Reassessing the Crime of Genocide

An analysis of whether the 'genocide-label' matters for prevention, justice and reconciliation.

Abstract

This research examines whether the genocide-label matters for preventing or stopping genocide, for justice and punishment for genocide and for reconciliation after genocide. The 'genocide debate' has generally been centered on discussing whether or not a certain situation can classify as genocide. There has been very little focus on what this 'labeling' will actually imply or not imply for the situation in question. Therefore it is determined to be relevant to ask this question and reassess the meaning of the genocide-label.

In almost every case of potential genocide the international community has been absorbed by discussing *what it is* instead of *what to do.* That has made genocide prevention highly ineffective. This excessive focus on the genocide-label – in its legal definition – has resulted in a neglect of other mass atrocity crimes and it has maintained a misleading focus on a purely semantic debate while human beings were killed in thousands. Not only has the genocide-label proved an obstacle for preventing and stopping *atrocity crimes* which did not meet the narrow legal definition of genocide, it has also proved an obstacle for preventing and stopping genocide itself. Therefore, this analysis concludes that the genocide-label *should not* matter for preventing and stopping genocide.

When genocide is being punished it necessarily implies that the genocide-label is used in the convictions. However, the prospect of deterring future *genocidaires* by punishing genocide does not seem very promising as the genocidal-mind is so absorbed by the genocidal narrative that it cannot see its acts as wrong or genocidal. Moreover, as a genocide conviction will not necessarily imply a higher sentence just *because* it is genocide and as it seem impossible to punish genocide proportionately, it could be concluded that the genocide-label *does not* matter for punishment and justice. On the other hand it can be argued that there is an intrinsic value in holding *genocidaires* accountable due to the expression of *moral truth* and a *normative* world order which is reflected in the trials. However, the quest for accountability must never become a substitute for taking action against genocide or mass atrocity crimes.

It seems crucial for many victims ability to reconcile that the genocide-label is attached in order to acknowledge the violation they suffered from. However, due to the moral stigma that the genocide-label carries, perpetrators are often reluctant about using it. This contradiction is making the importance of the genocide-label's role in reconciliation disputed and inherently difficult.

However, reconciliation needs to take place on more levels than that between perpetrators and victims. *Internal* reconciliation is often a neglected part of the overall reconciliation-process but is no less important, I will claim.

Victims of genocidal sexual violence are often not reconciled internally with their group because of the stigma attached to sexualized crimes. Acknowledging that sexual violence can be a genocidal crime – first of all via the genocidal crime itself, but also via the socially destructive effects that this crime causes *after* it has been committed – can open up a possibility for internal reconciliation as these genocidal *effects* will be exposed to the community. Thus, the victimized community might realize its own role in repairing the group internally and end what could be called a "post-genocidal genocide" against stigmatized victims. As a unified and healthy group is not only stronger internally but also externally, such internal reconciliation might be crucial for the success of the external reconciliation as well. Therefore this analysis suggests that the genocide-label *does matter* for the internal reconciliation, which can also be significant for the prosperity of the external reconciliation.

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Introduction

In August 1941 Winston Churchill stated in a broadcast: "We are in the presence of *a crime without a name*" referring to what was later named the Holocaust.[1] However, mass killings of a particular group of people are not a new phenomenon. It did not start with the Holocaust and sadly as we know, neither did it end with the Holocaust. As long as humanity has existed, mankind has slaughtered its own species in several scenarios. Similar for all these tragedies are the existence of a belief in the perpetrators that these people are not human beings. They do not contain human value, human dignity and ultimately the right to exist.

Although this incomprehensible *phenomenon* has existed long before the Holocaust, the *crime* has not. It was first after the Second World War that the phenomenon was conceptualized and became categorized as a distinct crime under international law. Through the tireless work of the Polish lawyer Raphael Lemkin the word *genocide* was coined in 1944. However, 'genocide' was not yet manifested as a legal term although it was included as a descriptive term in the indictment at the Nuremberg trials.[2] First in 1948 the newly established United Nations created the '*Convention on the Prevention and Punishment of the crime of Genocide* – also known as '*The Genocide Convention'* (UNCG). Finally, the crime without a name got a name and furthermore a legal definition.

Ever since the origin of the word 'genocide' the crime has attracted a lot of attention among lawyers, academics, the media and the public. It has fascinated and horrified people around the globe. It has been deemed 'the crime of crimes', 'the ultimate crime' and 'the odious scourge.' There are so many emotions attached to the word and while some has avoided the use of it in given situations, others have angrily opposed this avoidance calling them 'genocide deniers' – a label no one wants to have attached to ones person or state.

Throughout the latest decades it could seem like there has been an increased fixation with this 'crime of crimes'. Huge amounts of literature have been written about genocide since the word was coined and a whole field of genocide studies and different associations of genocide scholars has

[1] Raphael Lemkin, "Genocide," *American Scholar,* Vol. 15, no. 2. (Spring 1946), 1, (available at: http://pscourses.ucsd.edu/poli120n/Lemkin1946.pdf), (*Italic* is used as emphasis by the author in quotes here and throughout the following analysis).
[2] Malcom D. Evans, *International Law,* 4th Edition, 2014, 755.

arisen. In Turkey it can have severe consequences if one recognizes the Armenian genocide in public while on the contrary it is illegal to deny the Armenian genocide in France.[3] In 14 European countries it is illegal to deny the Holocaust. The UN and the US has been shamed for not calling the tragedy in Rwanda genocide as it was raging in 1994. Bosnia and Serbia still disagrees about whether genocide did or did not take place during the war. Oceans of journal articles and books exist in which scholars have debated whether the situation in Darfur was genocide or not. Most recently Danish newspapers have brought headlines stating that Myanmar is on the brink of genocide[4] and the UN Human Rights Council has now publicly announced that ISIS are committing genocide against the Yazidis in Iraq and Syria.[5]

As these examples indicate, the 'genocide debate' has largely been centered on discussing *whether or not a certain situation is genocide*. This question has been the main object of debate in most academic literature as well as in political, public and legal discussions regarding genocide. The majority of the literature on genocide is focused on either proving or disproving that a given situation is or is not genocide, without reflecting too much upon if such labeling actually has any implications. Why is so much time spent on debating this issue? Does it really matter if something is labeled genocide or not?

The purpose of this thesis is to examine whether the genocide-label matters. This question has been asked before, but the curious thing is that even though it has been asked at least ten years ago, it is still only occupying a minor space in the 'genocide debate.' Awareness has been raised upon this issue but the discussion maintains its fixation on proving or disproving genocide without much consideration on the very meaning of this effort. Regardless of whether we talk about situations which ended decades ago or situations which are ongoing and contemporary this has been the primary approach. Therefore it seems relevant to take up this question again and reassess the meaning of the genocide-label. As there has been no real attempt to examine whether the meaning of the genocide-label differs in different scenarios, the idea with this thesis is to compose an in-

[3] Kim Willsher, "Armenian Genocide Denial to be Banned in France as Senators Approve New Law," *The Guardian,* Monday 23, 2012, (available at:https://www.theguardian.com/world/2012/jan/23/armenian-genocide-denial-ban-france).
[4] Martin Gøttske, "Frygt for at Burmas styre tæller ned til folkemord," *Jyllands-Posten,* 11 November 2016.
[5] UN Human Rights Council, Thirty Second Session, Agenda Item 4,"*They Came to Destroy:" ISIS Crimes Against the Yazidis*, UN Doc. A/HRC/32/CRP.2, 15 June 2016, (available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf).

depth analysis of how the genocide-label might matter *differently* at different points of time and for different groups of people and entities.

I will claim, that whether the genocide-label matters depends on *who* you ask, *when* you ask and how you *define* and *understand* 'genocide.' Thus, the question has a *temporal* and *individual* aspect which I think is a central distinction to make if we are to get a more nuanced understanding of the meaning of this 'label.' The temporal aspect is not meant to be understood historically but whether we ask if the genocide-label matters *before, during* or *after* genocide. Different actors can attach the genocide-label to a situation and it might matter differently depending on who that actor or entity is – and when they attach it. The frame of the analysis is structured by the temporal aspect. In three separate chapters it will be examined whether using or not using the genocide-label matters for: 1) *preventing* or *stopping* genocide, 2) *punishment* and *justice* for genocide and 3) *reconciliation* after genocide. These three main themes will be analyzed throughout the thesis as follows:

Chapter I is an introductory chapter which lay out a description of the legal and etymological evolution of *the crime* of genocide. The point of this chapter is to give an idea of the thoughts and considerations which laid the foundation for criminalizing genocide under international law, and how the word – which later became so debated – occurred. Subsequently some normative reflections will be made on what our aim of classifying something as genocide should be.

Chapter II examines whether the genocide-label matters in order to *prevent* genocide from occurring and in addition whether it matters in order to *stop* genocide if it has already started. Does the use of the genocide-label imply any legal, political or moral obligations for the international community to act if a situation is on the brink of evolving into genocide, or if genocide has already started? Hence, this chapter deals with whether calling a situation genocide matters in regard to taking *action* against genocide.

Chapter III discusses whether the genocide-label matters for *punishment* and *justice*. Amongst other it will be discussed if it matters in relation to the prospect of deterrence, for measuring sentences and the value and potential effects of seeking criminal justice for genocide. The subject of this chapter overlaps with both chapter II and chapter IV as deterrence is obviously linked to genocide *prevention* and the question of justice in itself of course has relevance for the victims and therefore it could have relevance for the healing and *reconciliation* process after genocide.

Chapter IV examines whether the genocide-label matters for *reconciliation* after genocide. The focus of this chapter is to discuss whether using the G-word when the atrocities are over means something – whether negative or positive – in regard to healing the society. In this chapter I have chosen to keep a special focus on genocidal sexual atrocities. The reason for this is that it might have a special value for survivors of sexual atrocities whether or not their experiences are labeled 'genocide' in order to move forward and reconcile – not only with the perpetrators but especially with their own group. It is a hypothesis which will be the main object of analysis throughout this chapter as it might also add some valuable perspectives to the general discussion on whether the genocide-label matters for reconciliation.

The very issue of whether sexual violence can constitute genocide is yet relatively controversial, but nonetheless a highly relevant issue of international criminal law. In more cases this phenomenon is starting to be examined. However, there is still not overall consensus that sexual violence in itself can be a genocidal crime under certain paragraphs of the Genocide Convention. Therefore, in order to examine how the genocide-label might matter in relation to survivors of sexual violence, this chapter will discuss how sexual violence can constitute the crime of genocide.

Method and theory

This analysis will be conducted in a multidisciplinary manner. Inherent in the research question is a political, juridical and ethical dimension contained. It means that elements from the fields of international law, politics and ethics will be drawn upon throughout the thesis. International law as a field is placed in a quite awkward position where it is often accused by lawyers of being too political and by politicians of being too rigid and legalistic. This position is no less awkward to stand in when one is trying to find a meaningful method to examine a question which demands a legal, political and philosophical perspective at the same time. However, exactly this is also a great strength as it gives space for a nuanced and including analysis which respects and draws upon the values of an interdisciplinary approach.

In order to examine whether the genocide-label matters for preventing and stopping genocide in chapter II, two methods will primarily be used: A legal method and a qualitative analytical method. Both will be based on the examination of case-studies. The legal method is used to analyze whether there exists a legal obligation to prevent and react on a genocide finding. The legal method is understood and comprehended by first of all identifying the *legal issue*; whether there is a legal

obligation to prevent genocide, and second to identify the *relevant law*; the Genocide Convention, customary international law and relevant case-law and thirdly to *apply the law* to the legal issue and selected case studies.

A qualitative analysis of relevant case-studies will be used in order to examine how the perception of the genocide-label's role in genocide prevention has evolved within the international community. A special focus will be kept on the evolution of the US and the UNs perception of whether the genocide-label implies any legal obligations to prevent or stop genocide. This perception will be derived by looking into how the US and the UN have acted in cases of potential or ongoing genocide and which value they have attributed the genocide-label in that regard. The UN will primarily be represented by the Security Council (UNSC) but also other UN organs. The choice of focusing on the US and the UN has been made because these two actors have been not only most prominent in the 'genocide-debate' but also because they are generally perceived as being some of the actors which are most prone to actually take meaningful action against genocide.

The Rwandan genocide of 1994 and the genocide in Darfur staring in 2003 will be the two main cases used for this chapter. This is because a major shift in the perception of the G-word's operational consequences can be traced with these two cases. Other cases such as Bosnia, Kosovo, Libya, Myanmar and Syria will be included as well for illustration and clarification of different arguments.

In chapter III it will be examined how the genocide-label matters for justice and punishment through the use of three legal philosophical theories: The theory of deterrence, the theory of retributive justice and the theory of legal expressivism. These legal theories have been determined to be particularly relevant in relation to justice and punishment for genocide. Judgments by the ICTY, the ICTR and the ICJ will be used for illustration and examination throughout the chapter. In discussing this overall issue of accountability for genocide the discussion naturally moves into what has classically been called the 'peace versus justice debate.' Drawing on the case study of primarily Darfur it will be examined whether the quest for accountability for genocide can in fact have negative consequences for the people living in the inferno. A special focus will be kept on the Security Council's ICC referral of 2005 and its potential effects.

In chapter IV it will be examined whether the genocide-label matters for reconciliation through the use of case studies, testimonies from victims and the philosophical theory of *social death*. This analysis will be conducted in two parts. The first regards the genocide-labels role in what I call *external* reconciliation which deals with the reconciliation between the victims and the perpetrators – and to a certain degree the rest of the international community. The second part regards the role of the genocide-label in what I call *internal* reconciliation which deals with the reconciliation *within* the victimized group. This is an often neglected part of reconciliation but no less significant and maybe even crucial for the success of the *external* reconciliation as well.

Reconciliation processes can include a lot of different measures which are often alternatives to prosecution. In this analysis it has been chosen to especially focus on *acknowledgement* of the violation in question, both for internal and external reconciliation. That is because acknowledging the violation of genocide necessarily implies that the G-word is attached to the situation in question. Case-studies of Armenia, Bangladesh, Rwanda and ex-Yugoslavia will be used to discuss which meaning and value the perpetrators, victims and the international community has attributed acknowledgment of genocide and whether that can be seen as negative or positive for reconciliation. Acknowledgement as a reconciliation measure is primarily a symbolic matter which makes it particularly interesting and relevant to examine in order to assess the meaning of the genocide-label in reconciliation as the G-word itself can be seen as a symbolic matter.

It can be argued that the *internal* reconciliation is particularly relevant in regard to sexual violence as the stigma attached to this crime often implies that these victims are not even reconciled with their own group. Acknowledging that sexual violence is not merely a side-effect of the overall crime committed but can in fact be a genocidal crime in itself may enhance a new understanding within the community of how they can actually maintain the genocidal destruction *after* genocide by socially excluding their own members. The philosophical theory of *social death* will be used to examine this hypothesis.

The theory of *social death* will be used in conjunction with testimonies from survivors of genocidal sexual violence and case-studies to examine first of all; whether the perpetrators *intended* to socially kill the victims, and second; whether the social death can be said to actually have *occurred* in post genocidal societies. Case-studies of Bangladesh, Rwanda, Bosnia, Darfur, and the Yazidis of Iraq and Syria has been selected for this analysis as they all involve extreme scales of

sexual violence which can be argued to be genocidal. Before going into this analysis of whether it matters to acknowledge sexual violence as a genocidal crime it will be discussed *how* sexual violence can constitute the crime of genocide under international law. This analysis will be conducted through a legal method by identifying the *legal issue*; whether sexual violence can constitute the crime of genocide, identifying the *relevant law*; The Genocide Convention and case-law, gathering relevant facts from case-studies and *applying the law* to these facts.

As genocide is a very emotional topic a lot of the material and sources are colored by an emotional tone. That is not necessarily a bad thing but it should be kept in mind as it can lower the objectivity of the material. In regard to chapter IV the aim is not to collect objective statements as such, as the hypothesis is that the genocide-label might matter for victims as s*ubjects* and that this might affect the group as a whole – internally and externally. However, it still has to be representative and therefore a variety of cases will be looked into and drawn upon in order to deduce if acknowledging sexual violence as genocide matters for reconciliation.

When speaking about the 'genocide-label' it will throughout most of the thesis mean the *legal definition of genocide.* That is because it has been discovered that the legal definition is what most actors that this analysis deals with are referring to when they are speaking about genocide. Therefore it has been determined to be most relevant and fruitful to stay within this discourse especially for chapter II and III. In regard to genocide prevention (chapter II) actors have especially relied on and been consumed by the legal definition of genocide. Therefore it is particularly interesting to look into whether the G-word, in its legal definition, actually matters for preventing and stopping genocide – and whether it *should*. Chapter III is dealing with punishment and justice for genocide and therefore it has a particular focus on trials and lawsuits which are naturally using the legal definition of genocide.

In chapter IV the genocide-label is also *mainly* understood in its legal definition. However, the understanding of this definition will be expanded in order to look deeper into the effects of genocide especially for (but not excluded to) survivors of genocidal sexual violence. Hence, it should not be understood as if the legal definition is changed as such in this regard but should rather be seen as a broadened understanding of the concept of *genocidal destruction* of groups. This will of course be elaborated on in chapter IV. 'Atrocity crimes' and 'mass atrocities' are words which will frequently occur throughout the analysis. They are used simultaneously and carry the same meaning. They

refer to a summarization of the most extreme international crimes; crimes against humanity, war crimes *and* genocide as defined in the Rome Statute of the International Criminal Court (ICC) Article 6, 7 and 8. In regard to *war crimes* there is a special focus on those directly targeting civilians.

Chapter I

The evolution of the crime of genocide

When Raphael Lemkin started his work on creating the term genocide and lobbying for it to become criminalized as a distinct crime of international law it came as a response to the Holocaust. However, Lemkin was well aware of the fact that the Holocaust was not the only such example in history and neither would it be the last as he wrote in 1945: "This is a major problem facing the *coming world*."[6] Nonetheless, as he pointed out in one of his earliest articles, the new thing about this phenomenon was the systematic and deliberate way in which the Holocaust was conducted in order to completely eliminate whole groups of people. The Holocaust made this kind of annihilation enter into the consciousness of what he called the 'civilized world.'[7]

It suddenly became acknowledge that no word existed that could properly describe this crime in an adequate manner. 'De-nationalization' did not really comprehend biological destruction and Lemkin knew that he needed a word that could not be associated with other things than *that* particular crime.[8] 'Mass murder' was simply not satisfying enough as it did not comprehend the most distinctive feature of this crime which is the very *intention* of eradicating a group of people because they belong to *that group of people*. What Lemkin realized was that this crime was specifically directed against particular groups, *e.g.* national, racial or religious groups. Therefore Lemkin combined the ancient Greek word *genos* (race, kind or clan) with the Latin suffix *cide* (killing) to create the hybrid *genocide* which refers to the deliberate destruction of groups.[9] The individual who is harmed in these actions is not the main focus for the perpetrators, the group is the focus and harming the individuals is 'just' a necessary part of destroying the group. Genocide is a

[6] Raphael Lemkin, "Genocide – A modern crime," *Free World,* vol. 9 no. 4, (April 1945), 39.
[7] *Ibid*.
[8] Samantha Power, *A Problem from Hell,* 2002, 42.
[9] Raphael Lemkin, *Axis Rule in Occupied Europe,* 1944, 79.

crime which poses a threat to the very existence of groups and that is how it seriously differs from homicide.[10]

In December 1946 the UN General Assembly (UNGA) passed resolution 96 (I) in which it was stated that genocide is the denial of the right to existence of entire human groups. It causes great losses to humanity, is against the spirit and aims of the United Nations, it shocks the conscience of mankind and it is contrary to moral law and for these reasons genocide is a concern for all mankind.[11] However, throughout history genocide has gone unpunished and even almost untouched. This is probably due to the fact that no one really understood the nature of the crime of genocide before the Holocaust forced the world to think about it.

