly debated topic in genocide studies. Over the years, a number of academics and NGOs have identified circumstances which make a country vulnerable to the crime of genocide, and have used this knowledge to develop their own early warning systems and risk assessments to predict which countries are susceptible to genocide. One of the earliest studies into the conditions that give rise to genocide was presented by Kurt Jonassohn who identified a number of precursors to genocide: i) official statements from a government which are violent in nature; ii) the appearance of refugees fleeing the territory; iii) government regulations which override human rights provisions; and iv) propaganda by the state media.[130] One of the most influential warning systems in academia and policy circles was created by Barbara Harff who identified seven variables which are preconditions for the crime of genocide: i) political upheaval; ii) state-led discrimination; iii) a history of genocide; iv) an ethnically polarised elite; v) exclusionary ideology; vi) an autocratic government; and vii) trade openness and international engagement.[131] Harff uses these factors to develop a model to assess the risk of genocide in countries across the world. A drawback to Harff's model of

[129] United Nations General Assembly Human Rights Council 'Efforts of the United Nations System to Prevent Genocide and the Activities of the Special Adviser to the Secretary-General on the Prevention of Genocide: Report of the Secretary-General' (18 February 2009) UN Doc A/HRC/10/30, para. 2.
[130] Kurt Jonassohn, 'Prevention without Prediction' (1993) 7 Holocaust and Genocide Studies 1, 3–4.
[131] Barbara Harff, 'No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955' (2003) 97 American Political Science Review 57, 61–65; Barbara Harff, 'How to Use Risk Assessment and Early Warning in the Prevention and De-Escalation of Genocide and Other Mass Atrocities' (2009) 1 Global Responsibility to Protect 506, 520–521.

examining countries is that she employs her own definition of genocide rather than the legal definition as contained in the Convention.

Gregory Stanton, the founder and President of the non-governmental organisation Genocide Watch, has developed a model of ten stages of genocide:

> 1) Classification (society is divided by membership of one of the protected groups);
>
> 2) Symbolisation (the protected group is labelled with a name and/or symbolic identifiers);
>
> 3) Discrimination (infringing on civil and political rights);
>
> 4) Dehumanisation (propaganda used to degrade a protected group);
>
> 5) Organisation (strengthening of state structures, forming of militias, and stockpiling weapons);
>
> 6) Polarisation (propaganda used to drive groups apart);
>
> 7) Preparation (plans are drawn up, and there is increased hate propaganda);
>
> 8) Persecution (targeting of a protected group by forcing them to wear identifying symbols, confiscating their property, segregation into ghettoes or concentration camps, and the restriction of access to resources such as food and water);
>
> 9) Extermination (beginning of the campaign of genocidal violence);

10) Denial (perpetrators cover up evidence and blame the conflict on the victims).[132]

The ten stages do not occur in a linear process, stages can happen simultaneously and latter stages can precede earlier stages but for Stanton all ten stages are present in a genocide. Such attempts to structure the crime of genocide into stages are not without criticism. Mark Levene criticises those who believe that genocide follows some predictable pattern.[133] Despite this, there are now a variety of organisations (state, intergovernmental, and NGO) which study the risk of a country or region exploding into genocide violence which illustrates the importance attached to prediction as a means of prevention.[134] The risk factors and early warnings signals generated by these actors highlight some commonality as they have recognised that conditions which give rise to genocide include:

- A history of prior genocide or mass atrocities
- An autocratic or non-democratic regime
- Ongoing state-led discrimination
- Political instability
- Ongoing domestic armed conflict
- Armed conflict in neighbouring states
- Economic factors
- Increased hate media
- Public rallies and popular mobilization against vulnerable groups

[132] Gregory Stanton, 'The Ten Stages of Genocide' (Genocide Watch 2013) <http://www.genocidewatch.com/ten-stages-of-genocide> accessed 20 March 2019.
[133] Mark Levene, 'David Scheffer's "Genocide and Atrocity Crimes": A Response' (2007) 2 Genocide Studies and Prevention 81, 87.
[134] See discussion in Ernesto Verdeja, 'Predicting Genocide and Mass Atrocities' (2016) 9 Genocide Studies and Prevention 13.

- Upcoming elections
- Public commemorations of past crimes or contentious historical events that exacerbate tensions between groups
- Rapid change in government leadership, such as through assassination or coup
- Natural disasters
- Sharp increase in repressive state practices
- Arrest, torture, disappearance or killing of political, religious, or economic leaders
- Physical segregation or separation of the targeted group from the broader population
- Increase in weapons transfers to security forces or rebels
- Rapid increase or decline in opposition capacity
- Deployment of security forces against previously targeted civilian groups
- Commencement/resumption of armed conflict between government forces and rebels
- Spill over of armed conflict from neighbouring countries
- Nowhere for targeted civilian groups to flee as violence escalates.[135]

While these factors are important for predicting genocide, there is a drawback to forecasting the risk of genocide as many of the supposed warning signs and precursors of genocide could equally point towards the perpetration of other crimes. In this

[135] Ernesto Verdeja, 'Predicting Genocide and Mass Atrocities' (2016) 9 Genocide Studies and Prevention 13, 21, 27.

regard, Jonassohn notably even qualifies his own statement by saying that the precursors he identified 'may be generated by tragedies other than genocide, and refugees may be fleeing from disasters other than mass killings.'[136] The difficulty of predicting genocide may be due to the similarity between genocide and crimes against humanity and ethnic cleansing.

These crimes share several overlapping elements, in particular the acts which comprise the *actus reus* of their crimes. Crimes against humanity, which were initially under developed in international law, were finally defined in statute under Article 7 of the Rome Statute of the International Criminal Court. Under this provision crimes against humanity include acts of murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, sexual violence, persecution, enforced disappearance, apartheid, and other inhumane acts which are committed in the context of a widespread or systematic attack against a civilian population. Many of these acts also constitute crimes under Article II (a)-(e) of the Genocide Convention. Crimes against humanity in distinction from genocide do not require the specific intent to destroy, rather it requires the perpetrator possessing knowledge of the attack.[137] The crime of persecution is conceptually the closest to genocide as it requires an intent to discriminate against a group or collectivity on political, racial, national, ethnic, cultural, religious, or gender grounds.[138]

[136] Kurt Jonassohn, 'Prevention without Prediction' (1993) 7 Holocaust and Genocide Studies 1, 4.
[137] Margaret McAuliffe deGuzman, 'The Road from Rome: The Developing Law of Crimes against Humanity' (2000) 22 Human Rights Quarterly 335, 379.
[138] David L Nersessian, 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity' (2007) 43 Stanford Journal of International Law 221, 239; Caroline Fournet and Clotilde Pégorier, '"Only One Step Away From Genocide": The Crime of Persecution in International Criminal Law' (2010) 10 International Criminal Law Review 713.

Ethnic cleansing, which 'entered the international vocabulary' in 1992 to describe the policies being pursued by the parties to the situation in the former Yugoslavia, is not defined in statute.[139] However a UN Commission of Experts' report into the situation in Yugoslavia defined ethnic cleansing as a means of 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.'[140] The means of carrying out ethnic cleansing are 'murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.'[141] While elements of the crime of genocide can bear remarkable similarities to ethnic cleansing, international courts have held that ethnic cleansing is not an act of genocide, as ethnic cleansing is undertaken with the intent to forcibly displace a group from an area while the acts of genocide are intended to destroy a group.[142]

While the intent underlying each of these crimes is distinct, the three crimes share several overlapping elements, such as the acts that constitute each crime, which means it may be a complex task to identify the elements of each crime in the midst of violence. This difficulty has meant that increasingly the three crimes, along with war

[139] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 221. See also Drazen Petrovic, 'Ethnic Cleansing – An Attempt at Methodology' (1994) 5 European Journal of International Law 342, 342–343; John Quigley, 'State Responsibility for Ethnic Cleansing' (1998–1999) 32 University of California Davis Law Review 341, 343–344.
[140] United Nations Security Council 'Interim Report of the Commission of Experts' (26 January 1993) UN Doc S/25274, para. 55.
[141] ibid para. 56.
[142] *Prosecutor v Stakić* (Trial Judgment) IT-97-24-T (31 July 2003) [519]; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, [190]; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, [510].

crimes, have been grouped together under the category of 'atrocity crimes' or 'mass atrocity crimes'. In forecasting the risk of genocide, academics and NGOs usually also predict the risk of atrocity crimes.[143] As these academic and NGO models which seek to predict the crime of genocide have illustrated the difficulties of distinguishing the crime of genocide, have the recent attempts by the UN proved more successful in recognising the signs of genocide before or in the early stages of violence? Or is there a continued complexity in identifying elements of genocide which combined with the existence of an umbrella grouping of international crimes, atrocity crimes, raises the question of the utility of seeking to identify or determine genocide in the midst of violence when this general term can be employed to label a situation?

United Nations Measures to Detect Genocide

The noted failures of interpreting information from the field in Rwanda and Srebrenica led the former UN Secretary-General Kofi Annan to pledge to 'move the UN from a culture of reaction to a culture of prevention.'[144] In a speech marking ten years since the Rwandan Genocide, Annan contended that the UN in responding promptly to violence should not be constrained by 'legalistic arguments' in determining whether a situation meets the definition of genocide.[145] Annan stressed that gaps in the UN's capacity to analyse information it receives had affected its ability to respond to claims of genocidal violence in Rwanda and Srebrenica.[146] To address this failing in the UN's operations, Annan announced his intention to create the post of Special Adviser on the

[143] See discussion in Ernesto Verdeja, 'Predicting Genocide and Mass Atrocities' (2016) 9 Genocide Studies and Prevention 13.
[144] United Nations General Assembly 'Prevention of Armed Conflict: Report of the Secretary-General' (7 June 2001) UN Doc A/55/985, para. 4.
[145] United Nations Secretary-General 'UN Secretary-General Kofi Annan's Action Plan to Prevent Genocide' (7 April 2004) Press Release.
[146] ibid.

Prevention of Genocide.[147] The mandate of the Special Adviser as outlined by Annan was to:

> (a) Collect existing information, in particular from within the United Nations system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin which, if not prevented or halted, might lead to genocide;
>
> (b) Act as a mechanism of early warning to the Secretary-General, and through him to the Security Council, by bringing to their attention potential situations which could result in genocide;
>
> (c) Make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide;
>
> (d) Liaise with the United Nations system on activities for the prevention of genocide and work to enhance the United Nations capacity to analyse and manage information relating to genocide or related crimes.[148]

Since the creation of the post of the Special Adviser on the Prevention of Genocide in 2004, there have been great strides forward in identifying warning signs of genocide.[149] After ten years of developing and refining the approach to identifying signs of genocide, the Special Adviser on the Prevention of Genocide along with the Special Adviser on the Responsibility to Protect produced a framework of analysis for the prevention of atrocity crimes as a guide to assess the risk of genocide, crimes

[147] ibid.
[148] United Nations Security Council 'Outline of the Mandate for the Special Adviser on the Prevention of Genocide' (13 July 2004) UN Doc S/2004/567.
[149] Bertrand G Ramcharan, *Preventive Diplomacy at the UN* (Indiana University Press 2008) 177–187.

against humanity, and war crimes.[150] The framework presents eight risk factors which are common to all three atrocity crimes, and an additional two factors which are exclusive to the crime of genocide.[151] The list of risk factors draws upon the precursors of genocide recognised by academics and NGOs which illustrates there is consistency in the approach to recognising indicators of genocide.

The eight common risk factors are:

> 1) Situations of armed conflict or other forms of instability (security crises, humanitarian crises, natural disasters, political tensions, regime change, autocratic government, growing opposition movements, political repression, economic issues, and social problems);
>
> 2) A record of serious violations of international human rights and humanitarian law (past acts of genocide and other atrocity crimes, a history of impunity, inaction to prevent atrocities, and justification of crimes);
>
> 3) Weak state structures (under resourced institutions, lack of independent and impartial judiciary, corruption and poor governance, lack of oversight and accountability, and a lack of awareness of human rights and humanitarian law amongst institutions and security forces);
>
> 4) Motives or incentives (political, economic, military, perceived threats by protected groups, historical grievances, and ideological);

[150] United Nations 'Framework of Analysis for Atrocity Crimes: A Tool for Prevention' (2014). See also Adama Dieng and Jennifer Welsh, 'Assessing the Risk of Atrocity Crimes' (2016) 9 Genocide Studies and Prevention 4, 4.
[151] United Nations 'Framework of Analysis for Atrocity Crimes: A Tool for Prevention' (2014) 6.

5) Capacity to commit atrocity crimes (financial resources, availability of arms and personnel, and a culture of obedience to authority);

6) An absence of mitigating factors (lack of organised civil society, absence of independent media, lack of participation with international organisations, and lack of interest amongst United Nations member states to support a state in exercising its responsibility to protect its population from atrocity crimes);

7) Enabling circumstances or preparatory action (imposition of emergency laws which erode fundamental rights, suspension or interference with state institutions, increased inflammatory statements and propaganda, strengthening of security apparatus, acquisition of large quantities of arms and ammunition, restricting or expelling international organisations, NGOs and the media, increased violations of rights, and serious acts of violence); and

8) Triggering factors (sudden deployment of security forces, spill over of armed conflict or tension in neighbouring country, threats to a state's sovereignty by international actors, abrupt regime changes, serious acts of violence, religious intolerance, historical celebrations of past crimes, incitement, propaganda, elections, epidemics, natural disasters, and financial crises).[152]

The two specific risk factors to the crime of genocide are:

[152] ibid 10–17.

> 1) Past or present intergroup tensions or patterns of discrimination against protected groups (history of crimes against a group, discriminating, segregating, restricting, or excluding access to resources and rights, and denying the existence of a group); and
>
> 2) Signs of intent to destroy in whole or in part a protected group.[153]

The difficulty of identifying the intent to destroy from an early warning perspective is acknowledged by the Office of the Special Advisers as the report notes that proving the intent to destroy is 'both one of the most fundamental and one of the most difficult elements of the crime of genocide'.[154] However the report states that it is not an impossible task as there will be some indicators, which are unlikely to be explicit but which allow us to infer from the conduct of the actions that there is an intent to perpetrate genocide. As the specific intent of the crime of genocide distinguishes it from other atrocity crimes, it is beneficial to examine the indicators of this intent as perceived by the Office of the Special Advisers.

The indicators of genocidal intent are:

> i) Official documents, political manifests, media records, or any other documentation through which a direct intent, or incitement, to target a protected group is revealed, or can be inferred in a way that the implicit message could reasonably lead to acts of destruction against that group;
>
> ii) Targeted physical elimination, rapid or gradual, of members of a protected group, including only selected parts of it, which could bring about the destruction of the group;

[153] ibid 18–19.
[154] ibid 19.

iii) Widespread or systematic discriminatory or targeted practices or violence against the lives, freedom or physical and moral integrity of a protected group, even if not yet reaching the level of elimination;

iv) Development of policies or measures that seriously affect the reproductive rights of women, or that contemplate the separation or forcible transfer of children belonging to protected groups;

v) Resort to methods or practices of violence that are particularly harmful against or that dehumanize a protected group, that reveal an intention to cause humiliation, fear or terror to fragment the group, or that reveal an intention to change its identity;

vi) Resort to means of violence that are particularly harmful or prohibited under international law, including prohibited weapons, against a protected group;

vii) Expressions of public euphoria at having control over a protected group and its existence; and

viii) Attacks against or destruction of homes, farms, businesses or other livelihoods of a protected group and/or of their cultural or religious symbols and property.[155]

The development of these warning signals illustrates the evolution in the knowledge of the conditions that give rise to genocide and the indicators of genocidal violence in the early stages of a genocidal campaign. From this reading of the development of early warning systems for genocide, it is clear that there has been a consistency in the

[155] ibid 19.

risk factors of genocide identified by academics, NGOs, and UN actors. The studies highlight that states/regions are susceptible to genocide if there is political, social, economic, humanitarian, or environmental instability which creates a conducive atmosphere for a state or organisation to take measures to discriminately target a group or population.

4.3(ii) An Elusive Crime?

The research presented so far has shown that signs and evidence of genocide can be identified before or in the midst of violence, however there are a variety of complexities involved in identifying genocide which render it an arduous task. Identifying the precursors of genocide in the midst of violence is a substantive task as genocide rarely occurs in a vacuum, genocidal violence is usually part of a much larger conflict or situation with many different dimensions as highlighted by the situation in Rwanda. The 'Framework of Analysis' illustrates the similarities between the acts of genocide, crimes against humanity, and ethnic cleaning which mean that in the midst of bloodshed it is difficult to pinpoint these crimes. These crimes may be distinguished by the intent underlying the crime, however identifying this intent as violence rages on is a complicated task for any observer. While the 'Framework of Analysis' presents indicators of genocide intent, in practice it is a substantially different undertaking to connect the signs of genocide with the intent to destroy as violence swirls around.

Furthermore identifying the presence of risk factors may not even be sufficient for preventing atrocity crimes, as the former Special Adviser on the Responsibility to Protect, Edward Luck, claims that the weakness of the UN system is not in identifying

early warning signals but in the analysis and assessment of these warning signs.[156] For this reason while the indicators of genocidal intent are extremely helpful in providing criteria against which a situation may be analysed, it may still be difficult to fully comprehend these indicators in the midst of violence and to clearly distinguish the crime of genocide from other atrocity crimes. Therefore while undoubtedly the creation of the position of the Special Adviser on the Prevention of Genocide is a huge step forward in the prevention of and early intervention into violent situations across the globe, the complicated task of identifying the elements of genocide remains. The role of the Special Adviser is unlikely to be helpful in this regard due to the fact when creating the position Annan stated that 'the Special Adviser would not make a determination on whether genocide within the meaning of the Convention had occurred.'[157] The Special Adviser has said that '[i]f I wait until all the elements of genocide are in place according to international law, then by definition I have not prevented it.'[158]

Nevertheless the mandate of the Special Adviser ensures that they or the UN is not rushed into making a definitive finding on the question of genocide in the midst of violence. As the Special Adviser does not make a determination on genocide, when describing a situation they have used phrases such as 'risk of genocide' and 'potential for genocide' to describe unfolding threats or violence.[159] Regardless of what term is

[156] Edward C Luck, 'R2P at Ten: A New Mindset for a New Era?' (2015) 21 Global Governance 499, 502.
[157] United Nations Security Council 'Outline of the Mandate for the Special Adviser on the Prevention of Genocide' (13 July 2004) UN Doc S/2004/567.
[158] United Nations 'Press Conference, Mr Juan Mendez, the Special Adviser of the Secretary-General on the Prevention of Genocide' (26 September 2005) Press Release.
[159] See United Nations 'The statement of Under Secretary-General/Special Adviser on the Prevention of Genocide Mr. Adama Dieng on the human rights and humanitarian dimensions of the crisis in the Central African Republic' (22 January 2016) Press Release; United Nations 'Media Briefing by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide on his visit to South Sudan' (11 November 2016) Press Release.

used, a statement declaring that genocide has been perpetrated 'will remain a very serious allegation to make against a … government—and this would likely be equally true for any allegation that "precursors of genocide" are present on the territory of a given state.'[160] With the potential for the genocide label to evoke strong political reactions, it may be more strategic or palatable for the Special Adviser to employ the label atrocity crimes to describe situations of violence.

As a consequence of sharing a joint office with the Special Adviser on the Responsibility to Protect, those who have held the position of Special Adviser on the Prevention of Genocide have not always concentrated exclusively on the crime of genocide, rather they have also examined episodes of mass killings which do not always meet the definition of genocide.[161] Public statements by the current Special Adviser, Adama Dieng, along with the development of the 'Framework of Analysis for Atrocity Crimes' illustrates that increasingly the focus of the Special Adviser's activities is on the prevention of not just genocide but also the other atrocity crimes.[162] This is a promising development due to the difficulties of predicting the outbreak of

[160] Martin Mennecke, 'What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word"' (2007) 2 Genocide Studies and Prevention 57, 61.
[161] William A Schabas, 'Preventing the "Odious Scourge": The United Nations and the Prevention of Genocide' (2007) 14 International Journal on Minority and Group Rights 379, 390.
[162] See for example speeches and statements referencing the importance of preventing atrocity crimes: United Nations 'The Statement of Under Secretary-General/Special Adviser on the Prevention of Genocide, Mr. Adama Dieng, on the Human Rights and Humanitarian situation in the Central African Republic' (1 November 2013) Press Release; United Nations 'Statement by Adama Dieng, Special Adviser to the Secretary-General on the Prevention of Genocide, and Jennifer Welsh, Special Adviser to the Secretary-General on the Responsibility to Protect, on the situation in Iraq' (18 June 2014) Press Release; United Nations 'Statement by the Special Advisers of the Secretary-General on the Prevention of Genocide, Mr. Adama Dieng, and on the Responsibility to Protect, Ms. Jennifer Welsh, on the situation in Israel and in the Palestinian Occupied Territory of Gaza Strip' (24 July 2014) Press Release; United Nations 'Statement by Adama Dieng, UN Special Adviser on the Prevention of Genocide and Jennifer Welsh, UN Special Adviser on the Responsibility to Protect, on the situation in Yemen' (15 September 2015) Press Release; United Nations 'Statement by Adama Dieng, Special Adviser on the Prevention of Genocide, on the situation of civilians in the Syrian Arab Republic' (12 February 2016) Press Release; United Nations 'Statement by Adama Dieng, Special Adviser on the Prevention of Genocide, on the situation of civilians in the Syrian Arab Republic' (9 May 2016) Press Release; United Nations 'Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on recent inflammatory rhetoric by President Yahya Jammeh of the Gambia, targeting the Mandinka ethnic group' (7 June 2016) Press Release.

genocide and the issues surrounding identifying genocide in the early stages of violence.

The difficulties outlined so far in this chapter with predicting the outbreak of genocide and recognising the signs of genocide in the early stages of violence illustrate the unsuitably of the genocide label as a means of preventing violence. On account of this inadequacy, the thesis is proposing that the international community removes the focus on identifying genocide before or in the midst of violence. Instead the international community should concentrate on preventing atrocity crimes, regardless of which legal label has been applied to characterise the violence. Situating the prevention of genocide within the broader outlook of the prevention of atrocity crimes has been increasingly emphasised within the UN. The statements of Kofi Annan and the work of the Special Adviser on the Prevention of Genocide highlight an approach which is aimed at preventing rather than defining or determining the crime of genocide. A policy for prevention which does not get bogged down in definitional debates or in ranking the international crimes is a valuable strategy in addressing atrocity crimes. The contention of this thesis is of a similar viewpoint in that with the rise in prominence of the duty to prevent atrocity crimes, the international community should not exhaust energy and time on identifying genocidal intent before or in the midst of violence. The focus should be on analysing and interpreting the warning signals for atrocity crimes and formulating a preventative strategy to address the potential or actual violations of international law.

However even if the presence of indicators of atrocity crimes can be identified before they happen or in the early stages of the perpetration of the crimes it does not mean that action will be taken in response to these indicators, and that preventative measures will be enacted to stop a situation before it breaks out or expands. The nature of

international politics means that the world does not have the capacity for early warning signals and prevention; international politics is structured for crisis management but even that response is haphazard, if there is a response in the first place.[163] Currently the prevention of violence is talked about far more than it is practiced.[164] Samuel Totten is correct in asserting that '[w]ithout the willingness of an international body, a group of nations, or, at the very least, a single nation, to act to prevent a genocide or intervene early on, not even the most sophisticated and most efficiently operated genocide early warning system will be of much, if any, use.'[165] The study of Rwanda highlights that if a state or states are reluctant to intervene no action will be pursued regardless of the levels of violence or signs of impending violence. In Rwanda the lack of political will may explain why warning signals were missed or were refused to be acknowledged.[166] Therefore the effectiveness of the early warning systems and the success of preventative strategies are tied to the political will of states, a lack of desire on their part to respond to atrocity crimes will ensure that the world is doomed to once again bear witness to genocide.

4.4 Converting the Convention's Promise to Reality

The failure of the international community to convert the Convention's obligation to prevent into a meaningful norm of international law has led to tragic consequences with the atrocities witnessed in Rwanda and Srebrenica. In the aftermath of these genocides and the increased focus on political will, it was hoped that international law

[163] Martin Mennecke, 'What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word"' (2007) 2 Genocide Studies and Prevention 57, 59; Lisa Cherkassky, 'What Distinguishes the Evil of Genocide and How Should We Respond to It?' (2008) 4 International Journal of Punishment & Sentencing 110, 122.
[164] Alex J Bellamy, 'Conflict Prevention and the Responsibility to Protect' (2008) 14 Global Governance 135, 136.
[165] Samuel Totten, 'The Intervention and Prevention of Genocide: Sisyphean or Doable?' (2004) 6 Journal of Genocide Research 228, 237.
[166] Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 136.

would take precedence over politics.[167] The subsequent creation of the ICC looked like the ground-breaking moment in the shift from realpolitik to the protection of international law.[168] The judgment of the ICJ on state responsibility in *Bosnia and Herzegovina v Serbia and Montenegro* lent support to this new trend as the Court declared that states have a direct obligation to prevent genocide under Article 1 of the Convention.[169]

In examining the obligations under Article I of the contracting parties to the Genocide Convention, the ICJ held that state parties to the Convention have a responsibility to prevent and punish the crime of genocide.[170] The ICJ held that the obligation to prevent arises when a state becomes aware or should be aware of the existence of the crime of genocide.[171] The obligations to prevent and to not commit genocide have no territorial limit, they apply to states 'wherever it may be acting or may be able to act in ways appropriate to meeting the obligations'.[172] In meeting this obligation, states should employ all means and measures available to it and within its power to prevent genocide.[173]

Despite this initial promise of action at the turn of century, we continue to observe an international community which is selective in preventing violence, regardless of whether the genocide label has been applied to a situation. Issues of sovereignty and political will continue to plague the response and prevention of genocide, however

[167] Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 Leiden Journal of International Law 195, 195.
[168] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014) 2.
[169] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, [165].
[170] ibid [161]–[162].
[171] ibid [431].
[172] ibid [183].
[173] ibid [430].

this is the political environment within which the Genocide Convention has to operate.[174] Therefore the thinking around genocide prevention has to be around ways of seeking to address the crime of genocide, while removing the difficulties of the problematic label in the midst of violence. As the failure of the international community to protect civilians at risk from massacre in Rwanda and also in Srebrenica, at a similar time point, and Darfur, in the early years of the 21st century, dashed the fanciful notion that the promise of 'Never Again' was being taken seriously by the international community.[175] These tragic failures 'laid bare that the world lacked a coherent policy and the will to prevent and respond to genocide and mass atrocity.'[176] A new approach was required to protect civilians in the future.

4.4(i) The Responsibility to Protect

In the aftermath of Rwanda and Srebrenica; activists, politicians, and scholars began reconceptualising sovereignty, with sovereignty seen as encompassing a responsibility to protect civilians from grave violations of their human rights.[177] This movement eventually led to the creation of the doctrine of the Responsibility to Protect. In 2001, the Canadian government established the International Commission on Intervention and State Sovereignty (hereafter 'ICISS'), which developed the notion of a state bearing the responsibility for protecting its population.[178] If a state fails to honour this

[174] John Quigley, *Genocide Convention: An International Law Analysis* (Ashgate Publishing 2006) 87.
[175] Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (United States Holocaust Memorial Museum 2016) 6.
[176] ibid 6.
[177] Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 Review of International Studies 445, 446–447; Ramesh Thakur and Thomas G Weiss, 'R2P: From Idea to Norm—and Action' (2009) 1 Global Responsibility to Protect 22, 28; Francis M Deng, 'From "Sovereignty as Responsibility" to the "Responsibility to Protect"' (2010) 2 Global Responsibility to Protect 353, 359; Luke Glanville, 'The International Community's Responsibility to Protect' (2010) 2 Global Responsibility to Protect 287, 291–292.
[178] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (International Development Research Centre 2001).

responsibility, then other states have a responsibility to disregard the norm of non-intervention and take action to protect that state's population. The ICISS affirm that the UN Security Council is the appropriate UN actor for authorising intervention, however the ICISS would permit the UN General Assembly and regional organisations to act in situations where the UN Security Council had failed to act.[179]

When the UN General Assembly met in September 2005 to celebrate sixty years of existence and debate its future objectives, the delegates voted to accept the doctrine of the Responsibility to Protect in the final Outcome Document.[180] In comparable circumstances to the adoption of the Genocide Convention, the acceptance of a responsibility to protect populations arose at a time when the international community needed to find a way to address the failure to respond to atrocities.[181] The doctrine declares that states have a responsibility to protect their populations from the crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity. It is the responsibility of the international community to aid a state in protecting its population, and if a state fails to protect its population then the international community should engage diplomatic, humanitarian, and other peaceful means to protect populations. If peaceful means are ineffective, the UN Security Council should be prepared to act under Chapter VII of the Charter to protect a population.

The Outcome Document identifies the UN Security Council as the body responsible for authorising action. Under the doctrine there is no obligation upon the Security Council to act and there is no mechanism for other states to act outside the realm of the Security Council. This is despite the earlier ICISS report recommending that the

[179] ibid 49–50, 53–54.
[180] United Nations General Assembly Resolution 60/1 '2005 World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1, para. 138–139.
[181] Peter Hilpold, 'Intervening in the Name of Humanity: R2P and the Power of Ideas' (2012) 17 Journal of Conflict & Security Law 49, 67.

UN General Assembly and regional organisations could act in cases where the UN Security Council failed to respond. There is also no reference in the Outcome Document to unilateral action or acting as a part of a coalition. The designation of the UN Security Council as the organ responsible for authorising action was due to fears amongst non-aligned and smaller states, that the doctrine of RtoP is a mechanism that could be abused by larger states to justify intervention in the sovereign affairs of these smaller states.[182] These states are 'sceptical' of the 'altruistic claims' behind the intervention of larger states in situations.[183]

The fear with international law which focuses on intervention is that it will be used as a shield for military action by the major international players; in fact these states are more likely to use international law to justify inaction.[184] This decision to restrict authorisation for action to the UN Security Council limits the application of the doctrine of the RtoP due to the threat of a veto which means that similar to the prevention of genocide, the responsibility to protect is dependent on political will.[185] Therefore we are reliant on the interests of the UN Security Council members aligning

[182] Christine Gray, 'A Crisis of Legitimacy for the UN Collective Security System' (2007) 56 International and Comparative Law Quarterly 157, 167; Karen A Mingst and Margaret P Karns, *The United Nations in the 21st Century* (3rd edn, Westview Press 2007) 112; Thomas G Weiss, 'Halting Genocide: Rhetoric versus Reality' (2007) 2 Genocide Studies and Prevention 7, 17; Alex J Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention' (2008) 84 International Affairs 615, 616; Carlo Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' (2008) 13 Journal of Conflict & Security Law 191, 202; Edward C Luck, 'Sovereignty, Choice, and the Responsibility to Protect' (2009) 1 Global Responsibility to Protect 10, 17–18.

[183] Karen A Mingst and Margaret P Karns, *The United Nations in the 21st Century* (3rd edn, Westview Press 2007) 112.

[184] Edward C Luck, 'The Responsibility to Protect: Growing Pains or Early Promise?' (2010) 24 Ethics & International Affairs 349, 361.

[185] Aidan Hehir, 'The Responsibility to Protect: "Sound and Fury Signifying Nothing"?' (2010) 24 International Relations 218, 222; Alex J Bellamy, 'The Responsibility to Protect Turns 10' (2015) 29 Ethics & International Affairs 161, 180; Aidan Hehir, 'The Viability of the "Responsibility to Protect"' (2015) 3 Politics and Governance 85, 91, 94.

for action to be taken in response to genocide, crimes against humanity, ethnic cleansing, and war crimes.

Notwithstanding the widespread acceptance of the doctrine of the RtoP back in 2005, its relatively brief history has illustrated its mixed fortunes.[186] The de-escalation of ethnic violence in the aftermath of disputed electoral results in Kenya is regarded as a successful application of the concept of the RtoP. An AU-established mediation team, with the support of the UN, employed diplomatic and non-coercive measures to negotiate a political settlement.[187] Despite the potential threat of genocidal violence, the actors did not employ the label genocide to describe the violence. Instead during the violence, the Secretary-General and the Special Adviser on the Prevention of Genocide used the language of the RtoP to remind the parties to the violence that they had a responsibility not to violate the rights of civilians.[188]

Since Kenya, the UN Security Council has increasingly referred to the RtoP to characterise situations in Central African Republic, Cote d'Ivoire, Guinea, Kyrgyzstan, Libya, Mali, and Syria, amongst other situations.[189] RtoP terminology

[186] Lloyd Axworthy and Allan Rock, 'R2P: A New and Unfinished Agenda' (2009) 1 Global Responsibility to Protect 54, 54–55; Alex J Bellamy, 'The Responsibility to Protect – Five Years On' (2010) 24 Ethics & International Affairs 143, 148–157; Alex J Bellamy, 'The Responsibility to Protect Turns 10' (2015) 29 Ethics & International Affairs 161, 171–178; Edward C Luck, 'R2P at Ten: A New Mindset for a New Era?' (2015) 21 Global Governance 499, 499; Graham Harrison, 'Onwards and Sidewards? The Curious Case of the Responsibility to Protect and Mass Violence in Africa' (2016) 10 Journal of Intervention and Statebuilding 143, 146–153; Jennifer Welsh, 'The Responsibility to Protect: Assessing the Gap between Rhetoric and Reality' (2016) 51 Cooperation and Conflict 216, 221–222.

[187] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press 2008) 51, 106–107; Donald Steinberg, 'Responsibility to Protect: Coming of Age?' (2009) 1 Global Responsibility to Protect 432, 435–436; Noha Shawki, 'Responsibility to Protect: The Evolution of an International Norm' (2011) 3 Global Responsibility to Protect 172, 194–195.

[188] Gareth Evans, 'The Responsibility to Protect: An Idea Whose Time has Come … and Gone?' (2008) 22 International Relations 283, 287; Alex J Bellamy, 'The Responsibility to Protect – Five Years On' (2010) 24 Ethics & International Affairs 143, 154.

[189] Edward C Luck, 'The Responsibility to Protect: The First Decade' (2011) 3 Global Responsibility to Protect 387, 393; Alex J Bellamy, 'The Responsibility to Protect Turns 10' (2015) 29 Ethics & International Affairs 161, 165–167, 173–175, 177; Maggie Powers, 'Responsibility to Protect: Dead, Dying, or Thriving' (2015) 19 The International Journal of Human Rights 1257, 1260–1273.

has become increasingly part of the workings of UN actors and bodies such as the UN General Assembly, the Secretary-General, the High Commissioner for Human Rights, the Human Rights Council, and the Special Adviser on the Prevention of Genocide.[190] The history of the RtoP has undoubtedly shown that states have accepted that they have a responsibility to protect populations. How they pursue this responsibility is another matter, however.[191] There have been noted failures to respond with action to situations in Central African Republic, Democratic Republic of Congo, Myanmar, Sri Lanka, and Somalia.[192] In particular, the failure of the UN Security Council to respond to the atrocities in Syria illustrates the difficulty of applying the RtoP in a world of powerful political alliances.[193]

It seems that the RtoP doctrine as the Convention before it has failed to sufficiently challenge the primacy of state sovereignty and the will of states to pursue their own interests over the protection of populations.[194] If states lack the will to intervene in a situation of violence without a state's consent then the doctrine of the RtoP can never be an effective preventative instrument. Instead the term Responsibility to Protect will

[190] Edward C Luck, 'The Responsibility to Protect: The First Decade' (2011) 3 Global Responsibility to Protect 387, 391–392.
[191] Dieter Janssen, 'Humanitarian Intervention and the Prevention of Genocide' (2008) 10 Journal of Genocide Research 289, 297; Monica Hakimi, 'State Bystander Responsibility' (2010) 21 European Journal of International Law 341, 343–345; Theresa Reinold, 'The Responsibility to Protect – Much Ado About Nothing?' (2010) 36 Review of International Studies 55, 68.
[192] Alex J Bellamy, 'The Responsibility to Protect – Five Years On' (2010) 24 Ethics & International Affairs 143, 155–157; Alex J Bellamy, 'The Responsibility to Protect Turns 10' (2015) 29 Ethics & International Affairs 161, 165; Graham Harrison, 'Onwards and Sidewards? The Curious Case of the Responsibility to Protect and Mass Violence in Africa' (2016) 10 Journal of Intervention and Statebuilding 143, 149, 152–153.
[193] Aidan Hehir, 'The Viability of the "Responsibility to Protect"' (2015) 3 Politics and Governance 85, 92.
[194] Aidan Hehir, 'The Responsibility to Protect: "Sound and Fury Signifying Nothing"?' (2010) 24 International Relations 218, 233–234; Adrian Gallagher, *Genocide and its Threat to Contemporary International Order* (Palgrave Macmillan 2013) 104; Aidan Hehir, 'The Viability of the "Responsibility to Protect"' (2015) 3 Politics and Governance 85, 85–86, 94.

become part of the legacy of the failure of the international community to hold to their promise of 'Never Again'.

4.5 The Difficulty of Responding to Genocide

The promise of prevention under the Convention has 'lain dormant' since the adoption of the Convention.[195] The response to genocide is dictated by political interests and the notion of respecting sovereignty.[196] However it appears that state practice has shown undue respect for the principle of sovereignty at the expense of protecting populations afflicted by violence. Sovereignty is a bendable concept when it comes to advancing a state's own interests, but appears as more rigid when it comes to an issue that is not directly in that state's interests, including genocidal violence elsewhere. The case of Rwanda exemplified the failings of states and highlighted the 'weaknesses' of international law 'rather than their strengths'.[197] The much heralded creation of the role of Special Adviser on the Prevention of Genocide has not challenged the politicisation of the response to the crime of genocide.[198] The hope of prevention expressed in the Convention has sadly fallen away to be replaced by an acceptance that intervention depends on a state weighing up the potential beneficial or disadvantageous rationale for intervening in a situation.

While the prevention of genocide is dependent on the interests of states aligning, there remains complexities involved in identifying signs of genocide before or during

[195] Sarah Sewall, 'From Prevention to Response: Using Military Force to Oppose Mass Atrocities' in Robert I Rotberg (ed), *Mass Atrocity Crimes: Preventing Future Outrages* (Brookings Institution Press 2010) 160.
[196] Thomas Cushman, 'Is Genocide Preventable? Some Theoretical Considerations' (2003) 5 Journal of Genocide Research 523, 536.
[197] Elizabeth More, 'International Humanitarian Law and Interventions—Rwanda, 1994' (2007) 2 Genocide Studies and Prevention 155, 161.
[198] Aidan Hehir, 'The Special Adviser on the Prevention of Genocide: Adding Value to the UN's Mechanisms for Preventing Intra-State Crises?' (2011) 13 Journal of Genocide Research 271, 282.

violent episodes that have been signposted throughout this chapter. This chapter has described how the crime of genocide does not suddenly appear overnight, rather there are precursors that are lesser in 'intensity, gravity and scale.'[199] Through the work of academics, non-governmental organisations, and organs of the United Nations we have a much clearer picture of early indicators of the crime of genocide. However the question of identifying the intent to destroy in the actions of a state or organisation is still a complicated task despite the expansion in our knowledge of the path to genocide.[200] The difficulty of determining the crime of genocide can be highlighted in statements of the Special Adviser on the Prevention of Genocide that the risk factors of genocide could point not only towards genocide but also to other atrocity crimes.[201]

Rwanda, albeit one of the clearest cases of genocide since the adoption of the Convention, illustrates the complexity of identifying warning signs of genocide before the outbreak of genocide and determining genocide in the midst of violence. While precursors of genocide in Rwanda can be easily pinpointed after the fact, it was a complicated task faced by the international community to connect these warning signs to the crime of genocide in a country that had been beset by violence for much of its recent history. Even with the outbreak of violence, it was unclear for the first few weeks whether the violence was the latest in the long line of ethnic strife connected with the civil war or genocidal violence. When the international community becomes accustomed to a certain level of violence in a country or region, it becomes difficult

[199] Lyal S Sunga, 'Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic 2013) 362.
[200] Ekkehard Strauss, 'Reconsidering Genocidal Intent in the Interest of Prevention' (2013) 5 Global Responsibility to Protect 129, 149.
[201] United Nations 'Statement of Under Secretary-General/Special Adviser on the Prevention of Genocide Mr. Adama Dieng' (2 May 2014) Press Release; United Nations 'Media Briefing by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide on his visit to South Sudan' (11 November 2016) Press Release.

to change the mind-set of these actors to accept that genocide is a probable crime in a situation. The proof of the perpetration of the crime of genocide, while evident to us now with the benefit of hindsight and documentary evidence, was unclear to the relevant actors at the time as the information provided to them was vague on the intention underlying the violence.

If the genocide label sparks debates over definitional questions as it did in Rwanda rather than mobilising the international community into action, should the label be seen as a beneficial term to be employed in the pursuit of preventing widespread killing? A question has to be asked, does the word genocide need to be spoken by the actors intervening in a situation for the crime to be prevented? For example, in Kenya the successful intervention of the mediation team contributed to a de-escalation of ethnic violence that could potentially have become genocidal in nature. Actors such as the Special Adviser on the Prevention of Genocide never labelled the violence as genocide, instead they used the language of RtoP by reminding the parties to the violence that they had a responsibility not to violate the rights of civilians. The successful intervention in Kenya illustrates that it is not important what label is applied to violence, instead what is critical is that preventative measures are taken against the perpetrators of atrocity crimes.

This approach to violent situations is increasingly reflected in the work of the Special Adviser on the Prevention of Genocide as alongside a closer relationship with the Special Adviser on the Responsibility to Protect, the Special Adviser on the Prevention of Genocide has assumed a mandate relating to the prevention of atrocity crimes alongside the prevention of genocide. In dialogue with states, the Special Adviser has repeatedly affirmed that states have a responsibility to protect their populations from genocide, crimes against humanity, war crimes, and ethnic cleaning. This illustrates

that the United Nations and its members states responsibility for the prevention of genocide cannot be distinguished from its responsibility to prevent atrocity crimes. Therefore the distinction that had existed between the crimes has nearly completely disappeared over the last decade.

With the difficultly of determining the intent to destroy before the outbreak of violence and in the midst of violence, is it helpful to continue to use genocide as a preventative label? Especially when the adoption of the principles of the RtoP by states places the obligation to prevent genocide on the same standing as the duty to respond to crimes against humanity, war crimes, and ethnic cleansing. The initial fascination with the Convention was that it included a duty to prevent genocide, a duty that was not explicit in crimes against humanity or war crimes. The elements of these crimes and the obligations contained within have been 'significantly strengthened' since the adoption of the Convention.[202] The development of legal norms aimed at deterring international crimes culminating in the adoption of the RtoP doctrine has largely eliminated the flaws and gaps between genocide and enforcement of these international crimes. The acceptance of the importance of preventing these crimes alongside their inclusion in the statute of the ICC illustrate that the lacuna which once existed in international criminal law has largely receded in recent decades.

Therefore if states are hesitant or unwilling to employ the term genocide in the midst of genocide due to its complex understanding, which renders it arduous to identify and difficult to label, should the international community persist with the genocide label in the midst of violence or instead explore utilising the term atrocity crimes. The term 'atrocity crimes' could be employed to label ongoing violence while leaving the

[202] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 11.

determination of the crime of genocide to a competent international court or tribunal who can assess the evidence with the benefit of time rather than having to make an impulsive judgement in the midst of violence.

Preferably delaying a determination on the issue of genocide until a competent international court or tribunal has the benefit of time to examine the evidence and render a conclusion based on the documentation and testimony it has collated over the years should remove a number of the complications and frustrations involved with attempting to apply the legal definition of genocide to an ongoing situation. It could potentially remove the politicisation of the term in the midst of violence and eliminate the time taken to decide if the label should be applied to a situation. If the genocide label is eliminated as a term to be applied to ongoing violence, it might potentially lead to states not being able to hide behind the defence of the difficulty of identifying the crime of genocide in the midst of bloodshed as a shield for their inaction in the face of violence.

4.6 Conclusion

This chapter has explored the second strand of the research by examining why states and actors have often failed to label violence as genocide, and whether this lack of reaction is solely due to a lack of political will or could it be traced to faults within the definition of genocide, which render the elements of the crime difficult to identify and distinguish before violence occurs or in the midst of violence. The research has shown that issues of sovereignty and state interests will guide the response of states and political actors to a given situation, however the presence of political will alone does not mean that genocide is suddenly identifiable as argued in this chapter. The central argument of this chapter, as highlighted in the discussion of the response to Rwanda and the evaluation of the early warning systems for signs of genocide, is that warning

signs and evidence of genocide may be identifiable in the midst of violence however connecting the dots between the signs and evidence is a complex and arduous task. This means that the genocide label is ineffective if seeking a prompt response to a situation as it has complicated the response of states to situations of violence. Therefore this chapter has contended that in seeking a response to violence and to address the difficulties of identifying the signs and evidence of genocide, the atrocity crimes label should be employed to characterise violence so as the focus of prevention can be on the response and not the term used to label the violence. The following chapter will explore further this proposal by examining the difficulties faced by organs of the UN and states when they investigate the potential perpetration of the crime of genocide, and in particular the problems encountered by these actors whilst attempting to identify the intent to destroy in the midst of violence.

CHAPTER FIVE: CLOAKED BY BLOODSHED

5.1 Introduction

The preceding chapters have illustrated the complexities of identifying genocide, as the determination of the crime of genocide hinges on proving that the intent to destroy is present in the actions of a perpetrator or state/organisation. This element is difficult to distinguish in the midst of violence, however it is not an impossible task as illustrated by the jurisprudence of the international courts and tribunals and the indicators of genocide within the 'Framework of Analysis'. However the case study of Rwanda illustrates the complexity involved in determining genocide may not solely be due to identifying the elements of the crime but with how states respond and react to the genocide label. These complexities of the genocide label are never more apparent in the midst of violence than when actors undertake investigations to determine whether genocide has been perpetrated in a given situation.

The difficulties faced by the actors investigating the perpetration of genocide will be illustrated in this chapter by an examination of two UN-established inquiries, the first into the crimes committed in the Central African Republic, and the second on the crimes perpetrated by the Islamic State in the Sinjar region on the border of Iraq and Syria. The UN is not the only actor who undertakes inquiries into the perpetration of genocide, individual states have also initiated their own commissions of inquiry in certain contexts. I will analyse the potential conflicting approaches to determining genocide between a state and the UN by examining two separate investigations into the violence in Darfur, undertaken by the United States and the UN respectively. The situation in Darfur sparked the most significant debate since the Rwandan Genocide

on the question of whether genocide had been perpetrated.[1] The two investigations came down on opposite sides of the question as to whether genocide had taken place. The findings of these inquiries will be analysed to address why two investigations into the same situation resulted in different conclusions.

The results of these disparate studies presented throughout this chapter should inform our knowledge of the crime of genocide and its applicability to an ongoing situation which will further address the second strand of the research on the difficulties of not only identifying genocide but employing the genocide label in the midst of violence. If the process of identifying genocide in the midst of violence is too complex or onerous, it raises further questions about the utility of the genocide label as a preventative term to be deployed in a situation which leads into the third strand of the research on how genocide should be prevented and responded to using the label of atrocity crimes. Before beginning to address these contentions the chapter will turn to examine how the UN has sought to identify which crimes of international law have been perpetrated in the midst of violence and the potential difficulties faced by the actors and bodies in conducting an investigation in an ongoing situation.

5.2 Investigating the Perpetration of Genocide

The responsibility of examining whether genocide may have been perpetrated in an ongoing situation is generally given to commissions of inquiry established and mandated by organs of the UN.[2] Commissions of inquiry have been variously created by the UN Security Council, the UN General Assembly, the Human Rights Council,

[1] Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017) 511.
[2] United Nations Office of the High Commissioner for Human Rights 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) 2.

the Secretary-General, and the High Commissioner for Human Rights.[3] As commissions of inquiry are mandated by organs of the UN, the creation of an inquiry hinges on whether these actors and states possess the political will to address impunity.[4] The inevitable selectivity in the establishment of commissions of inquiry means that double standards in international relations will prevail as not every situation involving the suspected violation of international law will be investigated. Similar to ICC investigations, commissions of inquiry will rarely be directed to examine the conduct of major states or their allies despite claims that their actions may violate international law due to the influential role of these states in international relations. Therefore, once again similar to the ICC, the inquiries are predominantly focussed on violations of international law in African countries.

The commissions of inquiry which are authorised are composed of three or five individuals; experts in the area of international criminal law and human rights who are usually from geographically diverse backgrounds.[5] In conducting their investigations, commissions of inquiry gather background information on a situation, organise country visits, interview individuals, visit sites of reported atrocities, and examine documents, reports, and satellite imagery.[6] The commissions of inquiry have to examine if: i) did the event or events under investigation occur; ii) does the

[3] United Nations Office of the High Commissioner for Human Rights 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) 2.
[4] Philip Alston and Ryan Goodman, *International Human Rights: Texts and Materials* (Oxford University Press 2013) 877.
[5] United Nations Office of the High Commissioner for Human Rights 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) 18–20.
[6] Théo Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16 Journal of Conflict & Security Law 105, 106; United Nations Office of the High Commissioner for Human Rights 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) 36–56.

event/events constitute a violation of international law; and iii) whom is responsible for the violation of international law.[7]

Commissions of inquiry are concentrated on the responsibility of a state or a non-state body for violations of international law rather than at the level of individual criminal responsibility.[8] As commissions of inquiry are non-judicial in nature, the standard of proof generally employed by the commissions is 'reasonable suspicion' or 'reasonable grounds to believe' that a crime has been committed.[9] The standard of proof needed to determine an accused's guilt in a court of law is distinct from the standard of proof required to classify a situation as genocide. Instead of making definitive findings of crimes committed such inquiries recommend a course of action to international actors to respond to a situation.[10] Commissions of inquiry are often the precursor to judicial investigation by the ICC or action taken by a UN body.[11]

The potential complexities outlined in this research with identifying the elements of the crime before or in the midst of bloodshed does not mean that the UN commissions

[7] United Nations Office of the High Commissioner for Human Rights 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) 60.
[8] Lyal S Sunga, 'How can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?' (2011) 15 The International Journal of Human Rights 187, 189.
[9] United Nations Office of the High Commissioner for Human Rights 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) 62.
[10] United Nations Office of the High Commissioner for Human Rights 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) 7, 10–11. See also Dov Jacobs and Catherine Harwood, 'International Criminal Law Outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic 2013) 329; Larissa J van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law' (2014) 13 Chinese Journal of International Law 507, 527.
[11] Stephen Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions* (Geneva Academy of International Humanitarian Law and Human Rights 2012) 12; Dov Jacobs and Catherine Harwood, 'International Criminal Law Outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic 2013) 335–336.

of inquiry cannot establish evidence that points towards the perpetration of genocide in ongoing situations. The discussion of the report by the representatives of the Secretary-General in Rwanda in the previous chapter illustrates that genocide can be ascertained in the midst of violence. However there are difficulties faced by these commissions of inquiry or fact-finding missions in conducting their work and assessing the evidence gathered that illustrate the drawbacks of seeking to identify genocide in the midst of a situation.