States had developed systems to deal with crimes against individuals but not crimes against entire groups of people. Even more importantly, in most cases it is either the state itself or at least the strongest entity within the state who commits the genocide which makes accountability within the state highly improbable. Therefore genocide must be a crime of international law and not domestic law as its consequences are a concern for all of humanity and the state itself is likely to be the one committing, supporting or overlooking the genocide. The international community realized that an effective response to genocide required an organized cooperation between states. In resolution 96 (I) the UNGA requested the drafting of a legally binding convention on genocide. In that way resolution 96 (I) became the predecessor to the formal criminalization of genocide under international law. As Lemkin pointed out, "If the killing of one Jew or one Pole is a crime, the killing of all Jews or all Poles is not a lesser crime."[12]

The Convention on the Prevention and Punishment of the Crime of Genocide

In 1948 the *Convention on the Prevention and Punishment of the Crime of Genocide* was adopted by the UNGA and entered into force in 1951.[13] Thus, genocide became codified as treaty law which is legally binding on ratifying and acceding states. By 2017, 147 states are parties to the UNCG.[14]

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[10] Evans, *supra* note, 2, 755.
[11] UN General Assembly Resolution 96 (I), *The Crime of Genocide,* UN Doc. 96 (I), 11 December 1946.
[12] Lemkin, *supra* note, 1, 5.
[13] William, Schabas, *Genocide in International Law – the crime of crimes,* 2st edition, 2000, 3.
[14] United Nations Treaty Collection, Chapter IV, Human Rights, "1. Convention on the Prevention and Punishment of the Crime of Genocide," (available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en).

However, the international prohibition of genocide is in fact legally binding on *all* states regardless of their lack of membership to the Convention as it has achieved *jus cogens* status. It means that the norm is generally accepted as being peremptory – or non-derogable, which means that it cannot be violated by any state.

In 1951 the International Court of Justice (ICJ) made clear in its advisory opinion to the *Reservations* case that the illegality of genocide has a "universal character," and thus it is binding on *all states*, "even without any conventional obligations."[15] Therefore genocide is also customary international law as all *jus cogens* is customary international law, although not all customary international law is *jus cogens* but depends on the existence of state practices and *opinio juris.*[16] According to Article II of the UNCG genocide is:

> 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 birth within the group;
> (e) Forcibly transferring children of the group to another group.

This is the legal definition of genocide. Without any modifications this definition was directly incorporated in the statutes of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) in 1993 and 1994 which was created by the Security Council. In 1998 the Convention-definition was also included in the Rome Statute for the International Criminal Court (ICC). These direct adoptions of the definition manifest its continuing authority and that this is accepted as being the valid legal definition of genocide – a definition that not only lawyers are relying on.

For many people genocide is associated with 'mass killings' but as it appears from the acts listed in the legal definition, genocide can in fact be committed without killing anyone.[17] The *actus reus* of paragraph (a) is actually the only act of genocide which explicitly requires biological destruction.

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[15] *Reservations to the Convention on the prevention and Punishment of the Crime of Genocide,* Advisory Opinion, International Court of Justice, 28 May 1951, para. 23.
[16] Cherif M. Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes*," Law and Contemporary Problems,* vol. 59, no. 9, (1996), 68.
[17] Evans, *supra* note, 2, 755.

For that reason it could be argued that the definition is quite broad. However, this is not the case as the conduct elements – or *actus reus* – are not the only requirement for genocide. In the following some of the main issues of interpretation regarding the legal definition of genocide will be presented.

Three elements need to exist concurrently in order for something to constitute the crime of genocide. If one element is missing or cannot be proved, it is not genocide according to the legal definition. First the *actus reus*, also called the 'criminal act(s)', must be one of the acts listed from (a) - (e) to be genocidal. Second the group targeted must be protected by the convention by either being a; *national, ethnical, racial* or *religious group.* Lastly, the *means rea* also called the 'mental element' which is the intention behind the crime must be the *intent to destroy, in whole or in part* in order for it to be genocidal.

The genocidal intent (*means rea*) is also known as *dolus specialis* which means 'special intent, 'ergo a special intent to have the genocidal act cause the particular effect of destroying the targeted group either in whole or in part. *Dolus specialis* and 'genocidal intent' is equally precise terms and will be used simultaneously throughout the analysis. The genocidal intent is the most distinctive as well as the far most problematic element of the crime of genocide as it can be extremely difficult to prove beyond reasonable doubt the existence of such intent. Most commonly the failure of proving genocide, both in a legal context but also in political discussions at the international level, is due to a lack of evidence that the *dolus specialis* was present in the perpetrator(s).[18]

In addition no threshold exists for how to measure the 'in whole or in part' destruction element. 'In whole' is quite obvious but 'in part' is more debatable. Should it be measured in percentage of people killed in total or in a given area? Does it have to be a substantial part of the people in the group who are destroyed and what is a substantial part? Can it even be measured in body counts or is it (should it be) a whole other threshold?[19] How should 'destruction' be understood, is it solely physical or can it also be social, cultural or psychological?

Moreover, the UNCG has often been criticized for lacking the inclusion of certain groups such as political, linguistic, social and gender. In resolution 96 (I) the wording actually said "*political* and

[18] Schabas, *supra* note, 13, 241.
[19] Evans, *supra* note, 2, 757-758.

other groups," but it was left out in the final text of the Convention. There are several potential reasons for this. First of all, it was a deliberate attempt by the final drafters to make the definition as narrow as possible so that genocide would preserve its distinct feature and not be confused with other crimes such as 'crimes against humanity' and to increase the probability of ratifications.[20] Furthermore, had political groups been included Russia (and China) might have been in trouble, but it was not only Russia who had a problem with 'political groups.' Lemkin himself thought that political groups lacked the permanency which should be central for group definition.[21]

Much more can be said about groups, but we will leave it for now. The important thing to notice here is that the way in which 'genocide' entered into the international scene was by being defined as an international crime. Other definitions of genocide than the legal do exist. Nonetheless, at the international level the legal definition of genocide has since its origin become one of the most used both by international policymakers, lawyers and scholars when discussing whether or not certain situations are genocide. Hence, exactly the legal definition can be seen as the catalyst for the very debate which is questioned in this analysis and will for that reason be the definition used in this analysis.

The adoption of the UNCG manifested a hope that the culture of impunity for the crime of genocide would finally be undermined and genocide itself could be stopped. However, genocide has not ended and in many cases it is still very controversial to even call them genocide as it remains highly debated among academics, politicians, states and international bodies. The legal definition has frustrated people because it is so difficult applicable, especially because of the *dolus specialis*. The literature on genocide testifies that a lot of scholars as well as journalists have been spending a lot of their intellectual energy on criticizing the legal definition for being too narrow and inapplicable. Paradoxically they are at the same time caught up themselves in using this legal definition to discuss whether or not certain situations are genocide.

The main problem is that few have paid much attention to which consequences the application or withholding of the genocide-label might actually have when pre or post-genocidal cases are being discussed. Little time has been spent on discussing what the true meaning of this label is in different situations. What happens when we in fact manage to apply the genocide-label to a case or fail to do

[20] Schabas, s*upra* note, 13, 57.
[21] *Ibid*.

the same? Does it imply obligations and in that case, which obligations and for whom? Before going into the analysis a minor section will be used to reflect on what our aim of labeling something genocide actually is – and normatively speaking what it should be.

The aim of applying the genocide-label

In order to examine whether the genocide-label matter it is valuable to reflect on what the aim of labeling or not labeling a situation 'genocide' actually is. Is it *e.g.* to satisfy the victims, is it to stop a conflict, is it to heal a society, is it to make a political statement, is it to manifest a principle, is it to silence the public, is it to gain justice, or is it something completely different? These questions are obviously also dependent on the temporal aspect as it for instance does not make sense to talk about *e.g.* healing a society, satisfy the victim or gain justice if the genocide has not yet taken place – ergo *before* genocide. Nor does it make sense to talk about stopping a conflict if it is already over – ergo *after* genocide. A lot of potential aims of calling something genocide do actually first make sense *after* genocide has occurred.

However, one aim of using the genocide-label applies to both a *pre* and a *post*-genocidal situation: To end suffering. If a situation is on the brink of a mass slaughter or if such condition has already broken out the aim *must* be to prevent or end this immediate *physical suffering*. If genocide has already taken place the aim *must* be to end (or at least relieve) the *mental suffering* the people of a post-genocidal society suffers from. Our choice of using or not using the genocide-label must always be measured against the aim of that use: To end suffering.

It is not an obvious fact neither a necessary consequence that using the genocide-label will automatically end suffering. In fact it might do the opposite. This is one of the very points of this project; to examine what it actually implies to invoke the genocide-label. By looking at the genocide-debates whether among academics, politicians, states or international bodies it could seem like it has somehow been forgotten *why* we even discuss whether a certain situation can classify as genocide or not. It seems like it has been forgotten that the very reason for introducing the crime of genocide in international law was as stated in the preamble of the Genocide Convention: "(…) to liberate mankind from such an odious scourge (…)." Does the genocide-label do that or not?

Chapter II

Does the genocide-label matter for preventing and stopping genocide?

The first object of debate concerns the content of the *definition* of genocide while the second concerns the *obligations* to prevent and act in case of genocide. As the very title of the UNCG reveals, prevention has somehow been on the agenda since 'genocide' entered into international law. However, genocide prevention remains a much disputed matter in which the lines between law, politics and moral are confusing and merged.

Since the general 'genocide debate' has predominately been centered on the "genocide or not" dichotomy,[22] a question arises on whether this 'labeling' actually matters in order to prevent or stop genocide? Does the genocide-label trigger an obligation to act and in that case by whom, which kind of action and even more importantly, s*hould* it matter for genocide prevention? These questions will be analyzed throughout this chapter. First it is relevant to start by examining how the perception evolved within the international community on whether any operational consequences arise if the genocide-label is invoked *before* or *during* potential genocide.

Case studies will be used for examination and illustration throughout the chapter. In order to track how the perception evolved, a special focus will be kept on Rwanda and Darfur. This is partly because important changes can be traced with exactly these crises and at this period of time, and partly because a selection has been determined to be necessary in order to keep the analysis as precise as possible. To give a brief account of the time before Rwanda, it was primarily characterized by stalemate due to the cold war. It meant that the international community's ability to do anything in that period was quite limited. Naturally, this also applied to cooperative responses to genocide.[23]

When the people of Cambodia were subjected to unimaginable atrocities committed by the Khmer Rouge 1975-79 the genocide-label was not a main object of discussion. The US made some public statements condemning the human rights violations, but no actions were taken and the G-

[22] Christian Axboe Nielsen, "Surmounting the Myopic Focus on Genocide: The Case of the War in Bosnia and Herzegovina," *Journal of Genocide Research,* vol. 15, no. 1, (February 2013), 21.
[23] William Schabas, "Preventing the Odious Scourge: The United Nations and the Prevention of Genocide," *International Journal on Minority Groups and Rights,* vol. 14, (2007), 385.

word was not really debated while the atrocities toke place.[24] However, in regard to the Bangladesh genocide in 1971, an attempt to downplay the tragedy can actually be traced. Allegedly President Nixon new well of the bloodshed as it was ongoing but refused to condemn it publicly. However, it does not seem like that it was particularly due to an expectation of being forced to act if the G-word was used but rather an attempt to protect his cold war ally Pakistan.[25] The UN almost played no role in this case.

Hence, an international attitude towards the implications of applying the genocide-label was not that present in the cold war period. Other cases like Ethiopia and Uganda could of course be discussed as well, but it seems like an official 'genocide or not' discussion at the international scene first seriously occurred with Rwanda and thus the time after 1994. Therefore the analysis will have its starting point here. Cases such as Bosnia, Kosovo, Libya, Myanmar and Syria will be included as well during this chapter. As much of this chapter concerns a *development* in the international community's perception of G-words implications, the analysis will take a chronological form where the events and arguments appears in historical order.

Rwanda: Naming equals Acting

"How many acts of genocide does it take to make *genocide*?" This question was asked to the spokesperson for the US State Department Christine Shelly on June 10, 1994 regarding the situation in Rwanda as she was stating: "We have every reason to believe that *acts* of genocide have occurred."[26] There is a very specific purpose of using exactly this formulation, because *acts of genocide* in isolation do not *constitute genocide* as the *dolus specialis* is lacking or at least unidentified.

It is quite clear that this wording was not merely an expression of an arbitrary use of the genocide 'terminology.' Rather it was an expression of a solid knowledge of what the legal definition covered – and not at least what it did not cover as the familiarity with the content of the Genocide Convention was strikingly precise. Most probably, the US State Department had made

[24] United States Holocaust Memorial Museum, "International Responses to Khmer Rouge," (available at: https://www.ushmm.org/confront-genocide/cases/cambodia/violence/international-response).
[25] Gary Bass, "Looking Away from Genocide," *The New Yorker,* 19 November 2013, (available at: http://www.newyorker.com/news/news-desk/looking-away-from-genocide).
[26] Christine Shelley, US State Department Press Conference, video, 10 June 1994, (available at: https://www.youtube.com/watch?v=DFgLA2tE7_o).

sure that its staff was well-informed about the legal definition in order to make sure no one used it in a way they were not 'suppose' to do.[27] This interview took place in the end of what Samantha Power has called a "two-month dance to avoid the G-word" within the US State Department.[28] At this point the genocide in Rwanda had raged in two months and three days and yet no one within the international community *dared* to call it genocide.

Already before the outbreak of the tragedy a strong indication about the forthcoming annihilation was known of, at least within parts of the UN. On January 11, 1994 Major-General Dallaire faxed a document containing the following statement to his colleagues at the Department for Peacekeeping Operations (DPKO) at the UN headquarters in New York:

> "Since UNAMIR mandate he (the informant) has been ordered to register all Tutsi in Kigali. He suspects it is for their *extermination*. Example he gave was that in 20 minutes his personnel could kill up to 1000 Tutsis."[29]

This infamous document would later become known as "the genocide fax." In the fax Dallaire, who at the time was commander of the UN peacekeeping force UNAMIR, informed the department that he had just received intelligence by an alleged top level trainer of the *Interahamwe* militia concerning indications of an approaching 'mass slaughter' of Tutsis including the location of a weapon cache. Unsurprisingly, this fax has later been seen as a direct warning of the impending genocide. Yet no action was taken and less than three months later the genocide broke out. In fact the fax was not even passed on by the Secretariat to the UNSC.[30]

Whoever's fault that was is here a discussion of less relevance, the important thing to notice is the reluctance of using the genocide-label by some of the biggest actors at the international scene: the UN and the US. Why is that? A secret discussion paper from the US Secretary of Defense explains the rationale for this avoidance quite well:

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[27] Power, *supra* note, 8, 360.
[28] Power, *supra* note, 8, 359.
[29] Lieutenant-General Roméo Dallaire, Kigali, "Request for protection of Informant," To: *Baril/DPKO/UNATIONS*, New York, (11 January 1994), fax no. 011-250-96273, (available at: http://nsarchive.gwu.edu/NSAEBB/NSAEBB53/rw011194.pdf).
[30] UN Security Council Resolution, 1999/1257, *Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda,* UN Doc. S/1999/1257, 15 December 1999, 33.

> "Be Careful. Legal at State was worried about this yesterday – Genocide finding could commit the USG (the U.S. government) to actually '*do something*.'"[31]

This statement indicates that at the time the US believed that if the G-word was used then an obligation to act would in fact arise. A similar opinion seemed to be present within the UNSC. The Council was becoming more and more divided over whether to call the tragedy in Rwanda genocide or not. This was expressed in a predominately reluctance in using the G-word.[32]

The result of this reluctance was that no reinforcement was sent when the killings began despite Dallaire's request for more troops and an expanded (robust) mandate. The Pentagon opposed any kind of reinforcement not only by the US themselves but also by other UN nations because they feared it would force the US into a large scale involvement at the end. As Belgium had just lost ten peacekeepers they wanted to pull out completely and the US was fast to join them and support this withdrawal. By April 25, 1994 the peacekeeping force should have been reduced to 270, however, 503 remained in the inferno.[33]

The recollections from Somalia hovered like a dark shadow in the US memory which is part of the explanation for this permeating unwillingness to engage. Less than a year before Rwanda the US had been subjected to an infamous event in Somalia where 18 US troops to the UN mission UNOSOM II was killed and the corpses dragged through the streets of Mogadishu. The horrific event was broadcasted in American Television. Thus, the US was not at all interested in neither being involved themselves nor having the UN involved in another mission in Africa as the US would find it difficult to defend a total non-engagement in such mission. Therefore the US attempted to detach from a responsibility to act by not framing the crisis as genocide – the so-called 'crime of crimes.'[34]

The ambassador of New Zealand which at the time was one of the non-permanent members of the UNSC held the Presidency of April 30, 1994. In the draft of the Presidential Statement he attempted to include the word 'genocide' as he believed it would oblige the Council to act and stop the atrocities in Rwanda. The proposal was backed by Czech Republic, Spain, Nigeria and

[31] Office of the Secretary of Defense, 'Secret Discussion Paper: Rwanda,' 1 May 1994, 1, (available at: http://nsarchive.gwu.edu/NSAEBB/NSAEBB53/rw050194.pdf).
[32] Power, *supra* note, 8, 361.
[33] Power, *supra* note, 8, 366-367.
[34] Christine Gray, "*The UN and the Use of Force"* in: International Law and the Use of Force, 3rd edition, 2010, 294.

Argentina.[35] However, the US, the UK and China opposed and therefore the word was not included as consensus by all of the Councils members are required for the Presidential Statement to be passed.[36] This incident reveals that it was not only the US but several members of the UNSC who did not want to use the G-word – most likely because they believed it would activate unwanted obligations to act.

Instead of discussing the mass slaughter the Council kept a misleading focus on the civil war by referring to "breaches of International Humanitarian Law"[37] as if the whole crisis predominately concerned a situation of two warring parties, which was certainly not the case. By not even framing it as mass scale human rights violations the UNSC attempted to fixate the spotlight on a matter *i.e.* civil war, in which the UN did not find itself explicitly obliged to act. Direct phrases from the Genocide Convention were actually used in the Presidential Statement, but the specific word 'genocide' was omitted. Instead the Council just recalled that: "(..) 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."[38] In that way the G-word was not used and neither was it declared whether *that crime* was in fact being committed in Rwanda.

A Presidential Statement is of course not binding law and hence it has no operational consequences as such. However, Presidential Statements, as well as other UN documents which are not legally binding chapter VII resolutions, should not be underestimated as they can generate political will and contribute to determine the agenda from which *action* can in fact emerge. What the statement can do directly is to reveal the opinion and atmosphere within the UNSC regarding different matters. The April statement strongly indicates that the Council – namely represented by the US, the UK and China – was not prepared to use the G-word about the situation because they actually believed that it was an intervention-trigger. Hence, the discourse in this period was clearly characterized by a perception that the G-word equals an obligation to act. This made the most powerful actors at the international scene refrain from using the genocide-label.

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[35] UN web TV, Colin Keating on Prevention and Fight against Genocide – Security Council, 7155th Meeting, 16 April 2014, (available at: http://webtv.un.org/watch/colin-keating-on-prevention-and-fight-against-genocide-security-council-7155th-meeting/3475302783001).
[36] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law,* 2007, 21.
[37] UN Security Council Presidential Statement, *Statement by the President of the Security Council,* UN. Doc. S/PRST/1994/21, 19 April 1994, 1.
[38] *Ibid.*

A similar story unfolded in the parallel-conflict in ex-Yugoslavia. Here this 'semantic-game' about whether the Serbs atrocities committed in Bosnia amounted to genocide or not, was present as well, most probably due to the belief that such finding implied an obligation to act.[39] If this is the case it could be argued that the genocide-label *does matter* in order to prevent genocide. However, is it correct that the genocide-label in fact activates any obligation to act? The following section examine whether there is a *legal* obligation to prevent genocide.

Legal obligations to (re)act?

Despite some contradictory statements within the US State Department during the Rwandan genocide it seems quite obvious that the perception of an 'obligation to act' on the G-word was mainly believed to be a *legal* obligation. In the statement of June 10, 1994 Ms. Shelly tried to avoid applying the label to the situation by emphasizing that the word 'genocide' has a very specific *legal* meaning. In addition she explicitly stated that obligations arise in connection with the *use of the term* – ergo the term in its legal definition.[40] Therefore it seems reasonable to assert that the obligations the US believed was attached to the genocide-label were *legal* obligations. Nonetheless, it should not be underestimate that fear for public and political pressure on the US Government – if the G-word was outspoken and inaction remained – was also included in the 'calculation' which led to the avoidance of invoking the genocide-label.

Considering the very title of the Genocide Convention it can seem quite surprising that the legal obligation to prevent genocide is one of the most disputed legal issues in relation to genocide. Article 1 of the Genocide Convention reads that:

> "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."[41]

As this is not merely a preambular paragraph but in fact an actual Article of the Convention it seems reasonable to interpret this wording as meaning that genocide prevention is treaty-law and thus binding on all parties to the Convention to actually perform. In addition it could be argued that if the legal prohibition of genocide is *jus cogens* and thus customary international law, then the

[39] Power, *supra* note, 8, 258.
[40] US Department of State, "Daily Press Briefing," *US Department of State,* 10 June 1994, (available at: http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1994/9406/940610db.html).
[41] *Convention on the Prevention and Punishment of the Crime of Genocide*, Paris, 9 December 1948, Article 1.

prevention of genocide must at least be customary law as well as 'prevention' is in fact literally included in the text of the Convention. In that way it could be argued that there *is* a legal obligation to prevent genocide which applies to all states regardless of membership to the UNCG.

However, when looking at state practice the answer is not that straight forward. As mentioned, state practice is one of the two requirements which need to be present for a norm to be customary law, where *opinio juris* is the other. As professor of international law William Schabas points out plenty of massacres has happened in which the contracting parties has not done any attempt at all to prevent it. Apparently this inaction has had no consequences which indicate that it is generally accepted that states are *not* legally obliged to try to prevent genocide in another state. This suggests that it is perceived as being permissible not to react – ergo the *opinio juris* element.[42]

Furthermore it has been debated what the formulation "undertake to prevent" actually means. Of course there are a lot of different measures that could fall under this formulation *e.g.* diplomatic and political measures, economic and commercial sanctions, individual sanctions such as travel bans, freeze of bank accounts *etc*. Nonetheless, is it clearly military sanctions in form of humanitarian intervention (HI) which is the most disputed measure and what most states refuse to be legally bound to 'undertake.' This was certainly the case in Rwanda where especially the US feared to be legally obliged to intervene militarily if the G-word was outspoken. During the Rwandan genocide the US acted as if it was generally accepted that if the genocide-label was attached to a situation, the actor who attached it was also obliged to intervene.

Nevertheless, no such norm of HI was established which could have argued in favor of obligations to take action – either unilaterally by the US or bilaterally through the UN. Moreover, the prohibition of the use of force as laid out in Article 2(4) of the UN Charter had not ceased to be valid at this point (or now for that sake). It still required the UNSC's authorization to intervene and this was of course not happening as the US, the UK and China – all P5 members – was opposing such action. Hence it could be argued that the measures that needs to 'be undertaken' by the contracting parties are not military, as no military intervention is permitted without a UNSC authorization and no norm of HI was established.

[42] Schabas, *supra* note, 13, 528.

However, in 1999 this was about to undergo a shift – at least temporarily. In this year the US and its NATO allies intervened militarily in Kosovo under the banner of protecting the Kosovars from the Yugoslav Regime. Without it ever being formally declared some NATO leaders including President Clinton spoke about genocide and argued that an obligation to prevent it existed.[43] The intervention was not authorized by the UNSC which propose that the norm of HI was about to overrule the UN Charter. Immediately after the intervention an independent International Commission made a report on the Kosovo intervention. The Commission concluded that the NATO military intervention was *illegal* but *legitimate*. Illegal because it was not approved by the UNSC (due to a Russian veto), but legitimate because it was based on 'justifiable' grounds as all diplomatic measures had been exhausted and it did in fact liberate Kosovo from Serbian oppression.[44]

This is an interesting conclusion as it actually bases its view about legitimacy on the *result* of the intervention which was 'success' and at the same time emphasizes that such action (HI) is *illegal.* However, the report does not say that it *was* genocide and that this was the reason for a justifiable intervention in Kosovo. The arguments put forward by the 'interventionists' stating that preventing genocide and crimes against humanity through intervention is a justifiable action which overrules the UNSC was in fact declared *non-legal* or *quasi-legal* arguments by the Commission.[45] Thus the issue about legal obligations to prevent genocide in form of intervention remained disputed in the 1990s. When the US invaded Iraq in 2003, the international community's 'feelings' about so-called HI became less friendly once again.[46]

First in 2007 an ICJ judgment would bring some more clarification to this matter, but before that happened the international community found themselves in another situation where they had to determine how to operationalize the commitment 'never again.' In 2003 a tragedy in Darfur, Sudan broke out. At this point the 'legal obligation or not' to prevent genocide was still mainly unresolved. However, a discursive shift in the US perception on whether the G-word implies any obligations to act can be traced.

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[43] Schabas, *supra* note, 13, 530.
[44] Independent International Finding on Kosovo, *The Kosovo Report,* Executive Summary – Main Findings, January 2015, 3, (available at: http://reliefweb.int/sites/reliefweb.int/files/resources/The%20Kosovo%20Report.pdf).
[45] Independent International Finding on Kosovo, *The Kosovo Report,* Executive Summary – Main Findings, January 2015, 58, (available at: http://reliefweb.int/sites/reliefweb.int/files/resources/The%20Kosovo%20Report.pdf).
[46] Schabas, *supra* note, 13, 531.

Darfur: A word is just a word

In February 2003 extreme violence broke out in Darfur. The rebel groups the Sudanese Liberation Movement (SLM) and the Justice and Equality Movement (JEM) started to fight the Sudanese Government as they accused the Government for persecuting the non-Arab population – in particular the Fur, Masalit and Zaghawa.[47] The Government started to carry out a massivemilitary response in form of counter-insurgency. Although disputed, evidence supports that the Government allied with the infamous Arab militia called the *Janjaweed*.[48] This conflict ignited one of themost heated 'genocide-debates' at the international scene and in academia. The issue concerned whether the Sudanese Government in cooperation with the *Janjaweed* were committing genocide against the non-Arab ethnic groups in Darfur.

Reports about horrific raids where the *Janjaweed* plundered, raped and killed their way through villages followed by air shelling conducted by the Government reached the news papers of the world. These ethnic targeted atrocities infuriated the public whereby many journalists, academics and NGOs started to talk about genocide. Yet, neither Kofi Annan, Human Rights Watch or the European Union wanted to call it genocide.[49] In the US, pressure from the public and Congress was beginning to become serious and parallels to the shameful handling of Rwanda was often made by those opposing the Bush administrations inaction.

Surprisingly, it cumulated in the first-ever official 'genocide determination' made by the US Government about an ongoing crisis. On September 9, 2004 Secretary of State Colin Powell stated that: "Genocide has been committed in Darfur (…) and genocide may still be occurring."[50] Considering the almost desperate attempt to avoid attaching the label in the 1990s, this statement was really unexpected. *Prima facie* it could be seen as a sudden willingness to take action against genocide as the analysis above concluded that invoking the G-word was perceived to be an intervention-trigger by the US.

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[47] Jennifer Trahan, "Why the Killing in Darfur is Genocide," *Fordham International Law Journal,* vol. 31, (2008), 995.
[48] Colum Lynch, 'Rights Groups says Sudan's Government Aided Militias,' *The Washington Post,* 20 July 2004, (available at: https://web.archive.org/web/20060104021437/htt://www.genocidewatch.org/SudanRightsGroupSaysSudanAidesMilitas20July2004.htm).
[49] John Hagan and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide,'* 2009, 31.
[50] Colin Powell, "The Crisis in Darfur," Testimony before the Senate Foreign Relations Committee, Washington, DC, September 9, 2004 (available at: https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm).

However, Powell emphasized that "*no new action* is dictated by this determination."[51] This disappointing statement reveals that the perception of the operational consequences of applying the genocide-label had shifted within the US. It has made some scholars claim that the word had lost its *perceived* meaning.[52] Furthermore, it has been declared directly undermining for the verypurpose of the UNCG that the US first made this determination and then showed the world that it has no consequences at all to do so.[53] If the Convention does not work as a tool to take action against genocide, why do we even have it? The US did in fact invoke Article VIII of the UNCG as they called on the competent organs of the UN to take actions considered appropriate for the *prevention* of genocide and "to initiate a full investigation" as stated by Powell.[54] After this statement theUS did nothing more.

It is hard not to think that the reason for this sudden genocide 'labeling' was merely an attempt to silence the public which in fact did work quite well. The Bush administration seemed to be aware that not naming the crisis in Darfur genocide would be of great political cost. The exact year of 2004 was the ten yeas anniversary for the Rwandan genocide which meant that a lot of focus was directed on genocide and particularly the US disgraceful avoidance of the G-word in the past. This meant that the advocacy for calling Darfur by what was believed to be its rightful name was much louder than in 1994.[55]

Regretfully, as the G-word was outspoken the pressure evaporated despite the fact that suffering continued in Darfur. It could seem like that merely getting the label attached to the crisis was an end in itself in the US. This is seriously questioning whether the genocide-label matters in order to prevent and stop genocide if it does not imply any obligations to actually do something. In regard to the Rwandan genocide the problem was believed to be 'getting the labeling done' in order to catalyze action. However, as the analysis above expose no legal obligations to react on such determination was actually clarified in that period and when the US determined to use the G-word but not act on it, it supported an argument that no legal obligations to prevent genocide existed. Moreover it even indicated that no *moral* obligations to react on a genocide finding existed either.

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[51] *Ibid*.
[52] Luke Glanville, "Is "genocide" still a powerful word?" *Journal of Genocide research,* vol. 11, no. 4, (2009), 468.
[53] Martin Shaw, *What is Genocide?* 2007, 167.
[54] Granville, *supra* note, 52, 475.
[55] Granville, *supra* note, 52, 477.

The ICJ Judgment

Encouraging case-law on genocide prevention came with the ICJ Judgment in 2007. The Court did not confirm the applicant Bosnia's accusation that the State of Serbia had committed an overall policy of genocide within Bosnia during the war in the 1990's.[56] However, it *did rule* that the state of Serbia had *failed to prevent genocide.* Moreover the Court explicitly stated that a state "can be held responsible for breaching the *obligation to prevent* genocide (…)." and that prevention implies a: "corresponding duty to *act*."[57] Hence it was finally confirmed that a legal obligation to prevent genocide *does* exists.

There have been attempts to interpret this 'obligation to prevent' as being confined to the states own territory. However, as Schabas points out, the Court did not insist upon any distinction between genocide committed *within* a states own territory and *outside* its territory.[58] In paragraph 427. the Court reads that prevention is not merely a component to the duty to punish genocide, but has its own scope and hence is a duty of its own. That means that the duty to prevent genocide shall not merely be reduced to only include a reference to the competent organs of the UN as laid out in Article VIII of the UNCG. The Court noted:

> "Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter."[59]

Considering this ruling it could be argued that the US did not comply with its obligations to prevent genocide in Darfur as they most certainly knew of the crime, believed that the crime in fact amounted to genocide, had the means to at least try to stop it and yet did nothing more than calling on the competent organs of the UN. Of course this judgment is not legalizing unilaterally HI. As the Court points out the UN Charter shall still be respected, this means that Article 2(4) is no less valid than before the Judgment.

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[56] Martin Mennecke, "What's in a Name?: Reflections on Using, Not Using, and Over Using the "G-Word", *Genocide Studies and Prevention,* vol. 2, no. 1, (2007), 64.
[57] *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, International Court of Justice, 26 February 2007, para. 431.
[58] Schabas, *supra* note, 13, 524.
[59] *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, International Court of Justice, 26 February 2007, para. 427.

However, it can be argued that the US (not to speak of other actors such as the EU) could and *should* have done much more. They could have put far more pressure on the Sudanese Government, provided better equipment to the African Union (AU) force in Darfur and pushed for more action within the UN to actually get an authorization for bilateral action from the UNSC.[60] As apermanent member of the UNSC the US did not stand powerless in the UN which means that their voice could have been heard – insofar that it was raised. Of course this applies to the other P5 members as well, but as it was the US who invoked the G-word, they at least should have put more pressure on the Council to act, but they didn't.[61]

Moreover, in paragraph 461. the ICJ emphasized that of course the state does not need to succeed in preventing genocide, but at least it has to try with the means available.[62] It is not hard to argue that the 'means available' to the US was not at all employed in Darfur, only *the word* was. It was first as late as 2007 that a UN force (UNAMID) was finally established and sent to Darfur to support the AU mission. By that time allegedly 200.000 people had died.[63,64] Ironically, the US did not contribute with a single troop to the UN mission.[65]

What does the ICJ judgment add to this analysis? It could be argued that the genocide-label *does* matter for preventing genocide as the ICJ made clear that a legal obligation to prevent genocide in fact does exist. *Ergo*, if a situation is labeled genocide or is perceived likely to escalate into genocide a *legal* obligation to try to prevent it arises. However, there are still several problems with the relationship between the *genocide-label* and *genocide prevention*. First of all, as we know, the legal definition of genocide is very narrow and difficult to apply due to this legal preciseness. Second of all, if we actually find ourselves in a position where we can say without reasonable doubt that the situation can classify as genocide it is with necessity to late to prevent it as it is already occurring.

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[60] BBC News, "Darfur call by Genocide Survivors," *BBC News,* 20 October 2006, (available at: http://news.bbc.co.uk/2/hi/europe/6069600.stm).
[61] Martin Mennecke, "Genocide Prevention and International Law," *Genocide Prevention and Studies,* vol. 4, no. 2, (August 2009), 172.
[62] *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, International Court of Justice, 26 February 2007, para. 461.
[63] Alex de Waal, "Deaths in Darfur: Keeping Ourselves Honest," *SSRC Blogs,* 16 August 2007, (available at: https://web.archive.org/web/20080504092752/htt://www.ssrc.org/blogs/darfur/2007/08/16/deathsin-darfur-keeping-ourselves-honest/).
[64] Note by the author: The death tolls of Darfur are much disputed and should be taken with great caution.
[65] United Nations Peacekeeping, "UN Mission's Contributions by Country," *UN Peacekeeping,* 30 June 2013, (available at: http://www.un.org/en/peacekeeping/contributors/2013/jun13_5.pdf).

As the international lawyer Payam Akhavan notice: "Effective prevention is particularly challenging to grasp because success must be measured by *what does not happen*."[66] This statement points to a mistake which is often made in the discussion on whether there is an obligation to prevent genocide. *Preventing* genocide is being confused with *stopping* genocide. Particularly this problem is most evident in the 'genocide or not' debate. When it is discussed whether or not a certain situation can be labeled 'genocide' it seems to be forgotten that if we in fact are capable of making such determination it is obviously already too late to prevent it.

When we are speaking about whether or not something is genocide, we are not discussing *how to prevent* it – we are discussing *how to stop it*. This might seem like a quite banal observation, however, it is an important distinction to keep in mind if genocide prevention is ever going to be *preventive*. Unfortunately, it could seem like that it is a distinction few have kept in mind as the main focus continuously has been on whether or not the genocide-label can be applied regardless of whether we talk about preventing or stopping genocide. Both preventing and stopping genocide is equally important of course. However, the very idea with prevention is that we should never let the condition get to a point where it has to be stopped instead of prevented, because then the preventive efforts have already failed.

The ICJ did in fact try to address this problem by stating that prevention should begin when the state learns of the existence of serious risks of genocide being committed and that the state has a duty to use the means it has available to deter those who have the suspected intent (*dolus specialis*) of committing genocide.[67] But as we can see this determination of whether the beginning of genocide is under way still somehow relies on this very difficult applicable legal definition. Yet, the starting point for action is still whether the G-word can be attached to the situation or not. Therefore, it is most probable that instead of discussing whether or not genocide *is occurring* it will just be another infinite discussion on whether or not genocide is *about to occur*, based on a disagreement about whether the *dolus specialis* is present or not.

[66] Payam Akhavan, "Preventing Genocide: Measuring success by what does not Happen," *Criminal Law Forum,* vol. 22, (2011), 1.
[67] *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, International Court of Justice, 26 February 2007, para. 431.

The problem with the genocide-label

Regardless of whether the issue is about preventing or stopping genocide it seems like the legal definition is an obstacle for doing either. It suggests that the real problem is the legal definition. This should not be misunderstood as yet another criticism of the legal definition of genocide, it is not. Rather it is a criticism of the legal definitions misplaced role in genocide prevention. As the analysis above reveals, regardless of whether we speak about preventing or stopping genocide the label somehow needs to be attached to the situation before any action is considered. Further, it has been shown that for most international actors the genocide-label equals the legal definition of genocide. It means that in order for them to apply the genocide-label the elements of Article II of the UNCG need to be met, and that is a very high threshold.

Therefore it is very problematic that states, policymakers and international bodies use the legal definition to determine whether or not they should take action against what might be genocide. It is problematic because human lives are gambled due to a narrow legal definition, whose content is fairly irrelevant to the people who suffer. It can be stressed that whether or not something is genocide is a *legal matter*, but whether or not to intervene and take action is a *political matter*. Professor of international law Michael Kelly says that applying the genocide-label is still a highly 'political calculation' and a consistent policy of cooperative intervention to stop genocide under the legal definition is yet a long way ahead. [68] Therefore, I will claim, the genocide-label in its legal definition does not belong to politics and genocide prevention.

With that said it should not be understood as if international law is completely irrelevant for genocide prevention. As genocide prevention is in fact included in the legally binding UNCG and the ICJ made clear that there is a legal obligation to prevent genocide, international law is of course relevant for genocide prevention. However, it is not international law as such that does not belong in genocide prevention it is the genocide-label. *Ergo*, the problem is an excessive focus on the legal definition as being the starting point from where further action is determined. International law and especially newer developments in international law are very valuable and can be highly useful for genocide prevention insofar that it is not fixated on the genocide-label. The responsibility to protect (R2P) is one of these very valuable developments which will be elaborated on later in this chapter.

[68] Michael Kelly, "Genocide" – The Power of a Label," *Case W. Res. J. Intl. Law,* vol. 40, no. 147, (2008), 162.