Conducting an investigation in the midst of a situation presents a number of challenges as the reality on the ground can constantly change.[12] The missions work within a tight deadline so as to report back to their mandating body, in some cases it is only a couple of days they spend conducting country visits.[13] Due to these resource and time constraints a commission of inquiry cannot examine every allegation; rather it has to select case studies to examine and investigate.[14] This hampers their ability to accurately comprehend and represent the situation on the ground. In the midst of a situation with 'chaotic scenes of blood, broken bodies, busted buildings and shredded lives', an investigator has to get to grips with the 'historical, political, social and military context' of the situation.[15] Furthermore a dearth of available 'reliable "inside" information makes it difficult to uncover the full range of motives behind official actions and policies'.[16] Investigators are never the first to witness violence rather it is

[12] United Nations Office of the High Commissioner for Human Rights 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) 56–59.
[13] ibid 30.
[14] Théo Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16 Journal of Conflict & Security Law 105, 115.
[15] Lyal S Sunga, 'Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic 2013) 359.
[16] Eyal Mayroz, 'Ever Again? The United States, Genocide Suppression, and the Crisis in Darfur' (2008) 10 Journal of Genocide Research 359, 374.

local civilians, activists, journalists, and NGOs who are responsible for the early recording and reporting of a situation.[17] It is these local actors who are most knowledgeable about the violence.[18] However an ongoing situation hampers the ease of access to areas to visit and individuals to interview as an investigation is commonly carried out in a region beset by turmoil with uncooperative parties hindering the collection of evidence.[19] The problem might not be a lack of evidence but rather an abundance of evidence of atrocities which investigators will have to sift through to identify a perpetrator's intent to destroy a protected group.[20]

The difficulties of determining intent are magnified when those who are committing genocide take steps to mask the genocidal violence.[21] States or organisations are seldom explicit with their intent to destroy a group, rather they employ a number of strategies to hide the intent behind their actions and policies.[22] This means that the intent of a perpetrator is hard to establish, particularly when a violent situation is 'unfolding in some inaccessible location.'[23] Furthermore when there are numerous actors involved in a situation of violence, it can be difficult to identify who are the perpetrators and the victims when a country or a region is engulfed in violence.

[17] Lyal S Sunga, 'Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic 2013) 401.
[18] ibid 401.
[19] United Nations Office of the High Commissioner for Human Rights 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) 56–59.
[20] Lyal S Sunga, 'Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic 2013) 369.
[21] Israel W Charny, 'Templates for Gross Denial of a Known Genocide: A Manual' in Israel W Charny (ed), *Encyclopaedia of Genocide: Volume I* (ABC-CLIO 1999) 168; Alex J Bellamy, 'Getting away with Mass Murder' (2012) 14 Journal of Genocide Research 29, 29–53.
[22] Israel W Charny, 'Templates for Gross Denial of a Known Genocide: A Manual' in Israel W Charny (ed), *Encyclopaedia of Genocide: Volume I* (ABC-CLIO 1999) 168; Brian Martin, 'Managing Outrage over Genocide: Case Study Rwanda' (2009) 21 Global Change, Peace & Security 275, 275–290; Alex J Bellamy, 'Getting away with Mass Murder' (2012) 14 Journal of Genocide Research 29, 29–53.
[23] Jerry Fowler, 'A New Chapter of Irony: The Legal Implications of the Darfur Genocide Determination' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 129.

Genocide is also unlikely to be the only act being committed in a situation; crimes against humanity, ethnic cleansing, and war crimes could be perpetrated by the same actors against the same target group/population. Therefore in the midst of violence, the ability to infer intent in the conduct of an actor is an onerous task particularly when a situation is multifaceted and a perpetrator is acting in a manner to obscure the intent behind their actions.

Notwithstanding the potential difficulties faced by commissions of inquiry in conducting their work, the benefits of an analytical view of a situation are of critical importance for international actors in responding to a situation. Not only are the findings of an inquiry of importance in responding to a situation, the very presence of a commission in a country or region can potentially play a preventative role in a situation by encouraging a change in an actor's behaviour by increasing the political engagement of an aggressor.[24] However there is also the potential negative reaction to the deployment of a commission of inquiry such as a disengagement from a peace process, the expulsion of peacekeepers and humanitarian workers, and an increase in violations against a vulnerable population.[25]

The discussion above highlights the difficulties faced by commissions of inquiry not only in trying to identify which crime or crimes of international law have been perpetrated, but also in conducting an inquiry in the midst of violence. These difficulties can contribute to the complexity of identifying genocide as seen by examining the two distinct inquiries initiated by the government of the US and the UN

[24] Stephen Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions* (Geneva Academy of International Humanitarian Law and Human Rights 2012) 57.
[25] ibid 57.

into the violence that enveloped the Darfur region in western Sudan over the course of 2003 and the ensuing years.

5.3 Contrasting Conclusions in Darfur

The deep levels of violence within Darfur compelled the United States government to undertake an investigation into the crimes committed which led Colin Powell, at the time the US Secretary of State, to declare that the violence was genocide.[26] Powell referred the situation in Darfur to the UN Security Council, who established its own investigation, the International Commission of Inquiry on Darfur, into the violations of international criminal law and which determined that genocide had not been perpetrated.[27] How did these two investigations result in different conclusions when the two inquiries were examining similar facts? Before examining the investigations, a brief history of the situation in Darfur will be outlined to explain why investigations needed to be conducted.

Similar to the situation in Rwanda, the violence in Darfur was rooted in historic animosity and conflict as Darfur is home to a mixture of Arab and non-Arab ethnic groups, who have been competing for scarce resources over the decades.[28] The non-Arab ethnic groups believed that the Sudanese government gave preferential treatment to the Arab ethnic groups, and that Darfur was marginalised economically, socially, and politically.[29] In 2003, a group calling itself the Sudan Liberation Movement/Army

[26] United States Senate Foreign Relations Committee 'Hearing on the Crisis in Darfur, statement by Secretary of State Colin Powell' (9 September 2004).
[27] International Commission of Inquiry on Darfur, 'Report of the International Commission on Darfur to the United Nations Secretary-General' (25 January 2005) para. 518.
[28] Robert O Collins, 'Disaster in Darfur: Historical Overview' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 3, 6; Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 118–120.
[29] Samuel Totten, 'The Darfur Genocide' in Samuel Totten and Paul R Bartrop (eds), *The Genocide Studies Reader* (Routledge 2009) 200–201.

attacked key infrastructure in Darfur controlled by the government of Sudan.[30] In response to these attacks the Sudanese Army and an Arab militia, the Janjaweed, attacked non-Arab settlements in Darfur.[31] The violence was repetitive in nature; the Sudanese army would carpet-bomb a village and then the Janjaweed force would attack the village.[32] The attacks led to mass displacement of people in Darfur who sought refuge in internally displaced person camps.[33]

The ten year anniversary of the Rwandan Genocide brought international attention to the inaction of the UN and its member states in Darfur.[34] Numerous reports from academics, the media, and human rights organisations warned of a humanitarian crisis in the region, and a number of actors advised that the violence seen in Darfur could be genocidal in nature.[35] Questions were raised over whether these attacks on villages had any connection with the conflict with the rebel movement or was it an attempt to

[30] Robert O Collins, 'Disaster in Darfur: Historical Overview' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 9–10; Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 138–139; Fred Grünfeld and Wessel N Vermeulen, *Failure to Prevent Gross Human Rights Violations in Darfur: Warnings to and Responses by International Decision Makers (2003–2005)* (Brill Nijhoff 2014) 59–60.

[31] Robert O Collins, 'Disaster in Darfur: Historical Overview' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 11–12.

[32] Samuel Totten, 'The Darfur Genocide' in Samuel Totten and Paul R Bartrop (eds), *The Genocide Studies Reader* (Routledge 2009) 195.

[33] Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 149.

[34] Darren Brunk, 'Dissecting Darfur: Anatomy of a Genocide Debate' (2008) 22 International Relations 25, 30–34.

[35] Erin Patrick, 'Intent to Destroy: The Genocidal Impact of Forced Migration in Darfur, Sudan' (2005) 18 Journal of Refugee Studies 410, 411; Robert O Collins, 'Disaster in Darfur: Historical Overview' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 12–13, 20; Samuel Totten, 'The US Investigation into the Darfur Crisis and Its Determination of Genocide: A Critical Analysis' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 199; Darren Brunk, 'Dissecting Darfur: Anatomy of a Genocide Debate' (2008) 22 International Relations 25, 27–31; Fred Grünfeld and Wessel N Vermeulen, *Failure to Prevent Gross Human Rights Violations in Darfur: Warnings to and Responses by International Decision Makers (2003–2005)* (Brill Nijhoff 2014) 67–71; Joachim J Savelsberg, *Representing Mass Violence: Conflicting Responses to Human Rights Violations in Darfur* (University of California Press 2015) 49.

target non-Arab civilians.[36] A major question was raised over the relationship between the Janjaweed and the government of Sudan, with reports that the Janjaweed were not only financially supported by the Government but also that Government troops participated in attacks on civilians.[37] The investigative teams deployed by the US and the UN sought to clarify the relationship between the Janjaweed and the Government of Sudan, and establish what crimes were being committed and whether civilians were being targeted.

5.3(i) United States' Investigation

An investigation was triggered by satellite images collected by the US government which showed the mass migration of the population and the widespread devastation across Darfur.[38] To establish whether there was genocidal intent behind these actions, the US Department of State created the Atrocities Documentation Team, which included experienced investigators who had been involved in the ICTR and the ICTY.[39] It was the 'first ever official field investigation of a suspected genocide by one sovereign nation into another sovereign nation's actions while the killing was underway'.[40] The Atrocities Documentation Team conducted over a thousand interviews in refugee camps in Chad over the summer of 2004.[41]

[36] Andrew S Natsios, 'Moving beyond the Sense of Alarm' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 33.
[37] ibid 33.
[38] ibid 35–37.
[39] Nina Bang-Jensen and Stefanie Frease, 'Creating the ADT: Turning a Good Idea into Reality' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 47.
[40] Samuel Totten, 'The Darfur Genocide' in Samuel Totten and Paul R Bartrop (eds), *The Genocide Studies Reader* (Routledge 2009) 205.
[41] United States Department of State's Bureau of Democracy, Human Rights, and Labor 'Documenting Atrocities in Darfur' (September 2004) State Publication 11182. See also Samuel Totten, 'The US Investigation into the Darfur Crisis and the US Government's Determination of Genocide' (2006) 1 Genocide Studies and Prevention 57, 58–60.

Most interviews revealed a similar pattern in the attack, the first stage would be the aerial bombing of villages; which would be followed by government soldiers arriving in trucks and the Janjaweed arriving on horses and camels; then the soldiers and militias would enter and loot the village; and finally the villages would be destroyed to prevent civilians returning.[42] Many interviewees stated that they had knowledge of mass burial grounds.[43] The interviews revealed that the language used by the soldiers and militia was racist, including statements about killing 'all the blacks'.[44]

The Atrocities Documentation Team did not make a determination on whether genocide had been perpetrated; this question was left to the Department of State. Relying on the information and testimony gathered by the Atrocities Documentation Team and other sources available to the Department of State, Colin Powell felt confident to declare that the violence in Darfur was genocide.[45] Powell contended that the evidence proved that the violence was not random but part of a coordinated attack to target the group with an intent to destroy.[46] The decision was based on a number

[42] United States Department of State's Bureau of Democracy, Human Rights, and Labor 'Documenting Atrocities in Darfur' (September 2004) State Publication 11182. See also Andrew S Natsios, 'Moving beyond the Sense of Alarm' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 38; Samuel Totten, 'The US Investigation into the Darfur Crisis and Its Determination of Genocide: A Critical Analysis' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 200–201; John Hagan and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge University Press 2009) 7–13; Eric Markusen, 'Three Empirical Investigations of Alleged Genocide in Darfur' in Amanda F Grzyb (ed), *The World and Darfur: International Response to Crimes against Humanity in Western Sudan* (McGill-Queen's University Press 2009) 97.

[43] United States Department of State's Bureau of Democracy, Human Rights, and Labor 'Documenting Atrocities in Darfur' (September 2004) State Publication 11182. See also Andrew S Natsios, 'Moving beyond the Sense of Alarm' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 38.

[44] United States Department of State's Bureau of Democracy, Human Rights, and Labor 'Documenting Atrocities in Darfur' (September 2004) State Publication 11182. See also Samuel Totten and Eric Markusen, 'Moving into the Field and Conducting the Interviews: Commentary and Observations by the Investigators' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 98.

[45] United States Senate Foreign Relations Committee 'Hearing on the Crisis in Darfur, statement by Secretary of State Colin Powell' (9 September 2004).

[46] Samuel Totten, 'The US Investigation into the Darfur Crisis and the US Government's Determination of Genocide' (2006) 1 Genocide Studies and Prevention 57, 62.

of factors: i) villages of black Africans were targeted for attack; ii) the number of males who were killed and the number of women who were raped; iii) the destruction of crops, livestock, and water supply so as to prevent a means of existence; and iv) the prevention of humanitarian assistance in the form of medical care and food to reach internally displaced person camps.[47] Powell held the Janjaweed and the Government of Sudan responsible for the genocide.[48]

After making his determination, Powell acted under Article VIII of the Genocide Convention, and called upon the UN Security Council to undertake an investigation into the violations of international law.[49] Powell took this approach as a legal adviser at the State Department had advised him that a finding of genocide would not obligate the US to intervene under the Convention; instead the US would satisfy its requirement under the Convention to prevent genocide by referring the situation to the UN Security Council.[50] Therefore ten years on from the Clinton administration believing that using the word genocide in the midst of violence would require a state to take action in response, the United States' government arrived at a diametrically opposed conclusion.[51] The referral to the UN Security Council raises the question of the utility of a finding of genocide in the midst of a situation if it does not spark preventative action under the Genocide Convention to suppress genocide but rather results in more debates and deliberations about applying the genocide label to describe the violence.

[47] ibid 61.
[48] United States Senate Foreign Relations Committee 'Hearing on the Crisis in Darfur, statement by Secretary of State Colin Powell' (9 September 2004).
[49] ibid.
[50] Eyal Mayroz, 'Ever Again? The United States, Genocide Suppression, and the Crisis in Darfur' (2008) 10 Journal of Genocide Research 359, 367.
[51] Scott Straus, 'Rwanda and Darfur: A Comparative Analysis' (2006) 1 Genocide Studies and Prevention 41, 49–50; Eric Heinze, 'The Rhetoric of Genocide in U.S. Foreign Policy: Rwanda and Darfur Compared' (2007) 122 Political Science Quarterly 359, 374, 381; Luke Glanville, 'Is "Genocide" still a Powerful Word' (2009) 11 Journal of Genocide Research 467, 467–468, 474.

Notwithstanding this, the Darfur Atrocities Documentation Project is historic for two reasons. First of all it is the first time an individual state has undertaken an investigation to determine if the crime of genocide is being perpetrated, and secondly it is the first time a state has cited the provisions of the Genocide Convention when it referred the question of genocide to the UN Security Council.[52]

5.3(ii) The United Nations' Inquiry

One week after Powell declared that genocide had been perpetrated in Darfur, the UN Security Council requested the Secretary-General to establish a commission of inquiry to 'investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide had occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable'.[53]

The Commission of Inquiry was chaired by Antonio Cassese, the first president of the ICTY.[54] The Commission of Inquiry conducted a three month investigation, which included a number of trips to Darfur and the Sudan to gather evidence and interview witnesses from the Government of Sudan, the Janjaweed, the rebel groups, and NGOs.[55] In examining the situation the Commission first of all set out that there were two irrefutable facts arising from the violence, the first fact was that there was mass displacement of the population and the second fact was that there was large-scale destruction of villages.[56] The Commission determined that the Government of Sudan

[52] Andrew S Natsios, 'Moving beyond the Sense of Alarm' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 41.
[53] United Nations Security Council Resolution 1564 (18 September 2004) UN Doc S/RES/1564.
[54] International Commission of Inquiry on Darfur, 'Report of the International Commission on Darfur to the United Nations Secretary-General' (25 January 2005) para. 1.
[55] ibid para. 1, 20–25, 182–183.
[56] ibid para. 225–227.

and the Janjaweed were responsible for these violations of international law.[57] The Commission determined that the Government of Sudan was legally responsible for the crimes committed by the Janjaweed as they had effective control over their actions.[58] On the question of which law/s of international law had been violated, the Commission stated that war crimes and crimes against humanity had potentially taken place; leaving it to an international court to conclusively rule on what specific laws had been violated.[59] In contrast to Colin Powell's finding, the Commission of Inquiry concluded that the Government of Sudan did not pursue a policy of genocide.[60] How did the Commission arrive at this conclusion?

The Commission recognised that some elements of the crime of genocide may be identified in the violence.[61] In the opinion of the Commission there was undoubtedly evidence of systematic killing, violence causing serious bodily or mental harm, and the deliberate infliction of conditions of life likely to bring about the physical destruction of a protected group.[62] In addressing whether there was a particular targeted group, the Commission used a subjective approach to conclude that the Fur, Masalit, and Zaghawa tribes were a protected ethnic group, 'African', under the Convention.[63] The Commission recognised the distinction between 'Arab' and 'African' which was prevalent in society in Darfur, and which was based upon support for the rebels ('African') or support for the government forces ('Arab').[64]

[57] ibid para. 630.
[58] ibid para. 121–126.
[59] ibid para. 630.
[60] ibid para. 640.
[61] ibid para. 507.
[62] ibid para. 507.
[63] ibid para. 508, 510–512, 640.
[64] ibid para. 508, 510–511, 640.

In examining the evidence of intent, the Commission looked to see if the Government of Sudan pursued genocidal plans or policies.[65] The Commission acknowledged that there were potential indications of intent in the systematic nature of the violence and in statements made by those who are involved in targeting the African tribes.[66] Notwithstanding this evidence, the Commission determined that there were more convincing indicators which revealed the lack of intent.[67] One such example was that the Government troops and the Janjaweed refrained from killing all civilians in a number of villages; rather the militia selected people out of the group who they believed were rebels.[68] The Commission considered this as evidence of a lack of intent as the target of the attack were people who were viewed by the Government forces as rebels rather than the target being the group itself.[69]

Another example the Commission presented was the evidence that people displaced from their villages after an attack are not killed but rather are provided for in internally displaced person camps.[70] The belief of the Commission was that the aim of the Sudanese Government was to force the people to abandon the region, and not an attempt to destroy the group.[71] The Commission stated that the conditions in these camps do not bring about the destruction of the group as the Government of Sudan is allowing humanitarian access to the camps.[72] Interestingly the Commission concluded with a case involving two camel-owning brothers; in which one brother who owned two hundred camels was spared when the Janjaweed took the camels off him, while

[65] ibid para. 518.
[66] ibid para. 513.
[67] ibid para. 513.
[68] ibid para. 513.
[69] ibid para. 514.
[70] ibid para. 515.
[71] ibid para. 515.
[72] ibid para. 515.

the other brother was shot dead after refusing to hand over his one camel.[73] The Commission produced this case as evidence that the Janjaweed did not have the intention to destroy a group, rather the intention was to steal the camels because if they possessed the intention to destroy the group they would have killed both brothers.[74]

In its conclusion, the Commission determined on the basis of evidence obtained that the Government of Sudan had not pursued a policy of genocide in Darfur.[75] The Commission found that the actions of the Sudanese Government was a component of its plan to drive the groups from their villages in its 'counter-insurgency' campaign in Darfur.[76] The Commission stressed that their finding that genocide was not being perpetrated in Darfur did not detract from the international crimes which were committed against the groups or belittle the suffering felt by the victims.[77] The Commission acknowledged that the crime of genocide 'bears a special stigma' but argued that other international crimes, in particular categories of crimes against humanity, are similarly heinous in nature.[78]

5.3(iii) The Correct Approach?

The Commission of Inquiry's finding that the Government of Sudan did not pursue a policy of genocide was controversial and subject to critiques. A number of human rights organisations, genocide scholars, and members of the Atrocities Documentation Team have been highly critical of the Commission's report and instead have sided

[73] ibid para. 517.
[74] ibid para. 517.
[75] ibid para. 518.
[76] ibid para. 518.
[77] ibid para. 522.
[78] ibid para. 506, 522.

with the finding of the US State Department.[79] Critics have lambasted the Commission's focus on the complete destruction of a group rather than addressing whether the targeted group was a substantial part of the larger group.[80] Criticism has also been directed against the Commission for relying on the story of the two brothers, this example is maligned due to the opinion that focussing on one case study where genocidal intent is missing disregards the far more convincing evidence which was collected which indicated the intent behind the attacks.[81]

The Commission's conclusion is denounced for failing to account for the civilians who have been forced to flee their homes to internally displaced person camps, as the conditions in these camps have potentially led to the deliberate infliction of conditions calculated to bring about the destruction of the group as the Sudanese government has restricted humanitarian access and aid to these camps.[82] The Commission's finding is also dismissed for failing to address the genocidal act of bodily and mental harm which

[79] Jerry Fowler, 'A New Chapter of Irony: The Legal Implications of the Darfur Genocide Determination' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 132–134; Gregory H Stanton, 'Proving Genocide in Darfur: The Atrocities Documentation Project and Resistance to Its Findings' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 182–187; Eyal Mayroz, 'Ever Again? The United States, Genocide Suppression, and the Crisis in Darfur' (2008) 10 Journal of Genocide Research 359, 373.

[80] Erin Patrick, 'Intent to Destroy: The Genocidal Impact of Forced Migration in Darfur, Sudan' (2005) 18 Journal of Refugee Studies 410, 418; Jerry Fowler, 'A New Chapter of Irony: The Legal Implications of the Darfur Genocide Determination' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 132–133; Samuel Totten, 'The UN International Commission of Inquiry on Darfur: New and Disturbing Findings' (2009) 4 Genocide Studies and Prevention 354, 367–368.

[81] Erin Patrick, 'Intent to Destroy: The Genocidal Impact of Forced Migration in Darfur, Sudan' (2005) 18 Journal of Refugee Studies 410, 418; Jerry Fowler, 'A New Chapter of Irony: The Legal Implications of the Darfur Genocide Determination' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 134; David Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report' (2006) 7 Chicago Journal of International Law 303, 315; Matthew Lippman, 'Darfur: The Politics of Genocide Denial Syndrome' (2007) 9 Journal of Genocide Research 193, 209; Samuel Totten, 'The UN International Commission of Inquiry on Darfur: New and Disturbing Findings' (2009) 4 Genocide Studies and Prevention 354, 361–371.

[82] Matthew Lippman, 'Darfur: The Politics of Genocide Denial Syndrome' (2007) 9 Journal of Genocide Research 193, 209; Samuel Totten, 'The UN International Commission of Inquiry on Darfur: New and Disturbing Findings' (2009) 4 Genocide Studies and Prevention 354, 368–369.

has been perpetrated against civilians who have survived the attacks on the village but have suffered rape and torture.[83] The rushed nature of the inquiry has also been criticised as the Commission only had three months to complete its investigation, a problem that the Commission acknowledges in its report.[84] The role of the UN and its member states is also criticised, due to questions surrounding the backing and support, political and financial, provided to the Commission.[85]

The Commission's conclusion has been subject to criticism that this finding was based on political motivations rather than being the outcome of an appropriate legal determination.[86] It is believed that because the AU, the Arab League, and China were opposed to labelling the violence as genocide, the Commission was pressurised to tailor their report to the satisfaction of these major states. In critiquing this argument, Touko Piiparinen contends that the avoidance of the word genocide by the UN and its members states was not related to a lack of political will but rather due to a desire to maintain diplomatic relations with Sudan so as to advance peace talks and gain the Sudanese government's cooperation in the protection of civilians.[87] So even if the Commission's finding on the question of genocide was tailored to suit international actors it does not automatically mean that states were reluctant to get involved, instead the genocide label could have been viewed by states as an obstacle to peace in the

[83] Erin Patrick, 'Intent to Destroy: The Genocidal Impact of Forced Migration in Darfur, Sudan' (2005) 18 Journal of Refugee Studies 410, 419.
[84] International Commission of Inquiry on Darfur, 'Report of the International Commission on Darfur to the United Nations Secretary-General' (25 January 2005) para. 18. See also Samuel Totten, 'The UN International Commission of Inquiry on Darfur: New and Disturbing Findings' (2009) 4 Genocide Studies and Prevention 354, 357–358.
[85] Samuel Totten, 'The UN International Commission of Inquiry on Darfur: New and Disturbing Findings' (2009) 4 Genocide Studies and Prevention 354, 357–360.
[86] Eric Reeves, 'Darfur and International Justice' (2009) 56 Dissent 13, 16; Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 141.
[87] Touko Piiparinen, 'Reconsidering the Silence over the Ultimate Crime: A Functional Shift in Crisis Management from the Rwandan Genocide to Darfur' (2007) 9 Journal of Genocide Research 71, 73, 79, 85–88.

region. The subsequent reaction of the Sudanese government to Al Bashir's ICC indictment for genocide illustrates that the fear expressed by these states about the threat to the peace process by employing the genocide label to characterise the situation was apt.

Furthermore the finding that genocide was not perpetrated should not be automatically assumed to be a 'deliberate denial' of genocide as the Commission of Inquiry was not the only actor to find that genocide was not perpetrated.[88] The European Union, Amnesty International, Médecins Sans Frontières, and Human Rights Watch have all stated that genocide was not committed as there was no evidence of the government's intent to perpetrate genocide.[89]

In fact a similar accusation that the finding on the issue of genocide was based on political concerns rather than legal substance has been directed towards the United States.[90] It is claimed that the domestic pressure placed on the US government left Powell with no choice but to declare that genocide was being perpetrated.[91] The political nature of the genocide determination was due to the United States government facing increasing pressure from Congress, Christian church groups, the media, and civil society groups to label the violence as genocide.[92] Darfur saw one of the largest

[88] Darren Brunk, 'Dissecting Darfur: Anatomy of a Genocide Debate' (2008) 22 International Relations 25, 40.
[89] John Hagan and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge University Press 2009) 31; Joachim J Savelsberg, *Representing Mass Violence: Conflicting Responses to Human Rights Violations in Darfur* (University of California Press 2015) 96, 111.
[90] William A Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide' (2005) 18 Leiden Journal of International Law 871, 882–883; Luke Glanville, 'Is "Genocide" still a Powerful Word' (2009) 11 Journal of Genocide Research 467, 477–478; Fred Grünfeld and Wessel N Vermeulen, *Failure to Prevent Gross Human Rights Violations in Darfur: Warnings to and Responses by International Decision Makers (2003–2005)* (Brill Nijhoff 2014) 150.
[91] Gérard Prunier, *Darfur: The Ambiguous Genocide* (2nd edn, Cornell University Press 2007) 140; Fred Grünfeld and Wessel N Vermeulen, *Failure to Prevent Gross Human Rights Violations in Darfur: Warnings to and Responses by International Decision Makers (2003–2005)* (Brill Nijhoff 2014) 151.
[92] Gérard Prunier, *Darfur: The Ambiguous Genocide* (Cornell University Press 2005) 139–140; Eric Heinze, 'The Rhetoric of Genocide in U.S. Foreign Policy: Rwanda and Darfur Compared' (2007) 122

mobilisations in civil society of actors since the anti-Apartheid movement, with the creation of the Save Darfur Coalition who protested against the violence and demanded action to be taken.[93] These activists believed that labelling the violence as genocide would legally require the US government to intervene in Darfur.[94]

The case study of Darfur, the 'first case in which the Convention was officially invoked and directly applied to an on-going genocide', perfectly captures the complexity of the genocide label as definitional difficulties complicated the response to the violence.[95] These inquiries reveal the difficulty of identifying the intent underlying the crime of genocide in a multifaceted situation. Despite the presence of political will from one of the leading states within the UN, the Commission of Inquiry could not infer the intent to destroy from the actions of the Sudanese government. The United States' engagement with the violence in Darfur illustrates that a finding of genocide is 'not equivalent to actual action on the ground.'[96] Apart from the US government's declaration that genocide was being perpetrated in Darfur, the international reaction to the violence was comparable to the inaction witnessed in Rwanda.[97] Even during a promising period when the doctrine of Responsibility to

Political Science Quarterly 359, 368–369, 371–372, 381; Luke Glanville, 'Is "Genocide" still a Powerful Word' (2009) 11 Journal of Genocide Research 467, 474.

[93] Rebecca Hamilton and Chad Hazlett, '"Not on Our Watch": The Emergence of the American Movement for Darfur' in Alex de Waal (ed), *War in Darfur: And the Search for Peace* (Global Equity Initiative Harvard University 2007) 337–366; Dominik J Schaller, 'From Lemkin to Clooney: The Development and State of Genocide Studies' (2011) 6 Genocide Studies and Prevention 245, 247–248; Joachim J Savelsberg, *Representing Mass Violence: Conflicting Responses to Human Rights Violations in Darfur* (University of California Press 2015) 85–86.

[94] Rebecca Hamilton and Chad Hazlett, '"Not on Our Watch": The Emergence of the American Movement for Darfur' in Alex de Waal (ed), *War in Darfur: And the Search for Peace* (Global Equity Initiative Harvard University 2007) 341–343; Julie Flint and Alex de Waal, *Darfur: A New History of a Long War* (Zed Books 2008) 180–181.

[95] Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 55.

[96] Martin Mennecke, 'What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word"' (2007) 2 Genocide Studies and Prevention 57, 60.

[97] Scott Straus, 'Darfur and the Genocide Debate' (2005) 84 Foreign Affairs 123, 124; Touko Piiparinen, 'The Lessons of Darfur for the Future of Humanitarian Intervention' (2007) 13 Global

Protect was being accepted in international circles and the UN created the office of the Special Adviser on the Prevention of Genocide, the international community failed to halt and meaningfully respond to the atrocities in Darfur.[98]

The failure to respond to the violence in Darfur even after a huge awareness raising campaign by civil society actors shows that 'raising the profile of an issue and generating domestic political will are insufficient to galvanize a policy to halt genocide.'[99] The failure to respond should highlight to activists that genocide is not a 'magic word that triggers intervention.'[100] The Save Darfur Coalition and the media have been accused of oversimplifying the situation by overly focussing on intervention as a means of ending the violence without providing a lasting solution to the situation.[101] While the genocide label was important for 'drawing attention' to the situation in Darfur, it became a 'distraction to effective action' as actors dawdled over its definition.[102] The debate over what label to apply to the violence shifted the focus nearly entirely away from the suffering felt by victims across Darfur.[103] Darfur highlights the 'dangers of placing too much emphasis on a term rather than on meaningful action.'[104]

Governance 365, 366–367; Thomas G Weiss, 'Halting Genocide: Rhetoric versus Reality' (2007) 2 Genocide Studies and Prevention 7, 7.

[98] Paul D Williams and Alex J Bellamy, 'The Responsibility to Protect and the Crisis in Darfur' (2005) 36 Security Dialogue 27, 44; Alex de Waal, 'Darfur and the Failure of the Responsibility to Protect' (2007) 83 International Affairs 1039, 1054.

[99] Scott Straus, '"Atrocity Statistics" and Other Lessons from Darfur' in Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006) 193.

[100] Scott Straus, 'Darfur and the Genocide Debate' (2005) 84 Foreign Affairs 123, 131.

[101] Deborah Murphy, 'Narrating Darfur: Darfur in the U.S. Press, March-September 2004' in Alex de Waal (ed), *War in Darfur: And the Search for Peace* (Global Equity Initiative Harvard University 2007) 314–336.

[102] Alex de Waal, 'Reflections on the Difficulties of Defining Darfur's Crisis as Genocide' (2007) 20 Harvard Human Rights Journal 25, 32.

[103] Eyal Mayroz, 'Ever Again? The United States, Genocide Suppression, and the Crisis in Darfur' (2008) 10 Journal of Genocide Research 359, 373; Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge University Press 2012) 3, 5.

[104] Luke Glanville, 'Is "Genocide" still a Powerful Word' (2009) 11 Journal of Genocide Research 467, 482.

The reaction amongst the media and civil society actors to the declaration by the Commission that genocide had not been perpetrated in Darfur further highlights the fundamental gap between the legal and social understandings of genocide.[105] The Commission's findings were labelled by some observers and civil society actors as a betrayal of victims and 'virtually equivalent to Holocaust denial'.[106] This sentiment completely overlooks the fact that the Commission did refer to crimes against humanity being committed which in international law were no less serious than genocide.[107] Therefore whether a declaration of genocide is announced is of no real benefit to activists seeking intervention into a situation as they can refer to a state's responsibility to protect populations from atrocity crimes. The continued use of the term genocide by activists in an ongoing situation when they could refer to the other atrocity crimes emphasises that their focus on the genocide label is less on its promise of prevention but more on the moral value attached to a declaration of genocide in the midst of violence.

It is important to note that the Commission did state that its findings on the lack of genocidal intent on the part of the Government of Sudan does not rule out the possibility that an individual within the Government committed acts of genocide with the intent to destroy a group.[108] However the Commission declares that it is for a competent court or tribunal to assess whether an individual might be indicted for the

[105] David Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report' (2006) 7 Chicago Journal of International Law 303, 309.
[106] See discussion in William A Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide' (2005) 18 Leiden Journal of International Law 871, 873, 883.
[107] International Commission of Inquiry on Darfur, 'Report of the International Commission on Darfur to the United Nations Secretary-General' (25 January 2005) para. 505–506, 522. See also David Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report' (2006) 7 Chicago Journal of International Law 303, 306–309; Don Hubert and Ariela Blätter, 'The Responsibility to Protect as International Crimes Prevention' (2012) 4 Global Responsibility to Protect 33, 44–45.
[108] International Commission of Inquiry on Darfur, 'Report of the International Commission on Darfur to the United Nations Secretary-General' (25 January 2005) para. 520.

crime of genocide. The Commission did hand over a list of names of individuals it identified as having potentially violated international law.[109]

The fact that the Pre-Trial Chamber of the ICC five years later had reasonable grounds to believe that the President of Sudan, Omar Al Bashir, possessed the intent to destroy ethnic groups in Darfur highlights the potential benefits of not providing a definitive finding on the question of genocide in the midst of violence.[110] This is the main argument of this research, that genocide is simply not a term which can be employed in an ongoing situation as the flawed nature of the definition ensures that the elements of the crime are indeterminable in the midst of bloodshed. However it also important to note that the failure to execute the arrest warrant highlights the complexity of utilising the term genocide in a situation where an individual or state accused of genocide remains in power. Therefore even if an international court or tribunal has the time to assess the evidence and make a conclusive finding on genocide, it does not mean that this will translate into effective action to prevent or suppress genocide.

However the lack of response to genocide is not unique, if states do not possess the will to act no action will be taken regardless the label applied to a situation or evidence of violations of international criminal law produced by commissions of inquiry as illustrated by the failure of international actors to meaningfully respond to the situations in the Central African Republic and the crimes of the Islamic State. The findings of these two inquiries are of critical importance in documenting violations of international law, however what do the inquiries reveal about the complexities of

[109] ibid para. 531–532.
[110] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar al Bashir")* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09-94 (12 July 2010).

identifying genocide and applying the genocide label in the midst of an ongoing situation?

5.4 The Crisis in the Central African Republic

The International Commission of Inquiry on the Central African Republic was established in December 2013 by the UN Security Council to investigate reported violations of international humanitarian law and human rights law.[111] The inquiry was created in response to a fear that the situation in the Central African Republic 'could turn into a genocidal killing spree.'[112] While the UN Security Council did not refer to genocide in establishing the Commission, fears of genocide potentially taking place in the Central African Republic were expressed by the Special Adviser on the Prevention of Genocide, the Director of Operations of the United Nations Office for the Coordination of Humanitarian Affairs, and the NGO the International Federation for Human Rights.[113]

5.4(i) The Context of the Inquiry

The post-colonial history of the Central African Republic is a familiar story, with a succession of military dictators running the country for their own benefit.[114] With an

[111] United Nations Security Council Resolution 2127 (5 December 2013) UN Doc S/RES/2127.
[112] United Nations Security Council 'The International Commission of Inquiry on the Central African Republic' (22 December 2014) UN Doc S/2014/928, para. 78.
[113] United Nations Security Council 'The International Commission of Inquiry on the Central African Republic' (22 December 2014) UN Doc S/2014/928, para. 443. See also Ivonne Lockhart Smith, 'Conflict Management in the Central African Republic: Making Genocide Prevention Work' (2014) 23 African Security Review 178, 179; Mouhamadou Kane, 'Interreligious Violence in the Central African Republic' (2014) 23 African Security Review 312, 312, 314–315; Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 49.
[114] Alexis Arieff, 'Crisis in the Central African Republic' (2014) 7 Current Politics and Economics of Africa 27, 32; Gino Vlavonou, 'Understanding the "Failure" of the Séléka Rebellion' (2014) 23 African Security Review 318, 318–319; Martin Welz, 'Crisis in the Central African Republic and the International Response' (2014) 113 African Affairs 601, 602; Emizet F Kisangani, 'Social Cleavages and the Politics of Exclusion: Instability in the Central African Republic' (2015) 32 International Journal on World Peace 33, 38–46; Wendy Isaacs-Martin, 'Political and Ethnic Identity in Violent Conflict: The Case of Central African Republic' (2016) 10 International Journal of Conflict and

authoritarian state, weak governance and institutions, an underdeveloped economy and society, and a history of violence the Central African Republic displayed numerous indicators of atrocity crimes, and was ever present in the 2010s on the warning lists, created by academics and NGOs of countries at high risk of mass atrocities.[115]

The violence which the Commission of Inquiry was investigating began in March 2013 when Michel Djotodia and his Séléka rebel coalition, predominantly comprised of Muslim fighters, ousted the incumbent dictator and installed a new military government with Djotodia as the new president.[116] The Séléka lacked homogeneity, rather it was a combination of loose groupings of rebel factions that were brought together against the ruling leader due to issues of corruption, lack of access to power, lack of services and development, and the feeling that government excluded Muslims while preferring Christian groups.[117] Similar to the situations in Rwanda and Darfur, existing tensions between groups, while not always violent in nature, were exacerbated and manipulated.[118]

Violence 26, 26; Tim Glawion and Lotje de Vries, 'Ruptures Revoked: Why the Central African Republic's Unprecedented Crisis has not Altered Deep-Seated Patterns of Governance' (2018) 56 Journal of Modern African Studies 421, 426–427.

[115] Ivonne Lockhart Smith, 'Conflict Management in the Central African Republic: Making Genocide Prevention Work' (2014) 23 African Security Review 178, 179.

[116] Alexis Arieff, 'Crisis in the Central African Republic' (2014) 7 Current Politics and Economics of Africa 27, 28–29; Ivonne Lockhart Smith, 'Conflict Management in the Central African Republic: Making Genocide Prevention Work' (2014) 23 African Security Review 178, 178–179; Mouhamadou Kane, 'Interreligious Violence in the Central African Republic' (2014) 23 African Security Review 312, 313; Gino Vlavonou, 'Understanding the "Failure" of the Séléka Rebellion' (2014) 23 African Security Review 318, 319–321; Martin Welz, 'Crisis in the Central African Republic and the International Response' (2014) 113 African Affairs 601, 603.

[117] Alexis Arieff, 'Crisis in the Central African Republic' (2014) 7 Current Politics and Economics of Africa 27, 32; Gino Vlavonou, 'Understanding the "Failure" of the Séléka Rebellion' (2014) 23 African Security Review 318, 321.

[118] Alexis Arieff, 'Crisis in the Central African Republic' (2014) 7 Current Politics and Economics of Africa 27, 36–37.

Initial feelings of hope with this new government were quickly dispelled when it carried out similar violations of human rights which had characterised the previous government. The forces targeted neighbourhoods which were loyal to the previous government, and there were reports of executions, illegal detentions, torture, rape, looting, and destruction of property.[119] These attacks were largely perpetrated against the Christian and Animist communities. Djotodia did order the disbanding of Séléka in September 2013, however this had 'little practical impact' on halting the violence as the loose nature of the Séléka meant that Djotodia lacked control over large swathes of the coalition.[120]

Opposition to the Séléka formed in the aftermath of these incidents; with the creation of anti-balaka militias, a loose association of self-defence groups comprising former government and army members and which are primarily Christian.[121] The anti-balaka militias responded to the Séléka atrocities against non-Muslims by waging a campaign of violence against Muslims.[122] The violence spiralled into reprisals by both sides targeting either the Muslim or non-Muslim groups.[123] Civilians became the primary

[119] Mouhamadou Kane, 'Interreligious Violence in the Central African Republic' (2014) 23 African Security Review 312, 314; Gino Vlavonou, 'Understanding the "Failure" of the Séléka Rebellion' (2014) 23 African Security Review 318, 321; Spencer Zifcak, 'What Happened to the International Community – R2P and the Conflicts in South Sudan and the Central African Republic' (2015) 16 Melbourne Journal of International Law 52, 63.

[120] Alexis Arieff, 'Crisis in the Central African Republic' (2014) 7 Current Politics and Economics of Africa 27, 29; Ilmari Käihkö and Mats Utas, 'The Crisis in CAR: Navigating Myths and Interests' (2014) 49 African Spectrum 69, 70; Emizet F Kisangani, 'Social Cleavages and the Politics of Exclusion: Instability in the Central African Republic' (2015) 32 International Journal on World Peace 33, 34.

[121] Mouhamadou Kane, 'Interreligious Violence in the Central African Republic' (2014) 23 African Security Review 312, 312–314; Gino Vlavonou, 'Understanding the "Failure" of the Séléka Rebellion' (2014) 23 African Security Review 318, 323.

[122] Mouhamadou Kane, 'Interreligious Violence in the Central African Republic' (2014) 23 African Security Review 312, 314; Gino Vlavonou, 'Understanding the "Failure" of the Séléka Rebellion' (2014) 23 African Security Review 318, 323; Spencer Zifcak, 'What Happened to the International Community – R2P and the Conflicts in South Sudan and the Central African Republic' (2015) 16 Melbourne Journal of International Law 52, 62.

[123] Alexis Arieff, 'Crisis in the Central African Republic' (2014) 7 Current Politics and Economics of Africa 27, 33; Ivonne Lockhart Smith, 'Conflict Management in the Central African Republic: Making Genocide Prevention Work' (2014) 23 African Security Review 178, 179; Mouhamadou Kane,

casualty of the Séléka and anti-balaka violence. The violence resulted in over 400,000 civilians seeking refuge in neighbouring countries and over 800,000 internally displaced persons.[124] The violence also contributed to a humanitarian crisis in a country that even before the outbreak of violence was severely underdeveloped.[125]

In response to the crisis, regional and international actors have been active in condemning the violence and taking measures to address the violations of international law. While before the outbreak of violence, the Central African Republic was of low importance in the international community the Central African Republic did appear as the perfect venue for the application of the RtoP doctrine.[126] This was due to clear evidence of mass atrocities occurring that the government was not protecting its citizens from, there was support or at least no obstacles from regional actors for action, and probably most importantly the Central African Republic was not at the centre of competing strategic international importance for actors of the UN Security Council.[127]

In 2013, the AU Peace and Security Council suspended the Central African Republic from the AU and imposed sanctions against senior officials.[128] The UN also imposed a sanctions regime, including a travel ban and assets freeze, against leading figures in the crisis.[129] The AU created a peacekeeping mission, the African-led International

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'Interreligious Violence in the Central African Republic' (2014) 23 African Security Review 312, 312; Gino Vlavonou, 'Understanding the "Failure" of the Séléka Rebellion' (2014) 23 African Security Review 318, 320; Spencer Zifcak, 'What Happened to the International Community – R2P and the Conflicts in South Sudan and the Central African Republic' (2015) 16 Melbourne Journal of International Law 52, 62, 64.

[124] United Nations Security Council 'The International Commission of Inquiry on the Central African Republic' (22 December 2014) UN Doc S/2014/928, para. 438.

[125] Alexis Arieff, 'Crisis in the Central African Republic' (2014) 7 Current Politics and Economics of Africa 27, 28.

[126] Spencer Zifcak, 'What Happened to the International Community – R2P and the Conflicts in South Sudan and the Central African Republic' (2015) 16 Melbourne Journal of International Law 52, 69–70.

[127] ibid 69.

[128] Martin Welz, 'Crisis in the Central African Republic and the International Response' (2014) 113 African Affairs 601, 604.

[129] United Nations Security Council Resolution 2127 (5 December 2013) UN Doc S/RES/2127; United Nations Security Council Resolution 2134 (28 January 2014) UN Doc S/RES/2134.

Support Mission to the Central African Republic (hereafter 'MISCA') with a force strength of around six thousand troops.[130] At the same time as the UN Security Council created the International Commission of Inquiry on the Central African Republic, the UN Security Council also authorised MISCA, alongside a French mission Operation Sangaris, under Chapter VII of the Charter to protect civilians, support humanitarian access, contribute to security, and disarm the militias.[131] France, the former colonial power in the Central African Republic, deployed a 1,200 strong force (Operation Sangaris) to bolster 400 troops already stationed in the country because Laurent Fabius, the French Foreign Minister, warned that genocide was on the verge of occurring.[132]

Initially it seemed as if the international and regional involvement was having a measure of success, as the increasing number of atrocities committed by both the Séléka and anti-balaka militias forced the Central African Republic's neighbouring countries to demand that Djotodia step down as president in early 2014.[133] A new

[130] Martin Welz, 'Crisis in the Central African Republic and the International Response' (2014) 113 African Affairs 601, 605.

[131] United Nations Security Council Resolution 2127 (5 December 2013) UN Doc S/RES/2127. See also Alexis Arieff, 'Crisis in the Central African Republic' (2014) 7 Current Politics and Economics of Africa 27, 28; Ivonne Lockhart Smith, 'Conflict Management in the Central African Republic: Making Genocide Prevention Work' (2014) 23 African Security Review 178, 179, 180; Tatiana Carayannis and Mignonne Fowlis, 'Lessons from African Union-United Nations Cooperation in Peace Operations in the Central African Republic' (2017) 26 African Security Review 220, 225.

[132] Alex de Waal, 'Playing the Genocide Card' *The New York Times* (18 December 2013); Alexis Arieff, 'Crisis in the Central African Republic' (2014) 7 Current Politics and Economics of Africa 27, 28, 34; Ivonne Lockhart Smith, 'Conflict Management in the Central African Republic: Making Genocide Prevention Work' (2014) 23 African Security Review 178, 179, 180; Martin Welz, 'Crisis in the Central African Republic and the International Response' (2014) 113 African Affairs 601, 605; Cynthia Glock, 'Can the Central African Republic Carry on Without France' (2017) 162 The Rusi Journal 28, 29.

[133] Alexis Arieff, 'Crisis in the Central African Republic' (2014) 7 Current Politics and Economics of Africa 27, 29, 36; Gino Vlavonou, 'Understanding the "Failure" of the Séléka Rebellion' (2014) 23 African Security Review 318, 322–323; Martin Welz, 'Crisis in the Central African Republic and the International Response' (2014) 113 African Affairs 601, 603; Emizet F Kisangani, 'Social Cleavages and the Politics of Exclusion: Instability in the Central African Republic' (2015) 32 International Journal on World Peace 33, 34; Spencer Zifcak, 'What Happened to the International Community – R2P and the Conflicts in South Sudan and the Central African Republic' (2015) 16 Melbourne Journal of International Law 52, 64; Tim Glawion and Lotje de Vries, 'Ruptures Revoked: Why the Central African Republic's Unprecedented Crisis has not Altered Deep-Seated Patterns of Governance' (2018) 56 Journal of Modern African Studies 421, 431.

transitional government was installed, and while this process removed the Séléka from power the transition of power did not put an end to the violence as the two sides continued their respective campaigns against the civilian population.[134] MISCA was also struggling as the mission was lacking in financial and logistical support, and also lacked the number of troops required to oversee the operations in a sizeable country.[135] The diplomatic efforts to install the new transitional governmental meant that the UN Security Council ignored concrete action to prevent the violence.[136] 'Reminiscent' of Rwanda and Darfur the 'early warnings of the escalating systematic violence in the CAR were not matched by an immediate, adequate response from the international community.'[137] The failure to adequately address the violence eventually led to the EU Council to deploy a mission, authorised by the UN Security Council, to the Central African Republic in April 2014.[138] With the failure of MISCA to stabilise the situation the UN established the Multidimensional Integrated Stabilization Mission in the Central African Republic (hereafter 'MINUSCA') with a force strength of 12,000 to replace MISCA in April 2014.[139] The AU, Russia, and the US were initially opposed

[134] Martin Welz, 'Crisis in the Central African Republic and the International Response' (2014) 113 African Affairs 601, 603; Emizet F Kisangani, 'Social Cleavages and the Politics of Exclusion: Instability in the Central African Republic' (2015) 32 International Journal on World Peace 33, 34; Spencer Zifcak, 'What Happened to the International Community – R2P and the Conflicts in South Sudan and the Central African Republic' (2015) 16 Melbourne Journal of International Law 52, 64–65.
[135] Ivonne Lockhart Smith, 'Conflict Management in the Central African Republic: Making Genocide Prevention Work' (2014) 23 African Security Review 178, 180; Spencer Zifcak, 'What Happened to the International Community – R2P and the Conflicts in South Sudan and the Central African Republic' (2015) 16 Melbourne Journal of International Law 52, 63–64.
[136] Spencer Zifcak, 'What Happened to the International Community – R2P and the Conflicts in South Sudan and the Central African Republic' (2015) 16 Melbourne Journal of International Law 52, 71.
[137] Ivonne Lockhart Smith, 'Conflict Management in the Central African Republic: Making Genocide Prevention Work' (2014) 23 African Security Review 178, 179.
[138] United Nations Security Council Resolution 2134 (28 January 2014) UN Doc S/RES/2134. See also Martin Welz, 'Crisis in the Central African Republic and the International Response' (2014) 113 African Affairs 601, 605; Cynthia Glock, 'Can the Central African Republic Carry on Without France' (2017) 162 The Rusi Journal 28, 30; Friedrich Plank, 'The Effectiveness of Interregional Security Cooperation: Evaluating the Joint Engagement of the EU and the AU in Response to the 2013 Crisis in the Central African Republic' (2017) 26 European Security 485, 494.
[139] United Nations Security Council Resolution 2149 (10 April 2014) UN Doc S/RES/2149. See also Martin Welz, 'Crisis in the Central African Republic and the International Response' (2014) 113 African Affairs 601, 605–606; Emizet F Kisangani, 'Social Cleavages and the Politics of Exclusion:

to a UN mission as they believed that MISCA, Operation Sangaris, and the EU mission could stabilise the situation.[140] By the time MINUSCA deployed, after 18 months of violence, there were thousands killed, and tens of thousands left injured, mentally and physically.[141]

In the midst of this violence and spiralling humanitarian crisis, the International Commission of Inquiry on the Central African Republic conducted its investigation into violations of international humanitarian and human rights law by undertaking site visits and interviewing over nine hundred individuals (including victims, witnesses, religious leaders, civil society representatives, local and international NGOs, UN and international actors, government officials, opposition politicians, and members of the armed groups).[142] This was complicated by the ongoing violence as access to a number of areas of the country and sites of potential crimes was impeded, which potentially may have impacted on the ability of the Commission to identify elements of genocide in the midst of violence.[143]

5.4(ii) The Question of Genocide

On addressing the question of genocide, the Commission concentrated on the atrocities committed by the anti-balaka militias against Muslim civilians.[144] The Commission recognised that the anti-balaka deliberately targeted the Muslim population.[145] The anti-balaka militias conducted a widespread campaign against the

Instability in the Central African Republic' (2015) 32 International Journal on World Peace 33, 47–48; Tatiana Carayannis and Mignonne Fowlis, 'Lessons from African Union-United Nations Cooperation in Peace Operations in the Central African Republic' (2017) 26 African Security Review 220, 227.
[140] Spencer Zifcak, 'What Happened to the International Community – R2P and the Conflicts in South Sudan and the Central African Republic' (2015) 16 Melbourne Journal of International Law 52, 65.
[141] ibid 68.
[142] United Nations Security Council 'The International Commission of Inquiry on the Central African Republic' (22 December 2014) UN Doc S/2014/928, para. 7–14.
[143] ibid para. 7, 20–22.
[144] ibid para. 443–461.
[145] ibid para. 294.

Muslim population with, as recognised by the Commission, the 'desire to kill as many Muslims as possible'.[146] The anti-balaka deliberately targeted the Muslim population by burning their houses, businesses, and mosques, and by killing Muslims who tried to flee.[147] The Commission found that the majority of the Muslim population was deported or forcibly transferred from the country due to the campaign directed against them by the anti-balaka.[148] A number of Muslims were forced to stay in international protected enclaves however the anti-balaka deliberately prevented them from accessing food, water, and medical care.[149] The campaign against the Muslim population led to the reduction of the number of Muslims living in the capital city, Bangui, by 99% (from 100,000 to 1,000 in a couple of months).[150] It was estimated that more than 80% of the Muslim population has had to flee the country.[151]

To establish if genocide was perpetrated, the Commission concentrated on whether the expulsion of the Muslim population created conditions of life calculated to bring about the destruction of a group under Article II (c) of the Convention.[152] To identify the specific intent behind these crimes the Commission examined 'the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of the atrocities, whether there was systematic targeting of victims on account of their membership of a particular group, and whether the destructive and discriminatory acts were repetitive.'[153] The Commission concentrated on the acts of forcible transfer of a population to determine whether there was specific intent

[146] ibid para. 446.
[147] ibid para. 49, 290, 293–416, 446.
[148] ibid para. 434–442.
[149] ibid para. 49.
[150] ibid para. 447.
[151] ibid para. 447.
[152] ibid para. 454.
[153] ibid para. 455.

underlying the acts.[154] The Commission agreed with the case law of the ad hoc tribunals that while the crime of forcible transfer is not an act of genocide it may indicate genocidal intent.[155] Therefore the Commission examined whether there were 'sufficient indicia of genocidal intent for which forcible transfer would lead to the establishment of a reasonable inference of specific intent to destroy the targeted group.'[156]

On the basis of the evidence available to its investigation, the Commission could not conclude that genocide had been committed by the anti-balaka militias.[157] The Commission stated that '[i]n the absence of evidence demonstrating reasonable grounds to believe that the targeting and transfer of the population took place with specific intent to destroy the group as such, the Commission is not able to conclude that the crime of genocide took place.'[158] There was not 'sufficient evidence' for the Commission to conclude that 'attacks of the anti-balaka forces against the Muslim population were undertaken with the specific intent to achieve the physical destruction of the group, either in part or in whole.'[159]

The Commission did determine that the anti-balaka's campaign against the Muslim group 'could constitute the crime of persecution.'[160] The Commission also determined that the anti-balaka militia's campaign against Muslims could be deemed as ethnic cleansing, which the Commission stated is comprised of the crimes of persecution and forcible transfer and therefore should be prosecuted as a crime against humanity.[161]

[154] ibid para. 458.
[155] ibid para. 458–459.
[156] ibid para. 458.
[157] ibid para. 50, 78, 457, 461.
[158] ibid para. 459.
[159] ibid para. 461.
[160] ibid para. 418–433.
[161] ibid para. 50, 453.

The Commission stressed that a lack of a finding that genocide had occurred did not lessen the crimes which had been perpetrated in the situation.[162] The Commission cautioned that the perpetration of the crime of genocide is still a possibility in the future if the situation in the Central African Republic is not addressed.[163]

5.4(iii) The Utility of a Genocide Determination

While the Commission may have concluded that genocide was not perpetrated, the work of the Commission and the international responses to the violence in the Central African Republic illuminate the various complexities, outlined in this study, involved in identifying genocide in the midst of violence. The various warnings of genocide have been criticised for failing to understand the violence; Alex de Waal contended that genocide was not occurring, as the violence was not 'large-scale and systematic' and was being 'driven by the contingencies of fear, not a deeply nurtured intent to destroy another ethnic group.'[164] Ilmari Käihkö and Mats Utas also stated that what was happening in the Central African Republic was not genocide as the Séléka, the anti-balaka, and other militias lacked the central organisation that is required to perpetrate genocide.[165] De Waal argued that when the French Foreign Minister warned of genocide, this reference to genocide was a means of building domestic support for action by relying on the rhetorical value of the genocide label.[166]

For de Waal this misdiagnosis of the situation as genocide can have 'serious downsides' as it can lead to states taking the 'wrong actions to resolve it.'[167] Käihkö

[162] ibid para. 78.
[163] ibid para. 78.
[164] Alex de Waal, 'Playing the Genocide Card' *The New York Times* (18 December 2013).
[165] Ilmari Käihkö and Mats Utas, 'The Crisis in CAR: Navigating Myths and Interests' (2014) 49 African Spectrum 69, 71.
[166] Alex de Waal, 'Playing the Genocide Card' *The New York Times* (18 December 2013).
[167] ibid.

and Utas argue that while the focus on genocide may bring greater international attention to the situation it may lead to international actors 'taking the wrong decisions and focussing on the wrong issues.'[168] However it is difficult to assess the impact that the fears of genocide expressed by the French Foreign Minister alongside similar fears expressed by UN actors had on the response to the violence and whether it led to these actors pursing the wrong approach. However it does show how actors can view the genocide label as a distraction from or impediment to effective measures to respond to violence.

The report of the Commission does illustrate the difficulty of predicting the crime of genocide as despite the various warnings of the risk of genocide from international actors the situation did not develop along genocidal lines. While the creation of early-warning signals by academics, NGOs, states, and the UN have been a positive development in the prevention of violence, there remains the question of how certain states such as the Central African Republic which exhibit risk factors of atrocity crimes manage to avoid genocide or large-scale violence.[169] The UN has recognised this concern by noting that the presence of risk factors of atrocity crimes in a country/region does not inevitably mean that atrocity crimes will be perpetrated.[170] The 'Framework of Analysis' discusses the idea of triggering factors of atrocity crimes such as sudden changes to a country brought about by regime change, natural disaster,

[168] Ilmari Käihkö and Mats Utas, 'The Crisis in CAR: Navigating Myths and Interests' (2014) 49 African Spectrum 69, 70–71.
[169] Scott Straus, 'Retreating from the Brink: Theorising Mass Violence and the Dynamics of Restraint' (2012) 10 Perspectives on Politics 343, 344; Stephen McLoughlin, 'Rethinking the Structural Prevention of Mass Atrocities' (2014) 6 Global Responsibility to Protect 407, 415–418; Scott Straus, 'Triggers of Mass Atrocities' (2015) 3 Politics and Governance 5, 14.
[170] United Nations General Assembly 'Responsibility to Protect: State Responsibility and Prevention – Report of the Secretary-General' (9 July 2013) UN Doc A/67/929-S/2013/399, para. 16. See also Stephen McLoughlin, 'From Reaction to Resilience in Mass Atrocity Prevention: An Analysis of the 2013 UN Report *The Responsibility to Protect: State Responsibility and Prevention*' (2016) 22 Global Governance 473, 474, 477–478.

epidemics, and financial crises. These triggering factors can often explain why a country/region can suddenly be engulfed in violence, however they may be difficult to predict due to their abrupt nature.[171] Therefore it is still an arduous task in predicting whether a country/region will be enveloped in violence.

Genocide is not only difficult to predict, it is a complex crime to identify as emphasised in the report of the Commission. The Commission once again, as the ad hoc tribunals and other commissions of inquiry before it, underlines the central importance of the intent to destroy element of the crime in identifying genocide. The report of the Commission highlights the difficulties of divining this intent to destroy in the actions of an accused state or organisation, particularly when an actor is perpetrating multiple violations of international law. It is an arduous task to distinguish the crime of genocide from other atrocity crimes especially when an act such as the forcible transfer of a population can be presented as evidence of genocide, crimes against humanity, and ethnic cleansing.

However did this inquiry overlook persuasive evidence which indicated that the murders and widespread attacks perpetrated against the Muslim population were committed with the intent to destroy a group? Specifically the Commission's finding that the anti-balaka possessed the 'desire to kill as many Muslims as possible' would imply that the anti-balaka acted with the intent to destroy a group. In their report, the Commission fail to reconcile this desire to kill with their finding that there was a lack of evidence of specific intent. It seems a critical issue to not consider the evidence of a desire to kill all Muslims and instead concentrate on identifying the specific intent underlying the forcible transfer of the Muslim population. Conceivably the forced

[171] Samuel Totten, 'The Intervention and Prevention of Genocide: Sisyphean or Doable?' (2004) 6 Journal of Genocide Research 228, 229.

displacement of the population is a consequence of this intent to kill all Muslims. Therefore it could be argued that there are reasonable grounds to believe genocide has been perpetrated with the specific intent to destroy the Muslim population.

If the evidence pointed towards reasonable grounds for concluding that genocide may have been committed, why did the Commission not label the violence as genocide? Did the Commission tailor their findings due to a lack of political will on behalf of states to act in response to genocide? This is a complex question; while at certain times in 2014 a number of states showed a reluctance to get further involved, regional and international actors played a key role in the response including the deployment of security missions. While it could be argued that the Commission had to be mindful of the potential ramifications of a genocide finding on the resolution of the situation, the fact that the Commission highlighted that crimes against humanity and ethnic cleansing were equally serious crimes requiring international response illustrates that the Commission were not hesitant in reminding states of their obligations under international law.

Furthermore it could be the case that the Commission is overstating this desire to kill, and instead murder and widespread attacks are being used as a method to force the Muslim population to flee the country; acts which, absent an intent to destroy, would fall into the categories of crimes against humanity and ethnic cleansing. The Commission of Inquiry is not the only actor to find no evidence of a genocidal campaign due to a lack of specific intent and instead label the violence as crimes against humanity and war crimes.

The Prosecutor of the ICC, in conducting a preliminary inquiry into the situation in the Central African Republic after the government of the country referred itself to the

ICC in 2012, found that there is a 'reasonable basis to believe that both the Séléka and the anti-balaka groups have committed crimes against humanity and war crimes'.[172] On the issue of genocide, the Prosecutor determined that the evidence available 'is inconclusive on the question of whether the alleged crimes described in this report were committed with the requisite intent to destroy, in whole or in part, a national, ethnical racial or religious group, as such.'[173] The Commission did refer to the ICC's conclusion on the question of genocide in reaching their own finding on the existence of a campaign of genocide.[174] The Prosecutor did state that this 'conclusion is provisional and not binding for the purpose of any future investigation.'[175]

As the Prosecutor of the ICC's preliminary examination was presented before the submission of the Commission's report, the information contained in the Commission's investigation may have altered their view on the existence of a campaign of genocide. This could be important as on the basis of the evidence gathered during the preliminary inquiry and on a referral from the transitional government of the Central African Republic, the Prosecutor was authorised to open an investigation into crimes committed since 2012.[176] The findings of this investigation may mirror the ICC investigation in Darfur, where with the benefit of

[172] Office of the Prosecutor 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic' (24 September 2014) Press Release. See also Office of the Prosecutor 'Situation in the Central African Republic II: Article 53(1) Report' (24 September 2014) para. 56–216.
[173] Office of the Prosecutor 'Situation in the Central African Republic II: Article 53(1) Report' (24 September 2014) para. 220.
[174] United Nations Security Council 'The International Commission of Inquiry on the Central African Republic' (22 December 2014) UN Doc S/2014/928, para. 461.
[175] Office of the Prosecutor 'Situation in the Central African Republic II: Article 53(1) Report' (24 September 2014) para. 220.
[176] Office of the Prosecutor 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic' (24 September 2014) Press Release.

time and access to greater levels of documentation, the Prosecutor of the ICC can identify the elements of the crime.

However regardless of whether the ICC eventually finds potential evidence of genocide, the Prosecutor as well as the Commission have found evidence that indicates crimes against humanity and ethnic cleansing were perpetrated; which are not lesser crimes than genocide. The international community has the responsibility to protect populations from these crimes of international law as reinforced by the Commission.[177] Therefore a finding of genocide should not change the approach of the international community to resolving the situation in the Central African Republic. It seems uncertain that a finding of genocide would have changed the strategy of the international community towards the situation as by the time the Commission's report was presented the international community had already taken steps to respond to the violence. While the efforts to halt the violence were inadequate; states were already acting to prevent violence using a combination of diplomatic and more forceful measures and the ICC was acting to punish violations of international law. If genocide does not provoke a different response to crimes against humanity or ethnic cleansing, is there any benefit to international actors in employing the singular term in the midst of violence.

Therefore irrespective of whether genocide occurred, the complexities of the genocide label, in regards to predicting and identifying the crime, highlight the need for a unifying term such as atrocity crimes. The presence of a new name does not mean that suddenly action will be taken to respond to atrocity crimes, as the response to the evidence of crimes against humanity, war crimes, and ethnic cleansing in the Central

[177] United Nations Security Council 'The International Commission of Inquiry on the Central African Republic' (22 December 2014) UN Doc S/2014/928, para. 460.

African Republic illustrates, as Rwanda and Darfur before it, that '[d]ecisions on the prevention of widespread human rights violations remain hostage to the political will of P5 members.'[178] However the current situation is not viable as while the efforts of the international community to resolve the situation in the Central African Republic have had some successes, including the democratic election of a new government, there have been numerous setbacks, and the situation between the anti-balaka and the ex-Séléka forces remains tense and vulnerable to the perpetration of mass violence.[179] The failure to halt the violence meant that in 2017 there were further warnings about the risk of genocide from the Under Secretary-General for Humanitarian Affairs.[180] This failure to adequately address the situation indicates that a new way is needed to fulfil the international community's responsibility to protect civilians from all atrocity crimes. Removing the focus off labels and onto the prevention of and response to violations of international law, can only be beneficial to the victims of atrocities as while genocide is a significant label for victims its use does not signify action and/or accountability as illustrated by the case of the Yazidis of Sinjar.

5.5 The Destruction of the Yazidi People

The Independent International Commission of Inquiry on the Syrian Arab Republic was established by the Human Rights Council to conduct investigations into the violations of international law in Syria since 2011.[181] The Commission's mandate for the particular investigation which I will focus on in this section was to examine the events after the attack on the 3rd of August 2014 by members of the Islamic State and

[178] Ivonne Lockhart Smith, 'Conflict Management in the Central African Republic: Making Genocide Prevention Work' (2014) 23 African Security Review 178, 180.
[179] United Nations Security Council 'Report of the Secretary-General on the Central African Republic' (15 February 2018) UN Doc S/2018/125, para. 2.
[180] 'UN sees Early Warning Signs of Genocide in CAR' *Al Jazeera* (7 August 2017).
[181] United Nations General Assembly Human Rights Council Resolution S-16/1 (4 May 2011) UN Doc A/HRC/RES/S-16/1.

Al-Sham (hereafter 'ISIS') against the Yazidi group in the Sinjar region of Northern Iraq, with a particular focus on whether ISIS had perpetrated genocide.[182]

5.5(i) A Destructive Environment

The Yazidi are a 'Kurdish-speaking religious minority.'[183] There are an estimated 700,000 Yazidis located across the world, however the majority of adherents of the Yazidi faith live in the Sinjar region; the region, located close to the Iraqi-Syrian border, is predominantly comprised of the Yazidi population with a number of Arabs who are Sunni Islam also living in the region.[184] The Sinjar region was surrounded by ISIS-controlled areas in Iraq and Syria.[185] Even before the creation of ISIS, the Yazidi were on the margins of society in Iraq due to their 'relatively small numbers and their religious beliefs.'[186] The tenets of their religion, the belief in a fallen angel, have seen the Yazidi perceived as devil worshippers by Muslims and Christians.[187] These religious beliefs have led to the Yazidi being repeatedly persecuted throughout their

[182] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 1, 3, 7.
[183] Eszter Spät, 'Yezidi Identity Politics and Political Ambitions in the Wake of the ISIS Attack' (2018) 20 Journal of Balkan and Near Eastern Studies 420, 422. See also Raya Jalabi, 'Who are the Yazidis and Why is Isis Hunting Them' *The Guardian* (11 August 2014).
[184] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 1, 17–18. See also Ishaan Tharoor, 'Who are the Yazidis' *The Washington Post* (7 August 2014); Mirren Gidda, 'Everything You Need to Know about the Yazidis' *Time Magazine* (8 August 2014); Raya Jalabi, 'Who are the Yazidis and Why is Isis Hunting Them' *The Guardian* (11 August 2014).
[185] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 21.
[186] Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 121.
[187] Joshua Berlinger, 'Who are the Yazidis, and Why does ISIS want to Kill Them' *CNN* (8 August 2014); Diana Darke, 'Who, What, Why: Who are the Yazidis' *BBC* (8 August 2014); Raya Jalabi, 'Who are the Yazidis and Why is Isis Hunting Them' *The Guardian* (11 August 2014); Dana Ford and Josh Levs, '"Heroic" Mission Rescues Desperate Yazidis from ISIS' *CNN* (16 August 2014); Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 122; Hannibal Travis, 'Why was Benghazi "Saved," but Sinjar Allowed to be Lost? New Failures of Genocide Prevention, 2007–2015' (2016) 10 Genocide Studies International 139, 141; Andrea Sjøberg Aasgaard, 'Migrants, Housewives, Warriors or Sex Slaves? AQ's and the Islamic State's Perspectives on Women' (2017) 16 Connections 99, 109.

existence.[188] These religious beliefs came into conflict with the goal of ISIS in creating an Islamic caliphate.[189] ISIS regarded the Yazidi as 'theologically impure due to their diverging belief systems.'[190] The beliefs of the Yazidi made them 'legitimate targets of mass murder, forced conversion and slavery.'[191] ISIS's 'interpretation of Qur'anic principles and Islamic history' served as justification for targeting the Yazidis of Sinjar for destruction.[192]

The attack on the Sinjar region began in the early hours of the 3rd of August, with ISIS coordinating attacks on the towns and villages from its bases in Iraq and Syria.[193] The vast majority of the population fled the region, but those Yazidis remaining were forced to convert or suffered acts of repression. ISIS fighters concentrated on capturing Yazidis by setting up checkpoints and encircling villages, and the Commission estimate that thousands were captured in that way.[194] In the towns and villages across Sinjar, ISIS separated men from women and children, recalling the

[188] Ishaan Tharoor, 'Who are the Yazidis' *The Washington Post* (7 August 2014); Joshua Berlinger, 'Who are the Yazidis, and Why does ISIS want to Kill Them' *CNN* (8 August 2014); Mirren Gidda, 'Everything You Need to Know About the Yazidis' *Time Magazine* (8 August 2014); Nicky Woolf, 'In Iraq there is No Peace for Yazidis' *The Guardian* (9 August 2014); Raya Jalabi, 'Who are the Yazidis and Why is Isis Hunting Them' *The Guardian* (11 August 2014); Dana Ford and Josh Levs, '"Heroic" Mission Rescues Desperate Yazidis from ISIS' *CNN* (16 August 2014); Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 121–122; Hannibal Travis, 'Why was Benghazi "Saved," but Sinjar Allowed to be Lost? New Failures of Genocide Prevention, 2007–2015' (2016) 10 Genocide Studies International 139, 141; Eszter Spät, 'Yezidi Identity Politics and Political Ambitions in the Wake of the ISIS Attack' (2018) 20 Journal of Balkan and Near Eastern Studies 420, 422.

[189] Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 126.

[190] Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 123. See also Mirren Gidda, 'Everything You Need to Know about the Yazidis' *Time Magazine* (8 August 2014).

[191] Eszter Spät, 'Yezidi Identity Politics and Political Ambitions in the Wake of the ISIS Attack' (2018) 20 Journal of Balkan and Near Eastern Studies 420, 420. See also Ishaan Tharoor, 'Who are the Yazidis' *The Washington Post* (7 August 2014); Craig Whiteside, 'A Case for Terrorism as Genocide in an Era of Weakened States' (2015) 8 Dynamics of Asymmetric Conflict 232, 235, 236, 239.

[192] Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 123–124, 126.

[193] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 6.

[194] ibid para. 26, 29.

violence seen in Srebrenica, and perpetrated 'systematic and distinct' violations against each group.[195] Within days of the attack, reports emerged of systematic violence being perpetrated against the Yazidis including mass killings, forced conversion of religion, forced transfer of women and children into Syria, forced marriages of women to ISIS commanders, sexual slavery of women and young girls, and young boys being placed in ISIS training camps.[196] Hundreds of men were executed, if they refused to convert, while thousands of women and children were sold into sexual slavery.[197]

Those who fled the region, over 100,000 Yazidi, before the arrival of ISIS to their villages also suffered distinct violations as ISIS killed or captured many who tried to

[195] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 30–31. See also Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 130.

[196] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 2, 5. See also Martin Chulov, '40,000 Iraqis Stranded on Mountain as Isis Jihadists Threaten Death' *The Guardian* (7 August 2014); Nicky Woolf, 'In Iraq there is No Peace for Yazidis' *The Guardian* (9 August 2014); Martin Chulov, 'Yazidis Tormented by Fears for Women and Girls Kidnapped by Isis Jihadis' *The Guardian* (11 August 2014); Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 126, 128–130; Hannibal Travis, 'Why was Benghazi "Saved," but Sinjar Allowed to be Lost? New Failures of Genocide Prevention, 2007–2015' (2016) 10 Genocide Studies International 139, 139; Vian Dakhil, Aldo Zammit Borda, and Alexander RJ Murray, '"Calling ISIL Atrocities against the Yezidis by their Rightful Name": Do they Constitute the Crime of Genocide' (2017) 17 Human Rights Law Review 261, 269–277; Andrea Sjøberg Aasgaard, 'Migrants, Housewives, Warriors or Sex Slaves? AQ's and the Islamic State's Perspectives on Women' (2017) 16 Connections 99, 109; Samar El-Masri, 'Prosecuting ISIS for the Sexual Slavery of the Yazidi Women and Girls' (2018) 22 The International Journal of Human Rights 1047, 1052; Eszter Spät, 'Yezidi Identity Politics and Political Ambitions in the Wake of the ISIS Attack' (2018) 20 Journal of Balkan and Near Eastern Studies 420, 421; Pieter Omtzigt and Ewelina U Ochab, 'Bringing Daesh to Justice: What the International Community Can Do' (2019) 21 Journal of Genocide Research 71, 73.

[197] Sam Masters, 'Iraq Crisis: Starving, Desperate, but Safe from Isis on Mount Sinjar' *The Independent* (10 August 2014); Haroon Siddique, '20,000 Iraqis Besieged by Isis Escape from Mountain after US Air Strikes' *The Guardian* (10 August 2014); Raya Jalabi, 'Who are the Yazidis and Why is Isis Hunting Them' *The Guardian* (11 August 2014); Ian Johnston and Rachel Pells, 'Iraq Crisis: Iraqi Minority Says Massacre of Civilians Not Over Yet' *The Independent* (17 August 2014); Craig Whiteside, 'A Case for Terrorism as Genocide in an Era of Weakened States' (2015) 8 Dynamics of Asymmetric Conflict 232, 241–242; Andrea Sjøberg Aasgaard, 'Migrants, Housewives, Warriors or Sex Slaves? AQ's and the Islamic State's Perspectives on Women' (2017) 16 Connections 99, 109.

flee.[198] A number of Yazidi, estimated around 40,000 to 50,000, who fled made their way to Mount Sinjar where they sheltered in the upper plateau.[199] Tragically ISIS encircled the mountain and trapped tens of thousands of men, women, and children in unbearable conditions without access to food, water, and medical attention.[200] In response to the developing humanitarian crisis on Mount Sinjar, the US, French, and UK governments authorised humanitarian aid drops in the days after the attack.[201] The US conducted air strikes, at the request of the Iraqi government, beginning the 8th of

[198] Mirren Gidda, 'Everything You Need to Know About the Yazidis' *Time Magazine* (8 August 2014); Nicky Woolf, 'In Iraq there is No Peace for Yazidis' *The Guardian* (9 August 2014); Raya Jalabi, 'Who are the Yazidis and Why is Isis Hunting Them' *The Guardian* (11 August 2014); Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 126; Eszter Spät, 'Yezidi Identity Politics and Political Ambitions in the Wake of the ISIS Attack' (2018) 20 Journal of Balkan and Near Eastern Studies 420, 420.

[199] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 25, 27. See also Martin Chulov, '40,000 Iraqis Stranded on Mountain as Isis Jihadists Threaten Death' *The Guardian* (7 August 2014); Mirren Gidda, 'Everything You Need to Know About the Yazidis' *Time Magazine* (8 August 2014); Raya Jalabi, 'Who are the Yazidis and Why is Isis Hunting Them' *The Guardian* (11 August 2014); Dana Ford and Josh Levs, '"Heroic" Mission Rescues Desperate Yazidis from ISIS' *CNN* (16 August 2014); Christian Tomuschat, 'The Status of the "Islamic State" under International Law' (2015) 90 Die Friedens-Warte 223, 225; Eszter Spät, 'Yezidi Identity Politics and Political Ambitions in the Wake of the ISIS Attack' (2018) 20 Journal of Balkan and Near Eastern Studies 420, 420.

[200] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 27. See also Martin Chulov, '40,000 Iraqis Stranded on Mountain as Isis Jihadists Threaten Death' *The Guardian* (7 August 2014); Joshua Berlinger, 'Who are the Yazidis, and Why does ISIS want to Kill Them' *CNN* (8 August 2014); Mirren Gidda, 'Everything You Need to Know About the Yazidis' *Time Magazine* (8 August 2014); Nicky Woolf, 'In Iraq there is No Peace for Yazidis' *The Guardian* (9 August 2014); Sam Masters, 'Iraq Crisis: Starving, Desperate, but Safe from Isis on Mount Sinjar' *The Independent* (10 August 2014); Haroon Siddique, '20,000 Iraqis Besieged by Isis Escape from Mountain after US Air Strikes' *The Guardian* (10 August 2014); Dana Ford and Josh Levs, '"Heroic" Mission Rescues Desperate Yazidis from ISIS' *CNN* (16 August 2014); Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 126; Hannibal Travis, 'Why was Benghazi "Saved," but Sinjar Allowed to be Lost? New Failures of Genocide Prevention, 2007–2015' (2016) 10 Genocide Studies International 139, 139; Vian Dakhil, Aldo Zammit Borda, and Alexander RJ Murray, '"Calling ISIL Atrocities against the Yezidis by their Rightful Name": Do they Constitute the Crime of Genocide' (2017) 17 Human Rights Law Review 261, 271; Eszter Spät, 'Yezidi Identity Politics and Political Ambitions in the Wake of the ISIS Attack' (2018) 20 Journal of Balkan and Near Eastern Studies 420, 420–421.

[201] Dan Roberts, Martin Chulov, and Julian Borger, 'Obama Authorises Air Strikes on Isis to Help Iraqis Besieged on Mountain' *The Guardian* (8 August 2014); Sam Masters, 'Iraq Crisis: Starving, Desperate, but Safe from Isis on Mount Sinjar' *The Independent* (10 August 2014); Haroon Siddique, '20,000 Iraqis Besieged by Isis Escape from Mountain after US Air Strikes' *The Guardian* (10 August 2014); Spencer Ackerman, Kim Willsher, and Haroon Siddique, 'US Air Strikes Hit Isis Again as Efforts Intensify to Evacuate Yazidi Refugees' *The Guardian* (11 August 2014); Hannibal Travis, 'Why was Benghazi "Saved," but Sinjar Allowed to be Lost? New Failures of Genocide Prevention, 2007–2015' (2016) 10 Genocide Studies International 139, 139–140.

August around Mount Sinjar to help relieve the suffering population.[202] Obama stated that he authorised these air strikes due to the threat of genocide.[203] Despite these air strikes, hundreds died on Mount Sinjar before the Iraqi and Syrian Kurdish forces created a corridor for the Yazidis to flee the mountain.[204]

The effects of the attack on the Yazidi is plain to see, as the 400,000 Yazidis who lived in the Sinjar region have 'all been displaced, captured, or killed.'[205] Whether the atrocities perpetrated against the Yazidis constituted the crime of genocide, amongst other violations of international law, is what the Commission of Inquiry on the Syrian Arab Republic sought to answer.

5.5(ii) The Critical Element

In conducting their inquiry, the Commission interviewed 'survivors, religious leaders, smugglers, activists, lawyers, medical personnel, and journalists' and relied upon documentary evidence from 'statements, photographs, satellite images, and reports' as well as material produced by ISIS themselves to document the violations of

[202] Mirren Gidda, 'Everything You Need to Know About the Yazidis' *Time Magazine* (8 August 2014); Haroon Siddique, '20,000 Iraqis Besieged by Isis Escape from Mountain after US Air Strikes' *The Guardian* (10 August 2014); Spencer Ackerman, Kim Willsher, and Haroon Siddique, 'US Air Strikes Hit Isis Again as Efforts Intensify to Evacuate Yazidi Refugees' *The Guardian* (11 August 2014); Dana Ford and Josh Levs, '"Heroic" Mission Rescues Desperate Yazidis from ISIS' *CNN* (16 August 2014); Kristina Daugirdas and Julian Davis Mortenson, 'Contemporary Practice of the United States Relating to International Law' (2015) 109 The American Journal of International Law 174, 202, 206; Jason Ralph and James Souter, 'A Special Responsibility to Protect: The UK, Australia, and the Rise of the Islamic State' (2015) 91 International Affairs 709, 709.

[203] Dan Roberts, Martin Chulov, and Julian Borger, 'Obama Authorises Air Strikes on Isis to Help Iraqis Besieged on Mountain' *The Guardian* (8 August 2014); Martin Pengelly, 'Obama: Air Strikes and Aid Drops will Prevent "Act of Genocide"' *The Guardian* (9 August 2014).

[204] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 28. See also Nicky Woolf, 'In Iraq there is No Peace for Yazidis' *The Guardian* (9 August 2014); Haroon Siddique, '20,000 Iraqis Besieged by Isis Escape from Mountain after US Air Strikes' *The Guardian* (10 August 2014); Ishaan Tharoor, 'A U.S.-designated Terrorist Group is Saving Yazidis and Battling the Islamic State' *The Washington Post* (11 August 2014); Eszter Spät, 'Yezidi Identity Politics and Political Ambitions in the Wake of the ISIS Attack' (2018) 20 Journal of Balkan and Near Eastern Studies 420, 421.

[205] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 175.

international law.[206] In addressing the crime of genocide, interestingly the Commission refers to how genocide as viewed in the 'public imagination' is different than the legal definition.[207] The Commission states that genocide is often equated with the mass extermination of civilians without any reference to the specific intent to destroy a group.[208] The Commission reinforces that the specific intent to destroy is the key component of the crime of genocide.[209]

Before examining whether the intent to destroy could be inferred from the actions and statements, the Commission addressed the other elements of the crime of genocide. The Commission, following the jurisprudence of the ICTR and ICTY, used a combination of objective and subjective elements to determine that the Yazidis were a protected religious group.[210] Objectively the Yazidi religion has existed for thousands of years and while it incorporates elements of other religions it has its own distinct traditions.[211] Members of the Yazidis who were interviewed by the Commission also self-identified themselves as a 'separate religious denomination'.[212] Furthermore ISIS subjectively identified the Yazidis as a distinct religious group as it used the religious beliefs of the Yazidis as justification to abuse and attack the Yazidis.[213]

In documenting the acts under Article II of the Genocide Convention perpetrated against the Yazidi, the finding that the act of killing had been committed in the attack was apparent from the evidence provided by witnesses to the initial attack and the

[206] ibid para. 4.
[207] ibid para. 13.
[208] ibid para. 13.
[209] ibid para. 13.
[210] ibid para. 103–105.
[211] ibid para. 103.
[212] ibid para. 103.
[213] ibid para. 104.

subsequent violence imposed on the Yazidis.[214] The Commission considered that evidence of rape, sexual violence, sexual slavery, enslavement, torture, forcible transfer, indoctrination, and inhuman and degrading treatment amounted to acts causing both physical and mental harm.[215] The Commission found that the perpetration of these acts and the forced separation of families had a profound effect on the mental health of the victim's/victims' family as they were forced to either bear witness to crimes committed or suffer the uncertainty of the fate of family members after being forcible transferred.[216]

The Commission determined that ISIS had committed and was presently committing the act of deliberately inflicting conditions of life calculated to bring about the physical destruction of the Yazidis.[217] They reached this decision after examining the evidence of ISIS encircling and besieging the Yazidis who fled into the upper slopes of Mount Sinjar in the aftermath of the attack on the 3rd of August.[218] ISIS deprived the Yazidis access to food, water, and medical care, and also prevented planes from delivering aid packages and attacked rescue helicopters which sought to evacuate those in need of medical attention.[219] Furthermore, the Commission determined that ISIS deliberately inflicted conditions of life calculated to bring about the destruction of women and girls that were enslaved and subjected to sexual violence, as they were deprived of food, water, and medical care while in captivity and servitude.[220]

[214] ibid para. 106–111.
[215] ibid para. 112–136.
[216] ibid para. 129, 130, 132, 134–136.
[217] ibid para. 137–141.
[218] ibid para. 138.
[219] ibid para. 138.
[220] ibid para. 140.

The Commission concluded that ISIS had imposed and was still imposing measures intended to prevent births within the Yazidis.[221] The Commission stated that the acts of 'rape; sexual mutilation; the practice of sterilisation; forced birth control; separation of the sexes; prohibition of marriages; impregnation of a woman to deprive group identity; and mental trauma resulting in a reluctance to procreate' were committed with the intent to prevent births.[222] The Commission determined that ISIS had committed and was committing the crime of forcibly transferring children from the Yazidi group.[223] When young girls reached the age of nine, they were forcibly taken from their mother and sold as sex slaves.[224] Young boys who turn seven are forcibly removed from their mothers and taken to training camps to instruct them how to fight and to convert them to Islam.[225] This forced transfer seeks to destroy the children's identity as a Yazidi and prevent them from practising their religion.[226] The Commission looked at the issue of whether destruction of cultural property and heritage could amount to genocide as evidence was presented that Yazidi temples and shrines were destroyed in the aftermath of the attack.[227] Referring to the case law of the ICTY and ICJ, the Commission held that the destruction of cultural property is evidence of an intent to destroy.[228]

In examining the genocidal intent of ISIS, the Commission referring to the approach developed in the case law of the ad hoc tribunals, inferred the intent to destroy from

[221] ibid para. 142–146.
[222] ibid para. 142.
[223] ibid para. 147–149.
[224] ibid para. 82, 147.
[225] ibid para. 82, 92–95, 147.
[226] ibid para. 96, 148.
[227] ibid para. 98.
[228] ibid para. 157. Citing *Prosecutor v Krstić* (Appeals Judgment) IT-98-33-A (19 April 2004) [25]–[26]; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, [344].

the conduct, propaganda, and public statements of ISIS.[229] The Commission believed that the acts perpetrated against individual Yazidis was part of an 'overall objective' to destroy the Yazidi identity which would lead to the destruction of the Yazidis themselves.[230] The Commission determined that the matter of ISIS fighters possibly being motivated by 'territorial control' or 'sexual gratification' from the enslavement of Yazidi women and girls did not prevent the ISIS fighters also possessing the intent to destroy the Yazidis in their actions.[231] The aim was to destroy the Yazidi identity by death, forced conversions, or forced transfers.[232]

The Commission refer to the obvious 'organisational effort' which was put in place to align the actions of the ISIS fighters with the ideological position of ISIS with regard to the treatment of the Yazidis when they were captured so as to create a uniform approach to the attack and its aftermath.[233] Propaganda material released by ISIS, including its English language magazine *Dabiq*, was analysed to show that ISIS had developed an ideological approach to treating the Yazidis before their attack.[234] The 'religious interpretation' provided by Islamic State scholars guided the actions taken by the ISIS fighters when they captured Yazidis and their treatment of Yazidis in captivity and servitude.[235] The ideology of 'ISIS-interpreted Islam' was present in the interactions ISIS fighters had with the Yazidis, with Yazidi women and girls being labelled as *kuffar* (non-believers) when they were being held as slaves.[236] The actions taken by ISIS fighters of killing males and adolescent boys who did not convert,

[229] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 151–152, 153–155, 163.
[230] ibid para. 164, 204.
[231] ibid para. 158.
[232] ibid para. 159.
[233] ibid para. 156.
[234] ibid para. 153, 155.
[235] ibid para. 154–155.
[236] ibid para. 160.

enslaving and sexual slavery of women and girls, and the forced conversion and indoctrination of boys into the ranks of ISIS all 'adhered seamlessly to the religious mandates set out by its "scholars" concerning how to treat Yazidi captives.'[237]

The Commission found that ISIS fighters concentrated their attention exclusively on the Yazidis, by virtue of them being Yazidi.[238] The other religious communities in the region did not suffer the level of destruction faced by the Yazidis.[239] In the Sinjar region, Arab civilians were allowed to remain living in their villages.[240] The Christian community, in ISIS-controlled territories, live a difficult and precarious existence but they are allowed to exist as Christians in the Islamic State as long as they pay a tax.[241] The Yazidis are not afforded these opportunities to exist as group inside the Islamic State as the existence of the Yazidis is incompatible with ISIS ideology.[242]

After examining the evidence of the genocidal acts and the indicators of genocidal intent, the Commission concluded that 'ISIS has committed, and is committing, the prohibited acts with the intent to destroy, in whole or in part, the Yazidis of Sinjar, and has, therefore, committed the crime of genocide.'[243] The findings of this inquiry into the commission of genocide illustrate the importance of the intent to destroy in the definition of the crime of genocide. Absent evidence of an intent to destroy underlying the action of a state or organisation, a commission of inquiry will not have reasonable grounds to conclude that genocide has been perpetrated. The findings of this inquiry shows that it is not impossible to apply the legal definition of genocide to

[237] ibid para. 155, 160.
[238] ibid para. 159.
[239] ibid para. 162.
[240] ibid para. 162.
[241] ibid para. 162.
[242] ibid para. 162.
[243] ibid para. 165, 202.

ongoing violence; nevertheless the circumstances of this situation are quite distinct from other violent situations which the UN has investigated as this is one of the most clear cut cases of genocide in history. Indeed the Commission acknowledged that there was no attempt by the Islamic State to 'hide or reframe its conduct'; rather the Islamic State openly embraced a genocidal ideology.[244]

The intent to destroy was plainly evident from the propaganda, their online videos and their magazine, *Dabiq*, and from the scale of atrocities.[245] The intent to destroy was manifest in the violence as the attack on Sinjar and the perpetration of the abuses highlighted a high level of planning and organisation, in particular the 'institutionalisation of the sex slave trade'.[246] Statements and articles within *Dabiq*, in which ISIS employed religious doctrine to contend that ISIS fighters had a religious duty to enslave the Yazidi women and kill the Yazidi men so as to create an Islamic state, showed clearly that the intent behind these actions was the destruction of the Yazidi.[247] Seldom will a perpetrator be as open and explicit with their intent to destroy a group as the Islamic State is, rather it will depend on an inquiry divining the intent to destroy in the actions of an actor who takes steps to mask their intent.

[244] ibid para. 4.
[245] Pieter Omtzigt and Ewelina U Ochab, 'Bringing Daesh to Justice: What the International Community Can Do' (2019) 21 Journal of Genocide Research 71, 74.
[246] Samar El-Masri, 'Prosecuting ISIS for the Sexual Slavery of the Yazidi Women and Girls' (2018) 22 The International Journal of Human Rights 1047, 1047, 1052–1053. See also Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 125, 128, 130.
[247] Fazil Moradi and Kjell Anderson, 'The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations' (2016) 10 Genocide Studies International 121, 131; Vian Dakhil, Aldo Zammit Borda, and Alexander RJ Murray, '"Calling ISIL Atrocities against the Yezidis by their Rightful Name": Do they Constitute the Crime of Genocide' (2017) 17 Human Rights Law Review 261, 273, 278–280; Andrea Sjøberg Aasgaard, 'Migrants, Housewives, Warriors or Sex Slaves? AQ's and the Islamic State's Perspectives on Women' (2017) 16 Connections 99, 109–111; Samar El-Masri, 'Prosecuting ISIS for the Sexual Slavery of the Yazidi Women and Girls' (2018) 22 The International Journal of Human Rights 1047, 1053.

If the crime of genocide is potentially unidentifiable in cases of genocide due to the difficulty of ascertaining the intent to destroy, is there any benefit for commissions of inquiry in seeking to identify the crime in the midst of violence? Does a finding of genocide spark a new or different approach by states to addressing the crimes of a perpetrator, in this case ISIS?

5.5(iii) Consequences of a Genocide Finding

After concluding that genocide may have been perpetrated, the Commission recommended that the UN Security Council should refer the situation to the ICC or to an ad hoc tribunal.[248] The Commission recommended that the UN Security Council should consider utilising measures under Chapter VII to respond to the threat which ISIS poses to international peace and security.[249] The Commission also appealed to states which are signatories to the Genocide Convention, to act under Article VIII of the Convention and call upon the UN Security Council to take action under the Charter with the aim of preventing and suppressing genocide.[250]

For a long time before the Commission released their report, the UN Security Council and individual states had been acting to halt the threat of ISIS across the world, as can be seen by the US airstrikes on Mount Sinjar after the attack of August 2014. However the US abandoned efforts on Mount Sinjar, despite people still being trapped and ISIS remained in control of the territory.[251] The response to ISIS was constrained as '[n]o one committed adequate resources to the defeat of ISIS' after the attack in Sinjar.[252]

[248] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 207.
[249] ibid para. 207.
[250] ibid para. 212.
[251] Hannibal Travis, 'Why was Benghazi "Saved," but Sinjar Allowed to be Lost? New Failures of Genocide Prevention, 2007–2015' (2016) 10 Genocide Studies International 139, 152.
[252] ibid 146.

When the violence of ISIS spread to Europe with terrorist attacks this prompted a response as Australia, Belgium, Canada, France, the Netherlands, the UK, and the US all conducted air strikes on ISIS positions in Iraq, with the support of the Iraqi government; while the US also 'extended the campaign against ISIS into Syria.'[253] In confronting ISIS, the international community is utilising a multi-layered approach through military action, sanctions aimed at stopping the flow of money and arms, and measures aimed at stopping the recruitment of fighters.[254] Despite the international efforts to combat ISIS, the Independent International Commission of Inquiry on the Syrian Arab Republic stated, on the third anniversary of the attack in 2017, that the genocide against the Yazidi was still 'on-going and remains largely unaddressed'.[255]

Alongside the measures aimed at preventing the violence, actors within the international community are seeking to ensure accountability and justice for the victims of ISIS. While the threat of prosecutions may not deter ISIS fighters from committing atrocities as ISIS fighters are willing to give their life for their cause, steps are being taken to ensure that these actors cannot avoid justice.[256] Even though a draft UN Security Council resolution to refer the situation in Syria to the ICC was vetoed in 2014 by China and Russia, the UN Security Council passed a resolution in 2017, after the request of the Iraqi government, establishing the Iraq Investigative Team which would support the Iraqi government in collecting and preserving evidence and

[253] Jason Ralph and James Souter, 'A Special Responsibility to Protect: The UK, Australia, and the Rise of the Islamic State' (2015) 91 International Affairs 709, 709.
[254] United Nations Security Council 'Report of the Secretary-General on the Threat Posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat' (29 January 2016) UN Doc S/2016/92.
[255] United Nations Office of the High Commissioner for Human Rights 'Commission of Inquiry on Syria Calls for Justice on the Occasion of the Third Anniversary of ISIL's Attack on the Yazidis' (3 August 2017) Press Release.
[256] Annalise Lekas, '#ISIS: The Largest Threat to World Peace Trending Now' (2015) 30 Emory International Law Review 313, 347.

assist in the prosecution of ISIS fighters in Iraq and abroad.[257] Prior to this and with the failure of the UN Security Council to act, the UN General Assembly established the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 in 2017.[258] This body would collect evidence of violations of international law and assist states with future prosecutions by preparing files.[259]

The Commission for International Justice and Accountability, a NGO supported by the UK, the US, the EU, and other international partners, is another key actor documenting crimes on the ground for use in prosecution. Originally conceived as an idea by the UK government to train Syrians in documenting evidence of violations that could be used in future prosecutions from 2011 onwards, it has developed into an organisation that includes Syrian and Iraqi investigators and which has worked alongside the Iraq Investigative Team and the International, Impartial and Independent

[257] United Nations Security Council 'Draft Resolution' (22 May 2014) UN Doc S/2014/348; United Nations Security Council Resolution 2379 (21 September 2017) UN Doc S/RES/2379. See also Zachary D Kaufman, 'The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations' (2018) 16 Journal of International Criminal Justice 93, 94; Melinda Rankin, 'The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability (CIJA)' (2018) 20 Journal of Genocide Research 392, 394; Beth Van Schaack, 'The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide' (2018) 16 Journal of International Criminal Justice 113, 114–115; Pieter Omtzigt and Ewelina U Ochab, 'Bringing Daesh to Justice: What the International Community Can Do' (2019) 21 Journal of Genocide Research 71, 80–81.

[258] United Nations General Assembly Resolution 71/248 (11 January 2017) UN Doc A/RES/71/248. See also Christian Wenaweser and James Cockayne, 'Justice for Syria: The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice' (2017) 15 Journal of International Criminal Justice 211, 212; Zachary D Kaufman, 'The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations' (2018) 16 Journal of International Criminal Justice 93, 96; Pieter Omtzigt and Ewelina U Ochab, 'Bringing Daesh to Justice: What the International Community Can Do' (2019) 21 Journal of Genocide Research 71, 80.

[259] United Nations General Assembly Resolution 71/248 (11 January 2017) UN Doc A/RES/71/248. See also Christian Wenaweser and James Cockayne, 'Justice for Syria: The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice' (2017) 15 Journal of International Criminal Justice 211, 214.

Mechanism in collecting evidence of atrocities including Sinjar.[260] These developments are a promising but slow move towards justice and accountability.

However with the Iraq Investigative Team only focussing on the crimes of ISIS while excluding the myriad of crimes committed by both state and non-state actors in Iraq, Janet Benshoof, the President of the NGO the Global Justice Center, stated that the creation of the Iraq Investigative Team 'reeks of victor's justice'.[261] This reflects the nature of international justice in a world of political influence as illustrated in Chapter Three. The status of ISIS as an international pariah means that it is a little less complicated pursuing accountability for the crimes committed by ISIS than it is for addressing the other violators of international law in Iraq and Syria due to the competing interests of the Permanent Five of the UN Security Council. With the international environment being more palatable to addressing the crimes of ISIS; this may have translated into the findings of the Commission on the question of genocide.

The Commission's conclusion on the existence of genocide do raise a number of questions on the elements of genocide, and whether the Commission stretched the definition of genocide so as to apply it to the crimes committed. For instance there was not a massive number of victims of the attack on Sinjar, it was estimated that less than 1,000 were killed and a couple of thousand were forcibly transferred to ISIS territory, in comparison to widespread genocides such as the Holocaust and Rwanda. However with regard to the number of victims, similar to the approach of the ICTY to

[260] Melinda Rankin, 'The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability (CIJA)' (2018) 20 Journal of Genocide Research 392, 396–397, 399–409.
[261] Global Justice Center, 'UN Security Council Adopts Resolution – One Step Towards Justice for the Yazidi Genocide' (21 September 2017) Press Release. See also Zachary D Kaufman, 'The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations' (2018) 16 Journal of International Criminal Justice 93, 104.

cases concerning Srebrenica, the Commission examined the impact of these acts on the wider Yazidi population.[262] In addressing the perpetration of genocide the Commission acknowledges that the genocide has not 'primarily been accomplished through killings' but '[r]ather ISIS seeks to destroy the Yazidis in multiple ways, as envisaged by the drafters of the 1948 Genocide Convention.'[263] The Commission looked beyond the act of killing to examine how acts such as sexual slavery, forcible transfer, and forced conversions, which were key elements of ISIS's strategy for destroying the Yazidi, constituted crimes of genocide as these acts targeted the Yazidis identity.[264]

While this bleeds into the concept of cultural genocide as it is targeted at a group's identity, the elements of the crime of genocide have always had a close relationship with cultural genocide with elements such as the forced transfer of children, deliberately inflicting conditions of life, mental trauma, and the prevention of births concerned with the social existence of a group and how a group can sustain itself.[265] The Commission in applying the Convention to the case of ISIS is giving life to the various provisions of Article II rather than stretching the definition of genocide. Notwithstanding this, the Commission's approach to examining the different elements of the crime to find the existence of a genocide campaign may have been made easier by the international response to the crimes of ISIS.