To clarify the relationship between law, politics and moral, it can be argued that to a certain degree we are *morally* obliged to separate *law* from *politics* when talking about preventing genocide. Because if legal findings of genocide are used as a threshold for deciding whether or not to intervene we are becoming engaged in a purely rhetorical debate and thus become passive towards mass atrocities due to semantics. The G-word is too easy to use as an excuse for inaction and the precision inherent in the legal definition makes it unsuitable for determinating action.

Unfortunately in far too many cases the legal definition has been the fulcrum for discussion instead of what should be done. Much energy has been wasted on unimportant debates over wording when human beings should have been saved.[69] After the tragedy in Rwanda it could seem like the word 'genocide' has been used for the sake of the word itself and not for the practical implications of such use.[70] Therefore this excessive focus on the G-word itself is negative in the context of genocide prevention because it adds no meaningful progression to this field – it might actually do the opposite.

This brings us back to one of the first sections of this analysis: The aim of applying the genocide-label. In this section it was normatively stated that the choice of using or not using the genocide-label must always be measured against the aim of that use which *should* be to end suffering. Using the genocide-label to prevent and to stop genocide does not seem to fulfill this aim of ending suffering, in fact it rather seem like it is prolonging it. In the following part of chapter II it will be examined how the genocide-label might even be counterproductive for preventing and stopping genocide. Additionally, it will be suggested how improvements could be made based on an assessment of current legal and political initiatives.

The consequences of naming?

Especially due to the mental element – the *dolus specialis* – it can be quite arbitrary whether a situation can classify as genocide or not because the ability to prove the genocidal intent depends on a variety of circumstances.[71] It seems inappropriate to rely on such arbitrariness to determine whether or not to take action and save human lives. As stated above the legal definition is a serious constraint to prevent and stop genocide because it's content most often give rise to nothing more

[69] Mennecke, *supra* note, 56, 62.
[70] Glanville, *supra* note, 52, 476.
[71] Evans, *supra* note, 2, 757.

than a semantic debate. However, it is not exclusively the consideration about taking action which is paralyzed by the genocide-label. Excessive focus on the G-word can in fact have further negative consequences for preventing and stopping genocide.

A widespread problem with the genocide-label is *demonization*. When some individuals are subjecting other individuals to unimaginable suffering and cruelty it is a common human reflex to feel outrage and hatred towards the wrongdoers. But instead of manifesting a high-quality 'no' to the wrongdoers the aversion towards the unacceptable acts is often being transformed into a general *demonization* of the whole group of people to which the perpetrators belong. This reflex is especially hard to overcome when the wrongful act is labeled 'genocide' as this crime is so extreme. It might also be because genocide is often associated with an overall ideology that the whole group is somehow expected to follow, even though that is far from the majority of cases.

It is not uncommon to hear phrases like; 'the *Turks* committed genocide against the Armenians,' 'the *Hutus* committed genocide against the Tutsis,' 'the *Serbs* committed genocide against the Bosniaks' *etc*. although it was actually *some* Turks, *some* Hutu extremists (although many) and *some* Serbs who perpetrated the genocides. The problem with such generalized framing of these tragedies is that language is powerful. The way we speak about the world is a crucial co-determinant of how we perceive the world and not at least each other as human beings. Researcher Alex de Waal clarifies how this 'labeling' can be particularly destructive for a condition of *ongoing* atrocities which might amount to genocide:

> "The danger of the word 'genocide' is that it can slide from its wider, legally specific meaning, to a branding of the perpetrators' group as *collectively evil*. Having labeled a group or a government as 'genocidal,' it is difficult to make the case that a *political compromise* needs to be found with them."[72]

A lot of nuances are lost in such dichotomous labeling and lot of hatred is potentially created which is not exactly improving the situation. The genocide-label might offend the wrongdoers into a position of manifest unwillingness to cooperate, which leave few options for halting the tragedy. This is not the same as saying that the international community should spent all its energy on meeting the needs of the wrongdoers and avoid insulting them. In fact this is precisely about meeting the needs of the victims, as it is about choosing a strategy which is most likely to succeed

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

in preventing or stopping the suffering of the victims. If being thorough in once language implies a higher probability that mass atrocities are being halted, such carefulness should not be rejected.

It is considered likely that the genocide in Rwanda could have been prevented or at least stopped if the UN peacekeeping force had not been withdrawn and Dallaire had received the reinforcement he asked for.[73] UN peacekeeping missions can be a considerable tool to prevent a situation from escalating into further violence *e.g.* genocide or to stop ongoing genocide, insofar that the peacekeepers are properly equipped, are enough in numbers, and holds the necessary mandate. Nonetheless, according to chapter VI of the UN Charter, deploying a peacekeeping mission requires the *consent* of the host state. It is very unlikely that such consent will be obtained if the state concerned is named 'genocidal.'[74]

Furthermore, while 'consent' is the first principle of UN peacekeeping, 'impartiality' is the second.[75] As the term genocide is often associated with 'one side killing another' (which is not particularly untrue)[76] it can be very hard for a UN mission to appear *impartial* if the very cause of the mission to be establish is based on a genocide allegation, because such an allegation implies that one side is killing the other. Using the G-word in order to prevent or stop genocide through UN peacekeepers can be counterproductive as the 'word' can cause unwillingness to cooperation by the host state. The same applies to diplomatic measures which are also unlikely to succeed if the perpetrators feel insulted and condemned.

A misleading focus

One of the prime arguments for why a situation should be labeled genocide is that it creates focus and generates political will to do something about it. Darfur refutes this allegation, as the word was spoken but no action was taken. However, it cannot be disputed that it *did* generate focus, but which kind of focus – was it a valuable focus? The answer must be 'no.' Instead of being a focus on *what to do* it became a focus on *what it is*. The UN and the US disagreed on whether or not the crimes committed in Darfur amounted to genocide. The US based its genocide allegation on a survey

[73] Power, *supra* note, 8, 366.
[74] Mennecke, *supra* note, 56, 61.
[75] United Nations Peacekeeping, "Principles of Peacekeeping," *United Nations Peacekeeping,* (available at: http://www.un.org/en/peacekeeping/operations/principles.shtml).
[76] Mennecke, *supra* note 56, 65.

conducted by US investigators in refugee camps in Chad, July 2004. 1,136 Dafuri refugees were interviewed for the survey whose result indicated extreme levels of violence committed against non-Arab villagers.[77] What is remarkable is that around 1 million American Dollars was spent on a survey, which wouldn't be much more than a dust collector in the archives of the US State Department.[78]

The UN did not agree with the US genocide finding and in October 2004 it established the *International Commission of Inquiry on Darfur* pursuant to UNSC resolution 1564. Among other crimes the Commission was suppose to assess whether genocide had or had not occurred. In 2005 the Commission concluded that the *means rea*, was not met and hence the Sudanese Government was not committing genocide.[79] The Commission did recognize that mass atrocities were being perpetrated and the people needed protection.[80] Yet, two years should pass before the UN peacekeepers were sent to support the AU force in Darfur. The closest the UN came to action before UNAMID arrived too little and too late in 2007, was the UNSC's ICC referral in 2005.[81] In the Darfur Commission's report an ICC referral was requested based on the argument that:

> "The prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would no doubt contribute to the *restoration of peace* in that region."[82]

This is an interesting claim. Of course it is reasonable to argue that removing the top perpetrators can be a good tool to stop the violence. However, initiating an ICC investigation does not imply that the individuals responsible will immediately be removed and held accountable. ICC investigations are costly and time consuming, and what time is there when the atrocities are ongoing? If genocide prevention can do no better than relying on a court which in its nature is tailored to deal with crimes which *have already been committed*, then there is a long way ahead. It should be carefully considered whether an ICC investigation will contribute positively to the situation or if it could

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[77] Hagen and Rymond-Richmond, *supra* note, 49, xviii.
[78] Hagan and Rymond-Richmond, *supra* note, 49, xx.
[79] International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,* 2005, (Available at: http://www.un.org/news/dh/sudan/com_inq_darfur.pdf), para. 518.
[80] UN Commission of Inquiry on Darfur, *supra* note 79, para. 626.
[81] UN Security Council Resolution 1593, *The Situation Concerning Sudan,* UN Doc. S/RES/1593, 31 March 2005.
[82] UN Commission of Inquiry on Darfur, *supra* note 79, para. 584.

actually end up prolonging the conflict.[83] In Darfur it could unfortunately seem like that the ICC referral was somehow just another substitute for action or another phase of the 'genocide debate.'

This is revealing that the genocide-label *does* generate a lot of focus but not necessarily positive focus in the sense that things are actually attempted improved. Millions of dollars, time and energy were spent on discussing the classification of the crimes committed in Darfur, instead of how to act upon them. One is tempted to say that the genocide-label generated too much *focus*, but too little *action* – or at least a negative focus as it was merely accelerating a rhetorical debate which kept focus away from the real issue: stopping the atrocities.

Moreover, despite the fact that inaction generally remains when the G-word is outspoken, a major world-focus is going to be frozen on this particular conflict. It can result in other no less serious conflicts and human rights violations are being neglected, merely because the G-word has not been attached. After some states and NGOs started to speak about potential genocide towards the Rohingya's in Rakhine state a lot of world focus has been directed on Myanmar. However, few speaks about the systematic war crimes, such as torture, child soldier recruitment, sexual violence, indiscriminate shelling and other large scale human rights violations committed by the *Tatmadaw* (Burma Army) towards civilians in especially Kachin state but also Shan, Karen and Kayah.[84] When the genocide debate on Darfur was at its peak, few discussed the mass crimes in eastern Congo and Uganda, while ironically near nothing was done about Darfur either.[85] Around seven million people have been killed in DRC – however, no G-word, no attention.[86]

Another way in which the genocide-label can generate a misleading focus is through its tendency to create an unnuanced view on the victims and the perpetrators. After the Rwandan genocide few have questioned the atrocities committed by the 'other side.' When the genocide ended hundreds of thousands of primarily Hutus fled to Zaire (now DRC) to escape what could be seen as a horrendous retaliation for the genocide. Thousands died in DRC and allegedly the Rwandan army and the new Rwandan Government which was established after the genocide, was involved in these

[83] Mennecke, *supra* note, 61, 169.
[84] Karen News, "Fortify Rights: Burma Army committing war crimes in Kachin State," *Burma Link,* 9 June 2014, (available at:http://www.burmalink.org/fortify-rights-burma-army-committing-war-crimes-kachin-state/).
[85] Tim Allen, "Is 'Genocide' such a Good Idea?" *British Journal of Sociology,* vol. 62, no. 1, (2011), 30.
[86] Mennecke, *supra* note, 56, 64.

deaths. The President Kagame even succeeded in removing a prosecutor from the Rwandan Tribunals as she attempted to investigate crimes committed by Kagame's troops in 1994.[87]

Yet, Mr. Kagame is welcomed everywhere in the world. He and his people are perceived as being the victims of genocide, [88] which apparently excludes the possibility that they themselves can be perpetrators of massive crimes. It is like the word 'genocide' dissolves all other responsibilities, if you have been subjected to the 'evil of evil,' the 'crime of crimes' then all your own misdeeds is somehow being erased. It is not untrue that Kagame and his people are victims of genocide, but the point is that the picture is always more nuanced, and being a victim doesn't mean to be entitled to revenge nor impunity. This issue is closely related to an idea of a hierarchy of crimes.

The danger of a 'crime hierarchy'

Genocide has often been deemed the 'crime of crimes' without too much reflection upon what such crime hierarchy actually implies.[89] The problem is that it has created a discourse in which suffering caused by genocide is somehow associated with greater suffering, than suffering caused by other mass atrocities, such as crimes against humanity, war crimes and ethnic cleansing. In his article "Is genocide still a powerful word?' Dr. Luke Glanville is citing a passage from Camus' novel 'The Plague':

> "But I need you to acknowledge officially that we do have an outbreak of plague." "If we don't acknowledge it," said Rieux, "it still threatens to kill half the population of the town."[90]

As the 'plague' obviously represents genocide, the quote symbolizes how the failure of naming the situation 'genocide' will have the fatal consequence of indifference and non-action and ultimately be the cause of a tragedy unfolding. However, if we stay in this diseases-analogy (which is quite adequate), the problem is, I will claim, that if genocide is plague what is atrocity crimes then? It can't merely be a flue as it involves extreme crimes such as rape, torture, mass slaughter, extermination, enslavement *etc*. If it really is something else than plague, then it must at least be cholera. And what is worse plague or cholera? The point is that this hierarchy of crimes which has placed genocide above other serious crimes has ended up undermining the effort towards halting

[87] Allen, *Supra* note, 85, 29.
[88] *Ibid.*
[89] Mennecke, *supra* note, 56, 58.
[90] Glanville, *supra* note, 52, 467.

crimes which are just as devastating for humanity as genocide. Paradoxically, it has actually undermined the very effort towards preventing and stopping the crime of genocide itself.

When the word 'genocide' was coined there might have been a really sound reason for describing it in these hierarchical terms. The intention of placing genocide above other crimes by calling it 'the crime of crimes' was probably an attempt to make the world realize the nature of this crime and hence ultimately to stop the suffering it causes. Of course, the intention was not to downplay other grave atrocity crimes. But we have learned now (or have we?) that instead of stopping this 'odious scourge,' it have ended up being a constraint for stopping any of the most serious international crimes, including genocide itself. It will most likely be more fruitful if this discourse was transformed into a serious understanding that mass atrocity crimes can be of comparable gravity to genocide.

It could be argued that however inapplicable and counterproductive the legal definition of genocide is, the genocide-label is "needed" in order to have an instrument against severe international crimes committed *outside conflict*. The UNCG is the first ever Human Rights treaty. This makes it significant for several reasons, amongst other that it was acknowledge that the crime could be committed in peacetime. On the contrary crimes against humanity carried the *conflict nexus*. In the 1950 UNGA resolution about the *principles of international law* in regard to the Nuremberg Trials, it was written that crimes against humanity could only be committed in the context of war.[91]

However, this is not the case anymore as it was stated already in the early judgments by the ICTY that crimes against humanity can also be committed in peacetime. Additionally, the ICRC has confirmed that the omission of the 'conflict nexus' for crimes against humanity is now customary international law.[92] Therefore the 'genocide-label' is no more needed than 'crimes against humanity.' 'Atrocity crimes' allows space for the acknowledgment that both sides can commit crimes in a situation, because 'atrocity crimes' does not carry the 'one-sided' association that genocide does. In addition it gives more space for UN involvement,[93] as impartiality is much easier

[91] UN General Assembly, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,* UN Doc. 177, Yearbook of the International Law Commission vol. II, (1950), Principle VI.
[92] ICRC, Customary International Humanitarian Law, Rule 156. (available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_nl_rule156).
[93] Mennecke, *supra* note, 56, 65.

to remain when the G-word is not attached. If it is 'genocide' s*omeone* always has to be the one committing it, as that *someone* must carry the right intention due to the mental element, *dolus specialis*. Hence it is more adequate and fruitful to speak about mass atrocities in order to prevent and react.

To sum up; the genocide-label generates a lot of focus but almost no action. Instead it maintains the situation in a semantic debate, hampers diplomatic solutions as well as UN led interventions and steals focus from other devastating conflicts which need the world's attention. Partly, this might be because we have created this imaginary crime hierarchy which places genocide above other crimes, and reproduces the illusion that this is the only crime which might oblige action and justify intervention.

However, atrocity crimes is no less serious and horrible than genocide and as Schabas writes: "Taking the law as it currently stands, it seems impossible to conceive of a case of genocide that would not also respond to the definition of crimes against humanity."[94] It means that in order to prevent genocide we do not need to rely on a genocide finding, instead we should just focus our attention on taking action against atrocity crimes. In that way we would both transcend the inappropriate neglect of other mass crimes which did not meet the narrow legal definition of genocide and take action against a possible precursor to genocide, without having to name it as such. The very purpose of genocide prevention is that we should never find out if it would have developed into genocide. The doctrine of R2P is one of the most promising developments for *preventing* and *reacting* against mass atrocity crimes – including genocide.

The responsibility to protect

The responsibility to protect (R2P) came as a reaction to the massive failure of saving human lives in the 1990s. It emerged as a doctrine in 2001 as it was conceived in a report by the International Commission on Intervention and State Sovereignty (ICISS). The doctrine was remarkably fast in gaining recognition and support within the international community.[95] At the 2005 World Summit where the largest number of heads of state in the UN history where gathered, R2P was unanimously adopted.[96] The excitement peaked as the defining paragraphs of R2P (para.138.-139.) from the

[94] Schabas, *supra* note, 23, 396.
[95] Anthony F. Lang Jr., *Humanitarian Intervention,* in: Duncan Bell (ed.), Ethics and World Politics*,* 2010, 337.
[96] Evans, *supra* note 2, 517.

World Summit Outcome Document was approved by the UNSC in resolution 1674.[97] In the final text of the Outcome Document, R2P ended up covering the four most serious international crimes: Genocide, crimes against humanity, war crimes and ethnic cleansing.

Paragraphs 138. and 139. were later boiled down to be operationalized in a three pillar-approach by the Secretary-General Ban Ki-Moon. First, every state has a responsibility to protect its own population against the four atrocity crimes by taking timely and appropriate *preventive* measures. Second, the international community has a responsibility to assist and support the state in fulfilling this responsibility. Third, the international community has a responsibility to respond in a timely and decisive manner insofar that the state manifestly fails to protect its population – either by being unable or unwilling to do so.[98] This third pillar-response by the international community includes a variety of measures whereas the use of force is only to be employed as a *last resort* and with a UNSC authorization. Hence, R2P is *not* a third exception to the prohibition of the use of force.

It is absolutely central to understand that R2P is not merely another way of saying HI. It is not about having a *right* to intervene it is about having a *duty* to protect civilians at risk of mass atrocities. The idea was to change the discourse towards an understanding that sovereignty is not merely a right which the state possesses it is also a responsibility it has to perform in order to be entitled to its sovereignty. It means that it is first and foremost about the responsibility of the state *itself* to provide this protection. When the state continuously fails to uphold this obligation then the responsibility falls on the international community who shall either assist or engage. Hence, R2P is clarifying that "mass atrocities are everybody's business, not nobody's business," as the very center of the doctrine is *protection.*[99]

The ICISS proposed three forms of responsibilities, the responsibility to prevent, react and rebuild.[100] From paragraph 138. and 139. it becomes evident that *prevention* holds a very central place in R2P as it is the focal point of the two first pillars. The UNSG report notes that:

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[97] UN Security Council Resolution 1674, *On Protection of Civilians in Armed Conflict,* UN Doc. S/RES/1674, 28 April 2006.
[98] Report of the Secretary-General, *Implementing the Responsibility to Protect,* UN Doc. A/36/677, 12 January 2009, 8-9.
[99] Gareth Evans, "In Defense of R2P," *New York Times,* Opinion Paper, 11 March 2012, (available at: http://www.nytimes.com/2012/03/12/opinion/12iht-edletmon12.html).
[100] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the international Commission on Intervention and State Sovereignty,* Ottawa, international Development Research Center, Chapter 3, 4, 5.

"Prevention, building on pillars one and two, is a key ingredient for a successful strategy for the responsibility to protect."[101] Capacity-building, early warning, diplomatic measures and other peaceful means are an inherent part of the responsibility to *prevent* atrocity crimes. Paragraph 138. explicitly states that prevention includes preventing the *incitement* of such crimes and paragraph 139. is referring to the responsibility to use non-military means according to chapter VI and VII of the UN Charter.

Hence, it is clear that R2P can be directly transferred to the field of genocide prevention as a framework for how to operationalize the prevention. What makes R2P so potent for genocide prevention is that once and for all the whole debate on whether or not something is genocide and in that case whether or not one is obliged to respond to that became superfluous. In the R2P doctrine no hierarchy of crimes exists[102] and the *responsibility* cannot be interpreted as being any more or any less coercive depending on a genocide finding. R2P provides a tool to prevent – and insofar that has failed – take action against genocide without having to rely on the genocide-label.

One could ask if the debate would just transform into a discussion on whether atrocities are happening or not? It cannot be completely rejected, but it does not seem plausible that such a discussion would be as idle as the genocide debate, because it is much harder to refuse that atrocity crimes are happening. The definition of crimes against humanity and war crimes are much broader, contains a much wider range of acts and holds a less specific mental element than genocide. However, another challenge to R2P is that it is not legally-binding. It is not treaty-law and although it is a continuous discussion most evidence point in the direction that it is not customary international law yet. There are not sufficiently consistent state practices and *opinio juris* is lacking.[103]

Nonetheless, it is still a very valuable development because it manifests that preventing and stopping atrocity crimes is a responsibility that applies transnationally – a responsibility that all members of the UN in fact did agree on. Furthermore, R2P has been used several times in practices, it has gained serious foothold in the language at the international scene and thus holds a strong potential of evolving into customary international law. When the UNSC finally authorized the

[101] Report of the Secretary-General, *Implementing the Responsibility to Protect,* UN Doc. A/36/677, 12 January 2009, 9.
[102] Mennecke, *supra* note, 56, 62.
[103] Evans, *supra* note 2, 528.

deployment of a peacekeeping force in Darfur in 2007 it did so referring to R2P in resolution 1706.[104] When post-election and ethnic violence broke out in Kenya in 2008 the world got its first successful example on the use of diplomatic action under R2P. The international community managed to establish a coordinate response which settled the dispute in a power-sharing agreement solely through the use of mediation, dialogue and peaceful means.[105]

Libya on the other hand is the first example of the use of force under R2P pillar three. In 2011 the UNSC decided to authorities a military R2P-intervention in Libya to protect civilians against Qaddafi's atrocities.[106] NATO conducted the intervention from the air and in less than a year the mission was completed. However, the 'feelings' about this operation quickly became mixed. It was argued that the intervention force had overstepped its mandate by altering the mission from 'protection of civilians' to 'regime change.' This allegation developed into a debate about whether it was in fact a necessary part of the *protection* as it was the *regime* who committed the atrocities. It ignited a new debate about what to do when two *jus cogens* norms clash. What prevails, human rights or sovereignty?[107] This question is still an object of debate and it has been argued that Libya has undermined R2P.

However, Brazil brought a proposal that can be a tool to help overcome this issue: *The responsibility while protecting* (RwP). Summed up briefly, RwP means to keep a constant focus on reviewing the way in which the mandate is conducted to make sure it is not overstretched.[108] It could seem like old wine in a new bottle, but the importance of explicitly conceptualizing what is hoped to become a norm at the international scene, should not be underestimated. RwP can help maintain a focus on what legitimized intervention in the first place: Protection. However, RwP does not really deal with the paradox of what to do when the regime is committing the crimes – can civilians be protected without overriding the regime then?

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[104] ICRtoP, "An Introduction to the Responsibility to Protect," *International Coalition for the Responsibility to Protect*, (available at:http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop).
[105] Abdullahi Boru Halakhe, "R2P in Practices," Ethnic Violence, Elections and Atrocity Prevention in Kenya," *Global Center for the Responsibility to Protect,* 2013, 3, (available at: http://www.globalr2p.org/media/files/kenya_occasionalpaper_web.pdf).
[106] UN Security Council resolution 1973, *On Establishment of a Ban of Flights in the Libyan Arab Jamahiriya Airspace,* UN Doc. S/RES/1973, 17 March 2011.
[107] Alex J. Bellamy, "Libya and the responsibility to protect: The exception and the norm," *Ethics and International Affairs,* vol. 25, (2011), 265.
[108] Torsten Brenner, "Brazil as a norm entrepreneur: The responsibility while protecting initiative," *Global Public Policy Institute,* working paper, (March 2013), 3.

It is not hard to argue that sovereignty as well as the state itself is a construction – an overall good construction though. Sovereignty is something we made up partly because it is in fact beneficial for providing the possibility for protection and prosperity for the citizens of the sovereign state. But sometimes it becomes a dangerous construction when it does not fulfill its inherent purpose: bringing protection and prosperity. Human rights, on the other hand, are argued to be universal – something we possess merely by being human beings. Some would claim that this is only true for *natural law* scholars.[109] However, the whole world has in fact committed themselves to the *Universal Declaration of Human Rights* from where it is concluded that human rights are universal, indivisible and interdependent. If that is so, human rights must be something inherent in the human being, while sovereignty is an external construction. If one believes in this, it can be argued that human rights naturally prevails sovereignty. At least: "Sovereignty is not a license to kill" as Gareth Evans has correctly noted.[110]

Veto and 'RN2V'

Regretfully there is no consensus on the reasoning above and as the conflict in Syria evolved another major obstacle for the functionality of R2P became even clearer: The veto. Since the beginning of the crisis in 2011 Russia has vetoed seven UNSC daft resolutions to protect the Syrian Government. Out of these seven, China vetoed five.[111] The resolutions attempted to recommend a variety of measures to respond to the crisis including ICC referrals, Article 41 sanctions, calls upon states to make them refrain from transfer, trade or supply arms to Syria, as well as condemnations of violations of IHL.[112]

Reports have noted that the Syrian Government is responsible for two R2P crimes; *war crimes*, including sexual violence, torture, murder, arbitrary detentions, and use of chemical weapons and *crimes against humanity*.[113] However, whether it regards diplomatic or military responses, the veto

[109] Marie-Bénédicte Dembour, "What are Human Rights? Four Schools of Thought," *Human Rights Quarterly*, vol. 32, (2010), 2.
[110] Gareth Evans, Quote, at *Global Center for the Responsibility to Protect, (*available at: http://www.globalr2p.org/regions/syria).
[111] Richard Roth and David Shortell, "US slams Russian veto at the UN resolution on Syrian Chemical weapon use," *CNN,* 1 March 2017, (available at: http://edition.cnn.com/2017/02/28/europe/russia-un-senate-vote/).
[112] UN Security Council Draft Resolution(s), S/2014/348 (22 May 2014), S/2012/538 (19 July 2012), S/2011/612 (4 October 2011).
[113] International Coalition for the Responsibility to Protect, "The Crisis in Syria," ICRtoP, (available at: http://responsibilitytoprotect.org/index.php/crises/crisis-in-syria#III).

is a serious obstacle for a consistent use of R2P. If just one of the P5s is not interested in action, any pillar-three approach will not be realized as it requires UNSC authorization to do so and that requires P5 consensus. The veto power has since its origin been challenging for the international community, but when it comes to preventing or stopping mass atrocities it is a serious problem that one state can dictate worldwide inaction. However, there exist several proposals for how to reform the veto system. Charter amendment in order to limit the veto is unrealistic as such an attempt ironically requires that the P5 do not veto it – which they probably will.[114]

Another less formal way to overcome the veto-problem is needed. Informal processes can in fact be very powerful and are at the same time more achievable. A meaningful suggestion is to implement a 'new code of conduct' for the use of veto – better described as *the responsibility not to veto* (RN2V). RN2V would be a commitment by the P5s not to wield their veto in cases where a response to mass atrocities crimes are attempted, insofar that such attempt would have been passed by a majority.[115]

There is no guarantee that such commitment would be adhered by the P5s. Therefore it would require a strong engagement and pressure from civil society of the P5 nations to show their representatives that it is the will of the people not to be the cause for inaction towards mass atrocities. A suggestion could be that on the request of at least 50 UN member states, the Secretary-General should make a determination about whether mass atrocity crimes is occurring based on the definitions from the Rome Statute and thus trigger the RN2V. Such conduct would let democracy rule in the UN and ensure that a credible actor is the determining force.[116]

RN2V as well as R2P are methods of manipulating a discursive shift in the way in which mass atrocities are approached. It is about creating an understanding that sovereignty is always lower-ranking than the protection of people. If the P5s do not take this seriously they risk undermining their own credibility and end up being ignored as an important international organ or by powerful nations. The recent unilateral attack on Syria by the US Trump administration demonstrates this quite well. The world is much stronger if such actions are conducted in collaboration, therefore it

[114] Karen Adams, "General Assembly Plenary, Topic 1: Reforming Membership and Voting in the Security Council," *Tenton County Model UN,* (2 October 2013), 4.
[115] Ariela Blätter, "The Responsibility not to Veto: A Way Forward," *Citizens for Global Solutions,* (2014), 2, (available at: http://globalsolutions.org/files/public/documents/RN2V_White_Paper_CGS.pdf).
[116] Blätter, *supra* note, 115, 11.

would be a triumph if the P5s started dialoguing, not only with each other but with the rest of the UN system and its members as well.

Interim conclusion and way forward

If we truly want to prevent genocide we cannot wait for it to be determined as genocide, because at that point it will necessarily be too late to prevent it. The ICJ judgment clarified that a legal obligation to prevent genocide does in fact exist. However, in order to act *before* a full scale tragedy unfolds, we need to transcendent strict legal wording and find a new vocabulary that obliges action regardless of the genocide-label – R2P provides such vocabulary. There are definitely challenges with R2P, but there are also ways to overcome them.

However, current cases indicate that in spite of the endorsement of R2P the G-word is still used in a counterproductive way. The general reflex of falling into the 'genocide dichotomy' is yet very common, which is also the reason why this study is relevant. As recently as yesterday (17 April 2017) a British Official stated that genocide is occurring in South Sudan. The author of the article writes that this could make the international community consider intervention more seriously.[117] This is despite the fact that for three years the South Sudanese people have suffered from horrific atrocity crimes which is covered by R2P. It seems like the potential of R2P has not been fully grasped and neither has it been grasped that the G-word is irrelevant when it comes to preventing and stopping this crime that we wish should happen '*never again*.'

In the work towards getting R2P implemented as a norm it would be beneficial if energy was also spent on manifesting the non-existence of a crime hierarchy and raise awareness that 'genocide' should not be a stronger action-trigger than 'atrocity crimes.' The special advisor on the prevention of genocide is already working closely with the special advisor on R2P and this could be a good starting point from where such campaigning could begin. In conclusion, the genocide-label *should not* matter for preventing and stopping genocide. However, it might matter for justice and punishment in the aftermath.

[117] Aron Brooks, "Does South Sudan Qualify as Genocide?" *The East African Monitor,* 17 April 2017, (available at: http://eastafricamonitor.com/south-sudans-conflict-qualify-genocide/).

Chapter III

Does the genocide-label matter for justice and punishment?

In this chapter it will be examined how the genocide-label matter in the context of justice and punishment. The focal point will be a discussion of the dilemmas, paradoxes and possible effects of prosecuting genocide. The parties to the UNCG have through their ratification made a commitment to punish the crime of genocide. While the obligation to 'prevent' genocide has been highly disputed, the obligation to 'punish' the crime has predominately generated more consensuses among the signatories. Nonetheless, considering the fact that the accused at the Nuremberg Trials was actually not convicted for genocide but crimes against humanity, it was not before the 1990s that the crime of genocide was indicted and subsequently convicted.

It can be argued that punishing genocide is most of all an expression of failure, as the punishment of genocide necessarily entails that preventing it has failed. Others might say that it is the least we can offer the survivors, which make it crucial to punish the perpetrators. However, why do we punish and what can the effect of punishing genocide be? There are a wide range of potential answers to this question. I will focus on three possible objectives for punishment and justice: *Deterrence*, *retribution* and *expressivism.* Under each objective, dilemmas and issues which are particularly present in relation to punishing the crime of genocide will be discussed in order to assess if the genocide-label matters for criminal justice.

Deterrence

Deterrence as a legal theory is based on the assumption that punishing a perpetrator for a crime will make that person refrain from committing the crime again, and furthermore deter future perpetrators from committing a similar crime. In the case of genocide it would mean that holding *genocidaires* accountable will ultimately prevent genocide in the future. If that is so, it seems like a very sensible reason to make sure that *genocidaires* are punished for their crime. Hence, it can be said that it *is* important to use the genocide-label in judgments to make sure that future perpetrators understand that if they commit *this particular* crime, they will be held accountable. However, these assumptions can be challenged in several ways.

It has been argued that individuals who are strongly ideologically motivated – as is the case for most *genocidaires* – are very unlikely to be deterred.[118] In Gregory Stanton's theory of the 8 (now 10) stages to genocide, *dehumanization* is indisputably a very central facilitator of genocide. A perpetrator of genocide has often managed to dehumanize the victims to such an extent that the perpetrators simply do not see the victims as human beings anymore.[119] Often the victims are equated with animals and diseases. In Rwanda the Tutsis were called 'cockroaches' and in Darfur words like 'dog,' 'donkey' and 'Nuba' (derogatory term meaning 'black slave') were often used about the victims.[120]

Thus, the perpetrators have developed a genocidal mindset which is justifying what they are doing and actually make them believe that it is *necessary* and *right*.[121] A thief stealing a car might find it necessary as well, but he is most probably aware that it is wrong and not at least illegal. *Genocidaires* might know that genocide is illegal, but they do not see what they are doing as being *'genos'*-cide, as it is not 'people' who are killed from their perspective. A genocidal condition is created which enables completely 'ordinary' people to commit the most extreme crimes. This horrendous tendency might be well captured under what Hannah Arendt famously called 'the banality of evil.' It cannot be verified whether this applies to all perpetrators of genocide as there is often so many involved and the mind is complex and varying. However, it seems reasonable to believe that at least *genocidaires* do not carry out a cost-benefit analysis before committing the crime. It is simply not part of the genocidal intent to make such calculations about whether or not they will be held accountable.[122]

Another problem with the deterrence argument is that it is empirically untested and unproved. This is a general problem in criminology, because proving that punishment deters require that we can in fact show the cause for the *lack* of a crime. In cases of mass atrocities such as genocide it seems even harder to make such assessment as there have been so little actual cases of accountability for genocide. It was not before ICTR and ICTY that the crime of genocide was charged and convicted. Thus, we have very little evidence to base such assessment on. Furthermore,

[118] Claudia Card, "Genocide and Social Death," *Hypatia,* vol 8, no. 1, (2003), 68.
[119] Gregory H. Stanton, "The 8 Stages of Genocide," *Genocide Watch,* 1998, (available at: http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html).
[120] Hagan, *supra* note, 49, 9.
[121] Martin Mennecke, "Punishing Genocidaires: A Deterrent Effect or not?" *Human Rights Review,* (July 2007), 325-326.
[122] Mennecke, *supra* note, 121, 325.

by looking at the world after the establishment of the ICTY, the ICTR and the ICC, the deterrence argument is not exactly confirmed. Akhavan notes that:

> "No one should entertain the illusion that the *relative* success of the ICTY, the ICTR, and the ICC process, or the engagement of national and foreign courts, has somehow exorcised the specter of genocide and other massive crimes from our midst."[123]

However, both the ICTY and the ICTR believed that deterrence would actually be an effect of the trials and it was stated as one of the objectives.[124] But as the trials in the Hague and Tanzania had run for almost ten years, the crisis in Darfur broke out. This is not confirming that the trials had had the deterrent effect as hoped. Considering cases such as ISIS in Syria and Iraq, the current crisis in South Sudan, Myanmar's Rakhine state *etc*. it does not look like that the occurrence of mass atrocities has really decreased after the trials. On the other hand it can be argued that for deterrence to be effective, punishment needs to be consistent, meaning that there has to be a convincing degree of certainty about getting punished.[125] That is not yet the case for genocide as far from the majority of *genocidaires* has been held accountable. Ultimately, this is indicating that we do not really know yet if punishing genocide will deter future *genocidaires* as there are simply too little case-studies on the matter.

Furthermore, it can be argued that the ICC referral on Darfur regretfully has made the deterrence argument even more fragile. Despite the ICC arrest warrant issued ten years ago, it has not yet been possible to hold the Sudanese President Al Bashir accountable for his crimes, which include the crime of genocide. If a prospect of deterring future *genocidaires* have ever existed it has most probably been seriously undermined by the *Al Bashir* case. In addition this case is also very undermining for the power and credibility of ICC investigations and referrals by the UNSC.[126]

The question is whether time will show that punishing *genocidaires* can have a deterrent effect. Last year, co-responsible for the *Srebrenica massacre* Radovan Karadzic was found guilty of

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[123] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *The American Journal of International Law,* vol. 95, no. 7, (2001), 31.
[124] Mennecke, *supra* note, 121, 322.
[125] Valerie Wright, "Deterrence in Criminal Justice: Evaluating Certainty v. Severity of Punishment," *The Sentencing Project,* (2010), 9.
[126] Mennecke, *supra* note, 121, 329.

genocide and sentenced to 40 years of imprisonment.[127] However, this is unlikely to be sufficient to deter, as it is far from an expression of a consistent practice. Moreover, based on the first argument it is yet very contestable if deterrence is even possible for *genocidaires*. No matter how consistent accountability for genocide would be, the genocidal-mind holds a different logic.

Nonetheless, removing the top perpetrators might be a tool to *prevent* violence from breaking out again. This is another branch of deterrence called *incapacitation*, which means to simply make the perpetrators incapable of establishing a condition again in which the crime can be perpetrated *e.g.* by imprisoning him/her.[128] The value of such a result should surely not be underestimated, but the deterrent effect would still 'only' be confined to the specific region in which the crime was committed. Changing a 'culture of impunity' to a 'culture of accountability' for genocide *is* valuable, but probably for other reasons than that of 'classical' deterrence.

Retributive justice

There are many different variations and ways to interpret the concept of retributive justice. Most commonly it is understood as a justice theory which implies that a *proportionate punishment* of the perpetrator is *morally* and *intrinsically* good. A general view on retributive justice is that the punishment is not taking place for any other reason than *the punishment itself*. It is not a means to reach another goal such as *e.g.* deterrence or resocialization.[129] Hence, it can be argued that the key elements of the concept of retributive justice are *punishment* for the sake of the punishment itself and the *proportionality* of such punishment.

It is claimed that retribution is not revenge and it should not be confused with a wish to obtain vengeance, as it is not about emotionally finding pleasure in the suffering of the perpetrator.[130] If that was so, the element of proportionality would be superfluous as the one driven by revenge and agony in most cases could probably not find sufficient pleasure in a proportionate suffering. Legal philosopher Michael Moore notes that even if no one wanted revenge, the moral wrong done by the

[127] Tim Hume, "Radovan Karadzic Found Guilty of Genocide, Sentenced 40 Years," *CNN,* 25 March 2016, (available at: http://edition.cnn.com/2016/03/24/europe/karadzic-war-crimes-verdict/).
[128] Franklin Zimring & Gordon Hawkins, *Incapacitation: Penal Confinement in the Restraint of Crime,* 1995, 3.
[129] Stanford Encyclopedia of Philosophy, "Retributive Justice," *Stanford Encyclopedia of Philosophy*, 18 June 2014, (available at:https://plato.stanford.edu/entries/justice-retributive/#RetCriJus).
[130] *Ibid*.

perpetrator is sufficient reason to punish him/her according to the retributive theory.[131] However, it is especially the two elements of *punishment* and *proportionality* that gives rise to some challenges when the wrongdoing is the crime of genocide.