In addressing the crimes of ISIS, it was less complex for the Commission to apply the genocide label to situation, as there was acceptance within sections of the international

[262] United Nations General Assembly Human Rights Council '"They Came to Destroy": ISIS Crimes against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2, para. 175–187.
[263] ibid para. 202.
[264] ibid para. 202.
[265] See Elisa Novic, 'Physical-Biological or Socio-Cultural "Destruction" in Genocide? Unravelling the Legal Underpinnings of Conflicting Interpretations' (2015) 17 Journal of Genocide Research 63, 67–69.

community that genocide had been perpetrated against the Yazidi population. The US State Department, the US House of Representatives, the Council of Europe, the European Parliament, the UK House of Commons, the Canadian House of Commons, the French Senate and National Assembly, the Australian House of Representatives, and the Iraqi and Kurdish regional governments have all labelled the violence as genocide.[266] In employing the genocide label, these bodies did not undertake complex legal examinations of the crime rather they used the genocide label to legitimise their military response to ISIS.

These bodies also faced domestic and international pressure to label the violence as genocide from civil society groups and individuals who were demanding justice and accountability for the Yazidi.[267] The treatment of the Yazidi, particularly the sexual violence and slavery suffered by the women, 'triggered significant outcry' amongst civil society groups.[268] The genocide label was also extremely important for the Yazidi, as it would help them 'understand what had happened to them', while also giving the Yazidi recognition as a distinct group and using the word genocide would guarantee the safety of the Yazidi.[269] Vian Dakhil, a Yazidi Member of the Iraqi Council of Representatives, Aldo Zammit Borda, and Alexander Murray contend that the designation of the situation of genocide is important 'both from the perspective of

[266] Zachary D Kaufman, 'The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations' (2018) 16 Journal of International Criminal Justice 93, 95; Pieter Omtzigt and Ewelina U Ochab, 'Bringing Daesh to Justice: What the International Community Can Do' (2019) 21 Journal of Genocide Research 71, 72.
[267] Beth Van Schaack, 'The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide' (2018) 16 Journal of International Criminal Justice 113, 116.
[268] Mahmoud Monshipouri, Claude E Welch Jr, and Khashayar Nikasmrad, 'Protecting Human Rights in the Era of Uncertainty: How not to Lose the War against ISIS' (2017) 16 Journal of Human Rights 1, 5.
[269] Amelia Goldberg, 'Lessons from the ICC: The State of International Humanitarian Law – An Interview with Professor Luis Gabriel Moreno-Ocampo' (2017) 38 Harvard Law Review 54, 56; Eszter Spät, 'Yezidi Identity Politics and Political Ambitions in the Wake of the ISIS Attack' (2018) 20 Journal of Balkan and Near Eastern Studies 420, 429.

the victims and for the legal–historical record.'[270] While the genocide label has proved important for the victims, it has not ensured justice or accountability yet for the Yazidi of Sinjar.

The strong reaction of the international community and civil society to the atrocities suffered by the Yazidis can help explain why the Commission came to its conclusion on the question of genocide. As the international community was not engaged or interested in peace talks with ISIS, there was no risk that a genocide finding would complicate the resolution of the situation. However this does not mean that genocide was not perpetrated, as the findings of the Commission substantiate the existence of a genocidal campaign, rather it shows that genocide can be identified when states possess the political will. Therefore the application of the genocide label to this situation proved to be relatively uncomplicated due to the clear evidence of an intent to destroy and the lack of international opposition to a finding of genocide.

However was the genocide label important for the response? Pieter Omtzigt and Ewelina Ochab argue that an interim determination of genocide, pending a legal determination, by a state is important as unless it is determined then states will not take the action to prevent it.[271] To address this question and contention, it is beneficial to examine if the Commission's conclusion on the issue of genocide altered the strategy of the international community to addressing the problem of ISIS. While there is a not a consistent approach to confront the crimes of ISIS within the international community, due to the divergent interests of states, there is strong action being continually taken against ISIS over the past number of years due to their threat

[270] Vian Dakhil, Aldo Zammit Borda, and Alexander RJ Murray, '"Calling ISIL Atrocities against the Yezidis by their Rightful Name": Do they Constitute the Crime of Genocide' (2017) 17 Human Rights Law Review 261, 264.
[271] Pieter Omtzigt and Ewelina U Ochab, 'Bringing Daesh to Justice: What the International Community Can Do' (2019) 21 Journal of Genocide Research 71, 74–75.

to international peace and security. It is doubtful that the Commission's finding had a significant impact on the different international response to ISIS. It is unlikely that if the Commission had instead concluded that ISIS was committing ethnic cleansing or crimes against humanity that individual or a collection of states would have altered their strategies for confronting ISIS. Therefore while the genocide label was significant for characterising the violence against the Yazidis, it did not change how the international community perceived how to address the situation.

While the work of the Independent International Commission of Inquiry on the Syrian Arab Republic, along with the International Commission of Inquiry on the Central African Republic is important for documenting violations of international law, if their reports are not altering the approach of the international community, have these commissions improved the situation for the victims of these crimes? The continued violence in Iraq, Syria, and the Central African Republic illustrates that regardless of whether the labels of genocide, crimes against humanity, war crimes, or ethnic cleansing are applied to the situation, these situations will not be resolved by a finding or determination of a violation of international law in itself. Rather the resolution of such a situation requires international and regional actors committed to taking action, whether diplomatic or more forceful measures, to prevent and halt these crimes of international law.

5.6 The Complexity of Confronting Genocide

The case studies of the commissions of inquiry presented in this chapter have emphasised that proving the intent to destroy is the critical barrier to be overcome in reaching a conclusion on the perpetration of the crime of genocide. The findings of these investigations have highlighted that widespread death and destruction against a targeted group does not constitute the crime of genocide absent an intent to destroy a

group underlying these acts. It is this ingredient of the crime which determines whether a situation can be labelled genocide. The findings of the inquiries have illustrated that identifying this intent to destroy in the midst of violence is a difficult undertaking. The case of the Islamic State is unusual as rarely will a perpetrator be as transparent with the intent underlying their actions. Clear-cut cases of genocide are not the norm, rather investigators will have to tackle the tricky task of inferring the intent to destroy from a multifaceted situation comprising multiple actors and numerous violations of international law.

The complexity of identifying the intent to destroy element of the crime, as highlighted by the respective studies, illustrates the indeterminate nature of the definition of genocide. Despite the existence of the Genocide Convention, genocide does not have a precise legal meaning. Genocide is a 'contested concept: there is much disagreement about what qualifies for the term'; the word genocide can mean different things to different people with some associating genocide with large scale crimes as witnessed in the Holocaust and Rwanda, and others applying the genocide label to situations that differ in scope and magnitude.[272] These situations may not be any less deserving of the genocide label as there is uncertainty over which elements fall under the definition of genocide. While the Convention may spell out the acts of genocide, and the interpretation of the international courts have illustrated which elements are and are not included under the provisions of the Convention, 'there will always be some indeterminacy of meaning at the edges of the definition.'[273] This can be observed by examining how the different investigations approached the act of forcible transfer with the US investigation in Darfur and the Independent International Commission of

[272] Scott Straus, 'Darfur and the Genocide Debate' (2005) 84 Foreign Affairs 123, 132.
[273] Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 31–32.

Inquiry on the Syrian Arab Republic finding that the forcible transfer of population is evidence of an intent to destroy. In contrast the International Commission of Inquiry on Darfur and the International Commission of Inquiry on the Central African Republic concluding that forcible transfer was evidence of a campaign of ethnic cleansing and crimes against humanity.

Case studies highlight the indeterminate nature of genocide, as the meaning of genocide and the response to the crime can vary between which actors apply the genocide label. For example in Darfur, the Bush administration stated that a finding of genocide only necessitated a referral to the UN Security Council, while in response to the violence in Sinjar, Obama asserted that the threat of genocide required military action in response. The 'generality of legal language' within the Convention on prevention and response was 'used to buttress particular policies or preferences.'[274] The provisions of the Convention can be used to justify inaction due to the lack of clarity around preventing genocide and the difficulties with identifying genocide due to ambiguous provisions.

The ambiguity surrounding the elements of the crime of genocide and the response to genocide reflects international law as the language of international law is indeterminate.[275] This '[i]ndeterminacy of language is one reason' why law 'can never be completely clear and certain.'[276] However this indeterminacy in international law is not by accident, it was a deliberate choice by those who drafted treaties and

[274] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 610.
[275] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 38, 61; Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 31–32.
[276] Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 33.

conventions. Without a level of indeterminacy in applying international law, states would never agree to the acceptance of treaties and conventions.[277] As highlighted in Chapter Two, the provisions of the Genocide Convention were left deliberately vague by international actors to ensure widespread acceptance and adoption of the principles of preventing and punishing genocide.

However it is not just language and words that are indeterminate, it is the legal system and international law itself that are indeterminate.[278] The response of actors to a question or issue of international law is governed not only by 'international law' but by 'political, moral, social' contexts.[279] This means that the application of law, by a judicial body, commission of inquiry, or state, in a given situation can never be truly objective as there will always be a subjective choice.[280] There will always be discretion in the application of law as the '[a]ssessment of factual evidence can 'never' be 'politically neutral.'[281] Therefore whether a situation is regarded as genocide is dependent on the views of those applying the Genocide Convention, rather than a strict application of the law. This indeterminacy can be observed in the response to Darfur, as despite the US and UN inquiries examining similar facts, they arrived at different conclusions on the questions of genocide. This was because they were not strictly applying the Genocide Convention in a vacuum, rather there were divergent political interests in play.

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[277] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 591.
[278] ibid 62, 590.
[279] Sahib Singh, 'Koskenniemi's Images of the International Lawyer' (2016) 29 Leiden Journal of International Law 699, 703.
[280] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 342, 596; John Haskell, 'From Apology to Utopia's Conditions of Possibility' (2016) 29 Leiden Journal of International Law 667, 669.
[281] Alex J Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 20 Ethics & International Affairs 143, 149. See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 196, 593.

The indeterminacy of law does mean that there is no consistent interpretation of the Genocide Convention, as there will always be elements of genocide that fall at the margins of the crime, and that there is no standard response to genocide, as states can advocate or adopt different approaches or strategies for preventing or punishing genocide depending on the context of the situation. This is the nature of international law though; genocide will always be affected by external realities. The indeterminate nature of genocide along with the complex issues of identifying and determining genocide in the midst of violence outlined in this chapter is the reason why this thesis is contending that commissions of inquiry, mandated by states or by organs of the UN, should abstain from making a finding on the question of genocide or other international crimes such as crimes against humanity and ethnic cleansing. These commissions of inquiry should instead collect evidence of violations of international law, which can be used by the ICC or international tribunals to make a determination on which international crimes has been perpetrated.

There are certainly drawbacks from refraining on making a conclusion, even an interim one, on the crime of genocide in the midst of violence as the process of determining genocide through commissions of inquiries and international criminal courts is a long and arduous task, and it could be many years down the line before a determination can be made. In a time when decisive action is needed to respond to genocide, these processes can be too slow. There is also the difficultly that each new case of genocide requires the same level of detailed examination of the evidence.[282]

Notwithstanding the potential faults in reserving a definitive conclusion on genocide, deferring an inquiry would eliminate the difficulty of attempting to apply the Genocide

[282] Kenneth J Campbell, *Genocide and the Global Village* (Palgrave 2001) 24–25.

Convention's flawed definition of genocide in the midst of violence and instead ensure that the identification of the crime of genocide is determined after a careful and thorough examination of evidence. Furthermore refraining from characterising a situation as genocide would remove the potential difficulties which arise after a determination of genocide which affect the resolution of a situation such as an accused state withdrawing from peace negotiations and a lack of regional and international support for a coordinated response. If the present situation persists, the international community will continue to both struggle to identify genocide in the midst of bloody violence and take action in response to a finding of genocide which will bring us no closer to transforming the commitment of 'Never Again' into a reality.

5.7 Conclusion

The discussion of the complexities involved in identifying and determining genocide in the case studies of the commissions of inquiry investigations and the international reaction to situations potentially involving genocidal violence further highlights the issues that have been pinpointed throughout this thesis in relation to the utility of the genocide label as a preventative research. This chapter has shown that while elements of genocide may be identifiable in the midst of violence, it is complex to identify the intent to destroy element, and even if this element is identifiable it does not ensure there will be an effective response. The research has highlighted that the response to violence is not dictated by the label applied to characterise the violence, rather political will and state interests will guide the response of states. Therefore the central argument of this chapter is that the fact that the label applied to a situation will not prompt a response combined with the complexity of identifying the different elements of the crime in the midst of violence means that the genocide label is not a useful term to be employed in the prevention of violence. Rather as argued in this chapter, and

throughout the research the term atrocity crimes should be employed to label violence so that the focus on prevention can be on the response and not a flawed label that could provide an impediment to action.

The next chapter will advance this discussion in more detail by examining two ongoing situations in Burundi and South Sudan which could potentially involve the perpetration of the crime of genocide. The benefits and disadvantages of labelling these situations as genocide, while violence continues to rage on in these countries will be addressed with reference to the contention of this thesis that the determination of genocide should be reserved until after a situation has ended and a competent international court or tribunal has time to weigh up the evidence.

CHAPTER SIX: IN THE MIDST OF BLOODSHED

6.1 Introduction

The discussions of genocide in the preceding chapters in the case law and case studies of accepted and claimed cases of genocide has led to this chapter in which the three core strands of this thesis will be interwoven so as to explore the complexities surrounding applying, defining, determining, and identifying the crime of genocide in the midst of two ongoing situations. While the world's attention has been largely focussed in recent years on addressing or resolving the situations in Syria, Myanmar, and North Korea, two situations have been slowly bubbling away under the surface in the heart of Africa. The violence that has developed in Burundi and South Sudan over the last few years has scarcely received any coverage in the international media, despite the significant humanitarian impact of the respective situations. There has been widespread acts of violence and repression directed against civilians which has resulted in a number of casualties and the substantial displacement of segments of the population in both countries. In the midst of the violence that has engulfed these two countries, the word genocide has been referred to sporadically to either describe the violence in Burundi and South Sudan or to warn of the likelihood that the violence could develop along genocidal lines in the respective countries.

The various references to genocide in these two situations illustrate some of the complexities identified with the crime of genocide outlined so far in this study including the difficulty of predicting and identifying genocide and the value of the genocide label as a preventative term. In analysing these two case studies, the chapter will examine the benefits of the atrocity crimes label to remedy the apparent and perceived faults with the genocide label so as to offer a term that is more useful for those who seek a response to violence and for those who seek justice for victims. To

start examining the utility of the two labels as a means of preventing and responding to potential genocidal violence, the thesis will proceed with an examination of the discussions and references to genocide in the respective situations.

6.2 Burundi on the Brink

Burundi, similar to its neighbour to the north, Rwanda, has struggled in the aftermath of independence to transition to a stable state free from conflict and bloodshed. Burundi has been in a near constant state of violence since it gained independence in 1962, as a destructive power struggle between two ethnic groups has frequently descended into armed clashes which have resulted in mass civilian casualties.[1] The latest episode of political strife to grip Burundi unfolded over the course of 2015, due to controversy surrounding the presidential election. The rising levels of repression and violence led to a number of claims that genocide could be perpetrated. With the forewarnings of genocide in Burundi is it possible to identify indicators of genocide present in the violence since 2015? Are there warning signs throughout the history of Burundi that would point towards the perpetration of genocide?

6.2(i) A History of Hostility

The ethnic makeup of Burundi is nearly identical to its neighbour Rwanda, as the Hutu and Tutsi are the two predominant ethnic groups in society, with the Hutu comprising

[1] See accounts of violence since Burundi's independence Warren Weinstein, 'Ethnicity and Conflict Regulation: The 1972 Burundi Revolt' (1974) 9 Africa Spectrum 42; Rhoda E Howard, 'Civil Conflict in Sub-Saharan Africa: Internally Generated Causes' (1995) 51 International Journal 27; René Lemarchand, *The Dynamics of Violence in Central Africa* (University of Pennsylvania Press 2009); Kara Hoofnagle, 'Burundi: A History of Conflict and State Crime' in Dawn L Rothe and Christopher W Mullins (eds), *State Crime: Current Perspectives* (Rutgers University Press 2011); Kenneth Omeje, 'Understanding the Diversity and Complexity of Conflict in the African Great Lakes Region' in Kenneth Omeje and Tricia Redeker Hepner (eds), *Conflict and Peacebuilding in the African Great Lakes Region* (Indiana University Press 2013); Christina Cliff, 'The Coming Genocide? Burundi's Past, Present, and Potentially Deadly Future' (2018) 41 Studies in Conflict & Terrorism 722.

85% of the population.[2] Division between the ethnic groups was fostered under colonial rule as the Belgian government, employing a system of indirect rule, promoted the Tutsi to prominent administrative and governing roles, while affording the Tutsi unequal access to educational and employment opportunities.[3] The inequality in society built up feelings of resentment amongst the Hutu against the Tutsi, which would explode in the aftermath of independence.

Amid the wave of decolonisation sweeping across the African continent in the 1950s and 1960s, the Tutsi seized power in Burundi; with a Tutsi monarchy controlling the state following independence until it was overthrown by Tutsi-led military officer coup in 1966.[4] The Tutsi dominance in all sections of society in the post-independence years fostered dramatically increasing levels of division between the Hutu and Tutsi.[5] A Hutu uprising in Rwanda in 1972, which led to the Hutu seizing power there, sparked clashes in Burundi as its Hutu community similarly sought to gain control while the Tutsi military dictatorship sought to hold onto power.[6] The ethnic tensions in Burundi boiled over as the Hutu uprising was brutally quashed by the Tutsi-

[2] Peter Uvin, 'Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence' (1999) 31 Comparative Politics 253, 253; Kenneth Omeje, 'Understanding the Diversity and Complexity of Conflict in the African Great Lakes Region' in Kenneth Omeje and Tricia Redeker Hepner (eds), *Conflict and Peacebuilding in the African Great Lakes Region* (Indiana University Press 2013) 35.

[3] Linda Maguire, 'Power Ethnicised: The Pursuit of Protection and Participation in Rwanda and Burundi' (1995) 2 Buffalo Journal of International Law 49, 54–56, 63–64; Patricia Y Reyhan, 'Genocidal Violence in Burundi: Should Humanitarian Law Prohibit Domestic Humanitarian Intervention?' (1997) 70 Albany Law Review 771, 776; Peter Uvin, 'Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence' (1999) 31 Comparative Politics 253, 255; Kenneth Omeje, 'Understanding the Diversity and Complexity of Conflict in the African Great Lakes Region' in Kenneth Omeje and Tricia Redeker Hepner (eds), *Conflict and Peacebuilding in the African Great Lakes Region* (Indiana University Press 2013) 37.

[4] Linda Maguire, 'Power Ethnicised: The Pursuit of Protection and Participation in Rwanda and Burundi' (1995) 2 Buffalo Journal of International Law 49, 56–58.

[5] Kara Hoofnagle, 'Burundi: A History of Conflict and State Crime' in Dawn L Rothe and Christopher W Mullins (eds), *State Crime: Current Perspectives* (Rutgers University Press 2011) 147.

[6] Warren Weinstein, 'Conflict and Confrontation in Central Africa: The Revolt in Burundi, 1972' (1972) 19 Africa Today 17, 23; Léonce Ndikumana, 'Institutional Failure and Ethnic Conflicts in Burundi' (1998) 41 African Studies Review 29, 34; René Lemarchand, *The Dynamics of Violence in Central Africa* (University of Pennsylvania Press 2009) 31–32.

dominated army which led to over 100,000 Hutu deaths.[7] The Tutsi retributive campaign at this time against the Hutu has been labelled by researchers of the Burundian situation as 'genocide' due to the deliberate targeting of important members of the Hutu community, including political leaders, civil servants, and educated adults.[8]

As the Tutsi brutally supressed any Hutu insurrection, the Tutsi continued to dominate the political, economic, and military structures of the state until the 1990s.[9] Burundi began a slow process towards democratisation in the late 1980s and early 1990s, under President Pierre Buyoya of the Union for National Progress (hereafter 'UPRONA'), a Tutsi political party.[10] In 1993, the first ever presidential elections were held which led to a Hutu, Melchior Ndadaye, of the Front for Democracy in Burundi (hereafter 'FRODEBU'), a Hutu political party, gaining power.[11] Ndadaye planned an overhaul of the Burundian government by pursuing a policy of reconciliation which would

[7] Warren Weinstein, 'Tensions in Burundi' (1972) 2 Issue: A Journal of Opinion 27, 27; René Lemarchand, 'Genocide in the Great Lakes: Which Genocide? Whose Genocide?' (1998) 41 African Studies Review 3, 5–6.

[8] René Lemarchand and David Martin, *Selective Genocide in Burundi* (Minority Rights Group 1974); Warren Weinstein, 'Ethnicity and Conflict Regulation: The 1972 Burundi Revolt' (1974) 9 Africa Spectrum 42, 44, 48; Rhoda E Howard, 'Civil Conflict in Sub-Saharan Africa: Internally Generated Causes' (1995) 51 International Journal 27, 34; Linda Maguire, 'Power Ethnicised: The Pursuit of Protection and Participation in Rwanda and Burundi' (1995) 2 Buffalo Journal of International Law 49, 65; Patricia Y Reyhan, 'Genocidal Violence in Burundi: Should Humanitarian Law Prohibit Domestic Humanitarian Intervention?' (1997) 60 Albany Law Review 771, 776; René Lemarchand, *The Dynamics of Violence in Central Africa* (University of Pennsylvania Press 2009) 129–140; Aidan Russell, 'Obedience and Selective Genocide in Burundi' (2015) 85 Africa 437.

[9] Patricia Y Reyhan, 'Genocidal Violence in Burundi: Should Humanitarian Law Prohibit Domestic Humanitarian Intervention?' (1997) 70 Albany Law Review 771, 776; Léonce Ndikumana, 'Institutional Failure and Ethnic Conflicts in Burundi' (1998) 41 African Studies Review 29, 30, 37.

[10] Peter Uvin, 'Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence' (1999) 31 Comparative Politics 253, 261; Léonce Ndikumana, 'Towards a Solution to Violence in Burundi: A Case for Political and Economic Liberalisation' (2000) 38 The Journal of Modern African Studies 431, 434.

[11] Linda Maguire, 'Power Ethnicised: The Pursuit of Protection and Participation in Rwanda and Burundi' (1995) 2 Buffalo Journal of International Law 49, 58; Stef Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error' (2009) 3 Africa Spectrum 63, 64, 67.

dismantle the ethnic bias within political and military institutions.[12] However Ndadaye lasted only three months in his role before he was assassinated by Tutsi army officers, who feared the marginalisation of the Tutsi under Hutu rule, as part of a failed coup attempt.[13] Resulting clashes between the Hutu and Tutsi in the aftermath of the assassination led to 150,000 casualties.[14]

A UN Security Council established International Commission of Inquiry for Burundi into the clashes of 1993 determined that acts of genocide had been perpetrated by Hutu forces against the Tutsi minority during this period.[15] Furthermore, although the Commission did not examine the events of 1972, it suggested that acts of genocide may have been perpetrated against the Hutu at this time.[16] Despite the findings of this report, no domestic or international mechanisms were created to examine accountability for these two genocides. This illustrates that a finding of genocide will not compel a state or international actors to punish the perpetration of genocide, even in historical cases; which raises further questions as to the utility of the genocide label to not only prevent genocide but punish the commission of the crime.

In the aftermath of Ndadaye's assassination, the country continued to be ruled by a Hutu president, but behind the scenes the Tutsi regained control of the institutions of the state and were steadily expanding their influence.[17] This period continued to see an escalation of ethnic violence, as Hutu and Tutsi civilians were increasingly being

[12] Linda Maguire, 'Power Ethnicised: The Pursuit of Protection and Participation in Rwanda and Burundi' (1995) 2 Buffalo Journal of International Law 49, 59; David Rieff, 'Suffering and Cynicism in Burundi' (2001) 18 World Policy Journal 61, 64.
[13] Linda Maguire, 'Power Ethnicised: The Pursuit of Protection and Participation in Rwanda and Burundi' (1995) 2 Buffalo Journal of International Law 49, 59.
[14] Rhoda E Howard, 'Civil Conflict in Sub-Saharan Africa: Internally Generated Causes' (1995) 51 International Journal 27, 35.
[15] United Nations Security Council 'Report of International Commission of Inquiry for Burundi' (22 August 1996) UN Doc S/1996/682, para. 483, 496.
[16] ibid para. 498.
[17] Agostinho Zacarias, 'Time to Stop a Genocide Culture' (1996) 52(11) The World Today 286, 286.

targeted respectively by the Tutsi-led army and Hutu-formed militias, such as the National Council for the Defence of Democracy-Forces for the Defence of Democracy (hereafter 'CNDD-FDD') and the Party for the Liberation of the Hutu People-National Forces of Liberation (hereafter 'PALIPEHUTU-FNL').[18] In 1996 the Burundian Army, comprised nearly entirely of Tutsi, launched a coup to overthrow the government and installed Pierre Buyoya as president again.[19] Buyoya stated that the army took power to stop the genocidal violence being perpetrated by both the Hutu and Tutsi communities.[20] This new regime did not stop the violence, instead the situation descended into a full-scale ethnic clash.[21]

International condemnation of the violence and pressure from its regional partners in the form of sanctions imposed on the Burundian government forced Buyoya into negotiating with the opposition.[22] A peace agreement, the Arusha Peace and Reconciliation Agreement, which created a power-sharing government was signed in August 2000 between Tutsi and Hutu political parties.[23] Under the terms of the Agreement, Buyoya would hold the presidency of Burundi for 18 months and after

[18] Léonce Ndikumana, 'Towards a Solution to Violence in Burundi: A Case for Political and Economic Liberalisation' (2000) 38 The Journal of Modern African Studies 431, 435; Kelly M Greenhill, 'Mission Impossible? Preventing Deadly Conflict in the African Great Lakes Region' (2001) 11 Security Studies 77, 84; Patricia Daley, 'Ethnicity and Violence in Africa: The Challenge to the Burundi State' (2006) 25 Political Geography 657, 671; Filip Reyntjens, 'Burundi: A Peaceful Transition after a Decade of War' (2006) 105 African Affairs 117, 117.

[19] Patricia Y Reyhan, 'Genocidal Violence in Burundi: Should Humanitarian Law Prohibit Domestic Humanitarian Intervention?' (1997) 70 Albany Law Review 771, 772; Stef Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error' (2009) 3 Africa Spectrum 63, 70.

[20] Patricia Y Reyhan, 'Genocidal Violence in Burundi: Should Humanitarian Law Prohibit Domestic Humanitarian Intervention?' (1997) 60 Albany Law Review 771, 772, 778–779.

[21] Kelly M Greenhill, 'Mission Impossible? Preventing Deadly Conflict in the African Great Lakes Region' (2001) 11 Security Studies 77, 80–81.

[22] Patricia Daley, 'The Burundi Peace Negotiations: An African Experience of Peace-Making' (2007) 34 Review of African Political Economy 333, 338–340; Stef Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error' (2009) 3 Africa Spectrum 63, 72.

[23] Patricia Daley, 'Ethnicity and Violence in Africa: The Challenge to the Burundi State' (2006) 25 Political Geography 657, 674; Stef Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error' (2009) 3 Africa Spectrum 63, 72.

that the presidency would transition to a member of FRODEBU.[24] Despite the significant accomplishment of signing the Arusha Agreement, the Arusha negotiations excluded the two leading opposition groups, CNDD-FDD and PALIPEHUTU-FNL, which challenged the long-term stability of the peace agreement.[25] However, in November 2003, CNDD-FDD joined the transitional government after signing a ceasefire agreement.[26] Buyoya also successfully transitioned the presidency to Domitien Ndayizeye, a member of FRODEBU, in 2003 which indicated that Burundi was on the correct path to democratic governance.[27]

The year 2005 witnessed significant progress in the peaceful transition to power-sharing governance as the Burundian people approved a new constitution and voted in the first democratic elections since the signing of the Arusha Agreement. The constitution further enshrined ethnic power-sharing by providing that the parliament and the government would be split 60 percent Hutu and 40 percent Tutsi.[28] The newly adopted constitution also provided for ethnically-balanced military and security forces.[29] In the 2005 elections CNDD-FDD transformed from Burundi's main rebel group to its leading political party, as CNDD-FDD became the largest party in

[24] David Rieff, 'Suffering and Cynicism in Burundi' (2001) 18 World Policy Journal 61, 65; Filip Reyntjens, 'Burundi: A Peaceful Transition after a Decade of War' (2006) 105 African Affairs 117, 118.
[25] Dave Peterson, 'Burundi's Transition: A Beacon for Central Africa' (2006) 17 Journal of Democracy 125, 127; Stef Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error' (2009) 3 Africa Spectrum 63, 72.
[26] Dave Peterson, 'Burundi's Transition: A Beacon for Central Africa' (2006) 17 Journal of Democracy 125, 127; Patricia Daley, 'The Burundi Peace Negotiations: An African Experience of Peace-Making' (2007) 34 Review of African Political Economy 333, 346; Stef Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error' (2009) 3 Africa Spectrum 63, 73, 78–79.
[27] Filip Reyntjens, 'Burundi: A Peaceful Transition after a Decade of War' (2006) 105 African Affairs 117, 118.
[28] Filip Reyntjens, 'Burundi: A Peaceful Transition after a Decade of War' (2006) 105 African Affairs 117, 119; Stef Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error' (2009) 3 Africa Spectrum 63, 74–76.
[29] Patricia Daley, 'The Burundi Peace Negotiations: An African Experience of Peace-Making' (2007) 34 Review of African Political Economy 333, 347; Filip Reyntjens, 'Institutional Engineering, Management of Ethnicity, and Democratic Failure in Burundi' (2016) 51 Africa Spectrum 65, 68–69.

parliament.[30] Furthermore as the constitution provided for the direct election by the parliament of the first post-transition president, CNDD-FDD selected their candidate Pierre Nkurunziza as the new president of Burundi.[31] Due to the requirement of ethnic power-sharing, Nkurunziza's government while primarily comprised of members of CNDD-FDD also included members of FRODEBU and UPRONA.[32] The power-sharing government had a promising start as it signed a ceasefire with FNL, who had dropped the 'ethnically exclusive' PALIPEHUTU from its name, which came into effect in 2009.[33]

The successful transition of power and implementation of power-sharing governance seemed to mark a new period in Burundian politics, with violence replaced by democracy. However the peace proved to be fragile, as the power-sharing government began crumbling in the lead up to the presidential and parliamentary elections of 2010 as CNDD-FDD sought to restrict the opposition's freedom of assembly and expression.[34] While the political situation was becoming 'increasingly fragmented and partisan', the 'main schisms' in society were 'not along ethnic lines' rather it was disputes and clashes between primarily Hutu led political parties that resulted in these divides.[35]

[30] Dave Peterson, 'Burundi's Transition: A Beacon for Central Africa' (2006) 17 Journal of Democracy 125, 126; Filip Reyntjens, 'Burundi: A Peaceful Transition after a Decade of War' (2006) 105 African Affairs 117, 125–128.
[31] Filip Reyntjens, 'Burundi: A Peaceful Transition after a Decade of War' (2006) 105 African Affairs 117, 128–129; Patricia Daley, 'The Burundi Peace Negotiations: An African Experience of Peace-Making' (2007) 34 Review of African Political Economy 333, 347.
[32] Filip Reyntjens, 'Burundi: A Peaceful Transition after a Decade of War' (2006) 105 African Affairs 117, 130.
[33] Stef Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error' (2009) 3 Africa Spectrum 63, 74, 79–81.
[34] Devon Curtis, 'The International Peacebuilding Paradox: Power Sharing and Post-Conflict Governance in Burundi' (2013) 112 African Affairs 72, 87–88.
[35] Filip Reyntjens, 'Institutional Engineering, Management of Ethnicity, and Democratic Failure in Burundi' (2016) 51 Africa Spectrum 65, 72.

The 2010 elections furthered deepened divisions between the political parties as parties joined together in opposition to CNDD-FDD and boycotted the presidential and parliamentary elections.[36] This boycott led to Nkurunziza being re-elected unopposed, this time by popular vote, and CNDD-FDD forming a power sharing government with UPRONA and FRODEBU-Nyakuri, a splinter party of FRODEBU, who were seen as closely aligned with CNDD-FDD.[37] Burundi essentially became a de facto one-party state after 2010.[38] CNDD-FDD consolidated its dominant position in Burundian society by eliminating political opposition, and curtailing the freedom of assembly and expression of the media and civil society actors.[39]

The detention and restriction of movement of opposition political figures by the government security forces led to Léonce Ngendakumana, the leader of a leading opposition coalition, to call upon the Secretary-General and the international community to prevent 'political genocide' in Burundi in 2014.[40] Ngendakumana claimed that there were similarities between the actions of the CNDD-FDD and the Rwandan government in 1994 as the CNDD-FDD was employing its youth wing, the Imbonerakure, and the media to stir up tensions.[41]

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[36] Stef Vandeginste, 'Power-Sharing as the Fragile Safety Valve in Times of Electoral Turmoil: The Costs and Benefits of Burundi's 2010 Elections' (2011) 49 Journal of Modern African Studies 315, 318–320.
[37] ibid 319–323.
[38] Filip Reyntjens, 'Institutional Engineering, Management of Ethnicity, and Democratic Failure in Burundi' (2016) 51 Africa Spectrum 65, 74.
[39] Devon Curtis, 'The International Peacebuilding Paradox: Power Sharing and Post-Conflict Governance in Burundi' (2013) 112 African Affairs 72, 87–88; Stef Vandeginste, 'Burundi's Electoral Crisis – Back to Power-Sharing Politics as Usual?' (2015) 114 African Affairs 624, 625; Filip Reyntjens, 'Institutional Engineering, Management of Ethnicity, and Democratic Failure in Burundi' (2016) 51 Africa Spectrum 65, 74.
[40] United Nations Security Council 'Report of the Secretary-General on the United Nations Office in Burundi' (31 July 2014) UN Doc S/2014/550, para. 11.
[41] 'Burundi Lawyers Demand Jail for Opposition Chief for "Genocide" Warning' *The East African* (3 September 2014).

The reference to political genocide highlights how the social understanding of genocide has diverged from the legal definition, as political groups are not recognised as a protected group either under the Genocide Convention or in the jurisprudence of the international courts. Furthermore the act of detaining individuals or restricting their movement is not an act of genocide, as it would not lead to the destruction of a group. Ngendakumana, similar to other activists and victims as outlined in Chapter Two, was not concerned with matching the situation to the legal definition of genocide, but rather employed the word genocide as a means of drawing attention to the situation and sparking the international community into action. Associating Burundi with one of the worst atrocities of the last twenty five years, in Rwanda, was a further means of Ngendakumana drawing upon the powerful rhetorical and symbolic nature of the genocide label.

While political genocide may not amount to genocide, there was significant evidence that violence, if it did break out, may develop along genocidal lines within Burundi due to the presence of warning signs of genocide. Burundi's history of atrocity crimes, including genocide, combined with its political instability contributed to a situation where genocide may be committed. However the warning signs may also point towards the commission of other atrocity crimes due to the atrocity crimes sharing the same risk factors as genocide as illustrated in Chapter Four. Furthermore, even if Burundi was displaying indicators of genocide pre-2015 it is not an inevitability that genocide will be perpetrated as Chapter Four has highlighted that the presence of warning signals in a situation does not mean that atrocities will be committed. Genocide and other atrocity crimes requires a triggering factor, which is hard to predict before it happens. Therefore while Burundi was exhibiting signs of genocide prior to 2015, it was a hard task to predict genocide that would occur before the outbreak of

violence and repression in 2015 due to near identical warning signs of each atrocity crime.

6.2(ii) A Deteriorating Situation

The increasing escalation in hostility between the ruling party and the opposition parties and civil society reached its zenith at the 2015 elections. Tension between the government and the opposition was inflamed in 2015 by the issue of whether Nkurunziza was eligible to run for a third term as president under the terms of the constitution and the Arusha Agreement. The constitution provides that the president is directly elected by the people for a term of five years, which is renewable once.[42] Nkurunziza and his supporters' argument for running for a third term was that he was only directly elected by the people once, because when he was first elected in 2005 as President it was by the members of the parliament as set out in the constitution.[43] The opposition argued in response that the Arusha Agreement restricted presidential mandates to two five-year terms.[44]

Opposition to the third term developed into public protests by opposition parties and civil society groups which led to sharp crackdown by the security forces and the Imbonerakure, the youth wing of the CNDD-FDD, on civil society and the media so as to dissuade the holding of demonstrations.[45] Even a number of members of CNDD-

[42] Patricia Daley and Rowan Popplewell, 'The Appeal of Third Termism and Militarism in Burundi' (2016) 43 Review of African Political Economy 648, 649; Stef Vandeginste, 'Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi' (2016) 51 Africa Spectrum 39, 43.
[43] Patricia Daley and Rowan Popplewell, 'The Appeal of Third Termism and Militarism in Burundi' (2016) 43 Review of African Political Economy 648, 649.
[44] Stef Vandeginste, 'Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi' (2016) 51 Africa Spectrum 39, 48.
[45] Stef Vandeginste, 'Burundi's Electoral Crisis – Back to Power-Sharing Politics as Usual?' (2015) 114 African Affairs 624, 624; United Nations Security Council 'Report of the Secretary-General on the United Nations Electoral Observation Mission in Burundi' (7 July 2015) UN Doc S/2015/510, para. 5; Amnesty International, 'Braving Bullets: Excessive Force in Policing Demonstrations in Burundi' (23 July 2015) 15–31; United Nations General Assembly Human Rights Council 'Human Rights Situation in Burundi: Report of the United Nations High Commissioner for Human Rights' (17 June 2016) UN

FDD were strongly against Nkurunziza's third term which led to Nkurunziza purging internal opposition from within CNDD-FDD.[46] Despite the opposition, CNDD-FDD officially selected Nkurunziza as their presidential candidate in April 2015.[47] The climate of repression and violence only intensified after Burundi's Constitutional Court ruled that it was permitted under the constitution for Nkurunziza to run for a third term.[48] Acts of repression, including acts of arbitrary arrests and detention, torture, inhuman and degrading treatment, and extrajudicial killings, accelerated after an attempted coup in May by members of the police and military while Nkurunziza was out of the country.[49] The coup was quickly stopped after two days and its leaders were either remanded in prison or fled into exile.[50] The suppression of dissent led to clashes between armed opposition groups and government forces; grenade attacks became a daily occurrence in the capital Bujumbura, which led to a further crackdown on civil society.[51]

When the violence and repression broke out in 2015, there were further references to genocide by activists and victims as a means of calling upon the international community to take action. In May 2015, in the midst of the protests, members of the

Doc A/HRC/32/30, para. 3–8; United Nations General Assembly Human Rights Council 'Report on the Independent Investigation on Burundi' (25 October 2016) UN Doc A/HRC/33/37, para. 23–27, 125.

[46] Patricia Daley and Rowan Popplewell, 'The Appeal of Third Termism and Militarism in Burundi' (2016) 43 Review of African Political Economy 648, 649.

[47] Cara E Jones and Katrin Wittig, 'The 2015 Legislative and Presidential Elections in Burundi – An Unfinished Post-Conflict Transition' (2016) 43 Electoral Studies 206, 206.

[48] Stef Vandeginste, 'Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi' (2016) 51 Africa Spectrum 39, 52.

[49] Stef Vandeginste, 'Burundi's Electoral Crisis – Back to Power-Sharing Politics as Usual?' (2015) 114 African Affairs 624, 628–629; Human Rights Watch, 'Burundi: Deadly Police Response to Protests' (29 May 2015) Press Release; African Commission on Human and Peoples' Rights 'Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-Finding Mission to Burundi 7 - 13 December 2015' (17 May 2016) para. 45–52, 60–69; United Nations General Assembly Human Rights Council 'Human Rights Situation in Burundi: Report of the United Nations High Commissioner for Human Rights' (17 June 2016) UN Doc A/HRC/32/30, para. 5.

[50] Patricia Daley and Rowan Popplewell, 'The Appeal of Third Termism and Militarism in Burundi' (2016) 43 Review of African Political Economy 648, 650.

[51] United Nations Security Council 'Report of the Secretary-General on the United Nations Electoral Observation Mission in Burundi' (7 July 2015) UN Doc S/2015/510, para. 11.

Tutsi ethnic group expressed, in interviews with the International Crisis Group, fears that the government was planning a genocide against them as government forces cracked down on Tutsi protestors.[52] Similar to other victims of genocide and atrocity crimes, these actors, who are predominantly victims of the government-led repression, may be employing the word genocide to characterise the violence as they are relying on the moral value of the term to attract international interest to their plight, which highlights the effect of the social understanding of genocide on the general public.

The period leading up to the elections saw increased clashes and further violence between the government forces and the opposition, as well as the continued ill treatment of the civilian population.[53] The rising levels of violence and the sharp crackdown on civil society led the EU and the AU to withdraw their respective electoral observer teams arguing that conditions in the country were not conducive to the holding of free and fair elections.[54] While the UN and the regional grouping the East African Community (hereafter 'EAC') did monitor the elections, they stated that the 'climate was not conducive for an inclusive and credible electoral process.'[55]

In the elections the opposition parties failed to organise a united campaign against Nkurunziza, instead they splintered into a number of groupings, which led to Nkurunziza and CNDD-FDD winning re-election in July 2015.[56] Nkurunziza's re-election while deepening the political divide also led to an outbreak of violence and

[52] International Crisis Group, 'Burundi: A Dangerous Third Term' (20 May 2016) 13.
[53] Amnesty International, '"Just Tell Me What to Confess to": Torture and other Ill-Treatment by Burundi's Police and Intelligence Service since April 2015' (24 August 2015) 3–11; African Commission on Human and Peoples' Rights 'Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-Finding Mission to Burundi 7 - 13 December 2015' (17 May 2016) para. 70–84.
[54] Cara E Jones and Katrin Wittig, 'The 2015 Legislative and Presidential Elections in Burundi – An Unfinished Post-Conflict Transition' (2016) 43 Electoral Studies 206, 207.
[55] ibid 207.
[56] ibid 206, 208.

continued repression of opposition political parties, civil society, and the media.[57] Actors within the UN were cognisant of the risk of genocide in the aftermath of the elections. Matthew Rycroft, the Permanent Representative of the United Kingdom to the UN, warned in November 2015 that the situation could develop into a 'possible genocide' unless the UN took action to prevent violence.[58] This warning was made after the UN Security Council received briefings from key figures coordinating the response on the ground to the violence including the United Nations High Commissioner for Human Rights, the Special Adviser to the Secretary-General on the Prevention of Genocide, and the Under-Secretary-General for Political Affairs.[59] While these actors did not specifically mention genocide, they warned that inflammatory statements by members of the government could be seen as preparation for widespread violence.[60] In particular, the Special Adviser on the Prevention of Genocide drew parallels between the government speeches and language employed during the Rwandan Genocide.[61]

In response to these warnings, the UN Security Council passed a resolution calling for the government of Burundi to commit to peace negotiations, and stated that the UN Security Council would consider taking additional measures against Burundian actors who impede the peaceful solution to the situation.[62] Despite the acknowledgment

[57] Human Rights Watch, 'Burundi's Descent into Lawlessness' (7 November 2015) Press Release; Human Rights Watch, 'Burundi: President's Speech Instils Fear as Killings Increase' (10 November 2015) Press Release; United Nations Security Council 'Report of the Secretary-General on the United Nations Electoral Observation Mission in Burundi' (16 December 2015) UN Doc S/2015/985, para. 9, 12–15; Patricia Daley and Rowan Popplewell, 'The Appeal of Third Termism and Militarism in Burundi' (2016) 43 Review of African Political Economy 648, 648, 652; United Nations General Assembly Human Rights Council 'Human Rights Situation in Burundi: Report of the United Nations High Commissioner for Human Rights' (17 June 2016) UN Doc A/HRC/32/30, para. 6–7.
[58] Aislinn Laing, 'British UN Envoy Warns of "Possible Genocide" in Burundi' *The Telegraph* (13 November 2015).
[59] United Nations Security Council '7553rd Meeting' (9 November 2015) UN Doc S/PV.7553.
[60] ibid 3, 4, 6.
[61] ibid 6.
[62] United Nations Security Council Resolution 2248 (12 November 2015) UN Doc S/RES/2248.

from the UK representative that if these warnings were ignored the situation could spiral into a genocide, the UN Security Council did not spring into action which highlights that a warning of genocide does not automatically lead to states taking forceful action, including military deployment, to stop the violence. The UN Security Council was not to be swayed from its approach of focussing on diplomatic measures to resolve the situation in Burundi.

The UN efforts on the ground to mediate the situation and support dialogue are being led by the UN Peacebuilding Commission, which has been supporting peacebuilding efforts in Burundi since 2006, the Special Envoy of the Secretary-General for the Great Lakes Region, the Secretary-General's Special Adviser on Conflict Prevention, and the Special Envoy of the Secretary-General for Burundi.[63] The UN Security Council has also been active, since the outbreak of demonstrations and associated violence in April 2015, in condemning the violence by passing resolutions and issuing press statements urging the Burundian government and the other parties to put an end to the violence and commence dialogue.[64] Regional actors have also been key players in

[63] United Nations Security Council 'Report of the Secretary-General on the United Nations Electoral Observation Mission in Burundi' (7 July 2015) UN Doc S/2015/510, para. 17–20, 29; United Nations Security Council '7553rd Meeting' (9 November 2015) UN Doc S/PV.7553, 7–8; United Nations Security Council 'Report of the Secretary-General on the United Nations Electoral Observation Mission in Burundi' (16 December 2015) UN Doc S/2015/985, para. 29–33, 80; United Nations Security Council '7652nd Meeting' (18 March 2016) UN Doc S/PV.7652, 4–6; United Nations Security Council 'Report of the Secretary-General on Proposals to Enable the United Nations to Facilitate the Deployment of the African Union Observers in Burundi and on Modalities for Cooperation between the United Nations Police Component and the African Union Observers' (20 September 2016) UN Doc S/2016/799, para. 11; United Nations Security Council 'Report of the Secretary-General on Burundi' (23 February 2017) UN Doc S/2017/165, para. 51–53, 57–58, 64; United Nations Security Council '7895th Meeting' (9 March 2017) UN Doc S/PV.7895, 2–3, 5–6; United Nations Security Council '7978th Meeting' (20 June 2017) UN Doc S/PV.7978, 2–5; United Nations Security Council '8013th Meeting' (26 July 2017) UN Doc S/PV.8013, 2–6; United Nations Security Council '8109th Meeting' (20 November 2017) UN Doc S/PV.8109, 2–5; United Nations Security Council 'Report of the Secretary-General on the Situation in Burundi' (25 January 2018) UN Doc S/2018/89, para. 29–32; United Nations Security Council '8189th Meeting' (26 February 2018) UN Doc S/PV.8189, 2–5; United Nations Security Council '8268th Meeting' (24 May 2018) UN Doc S/PV.8268, 2–5.

[64] United Nations Security Council 'Security Council Press Statement on Situation in Burundi' (17 April 2015) UN Doc SC/11864; United Nations Security Council 'Security Council Press Statement on Situation in Burundi' (15 May 2015) UN Doc SC/11896; United Nations Security Council 'Security

responding to the situation as the regional bloc the EAC appointed President Yoweri Museveni of Uganda and the former president of Tanzania, Benjamin Mkapa as the mediator and facilitator respectively of the inter-Burundi dialogue between CNDD-FDD and opposition political parties and civil society groups.[65]

Therefore rather than deploying troops the focus of international and regional actors, in responding to the repression and violence since the genesis of the situation in 2015, has been on utilising diplomatic measures to facilitate dialogue. When more forceful action is taken or advocated by international and regional actors it has been met with a sharp response by the Burundian government. For instance when the EU imposed a travel ban and asset freeze against high ranking security officials the government stated that these measures jeopardised the peace talks.[66]

Despite the political interventions, tension remained high in Burundi after the President of the Senate gave a speech which threatened political opponents that they would be 'pulverised' if they continued to resist while also encouraging supporters of the government to 'go to work' (attack opposition members).[67] The rhetoric of this

Council Press Statement on Burundi' (24 May 2015) UN Doc SC/11905; United Nations Security Council 'Security Council Press Statement on Burundi' (4 June 2015) UN Doc SC/11919; United Nations Security Council 'Statement by the President of the Security Council' (26 June 2015) UN Doc S/PRST/2015/13; United Nations Security Council 'Security Council Press Statement on Situation in Burundi' (4 August 2015) UN Doc SC/11996; United Nations Security Council 'Statement by the President of the Security Council' (28 October 2015) UN Doc S/PRST/2015/18; United Nations Security Council Resolution 2248 (12 November 2015) UN Doc S/RES/2248; United Nations Security Council 'Security Council Press Statement on Situation in Burundi' (19 December 2015) UN Doc SC/12174; United Nations Security Council Resolution 2279 (1 April 2016) UN Doc S/RES/2279; United Nations Security Council Resolution 2303 (29 July 2016) UN Doc S/RES/2303; United Nations Security Council 'Security Council Press Statement on Situation in Burundi' (13 March 2017) UN Doc SC/12750; United Nations Security Council 'Statement by the President of the Security Council' (2 August 2017) UN Doc S/PRST/2017/13; United Nations Security Council 'Statement by the President of the Security Council' (5 April 2018) UN Doc S/PRST/2018/7; United Nations Security Council 'Security Council Press Statement on the Situation in Burundi' (22 August 2018) UN Doc SC/13461.

[65] Stef Vandeginste, 'Museveni, Burundi and the Perversity of *Immunité Provisoire*' (2016) 10 International Journal of Transitional Justice 516, 516, 518.

[66] United Nations Security Council 'Report of the Secretary-General on the United Nations Electoral Observation Mission in Burundi' (16 December 2015) UN Doc S/2015/985, para. 11.