As the punishment holds such a central place in retributive justice the question is, who shall be punished for genocide? In almost all cases, genocide is committed by a huge number of persons. Should every single one of these individuals be punished, only some of them, or maybe the state? Punishing only few individuals for crimes committed by hundreds – maybe thousands – can seem inappropriate. A lot of people might not feel that they have 'gained justice' as the person who harmed them or their beloved ones is not being punished. However, as the concept of retributive justice is not supposed to satisfy personal feelings of 'revenge' it can be argued that it does not matter.

On the other hand the concept claims that the moral wrong in itself requires punishment for justice to be done. Hence, it can be argue that if not all persons responsible are being punished for *their* particular wrongdoing (*i.e.* genocide), justice is not obtained. Insofar that it was actually realistic (economically and purely practically) to punish all *genocidaires*, it would in many cases imply that over half of the society would be imprisoned. In Rwanda almost 1 million people were killed and at least over half of the remaining had somehow participated in the killings.[132] If all of these people should be brought to justice for their crimes, who should run society afterwards?

If the state should be punished for genocide (which would be by the ICJ), it is a bit like punishing 'all' and 'nobody' at the same time. The biggest problem is, I will claim, that punishing a state for crimes committed by individuals, entails an inherent danger of succumbing to a *collective demonization* of the entire group of people who inhabits the state, as demonstrated in chapter II.

The other challenge is *proportionality*. How is proportionality supposed to be measured when the crime committed is as extreme and large-scale as genocide? Retributive justice holds that it is morally wrong to punish a perpetrator more than he/she deserves, but how do one measure what a

[131] Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law*, 2010, 89.
[132] United Nations website, 'Background Information on the Justice and Reconciliation Process in Rwanda,' *Outreach program on the Rwandan Genocide and the United Nations*, (available at: http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml).

perpetrator deserves and more importantly, what does a *genocidaire* deserve?[133] Attemptingto punish proportionately in cases of genocide seems like trying to repair the irreparable.

Of course one could say that this applies to almost all non-quantitative crimes (in terms of stolen material things which are refundable). If a perpetrator kills one person, punishing the perpetrator by killing him/her according to *lex talionis*, will not bring that person back anyways. Thus, it could be argued that the problem is the same regardless of whether one or thousands are killed. However, this reasoning is based on an emotional valuation of the harm done, and retributive justice is not supposed to be conducted in an emotional tone, but rather by based on what one might call a 'pure' sense of justice. That still does not solved the problem of finding a proportionate sentence for *genocidaires*.

The Bosnian Serb commander of the *Drnia Corps* Radislav Krstić was the first man who was convicted of genocide by the ICTY for the crimes committed in *the Srebrenica massacre*. He was sentenced to 46 years imprisonment (before the case was appealed).[134] Other *genocidaires* such as Jean Paul Akayesu[135] and Jean Kambanda[136] was sentenced to life imprisonment. The interesting thing about the *Krstić* case is that when the sentence was to be measured, the Trial Chamber noted that genocide was actually the 'crime of crimes' due to the "horrendous concept" of *dolus specialis*, but nonetheless:

> "A murder, whether qualified as a crime against humanity, a war crime or an act of genocide, *may be a graver offence* than imposing serious bodily or mental harm upon an individual [ergo, *genocide*]. In this regard, the Trial Chamber ascribes to the approach taken by the Appeals Chamber that "[t]he level [of penalty] in any particular case [be] fixed by reference to *the circumstances of the case*."[137]

It shows that in the view of the ICTY, measuring a proportionate punishment for genocide is not a monolithic matter, but should be measured in regard to each individual case. The quantity of victims and the quality of suffering should be taken into account as well, and here it is not self-

[133] Lisa Cherkassky, "Genocide: Punishing a Moral Wrong," *International Criminal Law Review,* vol. 9, (2009), 313.
[134] *Prosecutor v. Radislav Krstic,* Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 2 August 2001.
[135] *Prosecutor v. Jean Paul Akayesu,* Judgment, Trial Chamber, International Criminal Tribunal for Rwanda, 2 September 1998.
[136] *Prosecutor v. Jean Kambanda,* Judgment, Appeals Chamber, International Tribunal for Rwanda, 19 October 2000.
[137] *Prosecutor v. Radislav Krstic,* Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 2 August 2001, paras. 700-701.

evident that genocide surpasses other atrocity crimes in gravity. Compared with the findings in chapter II this is a very interesting conclusion, because it indicates that the practical consequences arising from this perceived 'crime hierarchy' differs according to whether we talk about preventing and stopping genocide or whether we talk about punishing genocide.

In the previous chapter it was concluded that the alleged crime hierarchy has continuously been an excuse for inaction. The dominating perception has been that if it cannot classify as genocide no action is really required, because only genocide is 'the crime of crimes.' Contrary, in the context of punishment, the hierarchy does not seem to imply any practical consequences for the measurement of the punishment. Genocide does not necessarily entail a higher sentence just *because* it is genocide. Hence, it could be concluded that the genocide-label *does not* matter for the measurement of the punishment as such, because the punishment of genocide is not necessarily different or greater than that of other atrocity crimes. However, it is argued that in international criminal law (ICL) the center of gravity is not the *punishment* but the *ceremonial trial*.[138]

Expressivism

It can be argued that the important thing about ICL is not so much that the perpetrator is being punished, but the fact that a trial is being held. Of course the punishment matters for the particular perpetrator and his/her particular victims. But as noted earlier in this chapter, it is far from the majority of perpetrators who are being held accountable. International courts only punish the 'most responsible.' Therefore, instead of being a forum for determining punishment, the trials are more like a 'political' ceremony, or what one might call an *expression*.[139] Thus, international trials can be described in terms of the theory of *legal expressivism*.

Legal expressivism holds that law can be symbolic and therefore what makes it meaningful is that it is sending a *moral message* about what is accepted as being right and wrong – in this regard

[138] David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law,* in: Samantha Besson & John Tasioulas (ed.), The Philosophy of International Law, 2010, 575.
[139] *Ibid.*

at the international scene.[140] Therefore, it can be argued that the international tribunals are co-determining of the *world order*. David Luban writes that:

> "(…) trials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means."[141]

However, the 'world order' that these trials are allegedly co-creating does not appear in visible and practical terms. As concluded above, punishment of *genocidaires* might at best have limited deterrent effect. The punishment can never be proportionate with the crime committed and genocide does not necessarily imply a greater sentence than that of other atrocity crimes. Nonetheless, according to the expressive theory this is not the aim of the trials. Punishing *genocidaires* is about expressing an *attitude* within the international community. Hence, it is not a *practical* but a *normative* world order it is creating. Is there any value in that?

The answer is predominantly yes, I will claim. First of all, it is a way of expressing that genocide (as well as other forms of 'political' violence) is not *beyond* the law. It can be a powerful way to internationally discredit *genocidaires* which in itself can be valuable. As noted, genocide is often somehow ideologically or politically motivated, which means that the perpetrator probably believes that his/her actions in some way are right and justifiable. Taking the perpetrator through the ceremonial trial is a way of expressing that regardless of the perpetrators ideological conviction such conduct is wrong and unacceptable. Hence, it is a way of expressing *moral truth*.[142]

Furthermore, impunity is an expression, just as well as accountability is an expression of how we accept that the world should be. If we want a world in which *genocidaires* are being held accountable for their crimes, the trials can function as a *moral language* that we use to express that wish. Furthermore, international trials are giving the victims at least some form of reaction from the international community which might be very valuable for them. This is closely linked to *reconciliation*, which will be examined more thoroughly in chapter IV. It can be argued though, that it is quite indispensable that the trials will also have some form of practical implications. The punishment can contribute to decrease the want for revenge by the victims and thus help the society

[140] Matthew D. Adler, "Expressive Theories of Law: A Skeptical Overview," *University of Pennsylvania Law Review,* vol. 148, (2000), 1364.
[141] Luban, *supra* note, 138, 576.
[142] Luban, *supra* note, 138, 577.

to move on in a nonviolent manner.[143] In addition it can be argued that trials are a way of making historical record of the genocide in order to prevent future deniers.[144] However, these 'practical' effects are not the aim as such for legal expressivism.

As noted earlier, language is powerful. Therefore it can be argued that the genocide-label *does* matter in the process of criminal justice, because the very act of making *genocidaires* stand trial for their crimes is a moral expression of the world order in which we want to live. The ceremonial trial is a way of officially stating that genocide is not an accepted conduct. This is a valuable statement to make in a world which has indisputably been dominated by an acceptance of impunity for genocide. However, the strive for accountability might also have backsides.

Peace or justice?

It has been argued that arrest warrants and prosecutions can actually have the negative effect of prolonging a conflict and possibly be a constraint for peace. This is classically known as the 'peace versus justice' debate.[145] In 2003 Uganda was the first state to invoke Article 14 of the Rome Statute by referring its own situation regarding the infamous Lord's Resistance Army (LRA) to the ICC. In Northern Uganda LRA are committing horrendous atrocity crimes.[146] The intention with the referral was to get the leaders of LRA prosecuted for their crimes. However, as arrest warrants were issued, peace talks had already begun. It is claimed that the ICC involvement made the LRA leaders loose incentive to peace due to the prospect of being prosecuted. Hence, the bloodshed continued. Therefore, the people who were desperately affected by the atrocious situation wanted the ICC to leave in order to obtain peace – and if peace implies impunity, so be it.[147] Citing an anonymous commentator, Akhavan writes that:

[143] Akhavan, *supra* note, 123, 24.
[144] Luban, *supra* note, 138, 575.
[145] Mennecke, *supra* note, 121, 327.
[146] Payam Akhavan, "The Lord's Resistance Army case: Uganda's Submission of the First State Referral to the International Court of Justice," *The American Journal on International Law,* vol. 99, (2005), 403-404.
[147] iTVS, 'Peace versus Justice,' *iTVS,* 6 May 2016, Movie, (summary available at: https://itvs.org/films/peace-versus-justice).

> "The quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow."[148]

Nonetheless, not everyone is interested in giving away the possibility for holding their perpetrators accountable. A woman who survived a LRA attack told that she did not have faith in the LRA's peace plans. If the ICC warrant was lifted they might just commit further atrocities now that the prospect of being held accountable was removed.[149] Based on the *incapacitation* argument, it can also be claimed that arresting the top perpetrator will in fact end the violence. Furthermore, that could strengthen the attempt to change the 'culture of impunity' into one of accountability.

This is outlining the main dilemma in the peace vs. justice debate. Should justice be pursued even if it would obstruct the potential for peace? On the other hand, can there be peace without justice? It is hard not to think that peace is becoming a bargaining chip for militias and other such groups. They can use it to pressure the people into granting them impunity by campaigning for a non-involvement by the ICC and other justice institutions, in return the people are promised to get so-called peace. Most of all, it seems like a highly undignified way of forcing people to choose between peace or justice when they are in fact entitled to both. Nonetheless, that does not change the fact that indictments may have the tragic effect of extending the violent situation.

However, the 'International Center for Transitional Justice' (ICTJ) holds that this is actually a false dilemma. Peace cannot exist in a vacuum and peace and justice is so intertwined that it is not meaningful to aim for only one or the other. Instead of being mutually exclusive, these two concepts should be seen as mutually reinforcing. This proposition is a very valid argument especially when talking about long-term peace. Instead of focusing on only stopping the immediate violence, an eye should be kept on how a peaceful situation can remain stable afterwards.[150] But sometimes the situation demands that the violence is stopped *immediately*.

It can be argued that the problem might be that if justice is attempted to be pursued *before* anything near peace has been obtained it can become dangerous. If people keep suffering on the

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[148] Payam Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia? A commentary on the United Nations War Crimes Tribunal," *Human Rights Quarterly,* vol. 20, (1998), 738.
[149] Pamela Yates (movie instructor), "The Reckoning: The Battle for the International Criminal Court," 19 January 2009, (available at: https://www.youtube.com/watch?v=OmvVCrX9uag), cited from: min. 23:25.
[150] International Center for Transitional Justice, "Peace versus Justice: A False Dilemma," *ICTJ,* 5 September 2011, (available at:https://www.ictj.org/news/peace-versus-justice-false-dilemma).

ground, as was the case in Darfur after the arrest warrants, what is the value of pursuing criminal justice? Darfur differs from Uganda in that it was the UNSC and not the state itself which made the ICC referral. When the referral came in 2005, no peace talks were under way and Sudanese Government had stated clearly that they did not intent to cooperate with the ICC.[151] Furthermore, it was first two years *after* the referral that the UN force was employed. It can be questioned if there have ever been a prospect of affecting the conflict positively through the ICC referral. If not, why do it then? Could it be that the ICC referral somehow became a substitute for action in Darfur? Peace and justice may be interconnected in a way that both need to be present *at some point* for the society to remain stable. But is seems reasonable to state that at least: "Justice does not lead: it follows."[152]

A peaceful society is a lot of things, but indeed it is a *secure* society. A society in which the people can feel safe and free not to get their basic human rights and their inherent dignity violated. Can a society be secure if perpetrators of mass atrocities can walk freely as in Uganda, or if *genocidaires* a running the country as president – as in Sudan? I believe that justice is an important part of obtaining true peace, but *when* that justice process should be started should be carefully considered based on each case and the prospect of actually stopping the perpetrators and the mass violence through the arrest warrants.

As a minimum, justice in form of ICC referrals should never become a substitute for the action which is really required in order to halt the immediate atrocities. That is after all also part of the reason why the UNSC can in fact halt an ICC investigation – if it determine it to be a threat to international peace and security.[153] However, in the case of Darfur, the UNSC was not really interested in taking action and maybe that is why they 'handed it over' to the ICC. The true value of the interaction between international security and law lies in the potential of the law to help enforce the right to security and thus the right to peace.

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[151] Mennecke, *supra note*, 121, 329.
[152] Jack Snyder and Leslie Vinjamuri, "Trials and Errors – Principles and Pragmatism in Strategies in International Justice," *International Security,* vol. 28, no. 9, (2003-4), 6.
[153] *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, *United Nations Treaty Series,* vol. 2187, no. 38544, Article 16.

Interim conclusion and way forward

Whether or not punishing genocide has a deterrent effect on future *genocidaires* is very hard to say because so few have in fact been punished for genocide. However, due to the nature of the genocidal mind the prospect of preventing genocide through punishment does not look very promising. In addition a *genocide conviction* does not necessarily imply a higher sentence just *because* it is genocide. Therefore one could ask if it matters whether it is the genocide-label which is used in the judgments. However, it should not be seen as a bad thing that the sentence is not essentially higher for genocide. Measuring sentences in terms of gravity and scale of the crimes instead of in labels seem very reasonable. But pragmatically speaking, it could be argued that because of the lack of tangible effects, the genocide-label *does not* matter for the punishment as such.

Nonetheless, there is an intrinsic value in holding *genocidaires* accountable because it is expressing an attitude within the international community. In this expression (*i.e.* the judgment) it *does matter* that it is the genocide-label which is used in order to make the expression reflect the moral disvalue of *this particular crime*. Gaining justice for a crime is a powerful way to construct at least a moral world order and hence increase the chances for a lasting peace. Nonetheless, cases such as Darfur reveals that it should be considered very carefully *when* that justice process is started. Justice must never be a substitute for action but should complement peace.

For *ongoing* conflicts fighting impunity might not be the best tool to use as a starter. First priority must be to stop the violence and second to hold those responsible for the violence accountable. If an ICC investigation cannot help stopping the violence because the prospect of enforcing arrest warrants are too low or the presence of the ICC can actually rip up the conflict even further, then it is yet too early to engage the ICC. People getting killed in their villages does probably not care which crimes Al Bashir is charged with, as long as he stops committing them. The ICC is a crucial international institution which establishment in 1998 can only be welcomed, but it was never meant to be an institution to enforce peace, it is an institution to enforce justice. Maintaining international peace and security is the task of the UNSC and merely passing on a security issue to a justice institution seems inappropriate and irresponsible.

Chapter IV

Does the genocide-label matter for reconciliation after genocide?

After genocide is over, the society is left with tremendous traumas, mistrust, fear and deep rifts between the perpetrators and the survivors. In order for the society to move forward and heal, some form of reconciliation is needed. Reconciliation has become a common term used in context of post-conflict societies. Reconciliation can be seen both as a process and as a result.[154] Ultimately, reconciliation should aim at restoring, reestablishing or at least improving the relationship between the perpetrators and the victims – but also internally among the victims, as will be examined later in this chapter.

However, what is the role of the genocide-label in reconciliation? Does it matter for reconciliation whether the genocide-label is used about the crimes committed? For this analysis it has been chosen to keep a special focus on genocidal sexual atrocities. As sexual violence is yet such a stigmatized crime it might have particular value for the survivors that their experiences are labeled 'genocide' in order to acknowledge that what they have been subjected to is not merely a side-effect of the overall crime committed, but a direct part of it. There is not yet overall consensus over the question of whether sexual violence can in fact constitutes the crime of genocide under certain paragraphs of the UNCG. Therefore, it will also be discussed *how* sexual violence can constitute the crime of genocide.

The genocide-label in reconciliation

In the case of genocide and other mass atrocity crimes it can seem particularly important to reconcile. Huge amounts of people have been affected by the crimes and huge amounts of people have committed the crimes. If it was practically possible to hold every single perpetrator legally accountable, it is not even sure that this would be the preferred option as it would mean that over half of the society would be removed in many cases, as discussed in the previous chapter. Furthermore, there is no guarantee that the quest for criminal justice will in fact imply reconciliation. Therefore it can be claimed to be crucial for the future of the society to start a reconciliation-process which involves alternative measures to prosecution. Amongst other, the

[154] Stanford Encyclopedia of Philosophy, "Reconciliation," *Stanford Encyclopedia of Philosophy*, 1 May 2015, (available at: https://plato.stanford.edu/entries/reconciliation/#ProRec).

measures used can be apologies, forgiveness, amnesties, reparations, lustrations, truth telling and acknowledgement.[155]

I have chosen to focus especially on *acknowledgement* as this branch of reconciliation seems particularly relevant to examine in relation to the genocide-label and not least in relation to genocidal sexual atrocities. Acknowledgment can be seen as including truth telling, apology, memorialization and also reparation. As noted in chapter II the 'genocide-debate' has been highly absorbed by whether or not a given situation can be classified as genocide. However, this focus does not only apply to *ongoing* cases of potential genocide but has often also continuously been the object of debate after the atrocities are over. This is indicating that it *does* mean something – at least for the survivors – that what had happened is acknowledged as being genocide and obviously it implies that the genocide-label is attached. However, whether that is positive or negative for reconciliation is another question.

Scholars of transitional justice generally agree that revelation and acknowledgement of the atrocities contributes positively to reconciliation.[156] However, as each case of genocide is different, different measures might be needed for the reconciliation to be successful. A lot of reconciliation-measures can be argued to be particularly relevant when the victims and the perpetrators are living in the same state and thus are forced to live together in the post-genocidal society, as in Rwanda. But it is far from the majority of cases where the situation is like that. In a lot a cases the perpetrators and victims do actually not live together afterwards, as in Armenia, Bangladesh and post Holocaust Germany.

Nonetheless, acknowledgement can be argued to be important regardless of whether or not the perpetrators and victims are living within the same state or region after the genocide. By looking at case-studies it seems to actually mean something in international relations that a state which has done wrong to another (whether in the past or present) is acknowledging that wrongdoing publicly. Furthermore, the value of an acknowledgement does not seem to be confined to be only an acknowledgement by the perpetrator (whether person or state), but can also be an acknowledgement by the international community.

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[155] Stanford Encyclopedia of Philosophy, "Reconciliation," *Stanford Encyclopedia of Philosophy*, 1 May 2015, (available at: https://plato.stanford.edu/entries/reconciliation/#ProRec).
[156] Mark R. Amstutz, "Is Reconciliation Possible After Genocide? The Case of Rwanda," *Journal of Church and State,* vol. 48, no. 3, (2006), 541-542.

It is claimed that a Turkish recognition of the Armenian genocide is indispensable for reconciliation between Armenia and Turkey. That is despite the fact that none of the people who actually experienced the genocide are alive anymore.[157] Everyday new articles are written about who has, who has not and who should have acknowledged the Armenian genocide. Bangladesh is increasingly starting to put pressure on actors within the international community to acknowledge that genocide happened in 1971 during the Liberation War. Bangladeshis living in various places of the world has this year started to urge the UN and states of the world community to recognize March 25 as 'Genocide Day' – a memorial day now marked nationally as a day of remembrance of the atrocities throughout Bangladesh.[158] However, why is this acknowledgment so important?

Acknowledgement can be a meaningful way to rebuild trust within or among societies, recreate a normative standard of acceptable behavior and heal the wounds from the past experience.[159] Many theories hold that traumas cannot be mended if they are not articulated. In addition acknowledgement can eliminate suspiciousness, as the victims will get a feeling that the perpetrators do actually see the act done as wrong and hence are less prone to do it again.[160] That will result in a more secure society which ultimately could end in forgiveness. However, in cases such as Armenia and Bangladesh for instance, it is not that there is any realistic prospect of genocide to be committed again as both of the countries was under control of the *genocidaires* as the atrocities took place (in case of Armenia more than 100 years ago) which is not the case anymore.

Nonetheless, the importance of a public acknowledgement is often not so much about getting any practical effect out of it, such as security or compensation (although that can be a part of it as well) but more for the value of the recognition in itself. The acknowledgement is symbolizing a mutual understanding of what has happened and thus reestablishes a moral equilibrium via the restoration

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[157] Davis L Phillips, "Centennial of the Armenian Genocide: Recognition and Reconciliation," *The Huffington Post,* 17 April 2015, (available at: http://www.huffingtonpost.com/david-l-phillips/centennial-of-the-armenia_b_7103004.html).

[158] Senior Correspondent, Unknown, "Bangladesh Missions Abroad Observes First Genocide Day, Demand UN Recognition," *Bangladesh News 24 Hours,* 27 March 2017, (available at: http://bdnews24.com/bangladesh/2017/03/27/bangladesh-missions-abroad-observe-first-genocide-day-demand-un-recognition).

[159] International Center for Transitional Justice, "ICTJ at 15: Highlights of our Work: Acknowledgement," *ICTJ,* (available at: https://www.ictj.org/gallery-items/acknowledgment).

[160] Stanford Encyclopedia of Philosophy, "Reconciliation," *Stanford Encyclopedia of Philosophy*, 1 May 2015, (available at: https://plato.stanford.edu/entries/reconciliation/#ProRec).

of the victims' dignity. Therefore it can be argued that the genocide-label holds an intrinsic value in the context of a post-genocidal situation as the importance of the label is contained in the word itself.

Unfortunately it is not always that simple to get an acknowledgment. First of all the perpetrator often have a different view on what happened and thus does not share the perception about what is the truth with the victims. In Rwanda a lot of people actually see the Rwanda Patriotic Front (RPF) as being a contributing cause to the genocide.[161] It is not uncommon that perpetrators and victims have difficulties in finding consensus about what happened at particular incidents when they confront each other in truth commissions and other public hearings.

Studies have shown that testimonies given at the *Gacaca Courts* in Rwanda were often sabotaged by participating perpetrators or their families. The *Gacaca Courts* were among other objectives supposed to bring forth truth and acknowledgement in order to reconcile.[162] Pakistan refuse to acknowledge that genocide happened during the Liberation War in Bangladesh and Serbia have the same approach to Bosnia as will be discussed later.[163,164] The Trump administration is currently in an awaked situation where people are urging for an acknowledgement of the Armenian genocide, which the government is trying to avoid – most probably to stay clear of trouble with Turkey.[165] These cases are just some among many and what they reveal is that acknowledgement is not something that everyone is necessarily willing to give. When states and other actors within the international community refrain from applying the G-word even though they had nothing to do with it – they are often doing so to protect allies or avoid disputes with the alleged perpetrators. Perpetrators are trying to avoid the word due to fear of being internationally shamed. Alicia Hu writes that:

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[161] Eugenia Zorbas, "What does Reconciliation after Genocide mean? Public Transcripts and Hidden Transcripts in Post-genocide Rwanda," *Journal of Genocide Research,* vol. 11, no. 1, (2009), 133.
[162] Karen Brounéus, "Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts," *Security Dialogue,* vol. 39, no. 1, (February 2008), 72.
[163] Tahmima Anam, "Pakistan's State of Denial," *The New York Times,* 26 December 2013, (available at: http://www.nytimes.com/2013/12/27/opinion/anam-pakistans-overdue-apology.html).
[164] Mershia Gadzo, "Time to Identify Srebrenica Massacre as Genocide," *Al Jazeera,* 8 July 2015, (available at: http://america.aljazeera.com/opinions/2015/7/20-years-later-it-is-time-to-identify-srebrenica-massacre-as-genocide.html).
[165] Patch Socal, "L.A. Country Presses President Trump To Recognize Armenian Genocide," *Beverly Hills Patch,* 4 May 2017, (available at: https://patch.com/california/beverlyhills/l-county-presses-president-trump-recognize-armenian-genocide).

> "On a fundamental level, genocide has become perhaps the worst public indictment, not for its illegality or political consequences, but for the *moral* and *cultural shame* it brings."[166]

Having the genocide-label attached to ones state or person is highly unwanted because of the moral stigma that the label carries. That is probably also the reason why denial is a common characteristic of genocide and included as one of the 10 stages of genocide according to the theory of Gregory Stanton. This is a huge paradox for reconciliation as the needs of the perpetrators and the victims may be contradicting. While acknowledgement can be very important for many victims ability to heal, such acknowledgement is often the last thing the perpetrator wants to give.

On July 11 2015, the Serbian Prime Minister Vučić attended a memorial of the *Srebrenica massacre* to signalize progress in the reconciliation between Serbs and Bosnian Muslims. But he was met with a crowd of thousands of people chanting 'genocide,' as his government refuses to use the genocide-label to describe the massacre. It is claimed that a lot of Bosnian Muslims do not believe that true reconciliation can take place before Serbia is willing to use the G-word.[167] In February 2017, the Muslim Bosniak Leader Izetbegovic said that he wanted to request for a revision of the 2007 ICJ judgment which cleared Serbia for blame of genocide. A genocide conviction against Serbia could allow Bosnia to seek billions of dollars in compensation.

However, a new lawsuit could also possibly rip up tensions and result in a very serious post-Dayton crisis in the Balkans. In addition, there are disagreements about whether the majority of Bosnians even support this new lawsuit and whether it would do any good to the victims. The 'Association of Victims and Witnesses of Genocide' claims that it would be a triumph for the victims – saying that a new lawsuit is a matter of ethics and justice.[168] Other political analysts say that it is just ripping up the pain of the victims and hurting them even further. In March this year, the ICJ rejected the appeal based on the argument that it did not come from competent authorities within Bosnia & Herzegovina. Izetbegovic himself commented on the decision admitting that it

[166] Alicia Hu, "Genocide Taboo: Why we're Afraid of the "G-word," *World in Review,* (Summer 2016), 6.
[167] Hu, *supra* note, 166, 4.
[168] Maja Zuvela, "Bosnia Split over Appeal of Ruling Clearing Serbia of Genocide," *Reuters,* 14 February 2017, (available at: http://uk.reuters.com/article/uk-bosnia-serbia-lawsuit-idUKKBN15T27I).

would actually calm the political crisis (over whether or not to make a new lawsuit), but it will not compensate for the *injustice* towards the victims.[169]

The 'Mothers of Srebrenica Association' is also disappointed with the ICJ rejection: "We hoped there would be justice, but there is no justice."[170] However, justice can take many forms. Maybe an official 'genocide acknowledgement' from Serbia of at least the *Srebrenica Massacre* could have averted the Bosnian appeal as justice does not necessarily have to be expressed in form of prosecution but can also be symbolic. For instance, can an acknowledgment function as a symbolic reparation, although it is hard to say if it would in fact have had such effect in this case.

I will claim that reconciliation in many ways is about reestablishing some kind of moral equality between the perpetrators and the victims. In the genocidal acts the perpetrators have devalued the victims to a lower moral state. When an acknowledgement of the genocide has been given, the victims might be able to feel uplifted in their dignity and moral worth, as it has been declared that what happened to them was wrong. But in the same movement, the perpetrator might now feel degraded to a lower moral state, due to the moral stigma the genocide-label carries. One could argue that this is purely justified as it is the perpetrator who has done wrong to the victims in the first place and now he/she must suffer for that. However, reconciliation is essentially about improving *relationships*, which ultimately cannot be done if one party feels shamed and undignified. Reconciliation must be *between* the perpetrator and the victim not *for* the victim *against* the perpetrator.

Reconciliation is supposed to bring a more long-term improvement into the relationship, whether among states or people living within the same state. As mentioned earlier punishment can be a part of that but it cannot stand alone. In order to overcome this moral inequality which is complicating reconciliation it seems reasonable to state that a mutual admission needs to be given. Professor of international relations Mark Amstutz writes that:

> "The prospect for fulfilling such conditions (of reconciliation) increases when offenders *acknowledge* culpability, express repentance, and authenticate remorse through restitution and/or financial

[169] Maja Garaca Djurdjevic and Danijel Kovacevic, "Bosnia Appeal in Genocide Case Against Serbia Rejected," *Balkan Insights,* 9 March 2017, (available at: http://www.balkaninsight.com/en/article/bosnia-appeal-in-genocide-case-against-serbia-rejected-03-09-2017).
[170] Andalou Agency, "Bosnia's Appeal of Serbia Genocide Ruling Rejected," *Daily Sabah Balkans,* 9 March 2017, (available at: https://www.dailysabah.com/balkans/2017/03/09/bosnias-appeal-of-serbia-genocide-ruling-rejected).

> reparations, while victims respond with compassion to the offenders' remorse by *acknowledging* the confession and releasing them from some or all of their *moral debts*."[171]

If the perpetrators should feel less devalued by acknowledging their crime it might be valuable if the victims could somehow be able to forgive or at least show some kind of acceptance of the perpetrators admission. Thus, it can be argued, that a form of acknowledgement needs to be given on both sides. Nonetheless, neither forgiveness nor apology can be forced upon anyone and true reconciliation after genocide is essentially a difficult issue. In order to be successful, reconciliation needs to be voluntary.

Nonetheless, giving an acknowledgement can be seen as starting a dialogue from where a more fruitful relationship can be restored which is also beneficial for the perpetrators.[172] Acknowledgments are often 'cost-free' (in practical terms) and it is argued that in most cases reconciliation is simply not possible without some kind of acknowledgement of the violation. The 'International Center for Transitional Justice' says that it is important to keep in mind that the aim of transitional justice and the means to obtain reconciliation varies depending on context, but that recognition of the dignity of individuals and acknowledgement of the violations are constant features regardless of context.[173]

I will argue that this is particularly true for sexual violence. But here we move into a 'different' kind of reconciliation as it is not 'only' about reconciliation *with the perpetrators* but also (and maybe even more) about reconciliation *within the victimized group itself*. I have chosen to call this *internal* reconciliation where I call the reconciliation between the victim and the perpetrators *external reconciliation*. It can be argued that victims of *genocidal sexual atrocities* are often not being reintegrated into civil society nor given back equal rights in the same way as victims of non-sexual genocidal crimes. Sexual violence, due to its stigma, is often not truly acknowledged as being part of the atrocities but is rather perceived as a horrendous – but nonetheless, *side-effect* of the overall crime. It means that the dignity of *these individuals* is often not recognized, not only by the perpetrators, but actually by the victims own group. That has been (and is yet) the case for

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[171] Amstutz, *supra* note, 156, 555.
[172] Kora Andrieu, "Sorry for the Genocide: How Public Apologies can Help Promote National Reconciliation," *Millennium Journal of International Studies,* vol. 38, no. 1, (2009), 3.
[173] International Center for Transitional Justice, "What is Transitional Justice?" *International Center for Transitional Justice*, (available at: https://www.ictj.org/about/transitional-justice).

sexual violence as a war crime and crimes against humanity, but also in the case of sexual violence as genocide.[174]

It might mean that even if an acknowledgment is in fact given – either by the perpetrators, the international community or both - the victims of sexual violence committed in the context of genocide 'falls out' of this acknowledgement. It is clear that the attitude towards women who have been subjected to sexual violence during war or genocide is often dominated by exclusion and shaming. Therefore, survivors of genocidal sexual violence are not granted the same chance of reconciliation – not only with the perpetrators but with their own group – because the particular way in which the crime was committed against them remains mainly unrecognized as being part of the genocide. By expanding the understanding of the *effects* of genocidal sexual violence, such recognition might come closer. Ultimately that could make the group more prone to an overall *external* reconciliation with the perpetrators as well. Before an examination of this question is conducted, it will be discussed *how* sexual violence can constitute the crime of genocide under international law.

The legal status of genocidal sexual atrocities

Conflict related sexual violence is not a new phenomenon; it has existed as long as war itself. Rape in war has been internationally outlawed since 1907 in the Hague Regulations where it was implicitly included in Article 46 and subsequently in the Fourth Geneva Convention of 1949 where it was directly included in Article 27. However, the extent of conflict related sexual violence has in no way decreased since the prohibitions and it was not until the middle of the 1990s that it was seriously understood as being an explicit *tool of war*.[175]

The extreme amount of sexual violence committed during the war in the former Yugoslavia and the Rwandan genocide enhanced this understanding. It became evident that the sexual violence was conducted in such a systematic and deliberate way that it could not 'merely' be an inevitable

[174] United Nations Website, "Supporting Survivors of Sexual Violence," *Outreach Program on the Rwandan Genocide and the United Nations*, (available at: http://www.un.org/en/preventgenocide/rwanda/about/support.shtml).
[175] Lesley Pruitt, "Looking Back, Moving Forward: International Approach to Addressing Conflict-Related Sexual Violence," *Journal of Women, Politics & Policy,* vol. 33, no. (2012), 301.

byproduct of war.[176] Consequently, sexual violence was defined as constituting war crimes and crimes against humanity in the ICTY, the ICTR and subsequently the ICC statutes. However, the legal status of sexual violence *as genocide* has been more disputed as it is not explicitly included in the genocide definition, but can be interpreted to fit in under certain paragraphs. This section will give an account on how sexual violence can constitute the crime of genocide under three paragraphs of the UNCG: paragraph (b), (d) and (e). The argument will be illustrated through case-studies.

Paragraph (b) of the UNCG is the paragraph under which sexual violence most explicitly can be included. The *actus reus* of sexual violence is indisputably "causing serious bodily or mental harm to members of the group." However, whether it is done with the *intent* to destroy the group in whole or in part is the constituting as well as challenging element. In the ICJ *Genocide* case, the Court ruled that the rapes committed throughout Bosnia during the war did satisfy the *actus reus* of Article II (b) of the UNCG. However, the Court held that the *dolus specialis* was lacking and hence the sexual violence did not constitute the crime of genocide under Article II (b). The Court noted that these sexual atrocities might amount to war crimes and crimes against humanity but not genocide.[177]

Nonetheless, at that point it had in fact been proven before that sexual violence *can* constitute the crime of genocide under Article II (b). In the case against Jean-Paul Akayesu the Chamber concluded that sexual violence did constitute the crime of genocide as:

> "Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to the destruction of the Tutsi group as a whole."[178]

The Chamber considered that the way in which the genocidal intent can be proven is by looking *contextually* on the rapes committed. That is to consider whether the sexual violence was committed in the context of other systematic attacks against the particular group, to look at the scale of the atrocities, the repetition of the crime, if it was a part of a political doctrine and whether they were

[176] Ruth Seifert, "The Second Front: The Logic of Sexual Violence in Wars," *Women's Studies International Forum,* vol. 19, nos. 1/2, (1998), 35.
[177] *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, International Court of Justice, 26 February 2007, para. 319.
[178] *Prosecutor v. Jean Paul Akayesu,* Judgment, Trial Chamber, International Criminal Tribunal for Rwanda, 2 September 1998, para. 731.

committed by the same offenders.[179] As the Chamber pointed out, the sexual violence in Rwanda was committed solely against Tutsi women *because* they were Tutsi women and therefore can be seen as a direct part of the policy of destroying Tutsis. A woman testified that she was *not* raped because her ethnicity was unknown to the perpetrators.[180]

This is indicating that sexual violence was used as a deliberate tactic to traumatize the Tutsis into destruction and to ruin the very foundation of society. The Chamber confirms this proposition as it writes:

> "Sexual violence was a step in the process of *destruction* of the Tutsi group – destruction of the *spirit*, of the *will to live*, and of *life itself*."[181]

Testimonies from survivors of sexual violence during the genocide illustrate how this terrifying tactic was comprehended. Some victims were asking their perpetrator to kill them to be relived from the suffering, but the perpetrators refused, telling the victims that instead they would "die of sadness."[182] This statement reveals how sexual violence was used to intentionally destroy the Tutsis through deliberately imposing extreme mental as well as physical harm upon members of the group.

It can be claimed that sexual violence can constitute genocide under paragraph (d); imposing measures intended to prevent births within the group. This proposition has not been proven by any court yet, and the argument is more complex than the previous. It could be argued that there is a double-intention inherent in this paragraph as there must both be an intention to prevent birth within the group, and an intention to destroy the group through that prevention of birth. However, it can also be said that preventing births within a group will obviously result in the destruction of the group – although it will not be an immediate result.

There are several ways in which sexual violence can be a measure to prevent birth. First of all it can be argued that the very act of committing a sexualized crime can traumatize the victims into

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[179] *Prosecutor v. Jean Paul Akayesu,* Judgment, Trial Chamber, International Criminal Tribunal for Rwanda, 2 September 1998, paras. 523-524.
[180] *Prosecutor v. Jean Paul Akayesu,* Judgment, Trial Chamber, International Criminal Tribunal for Rwanda, 2 September 1998, para. 732.
[181] *Prosecutor v. Jean Paul Akayesu,* Judgment, Trial Chamber, International Criminal Tribunal for Rwanda, 2 September 1998, para. 732.
[182] Human Rights Watch Report, "Shattered Lives – Sexual Violence During the Rwandan Genocide and its Aftermath," *Human Rights Watch/Africa,* September 1996, (available at: https://www.hrw.org/reports/1996/Rwanda.htm).

refusing to procreate afterwards. Hence, the group will slowly be destroyed due to a falling birthrate. In the *Akayesu* judgment it was confirmed that measures intended to prevent birth are not confined to be *physical* but can also be *mental*.[183] It is very difficult to prove whether the intent of the sexual violence was specifically to traumatize the victims not to procreate. However, by combining the *physical* way in which the sexual violence was conducted with the *mental* effect that the act would inevitably cause, we might be able to deduce the intent.