[67] ibid para. 8.

speech was seen as similar in manner to speeches given during the Rwandan Genocide.[68] The increasing levels of tension and repression against those supporting or perceived to support the opposition led to people fleeing areas due to fears of government attacks and reprisals on areas associated with the opposition.[69]

The worst period of violence was in December 2015 after an attack by armed opposition groups on four military positions in and around Bujumbura led to a sharp increase in abuses and atrocities perpetrated against the civilian population by members of the security forces and the Imbonerakure.[70] The reprisal against the civilian population conducted in the days after the attacks left more than one hundred dead while many more were victims of torture, gang rape, and sexual violence.[71] In the aftermath of this period of violence the AU's Peace and Security Council did threaten to intervene militarily in the situation with a protection and prevention mission comprising 5,000 soldiers.[72] However the AU member states failed to agree on deploying a military mission and instead the AU sent human rights observers and military experts into Burundi to monitor the situation.[73] The UN sought to send

[68] ibid para. 8.
[69] United Nations General Assembly Human Rights Council 'Report on the Independent Investigation on Burundi' (25 October 2016) UN Doc A/HRC/33/37, para. 98–100.
[70] Amnesty International, '"My Children are Scared": Burundi's Deepening Human Rights Crisis' (22 December 2015) 2–8; African Commission on Human and Peoples' Rights 'Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-Finding Mission to Burundi 7 - 13 December 2015' (17 May 2016) para. 99; United Nations General Assembly Human Rights Council 'Human Rights Situation in Burundi: Report of the United Nations High Commissioner for Human Rights' (17 June 2016) UN Doc A/HRC/32/30, para. 7, 13.
[71] Amnesty International, '"My Children are Scared": Burundi's Deepening Human Rights Crisis' (22 December 2015) 3–8; Amnesty International, 'Burundi: Satellite Evidence Supports Witness Accounts of Mass Graves' (28 January 2016) Press Release; United Nations General Assembly Human Rights Council 'Report on the Independent Investigation on Burundi' (25 October 2016) UN Doc A/HRC/33/37, para. 43–44.
[72] Bridget Conley, 'The "Politics of Protection": Assessing the African Union's Contributions to Reducing Violence against Civilians' (2017) 24 International Peacekeeping 566, 569, 580.
[73] International Crisis Group, 'The African Union and the Burundi Crisis: Ambition versus Reality' (28 September 2016) 9–10.

assistance to the AU mission with the deployment of a police component however the Burundian government have continually refused to consent to this deployment.[74]

There was a further reference to genocide after a UN Security Council visit to Burundi in January 2016 when the Permanent Representative of France to the UN reported that opposition figures, 'members of the so-called radical opposition, not represented in the official institutions' of the state, believed that 'genocide was either already happening in Burundi or was about to.'[75] This warning that genocide was underway or close to being perpetrated, did not lead to the UN Security Council taking any drastically different action other than to maintain the focus on diplomatic solutions.

These efforts to support dialogue have largely been unsuccessful; however, since the violence of December 2015 there has been a reduction in the levels of violence as armed clashes between government forces and opposition groups have declined in frequency.[76] The United Nations Independent Investigation on Burundi (hereafter 'UNIIB'), a joint UN/AU investigation authorised by the UN General Assembly Human Rights Council after a Special Session on the situation in Burundi in December 2015, attributes this decrease in violence to the increased repression by government forces.[77] The Commission of Inquiry on Burundi, established by the Human Rights

[74] United Nations Security Council Resolution 2303 (29 July 2016) UN Doc S/RES/2303; United Nations Security Council 'Report of the Secretary-General on Proposals to Enable the United Nations to Facilitate the Deployment of the African Union Observers in Burundi and on Modalities for Cooperation between the United Nations Police Component and the African Union Observers' (20 September 2016) UN Doc S/2016/799; United Nations Security Council 'Report of the Secretary-General on Burundi' (23 February 2017) UN Doc S/2017/165, para. 54–56.

[75] United Nations Security Council '7615th Meeting' (29 January 2016) UN Doc S/PV.7615, 2.

[76] United Nations General Assembly Human Rights Council 'Human Rights Situation in Burundi: Report of the United Nations High Commissioner for Human Rights' (17 June 2016) UN Doc A/HRC/32/30, para. 8; United Nations Security Council 'Report of the Secretary-General on Burundi' (23 February 2017) UN Doc S/2017/165, para. 4, 19; United Nations Security Council '8268th Meeting' (24 May 2018) UN Doc S/PV.8268, 2.

[77] United Nations General Assembly Human Rights Council 'Report on the Independent Investigation on Burundi' (25 October 2016) UN Doc A/HRC/33/37, para. 126–129. See also United Nations General Assembly Human Rights Council Resolution S-24/1 (22 December 2015) UN Doc A/HRC/RES/S-24/1, para. 17.

Council in 2016, states that since 2016, the violations are being perpetrated in a 'more clandestine, but equally brutal, manner'.[78] There is continued evidence of extrajudicial killings, enforced disappearances, sexual violence, grenade attacks and exchanges of gunfire as well as a rise in cases of torture and inhuman treatment of those arbitrarily detained.[79]

The sustained violence resulted in a campaign launched in 2016 by the international NGO, the International Federation for Human Rights, and the Burundian human rights organisation, the ITEKA League, which called for the UN and the AU to deploy a peacekeeping mission to Burundi to prevent genocide. These groups contend that genocide is a possibility in Burundi as the actions and rhetoric of the government, security forces, and the Imbonerakure illustrates a 'willingness … to destroy the Tutsi community in its entirety because of their ethnicity.'[80] They maintain that while the Tutsi are not the only group targeted by the government, 'ethnicity is sufficiently being used for the current situation in Burundi to be called a repression with genocidal dynamics.'[81] Similar to the Darfur advocacy campaign, this campaign is using the

[78] United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (11 August 2017) UN Doc A/HRC/36/54, para. 13. See also United Nations General Assembly Human Rights Council Resolution 33/24 (5 October 2016) UN Doc A/HRC/RES/33/24, para. 23.

[79] Human Rights Watch, 'Burundi: Abductions, Killings, Spread Fear' (25 February 2016) Press Release; United Nations General Assembly Human Rights Council 'Human Rights Situation in Burundi: Report of the United Nations High Commissioner for Human Rights' (17 June 2016) UN Doc A/HRC/32/30, para. 8; Human Rights Watch, 'Burundi: Intelligence Services Torture Suspected Opponents' (7 July 2016) Press Release; Human Rights Watch, 'Burundi: Gang Rapes by Ruling Party Youth' (27 July 2016) Press Release; Human Rights Watch, 'Burundi: Attacks by Ruling Party Youth League Members' (19 January 2017) Press Release; United Nations Security Council 'Report of the Secretary-General on Burundi' (23 February 2017) UN Doc S/2017/165, para. 4, 19, 26–29; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (11 August 2017) UN Doc A/HRC/36/54, para. 46–47, 51; Amnesty International, 'Conform or Flee: Repression and Insecurity Pushing Burundians into Exile' (29 September 2017) 8–18; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (8 August 2018) UN Doc A/HRC/39/63, para. 10–11, 32–47.

[80] International Federation for Human Rights and ITEKA League, 'Repression and Genocidal Dynamics in Burundi' (November 2016) 39, 162.

[81] ibid 11, 104–105.

term genocide to mobilise support around intervention which illustrates the rhetorical value attached to the word genocide.

While civilians and civil society groups may be employing the genocide label in order to draw attention to Burundi, there could be merits to the claims from witnesses and actors on the ground that genocide is being perpetrated as it is important to remember that in Rwanda it was actors on the ground who were the first ones to characterise the violence as genocide. However these actors are predominantly claiming that genocide could be perpetrated, rather than claiming it is already being perpetrated. Is it possible, with the knowledge outlined so far in this study of the difficulty of identifying genocide, to predict an outbreak of genocide?

Indicators of Genocide

The International Federation for Human Rights and the ITEKA League state that the toxic environment in Burundi could lead to genocide being perpetrated as 'all the criteria and conditions for the perpetration of genocide are in place: ideology, intent, security institutions, mobilization via militias, identifying populations to be eliminated, and using historical justifications to do so.'[82] The UNIIB warn that due to Burundi's history of violence 'the danger of the crime of genocide also looms large.'[83] Such claims must be closely interrogated in assessing the extent of the threat of genocide in Burundi.

Burundi's history of ethnic violence and ethnic division would make one assume or even expect that civilians would be targeted due to their ethnicity in the latest wave of repression. However the ethnic divisions of the past were not evident in the initial

[82] ibid 11.
[83] United Nations General Assembly Human Rights Council 'Report on the Independent Investigation on Burundi' (25 October 2016) UN Doc A/HRC/33/37, para. 124.

stages of the situation. While the protests against Nkurunziza's third term did take place in largely Tutsi neighbourhoods in Bujumbura, the demonstrations included a large number of Hutu protestors.[84] Rather than ethnicity being a significant marker in these clashes, the situation in Burundi is rooted in political tension between Nkurunziza/CNDD-FDD and the opposition (political parties, civil society, and the media) which has been steadily growing since CNDD-FFD came to power in 2005. Since the genesis of the situation in April 2015, the majority of UN actors, UN organs, AU bodies, and NGOs maintain that the government, the defence and security forces, and the Imbonerakure are deliberately targeting through acts of violence and hate speech those in opposition or perceived to be in opposition to the government.[85]

The International Federation for Human Rights and ITEKA League report is the only study of the situation to label the violence against the civilian population as perpetrated

[84] Stef Vandeginste, 'Burundi's Electoral Crisis – Back to Power-Sharing Politics as Usual?' (2015) 114 African Affairs 624, 632; International Crisis Group, 'Burundi: A Dangerous Third Term' (20 May 2016) 13.

[85] See for example United Nations Office of the High Commissioner for Human Rights 'Comment by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein on Burundi Killing' (6 November 2015) Press Release; Human Rights Watch, 'Burundi: President's Speech Instils Fear as Killings Increase' (10 November 2015) Press Release; International Federation for Human Rights, 'The International Community must Act Quickly before the Situation becomes Irreparable' (24 November 2015) Press Release; United Nations Security Council 'Report of the Secretary-General on the United Nations Electoral Observation Mission in Burundi' (16 December 2015) UN Doc S/2015/985, para. 82; African Commission on Human and Peoples' Rights 'Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-Finding Mission to Burundi 7 - 13 December 2015' (17 May 2016) para. 146, 148–157; International Crisis Group, 'Burundi: A Dangerous Third Term' (20 May 2016) 5–7; United Nations General Assembly Human Rights Council 'Human Rights Situation in Burundi: Report of the United Nations High Commissioner for Human Rights' (17 June 2016) UN Doc A/HRC/32/30, para. 10–11, 17, 18–20, 23, 24, 27–29, 30–31, 34–37, 39–41, 45, 46–48; United Nations General Assembly Human Rights Council 'Report on the Independent Investigation on Burundi' (25 October 2016) UN Doc A/HRC/33/37, para. 39, 42, 50, 53, 58, 62, 65, 66, 68, 73–74, 98, 100; United Nations Security Council 'Report of the Secretary-General on Burundi' (23 February 2017) UN Doc S/2017/165, para. 44; United Nations Office of the High Commissioner for Human Rights 'Grotesque Rape Chants Lay Bare Campaign of Terror by Burundi Militia – Zeid' (18 April 2017) Press Release; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (11 August 2017) UN Doc A/HRC/36/54, para. 13–14, 33, 38, 49, 53, 59; United Nations Security Council 'Report of the Secretary-General on the Situation in Burundi' (25 January 2018) UN Doc S/2018/89, para. 41; United Nations Office of the High Commissioner for Human Rights 'Oral Presentation of the Commission of Inquiry on Burundi at the 37th Session of the Human Rights Council' (13 March 2018) Press Release; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (8 August 2018) UN Doc A/HRC/39/63, para. 10.

with the intent to destroy the Tutsi. The separate in-depth inquiries conducted by international law and human rights experts on behalf of the AU and UN, who are also relying on witness testimony, have found no evidence of the existence of a genocidal campaign targeted against the Tutsi ethnic group. Unlike the UN inquiries established to investigate whether of acts of genocide were perpetrated in the Central African Republic, Darfur, or by ISIS, the inquiries created by the various organs of the UN and the AU were not specifically mandated to investigate the crime of genocide. This would indicate that these bodies do not think that genocide is being perpetrated in Burundi, or it could be the case that they are wary of labelling the violence as genocide due to the potential implications.

Regardless of whether states were reluctant to use the word genocide, the Commission of Inquiry did examine the question of genocide, and found that 'although, within the context of certain violations such as arrests, torture and sexual violence, the Commission was able to show that the Tutsi were targeted by insults of an ethnic nature, it is not in a position to establish the existence of a political will to destroy that ethnic group in whole or in part.'[86] The definition of genocide employed by the Commission of Inquiry corresponds to the Convention's definition as the Commission highlights the central role of intent to the crime of genocide. Evidence of genocidal acts targeted against a protected group will not amount to genocide absent an intent to destroy underlying the crime.

While the Commission of Inquiry is employing the legal definition of genocide to support their finding that genocide was not perpetrated it could also be the case that, given similar criticisms of the UN Darfur inquiry that the report was tailored to the

[86] United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (11 August 2017) UN Doc A/HRC/36/54, para. 75.

wishes of the major states, the Commission of Inquiry refused to label the violence of genocide due to international pressure. However the Commission of Inquiry along with the UNIIB have separately identified evidence of violations that may amount to crimes against humanity in Burundi since the outbreak of violence and repression in 2015.[87] The international community has the same responsibility to respond to these crimes as genocide, so regardless of using the word genocide the inquiries are still placing pressure on the international community to respond to the violence.

Notwithstanding the evidence of violations that may amount to crimes against humanity the UNIIB do state that due to the 'closed and repressive' nature of Burundian society, it is impossible to fully determine the crimes which have been perpetrated.[88] There is sufficient evidence that the Tutsi are often the target of brutality and hate speech which means that if the violence does intensify in the future then the Tutsi could be deliberately targeted (as the Tutsi ethnic group, rather than as Tutsi who happen to be political opponents) for destruction.[89] There have been

[87] United Nations General Assembly Human Rights Council 'Report on the Independent Investigation on Burundi' (25 October 2016) UN Doc A/HRC/33/37, para. 123; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (11 August 2017) UN Doc A/HRC/36/54, para. 65–73; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (8 August 2018) UN Doc A/HRC/39/63, para. 66–70.

[88] United Nations General Assembly Human Rights Council 'Report on the Independent Investigation on Burundi' (25 October 2016) UN Doc A/HRC/33/37, para. 34.

[89] Evidence of acts of violence and ethnically-motivated rhetoric directed at the Tutsi, see International Crisis Group, 'Burundi: Peace Sacrificed?' (29 May 2015) 4; United Nations Office of the High Commissioner for Human Rights 'Alarming New Patterns of Violations Emerging in Burundi – Zeid' (15 January 2016) Press Release; African Commission on Human and Peoples' Rights 'Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-Finding Mission to Burundi 7 - 13 December 2015' (17 May 2016) para. 55; United Nations Office of the High Commissioner for Human Rights 'Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, on the situation in Burundi' (29 June 2016) Press Release; Human Rights Watch, 'Burundi: Gang Rapes by Ruling Party Youth' (27 July 2016) Press Release; United Nations Committee Against Torture 'Concluding Observations of the Committee on the Special Report of Burundi Requested under Article 19 (1) *in fine* of the Convention' (9 September 2016) UN Doc CAT/C/BDI/CO/2/Add.1, para. 18; United Nations General Assembly Human Rights Council 'Report on the Independent Investigation on Burundi' (25 October 2016) UN Doc A/HRC/33/37, para. 73, 77, 136; International Federation for Human Rights and ITEKA League, 'Repression and Genocidal Dynamics in Burundi' (November 2016) 11, 38–40, 106–107, 162; United Nations Office of the High Commissioner for Human Rights 'Grotesque Rape Chants Lay Bare Campaign of Terror by Burundi

warnings about the potential for the political crisis to inflame ethnic tensions.[90] This speculation on the threat of ethnic violence illustrates the difficulty of actors predicting if a situation will develop along ethnic lines before the outbreak of large scale violence. If it is a complex task to predict an ethnic element to a situation, it is an even more arduous task to predict that an ethnic group will be targeted for destruction.

Even if the situation develops an ethnic dimension it does not mean that genocide will be perpetrated, as the violence might lead to the commission of crimes against humanity or other atrocity crimes. There have been a multitude of stark warnings from key actors within the UN system on the potential for Burundi to descend into widespread bloodshed with the risk of the perpetration of atrocity crimes.[91] This

Militia – Zeid' (18 April 2017) Press Release; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (11 August 2017) UN Doc A/HRC/36/54, para. 46, 49; *Situation in Burundi* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi) ICC-01/17-X-9-US-Exp (25 October 2017) para. 113.

[90] United Nations 'Statement by Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide on Mission to Burundi' (30 May 2015) Press Release; United Nations Security Council 'Report of the Secretary-General on the United Nations Electoral Observation Mission in Burundi' (7 July 2015) UN Doc S/2015/510, para. 65; United Nations Office of the High Commissioner for Human Rights 'Opening Statement by Zeid Ra'ad Al Hussein United Nations High Commissioner for Human Rights at the Human Rights Council 24th Special Session' (17 December 2015) Press Release; United Nations Office of the High Commissioner for Human Rights 'Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, on the situation in Burundi' (29 June 2016) Press Release; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (11 August 2017) UN Doc A/HRC/36/54, para. 76.

[91] United Nations 'Statement by Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide on Mission to Burundi' (30 May 2015) Press Release (warned that Burundi's history of ethnic violence made it susceptible to atrocity crimes); United Nations Security Council '7482nd Meeting' (9 July 2015) UN Doc S/PV.7482, 4 (the High Commissioner for Human Rights advised the United Nations Security Council in July 2015 that the 'escalating pattern of politically motivated violence, coupled with the country's history of recurring bloodshed and atrocities, should alert us to the potential for serious crisis.'); United Nations Security Council '7553rd Meeting' (9 November 2015) UN Doc S/PV.7553, 6; United Nations Office of the High Commissioner for Human Rights 'Opening Statement by Zeid Ra'ad Al Hussein United Nations High Commissioner for Human Rights at the Human Rights Council 24th Special Session' (17 December 2015) Press Release (warned that Burundi was at 'bursting point, on the very cusp of a civil war); United Nations Secretary-General 'Informal Briefing to the General Assembly' (14 January 2016) Press Release (warned that 'Burundi teetered on the edge of cataclysm.'); United Nations Secretary-General 'Remarks to the African Union Peace and Security Council' (29 January 2016) Press Release (said Burundi was 'close to the brink'); United Nations Security Council '7652nd Meeting' (18 March 2016) UN Doc S/PV.7652, 4 (the High Commissioner for Human Rights warned the United Nations Security Council that Burundi remained 'on the brink of a sudden escalation of violence of even more massive proportions.'); United Nations Office of the High Commissioner for Human Rights 'Introduction to Country

illustrates, as discussed in Chapter Four, that the warning signs of genocide are nearly identical to other atrocity crimes as these crimes share the same indicators and underlying conditions as genocide.

Despite the advancement in the knowledge of predicting genocide, with the UN's creation of the 'Framework of Analysis for Atrocity Crimes', there continues to be difficulties with identifying signs of genocide. As argued in Chapter Four genocide does not follow a predictable pattern, so any attempt to break down the crime into stages or map it onto a guide will have inherent limitations. Chapter Four shows that a situation may display all the indicators of the perpetration of atrocity crimes but this does not actually mean that a situation will result in mass bloodshed. Therefore in a fluid situation such as Burundi, were the violence is relatively low level, it is a complex task to not only predict if a situation will explode into genocidal violence but also to identify the trigger that will ignite the situation.

The situation in Burundi illustrates the complexity of predicting genocide before the outbreak of violence, and the difficulty of identifying genocide in the early stages of a situation. This is why this research is advocating for the label atrocity crimes to be employed instead of undertaking the complex task of distinguishing the identifiers of each atrocity crime to predict the likelihood of which crime will be committed. It would remove the time spent focussing on labels rather than concentrating on the response to the situation.

In Burundi the label applied to characterise the violence will not trigger a response, this can be seen by the fact that the campaign launched by the International Federation

Reports/Briefings/Updates of the Secretary-General and the High Commissioner under Item 2' (21 March 2018) Press Release (the Deputy High Commissioner for Human Rights reported to the Human Rights Council that the situation remained 'grave' and this was 'fuelling growing pessimism about the future' of Burundi).

for Human Rights and ITEKA League did not lead to the AU and/or the UN to mobilise under the banner of the RtoP or the Genocide Convention to take action to prevent genocide. This signifies how a claim of genocide does not translate into immediate and effective action. The failure to halt the violence in Burundi should also indicate that if the definition of genocide is expanded to include additional elements such as political groups it would not lead to a different response to crimes against these groups. Does this failure to respond signify a lack of political will to act?

States may not possess the political will to get further involved in Burundi as unlike in Darfur the situation in Burundi has scarcely received attention in the media which as a consequence means that there is no mass movement of civilians, NGOs, and the media calling for states and the UN to take stronger action. Therefore facing no pressure from domestic constituencies, states may feel relatively free to continue their current approach to the situation without fearing the potential consequence of inaction. However on the other hand it could be argued that states on the UN Security Council do possess the political will to act as they have agreed upon the deployment of a UN mission but are cognisant of the fact that undermining Burundi's sovereignty would not aid the negotiation of a peace agreement and instead it could further destabilise the situation.

This is why the campaign by the International Federation for Human Rights and ITEKA League can be seen as flawed, as it proposes a solution (military intervention) without any appreciation of the reality faced by international actors on the ground. As highlighted in Chapter Two and Chapter Five, activists are often guilty of oversimplifying a situation and focussing on a quick fix rather than addressing the underlying issues which give rise to violence. The case of Burundi should show that possessing the political will to act does not automatically mean that states will pursue

military action, rather it could mean that states are willing to act instead through organs of the UN and regional bodies to achieve peace.

6.2(iii) Pursuing Peace or Justice

While international and regional actors have primarily focussed on diplomacy and dialogue in their quest for peace, there has been a move towards justice and accountability which could potentially involve competing interests in the resolution of the situation. The perpetration of acts of violence and repression led Fatou Bensouda, Prosecutor of the ICC, to announce in April 2016 that she was opening a preliminary examination of the situation in Burundi as the Office of the Prosecutor had received reports of acts which fall under crimes within the jurisdiction of the ICC being committed in Burundi.[92] In response to the Prosecutor's move to examine the situation, the government of Burundi voted to withdraw from the Rome Statute and officially notified the Secretary-General of its withdrawal in October 2016.[93] As well as withdrawing from the ICC, the government of Burundi suspended cooperation with the Office of the High Commissioner for Human Rights and other human rights monitoring mechanisms and denied the Commission of Inquiry access to the country to investigate the violations of international law.[94]

[92] Office of the Prosecutor 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi' (25 April 2016) Press Release.

[93] Office of the Prosecutor 'Statement of the President of the Assembly of States Parties on the process of withdrawal from the Rome Statute by Burundi' (18 October 2016) Press Release; Office of the Prosecutor 'Report on Preliminary Examination Activities 2016' (14 November 2016) para. 27.

[94] United Nations Security Council 'Report of the Secretary-General on Burundi' (23 February 2017) UN Doc S/2017/165, para. 4, 36–40, 42; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (11 August 2017) UN Doc A/HRC/36/54, para. 4–5; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (8 August 2018) UN Doc A/HRC/39/63, para. 5.

Burundi's departure from the ICC took effect one year later on the 27th of October 2017.[95] Burundi's withdrawal from the ICC does not preclude an investigation into crimes committed in Burundi while it was a signatory of the Rome Statute. In September 2017 the Prosecutor requested the Pre-Trial Chamber of the ICC to authorise an investigation into the situation in Burundi.[96] On October 25th, two days before Burundi officially withdrew from the Rome Statute, the Pre-Trial Chamber determined that there was a reasonable basis to authorise an investigation into the situation in Burundi.[97] The Pre-Trial Chamber stated that the evidence submitted by the Prosecutor shows that since April 2015, members of the civilian population who support or perceive to support the opposition have been targeted by high-ranking officials of the Burundian government, the police, the intelligence service, the military services, and the Imbonerakure (the youth wing of the ruling party).[98]

The Pre-Trial Chamber of the ICC determined that there is a reasonable basis to believe that acts of murder, attempted murder, imprisonment or other severe deprivation of physical liberty, torture, rape, enforced disappearances, and persecution constituting crimes against humanity under Article 7 of the Rome Statute have been committed by members of the Burundian security forces and the Imbonerakure.[99] The

[95] Office of the Prosecutor 'Report on Preliminary Examination Activities 2017' (4 December 2017) para. 289.
[96] *Situation in Burundi* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi) ICC-01/17-X-9-US-Exp (25 October 2017) para. 4. See also Prosecutor's request for authorisation *Situation in Burundi* (Request for Authorisation of an Investigation Pursuant to Article 15) ICC-01/17-X-5-US-Exp (6 September 2017).
[97] *Situation in Burundi* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi) ICC-01/17-X-9-US-Exp (25 October 2017) para. 195.
[98] *Situation in Burundi* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi) ICC-01/17-X-9-US-Exp (25 October 2017) para. 33. See also *Situation in Burundi* (Request for Authorisation of an Investigation Pursuant to Article 15) ICC-01/17-X-5-US-Exp (6 September 2017) para. 40–43.
[99] *Situation in Burundi* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi) ICC-01/17-X-9-US-Exp (25 October 2017) para. 67, 90, 109, 116, 136.

scope of the investigation is limited to acts committed in Burundi from the 26th of April 2015 to the 26th of October 2017, however the Prosecutor can extend her investigation to events before and after this time period if legal requirements under the Rome Statute are met.[100] While the Prosecutor made no submissions and arguments concerning the commission of genocide, the Pre-Trial Chamber stated that the Prosecutor can 'on the basis of the evidence, extend her investigation to other crimes against humanity or other article 5 crimes, i.e. war crimes and genocide'.[101]

The involvement of the ICC has not had any noticeable effect on ameliorating the government of Burundi's behaviour and inducing it into negotiating with the opposition through the auspices of the inter-Burundi dialogue. International criminal justice alone cannot end violence unless states are willing to respond.[102] For instance the establishment of the ICTY and the involvement of the ICJ in the former Yugoslavia in the early 1990s did not act as a barrier to the Srebrenica genocide.[103] International justice and accountability under the auspices ICTY only began gaining results when states took coercive action to prevent violence and bring individuals to justice.[104] Therefore stopping the violence 'lies in politics, not law'.[105]

As revealed by the reaction to the Al Bashir warrant described in Chapter Three, it is particularly difficult to pursue justice when a state which is accused of being involved

[100] ibid para. 191–192.
[101] ibid para. 193.
[102] Kenneth A Rodman, 'Darfur and the Limits of Legal Deterrence' (2008) 30 Human Rights Quarterly 529, 530.
[103] Nikolas Rajković, 'On "Bad Law" and "Good Politics": The Politics of the ICJ *Genocide* Case and Its Interpretation' (2008) 21 Leiden Journal of International Law 885, 891; Kenneth A Rodman, 'Darfur and the Limits of Legal Deterrence' (2008) 30 Human Rights Quarterly 529, 533.
[104] Kenneth A Rodman, 'Darfur and the Limits of Legal Deterrence' (2008) 30 Human Rights Quarterly 529, 530; Kenneth A Rodman, 'Why the ICC Should Operate Within Peace Processes' (2012) 26 Ethics & International Affairs 59, 62.
[105] Kenneth A Rodman, 'Darfur and the Limits of Legal Deterrence' (2008) 30 Human Rights Quarterly 529, 559.

in the commission of crimes remains in power.[106] The study of the Al Bashir warrant highlighted that if you do seek to indict combatants and leaders in an ongoing situation you potentially risk prolonging that situation and deepening the level of violence perpetrated against civilians.[107] While the investigation may not have led to deepening levels of violence, it has certainly prolonged the situation as Burundi suspended cooperation with international organisations which mirrors the response of the Sudanese government to the arrest warrant.

There are further similarities between the reactions to the ICC investigations in Burundi and Darfur, as the involvement of the ICC has been criticised by neighbouring countries as President Museveni of Uganda and the president of Tanzania, John Magufuli condemned the ICC Pre-Trial Chamber's decision to open an investigation for its potential to jeopardise the EAC led peace negotiations.[108] These regional actors do not want to be placed in the difficult situation of negotiating a peace agreement with individuals who may be subject to international arrest warrants. Therefore, comparable to the regional reaction to the Al Bashir warrant outlined in Chapter Three, there are influential regional actors contending that criminal justice should be side-lined for the pursuit of peace. This raises the dilemma of whether peace can be achieved in Burundi, with the threat of prosecution hanging over the head of government and security officials.

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[106] David Wippman, 'Can an International Criminal Court Prevent and Punish Genocide' in Neal Riemer (ed), *Protection against Genocide: Mission Impossible?* (Praeger 2000) 87.

[107] Alexis Arieff, Rhoda Margesson, and Marjorie Ann Brown, 'International Criminal Court Cases in Africa: Status and Policy Issues' in Harry P Milton (ed), *International Criminal Court: Policy, Status and Overview* (Nova Science Publishers 2009) 22; Martin Mennecke, 'Genocide Prevention and International Law' (2009) 4 Genocide Studies and Prevention 167, 169; Victor Peskin, 'The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur' (2009) 4 Genocide Studies and Prevention 304, 310–311; Marianne L Wade, 'The Criminal Law between Truth and Justice' (2009) 19 International Criminal Justice Review 150, 157.

[108] United Nations Security Council 'Report of the Secretary-General on the Situation in Burundi' (25 January 2018) UN Doc S/2018/89, para. 27.

While justice should not be undermined, it is difficult to achieve accountability when not only is a government refusing to cooperate with an investigation but also two important facilitators of the peace process are opposed to any judicial mechanism. Therefore the Prosecutor's investigation and the potential issuance of arrest warrants is a key obstacle which will have to be confronted in the future if the situation is not resolved.

A negotiated settlement looked unlikely in 2018, as tension rose again in Burundi after Nkurunziza and his government's decision to hold a referendum in May 2018 on proposed changes to the Constitution, which would remove the power-sharing provisions and restrictions on term limits set out within the Constitution and the Arusha Agreement.[109] The changes to the constitution were approved by nearly three quarters of voters, with a turnout of over 95% in a referendum campaign that was marked by voter intimidation and violence.[110]

In the lead-up to the Constitutional Referendum, government officials in public statements warned people not to oppose the amendments while also threatening to target anyone who does campaign against the government.[111] The referendum campaign led to an increase in repression as government forces targeted opposition

[109] United Nations Security Council 'Report of the Secretary-General on the Situation in Burundi' (25 January 2018) UN Doc S/2018/89, para. 3–5. See also International Crisis Group, 'Burundi: A Dangerous Third Term' (20 May 2016) 7–9; United Nations Security Council 'Report of the Secretary-General on Burundi' (23 February 2017) UN Doc S/2017/165, para. 2–3, 8, 10, 12; Human Rights Watch, '"We Will Beat You to Correct You": Abuses Ahead of Burundi's Constitutional Referendum' (18 May 2018) 13.

[110] United Nations Security Council '8268th Meeting' (24 May 2018) UN Doc S/PV.8268, 2.

[111] United Nations Office of the High Commissioner for Human Rights 'Oral Presentation of the Commission of Inquiry on Burundi at the 37th Session of the Human Rights Council' (13 March 2018) Press Release; United Nations Office of the High Commissioner for Human Rights 'Introduction to Country Reports/Briefings/Updates of the Secretary-General and the High Commissioner under Item 2' (21 March 2018) Press Release; Human Rights Watch, 'Burundi: Repression Linked to Presidential-Term Vote' (17 April 2018) Press Release; Human Rights Watch, '"We Will Beat You to Correct You": Abuses Ahead of Burundi's Constitutional Referendum' (18 May 2018) 13–15; United Nations Office of the High Commissioner for Human Rights 'Oral Briefing by the Members of the Commission of Inquiry on Burundi to the Human Rights Council' (27 June 2018) Press Release.

politicians and civil society actors calling for a No vote.[112] In May 2018, the most violent attack since December 2015 was perpetrated when at least 24 people, including women and children, were murdered by unidentifiable individuals.[113] With the passing of the referendum and the continued reluctance of the Burundian government to enter dialogue with the opposition and engage with international bodies, the situation remained tense in 2018.

There is no definitive number of those who have been killed since the beginning of the violence, the last official account was from the UN Office of the High Commissioner for Human Rights which documented 593 violations of the right to life from April 2015 to the 31 December 2016.[114] There has also been widespread displacement since April 2015, as more than 430,000 people have fled the country to seek refuge in neighbouring countries while there are over 175,000 internally displaced persons within Burundi.[115] Furthermore over 3 million people, which accounts for one quarter of the population require humanitarian assistance.[116]

While the levels of violence have fluctuated in Burundi since 2015, there are indications that the violence could develop into genocide in the warnings coming from

[112] Human Rights Watch, 'Burundi: Repression Linked to Presidential-Term Vote' (17 April 2018) Press Release; United Nations Office of the High Commissioner for Human Rights 'Tension Grips Burundi after Deadly Attack and as Referendum Approaches – Zeid' (15 May 2018) Press Release; Human Rights Watch, '"We Will Beat You to Correct You": Abuses Ahead of Burundi's Constitutional Referendum' (18 May 2018) 20–31; United Nations Office of the High Commissioner for Human Rights 'Oral Briefing by the Members of the Commission of Inquiry on Burundi to the Human Rights Council' (27 June 2018) Press Release; United Nations General Assembly Human Rights Council 'Report of the Commission of Inquiry on Burundi' (8 August 2018) UN Doc A/HRC/39/63, para. 12.
[113] United Nations Office of the High Commissioner for Human Rights 'Tension Grips Burundi after Deadly Attack and as Referendum Approaches – Zeid' (15 May 2018) Press Release; United Nations Office of the High Commissioner for Human Rights 'Oral Briefing by the Members of the Commission of Inquiry on Burundi to the Human Rights Council' (27 June 2018) Press Release.
[114] United Nations Security Council 'Report of the Secretary-General on Burundi' (23 February 2017) UN Doc S/2017/165, para. 4.
[115] United Nations Office of the High Commissioner for Refugees 'Burundi Situation' (January 2018).
[116] United Nations Security Council '7895th Meeting' (9 March 2017) UN Doc S/PV.7895, 2; United Nations Security Council '7978th Meeting' (20 June 2017) UN Doc S/PV.7978, 3; United Nations Security Council '8189th Meeting' (26 February 2018) UN Doc S/PV.8189, 3.

individuals and groups on the ground. Would a genocide finding improve the situation in comparison to a finding of atrocity crimes? With the international community failing to meaningfully respond to threats of genocide and atrocity crimes, would a clear determination of genocide by an actor or inquiry of the UN and the AU alter their approach to the situation?

6.2(iv) The Value of a Genocide Finding

If the genocide label was utilised it should not spark a different reaction to the current approach of international and regional actors as to what further response beyond international inquiries and an ICC investigation would a claim of genocide spur? The label genocide would unlikely lead to military intervention as the examination of previous situations illustrates that the genocide label is a recipe for inaction which could in fact destabilise an already precarious situation.

In Burundi, the label to be applied to the violence is not dictating the international response to the situation rather the level of violence and government response is guiding the approach to resolving the situation. With the situation in Burundi not yet involving large-scale violence the focus of international and regional efforts is on employing softer measures to facilitate dialogue, encouraging the government of Burundi to re-engage with international human rights bodies, and gaining the government's cooperation with the deployment of AU and regional forces to aid in peacebuilding operations and human rights monitoring.

A determination of genocide in the midst of the situation would be problematic due to the potential responses of the Burundian government, and regional and international actors. An accusation of genocide could push an already internationally disengaged Burundi over the edge, as the international community's options for resolving the

Burundi crisis would drastically narrow. A finding of genocide by a state or a commission of inquiry would make peace negotiations virtually impossible as civil society actors would decry any attempts of dialogue with those accused of, in their minds, the gravest crime. There would also be the further issue of civil society actors advocating impractical solutions, which means that the international community would be at a standstill. This would not improve the lives of the very people suffering from the violence, whether it is genocidal or not.

While the UN Security Council and the AU may not be using the label genocide, it does not mean that steps are not being taken to prevent genocide in Burundi. The word genocide does not need to be spoken in Burundi to prevent the crime. The international efforts to halt the perpetration of human rights violations, while not explicitly aimed at the prevention of genocide, are directed at addressing the conditions that give rise to atrocity crimes, which as we know are nearly identical for each atrocity crime. Therefore activists and victims should not be concentrating on labelling the violence as genocide or extending the definition of genocide, as the genocide label or an expanded definition of genocide encompassing elements of a social understanding of genocide will not improve the situation on the ground as repression and violence will continue regardless the label applied to describe the violence.

In conclusion while the violence in Burundi may not amount to the crime of genocide, the references to genocide in this chapter have highlighted the various drawbacks associated with the genocide label discussed throughout this study. Genocide as a crime is difficult to predict, due to the complexity of forecasting whether a campaign of genocide will evolve from the signifiers of genocide present in a situation. Burundi is a typical ethnic conflict, however this does mean that Burundi will follow some

predictable pattern. Despite Burundi's history of atrocity crimes, including the perpetration of genocide, it is near impossible to know that genocide will be perpetrated. Even when crimes are perpetrated, genocide is hard to identify due to the difficulty of distinguishing the elements of genocide from other crimes of international law in the midst of spiralling violence. The intent to destroy differentiates the crime of genocide, however this element is onerous to identify in the midst of violence as actors are rarely explicit with the intent underlying their actions. In Burundi, similar to many situations of violence, actors have concealed their actions and policies under the guise of political and military objectives.

As well as illustrating the complexities surrounding identifying signs and evidence of genocide the case of Burundi highlights that employing the label genocide or expressing fears of the risk of genocide does not provoke effective international or regional responses to violence. Genocide has not sufficiently challenged the political will of states to prevent and respond to genocide. The inadequacy of the genocide label as a preventative term in the midst of violence raises significant questions for the future study of genocide. Should focus continue to be on defining the crime or should there be an acceptance that genocide as a term provides more obstacles to peace than remedies for halting violence due to the variety of complexities involved in identifying the crime in the midst of violence? The discussion of genocide within the context of Burundi indicates that genocide is a problematic label for prevention, but perhaps the term has been more successfully employed to address violence in a situation that has developed to the north of Burundi.

6.3 South Sudan Facing the Abyss

The world's newest state South Sudan achieved independence in July 2011 after a protracted military campaign against the Sudanese government. Unfortunately

independence did not deliver peace and stability; instead South Sudan's post-independence experience has been marked by political infighting which in 2013 descended into widespread bloodshed and a large scale humanitarian crisis. With various warnings related to the threat of genocide present in the situation in South Sudan, is it possible to forecast the risk of genocide or identify the initial stages of genocide in South Sudan? Furthermore if these signs are identifiable, is it beneficial to label the violence as genocide in seeking to halt the violence that has plagued South Sudan since 2013?

6.3(i) Forging a Nation

The roots of the violence that ignited in South Sudan in 2013 can be traced back to the South's struggle for self-determination in Sudan. Cultural, economic, political, and religious disparities between the north and the south of Sudan led to a civil war breaking out in 1955, in the midst of the country gaining independence from Britain and Egypt's colonial rule.[117] While the south of Sudan is home to a diverse ethnic population with over sixty different ethnic groups, these ethnic groups united together with the objective of achieving greater levels of autonomy from the Khartoum government.[118] The south largely united under the banner of the Sudan People's Liberation Movement and its Army (hereafter 'SPLM' and 'SPLM/A'), led by John

[117] Amir H Idris, *Sudan's Civil War: Slavery, Race and Formational Identities* (The Edwin Mellen Press 2001) 1; Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 40–41.
[118] Jenik Radon and Sarah Logan, 'South Sudan: Governance Arrangements, War, and Peace' (2014) 68 Journal of International Affairs 149, 152.

Garang, a member of the Dinka ethnic group.[119] The SPLM/A did not seek independence but rather a new secular inclusive Sudan.[120]

This vision of a united Sudan espoused by Garang was not accepted by all the members of the SPLM, instead an opposition movement within the SPLM, led by Riek Machar and comprising primarily of members of the Nuer ethnic group, called for the succession of the South.[121] The divisions within the different factions of the SPLM created a civil war within a civil war, and saw some of the bloodiest atrocities of the civil war period.[122] The legacy of this split within the SPLM is seen in the violence that arose in 2013 as references to historical atrocities are being used to inflame tensions between groups.

The feuding groups within the SPLM did reunite, after years of crippling violence, under the SPLM banner in the interest of negotiating a peace agreement.[123] Peace negotiations between the SPLM and the Sudanese government started in 1993 with the support of the regional grouping the Intergovernmental Authority on Development (hereafter 'IGAD').[124] While the process was slow, regional and international

[119] Amir H Idris, *Sudan's Civil War: Slavery, Race and Formational Identities* (The Edwin Mellen Press 2001) 3; Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 66.
[120] Douglas H Johnson, 'Twentieth-Century Civil Wars' in John Ryle, Justin Willis, Suliman Baldo, and Jok Madut Jok (eds), *The Sudan Handbook* (Rift Valley Institute 2011) 127; Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 67.
[121] Amir H Idris, *Sudan's Civil War: Slavery, Race and Formational Identities* (The Edwin Mellen Press 2001) 129–130; Douglas H Johnson, 'Twentieth-Century Civil Wars' in John Ryle, Justin Willis, Suliman Baldo, and Jok Madut Jok (eds), *The Sudan Handbook* (Rift Valley Institute 2011) 130–131.
[122] Amir H Idris, *Sudan's Civil War: Slavery, Race and Formational Identities* (The Edwin Mellen Press 2001) 129–130; Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 79, 98.
[123] John Young, *The Fate of Sudan: The Origins and Consequences of a Flawed Peace Process* (Zed Books 2012) 54.
[124] Douglas H Johnson, 'Twentieth-Century Civil Wars' in John Ryle, Justin Willis, Suliman Baldo, and Jok Madut Jok (eds), *The Sudan Handbook* (Rift Valley Institute 2011) 131; John Young, *The Fate of Sudan: The Origins and Consequences of a Flawed Peace Process* (Zed Books 2012) 83; Kasaija Phillip Apuuli, 'IGAD's Mediation in the Current South Sudan Conflict: Prospects and Challenges' (2015) 8 African Security 120, 126.

commitment to a negotiated peace brought about further talks.[125] A seminal moment in the peace negotiations occurred in 2002 when the Machakos Protocol was signed by the Sudanese government and the SPLM which outlined the broad principles of a peace agreement, and crucially granted the South the option of holding a referendum for independence.[126] Then in 2005, one of the longest running civil wars in Africa ended when the government of Sudan and the SPLM signed the Comprehensive Peace Agreement.[127]

Garang who was one of the leading negotiators of the Comprehensive Peace Agreement died in a helicopter crash a number of months after the signing of the agreement.[128] Salva Kiir Mayardit, Garang's deputy commander in the SPLA and a member of the Dinka ethnic group like Garang, replaced him as the leader of the SPLM while Riek Machar, who had re-joined the SPLM before the signing of the Comprehensive Peace Agreement, became second in command.[129]

In January 2011 the south voted overwhelmingly (98.83%) to become an independent country, which formally occurred on the 9th of July 2011 with the creation of the Republic of South Sudan.[130] As leader of the SPLM, Kiir became the President of the

[125] Gareth Curless and Annemarie Peen Rodt, 'Sudan and the Not So Comprehensive Peace' (2013) 15 Civil Wars 101, 104–105.
[126] Øystein H Rolandsen, 'A Quick Fix? A Retrospective Analysis of the Sudan Comprehensive Peace Agreement' (2011) 30 Review of African Political Economy 551, 555–556; Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 168.
[127] Douglas H Johnson, 'Twentieth-Century Civil Wars' in John Ryle, Justin Willis, Suliman Baldo, and Jok Madut Jok (eds), *The Sudan Handbook* (Rift Valley Institute 2011) 132; Johan Brosché and Kristine Höglund, 'Crisis of Governance in South Sudan: Electoral Politics and Violence in the World's Newest Nation' (2016) 54 Journal of Modern African Studies 67, 73.
[128] Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 173; Salman MA Salman, 'South Sudan Road to Independence: Broken Promises and Lost Opportunities' (2013) 26 Global Business and Development Law Journal 343, 402.
[129] Øystein H Rolandsen, 'A Quick Fix? A Retrospective Analysis of the Sudan Comprehensive Peace Agreement' (2011) 30 Review of African Political Economy 551, 559.
[130] Roberto Belloni, 'The Birth of South Sudan and the Challenges of Statebuilding' (2011) 10 Ethnopolitics 411, 411; Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 3.

newly independent South Sudan while Machar assumed the position of Vice President.[131] On the 14th of July 2011, South Sudan was admitted as the 193rd member of the UN.[132] Despite its membership of the community of nations, South Sudan has not ratified the Genocide Convention or the Rome Statute. On gaining independence South Sudan became one of the poorest and least developed nations, and its socio-economic difficulties and weak state institutions have contributed to political instability and the rise of violence within the new state.[133] Rather than deliver the peace which was tantalisingly promised, independence has reopened old rivalries as there has been a power struggle between Kiir and Machar since independence which boiled over in 2013.

Would this tension evolve along genocidal lines, or is it impossible to predict due to the similarities between the atrocity crimes? The instability in society combined with South Sudan's recent history of atrocity crimes indicates that South Sudan pre-2013 was vulnerable to the perpetration of atrocity crimes, including genocide. However this does not mean that the situation in South Sudan which developed in 2013 would lead to the perpetration of genocide due to the complexity of distinguishing indicators of the atrocity crimes and the difficulty of identifying a triggering factor for genocidal violence. Until the violence broke out, it was impossible to predict that genocide would be perpetrated.

[131] Douglas H Johnson, 'The Political Crisis in South Sudan' (2014) 57 African Studies Review 167, 168.
[132] United Nations General Assembly Resolution 65/308 (25 August 2011) UN Doc A/RES/65/308.
[133] Robert Belloni, 'The Birth of South Sudan and the Challenges of Statebuilding' (2011) 10 Ethnopolitics 411, 424; Gareth Curless and Annemarie Peen Rodt, 'Sudan and the Not So Comprehensive Peace' (2013) 15 Civil Wars 101, 102, 110–111; Johan Brosché and Kristine Höglund, 'Crisis of Governance in South Sudan: Electoral Politics and Violence in the World's Newest Nation' (2016) 54 Journal of Modern African Studies 67, 83.

6.3(ii) A Violent Eruption

The situation that developed in South Sudan in 2013 was sparked by an announcement by Machar that he would challenge for the presidency, a decision which led to Kiir removing Machar from his role as Vice-President in June 2013 and dismissing his entire cabinet.[134] This action led to a power struggle within the government and the military.[135] In December 2013, fighting broke out in the capital Juba amongst members of the Presidential Guard which quickly spread to army barracks surrounding Juba.[136] In response to the clashes, Kiir accused Machar of leading a coup against him and detained eleven politicians, however Machar avoided arrest as he fled the capital.[137] While the situation was founded in a political confrontation between Kiir and Machar, there was a definite ethnic element to the violence as Dinka soldiers within the Dinka-dominated SPLA deliberately targeted members of the Nuer ethnic group in house to house searches in Juba in the initial days of the situation.[138]

[134] Douglas H Johnson, 'The Crisis in South Sudan' (2014) 113 African Affairs 300, 303–304.
[135] Øystein H Rolandsen, 'Another Civil War in South Sudan: The Failure of Guerrilla Government?' (2015) 9 Journal of Eastern African Studies 163, 170–171.
[136] Douglas H Johnson, 'The Political Crisis in South Sudan' (2014) 57 African Studies Review 167, 171; Jenik Radon and Sarah Logan, 'South Sudan: Governance Arrangements, War, and Peace' (2014) 68 Journal of International Affairs 149, 149–150; Johan Brosché and Kristine Höglund, 'Crisis of Governance in South Sudan: Electoral Politics and Violence in the World's Newest Nation' (2016) 54 Journal of Modern African Studies 67, 76–77.
[137] Douglas H Johnson, 'The Crisis in South Sudan' (2014) 113 African Affairs 300, 300; Øystein H Rolandsen, 'Another Civil War in South Sudan: The Failure of Guerrilla Government?' (2015) 9 Journal of Eastern African Studies 163, 163.
[138] African Union 'Report of the Chairperson of the Commission on the Situation in South Sudan' (30 December 2013) PSC/AHG/3(CDXI), para. 11; United Nations Mission in South Sudan 'Interim Report on Human Rights: Crisis in South Sudan — Report Coverage 15 December 2013–January 31 2014' (21 February 2014) 11; United Nations Mission in South Sudan 'Conflict in South Sudan: A Human Rights Report' (8 May 2014) para. 70–78; Human Rights Watch, 'South Sudan's New War: Abuses by Government and Opposition Forces' (7 August 2014) 18, 23, 26–27; United Nations General Assembly Human Rights Council 'Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan: Detailed Findings' (10 March 2016) UN Doc A/HRC/31/CRP.6, para. 145–147.

Outside the capital, units of the SPLA defected to Machar, who was also bolstered in support by militia groups.[139] Machar's forces, who were associated with the Nuer ethnic group, became known as the SPLM/A in Opposition (hereafter 'SPLM/A-IO'), repeatedly clashed with the SPLA as violence spiralled into other towns and villages across South Sudan.[140] The situation became more complex as the violence spread across South Sudan as other armed groups and militias became involved in the violence, clashing with both the SPLA and the SPLA-IO and fighting amongst themselves.[141] These armed groups and militias formed primarily along ethnic lines, which lead to the SPLA, SPLA-IO, and other militias to deliberately target civilians on the basis of their ethnicity due to their real or perceived support for an opposing side.[142]

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[139] Douglas H Johnson, 'The Crisis in South Sudan' (2014) 113 African Affairs 300, 300–301, 307; Øystein H Rolandsen, 'Another Civil War in South Sudan: The Failure of Guerrilla Government?' (2015) 9 Journal of Eastern African Studies 163, 163–164.

[140] Jenik Radon and Sarah Logan, 'South Sudan: Governance Arrangements, War, and Peace' (2014) 68 Journal of International Affairs 149, 149; Johan Brosché and Kristine Höglund, 'Crisis of Governance in South Sudan: Electoral Politics and Violence in the World's Newest Nation' (2016) 54 Journal of Modern African Studies 67, 77.

[141] Johan Brosché and Kristine Höglund, 'Crisis of Governance in South Sudan: Electoral Politics and Violence in the World's Newest Nation' (2016) 54 Journal of Modern African Studies 67, 77–78; United Nations Security Council 'Final Report of the Panel of Experts on South Sudan' (22 January 2016) UN Doc S/2016/70, para. 13; United Nations General Assembly Human Rights Council 'Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan: Detailed Findings' (10 March 2016) UN Doc A/HRC/31/CRP.6, para. 144, 150, 154–155, 255–257, 262; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (23 February 2018) UN Doc A/HRC/37/71, para. 18–19.

[142] African Union and Intergovernmental Authority on Development 'The AU and IGAD Reiterate the Call for an Immediate Ceasefire in South Sudan and Urgent Dialogue between the Parties' (25 December 2013) Press Release; United Nations Office of the High Commissioner for Human Rights 'South Sudan: "What I Saw Was a Horror," Says Top Human Rights Official' (17 January 2014) Press Release; United Nations Mission in South Sudan 'Interim Report on Human Rights: Crisis in South Sudan — Report Coverage 15 December 2013–January 31 2014' (21 February 2014) 6, 11–19; United Nations Security Council 'Report of the Secretary-General on South Sudan' (6 March 2014) UN Doc S/2014/158, para. 29–31; Intergovernmental Authority on Development Monitoring and Verification Mechanism 'Investigations into Violations of the Cessation of Hostilities Agreement in Bor (Jonglei State) 17 April 2014' (25 April 2014) 5; Amnesty International, 'Nowhere Safe: Civilians under Attack in South Sudan' (8 May 2014) 7, 11–13, 15, 18–29, 51–52; United Nations Mission in South Sudan 'Conflict in South Sudan: A Human Rights Report' (8 May 2014) para. 157; Intergovernmental Authority on Development Monitoring and Verification Mechanism 'Investigations into Continuing Violations of the Cessation of Hostilities Agreement in Bor, Juba and Bentiu' (20 June 2014) 4–5; African Union Commission of Inquiry on South Sudan, 'Final Report of The African Union

In response to the violence the international community has continually attempted to mediate the situation and halt the slaughter. The IGAD negotiated a ceasefire between the SPLM/A and the SPLM/A-IO in January 2014 but it was repeatedly broken by both sides and it did nothing to abate the violence.[143] Continued attempts by the IGAD to negotiate ceasefires stalled over the following months as violence raged on.[144] The

Commission of Inquiry on South Sudan' (15 October 2014) para. 60, 762–769, 813–814, 1135; United Nations General Assembly Human Rights Council 'Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in South Sudan' (25 November 2014) UN Doc A/HRC/27/74, para. 19; United Nations Mission in South Sudan 'Attack on Civilians in Bentiu and Bor April 2014' (9 January 2015) para. 74, 91–100; Intergovernmental Authority on Development Monitoring and Verification Mechanism 'Investigations into Violations of the Cessation of Hostilities Agreement in Nassir, Upper Nile State' (23 January 2015) 6; United Nations General Assembly Human Rights Council 'Human Rights Situation in South Sudan: Report of the United Nations High Commissioner for Human Rights' (27 March 2015) UN Doc A/HRC/28/49, para. 9; United Nations Mission in South Sudan 'Flash Human Rights Report on the Escalation of Fighting in Greater Upper Nile (April/May 2015)' (29 June 2015) para. 15, 16, 26; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 20 August-23 November 2015)' (23 November 2015) UN Doc S/2015/902, para. 17; United Nations Mission in South Sudan 'The State of Human Rights in Protracted Conflict in South Sudan' (4 December 2015) para. 7, 77; United Nations Security Council 'Final Report of the Panel of Experts on South Sudan' (22 January 2016) UN Doc S/2016/70, para. 110–111; United Nations General Assembly Human Rights Council 'Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan: Detailed Findings' (10 March 2016) UN Doc A/HRC/31/CRP.6, para. 150, 193, 332–334; United Nations General Assembly Human Rights Council 'Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan' (22 April 2016) UN Doc A/HRC/31/49, para. 19, 24–26, 29, 32, 42, 264, 274; Ceasefire and Transitional Security Arrangements Monitoring Mechanism 'Violations in the Yei Area' (4 September 2017) 3; Ceasefire and Transitional Security Arrangements Monitoring Mechanism 'Violations in Wonduruba, Central Equatoria State' (4 September 2017) 3; Ceasefire and Transitional Security Arrangements Monitoring Mechanism 'Violations in Western Equatoria' (3 November 2017) 2–3; United Nations Security Council 'Interim Report of the Panel of Experts on South Sudan' (20 November 2017) UN Doc S/2017/979, para. 34–35; United Nations Security Council 'Final Report of the Panel of Experts on South Sudan' (12 April 2018) UN Doc S/2018/292, para. 13, 30, 41–45.

[143] Intergovernmental Authority on Development 'Agreement on Cessation of Hostilities between the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement/Army (In Opposition) (SPLM/A In Opposition)' (23 January 2014). See also United Nations Security Council 'Report of the Secretary-General on South Sudan' (6 March 2014) UN Doc S/2014/158, para. 9–10; Kasaija Phillip Apuuli, 'IGAD's Mediation in the Current South Sudan Conflict: Prospects and Challenges' (2015) 8 African Security 120, 128–130.

[144] United Nations Security Council 'Report of the Secretary-General on South Sudan' (25 July 2014) UN Doc S/2014/537, para. 2–6; United Nations Security Council 'Report of the Secretary-General on South Sudan' (30 September 2014) UN Doc S/2014/708, para. 2–10; United Nations Security Council 'Report of the Secretary-General on South Sudan' (18 November 2014) UN Doc S/2014/821, para. 2–8; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 18 November 2014-10 February 2015)' (17 February 2015) UN Doc S/2015/118, para. 2–9; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 11 February-13 April 2015)' (29 April 2015) UN Doc S/2015/296, para. 2–4; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 14 April-19 August 2015)' (21 August 2015) UN Doc S/2015/655, para. 2–16.

UN is also involved in negotiating a peaceful settlement to the situation through the United Nations Mission in South Sudan (hereafter 'UNMISS'), a UN Security Council created Chapter VII mission deployed to South Sudan after the vote for secession.[145] Since the genesis of the situation and in response to the constant levels of violence, the UN Security Council repeatedly bolstered the mandate and the force strength of UNMISS.[146] With the repeated failure to halt the violence and foster dialogue the UN Security Council in March 2015 created a sanctions regime, a travel ban and asset freeze, which would be targeted against those who violated international law and prolonged the violence.[147] The US, Canada, and the EU have also imposed travel bans and asset freezes against high ranking SPLM/A and SPLM/A-IO officials.[148]

Signs of Genocide

With mediation frustrated, violence continued unabated which led to claims that genocide could be perpetrated due to the ethnic dimension to the violence. In April

[145] United Nations Security Council Resolution 1996 (8 July 2011) UN Doc S/RES/1996.

[146] United Nations Security Council Resolution 1996 (8 July 2011) UN Doc S/RES/1996; United Nations Security Council Resolution 2132 (24 December 2013) UN Doc S/RES/2132; United Nations Security Council Resolution 2155 (27 May 2014) UN Doc S/RES/2155; United Nations Security Council Resolution 2187 (25 November 2014) UN Doc S/RES/2187; United Nations Security Council Resolution 2223 (28 May 2015) UN Doc S/RES/2223; United Nations Security Council Resolution 2252 (15 December 2015) UN Doc S/RES/2252; United Nations Security Council Resolution 2302 (29 July 2016) UN Doc S/RES/2302; United Nations Security Council Resolution 2304 (12 August 2016) UN Doc S/RES/2304; United Nations Security Council Resolution 2327 (16 December 2016) UN Doc S/RES/2327; United Nations Security Council Resolution 2392 (14 December 2017) UN Doc S/RES/2392; United Nations Security Council Resolution 2406 (15 March 2018) UN Doc S/RES/2406; United Nations Security Council Resolution 2418 (31 May 2018) UN Doc S/RES/2418; United Nations Security Council Resolution 2428 (13 July 2018) UN Doc S/RES/2428.

[147] United Nations Security Council Resolution 2206 (3 March 2015) UN Doc S/RES/2206, para. 5–8, 9, 12. Sanctions renewed under United Nations Security Council Resolution 2271 (2 March 2016) UN Doc S/RES/2271; United Nations Security Council Resolution 2280 (7 April 2016) UN Doc S/RES/2280; United Nations Security Council Resolution 2290 (31 May 2016) UN Doc S/RES/2290; United Nations Security Council Resolution 2353 (24 May 2017) UN Doc S/RES/2353.

[148] United Nations Security Council 'Report of the Secretary-General on South Sudan' (25 July 2014) UN Doc S/2014/537, para. 10; United Nations Security Council 'Report of the Secretary-General on South Sudan' (18 November 2014) UN Doc S/2014/821, para. 9; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 2 September to 14 November 2017)' (1 December 2017) UN Doc S/2017/1011, para. 14; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 15 November 2017 to 16 February 2018)' (28 February 2018) UN Doc S/2018/163, para. 13.

2014, Eric Reeves, a genocide researcher, and John Prendergast, a genocide prevention activist, contended that the violence bears 'all the hallmarks of genocide' due to the ethnic split in the army which is leading armed groups to target individuals on the basis of their ethnicity.[149] In May 2014, the then US Secretary of State John Kerry stated that 'with respect to the question of genocide, there are very disturbing leading indicators of the kind of ethnic, tribal, targeted nationalistic killings taking place'.[150] On the next day, the Special Adviser on the Prevention of Genocide warned the UN Security Council about the presence of risk factors and precursors of genocide and other atrocity crimes in the violence including ethnically-motivated violence, discrimination based on ethnicity, groups forming around ethnicity, and radio broadcasting of hate speech and incitement to violence.[151] In the same month, Navi Pillay, the then High Commissioner for Human Rights and a former President of the ICTR, reported that she witnessed a number of precursors of genocide in the violence, such as 'hate media including calls to rape women of a particular ethnic group; attacks on civilians in hospitals, churches and mosques; even attacks on people sheltering in UN compounds – all on the basis of the victims' ethnicity.'[152]

The language employed by the observers reflects the difficulty of predicting the outbreak of genocide as they refer to indicators and signals of genocide within South Sudan. These references to genocide are speculative as the presence of warning signs in South Sudan does not mean that the situation will escalate. The discussion in Chapter 4 on the warning signs of genocide showed that not every situation which

[149] Eric Reeves and John Prendergast, 'Preventing Genocide in South Sudan' *Sudan Tribune* (29 April 2014).
[150] Anne Gearan, 'Kerry Warns of Genocide in South Sudan' *The Washington Post* (1 May 2014).
[151] United Nations Security Council '7168th Meeting' (2 May 2014) UN Doc S/PV.7168, 4–5.
[152] United Nations Office of the High Commissioner for Human Rights 'UN Report Documenting Human Rights Violations on "A Massive Scale" in South Sudan Underscores Extreme Urgency – Pillay' (9 May 2014) Press Release.

displays signs of genocide will result in genocide being perpetrated. In fact the warnings may indicate that the violence may develop into crimes against humanity and ethnic cleansing due to the similar warning signals for each crime. As highlighted in Chapter 4, it is a complex task to predict not only if an atrocity crime will be committed but also to predict which atrocity crime will be perpetrated.

While the observers cautioned of the risk of genocide in 2014, the violence did not develop along genocidal lines, as least according to the AU Commission of Inquiry, which was the only inquiry to address the perpetration of genocide. The AU Commission of Inquiry stated that notwithstanding the central role of ethnicity in the situation, there were no reasonable grounds, based on interviews and evidence, to believe genocide had been perpetrated.[153] Despite the deliberate targeting of Nuer civilians on the basis of their ethnicity at roadblocks and in house-to-house searches by the SPLA in Juba in December 2013 resembling the early days of the Rwandan Genocide, the AU-mandated Commission of Inquiry considered these actions as evidence of a government plan to commit crimes against humanity.[154] This illustrates the difficulty of comparing situations and applying the lessons of one situation to another, as not every situation that involves the deliberate targeting of civilians on the basis of their membership of a protected group amounts to genocide. Furthermore it highlights the central role of intent within the crime of genocide, as there was clear evidence of physical acts occurring which were targeted against ethnic groups, but a genocidal intent underlying these acts was not discernible from the available evidence.

[153] African Union Commission of Inquiry on South Sudan, 'Final Report of The African Union Commission of Inquiry on South Sudan' (15 October 2014) para. 805.
[154] African Union Commission of Inquiry on South Sudan, 'Final Report of The African Union Commission of Inquiry on South Sudan' (15 October 2014) para. 810–812. See also United Nations Mission in South Sudan 'Conflict in South Sudan: A Human Rights Report' (8 May 2014) para. 288.

Instead of finding evidence of a campaign of genocide, inquiries conducted by the AU Commission of Inquiry, the Human Rights Division of the UNMISS, and the UN Office of the High Commissioner for Human Rights have determined that there are reasonable grounds to believe that government and opposition forces have perpetrated war crimes and crimes against humanity since December 2013 due to the widespread and systematic nature of the attacks.[155] Furthermore in their reports to the UN Security Council, the UN Secretary-General has communicated their belief that crimes against humanity have been committed throughout the violence.[156] In statements and resolutions the UN Security Council has repeatedly contended that the violence may amount to war crimes or crimes against humanity.[157] Therefore the majority of

[155] United Nations Mission in South Sudan 'Conflict in South Sudan: A Human Rights Report' (8 May 2014) para. 288–292; African Union Commission of Inquiry on South Sudan, 'Final Report of The African Union Commission of Inquiry on South Sudan' (15 October 2014) para. 810–824, 1134–1137; United Nations Mission in South Sudan 'Attack on Civilians in Bentiu and Bor April 2014' (9 January 2015) para. 3, 122, 124–126; United Nations Mission in South Sudan 'The State of Human Rights in Protracted Conflict in South Sudan' (4 December 2015) para. 1, 55; United Nations General Assembly Human Rights Council 'Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan: Detailed Findings' (10 March 2016) UN Doc A/HRC/31/CRP.6, para. 324–325, 327–334, 345; United Nations General Assembly Human Rights Council 'Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan' (22 April 2016) UN Doc A/HRC/31/49, para. 12.

[156] United Nations Security Council '7172nd Meeting' (12 May 2014) UN Doc S/PV.7172, 3; United Nations Security Council 'Report of the Secretary-General on South Sudan' (25 July 2014) UN Doc S/2014/537, para. 76; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 14 April-19 August 2015)' (21 August 2015) UN Doc S/2015/655, para. 74; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 10 November 2015-2 February 2016)' (9 February 2016) UN Doc S/2016/138, para. 74.

[157] United Nations Security Council 'Security Council Press Statement on Cessation of Hostilities Agreement In South Sudan' (23 January 2014) UN Doc SC/11261; United Nations Security Council 'Security Council Press Statement on Attacks against United Nations and Civilians in South Sudan' (18 April 2014) UN Doc SC/11359; United Nations Security Council Resolution 2155 (27 May 2014) UN Doc S/RES/2155; United Nations Security Council 'Security Council Press Statement on South Sudan' (25 July 2014) UN Doc SC/11492; United Nations Security Council 'Security Council Press Statement on South Sudan' (6 August 2014) UN Doc SC/11512; United Nations Security Council 'Statement by the President of the Security Council' (8 August 2014) UN Doc S/PRST/2014/16; United Nations Security Council Resolution 2187 (25 November 2014) UN Doc S/RES/2187; United Nations Security Council 'Statement by the President of the Security Council' (24 March 2015) UN Doc S/PRST/2015/9; United Nations Security Council 'Security Council Press Statement on South Sudan' (17 May 2015) UN Doc SC/11897; United Nations Security Council Resolution 2223 (28 May 2015) UN Doc S/RES/2223; United Nations Security Council Resolution 2241 (9 October 2015) UN Doc S/RES/2241; United Nations Security Council Resolution 2252 (15 December 2015) UN Doc S/RES/2252.

observers to the situation are consistent in their view that the violations may amount to crimes against humanity and war crimes rather than genocide.

However this does not mean genocide was not occurring in South Sudan in 2013 and 2014; it could be that genocide was being perpetrated by one or more parties to the situation but the elements of the crime were not identifiable or distinguishable to observers and the inquiries. The multifaceted nature of the situation in South Sudan means that there have been numerous violations committed by the different parties at the same time, which means it may have been difficult in 2013 and 2014 to distinguish indicators of genocide from these other crimes.

Regardless of whether genocide was perpetrated in South Sudan in 2013 and 2014, international and regional observers were aware of the risk of genocide in the situation during this time period due to the multiple warnings. Arguably signatory states to the Genocide Convention had a responsibility to prevent genocide during this time period due to their awareness of the threat of genocide. John Kerry tacitly acknowledged this responsibility when he stated that the levels of ethnic and tribal killing 'present a very serious challenge to the international community with respect to the question of genocide.'[158] In responding to the violence, Kerry argued for the implementation of sanctions and the deployment of additional troops to bolster UNMISS, measures which had been adopted by the UN Security Council.[159] These measures are not exclusively aimed at preventing genocide, instead the intention behind the adoption of these measures is to address the root causes of all atrocity crimes which are plaguing South Sudan. This raises the utility of the genocide label in the midst of violence, as

[158] Phil Stewart and Aaron Maasho, 'U.S. Warns of South Sudan Genocide Risk, Raises Hope of New Forces' *Reuters* (1 May 2014).
[159] ibid.

the presence of warning signs of genocide did not exclusively inform the approach of the international community at the time, rather the levels of violence primarily dictated the response to the situation.

Further issues with the utility of the genocide label as a preventative term are illuminated by the fact that the international community, while aware of the threat of genocide, was still willing to negotiate a peace agreement with potential perpetrators of genocide in 2014 and 2015. Genocide is no different than the other atrocity crimes; regional and international actors are willing to ignore the perpetration or potential commission of crimes in order to prioritise the pursuit of peace.

Eventually negotiations involving the IGAD, the AU, the EU, the US, the UK, China, and Norway led to Kiir and Machar signing the Agreement on the Resolution of the Conflict in the Republic of South Sudan (hereafter 'ARCSS'), an agreement which provided for a power-sharing government and the return of Machar as Vice President, in August 2015.[160] This does not mean that the pursuit of criminal justice in South Sudan should be side-lined, as the ARCSS provides for the establishment of a hybrid court by the AU Commission which would have jurisdiction over genocide, crimes against humanity, war crimes and other crimes of national and international law committed since December 2013.[161]

[160] Intergovernmental Authority on Development 'Agreement on the Resolution of the Conflict in the Republic of South Sudan' (17 August 2015). See also United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 20 August-23 November 2015)' (23 November 2015) UN Doc S/2015/902, para. 2; Aleksi Ylönen, 'Reflections on Peacebuilding Interventionism: State and Nationbuilding Dilemmas in Southern Sudan (2005 to the present)' (2016) 28 Global Change, Peace and Security 213, 220–221.

[161] Intergovernmental Authority on Development 'Agreement on the Resolution of the Conflict in the Republic of South Sudan' (17 August 2015) Chapter V. See also United Nations Security Council 'Report of the Secretary-General on Technical Assistance Provided to the African Union Commission and Transitional Government of National Unity for the Implementation of Chapter V of the Agreement on the Resolution of the Conflict in the Republic of South Sudan' (7 April 2016) UN Doc S/2016/328, para. 1, 4.

While the international community may not have responded meaningfully with military force to prevent the violence that engulfed South Sudan since 2013 the focus on diplomacy did lead to the signing of the ARCSS. However, similar to many other attempts to negotiate peace agreements throughout the world, it left the conditions that gave rise to violence largely unaddressed which meant that the threat of genocide remained within South Sudan.[162]

6.3(iii) A Further Breakdown

The period after the signing of the ARCSS saw a reduction in levels of violence. However this agreement, as the others before it, began to unravel and in July 2016, five years on from independence, clashes between Kiir's and Machar's forces in Juba led to Machar fleeing the city for a second time as violence once again swept across the country.[163] The breakdown of the transitional government seemed to spark a new stage in the violence as there was an increased ethnic dimension to the situation.[164] There were parallels between the violence witnessed in Juba in 2016 and the violence in Juba in December 2013 as the SPLA once again deliberately targeted Nuer civilians in Juba when conducting checkpoints and house-to-house searches, while they allowed those who they believed to be Dinka go free.[165]

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[162] See for example the discussion on the failure of the peace agreements in Rwanda, Burundi, and Central African Republic.

[163] Lotje de Vries and Mareike Schomerus, 'Fettered Self-Determination: South Sudan's Narrowed Path to Secession' (2017) 19 Civil Wars 26, 26, 41.

[164] United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 12 August-25 October 2016)' (10 November 2016) UN Doc S/2016/950, para. 11, 41, 73; United Nations Security Council 'Special Report of the Secretary-General on the Review of the Mandate of the United Nations Mission in South Sudan' (10 November 2016) UN Doc S/2016/951, para. 3, 10, 12, 14; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (6 March 2017) UN Doc A/HRC/34/63, para. 16, 26–28, 32, 81; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 2 March to 1 June 2017)' (15 June 2017) UN Doc S/2017/505, para. 36, 40.

[165] Human Rights Watch, 'South Sudan: Killings, Rapes, Looting in Juba' (15 August 2016) Press Release; United Nations Security Council 'Report of the Panel of Experts on South Sudan' (19 September 2016) UN Doc S/2016/793, para. 13; Amnesty International, '"We did not Believe we would Survive": Killings, Rape and Looting in Juba' (11 October 2016) 11–13, 18–22; United Nations Office

Across the country the collapse of the transitional government led to a 'massive increase' in the number of abuses and violations of international criminal law.[166] Civilians continued to be deliberately targeted on the basis of their ethnicity and their real or perceived support for the opposition.[167] Ethnic division has been stirred by hate speech in public speeches and through the media and on social media, in

of the High Commissioner for Human Rights and United Nations Mission in South Sudan 'A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan, in July 2016' (16 January 2017) para. 43–45.

[166] United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (6 March 2017) UN Doc A/HRC/34/63, para. 81.

[167] Human Rights Watch, 'South Sudan: Killings, Rapes, Looting in Juba' (15 August 2016) Press Release; United Nations Security Council 'Report of the Panel of Experts on South Sudan' (19 September 2016) UN Doc S/2016/793, para. 13; Amnesty International, '"We did not Believe we would Survive": Killings, Rape and Looting in Juba' (11 October 2016) 11–13, 18–22; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 12 August-25 October 2016)' (10 November 2016) UN Doc S/2016/950, para. 11, 41, 73; United Nations Security Council 'Special Report of the Secretary-General on the Review of the Mandate of the United Nations Mission in South Sudan' (10 November 2016) UN Doc S/2016/951, para. 3, 10, 12, 14; United Nations Security Council 'Interim Report of the Panel of Experts on South Sudan' (15 November 2016) UN Doc S/2016/963, para. 13–24, 31; United Nations Security Council '7814th Meeting' (17 November 2016) UN Doc S/PV.7814, 2–4; Joint Monitoring and Evaluation Commission 'Opening Statement by HE Festus G Mogae, Chairman of JMEC during the Plenary Meeting of 15th December 2016' (15 December 2016) Press Release; United Nations Office of the High Commissioner for Human Rights and United Nations Mission in South Sudan 'A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan, in July 2016' (16 January 2017) para. 43–45; Ceasefire and Transitional Security Arrangements Monitoring Mechanism 'CTSAMM Monitoring Report January 2017' (7 February 2017) 5; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (6 March 2017) UN Doc A/HRC/34/63, para. 16, 26–28, 32, 81; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 16 December 2016 to 1 March 2017)' (16 March 2017) UN Doc S/2017/224, para. 36; United Nations Security Council 'Final Report of the Panel of Experts on South Sudan' (13 April 2017) UN Doc S/2017/326, para. 83; Human Rights Watch, 'South Sudan: New Spate of Ethnic Killings' (14 April 2017) Press Release; Ceasefire and Transitional Security Arrangements Monitoring Mechanism 'Killing and Displacement of Civilians in Pajok' (15 May 2017) 7–9; Ceasefire and Transitional Security Arrangements Monitoring Mechanism 'Killing of Civilians in Wau' (15 May 2017) 4–6; Ceasefire and Transitional Security Arrangements Monitoring Mechanism 'Violations in the Malakal Area' (15 May 2017) 6; United Nations Mission in South Sudan and United Nations Office of the High Commissioner for Human Rights 'Human Rights Violations and Abuses in Yei July 2016–January 2017' (19 May 2017) para. 2, 27–28, 45; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 2 March to 1 June 2017)' (15 June 2017) UN Doc S/2017/505, para. 17, 36, 40; Human Rights Watch, '"Soldiers Assume We Are Rebels": Escalating Violence and Abuses in South Sudan's Equatorias' (1 August 2017) 3, 17; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (23 February 2018) UN Doc A/HRC/37/71, para. 24, 70; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (23 February 2018) UN Doc A/HRC/37/CRP.2, para. 185, 195–196, 201, 290, 294, 296, 330–332, 380, 405, 420, 426–427, 514, 599.

particular by officials within the SPLM and SPLM-IO after the collapse of the government in July 2016, which has called for the targeting of opposing ethnic groups.[168] Antagonism between the ethnic groups is also being stirred after an executive order by Kiir to increase the number of states in South Sudan from ten to twenty eight as this decision is perceived by other ethnic groups as a strategy to annex land and resources to further advantage the Dinka.[169] This plan has led to violence as the SPLA have launched operations in non-Dinka areas to force the displacement of other ethnic groups to reclaim land for the Dinka.[170]

This ethnically-driven rhetoric and violence led the Special Adviser on the Prevention of Genocide to warn the UN Security Council that there is a real risk of the 'political

[168] United Nations Office of the High Commissioner for Human Rights 'South Sudan: Dangerous Rise in Ethnic Hate Speech must be Reined in' (25 October 2016) Press Release; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 12 August to 25 October 2016)' (10 November 2016) UN Doc S/2016/950, para. 11; United Nations 'Media Briefing by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide on his visit to South Sudan' (11 November 2016) Press Release; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (6 March 2017) UN Doc A/HRC/34/63, para. 26; United Nations Mission in South Sudan and United Nations Office of the High Commissioner for Human Rights 'Report on the Right to Freedom of Opinion and Expression in South Sudan since the July 2016 Crisis' (22 February 2018) 2, 5, 27–30.

[169] United Nations Security Council 'Special Report of the Secretary-General on the Review of the Mandate of the United Nations Mission in South Sudan' (23 November 2015) UN Doc S/2015/899, para. 7; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 20 August-23 November 2015)' (23 November 2015) UN Doc S/2015/902, para. 9, 14–15; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 10 November 2015-2 February 2016)' (9 February 2016) UN Doc S/2016/138, para. 6; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 3 February-31 March 2016)' (13 April 2016) UN Doc S/2016/341, para. 27; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 1 April-3 June 2016)' (20 June 2016) UN Doc S/2016/552, para. 9, 62; United Nations Security Council 'Special Report of the Secretary-General on the Review of the Mandate of the United Nations Mission in South Sudan' (10 November 2016) UN Doc S/2016/951, para. 12; United Nations Security Council 'Interim Report of the Panel of Experts on South Sudan' (15 November 2016) UN Doc S/2016/963, para. 14; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (6 March 2017) UN Doc A/HRC/34/63, para. 14; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (23 February 2018) UN Doc A/HRC/37/71, para. 21, 106.

[170] United Nations Security Council 'Interim Report of the Panel of Experts on South Sudan' (15 November 2016) UN Doc S/2016/963, para. 13; Ceasefire and Transitional Security Arrangements Monitoring Mechanism 'Violations in the Malakal Area' (15 May 2017) 6; Amnesty International, '"It was as if my Village was Swept by a Flood": South Sudan – Mass Displacement of the Shilluk from the West Bank of the White Nile' (21 June 2017) 5–6.

conflict' developing into an 'ethnic war.'[171] Based on the evidence of ethnically motivated violence and rhetoric the UN Security Council agreed with the Special Adviser on the Prevention of Genocide that the situation which 'began as a political conflict could transform into an outright ethnic war'.[172] The Secretary-General argues South Sudan is 'on the edge of the abyss', and unless action is taken to prevent the violence there will be a 'catastrophe.'[173] This bleak humanitarian picture and the post-independence political and social instability combined with South Sudan's history of atrocity crimes means that South Sudan continued to be vulnerable to the commission of atrocity crimes, including genocide.[174]

The Threat of Genocide

The collapse of the transitional government in July 2016 led to further warnings of genocide, as violence with a significant ethnic dimension engulfed the country. In November 2016, Kate Almquist Knopf, director of the Africa Centre for Strategic Studies, reported that 'nearly all of the warning signs of impending genocide are present: extreme tribal polarization fuelling a cycle of revenge, widespread and

[171] United Nations Security Council '7814th Meeting' (17 November 2016) UN Doc S/PV.7814, 6. See also warnings about ethnic violence United Nations Office of the High Commissioner for Human Rights 'SPLA Committed Widespread Violations During and After July Fighting in South Sudan – Zeid' (4 August 2016) Press Release; United Nations Office of the High Commissioner for Human Rights 'South Sudan: Dangerous Rise in Ethnic Hate Speech must be Reined in' (25 October 2016) Press Release; Joint Monitoring and Evaluation Commission 'Opening Statement by HE Festus G Mogae, Chairman of JMEC during the Plenary Meeting of 22nd November 2016' (22 November 2016) Press Release; United Nations Office of the High Commissioner for Human Rights 'Statement by Yasmin Sooka, Chair of the Commission on Human Rights in South Sudan at the 26th Special Session of the UN Human Rights Council' (14 December 2016) Press Release.

[172] United Nations Security Council 'Security Council Press Statement on Ethnic Violence, Situation in South Sudan' (18 November 2016) UN Doc SC/12596; United Nations Security Council Resolution 2327 (16 December 2016) UN Doc S/RES/2327.

[173] United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 12 August to 25 October 2016)' (10 November 2016) UN Doc S/2016/950, para. 67.

[174] See warnings about risk of mass atrocities African Union, Intergovernmental Authority on Development, and United Nations 'Joint Press Statement by the AU, IGAD and the UN Consultations on South Sudan' (29 January 2017) Press Release; United Nations 'Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on the Situation in South Sudan' (6 February 2017) Press Release.

systematic attacks against civilians, hate speech, atrocities intended to dehumanize particular populations, and targeting of community and tribal leaders, among others'[175] Also in November 2016, the Special Adviser on the Prevention of Genocide warned that due to the violence and inflammatory rhetoric South Sudan is becoming increasingly ethnically polarised which means that there is the potential for the violence to escalate into genocide.[176] In a briefing to the UN Security Council in the same month, the Special Adviser on the Prevention of Genocide listed a number of risk factors in South Sudan which 'provide an environment ripe for the commission of mass atrocities', including genocide.[177] The warning signs of mass violence include a political and security crisis; a weak economy; the arming, recruitment, and training of the SPLA and SPLA-IO; the impunity of security forces; a lack of accountability, the restriction and targeting of civil society and the media; a humanitarian emergency; and a rise in hate speech. In December 2016 the Secretary-General warned that there was a real risk that the atrocity crimes being committed, including ethnic cleansing, could escalate into genocide.[178]

These warnings further highlight the difficulty of predicting genocide that was observed with the 2014 warnings, as any situation involving acts of violence and repression deliberately directed against a protected group under the Genocide Convention could potentially evolve into genocide. However the difficulty is identifying the triggering factor that will push an actor into perpetrating genocide. That is why the language used by the observers is once again highly speculative, warning about the conditions that give rise to genocide being present in South Sudan

[175] Kate Almquist Knopf, *Ending South Sudan's Civil War* (Council on Foreign Relations 2016) 3.
[176] United Nations 'Media Briefing by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide on his visit to South Sudan' (11 November 2016) Press Release.
[177] United Nations Security Council '7814th Meeting' (17 November 2016) UN Doc S/PV.7814, 4–6.
[178] Ban Ki-Moon, 'The World has Betrayed South Sudan' *Newsweek* (16 December 2016).

rather than definitively state that genocide will be perpetrated. Furthermore, similar to the 2014 warnings, while these warning signs point towards the perpetration of genocide, the indicators could also conceivably point towards the commission of other atrocity crimes as the atrocity crimes share near identical underlying conditions as illustrated in the UN's 'Framework of Analysis for Atrocity Crimes'.

The evidence collected by the Human Rights Division of the UNMISS, the UN Office of the High Commissioner for Human Rights, and the UN General Assembly Human Rights Council-mandated Commission of Human Rights have led these bodies to conclude that there is reasonable grounds to believe that government and opposition forces have perpetrated war crimes and crimes against humanity.[179] Furthermore the government policy of forced removal of civilians to reclaim land for the Dinka has been labelled as ethnic cleansing by the chair of the Commission on Human Rights, Yasmin Sooka.[180] Sooka argued that acts of killing, rape, sexual violence, abductions, looting, and destruction of property were being employed as means of cleansing an ethnic group from an area.[181] The UNMISS and the UN Office of the High Commissioner for Human Rights also agreed that the actions of the SPLA indicated a

[179] United Nations Office of the High Commissioner for Human Rights and United Nations Mission in South Sudan 'A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan, in July 2016' (16 January 2017) para. 98; United Nations Mission in South Sudan and United Nations Office of the High Commissioner for Human Rights 'Human Rights Violations and Abuses in Yei July 2016–January 2017' (19 May 2017) para. 73; United Nations Office of the High Commissioner for Human Rights 'UN Human Rights Commission Collects Evidence to Hold More than 40 South Sudanese Officials Accountable for War Crimes and Crimes against Humanity' (23 February 2018) Press Release; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (23 February 2018) UN Doc A/HRC/37/71, para. 105–106.

[180] United Nations Office of the High Commissioner for Human Rights 'UN Human Rights Experts say International Community has an Obligation to Prevent Ethnic Cleansing in South Sudan' (1 December 2016) Press Release. See also United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (6 March 2017) UN Doc A/HRC/34/63, para. 82.

[181] United Nations Office of the High Commissioner for Human Rights 'UN Experts Call for UN Special Investigation into Epic Levels of Sexual Violence in South Sudan' (2 December 2016) Press Release; United Nations Office of the High Commissioner for Human Rights 'Statement by Yasmin Sooka, Chair of the Commission on Human Rights in South Sudan at the 26th Special Session of the UN Human Rights Council' (14 December 2016) Press Release.

strategy to forcibly displace civilians, as witnesses stated that the intent underlying the violence was to 'cleanse' these areas.[182] The Secretary-General has also cautioned the UN Security Council about the risk of ethnic cleansing being perpetrated.[183] Therefore the majority of observers and inquiries have not found evidence of a genocidal campaign.

However this does not mean that genocide has not been perpetrated due to the difficulties of distinguishing the elements of the crime from other atrocity crimes. The Special Adviser on the Prevention of Genocide does note that due to the number of actors involved in the violence, either as perpetrators or victims, it is difficult to assess the risk of atrocity crimes.[184] The difficulties of distinguishing the crimes can be highlighted by the Commission on Human Rights who stated in their March 2017 report that 'warning signs and enablers for genocide and ethnic cleansing include the cover of an ongoing conflict to act as a "smoke screen", several low-level and isolated acts of violence to start the process, the dehumanization of others through hate speech, economic volatility and instability, deliberate starvation, the bombardment of and attacks against civilians, forced displacement and the burning of villages.'[185] This highlights that to observers it is a near impossible task to predict if genocide will be perpetrated or identify genocide in its early stages, which further illustrates why employing the general label atrocity crimes as a preventative term would be advantageous rather than seeking to vainly distinguish indicators of crime. As

[182] United Nations Mission in South Sudan and United Nations Office of the High Commissioner for Human Rights 'Indiscriminate Attacks against Civilians in Southern Unity: April-May 2018' (10 July 2018) para. 36.
[183] United Nations Security Council 'Special Report of the Secretary-General on the Review of the Mandate of the United Nations Mission in South Sudan' (10 November 2016) UN Doc S/2016/951, para. 14.
[184] United Nations Security Council '7814th Meeting' (17 November 2016) UN Doc S/PV.7814, 6.
[185] United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (6 March 2017) UN Doc A/HRC/34/63, para. 82.

highlighted during the study under the RtoP protocol, states have the same responsibility to protect civilians from genocide as other atrocity crimes. Therefore a warning of genocide should in theory not spark a different response to warnings of crimes against humanity and ethnic cleansing.

The international and regional reaction to the 2016 warnings of genocide was not radically different to the response to the 2014 warnings, as the international community has continued to focus on establishing a functioning government. Indicators of genocide and other atrocity crimes continue to be no barrier to peace. However the international community has continued to take steps to address conditions that give rise to genocide and other atrocity crimes due to the warnings of these crimes. In particular the warning from the Special Adviser on the Prevention of Genocide prompted action as he emphasised that genocide is a process, and not an event which occurs overnight which means that steps can be taken to prevent the crime before it is too late.[186]

On the foot of this warning representatives of Albania, Australia, Belgium, Costa Rica, Germany, Ireland, Macedonia, Mexico, Netherlands (also on behalf of Rwanda), Norway, Slovakia (on behalf of the EU), Slovenia, and Uruguay expressed serious concern about the presence of warning signs of genocide in South Sudan during a special session of the Human Rights Council on the situation in South Sudan in December 2016.[187] These countries agreed with the Special Adviser on the Prevention of Genocide that action needed to be taken to prevent genocide and they called for all parties to halt the violence, to work towards the establishment of the transitional

[186] United Nations Security Council '7814th Meeting' (17 November 2016) UN Doc S/PV.7814, 6.
[187] United Nations Office of the High Commissioner for Human Rights 'Human Rights Council Opens Special Session on the Situation of Human Rights in South Sudan' (14 December 2016) Press Release.

government, for government cooperation with regional and international bodies, for the government to consent to the deployment of additional peacekeepers, and for the setting up of the hybrid court.[188] These recommendations were adopted into the resolution passed at the conclusion of the special session.[189]

Notwithstanding these attempts to respond to the violence, the threat of genocide remained present. A few months later in March 2017 during an interactive dialogue with the Commission on Human Rights in South Sudan members of the Human Rights Council including Albania, Slovakia, and Slovenia continued to express fears of genocide being perpetrated alongside other atrocity crimes.[190] In fact in the previous month Brigadier General Henry Oyay Nyago, a former officer of South Sudan's military court, had accused, in a resignation letter addressed to Kiir, the government and Kiir of committing 'genocidal acts' alongside war crimes, crimes against humanity, and ethnic cleansing against civilians.[191]

This claim that 'genocidal acts' are occurring is distinct from a claim that genocide is occurring, as acts of violence may comprise the *actus reus* of genocide but lack the *mens rea* of the crime. However Nyago does not undertake a legal examination of the crime, instead Nyago highlights the wide spectrum of crimes perpetrated under the

[188] See for example United Nations Office of the High Commissioner for Human Rights 'Australian Statement' (14 December 2016); United Nations Office of the High Commissioner for Human Rights 'German Statement' (14 December 2016); United Nations Office of the High Commissioner for Human Rights 'Statement by HE Mr Fedor Rosocha Ambassador, Permanent Representative of the Slovak Republic on behalf of the European Union' (14 December 2016); United Nations Office of the High Commissioner for Human Rights 'Statement by Ireland' (14 December 2016); United Nations Office of the High Commissioner for Human Rights 'Statement South Sudan Special Session on behalf of the co-Chairs of the Group of Friends of the Responsibility to Protect' (14 December 2016).
[189] United Nations General Assembly Human Rights Council Resolution S-26/1 (19 December 2016) UN Doc A/HRC/RES/S-26/1.
[190] United Nations Office of the High Commissioner for Human Rights 'Human Rights Council Holds Interactive Dialogue with the Commission on Human Rights in South Sudan, Starts General Debate on Human Rights Situations Requiring the Council's Attention' (14 March 2017) Press Release.
[191] United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (23 February 2018) UN Doc A/HRC/37/CRP.2, para. 677–678.

auspices of the government and the failure of the government to investigate these crimes. Therefore the reference to genocide and other atrocity crimes is less about the potential legal consequences of a finding of genocide; rather Nyago is relying on the rhetorical value of genocide and the other crimes to not only shame Kiir and the government but draw attention to the situation. While Nyago does not explicitly call for international attention, in publically releasing the letter and using the genocide label ensured that Nyago's letter received media coverage. As illustrated throughout the study the genocide label is powerful tool for raising awareness of an issue.

The rhetorical value attached to the genocide label means that activists and victims are more willing to label a situation as genocide to not only draw attention to a situation but also to capture the suffering of victims. The significance of a determination of genocide for activists and victims can be seen in a statement issued in April 2017 by a number of opposition parties in which they called upon the AU, the UN, and the UN Secretary-General to 'recognise and condemn the genocidal actions of Kiir's regime'.[192] For these groups if the international community issued a 'full, frank, and just acknowledgement of the unfolding genocide' it would serve as a 'necessary first step to honour the victims and their families and signal a glimmer of hope for the future.'

Similar to activists and victims in Darfur, the genocide label was regarded by these groups as the only label that would accurately represent the atrocities faced by the victimised population and failure to use the word genocide would only prolong the suffering of the victims. This study has shown though that while the symbolic value

[192] 'Opposition Parties Calls World Leaders to Speak on South Sudan Genocide' *Sudan Tribune* (17 April 2017) (Opposition groups include the Sudan People Liberation Movement-In Opposition (SPLM-IO), the Sudan Peoples' Liberation Movement, former detainee (FDs), National Democratic Movement (NDM), People's Democratic Movement (PDM), South Sudan National Movement for Change (SSNMC) and the National Salvation Front (NAS)).

of international recognition of genocide is important for victims and activists, it does not translate into effective action to prevent the crime. Media coverage and increased international attention does not stop atrocities, so while the rhetorical value of the genocide label is clear, it is less clear the utility of the genocide label for preventing genocide and other atrocities.

The ineffectiveness of the genocide label as a preventative term can be seen by the fact that even when used to label the violence in South Sudan, it did not spark an effective response to halt the violence. In April 2017 after a visit to South Sudan, Priti Patel, the then British Secretary of State for International Development, labelled the violence as genocide in a media interview.[193] Patel said evidence of villages being burned, people being displaced, attacks on civilians, sexual violence, and the blocking of aid on tribal grounds signifies that genocide is occurring.[194] Despite acknowledging that genocide was occurring, there was no reference to the UK's responsibility to prevent genocide after a finding of genocide. There was no call for the UK to mobilise under the Genocide Convention or the RtoP protocol. Instead Patel called upon African leaders and governments to do more to resolve the situation by bringing Kiir to the negotiating table.[195] For Patel a finding of genocide does not dictate a different response to the approach that is already being taken by regional and international actors. Therefore it does not seem as if the label applied to the situation matters to the response but rather the level of violence dictates the reaction.

[193] Rodney Muhumuza, 'UK goes beyond UN to say South Sudan Violence "is now Genocide"' *The Independent* (13 April 2017).
[194] Elias Biryabarema, 'UK Says Killings in South Sudan Conflict Amount to Genocide' *Reuters* (12 April 2017).
[195] Rodney Muhumuza, 'UK goes beyond UN to say South Sudan Violence "is now Genocide"' *The Independent* (13 April 2017).

However the rhetorical value and significance attached to the genocide label is still problematic for states. This can be witnessed by the fact that the UK government did not adopt the position that genocide was occurring; furthermore a press release of Patel's visit issued by her department omitted any reference to genocide.[196] This highlights that states are still wary of the word genocide and the obligations that may attach to a declaration of genocide. There is a fear, containing some elements of a hangover from Rwanda, that using the genocide label will require states to take action. States are therefore treading the line between recognising the risk of genocide and actually taking action to prevent genocide. John Kerry acknowledged this conundrum in 2014, when he said that the indicators of genocide would pose a question for the international community. This illustrates that the rhetorical power possessed by the genocide label is far more powerful than its preventative value.

Since the failure to install the transitional government in July 2016 international and regional efforts to implement the ARCSS and mediate between the different parties have largely failed.[197] However it is a difficult task to rate how effective the measures adopted by the UN Security Council and other international actors have been at hindering the parties' ability to commit genocide or other atrocity crimes. Similar to the situation in Burundi, while the attempts to mediate the violence have not stopped

[196] Department for International Development 'Priti Patel Urges End to Conflict and Man-Made Famine in South Sudan' (13 April 2017) Press Release.

[197] United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 12 August-25 October 2016)' (10 November 2016) UN Doc S/2016/950, para. 2–6; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 16 December 2016 to 1 March 2017)' (16 March 2017) UN Doc S/2017/224, para. 2–6; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 2 March to 1 June 2017)' (15 June 2017) UN Doc S/2017/505, para. 2–9; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 2 June to 1 September 2017)' (15 September 2017) UN Doc S/2017/784, para. 2–12; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 2 September to 14 November 2017)' (1 December 2017) UN Doc S/2017/1011, para. 2–13; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 15 November 2017 to 16 February 2018)' (28 February 2018) UN Doc S/2018/163, para. 8–12.

the bloodshed it is not clear that it has made the situation worse. Conceivably the presence of the UNMISS and the imposition of sanctions could be preventing the parties from committing further acts of mass violence. In fact the Secretary-General did state, in March 2017, that the threat of genocide had diminished due to the political interventions of the UN, regional organisations, and neighbouring countries.[198] Notwithstanding this, the measures adopted to date have not halted the capacity of actors to perpetrate violence, including genocide.

Despite the fact that genocide remained a threat in 2018, regional and international actors were unlikely to alter their strategy for resolving the situation due to the realities of international relations. The current political climate means that the deployment of more soldiers is improbable as the UN's budget is being stretched to cover an array of situations, and South Sudan is one of many missions which are severely underfunded and under resourced. For the UNMISS to receive the money, resources, and troop numbers needed to halt the violence it would take a whole culture shift across multiple countries for governments to change from the current culture of reaction to a culture of prevention. It would also need a strong coalition of civil society actors pushing for action which is improbable as the situation in South Sudan, similar to Burundi, has fallen in between the cracks of international attention in comparison to the situations in Syria and Myanmar. Therefore the mission in South Sudan will continue to be under resourced and incapable of permanently halting the violence.

The collapse of the transitional government has also meant that despite the efforts of the AU and the UN, the hybrid court has yet to be established as of 2018.[199] However

[198] United Nations Secretary-General 'Secretary-General's Press Conference at UN Headquarters, Gigiri Complex' (8 March 2017) Press Release.
[199] United Nations Security Council 'Report of the Secretary-General on Technical Assistance Provided to the African Union Commission and Transitional Government of National Unity for the

it is likely that the pursuit of criminal justice will have to come second to the pursuit of peace, in order to establish the hybrid court there needs to be a functioning government. The IGAD did oversee the signing of a ceasefire in December 2017; however this was repeatedly breached by the parties.[200] The Office for the Special Adviser on the Prevention of Genocide was still warning in 2018 of the ethnic division in society becoming further 'entrenched' which meant that the risk of genocide and other crimes remained high.[201] After further negotiations, once again overseen by the IGAD, the warring parties did agree in August 2018 to a revitalised ARCSS which would allow a new transitional government to take power until democratic elections are held.[202] The repeated failure to implement peace agreements would indicate this latest agreement could unravel and the violence that has blighted South Sudan since December 2013 could continue into 2019, and South Sudan will continue to be deprived of both peace and justice.

There is no official record of the number of people who have died since the outbreak of violence in 2013, however the United Nations Office for the Coordination of Humanitarian Affairs estimates that tens of thousands have been victims of the

Implementation of Chapter V of the Agreement on the Resolution of the Conflict in the Republic of South Sudan' (7 April 2016) UN Doc S/2016/328; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 2 March to 1 June 2017)' (15 June 2017) UN Doc S/2017/505, para. 49; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 2 September to 14 November 2017)' (1 December 2017) UN Doc S/2017/1011, para. 53; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 15 November 2017 to 16 February 2018)' (28 February 2018) UN Doc S/2018/163, para. 51.

[200] United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 15 November 2017 to 16 February 2018)' (28 February 2018) UN Doc S/2018/163, para. 2–5; United Nations Security Council 'Report of the Secretary-General on South Sudan (covering the period from 17 February to 3 June 2018)' (14 June 2018) UN Doc S/2018/609, para. 14–20.

[201] United Nations Security Council 'Final Report of the Panel of Experts on South Sudan' (12 April 2018) UN Doc S/2018/292, para. 41.

[202] Intergovernmental Authority on Development 'Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS)' (28 August 2018).

violence.[203] Multiple parties to the situation have perpetrated acts of extrajudicial killing, mass killing, enforced disappearance, arbitrary arrests and detentions, abductions, beatings, torture, ill-treatment, sexual violence, rape, sexual slavery, forced abortion, deliberate shelling of civilian areas, and the looting and destruction of property and livestock.[204] The violence has led to widespread displacement as since

[203] United Nations Office for the Coordination of Humanitarian Affairs 'South Sudan: 2017 Humanitarian Needs Overview' (December 2016) 2, 4.

[204] United Nations Mission in South Sudan 'Interim Report on Human Rights: Crisis in South Sudan — Report Coverage 15 December 2013–January 31 2014' (21 February 2014) 9; Amnesty International, 'Nowhere Safe: Civilians under Attack in South Sudan' (8 May 2014) 18–36; United Nations Mission in South Sudan 'Conflict in South Sudan: A Human Rights Report' (8 May 2014) para. 265–266; Human Rights Watch, 'South Sudan's New War: Abuses by Government and Opposition Forces' (7 August 2014) 18, 22–74; African Union Commission of Inquiry on South Sudan, 'Final Report of The African Union Commission of Inquiry on South Sudan' (15 October 2014) para. 380; International Crisis Group, 'Sudan and South Sudan's Merging Conflicts' (29 January 2015) 11; United Nations Mission in South Sudan 'Flash Human Rights Report on the Escalation of Fighting in Greater Upper Nile (April/May 2015)' (29 June 2015) para. 20–22; Human Rights Watch, '"They Burned it All": Destruction of Villages, Killings, and Sexual Violence in Unity State, South Sudan' (22 July 2015) 17–25, 30–37; United Nations Mission in South Sudan 'The State of Human Rights in Protracted Conflict in South Sudan' (4 December 2015) para. 1, 12; United Nations Security Council 'Final Report of the Panel of Experts on South Sudan' (22 January 2016) UN Doc S/2016/70, para. 110–123, 128–134; Amnesty International, '"Their Voices Stopped": Mass Killing in a Shipping Container in Leer, South Sudan' (10 March 2016) 10–24; Amnesty International, 'Denied Protection of the Law: National Security Service Detention in Juba, South Sudan' (7 April 2016) 1–2; United Nations General Assembly Human Rights Council 'Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan' (22 April 2016) UN Doc A/HRC/31/49, para. 8, 13–39, 42–51; Amnesty International, '"We are still Running": War Crimes in Leer, South Sudan' (28 July 2016) 12–43; Amnesty International, '"We did not Believe we would Survive": Killings, Rape and Looting in Juba' (11 October 2016) 11–22; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (6 March 2017) UN Doc A/HRC/34/63, para. 25–32, 34–40; United Nations Security Council 'Final Report of the Panel of Experts on South Sudan' (13 April 2017) UN Doc S/2017/326, para. 61–62; United Nations Mission in South Sudan and United Nations Office of the High Commissioner for Human Rights 'Human Rights Violations and Abuses in Yei July 2016–January 2017' (19 May 2017) para. 29–67; Amnesty International, '"It was as if my Village was Swept by a Flood": South Sudan – Mass Displacement of the Shilluk from the West Bank of the White Nile' (21 June 2017) 6–13; Amnesty International, '"If Men are Caught, they are Killed, if Women are Caught, they are Raped": South Sudan – Atrocities in the Equatoria Region turn Country's Breadbasket into a Killing Field' (4 July 2017) 10–22; Amnesty International, '"Do not Remain Silent": Survivors of Sexual Violence in South Sudan Call for Justice and Reparations' (23 July 2017) 21–44; Human Rights Watch, '"Soldiers Assume We Are Rebels": Escalating Violence and Abuses in South Sudan's Equatorias' (1 August 2017) 13–17, 21–45; United Nations Security Council 'Interim Report of the Panel of Experts on South Sudan' (20 November 2017) UN Doc S/2017/979, para. 34–47; United Nations Mission in South Sudan and United Nations Office of the High Commissioner for Human Rights 'Report on the Right to Freedom of Opinion and Expression in South Sudan since the July 2016 Crisis' (22 February 2018) 2; United Nations General Assembly Human Rights Council 'Report of the Commission on Human Rights in South Sudan' (23 February 2018) UN Doc A/HRC/37/71, para. 24–28, 35–100; United Nations Security Council 'Final Report of the Panel of Experts on South Sudan' (12 April 2018) UN Doc S/2018/292, para. 40; United Nations Mission in South Sudan and United Nations Office of the High Commissioner for Human Rights 'Indiscriminate Attacks against Civilians in Southern Unity: April-May 2018' (10 July 2018) para. 21–39.

the beginning of the violence, more than 4 million people have fled their homes with 1.9 million people internally displaced within South Sudan while there are over 2 million people seeking refuge in neighbouring countries.[205] The violence has also contributed to a large-scale humanitarian crisis with a lack of access to food, water, and medical care causing hunger, malnourishment, and the spread of disease amongst the population.[206] With the dire humanitarian situation and the failure to halt the slaughter combined with the threat of genocide being nearly omnipresent in South Sudan from 2013 to 2018, would a clear and definitive determination of genocide by a state or AU or UN actor/body alter the strategy of international and regional actors for resolving the situation?

6.3(iv) The Benefits of a Determination of Genocide

A finding of genocide should in theory not change the approach of the international community as states have the same responsibility to act to protect civilians from war crimes, crimes against humanity, and ethnic cleansing which the investigations have already determined may have been committed. However a determination of genocide would provoke a different reaction amongst civil society actors and the general public, due to their perception of genocide as the worst crime in existence, which could translate into a different stance being adopted by a state or states towards peace negotiations. A greater level of interest in a situation could be beneficial as it may lead to significantly more resources being committed to a situation as civilians will push for tougher measures to be taken against the perpetrator. However the international reaction to the situation in Darfur and Sinjar highlights that even with a finding of genocide and a committed coalition of civil society actors there is no

[205] United Nations Office for the Coordination of Humanitarian Affairs 'South Sudan: 2018 Humanitarian Needs Overview' (November 2017) 2, 4.
[206] ibid 2, 4–9.

guarantee that this will lead to the resolution of a situation. The study of past cases of the application of the label genocide in the midst of violence illustrates that the use of the genocide label severely restricts the options available to a state to bring about a peaceful settlement to a situation.

Failing to employ the term genocide to describe the situation in South Sudan does not imply a lack of political will on behalf of states but rather could indicate that a state or states believe that pursuing peace negotiations is the best strategy for halting the violence. For instance if the SPLM/A, SPLM/A-IO, and other armed groups were accused of committing genocide, they would likely withdraw from negotiations. Employing the word genocide could also antagonise regional actors whose cooperation is of critical importance in resolving the situation such as in Darfur. Furthermore with a declaration of genocide a state would find it difficult if not impossible to negotiate a settlement as the public and civil society groups would decry holding talks with organisations and people accused of perpetrating genocide. Therefore while the genocide label may draw more attention to South Sudan it could be counterproductive as it would hinder a state's or states' ability to achieve a peaceful resolution to the situation which would only prolong the suffering of the civilian population.

However regardless of whether states are fearful of using the word genocide, states are aware of the risk of genocide and can adopt measures to prevent the crime even without using the word genocide. Genocide does not need to be spoken for the crime to be prevented, in fact it could actually be argued that in pursuing forceful measures under Chapter VII of the Charter with the deployment of UNMISS and the imposition of sanctions, the members of the UN Security Council are already fulfilling their obligation to prevent genocide under the Genocide Convention as they are employing

'all means reasonably available to them' after learning, through warnings from UN actors, of 'the existence of a serious risk that genocide will be committed.'[207] While it may be the case that these actors did not take these actions with the expressed objective of preventing genocide, these measures aimed at halting war crimes, crimes against humanity, and ethnic cleansing will also address the underlying conditions and elements which give rise to the perpetration of genocide. Therefore similar to the international response to Burundi, states are potentially meeting their duty under the Convention to prevent genocide without utilising the word genocide to label the violence.

Thus, while the situation which has unfolded in South Sudan since December 2013 bears a number of elements of the crime of genocide (acts of genocide and a targeted group), the complexity of distinguishing the perpetration of genocide from the other violations of international criminal law combined with the evidence that a determination of genocide does not shield civilians from the commission of further atrocity crimes indicates that energy and time should not be expended on seeking to identify the existence of genocide or labelling the situation as genocide. This is why this thesis has advocated for employing the general term atrocity crimes to characterise the violence rather than focus on the flawed label genocide which only provides a distraction to effective remedy for preventing and halting violence.

6.4 Implications for the Study of Genocide

While there may be deeper levels of violence in South Sudan in comparison to Burundi, the study of the respective situations highlight comparable deficiencies

[207] Convention on the Prevention and Punishment of the Crime of Genocide Article IX. See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [431]–[432].

within the definition of genocide. Despite the considerable growth of knowledge in predicting and identifying genocide, the two case studies have highlighted the difficulties of distinguishing genocide from other atrocity crimes particularly in the early stages of a situation. Before the outbreak of violence in the respective countries it was nearly impossible to forecast which crime would be committed as both countries were ripe for the perpetration of genocide due to their respective history of violence, including the past perpetration of genocide, and conditions that give rise to the commission of genocide, including instability in society and a struggle for power. However these indicators of genocide can also give rise to the perpetration of atrocity crimes. Until the violence breaks out, and even then, it is nearly impossible to predict which crime will be committed, if a crime will even be perpetrated in the first place as the examination of the situations in Burundi and South Sudan illustrates that the threat of genocide and other atrocity crimes is not constant. Rather the risk of genocide can ebb and flow throughout a situation depending on external factors. This 'cyclical nature of the way in which risk of genocide fluctuates over time highlights the inherent difficulty of attempts to predict genocide.'[208]

The outbreak of violence seldom makes the task of distinguishing genocide from the other atrocity crimes less onerous with the *actus reus* of the crime of genocide sharing nearly identical elements with crimes against humanity and ethnic cleansing. The fact that acts such as forcible transfer of the population, torture, sexual violence, acts causing mental harm, restriction of access to food, medical services, and other essential elements for the survival of a group can be simultaneously acts of genocide and acts of crimes against humanity and ethnic cleansing does mean that it can be hard to compare and to apply the lessons of previous cases of genocide to the future study

[208] Deborah Mayersen, 'On the Timing of Genocide' (2010) 5 Genocide Studies and Prevention 20, 34.

of genocide and the prevention of the crime. With the similarities between the crimes, the identification of the crime being perpetrated is further complicated by the fact that multiple crimes can be perpetrated in the same situation. Furthermore all three crimes can be deliberately targeted against a group, which while not an essential ingredient of each crime does illustrate the difficulties of pinpointing the perpetration of each crime in a situation.

The difficulties of forecasting the risk of genocide and identifying the crime in the midst of violence in Burundi and South Sudan reveal that the characteristics of a genocidal campaign cannot be clearly distinguished absent evidence of an intent to destroy underlying the actions. Even if this intent to destroy is evident before or during the commission of genocide, the identification of genocide is dependent on the political will of individuals and states to label the violence as genocide. This illustrates the indeterminate nature of genocide, as outlined in the previous chapter, as the identification of genocide will be highly context specific. All actors, regardless of whether they are a state, the UN, an international court, or a NGO, will be subject to this indeterminacy as the determination of genocide will not be a strict application of the law, but rather a careful balancing of the interests of these actors in making a determination. This means that there is no definitive objective finding on the question of genocide, rather the subjective opinions of those making the determination will always impact their approach.

For instance while the commissions of inquiry and other actors observing the situations in Burundi and South Sudan may have found that the violence may not amount to genocide in either situation, these situations could arguably be seen as genocide depending on the perspective of the individual or group observing the violence as there is considerable evidence of acts of genocide and deliberate targeting

of groups within the two countries. Many of the acts that have been perpetrated against the Burundian and South Sudanese people have been labelled as genocide previously by international courts and commissions of inquiry in Rwanda, the former Yugoslavia, Darfur, and Sinjar. In particular acts comprising the *actus reus* of the crime under Article II (b)-(e), acts that have not led to the immediate death of a group have been identified as constituent parts of the crime of genocide. This reflects the indeterminacy of genocide, as it is not clear what the boundaries of the crime are. There are no conceptual limits, rather the elements of the crime can fall across numerous crimes which renders the identification of the crime a complex task.

Furthermore there is definite proof that these acts are being deliberately targeted against a civilian population, in some cases on the basis of their ethnicity in both Burundi and South Sudan. While the parties to the respective situations may not be explicit with their intent to destroy a group, with regard to a clear plan or policy to destroy a group, in both countries there have been speeches and statements that would support evidence of an intent to destroy a group with calls for deliberate and systematic attacks on groups. However due to the indeterminate nature of the definition of genocide, there is no precise method of establishing this intent. The practice of the international courts and ad hoc tribunals along with the commissions of inquiry have clarified how to infer the intent to destroy, but still the 'interpretation of what constitutes genocidal intent has been inconsistent.'[209] Recalling once again how acts such as forcible transfer of population and restriction of humanitarian aid can be regarded as signifying an intent to destroy in one case, Srebrenica, while in another, Central African Republic, it was evidence of crimes against humanity and ethnic

[209] Olaf Jensen, 'Evaluating Genocidal Intent: The Inconsistent Perpetrator and the Dynamics of Killing' (2013) 15 Journal of Genocide Research 1, 3.

cleansing. Therefore whether these acts amount to evidence of genocide varies from case to case or even actor to actor, as seen in Darfur; which means that the determination of genocide is dependent on the perspective of those observing the violence.

This does not mean that these observers are wrong about not labelling the violence as genocide or finding evidence of genocide, as it is entirely reasonable on the basis of the evidence available for states, the commissions of inquiry, and other observers to hold the opinion that genocide was not perpetrated in either Burundi or South Sudan. This is because genocide is rarely a cut and dried case, rather there will always be a level of indeterminacy around whether evidence of acts committed, plans and policies enacted, and speeches delivered amounts to genocide. For instance the reaction to the situation in Darfur shows that 'real differences do exist in defining "genocide"' and these 'differences will surface in the midst of crises and during situations that are not clear-cut cases of extermination.'[210] Concluding that genocide is not occurring or finding no evidence of genocide in Burundi and South Sudan is not equivalent to genocide denial, rather it reflects the difficulties of employing the definition of genocide in the midst of violence.

The indeterminacy of international law does not only affect the identification of the crime, but also the prevention of the crime. As discussed previously, the Genocide Convention is vague on the responsibility of states under the Convention to prevent genocide. After the passing of the Genocide Convention, it was unclear whether the duty to prevent required a legal determination of genocide, before the Genocide

[210] Scott Straus, 'Rwanda and Darfur: A Comparative Analysis' (2006) 1 Genocide Studies and Prevention 41, 51.

Convention would apply to a given situation?[211] And if so under the Convention 'who should make a determination that genocide is to take place, who should prevent it and what kind of international approval they would need.'[212]

Furthermore it was not certain whether the reference to states undertaking to prevent genocide under Article II of the Convention, imposed a legal obligation to prevent genocide on states or whether it was simply a moral obligation. The thinking of states at the time of the adoption of the Convention, and the subsequent state practice shows that states do not believe that the Genocide Convention imposes an obligation to act as '[n]o government would have ratified the convention if its intent were to require as a legal obligation, that all states parties deploy military forces to foreign territories to prevent genocide whenever and wherever it occurs.'[213] Imposing a legal obligation would have removed a level of indeterminacy within the Genocide Convention that can be used by states to justify action or inaction depending on the situation. States purposely imbued the Genocide Convention with a level of indeterminacy to grant them control over applying or not applying the provisions of the Convention in a given situation if their interests are at stake.

The jurisprudence of the ICJ in the case of *Bosnia and Herzegovina v Serbia and Montenegro* did clarify that states have a responsibility to prevent genocide when a state is aware of a serious risk of genocide is being perpetrated.[214] However there remains a level of indeterminacy as the ICJ did not elaborate 'how such a

[211] Eyal Mayroz, 'The Legal Duty to "Prevent": After the Onset of "Genocide"' (2012) 14 Journal of Genocide Research 79, 80.
[212] Stephanie Carvin, 'A Responsibility to Reality: A Reply to Louise Arbour' (2010) 36 Review of International Studies 47, 50.
[213] David Scheffer, 'Lessons from the Rwandan Genocide' (2004) 5 Georgetown Journal of International Affairs 125, 132.
[214] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, [431].

determination was to be made or which criteria were to be used.'[215] This means that assessing the 'serious risk' of genocide is 'an essentially political determination'.[216] There is further indeterminacy in the judgment surrounding how to establish the geographical and political links between the state who failed to prevent genocide and the party who committed genocide.[217] Therefore while going someway to clarifying the responsibility of states under the Convention to prevent genocide, the case law of the ICJ shows that this obligation to prevent will also be subject to a level of indeterminacy.

This indeterminacy in preventing genocide extends to the methods of confronting genocide as it is unclear what action should be taken under the Genocide Convention to respond to genocide.[218] The Convention only lays out that states have recourse to call upon the organs of the UN under Article VIII. It does not set out how the crime can be prevented, does it require diplomatic engagements or more coercive efforts, or a combination of the two. However providing discretion to states with regard to means of prevention is important as there is no perfect response to genocide, as 'different situations will demand different measures'.[219] There will always be a difference of opinion on how to respond to a situation of violence.[220]

The response of regional and international actors to the respective situations in Burundi and South Sudan exemplifies this, as there is no correct approach for

[215] Stephanie Carvin, 'A Responsibility to Reality: A Reply to Louise Arbour' (2010) 36 Review of International Studies 47, 49.
[216] Eyal Mayroz, 'The Legal Duty to "Prevent": After the Onset of "Genocide"' (2012) 14 Journal of Genocide Research 79, 92.
[217] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, [430].
[218] Björn Schiffbauer, 'The Duty to Prevent Genocide under International Law: Naming and Shaming as a Measure of Prevention' (2018) 12 Genocide Studies and Prevention 83, 85.
[219] Luke Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12 Human Rights Law Review 1, 20.
[220] Alex J Bellamy, 'The Responsibility to Protect – Five Years On' (2010) 24 Ethics & International Affairs 143, 162.

confronting claims of genocide and other atrocity crimes. Military deployment will not always will be the right option, while diplomatic efforts can have different responses on the level of engagement with a perpetrating state or actor. The involvement of the ICC in Burundi shows how international justice can have a negative effect on the prevention of violence, with the Burundian government disengaging from international affairs. Just as genocide and other atrocity crimes do not follow a predictable pattern, the response to these crimes is not an exact science. There is not one strategy to confront genocide, rather there are a multitude of options that can be diplomatic or coercive in nature to reduce the likelihood of genocide. The success of these methods is dependent not on the label applied to the violence, but rather the support and backing of powerful and influential states which brings us back to the indeterminacy of genocide.

The difficulties of identifying the elements of the crime and preventing its perpetration due to the indeterminate nature of genocide reflect the state of international politics, as while the situations in Burundi and South Sudan are multifaceted in nature, they are not particularly unique situations in comparison to violent situations occurring across the world. The levels and characteristics of the violence in the two countries are not unprecedented, rather the situations merely reflect the latest in another multi-dimensional ethnic clash which have continually blighted the world and Africa, in particular, over the last number of decades. Therefore the information gained from examining the complexities of distinguishing and identifying genocide before and in the midst of violence in Burundi and South Sudan can provide valuable knowledge for the future of genocide studies. While the crimes committed in the two situations may not amount to genocide, the varied references to genocide illuminate important lessons about the utility of the legal label of genocide as a preventative term.

The complexities of predicting and identifying genocide, due to its indeterminacy, before or during the perpetration of violence raise the utility of seeking to determine genocide in the midst of situation particularly when the respective studies have shown that measures aimed at the prevention of other atrocity crimes, will also address the underlying causes of genocide. Therefore in the midst of violence is it beneficial for actors to be discussing the risks or likelihood of genocide rather than focussing on responses to violence?

The definition of genocide is unworkable in the midst of violence, as discussions of genocide at best provide a distraction but at worst stall or provide a cover for inaction. Discussions of warning signs or indicators of genocide would lead to actors once again getting bogged down in definitional debates. Even if the definition of genocide was extended, it would not lead to a different approach to preventing genocide. The response would still be heavily dependent on political will, and the evidence of previous situations indicate that genocide is a distraction from concrete efforts to prevent violence. While genocide's powerful rhetorical value may draw attention to a situation, it does not translate into effective action to prevent a crime. The Genocide Convention may provide that states have a responsibility to prevent genocide, however this does not guarantee that states will respond, any more than a finding of crimes against humanity will compel states to act, with UN Security Council authorisation, under the doctrine of RtoP.

So while a label of genocide may accurately describe the suffering of a victimised population, its use will not ensure that the violence will stop. The evidence of the response to Darfur, along with the response to Rwanda and Sinjar, shows that the political will of member states of the UN and regional bodies, not the label applied to characterise the violence, will dictate the response of the international community.

Therefore the focus of academics and activists should not be on debating the definition of genocide or the semantics of genocide, but rather on the prevention of the crime no matter the label used to describe it.[221] As even with all the academic focus on discussing and researching genocide, genocide continues to be perpetrated.[222] Therefore new approaches to confronting the crime of genocide need to be explored and assessed.

This is why this research is advocating the use of the label atrocity crimes to characterise violence. While employing the label atrocity crimes to describe a situation does not ensure that action will be taken to prevent the violations of international criminal law, it removes the stigma around labels and the potential hierarchical treatment of crimes in the minds of diplomats and activists. Leaving the question of genocide to a competent international court or tribunal would remove the complexities around employing a flawed definition of genocide in the midst of violence.

6.5 Conclusion

In examining the various references to genocide in the respective situations in Burundi and South Sudan, the three core strands of this thesis and research questions contained within each strand have been explored and addressed. The central aim of this chapter

[221] Israel Charny, 'Toward a Generic Definition of Genocide' in George Andreopoulos (ed*), Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press 1994) 81; Freda Kabatsi, 'Defining or Diverting Genocide: Changing the Comportment of Genocide' (2005) 5 International Criminal Law Review 387, 388; David M Crane, '"Boxed In": Semantic Indifference to Atrocity' (2008) 40 Case Western Reserve Journal of International Law 137, 145; Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 221; Hannibal Travis, 'On the Original Understanding of the Crime of Genocide' (2012) 7 Genocide Studies and Prevention 30, 43; Herbert Hirsch, 'Preventing Genocide and Protecting Human Rights: A Failure of Policy' (2014) 8 Genocide Studies International 1, 1, 4–5; Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (United States Holocaust Memorial Museum 2016) 30.

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

has been to show the complexities of the genocide label by illustrating the flawed understanding of the term, the stigma surrounding the word, the value of labels for a response, the influence of political will, the difficulties of identifying the elements of the crime before or during a situation, and the similarities between the different atrocity crimes which means that it can be arduous to distinguish the elements of the crime in the midst of violence. These factors and conditions that are apparent in the responses to genocide that we have seen not only in Burundi and South Sudan but also in the responses in Darfur, Srebrenica, Central African Republic, and the Sinjar Region in Northern Iraq highlight that the complexity of identifying and determining genocide will be a factor in every situation rather than being context specific to these case studies. This is because as outlined in this chapter and the preceding chapters, the crime of genocide is indeterminate and will remain indeterminate no matter the context it is applied in. Therefore this is why the central argument of this chapter is that the indeterminate nature of genocide combined with the complexities of identifying genocide and employing the genocide in responding to violence means that the genocide label is not a valuable or beneficial term to address emerging or ongoing violence, and instead the term atrocity crimes should be employed as a placeholder label while the international community concentrates on an effective response to a situation.

To conclude, while the case studies of Burundi and South Sudan may not directly concern the perpetration of genocide, the references to genocide throughout the two sections of this chapter illustrate the flaws apparent in the Genocide Convention's definition of genocide and the need for a new approach to preventing genocide that removes the difficulties around identifying the crime and taking action to prevent

genocide. Employing the label atrocity crimes, while not a perfect solution, is a step in the right direction.

CHAPTER SEVEN: THE UTILITY OF THE GENOCIDE LABEL

7.1 Introduction

The previous chapters of this thesis have developed along the three core strands of this research, and have addressed the research questions in a variety of ways which have illustrated and illuminated the flaws apparent within the definition and understanding of genocide. In this chapter the aim is to tie together the three core strands of the research so as to address the key concern of this thesis, the utility of the legal definition of genocide as a preventative term. Employing the knowledge and information gained from the case law and case studies and the various references to genocide by political actors, academics, civil society activists, and victims of atrocities, this chapter aims to highlight why the genocide definition is unsuitable for the prevention and response to ongoing violence. Essentially, the specific elements of the crime are difficult to identify in the midst of violence and the understanding of genocide can limit the response of actors to violence.

With the flaws apparent in employing the genocide label in the midst of violence for preventative purposes, this chapter will aim to illustrate, relying on the information and evidence gathered throughout this research, that the atrocity crimes label is a more advantageous and effective term to be employed in the midst of violence as it addresses the complexities of the genocide label while ensuring the focus is on the response not the label. To begin addressing the utility of these two respective labels, and how the arguments surrounding these two labels have developed within the key core strands of this research, this chapter will commence by highlighting once again how the Genocide Convention and the definition of genocide has failed to adequately address the perpetration of violence.

7.2 A Failed Convention

The historic adoption of the Convention on the Prevention and Punishment of the Crime of Genocide by the UN General Assembly in 1948 was intended to be a signal to the world that states would no longer stand idly by while the physical existence of groups of people was under threat from destruction. The tragic history of the application, or more accurately the non-application, of the provisions of the Genocide Convention in numerous situations of violence since 1948 illustrates that this promise of prevention under the Convention has sadly all too often languished as states have dawdled over questions of definitions and means of prevention while populations of people are being deliberately targeted for destruction across the globe. This is despite there being a clear desire amongst politicians, international institutions, academics, and activists to prevent genocide. In the aftermath of a genocide we hear these actors proclaiming that genocide will never again be perpetrated, and that the reaction will be different the next time the international community faces a claim of genocide. However as shown by the catastrophic cases of Rwanda, Srebrenica, Darfur, the genocidal violence of ISIS in Sinjar, and recently the crimes of the Myanmar government committed against the Rohingya people in Rakhine State, genocide is always perpetrated 'somewhere else, time and again.'[1]

This failure to meaningfully respond to these situations and to convert the obligation to prevent violence before the outbreak of bloodshed into a reality of international affairs is undoubtedly a result of states and international organisations lacking the political will to act due to these actors prioritising their interests over the protection of

[1] Samuel Totten, 'The Intervention and Prevention of Genocide: Sisyphean or Doable?' (2004) 6 Journal of Genocide Research 228, 246. See also Theresa Reinold, 'The Responsibility to Protect – Much Ado about Nothing?' (2010) 36 Review of International Studies 55, 72.

a group. As discussed throughout this study '[r]ealpolitik, a lack of political will, and economic interests' have all proven to be barriers to 'timely and effective action.'[2] We have seen time and again from Rwanda to Darfur that states are unwilling to commit the necessary resources (financial, diplomatic, humanitarian, military, and personnel) required to confront the horrors of genocide either in the midst of violence or prior to the explosion of violence. Despite the powerful symbolic nature of the genocide label due to its historical connotation with the Holocaust, states have frequently not been motivated to match their verbal commitment to prevent genocide with effective action to respond to claims of genocide. The Genocide Convention's promises of prevention and action are meaningless in a world of divergent political interests, which means that the application of the Convention will always be subject to the whims of states.

Notwithstanding the impact that political will has on the response to genocide, there are distinct issues within the very concept of genocide that affect the determination of genocide in the midst of violence. Overly focussing on the problem of political will obscures the complexities with the definition of genocide as set out within the Genocide Convention. While in the seventy years since the adoption of the Genocide Convention there have been great strides made in developing the understanding of the crime of genocide, there are still significant questions surrounding the identification of the elements of the crime in the midst of violence. Therefore the presence of political will to act in a given situation does not automatically mean that genocide is suddenly identifiable in the midst of violence, the underlying issues with the definition of genocide are constant regardless of whether a state is minded to act or not.

[2] Samuel Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 Genocide Studies and Prevention 211, 217.

The complexities of determining genocide in an ongoing situation are not solely connected to issues of identifying the elements of the crime, the complexities are also related to the potential political and legal implications of a claim of genocide in an ongoing situation. The symbolic nature of the genocide label, with its connection to some of the worst atrocities in history, has proven to be an obstacle to the prevention of violence as the focus of the response can far too often get tangled up on what to label the violence rather than discussing effective measures to halt violence. The genocide label can also be limiting in the nature of what response international and regional actors can pursue due to this perception of genocide as the worst crime in existence. These complexities associated with describing an ongoing situation as genocide, combined with the complexity of identifying the crime in the first place are apparent in the situations, under review in this study, in Rwanda, Srebrenica, Darfur, the Central African Republic, Sinjar Region, Burundi, and South Sudan as these situations have in a variety of ways illuminated the difficulties of predicting genocide, identifying signs of genocide in the midst of violence, preventing and responding to genocide, and labelling ongoing violence as genocide.

In discussing the difficulties of employing the Genocide Convention in the midst of violence, this thesis set out to address how these various inherent complexities within the concept of genocide impact on the response to genocide, and whether the difficulties involved in determining genocide in the midst of violence raise the utility of invoking the genocide label in an ongoing situation for the prevention and response to violence. In addressing the utility of the genocide label through a variety of studies of case law and situations of genocide and/or suspected cases of genocide, this thesis has developed along three core strands: i) defining the crime; ii) identifying and determining the crime, in case law and case studies, before and during the outbreak of

violence; and iii) how states should undertake to prevent and respond to the crime of genocide in the midst of violence, through the use of the label of atrocity crime. These three strands are naturally intertwined as the research has evolved it has highlighted the flaws of the genocide label and the need for a new approach to tackling the prevention and response to genocide. A core theme that emerged from the first strand of the research and which flowed throughout the study was that a flawed definition of genocide as conceptualised under the Genocide Convention rendered the identification of genocide in the midst of violence a complex task.

7.3 A Deficient Definition

The adoption of the Genocide Convention in the aftermath of the Holocaust was a triumph of diplomatic negotiation of the various UN drafting bodies. In just under two years from the first resolution at the UN General Assembly to the eventual passing of the Convention by the General Assembly, through a series of negotiations and deliberations states had transformed Lemkin's concept from an academic concept to a crime of international law. Lemkin's concept of genocide did undergo significant revision with elements of the crime added and excluded throughout the drafting process as the draftees sought the best possible document to address the crime of genocide. Notwithstanding the success of political compromise in passing the Convention, the compromises did create some ambiguity around defining the elements of genocide.[3] For academics and observers who studied the Convention, it was left unclear under the definition contained within Article II as how to establish the existence of an intent to destroy a group and how to determine whether a group was targeted in whole or in part. Furthermore it was uncertain whether the lists of acts of

[3] Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 48.

genocide and protected groups is exhaustive or could it be expanded to include additional elements as proposed by academics and activists.

While the definition of genocide as conceptualised by the drafters of the Genocide Convention in the 1940s is flawed, the understanding of the crime is not static. From the judgment in the case of *Akayesu* to the decision to issue an arrest warrant for Omar Al Bashir to the recent verdict to affirm the sentence of Radovan Karadžić, the Convention has been central in ensuring that those who have committed or are responsible for some of the worst atrocities over the last number of decades are held accountable and brought to justice. Although the move to justice and realising the punishment component of the Convention was slow with case law only emanating from international institutions in the late 1990s, when the judgments did arrive the interpretation of the crime by the ICTR, ICTY, ICJ, and ICC breathed life into the provisions of the Genocide Convention and clarified some of the uncertainties within the definition of genocide that had been raised by academics and activists.

While there has been some inconsistency in interpretation between the various institutions, this is generally related to issues related to examining genocide at the level of individual accountability; when examining the broader picture of the concept of genocide the international courts and ad hoc tribunals have been consistent in interpreting the elements of the crime. The jurisprudence of these institutions has highlighted the key elements within the definition of genocide; an act of genocide that is targeted against a protected group with the intent to destroy that group. Establishing the existence of each of the elements varies in complexity.

Evidence of acts of genocide are the most straightforward signs of genocide that can be identified in the midst of violence as they are normally visible and widespread. In

the case law of the Rwandan and former Yugoslavian tribunals and the ICC's examination of the situation of Darfur in relation to the accountability of Al Bashir, there was extensive evidence of crimes committed which corresponded to acts of genocide under Article II (a)-(e). Although evidence of crimes are evident there is a difficulty that the acts of genocide can also correspond to a number of crimes including murder, extermination, torture, sexual violence, and other acts that cause physical and mental harm under the category of crimes against humanity. The similarities between the underlying acts of the crime do mean that to distinguish the perpetration of genocide from other crimes of international law is a complex task, as in a multifaceted situation numerous crimes may be committed in the same incident so it is an arduous task to identify which crime is being committed in each incident. The crimes can occur at the same time, or a crime can be a precursor to the perpetration of another crime.[4] Genocide is rarely the only crime committed, the situations in Rwanda, Srebrenica, and Darfur were all accompanied by the perpetration of war crimes and crimes against humanity. In order to distinguish the crimes, evidence of a group targeted for destruction needs to be established.

This is where the identification of the crime of genocide gets complex, as despite the jurisprudence of the international courts, there is still ambiguity surrounding ascertaining the elements of the crime, in particular the intent to destroy and the size of the targeted group.[5] With regard to the latter issue, the courts have held that the size of the group targeted for destruction must be substantial which can be established from not only the numbers targeted but also the significance of those targeted for the

[4] Adama Dieng and Jennifer Welsh, 'Assessing the Risk of Atrocity Crimes' (2016) 9 Genocide Studies and Prevention 4, 5.
[5] Klejda Mulaj, 'Forced Displacement in Darfur, Sudan: Dilemmas of Classifying the Crimes' (2008) 46 International Migration 27, 34.

survival of the group. By not associating genocide with a numerical amount of victims has meant that the death of an estimated one million people in Rwanda and the death of around eight thousand people in Srebrenica were both considered by international courts to constitute the crime of genocide. Differences between the scale of atrocities does make it hard to compare situations, as not every case of mass violence with a substantial number of victims is genocide. For instance despite widespread atrocities across the former Yugoslavia, only the situation in Srebrenica was termed genocide by the ICTY despite evidence of the establishment of concentration camps and the deliberate targeting of civilians across the territory by the parties to the situation. The case law illustrates that a situation can only be identified as genocide if acts of genocide were targeted against a recognised protected group with the requisite intent to destroy the group.

This thesis has focussed primarily on the difficulty of determining the intent to destroy within the actions of a state or non-state actor, as the international courts and ad hoc tribunals have held that the 'key determinant' of the crime of genocide is 'intent and not the scale of humanitarian abuse' and this intent distinguishes the crime of genocide from other atrocity crimes.[6] The intent to destroy is not only central to the crime of genocide, it is also the most onerous ingredient of the crime to identify.[7] The intent to destroy is a complex element to identify, as it impossible to know what an individual is thinking when they pursue a certain action or course of conduct. As the courts have stated, those accused of genocide are rarely explicit with their intent to destroy a group rather it requires a court to divine the intent to destroy from the facts and evidence

[6] Steven Haines, 'Humanitarian Intervention: Genocide, Crimes against Humanity, and the Use of Force' in George Kassimeris and John Buckley (eds), *The Ashgate Research Companion to Modern Warfare* (Ashgate 2010) 326.
[7] Devrim Aydin, 'The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts' (2014) 78 The Journal of Criminal Law 423, 437.

available. The international courts and tribunals have illustrated that it is possible to discern an intent to destroy in the actions of an accused individual or state, by examining the conduct of an actor and the wider pattern of violence. The case law of the ICTR, ICTY, ICJ, and ICC has shown the development in recognising the indicators of genocidal intent in the actions, conduct, and words of an accused. Therefore although it may not be conceivable to know exactly what an individual was contemplating when they perpetrated a crime or deliberately targeted a group, courts can infer the intent underlying these actions from the evidence and facts available.

The twenty years of jurisprudence from the international criminal law institutions have shown that inferring the intent to destroy in the actions of an accused individual or state/non-state body is possible on the basis of evidence available however these institutions have had the benefit of time and access to documentary evidence and witness testimonies before determining the existence of genocidal intent. The case law of the ICTR, ICTY, ICJ, and ICC were all delivered a number of years, and in the case of the ICJ and some of the later cases in the ICTR and ICTY a substantial amount of time, after the events under examination. This allowed the justices more time to assess and weigh up the evidence while also being cognisant of the wider context of the crimes committed. Identifying the intent to destroy as violence rages on is a substantially different task to the investigation that a court can conduct into a situation after it has finished. In the midst of violence, a state or UN body does not have access to the same level of evidence to form a wider picture of the context of the violence. This brings us into the second stand of the research, concerning the difficulties of identifying the crime of genocide due to the complexities of the label genocide, including a flawed definition.

As discussed above the definition of the crime, as interpreted by the international courts and tribunals, in the midst of violence continues to be clouded in ambiguity despite the judicial clarifications. This uncertainty over the elements compounds the task of observers in identifying the crime of genocide in the midst of a situation or predicting the perpetration of genocide before the outbreak of violence. With regard to the latter, while there has been a growth over the last few decades in our knowledge of predicting the crime of genocide, the conditions that give rise to the perpetration of genocide, and the early indicators of genocide in a situation, particularly with the creation of the role of Special Adviser on the Prevention of Genocide and the development of warning signals within the UN's 'Framework of Analysis for Atrocity Crimes', the prediction of genocide can never be an exact science.[8]

It is almost impossible in the initial stages of monitoring a situation to assess which crime is at risk of being perpetrated.[9] This is due in part to genocide sharing similar indicators of violence with crimes against humanity, ethnic cleansing, and war crimes but also due to the inherent difficulties of predicting the occurrence of a crime. There is not one single factor which makes a country more vulnerable to genocide than another country, rather there is a multitude of factors and conditions that make a country susceptible to the perpetration of genocide.[10] The fact that a situation can either rapidly or gradually develop into genocidal violence hinders the ability of observers to predict the likelihood of genocide as situations will not follow some predictable pattern. Furthermore a country may exhibit signs of genocide but may not

[8] Ernesto Verdeja, 'Predicting Genocide and Mass Atrocities' (2016) 9 Genocide Studies and Prevention 13, 14.
[9] Adama Dieng and Jennifer Welsh, 'Assessing the Risk of Atrocity Crimes' (2016) 9 Genocide Studies and Prevention 4, 5.
[10] Deborah Mayersen and Stephen McLoughlin, 'Risk and Resilience to Mass Atrocities in Africa: A Comparison of Rwanda and Botswana' (2011) 13 Journal of Genocide Research 247, 263.

ever descend into mass violence or if violence does occur it is not assured that genocide will be committed. It is hard to predict how a situation will develop, for example both Burundi in 2015 and Rwanda in 1994 were displaying indicators of potential genocidal violence as both had a history of atrocity crimes, including genocide, between the two same ethnic groups but the situations developed along different paths involving widely different levels of violence.

The complexities involved in ascertaining the likelihood of the perpetration of genocide and distinguishing the warning signs of genocide from other atrocity crimes, highlight the flaws within the definition of genocide as the elements of the crime cannot be identified with any certainty before the outbreak of violence. This is due to the difficulty of predicting whether a state will possess the intent to destroy, as the identification of this element is key to a determination of genocide. This intent to destroy is rarely manifest until violence occurs, and even then it is difficult to pinpoint. Rarely will actors be explicit with their intent to destroy, as in the case of ISIS, rather actors and groups will take steps to mask and reframe their actions and conduct. The examination of the situations in the Central African Republic and Darfur shows the difficulty faced by actors in recognising the signs of genocide in an ongoing situation. Even in one of the clearest cases of genocide, the contrasting reports and witness testimony from the ground in Rwanda illustrate the difficulty of identifying the intent to destroy underlying the actions. The situations in Burundi and South Sudan highlight that even in a situation that does not directly concern the perpetration of genocide, there will be indicators of genocide present amongst evidence of other crimes which adds to the difficulty of distinguishing signs of violence.

The studies of the situations presented in this research highlight that it is not only the intent to destroy that is hard to establish, the other elements of the crime of genocide

are difficult to determine. In particular it is difficult to establish the existence of a protected group as there are questions about the scale of atrocities committed against a group and the numbers of people targeted for destruction as discussed previously. Determining the substantial nature of a targeted segment of a population is a complex task to be undertaken in the midst of violence as it requires knowledge of the impact of that targeted group on the wider population. Identifying a targeted group can also be complicated by the fact that it can be hard to establish on what basis a group is being targeted. In Burundi and South Sudan members of ethnic groups are the target of violence, but it is unclear whether they are being targeted because of their membership of an ethnic group or their perceived or actual support for the opposition. This requires observers to distinguish between the motives and intent underlying the actions, which is a substantially arduous task in the midst of swirling violence where perpetrators' motives and intent can change over time.

The elements of the crime of genocide do not lend any certainty to identifying the crime of genocide, with the complexities of identifying the intent to destroy a targeted protected group, with its various aspects to this component of the crime, and the fact that the most identifiable ingredient of the crime an act of genocide can also amount to a crime against humanity, a war crime, or an act of ethnic cleansing. Therefore notwithstanding the substantial increase of our knowledge of the elements of the crime of genocide in the case law of the international criminal law institutions and reports presented by commissions of inquiry the difficulty of identifying the crime of genocide in the midst of violence remains. This means that the determination of genocide in

the midst of violence cannot in most cases be 'substantiated in unequivocal way without the sad privilege of empirical evidence and hindsight'.[11]

The complexity of recognising the intent underlying genocide renders genocide nearly impossible to predict or identify in its early stages, which is why it is understandable that academics and activists continue to press for a revised definition of genocide. However, expanding or reimagining the definition of genocide does not address the complexities surrounding identifying genocide before or in the midst of violence. A new definition of genocide would not challenge the unpredictable nature of genocide, as this research has shown until violence breaks out it is nearly impossible to predict the nature of the crime, even if a situation is displaying indicators of genocide. The difficulty of predicting genocide has long been recognised by academics in the development of early warning systems which cover assessing the risk of genocide alongside other atrocity crimes as described in Chapter Four. With the difficulty of predicting genocide, any new definition would face the same problems in discerning the perpetration of genocide before an eruption of violence.

Even when violence breaks out there is no guarantee that a new definition of genocide will be identified as shown by the complexities faced by actors in recognising signs of the legal definition of genocide in ongoing situations. Currently genocidal violence is often indistinguishable in advance or at the time from other atrocity crimes due to the similar conditions which give rise to the crimes and the fact that the crimes can all be present in the same incident. A new definition of genocide is unlikely to change this, as some of the proposed changes to the definition of genocide outlined in Chapter Two

[11] Aristotle A Kallis, 'Eliminationist Crimes, State Sovereignty and International Intervention: The Case of Kosovo' (1999) 1 Journal of Genocide Research 417, 429. See also Lisa Cherkassky, 'What Distinguishes the Evil of Genocide and How Should We Respond to It?' (2008) 4 International Journal of Punishment & Sentencing 110, 122.

include adding elements to the crime, such as political groups and cultural genocide, which are already subsumed under the category of other atrocity crimes. Expanding the notion of genocide to include these additional elements would mean that the various atrocity crimes which already share some overlapping elements, would be nearly indistinguishable thus making the determination of genocide an even more complex task.

As well as failing to address the complexities of predicting and identifying genocide, attempts to redefine or redraft the concept will not solve the complexity of responding to genocide. This is because a new definition of genocide will not automatically lead to the prevention of genocide, as previous chapters have highlighted that states are slow to react effectively to claims or evidence of a risk or the perpetration of genocide due to the contentious nature of the genocide label.[12] Notwithstanding the evidence in Rwanda and Darfur, and more recently in the Central African Republic, Sinjar, Burundi, and South Sudan that claims of genocide do not directly translate into effective action to halt violence, activists continue to label situations as genocide as a means of drawing attention to a situation and prompting an international response to violence. The focus on the genocide label is because it is seen as important how '[p]oliticians, diplomats, military leaders, NGO activists, jurists, journalists, and citizens' define a situation as the definition employed to characterise the violence can condition the response of these actors.[13] Genocide has, in the minds of a number of academics, activists, and politicians, become equated with intervention on the back of a sense of failed responsibilities in Rwanda and Darfur; and a declaration of genocide

[12] Dan Kuwali, 'Old Crimes, New Paradigms: Preventing Mass Atrocity Crimes' in Robert I Rotberg (ed), *Mass Atrocity Crimes: Preventing Future Outrages* (Brookings Institution Press 2010) 45.
[13] Joachim J Savelsberg, *Representing Mass Violence: Conflicting Responses to Human Rights Violations in Darfur* (University of California Press 2015) 1.

is now seen by some as a commitment to act. This is based on a false perception of genocide as a determination of genocide will not lead to intervention as illustrated by the failure of the US to intervene in Darfur despite a finding of genocide.

This belief shows that it is not only a flawed definition of genocide that is a barrier to preventing genocide, it is also the stigma attached to the genocide label which is affecting its application in the midst of violence. The case studies illustrate that it is political will not the label applied to the violence which will condition the response of states and international actors to a situation. In fact the examination of the case studies shows that the genocide label can actually be a barrier to action, if it affects the interests of states and/or the approach the international community is pursuing to resolve a situation. States have been willing to employ the word genocide to suit their own interests, such as when the US referred to the violence in Darfur as genocide as a means of pacifying the large scale advocacy campaign and when numerous countries labelled the violence against the Yazidi as a means of condemning the actions of ISIS. In these cases, a determination of genocide was low risk for these states as it did not impede or hinder their response or lack of response. However in more delicate situations than the response to ISIS, where peace treaties and ceasefires are at risk, states have been more wary of the genocide label due to the possible repercussions of a genocide finding in the midst of violence.

With the rhetorical significance of a genocide finding, politicians have to be careful of the word genocide due to the profound consequences it can have on a situation. In responding to situations of violence the UN and its member states have to balance the

interests of sovereignty and protecting the rights of individuals.[14] Using the word genocide to characterise violence may unsettle or topple this delicate balance. This means that states may not lack the political will to label a situation as genocide, but rather view the genocide label as limiting their response to a situation. Particularly when policymakers already, even without using the word genocide, face a delicate task when responding to situations as measures such as providing humanitarian assistance, diplomatic engagement, pursuing prosecutions, or military intervention can have the opposite desired effect by leading to the continuation of violence and insecurity of vulnerable populations.[15]

Due to the stigma surrounding the genocide label, employing the genocide label in the midst of a situation would potentially further reduce the likelihood of a negotiated end to a situation as actors accused of perpetrating genocide disengage from the international community. This is why there was such anger towards the arrest warrant in Darfur, due to the potential impact on peace negotiations and the humanitarian situation. Genocide remains a serious allegation which states are wary of employing to characterise another state's or non-state actor's behaviour, so any new definition will have to confront the reality that states are hesitant to label situations as genocide due to the political and legal ramifications of applying the label to a situation.

Therefore while genocide's association with some of the worst atrocities in modern history (the Holocaust, Rwanda, and Srebrenica) have endowed the genocide label with a powerful rhetorical value, which can be beneficial for drawing attention to a situation the genocide label has more often provided a distraction to an effective

[14] Isaac Terwase Sampson, 'The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing their Convergence and Divergence on Intervention' (2011) 16 Journal of Conflict & Security 507, 508.
[15] Kurt Mills, *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute, and Palliate* (University of Pennsylvania Press 2015) 2.

remedy. A claim of genocide, rather than generate 'effective international responses' spawns 'lengthy legal debate' as in Rwanda and Darfur where the focus of the response became the label to apply to the violence rather than what action was appropriate for addressing the violence.[16] Darfur, in particular, exemplifies that the genocide label is not a 'decisive step toward action to stop mass killings.'[17] The failure to respond effectively and consistently to the situations in Rwanda and Darfur, amongst others, means that the hope of prevention expressed in the Convention has sadly fallen away to be replaced by an acceptance that intervention depends on a state weighing up the potential beneficial or disadvantageous rationale for intervening in a situation, and genocide identification and prevention has routinely proven to not be among the priorities of the major states.[18]

Any definition of genocide that is crafted will be placed in the same political realities that face the definition of genocide provided under the Genocide Convention. However genocide is conceptualised, it will not sufficiently challenge a state which is lacking the political will to act to prevent genocide.[19] No state will ever accept a definition of genocide that will impose a legal obligation on a state to act in all cases with diplomatic and military force to prevent genocide. Rather any new definition will be subject to the same limitations which hinder the current definition of genocide, in that states will control when and where the definition is applied.

[16] Don Hubert and Ariela Blätter, 'The Responsibility to Protect as International Crimes Prevention' (2012) 4 Global Responsibility to Protect 33, 44.
[17] Martin Mennecke, 'What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word"' (2007) 2 Genocide Studies and Prevention 57, 63.
[18] Thomas Cushman, 'Is Genocide Preventable? Some Theoretical Considerations' (2003) 5 Journal of Genocide Research 523, 536.
[19] Jerry Fowler, 'Diplomacy and the "G-Word"' (2003) 35 Case Western Reserve Journal of International Law 213, 215.

The complexities faced by definition of genocide as conceptualised under the Convention will not be radically altered by a new definition, whatever the elements that comprise the new definition, as issues with predicting, identifying, preventing, and responding to the crime will always be present in the current political environment. This political environment while constraining the application of the current definition of genocide to situations of violence, also ensures that the likelihood of the adoption of a new definition of genocide for a changing world is bleak as there is no appetite to rework the definition within the member states of the UN. Therefore while the arguments of an expanded definition of genocide are persuasive due to the clear faults within the definition of genocide and the failure of the international community to effectively address the crime of genocide, there is the reality to be confronted that a new or amended definition is unlikely to be adopted by states.

Even if there was a desire to revisit the definition, the records of the drafting bodies illustrate that genocide is a contentious concept so with the expansion of the number of UN member states there is no guarantee that they would create a treaty that is more effective at responding to the crime of genocide. The expansion of member states of the UN, comprising members of former colonies and smaller nation states, could provide a more representative convention however a significant number of states are confronting similar issues which faced them in the 1940s, regarding difficulties with including minority groups in their territories which means that any definition would be subject to the same compromises that defined the Genocide Convention. Issues of including additional groups such as political and LGBTQ groups, and elements of cultural genocide have not become more palatable over the years, so in all likelihood any new definition composed by states could again omit these elements. The

compromises would not only affect which elements are included or excluded from within the definition, but the substance of the provisions of a new convention.

A new treaty would be subject to the same ambiguities in interpretation as the current legal definition of genocide, as this research has shown that genocide is an indeterminate crime and with international law in itself being inherently indeterminate, a new definition will be subject to the same indeterminacies that hinder the application of the current definition of genocide.

7.4 An Indeterminate Crime

After the adoption of the Genocide Convention in 1948, the President of the UN General Assembly, Herbert Vere Evatt of Australia, pronounced that the 'supremacy of international law had been proclaimed and a significant advance had been made in the development of international law.'[20] While it was undoubtedly a significant moment in the history of international law, as the Genocide Convention was one of the first human rights treaties endorsed by the members states of the UN, the passing of the Convention did not herald the supremacy of international law as the depressing history of the application or non-application of the provisions of the Convention exemplifies. Regrettably it is not possible to apply the law of genocide in a vacuum without any interference of political interests, instead the Genocide Convention has entered the murky world of international politics, where states are king in deciding whether to respond to a given situation. The subjection of the Convention to the will of states is no different than the circumstances faced by other crimes of international law, as 'international law is situated within international politics'.[21] The influence of

[20] United Nations General Assembly (179th Meeting) 'Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)' (9 December 1948) UN Doc A/PV.179, 852.
[21] Ian Hurd, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28 Ethics & International Affairs 39, 40.

politics means that the response to international crimes is selective at best, as states can pick and choose when to intervene. This selective nature of the application of international law can be justified under the very same international law, as law is purposely indeterminate.

As the Genocide Convention is a political creation it is subject to the same indeterminacies that affect international law. The discussion of the case studies within Chapter Five and Chapter Six highlighted this indeterminate nature of genocide, in that the provisions of the Genocide Convention cannot be determined with precision. However this reflects the nature of international law, as the language of international law can never be perfectly precise.[22] The indeterminacy of the Genocide Convention can be seen in the ambiguity within the language of the provisions of the definition of genocide within Article II. This research has shown the difficulty of identifying the elements of Article II due to complexities of distinguishing the acts of genocide, establishing the existence of a protected group, and recognising the intent to destroy in the midst of violence.

While the provisions within Article II have been clarified by international courts, international actors, and commissions of inquiry there is still considerable indeterminacy surrounding ascertaining evidence of these elements. The case studies have highlighted that there is a relative indeterminacy regarding the acts of genocide, as these acts can encompass a number of different crimes, contingent on the intent underlying the act. For instance the perpetration of acts of murder and extermination can be considered as genocide, crimes against humanity, and ethnic cleansing

[22] Jan Klabbers, 'The Meaning of Rules' (2006) 20 International Relations 295, 297.

depending on the perspective of the observer making a determination of the violations of international law.

The perspective of these observers is critical in distinguishing the elements of genocide as case studies have highlighted how acts such as forcible transfer of a population and restrictions on humanitarian access to civilians have been considered acts of genocide in certain situations, Darfur and Sinjar, and as acts of crimes against humanity and ethnic cleansing in South Sudan. Therefore the determination of genocide is very context specific, which however means that lessons learnt from one situation cannot be directly applied to the next situation. Not every situation involving mass violence targeted against a group will comprise genocide, rather it depends on identifying elements of a crime that are inherently indeterminate.

There are inherent ambiguities in defining the elements of the crime, as they remain fluid over time due to the interpretations of actors and institutions.[23] So while the jurisprudence of the international courts and ad hoc tribunals may clarify elements of the crime, they may add to the indeterminacy of the crime by outlining how elements of the crime are determined. For instance while there is indeterminacy concerning how to establish the 'in whole or in part' element of a group, when the courts held that the amount targeted should be substantial; this provides those who are making determinations on the question of genocide considerable scope to make a conclusion on the perpetration of genocide. Due to the indeterminacy surrounding establishing the prominence of the targeted part of the group within the whole group, whether that targeted part was emblematic of the group, and if the targeted part of group is essential

[23] Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 56.

to the survival of the group. Assessing the significance of a targeted group for the survival of a group is inherently a subjective task.

Ascertaining that an act targeted against a group was committed with the intent to destroy that group will also require a level of subjectivity, as the language of the Convention is unclear on how to establish this intent. The case studies have shown the relative difficulties faced by observers in identifying the intent to destroy due to the indeterminacies surrounding recognising signs of intent in the midst of violence. While there have been judicial clarifications and the interpretations by actors and bodies investigating the potential perpetration of genocide on the elements of the crime of genocide, there remains uncertainties about the boundaries of the definition as elements can blur into other atrocity crimes. This uncertainty at the fringes of the law affects the overall application of the law.[24]

This indeterminacy surrounding the language affects the identification of the crime of genocide in the midst of violence; furthermore it also affects the response to a situation. Outside of the definition of the crime, other articles within the Convention are also vague on the responsibilities of states with regard to genocide such as those relating to prevention under Article I and Article VIII. While providing that states undertake to prevent genocide, under Article I, and in meeting this duty states have recourse to call upon the organs of the UN to act under the Charter, under Article VII, these provisions do not specify what action can be taken. While in Rwanda, the US believed a finding of genocide compelled a state to act with military force, subsequent state practice and the judgment of the ICJ shows this view to be inaccurate. Rather

[24] Jan Klabbers, 'The Meaning of Rules' (2006) 20 International Relations 295, 295, 297.

the provisions of the Convention, as interpreted in the case of *Bosnia and Herzegovina v Serbia*, provide considerable scope to states in meeting this duty to prevent genocide.

Therefore it is unclear what response a call for action under the Convention will provoke; there is no consistency in response to situations of genocide as shown by the US government under Bush only referring the genocidal situation in Darfur to the UN Security Council while the Obama administration intervened unilaterally against ISIS to conduct air strikes on Mount Sinjar in response to a threat of genocide. This selectivity in response is a hallmark of international relations, and is enshrined in international law with the indeterminacy of provisions to respond to violence, including the indeterminate articles within the Genocide Convention.

This indeterminacy of language within the Genocide Convention, reflects the wishes of the drafters. As discussed in the previous chapters, the provisions of the Genocide Convention were left deliberately ambiguous and vague to ensure widespread acceptance of its principles. However, it has meant that the Convention's definition of genocide is difficult to predict and identify, which has hindered the preventative potential of the Convention.[25] The ability of the international community to take preventative action is constrained by the indeterminacy in the interpretation of international law as the laws are complex and leave 'open-ended qualifications which restrict their scope and relevance.'[26] The 'considerable indeterminacy' of genocide 'in terms of the element of scale and gravity – is such that its application and interpretation is highly context specific.'[27]

[25] Eyal Mayroz, 'The Legal Duty to "Prevent": After the Onset of "Genocide"' (2012) 14 Journal of Genocide Research 79, 90.
[26] Aristotle A Kallis, 'Eliminationist Crimes, State Sovereignty and International Intervention: The Case of Kosovo' (1999) 1 Journal of Genocide Research 417, 428.
[27] Payam Akhavan, 'Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes against Humanity and Genocide' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 279, 284.

The indeterminacy of the definition of genocide offers significant scope for actors in applying the Genocide Convention in the midst of violence, as there is not one meaning of genocide. As David Moshman contends 'definitions are social conventions, not empirical truths about the world. Events are not inherently genocidal or not genocidal. It is up to us to determine what we mean by genocide.'[28] However the indeterminate nature of law does not mean that law is wholly indeterminate, rather it means that in applying law there is 'subjective discretion' for those applying the law in a given situation but this 'subjective discretion' has to exist within the limits of the law.[29]

We can see this in the interpretation of the Convention by the international courts as they have expanded upon elements within the crime, justified in relation to the wording of the provisions and the wishes of the drafters, while refusing to extend the definition to include acts targeted against other groups, such as political groups, and to include acts of cultural genocide under the auspices of the Genocide Convention. This means that while we may not be certain how an actor will act in applying a law, we know the limit of their actions. While those applying the law are constrained within the limit of the law, the indeterminacy surrounding genocide continues to provide considerable scope for those applying the definition of genocide to a given situation to stretch or narrow the boundaries of the definition, while staying within the confines of the law, to suit their interests.

[28] David Moshman, 'Conceptual Constraints on Thinking about Genocide' (2003) 3 Journal of Genocide Research 431, 445.
[29] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 34, 38.

The indeterminate nature of law can be used to justify inaction on the part of states or bodies unwilling to take action.[30] Rather than bolster the pursuit of accountability, international law has been used by the major international players to justify inaction.[31] The flawed definition of genocide as conceptualised under the Genocide Convention justifies a lack of political will to respond to violence as the 'deficiencies of the Convention intensify this problem' of political will 'by allowing and enabling politicians to manipulate and exploit the very tool that should encourage action.'[32] Under the Genocide Convention, states or actors can rely on the indeterminacy of the definition, as states can claim that the targeted part of a group is not substantial or significant, and in particular can claim that there is no evidence of an intent to destroy a group, to justify not labelling a situation as genocide and not responding to a situation.

The legal definition provides states with a 'ready-made legal excuse not to take action' due to the difficulty of identifying the specific intent.[33] This can be seen in the case of Rwanda, where the US government avoided the use of the word due to the complexities of identifying the intent to destroy in the violence.[34] The government relied on the ambiguities within the definition to support its position of not labelling the violence, which buttressed their wider goal of not getting militarily involved in

[30] Klejda Mulaj, 'Forced Displacement in Darfur, Sudan: Dilemmas of Classifying the Crimes' (2008) 46 International Migration 27, 39.
[31] Edward C Luck, 'The Responsibility to Protect: Growing Pains or Early Promise?' (2010) 24 Ethics & International Affairs 349, 361.
[32] Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 54.
[33] Michael J Bazyler, 'In the Footsteps of Raphael Lemkin' (2007) 2 Genocide Studies and Prevention 51, 52–53.
[34] Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 54.

Rwanda. While international law allows states to defend inaction with regard to a particular situation, it can also serve as justification for taking action.[35] For example, Obama relying upon international law to justify air strikes on Mount Sinjar as a means of genocide prevention.

When states are motivated to act, international law is a tool to wield in international relations to support and defend their actions and conduct. This creates inconsistency in the application of international law as states are selective when and where they apply the principles of rules. Why intervene with military force, in the form of air strikes, in response to the crimes of ISIS due to the threat of genocide, but not take military action to respond to the situations in Burundi and South Sudan which are having a devastating humanitarian effect on the civilian population? It is because in situations different principles will be at play, and states will be caught between the sovereignty and intervention dilemma. However it does mean the application of law, including the Genocide Convention, will never be consistent but this can be justified under international law. As under international law, due to the issues of indeterminacy, it is possible to defend any course of action with respect to the provisions of the law.[36]

The indeterminate language of the Convention can also justify observers arriving at different conclusions on the question of genocide, such as in Darfur.[37] In Darfur '[t]he fact that the US and UN arrived at such divergent conclusions, while possibly influenced by differences in methodology, rigor, and thoroughness in their respective

[35] Ian Hurd, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28 Ethics & International Affairs 39, 39.
[36] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 591.
[37] ibid 38–39.

investigations' was 'a result of the definitional ambiguities in the Genocide Convention.'[38] The findings on the question of genocide were split on the question of genocidal intent, due to the complexities of identifying this element in violence. However this reflects the nature of international law as there will always be 'competing judgments about the facts of the case (for example, about the cause, existence, and scale of mass atrocities)'.[39] Notwithstanding this the complexities of identifying the intent to destroy in the midst of violence do provide states, international actors, international courts, and commissions of inquiry with a readily available excuse for not applying the genocide label to a potentially politically contentious or sensitive case.[40]

The lack of clarity surrounding the definition can excuse a state or body not having the political will to act or label the violence as genocide, as in Darfur while the Commission of Inquiry may have been biased, as claimed by a number of actors, towards not finding evidence of genocide, the 'ambiguities of the Convention certainly assisted its manipulation of the definition of genocide so as to arrive at the desirable conclusion.'[41] The lack of conceptual clarity surrounding genocide means that the situations in Burundi and South Sudan, while displaying signs of genocide, can be justifiably regarded as not involving the perpetration of genocide due to the difficulties of establishing the elements of the crime due to their indeterminate nature.

[38] Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 56.
[39] Alex J Bellamy, 'The Responsibility to Protect – Five Years On' (2010) 24 Ethics & International Affairs 143, 162.
[40] Martin Shaw, *What is Genocide* (2nd edn, Polity Press 2015) 106.
[41] Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 56.

However even if the language of the Genocide Convention, related to defining and preventing the crime, was determinate the legal system itself would remain indeterminate.[42] Martti Koskenniemi presented the idea that law is not just indeterminate because of the language of law but the very nature of law. Koskenniemi argues that the 'problems of treaty interpretation lie deeper than in the unclear character of treaty language. They lie in the contradiction between the legal principles available to arrive at an interpretation.'[43] This means that it is the very notions which underpin the language that are also indeterminate. For example, Koskenniemi argues that there is no 'determinate extent to sovereignty at all' as '[a]nything can be explained as in accordance with or contrary to sovereignty'.[44]

The indeterminate nature of sovereignty and how states have perceived their responsibilities in respecting sovereignty – to respect in some cases but in others to disregard – highlight that there can be no 'coherent justification' under the law with regard to questions of intervention and sovereignty.[45] State sovereignty becomes a 'formidable barrier' to action when states are not motivated to act.[46] There will be always conflicting demands in international law, between different rules and principles. This can be seen in the conflict between the UN's role in preventing genocide and its role in upholding the sovereignty of states.[47] Koskenniemi contends that law can never be determinate, in that we never know how states will act in the

[42] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 62, 590.
[43] ibid 341.
[44] ibid 240.
[45] ibid 62.
[46] Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 58.
[47] ibid 50.

future in responding to these different rules and principles.[48] There will always be a 'choice' under international law for actors in the application of laws to a given situation.[49]

The indeterminate nature of the wider body of international law and rights, and in particular the indeterminacies within the definitional and preventative provisions within the Genocide Convention, does mean that the response to genocide is very much dependent on the political will of states to act in a given situation. Generating political will is the 'most important dimension' of prevention.[50] Law will, by itself, be unable to 'consistently stimulate timely, coordinated and effective international responses to mass atrocities.'[51] Unless 'measures of enforcement and reparation are inscribed in law, the extraterritorial protection of populations from mass atrocities will continue to be dependent, as it has long been, on the vagaries of the political will of states.'[52] As the case studies have illuminated the 'decisions about prevention or intervention' in a given situation 'have more to do with policy and/or moral choices than with the law.'[53] Genocide cannot be divorced from law, as politics 'permeates' the understanding and interpretation of genocide.[54]

The discussion of the response to genocide throughout this study has shown that while '[t]he personalities, ideologies, and geopolitical constraints' of states 'have shifted

[48] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 590.
[49] ibid 596.
[50] Ernesto Verdeja, 'Predicting Genocide and Mass Atrocities' (2016) 9 Genocide Studies and Prevention 13, 13.
[51] Luke Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12 Human Rights Law Review 1, 32.
[52] ibid 32.
[53] Eyal Mayroz, 'The Legal Duty to "Prevent": After the Onset of "Genocide"' (2012) 14 Journal of Genocide Research 79, 93.
[54] Nikolas Rajković, 'On "Bad Law" and "Good Politics": The Politics of the ICJ *Genocide* Case and Its Interpretation' (2008) 21 Leiden Journal of International Law 885, 887.

with time … the major powers have consistently refused to take risks to suppress genocide.'[55] The history of the international measures to confront the perpetration of genocide highlights that despite the existence of the Genocide Convention, the first international efforts to institute prevention were only in 2004 with the creation of the role of the Special Adviser on the Prevention of Genocide.[56] Despite the verbal commitment to take action to prevent and respond to genocide, states will continue to weigh up the benefits of getting involved.[57] The term genocide is 'a stumbling block to genocide prevention.'[58]

The indeterminacy of the genocide label due to the differing meanings does render 'genocide a difficult term around which to mobilise an international coalition for intervention.'[59] The 'analysis' of the Genocide Convention has shown that it has its 'flaws and is an impediment to the prevention and halting of genocide in terms of its failure to clarify what the obligation to prevent entails, including what actions might be required and legitimate, its definitional ambiguities which cause debilitating debates over whether a situation is in fact genocide, and its punitive focus which draws attention away from prevention and intervention.'[60]

While the Genocide Convention has proven to be ineffective at times of crisis, this does not mean that a new definition or concept of genocide is needed or required. Regardless of how genocide is defined, the indeterminate nature of law will impact

[55] Samantha Power, 'Raising the Cost of Genocide' (2002) 49 Dissent 85, 88.
[56] Edward C Luck, 'Why the United Nations Underperforms at Preventing Mass Atrocities' (2018) 11 Genocide Studies and Prevention 32, 35.
[57] Samantha Power, 'Raising the Cost of Genocide' (2002) 49 Dissent 85, 91.
[58] Martin Mennecke, 'What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word"' (2007) 2 Genocide Studies and Prevention 57, 62.
[59] Scott Straus, 'Darfur and the Genocide Debate' (2005) 84 Foreign Affairs 123, 132.
[60] Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 59.

the identification of genocide and the prevention and response to genocide. Consistency in the response to genocide will always be a problem, no matter if the definition was expanded.[61] This is because the prevention of genocide is not 'a legal question' rather it is a 'political question' which means that the definition of genocide is unsuited to it as 'predicating political action on satisfaction of a legal definition is a recipe for inaction.'[62]

Definitional 'debates typically distract from difficult, but more important, questions over what could and should be done to prevent or halt genocide.'[63] This is why the focus should not be on redefining the concept of genocide, but rather on finding or employing new and different approaches to confronting the crime of genocide. With the evidence that the interpretation and understanding of genocide may potentially be providing an obstacle to prevention, should we persist with the label of genocide when a more appropriate label from a pragmatic point of view may be available. This thesis has advanced the concept of atrocity crimes as a means of removing the complexities surrounding determining genocide due to its indeterminate nature and its potential thorny political impact in the midst of violence.

7.5 Preventing 'Atrocity Crimes'

The adoption of the Genocide Convention was meant to be a watershed moment in the history of the UN, however the definition of genocide has caused more difficulties than it has offered solutions. The various complexities associated with the definition

[61] Michael J Kelly, '"Genocide" – The Power of a Label' (2007–2008) 40 Case Western Reserve Journal of International Law 147, 162.
[62] Jerry Fowler, 'Diplomacy and the "G-Word"' (2003) 35 Case Western Reserve Journal of International Law 213, 215.
[63] Kelly Maddox, '"Liberat[ing] Mankind from Such an Odious Scourge": The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 Genocide Studies and Prevention 48, 57.

of genocide have contributed to the international community failing to meaningfully convert the Genocide Convention's promise to prevent the crime of genocide into a reality, as violence continues to rage across the world with UN member states silent not only on intervention but also on taking diplomatic and peaceful measures to protect populations.[64] Notwithstanding the faults apparent in the Convention states have shown no appetite to revisit the definition, and therefore it will be the definition which will continue to apply to situations of violence. As a consequence, those interested in genocide prevention have to find some way of using the definition of genocide to fulfil the goals of preventing and punishing the crime of genocide.

This thesis has advocated delaying determining the perpetration of genocide until an international court or tribunal can assess the evidence, and instead adopt the umbrella term 'atrocity crimes' (composing the crimes of genocide, crimes against humanity, ethnic cleansing, and war crimes), to characterise violence in the midst of a situation. Utilising the term atrocity crimes is not a straightforward solution as obviously genocide retains a strong moral weight, particularly amongst the victims of atrocities. Genocide is seen as an important word to characterise the experience of a victimised population, therefore any attempt to lessen its significance could be seen as diminishing the suffering of victims. This thesis is seeking not to minimise or marginalise the trauma of victims, rather it is seeking to maximise the preventative potential of the Genocide Convention and other sources of international law.

Removing the focus off the genocide label does not demean the victims; rather, refusing to act in response to violence, regardless the label, demeans victims. As

[64] Thomas G Weiss, 'Halting Genocide: Rhetoric versus Reality' (2007) 2 Genocide Studies and Prevention 7, 8; Jennifer Welsh, 'The Responsibility to Protect: Assessing the Gap between Rhetoric and Reality' (2016) 51 Cooperation and Conflict 216, 225.

Payam Akhavan asks, is it better to claim genocide is occurring and do nothing or not use the genocide label and still do nothing.[65] They are both equally cruel scenarios, as in either case they leave populations to confront horrific atrocities without the hope of action. This is why the focus should not be on labels as debates about whether an atrocity constitutes genocide or a crime against humanity or ethnic cleansing distract us from the real issue, which is the fact that violence no matter its label is being perpetrated against a population.[66]

Utilising the word genocide should not be seen as important for the prevention of genocide, the crime can be prevented without a determination of genocide or even using the word genocide. The evidence of the AU-UN diplomatic mission in Kenya shows that the crime of genocide can be addressed without the word genocide being spoken. Furthermore it could be argued that the threat and risk of genocide is being confronted in Burundi and South Sudan without the word genocide being used by UN or AU states in responding to the violence. The word, while rhetorically significant, is not central to the prevention of the crime. Employing the more general atrocity crimes label, crucially, should not lead to a fundamentally different response being advocated, as the measures aimed at preventing and responding to the atrocity crimes of crimes against humanity, war crimes, and ethnic cleansing will also address the perpetration of genocide where it occurs. There is not some special mechanism or measure available to international actors that will only address the prevention of genocide.

[65] Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge University Press 2012) 3.
[66] Madeline Morris, 'Genocide Politics and Policy' (2003) 32 Case Western Reserve Journal of International Law 205, 209.

Prioritising the term atrocity crimes would not require a substantial change in outlook as the prevention of genocide is already intertwined with the prevention of atrocity crimes, as the Special Adviser on the Prevention of Genocide has assumed responsibility for addressing the perpetration of atrocity crimes as shown by the Special Adviser's involvement in Burundi and South Sudan. Furthermore states are cognisant of the risk of all atrocity crimes, and the coordinated prevention of atrocity crimes is increasingly becoming part of the response of the international community to violations of international law. Countries across the world including the US, Switzerland, Germany, Kenya, Tanzania, Uganda, Argentina, Costa Rica, Paraguay have initiated mechanisms to identify elements of atrocity crimes and to prevent these crimes.[67]

Utilising the term atrocity crimes should in theory not impact on the response to genocide as the international community already has the responsibility to protect civilians from crimes against humanity, ethnic cleansing, and war crimes under the RtoP doctrine. The adoption of the principles of RtoP by states means that the prevention of genocide is now 'intimately interwoven' with the Responsibility to Protect doctrine.[68] While the responsibility to protect civilians from genocide may, in comparison to crimes against humanity and ethnic cleansing, extend beyond the RtoP with the existence of the Genocide Convention. In fact the obligations to prevent genocide under the Convention are comparable to the RtoP doctrine as the responsibility lies with the UN to respond or authorise a response from its member

[67] See discussion in Samantha Capicotto and Rob Scharf, 'National Mechanisms for the Prevention of Atrocity Crimes' (2018) 11 Genocide Studies and Prevention 6; Sarah Brockmeier and Philipp Rotmann, 'Germany's Politics and Bureaucracy for Preventing Atrocities' (2018) 11 Genocide Studies and Prevention 20; Giulia Persoz, 'Neutrality: A Tool or a Limit for Preventing Mass Atrocity Crimes and Genocide? The Case of Switzerland' (2018) 11 Genocide Studies and Prevention 75.
[68] Stephen Hopgood, 'The Last Rites for Humanitarian Intervention: Darfur, Sri Lanka and R2P' (2014) 5 Global Responsibility to Protect 181, 182.

states. Therefore there is no downgrading of the crime of genocide by incorporating it in the wider category of atrocity crimes.

While there has been a rise in prominence in the responsibility to prevent and respond to atrocity crimes, this does not mean that atrocity crimes are more likely to be addressed by international actors than the crime of genocide. The brief history of the acceptance of the RtoP doctrine in state practice shows that it is subject to some of the same indeterminacies that surround the Genocide Convention. The language of the Outcome Document setting out the doctrine of RtoP does not specify what action, if any, should be taken to respond to violence.[69] This vagueness in language is 'produced by a combination of uncertainty about what is expected, disagreements about what ought to be expected, and an interest in preserving flexibility for the future.'[70] The language was purposely indeterminate, as it provides a wide scope for states to pursue their own course of action or justify inaction on their part. In accepting that states had a responsibility to protect civilians outside their borders, states did not want to be bound by a legal obligation to act in a particular way.

However irrespective of whether the Genocide Convention or the RtoP doctrine impose a legal obligation to act does not really matter at the end of the day; what is important to prevention and intervention is the political will of states and international institutions.[71] The inconsistent and selective application of the RtoP shows that the doctrine has not changed the 'existing structure of international law regarding sovereign responsibility, the authority to use force, or the thresholds for

[69] Alex J Bellamy, 'The Responsibility to Protect – Five Years On' (2010) 24 Ethics & International Affairs 143, 161–162.
[70] ibid 162.
[71] Eyal Mayroz, 'The Legal Duty to "Prevent": After the Onset of "Genocide"' (2012) 14 Journal of Genocide Research 79, 90.

intervention'.[72] When states want to act, they will act, and when they want to do nothing, they will take no action. This means that, like the Genocide Convention, the RtoP is 'a political rather than a legal concept.'[73] The RtoP 'carries little, if indeed any, legal weight' rather it is 'the latest in a long line of grandiose declarations made by states that have had little influence on actual international relations.'[74] Therefore utilising the label atrocity crimes and relying on the doctrine of RtoP does not address the difficulties of political will which impact on the prevention and response to violations of international criminal law.

However this does not mean that the use of the label of atrocity crimes is futile, rather it reveals the nature of international law. Atrocity crimes, such as genocide, cannot exist in a vacuum as consistency and selectivity will always blight the response to situations of violence due to the indeterminate nature of law. Law simply cannot be separated from the operation of realpolitik, therefore methods of maximising the application of international criminal law to a given situation need to be explored so as to support the prevention and response to these crimes. Utilising the term atrocity crimes to characterise violence will never be a perfect solution to preventing and responding to crimes of international law, similar to how the word genocide has proven ineffective at times in confronting genocidal violence. The drawbacks of the label atrocity crimes are not a strong enough argument to override the utility of the label in preference to the genocide label as the flaws of the genocide label as a tool for prevention have been apparent since the adoption of the Genocide Convention. This

[72] Aidan Hehir, 'The Responsibility to Protect: "Sound and Fury Signifying Nothing"?' (2010) 24 International Relations 218, 234. See also Alex J Bellamy, 'The Responsibility to Protect – Five Years On' (2010) 24 Ethics & International Affairs 143, 144; Theresa Reinold, 'The Responsibility to Protect – Much Ado about Nothing?' (2010) 36 Review of International Studies 55, 78.
[73] Edward C Luck, 'The Responsibility to Protect: Growing Pains or Early Promise?' (2010) 24 Ethics & International Affairs 349, 363.
[74] Aidan Hehir, 'The Responsibility to Protect: "Sound and Fury Signifying Nothing"?' (2010) 24 International Relations 218, 233–234.

thesis is contending that utilising the label atrocity crimes rather than the genocide label in the midst of a situation would bolster these attempts to fulfil the preventative potential of the Convention.

This is because the current approach to fulfilling the Convention's promise of prevention has been impeded by the understanding of genocide, as while the symbolic and moral standing of the genocide label is one of the greatest strengths of the term genocide, it has also proved to be a significant weakness with the rhetorical value of the genocide label leading to states avoiding employing the term. This is why my thesis has argued for removing the focus off labels, as genocide constrains not only the thinking of politicians but also their response to a situation. While genocide may be the appropriate label to apply to the violence in a given situation, the label will mean nothing in terms of prevention if no action is taken. The focus should be on the response to a situation and not the label to be applied to a given situation as 'regardless of what such atrocities are called, they remain atrocities, and must be stopped and punished.'[75]

Utilising the term atrocity crimes to characterise ongoing violence, while removing the focus off specific labels, would also address some of the deficiencies and indeterminacies which affect employing the definition of genocide in the midst of violence. Deficiencies such as the overlap between the conditions that give rise to the crimes and the acts underlying the crimes which hinder the prediction and identification of the crime. While there are distinct differences between the elements of the atrocity crimes, in terms of the provisions of the crimes in statute and case law, the conceptual boundaries of the crimes do overlap which means that the crimes are

[75] Erin Patrick, 'Intent to Destroy: The Genocidal Impact of Forced Migration in Darfur, Sudan' (2005) 18 Journal of Refugee Studies 410, 420.

nearly indistinguishable depending on which acts are perpetrated. For instance the evidence of the case law and case studies of genocide show that 'it seems impossible to conceive of a case of genocide that would not also respond to the definition of crimes against humanity.'[76]

With the difficulties therefore of distinguishing the crimes before or in the midst of violence, it is beneficial to delay the determination of which crime was committed, particularly when evidence of mental intent underlying the acts can be critical for establishing the existence of which law of international criminal law has been violated. Therefore using the umbrella category of atrocity crimes would allow time to gather evidence of which crime was committed, rather than be rushed into a determination so as build international support to respond to that particular crime. The label to apply to the violence should not matter rather the focus should be on the response to the situation as it is an onerous burden for the UN to not only have to establish evidence of a state or organisation led genocidal campaign but also to have the responsibility to motivate states to respond to a finding of genocide. The deficient definition of genocide complicates this approach, with the complexities of identifying the crime in the midst of violence as states have used the difficulties of identifying the crime to abrogate their duties to prevent and respond to violations of international criminal law. This signals the need for the label of atrocity crimes to address these complexities. Employing the term atrocity crimes to characterise ongoing violence would ensure that time was not spent on applying a deficient definition of genocide to a situation of violence rather than actors focussing on the methods that would best respond to and ameliorate the violence.

[76] William A Schabas, 'Preventing the "Odious Scourge": The United Nations and the Prevention of Genocide' (2007) 14 International Journal on Minority and Group Rights 379, 396.

Utilising this term would not only remove the difficulties of identifying an indeterminable definition of genocide in the midst of violence, it would also negate the impact of a flawed understanding of genocide on the response to a situation as has been illustrated throughout the chapters in this study. As discussed, the association of genocide with the worst crimes in existence has given the term a powerful moral standing which while advantageous for bringing greater awareness to a situation, can complicate the response to the violence as states are fearful of the genocide label and its implications. The term genocide can have a tremendous impact on the response to a situation as its use can be counterproductive by hindering the ability of states to address violence due to limiting the possibility of conducting peaceful negotiations as individuals will be wary of future prosecutions. The use of the word genocide can also imply action on behalf of states to respond to a situation, which means states concentrate on avoiding labelling the violence as genocide rather than concrete plans to confront the violence. The term atrocity crimes does not bear the same levels of stigma as held by the genocide label currently, which means that its use in a given situation may pose less complexities than the genocide label due to people not associating atrocity crimes with action and intervention.

Utilising the term atrocity crimes as a tool for prevention is not a perfect solution to confronting violations of international criminal law, as the term will not directly translate into action to prevent genocide and other crimes of international criminal law. It is debatable whether, if the label of atrocity crimes was applied in the situations in Rwanda, Srebrenica, Darfur, the Central African Republic, Sinjar, Burundi, and South Sudan rather than the labels of genocide, crimes against humanity, war crimes, and ethnic cleansing that there would have been a response or more effective action taken to address the respective situations.

However there will never be a faultless label to apply to situations of complex violence due to the nature of international law and its relationship with international politics, and the reality of a divided world with competing and divergent interests. The prevention of genocide has also floundered in this world of realpolitik and political will; however, the deficiencies of the genocide label as a preventative tool have contributed to this ineffectiveness in the midst of violence by providing justification for a lack of action due to the complexities of identifying the elements of the crime. These complexities which are restricting the realisation of the preventative potential under the Genocide Convention signal that a different approach is needed, not a new definition as since the creation of the concept of genocide '[m]uch has been written about genocide' and redefining the crime but '[l]ittle has been done to prevent it.'[77]

7.6 Conclusion

In conclusion, the above discussion in this chapter and the research presented throughout this study illustrates why atrocity crimes is a useful and effective category to be applied in the midst of violence to remedy the flaws and indeterminacy of the Genocide Convention's definition of genocide which often adversely impacts on the prevention and response to violence. This is a central argument of this thesis, in that the deficient and indeterminate nature of the definition of genocide has rendered the Genocide Convention ineffective in times of violence which means that the genocide label should not be employed in the midst of violence as a preventative term. This argument has developed across the three core strands of this thesis and the research questions contained within these strands, the answers to which have illuminated the various faults within the concept of genocide and its utility as a preventative term. The

[77] Frank Chalk, 'Genocide in the 20th Century – Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 150.

knowledge gained from an examination and analysis of the rules and practices of the law genocide permit this research to come to some conclusions about the utility of the law of genocide and allows this thesis to present scope for future research and recommendations for the use and practice of the law of genocide by actors.

CHAPTER EIGHT: FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

8.1 Introduction

In the preceding chapters the thesis has engaged with the research questions through an examination of the Genocide Convention and its application in case law and case studies. In tackling these research questions key themes and arguments have emerged on the state of the law of genocide and the utility of the definition of genocide as a preventative measure. In this final chapter, the thesis will present the core findings and conclusions, which have become evident through the research process, on the utility of employing the genocide definition in the midst of violence. On the basis of these findings and conclusions this chapter will address the implications of this thesis for the study of genocide, how the research fits into the wider literature of genocide studies and the scope for future research in this area. Alongside recommending a potential future direction of genocide studies, this chapter will also present a series of recommendations to those actors who potentially engage with and make determinations of the crime of genocide in the midst of violence. Therefore the aim of this chapter, in engaging with the various concerns and matters outlined above, is to highlight what this research says about the future direction of genocide studies and prevention and to neatly encapsulate what this research set out to address, by presenting and evaluating the key evidence that has emerged to answer these questions.

8.2 Answering the Research Questions

The motivation for undertaking this thesis was to address why states fail to take meaningful action to prevent and/or prosecute genocide or to characterise particular acts and atrocities as genocide. Relying on the substantial body of literature on

genocide, this thesis set out to investigate whether the premise that a state's failure to respond is due to a lack of political will could fully explain this lack of response or could this lack of response be due to complexities related to defining, identifying, interpreting, and determining the crime. The focal point of this research was therefore the question of whether genocide was identifiable in the midst of violence due to the impact and effect of these potential complexities. This central research question of this thesis was conceived within three core strands of research which each contained a number of research questions which dealt with the various elements of identifying the crime of genocide.

The first strand of this research was concerned with the preliminary issue of how to define genocide, whether to employ the definition as adopted within the Genocide Convention or to use one of the many definitions crafted by academics and activists to address the crime of genocide. Included within this strand was the question of whether there has been a divide between the legal understanding of genocide as contained within the Genocide Convention and the social understanding of genocide held by members of the general public due to the academic and activist attempts to rework the definition of genocide. The second strand of this research, which comprised the core focus of this thesis, was concerned with how the limitations of the legal and social understandings of genocide affect the identification of genocide in the midst of violence. This strand explored the legal, societal, political, and historical contexts that can impact on the identification of the elements of genocide and the characterising of a situation as genocide by an actor. In examining the complexities inherent in applying the label of genocide to an ongoing situation, at the core of this research was an overarching question of the utility of the genocide label as a preventative term to be employed in the midst of violence as a means of response. The

third strand of this research follows on from this question, by examining how genocide could be prevented and confronted, through the use of the concept of atrocity crimes, if the definition of genocide is too complex to identify and determine in the midst of violence.

These research questions and research strands were explored through a combination of doctrinal research and critical and contextual analysis of the law of genocide and the use of the term genocide in practice. In conducting this research approach this thesis engaged with primary and secondary sources relating to the Genocide Convention, case law of the international courts and tribunals, and the situations in Rwanda, Srebrenica, Darfur, Central African Republic, the Sinjar region in Iraq, South Sudan, and Burundi to illustrate the difficulties of identifying the crime of genocide in practice. The analysis of these sources and case studies highlight key difficulties in applying the current internationally accepted definition of genocide in the midst of violence, which have led to this thesis to propose a number of core findings on the concept of genocide and how it is defined and understood and on the utility of the genocide label as a preventative term to be employed in the midst of violence.

The first key finding which emerged from the research is that the only definition that should be applied to characterise ongoing violence is the definition contained within the Genocide Convention as it is the sole definition of genocide that has been accepted by states and recognised in international courts and tribunals. This means when examining the complexities of identifying genocide and the utility of the term genocide for preventative purposes, it is the Convention's definition of genocide that needs to be assessed. However the discussion of the academic and activist reinterpretations of genocide in Chapter Two was important for highlighting ambiguities and complexities in the legal definition which impact on the identification

of genocide. These complexities within the definition which were pinpointed in research studies were explored and teased out in the research that followed on the case law and case studies.

The research has illustrated that there are three key elements that have to be identified so as to make a determination or conclusion on the question of the perpetration of genocide. The three elements are an act of genocide, a protected group, and an intent to destroy. A core finding of this thesis is that while the levels of complexity may vary it is a complex task to identify all three elements in the midst of violence. This is due to the difficulties of distinguishing acts of genocide in the midst of violence, recognising on what basis a group is being targeted, and establishing evidence of an intent to destroy. The complexities associated with establishing the existence of genocide illustrated throughout the thesis render genocide an unsuitable term to employ in the midst of violence as the complexities reflect the nature of international law and politics.

The examination of genocide has shown that there can never be a precise definition of genocide as elements of the crime are inherently indeterminate, and the specific intent element is notoriously difficult to ascertain in most contexts. The indeterminate nature of genocide is a key theme that emerged from the research of the Genocide Convention, the case law, and the case studies of this thesis. Indeterminacy affects the identification of the elements of genocide and the prevention of the crime as it provides considerable scope for actors in interpreting the provisions of the Genocide Convention as there is no precise answer to whether an act is genocide and there is no direct obligation on a state to respond effectively to claims and/or evidence of genocide. While the examination of genocide in case law, reports by commissions of inquiry, and statements by UN and state officials provides us with a much clearer idea

of the elements of genocide, the elements of the crime will always be subject to a level of indeterminacy no matter the context. The indeterminate nature of genocide does not mean genocide can never be identified or responded to as it quite clearly can be as shown by the research on the response to the crimes of ISIS, however the identification and prevention of genocide is dependent on the subjective whims of actors which renders genocide an unsuitable label to promote as a term that will result in an effective response to a situation of violence.

The research has shown that the identification of genocide is affected not only by a level of indeterminacy but also by the stigma surrounding the genocide label due to the legal and social understandings of genocide. The study highlighted how states have been reluctant to employ the word genocide to characterise a situation due to the perceived stigma of labelling a situation as genocide and how it may impact on a state's interests. This shows the key role that political will plays in the response to genocide, however this research has illustrated that political will alone cannot explain the lack of response, rather there are complexities inherent within the genocide label which have negatively affected its applicability in the midst of violence. This thesis has shown through an examination of the case studies how these complexities can explain why states have been reluctant to take action to respond to claims of genocide and often failed to label ongoing violence as genocide. These various complexities faced by actors in employing the genocide label have limited the utility of the Genocide Convention to identify, prosecute, and prevent genocide. This is the major finding from this thesis, that the definition of genocide as contained within the Genocide Convention is unsuitable for the prevention and response to genocide in the midst of violence, therefore a new approach is needed to ensure that genocide is prevented in the future.

This finding led the thesis to contend that for the purposes of prevention, the broader category of atrocity crimes should be used to characterise ongoing violence rather than needing to drill into the specific elements of the definition of genocide. The research on the concept of atrocity crimes highlighted the advantages of this label, as this thesis has shown the considerable difficulty of distinguishing some of the elements and warning signs of genocide from other crimes of international criminal law. Employing the atrocity crimes label should not change the obligation to respond to a situation as this research has shown that states have a responsibility to protect populations from all forms of atrocity crimes. A central finding in favour of the atrocity crimes concept is that the discussion of the various situations under review illustrate that the level of violence dictates the response, not the label applied to characterise the violence. Therefore a major conclusion of this research was that the focus should be on preventing all forms of mass atrocity violence through employing the general atrocity crimes label rather than seeking to distinguish the elements of crimes so as to apply a specific label to the violence as political will not the label applied to the situation will dictate the response.

In the seventy years since Raphael Lemkin first proposed the word and the United Nations enshrined the concept in law, the research presented within this thesis lays out that the prevention of the crime may sometimes be best served by not making contentious accusations of genocide. Utilising the concept of atrocity crimes offers a way forward to realising the preventative potential under the Convention that Lemkin and the drafters conceived of back in the 1940s, by removing the focus on applying an indeterminate definition and a potentially problematic label in the midst of a situation. If the present approach to confronting and preventing the crime of genocide by applying the flawed definition of genocide continues, it indicates that the crime

will not be adequately addressed which means that genocide and other atrocity crimes may be more likely to recur.

To conclude, in undertaking to understand why states have often failed to respond to claims/evidence of genocide and failed to label situations as genocide, this thesis has shown that these failings are not solely due to a lack of political will. In presenting evidence from documents and case studies this thesis has shown that the failure can be traced to faults within the very concept and definition of genocide which cannot be remedied or addressed due to the nature of the politics of international relations as it currently stands. This means that the identification of genocide in the midst of violence will always be constrained by the inherent complexities within the definition of genocide. This has led the thesis to conclude that the answer to the key overarching question of the research strands on the utility of the definition of genocide is that the genocide definition is unsuitable and not beneficial for the prevention of violence. Instead the final conclusion of this thesis is that the overarching category of atrocity crimes should be employed to characterise ongoing mass atrocity violence as a means of prevention, while reserving questions on the perpetration of genocide until an international court and criminal tribunals can consider the evidence and testimonies.

The findings and conclusions put forward in this thesis have relied and built upon arguments and research contained within the substantial body of literature on the subject of genocide. Obviously it was not possible within the scope of this research to discuss every theme and topic within genocide studies, however this researched touched upon key research areas that deal with the application of the genocide definition in the midst of violence and the prevention of genocide. Therefore in presenting research and conclusions within this thesis on these areas means that the

findings of this thesis have direct implications for the study and approach to the topic of genocide studies, and specifically the prevention of genocide. The findings and conclusions also permit this thesis to offer some recommendations for the future study of genocide and potential policy changes to the practice of genocide prevention in the work of states, intergovernmental organisations, nongovernmental organisations, and civil society groups.

8.3 Contributions of this Thesis to the Area of Genocide Studies and Genocide Prevention

8.3(i) Implications of this Research for the Future Study of Genocide, Atrocity Crimes, and the Responsibility to Protect

The findings and conclusions presented within this thesis are broadly consistent with the findings contained in previous research on the topic of genocide. As discussed, since the inception of the Genocide Convention criticism has been aimed at the definition of genocide and its applicability to characterise a particular situation or situations. Therefore research into how the elements of genocide are unidentifiable in the midst of violence and how states lack the political will to react does not present original ground breaking research. However this research was necessary so as to provide a foundation and basis for this thesis to examine the key concern of this thesis, the utility of the genocide definition. The fact that the findings of this research were consistent with the substantial body of literature on genocide with regard to the complexities of identifying genocide is a strength of this thesis as it signifies that there is a need to investigate the continued utility of the genocide label.

This research has shown that there needs to be a greater focus on the utility of the genocide label as the theory that the failure of genocide prevention is due to a lack of political will has been challenged by the findings of this thesis. These findings support

the argument, advanced by Leo Kuper and those that followed him in the study of genocide, that the focus should be on the very concept of genocide and its applicability in the midst of violence. In distinction to those early researchers in the field of genocide studies this thesis has contended that academic focus needs to be removed off redefining genocide, as there is only one accepted definition of genocide, and overly focusing on defining genocide brings the goal of prevention under the Genocide Convention no closer to reality. While it is beneficial that this previous academic research identifies flaws within the definition of genocide and its application and practice, this type of research is often lacking in that it fails to address how the very concept of genocide contributes to a lack of prevention. A key implication of this thesis is that genocide itself as a term and concept inhibits the response to violence.

Therefore a central recommendation of this thesis is that academic research should instead focus on how the ambiguities and deficiencies, that have been identified consistently in literature, which impact on effectively employing the genocide definition as a preventative term to respond to violence raise the utility of the continued use of the genocide label. In particular examining an ongoing situation, where there is question marks over the perpetration of genocide or there is a lack of international acceptance of genocide, provides considerable scope for future research on the utility of the genocide label in the midst of violence. This is because the research of an ongoing situation, as shown with the examination of the situations of Burundi and South Sudan, allows researchers to explore various elements involved in the identification and prevention of genocide, such as distinguishing warning signals and signs of genocide, how different actors use or do not use the genocide label, and evaluating the measures adopted to respond to the situation. Clearly research on these topics already takes place, however this research points towards the potential for these

topics to be studied as a means of assessing the utility of the genocide label in the midst of violence.

While this thesis has relied and built upon previous research to address the continued utility of the genocide label and the findings presented in this thesis are largely similar to what has been previously argued within the genocide studies community, there are some areas that differ and provide scope for future research. In particular the discussion and findings in relation to how the indeterminate nature of genocide impacts on the identification and prevention of genocide is one theme that is lacking in the majority of studies of genocide. This thesis has stressed the importance of the indeterminacy theory to the study of genocide by highlighting how the indeterminate nature of law underlies the application of the Genocide Convention not only in times of violence but also in applying the law of genocide in international courts and tribunals. The indeterminacy theory has been critical to this thesis in explaining through an examination of case law and case studies why there may be issues within defining, interpreting, identifying, determining, preventing, and responding to genocide. This is because there is no exact definition and interpretation of genocide, rather there is a level of subjectivity with the application of the Genocide Convention and the genocide label in every context and situation. Employing the indeterminacy theory to examine the utility of the genocide label has allowed this thesis to make a significant contribution to the study of genocide as it has identified some of the flaws in the assumptions and theories underlying genocide studies.

The indeterminacy theory challenges the assumption in genocide studies that a new definition of genocide would solve the problems of applying the definition of genocide to characterise a situation. This research has implied that the issue of indeterminacy is critical for academics to address if they are proposing a new definition of genocide

as they have to reconcile their new preferred definition with the fact that this new definition would be subject to the same indeterminacies that affect the current legal definition. Furthermore an implication of this research's reliance on the indeterminacy theory is that a lack of effective response to genocide is not solely due to lack of political will, rather states can face real difficulty in identifying the elements of genocide and deciding what action to pursue in response to genocide. This means for the purposes of the study of genocide that it may be hard to criticise a state's failure to respond or label violence as genocide as there will always be a level of subjectivity around the elements of genocide which will affect their choice or decision whether to characterise ongoing violence as genocide. Therefore this research recommends that researchers be cognisant of the role that indeterminacy plays in the application of the genocide label in a particular situation, as the identification and prevention of genocide will be dependent on the political, economic, social, and historical context of the situation rather than a strict application of the law of genocide. While genocide is an inherently indeterminate crime, the indeterminate nature of genocide does provide considerable scope for researchers to examine the different effects of indeterminacy on the application of the genocide label to a particular situation. This research has identified some of these effects, however further research could examine the indeterminacy of genocide in more detail in specific case law or case studies, and to highlight how the theory of indeterminacy is universal to the application of the Genocide Convention by examining the use of the genocide label in different contexts.

The theory of indeterminacy is central to this thesis in contributing further knowledge to the study of genocide, as it is the basis for the contention that genocide is an unsuitable and ineffective label to be employed in the midst of violence. The findings in relation to the presence of indeterminacy in the application of the Genocide

Convention support this thesis in advocating for a new approach to genocide prevention, in the form of utilising the label atrocity crimes. Therefore the indeterminacy theory is critical for laying the foundation for the conclusion of this research, that for the purposes of prevention the label atrocity crimes should be employed by actors to characterise ongoing violence.

Assessing the utility of the atrocity crimes concept throughout this study permits this research to contribute to the growing body of research on the advantages of employing the atrocity crimes label in response to violence. The findings of this thesis support the proposal of Scheffer and others for a change in how genocide is responded to by employing the label atrocity crimes. This research builds upon this contention by presenting evidence from an analysis of case law and case studies to strengthen the argument for utilising this label. While atrocity crimes is being increasingly referred to in academic research and policy discussion, there has been a lack of analytical studies of the utility of the label and an absence of evidence presented for why atrocity crimes should be employed as a label rather than genocide as a means of response. This research has presented some arguments for why atrocity crimes is a more effective label to respond to ongoing violence, which provide a potential avenue for future research into the topic of atrocity crimes. The implication of this research, is that the findings and conclusions in relation to the respective utility of the genocide and atrocity crimes labels are universal and will apply to any situation of violence under review so it is potentially interesting for future research to build upon this conclusion and to assess whether the atrocity crimes label is more suitable and effective than the genocide label for the purposes of prevention. Once again the study of ongoing situations, similar to the analysis of the situations in Burundi, the Central African Republic, the Sinjar region, and South Sudan, provides ample evidence and

information to build an argument around the utility of atrocity crimes in terms of prevention by conducting policy analysis of the potential impact of the genocide label on the response in a particular context.

The research presented in this thesis on the utility of the label atrocity crimes does not only have implications for the study of genocide, it is also relevant to the study of the RtoP doctrine. This thesis has contended that when actors use the atrocity crimes label as a means of response the RtoP should be the basis for the response to ongoing violence. This research has supported this argument by focusing on the failings of the genocide label to respond to violence however future research can also focus on how the atrocity crimes label may remedy the faults and deficiencies that may be apparent in identifying and preventing the three other atrocity crimes, that fall under the RtoP, in times of violence. Further research into the topic of the RtoP could potentially explore this contention in more detail and focus on how the atrocity crimes label may strengthen the application and use of the RtoP doctrine in response to violence. This is a key contribution to genocide studies as the research is not simply providing criticism of the current state of the law of genocide and genocide prevention. The research is offering a solution to the prevention of genocide and other forms in violence in terms of presenting a different label to employ to characterise violence, pinpointing the basis for states to act under in response to violence, and indicating a doctrine that actors who are seeking a response can refer to and rely upon.

This last point is key because in advocating the concept of atrocity crimes, this thesis and the research findings on the respective utility of the genocide and atrocity crimes labels are not only directed at genocide researchers alone, it is also directed towards the wide variety of actors who are involved in the response to ongoing violence and actors who seek a response to violence.

8.3(ii) Recommendations for Policy and Practice

The key recommendation of this thesis for policy and practical approaches to genocide prevention is that for the purposes of responding to violence actors should employ the atrocity crimes label rather than the genocide label to characterise ongoing violence. Recommending the adoption of the term atrocity crimes as a preventative term to be employed in the midst of violence will obviously have policy implications for how states and actors (no matter if they are a state, intergovernmental, or nongovernmental organisation or official, member of the media, academic, researcher, civil society member, victims, survivors, or any member of the general public) engage with the prevention and response to genocide. This research is calling upon these actors to completely abandon employing the genocide label in the midst of violence when they advocate for action in response to a situation in violence. Instead the research has recommended that these actors refer to the general term atrocity crimes, while leaving the question of genocide until after a situation has ended and an international court or tribunal can make a determination on the basis of evidence.

This research has submitted that the term atrocity crimes would only be employed in the midst of violence; there would not be a legal definition of atrocity crimes nor would it be recognised in statute, rather the crimes that comprise the term atrocity crimes would remain crimes of international law that would continue to be punished in international courts and tribunals. This thesis recommends that actors would adopt the atrocity crimes label as part of a policy discussion around responses to ongoing violence, rather than actors spending time discussing whether elements of the crime meet the requirements of the specific crime. In particular this recommendation is directed towards academics, civil society groups, and nongovernmental organisations who focus on the genocide label as a means for prompting and compelling states to

take action. The implication of this research for policy discussions around genocide prevention is that the focus should be on prevention and response, rather than which label to apply to a situation as this research has illustrated that the level of the violence and the political interests of a state not the label applied to a situation will condition the response of a state to a particular situation.

The recommendation to employ the atrocity crimes label is not a drastic change as this research has shown that states and the UN have already incorporated mechanisms for identifying warning signs of atrocity crimes and have adopted strategies aimed at preventing and responding to atrocity crimes. This research is just going one step forward in arguing that these efforts mean that these states and the UN should no longer need to use and rely on the genocide definition to respond to violence as the measures adopted to address atrocity crimes will also address the perpetration of genocide. This thesis has recommend that in utilising the term atrocity crimes as a means of prevention, actors should refer to the responsibility that states have to protect populations from genocide, crimes against humanity, ethnic cleansing, and war crimes under the doctrine of RtoP. This research is not arguing for a new framework of prevention, rather it is relying on the existing framework for prevention within the RtoP doctrine and ensuring that the focus of actors is on fulfilling the aims under this doctrine to protect populations from atrocity crimes. The implication of this research is that the RtoP doctrine is more effective and useful for the purposes of prevention than the Genocide Convention as there is less indeterminacy surrounding the application of the RtoP doctrine as it covers all four atrocity crimes. Therefore the main recommendation of this thesis for policy and practice is that actors, regardless of whether they are a public or private individuals, in responding to or seeking a response to situations potentially involving genocidal violence should utilise the atrocity crimes

label to characterise the violence and refer to a state's responsibility to protect populations from atrocity crimes under the RtoP doctrine.

8.4 Conclusion

In this final chapter, the main findings and conclusions of this research have been presented and the chapter has addressed and discussed the implications of these findings for the study of genocide and the practice of genocide prevention. This chapter has shown that the main finding for this thesis is that it is often not useful to apply and determine the crime of genocide in the immediate response to mass violence, as the complexities of the definition render it difficult to identify and prevent. On that basis this thesis has advocated the application of the atrocity crimes category in the midst of violence. This approach to genocide prevention has key implications for the study of genocide, and provides several avenues for further research to deepen the argument and enrich the already existing body of work on the utility of the concept of atrocity crimes. This concluding chapter has also shown evidently how the findings presented throughout this research will impact on the approach of states and other actors to the prevention of genocide. This chapter has included some key recommendations for these actors so as to convert the obligation to prevent into a reality of international affairs. To conclude, the world can and should do better in preventing these crimes; utilising the category of atrocity crimes, while a small shift in the behaviour and practice of states and international actors, can be a step in the right direction into converting the promise of 'Never Again' into reality.

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