By looking at cases such as Rwanda and Darfur it could be argued that the perpetrators were well aware that the sexual violence would have at least the *physical* and maybe also the *psychological* effect of making the victims unable to procreate – and that this was the exact intent. In Rwanda the sexual violence was often accompanied by mutilation of the sexual organs with *e.g.* machetes, knives, sticks, boiling water and sometime acid.[184] Forced abortion is also an act of sexual violence and is not only preventing the woman from giving birth, but is also destroying the life of a child which was already created. In Darfur pregnant women were often raped with sticks or weapons till abortion or had their womb cut open after rape, the perpetrators said that this was "a child of an enemy."[185] Obviously, these women – if they survive – will in most cases not be able to procreate *physically* after these crimes and due to the hyper-violent character of the acts they might also be *psychologically* traumatized into inability to procreate.

In the ICJ *Genocide* case, the Court held that because the birth rates within Bosnia after the war had not decreased it could not be proven that the intent of the perpetrator was to prevent birth within the group by traumatizing the women to not procreate through the sexual violence.[186] However, it can be argued that the Court has made this deduction based on a backwards assessment. If one reads the Genocide Convention it becomes evident that whether the perpetrators *succeeded* or not in preventing birth within the group, through whatever measure they imposed, is irrelevant as long as the *intent* was to prevent birth. If sexual violence was used as a measure intended to prevent births

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[183] *Prosecutor v. Jean Paul Akayesu,* Judgment, Trial Chamber, International Criminal Tribunal for Rwanda, 2 September 1998, 508.
[184] Human Rights Watch Report, "Shattered Lives – Sexual Violence During the Rwandan Genocide and its Aftermath," *Human Rights Watch/Africa,* September 1996, (available at: https://www.hrw.org/reports/1996/Rwanda.htm).
[185] Women under Siege, "Witness: Darfur-Sudan," *Women under Siege,* (available at: http://www.womenundersiegeproject.org/witness#darfur-sudan).
[186] *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, International Court of Justice, 26 February 2007, paras.358. 360.

within the group, with the specific intent of destroying group, the act constitutes genocide under Article II (d) regardless of the result of that act.[187]

Moreover rape can be perpetrated with the intent to impose forced pregnancy on women within a particular group in order to force the women to give birth to children that does not belong to the their own group. In many societies the ethnicity of a child is believed to be determined by the father's ethnicity. It means that a child of *e.g.* a Bosniak mother and a Serb father will be perceived as being Serb. In the *Akayesu* judgment the Chamber noted that:

> "In patriarchal societies, where membership of a group is determined by the *identity of the father*, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, *with the intent* to have her give birth to a child who will consequently *not belong* to its mother's group"[188]

Obviously this is a biological ignorant argument as a child is of course receiving genes from both the mother and the father. However, once again that is irrelevant as it is the *intention* behind the act and not the *result* of the act which determines its genocidal status. Infamous 'rape camps' existed several places in Bosnia during the war in which Muslim women were systematically raped and some held captured until abortion was too late. Survivors testified that they were told by the perpetrators that now they would give birth to 'Serbs' or 'Little Chetniks.'[189] If the perpetrator believes that the child born as a result of the rape will belong to his group and he is committing it with the intent of destroying the group by preventing the woman from given birth to children of her own group – then the act is genocide under Article II (d).

Although it is more disputed in this regard, the same argument can in fact also be used for paragraph (e): Forcibly transferring children of the group to another group. This act can be interpreted to included forced pregnancy through rape where the children born from such action will not belong to the victims but the perpetrators group and hence have been 'forcibly transferred.'

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[187] Anthony Marino, "The Status of Rape as Genocide," *Boston University International Law Journal,* vol. 27, no. 205, (2009), 217.

[188] *Prosecutor v. Jean Paul Akayesu,* Judgment, Trial Chamber, International Criminal Tribunal for Rwanda, 2 September 1998, para. 507.

[189] Robert Fisk, "Bosnia War Crimes: 'The Rapes Went on Day and Night:' Robert Fisk in Mostar, Gathers Detailed Evidence on Systematic Sexual Assaults on Muslim Women by 'White Eagle' Gunmen," *The Independent,* 8 February 1993, (available at: http://www.independent.co.uk/news/world/europe/bosnia-war-crimes-the-rapes-went-on-day-and-night-robert-fisk-in-mostar-gathers-detailed-evidence-of-1471656.html).

Again, for this crime to be genocidal it has to be proven that the intention behind it was to destroy the group. The horrifying evidence and testimonies from Bosnia indicates that this was the case in some of the 'rape camps.' In Darfur women who were subjected to sexual violence by the *Janjaweed* were also often told that these children created through the rape would be 'red' or Arabs and hence the group of "Black Africans" would be diluted.[190]

These statements indicate that the perpetrators were committing the rapes with the intention to transfer the children from the Bosniak to the Serb group or from the "Black African" to the Arab group and hence gradually diluting the victimized groups by 'changing' the ethnic composition. In the ICJ *Genocide* case, the Court considered this argument and determined that paragraph (e) had not been violated because the children would nonetheless be brought up by Muslims and therefore not be Serbs.[191] Here the Court is again basing its argument on the *result* instead of the *intent* of the crime and could for that reason be considered invalid from a *legal* perspective. However, whether a genocidal crime of sexual violence will be convicted under paragraph (d) or (e) doesn't seem to matter that much as long as it is understood that forced impregnation *can be* a genocidal crime if the intention of the offender is to change the ethnic composition through that act.

A similar situation to that of Bosnia is currently unfolding in Iraq and Syria where ISIS is capturing women from the ethno-religious group Yazidi, selling them as cattle, taking them as 'wives,' forcing them to convert to Islam and raping and impregnating them whereas the children are perceived as being Muslims and not Yazidis. The Human Rights Council issued a report on June 16, 2016 in which it was declared that ISIS is committing genocide against the Yazidis. By referring to the *Akayesu* judgment the Council stated that sexual violence committed against the Yazidi women constitutes the crime of genocide under the UNCG Article II paragraph (b) and (d). The women are forcibly impregnated by ISIS-fighters with the intention of changing the ethnic composition and in addition subjected to unimaginable mental and physical suffering through multiple rapes and systematic sexual violence as a part of the overall destruction of the Yazidi people.[192]

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[190] Hagan and Rymond-Richmond, *supra* note, 49, 10.

[191] *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, International Court of Justice, 26 February 2007, para. 366.

[192] UN Human Rights Council, Thirty Second Session, Agenda Item 4,"*They Came to Destroy:" ISIS Crimes Against the Yazidis*, UN Doc. A/HRC/32/CRP.2, 15 June 2016, paras. 123. 145.

Acknowledging sexual violence as a genocidal crime

A sorrowfully large amount of evidence indicates that sexual violence is and has been used a part of a genocidal strategy. Additionally, case-law and further legal analysis on the matter confirms that sexual violence can constitute the crime of genocide under international law. However, is it important to acknowledge sexual violence as a genocidal crime? Does it mean anything for reconciliation that sexual violence is recognized as being genocide? The main problem of sexual violence is that in patriarchal cultures rape is regarded as shameful. Women who have been subjected to sexual violence during war and genocide are often ostracized by their family and society, their husbands sometimes divorce them and often they find it difficult to remarry.[193]

These are the most common reasons why many survivors of sexual violence do not reveal it, because of the stigma attached to this crime. This stigma might be maintained and reproduced by the fact that few people within civil society understand that sexual violence is also part of the overall crime committed – *e.g.* the genocide. They perceive it as something shameful and honor related instead of an unacceptable violation of the individual and international law. In Darfur exclusion of women who have been subjected to sexual violence by the *Janjaweed* is in many cases particularly severe. A range of testimonies from Dafuri women reveals how devastating this stigmatization is:

> "After the man raped me, they (my family) would not eat with me. They treated me like a dog and I had to eat alone." (…) "When I got back to my brother's house I told him what had happened. My brother said to me, 'If you stay in my house, I'm going to shoot you (to kill you).' After that, I was afraid and I came to Farchana. My mother doesn't speak to me."[194]

Another woman who had been raped and told her family about it was kicked out of the house and her uncle followed her and cut off all her hair. Following the atrocities in Bangladesh, the stigma against the enormous number of women who were raped was so huge that many women chose to stay with their rapist because they were shamed out of their own community. A Bangladeshi woman recounts:

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[193] Human Rights Watch Report, "Shattered Lives – Sexual Violence During the Rwandan Genocide and its Aftermath," *Human Rights Watch/Africa,* September 1996, (available at: https://www.hrw.org/reports/1996/Rwanda.htm).
[194] Physicians for Human Rights report, "Nowhere to Turn: failure to Protect, Support and Assure Justice for Darfuri Women," *Physicians for Human Rights and Harvard Humanitarian Initiative*, (2009), 28.

> "We went with them voluntarily because when we were being pulled out from the bunkers bythe Indian Soldiers, some of us half-clad, other half-dead, the hatred and deceit I saw in the eyes of our countrymen standing by, I could not raise my eyes a second time. They were throwing variousdirty words at us … I did not imagine that we would be subjected to so much hatred from our own countrymen."[195]

In Rwanda women are also often being excluded and live in isolation if they have been raped during the genocide. Interviews show that many feel guilty for having survived and some are accused for having collaborated with the *genocidaires* because they survived.[196] They do not understand that the rapes the women were subjected to were not a 'substitute' for being subjected to a genocidal crime – it was a genocidal crime.

Revealing the truth about these crimes by naming them 'genocide' might help change the societal attitude towards the victims of that crime. Using the G-word about sexual violence might sensitize a society into understanding the nature of the crime and that the victims have been just as much subjected to genocide as those who died or suffered from other non-sexual genocidal crimes. That could contribute to securing a paradigm in which the crimes committed against (primarily) women during genocide is not understood as being any less significant or genocidal merely because the women 'survived.'

The feature of genocidal sexual violence is that the very *intention* of doing it for the perpetrator is to destroy the group which naturally includes destroying the women who they are subjecting to the sexual violence. That destruction can take many forms and does not necessarily have to be a biological destruction but is rather in most cases of genocidal sexual violence a deliberate mental destruction of the victim. That is evident from cases such as Rwanda where the victims were told that they would not be killed instead they would "die of sadness." In Bosnia women were subjected to sexual torture in form of forcing them to bear children of the perpetrators in order to "break their will."[197]

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[195] Women under Siege, "Witness: Bangladesh," *Women under Siege,* (available at: http://www.womenundersiegeproject.org/witness#bangladesh).
[196] Human Rights Watch Report, "Shattered Lives – Sexual Violence During the Rwandan Genocide and its Aftermath," *Human Rights Watch/Africa,* September 1996, (available at: https://www.hrw.org/reports/1996/Rwanda.htm).
[197] Lauren Wolfe, 'Rape is being used for Ethnic Cleansing in South Sudan. But it's not the First Place, or the Last,' *Women Under Siege,* 19 December 2016, (Available at: http://www.womenundersiegeproject.org/blog/entry/rape-is-being-used-for-ethnic-cleansing-in-south-sudan.-but-its-not-the-fir).

This destruction may fall under the concept of *social death*. Feminist philosopher Claudia Card describes this concept as a loss of social vitality, loss of social identity and additionally loss of meaning with one's existence. Relationships are maintaining social vitality and create social identity. The theory holds that when these relationships are lost the person losses his/her social vitality and social identity, and hence is 'dying socially.'[198] I will claim that this *social death* may be particularly prominent for survivors of genocidal sexual violence. As the examples above revealed many of these women are being excluded from the family and community. That means that not only have they lost their relationships to those who died they have also lost their relationships to those who survived.

It can be argued that the distinct thing about genocidal sexual violence is that the ostracized women are socially killed in that they have their belonging to the group *destroyed.* Even though they 'survived' and parts of the group still exist, they have been 'destroyed' as being part of that group. Naturally, that is also (psychologically) destroying the group as a whole, despite the fact that it is the groups own members who maintains this condition of destruction. In that sense it could be argued that the group is maintaining genocide *after* genocide is over as they are continuously destroying the group through the stigmatization of its members. Of course it is not *all* survivors of genocidal sexual violence who are being excluded and stigmatized, but the number is huge.

As shown above the examples indicate that the perpetrators are exactly aiming at causing this social death to the victims by humiliating them and stripping them from their social identity. In Darfur interviews with many survivors show that often the perpetrators took their clothes after the sexual violence and forced the women to walk back to their village naked.[199] This is highly disturbing regardless of which society it happens in, but in Darfur were not even a woman's own children are supposed to see her naked, such conduct is particularly destroying for the woman's social identity. As part of that society the perpetrators are surely well aware of this and that is exactly why they do it. Probably unaware of this academic concept, their aim is yet to *socially kill* the women. Hence, it can be argued that the genocidal intent of the perpetrator is colored by gender.

Using the genocide-label about sexual violence might enhance an understanding that men and women are often targeted differently – not only in conflict – but also in genocide. In genocides the

[198] Card, *supra* note, 118, 63.
[199] Hagan and Rymond-Richmond, *supra* note, 49, 23.

case is often that men are killed and women are raped – both can be genocidal crimes. In genocide women are often targeted intersectionally as they are first of all targeted because they belong to a particular group and second because they are women. That does not make it worse than the way in which males are primarily targeted, but it certainly doesn't make it any less significant or necessarily less genocidal either – it makes it distinct. While men are primarily biologically killed, women are primarily socially killed.

By looking at the *effects* of genocide, and particularly the effects for survivors of sexual violence it may be argued according to the theory of social death that the genocide-label matters because it opens up an understanding of the reality which follows for survivors of genocidal sexual violence: That is a reality of loss off social relationships due to stigmatization and thus loss of meaning with one's existence. It can be argued that they are experiencing a continuous genocide as their group membership is destroyed. A Rwandan survivor, who was publicly gang-raped, describes how she had become indifferent to life and how life is in fact causing her further suffering:

> "I regret that I didn't die that day. Those men and women who died are now at peace whereas I am still here to suffer even more. I'm handicapped in the true sense of the word. I don't know how to explain it. I regret that I'm alive because I lost my lust for life."[200]

The genocide-label might matter in that it can help describe that the genocide is actually still taking place for many of the survivors of sexual violence after the genocide is over. For them the genocide might still be ongoing as they have been *destroyed* as a part of the group and yet are condemned to somehow live within it – they have been socially destroyed. A woman from Rwandan explained that: "We are not understood by society. We are the living dead."[201] Using the genocide-label to describe the sexual violence committed is not only often more adequately covering the experience that the women had, it may also enhance a better understanding of this reality within civil society. Thus, it might help erase stigma and reintegrate victims into the community which can improve the healing of the society as a whole.

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[200] Women under Siege, "Witness: Rwanda," *Women under Siege,* (available at: http://www.womenundersiegeproject.org/witness#rwanda).
[201] Human Rights Watch Report, "Shattered Lives – Sexual Violence During the Rwandan Genocide and its Aftermath," *Human Rights Watch/Africa,* September 1996, (available at: https://www.hrw.org/reports/1996/Rwanda.htm).

Genocide has classically been described as being distinct from other crimes due to the character of its victims – which is *a group.*[202] Card suggests another understanding of what is particularly distinct for genocide:

> "What distinguishes genocide is not that it has a different kind of victim, namely, groups (although it is a convenient shorthand to speak of targeting groups). Rather, the *kind of harm* suffered by individual victims of genocide, in *virtue of their group membership*, is not captured by other crimes."[203]

The 'kind of harm suffered by individuals' is referring to the social death. The social death can be experienced by victims who lost their entire family and hence all their relationships, social vitality and social identity. But it can also be experienced, I will claim, by victims of sexual violence who did not lose all their relatives in a physical manner but in a social manner as the relatives (and the community) ostracizes the victims. Hence, this understanding of genocide suggests that sexual violence can be genocidal in a manner which is actually happening *within* the group as the intentional harm done by the perpetrator in order to destroy the group is in fact *maintained* by the group itself.

Men and boys can also be victims of sexual violence which can also constitute the crime of genocide under paragraph (b). Sometimes men are directly raped and other times they are subjected to other forms of sexual violence. During the war in Bosnia it has been revealed that men were forced to perform oral sex on each other publicly. This is a disturbing crime in all contexts, but in societies where not only sexual violence is much tabooed but homosexuality in general is highly disvalued, such crimes can be said to be particularly destructive for the victim. Former legal advisor on gender at the ICTY Patricia Sellers explains how this is somehow giving the victims a feeling of dying and yet they are *condemned* to live.[204] This is how men can also be at risk of experiencing a social death through sexual violence. However, the problem is generally much more outspoken for women because they are the main target for this crime and because they can be targeted with genocidal sexual violence in several ways.

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[202] Luban, *supra* note, 138, 574.
[203] Card, *supra* note, 118, 68.
[204] United Nations International Criminal Tribunal for the Former Yugoslavia, "Crimes of Sexual Violence," *ICTY website,* (available at: http://www.icty.org/sid/10312).

As mentioned it is not an uncommon genocidal strategy to forcible impregnate women to make them give birth to children of the perpetrators group. However, in regard to non-genocidal sexual violence, children are also often a common effect of the crime, so that is not distinct for genocidal sexual violence as such. However, there is in fact a distinction, because as earlier mentioned it is an *effect* of sexual violence as *e.g.* crimes against humanity or war crimes, where it in genocide is sometimes the very *intention* of the crime that a child shall be born and not be a part of the mothers group. In male dominant-cultures that will often also imply that the mother of that child does not belong to the group anymore either. The child symbolizes a 'visible' imprint of the perpetrators face and contributes further to the stigmatization of the woman.

In Darfur survivors recounts how perpetrators said that: "Every woman will deliver red. Arabs are the husbands of those women."[205] 'Red' is referring to skin color as Arabs are said to a have redder skin tone than so-called Black Africans. Such a statement indicates that impregnation was believed to detach the women and child from their original group. The subsequent treatment of many of these women by their family and community confirms that this belief was not only held by the perpetrators. In Rwanda an estimate 2000-5000 children was born as a result of rape during the genocide. These children are known as "children of hate." Some families accept the children but others reject the woman and the child, saying that it is an *Interahamwe*-child.[206]

Additionally many of the women who were subjected to genocidal sexual violence, especially in Rwanda, were also given a physical death-sentence as huge numbers were infected with HIV/AIDS and many even deliberately.[207] Besides the deadly effects of this disease it also further exacerbated the social death that these women are experiencing. Not only had they been subjected to a highly stigmatizing crime, as a result of that crime they were also infected with a highly stigmatizing disease.

Many women have died of HIV/AIDS following the genocide in Rwanda as they did not have the means or courage to see a doctor. Many of those who died have children born from rape who are

[205] Hagan and Rymond-Richmond, *supra* note, 49,10.
[206] Human Rights Watch Report, "Shattered Lives – Sexual Violence During the Rwandan Genocide and its Aftermath," *Human Rights Watch/Africa,* September 1996, (available at: https://www.hrw.org/reports/1996/Rwanda.htm).
[207] United Nations Website, "Background Information About Sexual Violence used as a Tool of War," *Outreach Program on the Rwandan Genocide and the United Nations*, (available at: http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml).

now alone, stigmatized because they are children of *Interahamwe* and possibly infected by HIV/AIDS as well.[208] We need to chance the attitude towards sexual violence and that can be done by creating a new paradigm for how sexual violence and its effects are articulated and understood. Using the G-word to describe these sexual crimes that the women have experienced may open up for a respond which is more knowledgeable and understanding about what it is that these women have suffered and are continuously suffering.

It might also be the case for victims of other genocidal crimes than the sexualized that they are socially dead due to loss of all family members, mutilation *etc.* and that should surely not be underestimated either. However, it seems reasonable to state that the *social death* is particularly urgent for survivors of sexual violence due to the worldwide stigma which is attached to sexualized crimes. However, starting to understand and thus articulate sexual violence as genocide will not necessarily entail that the women are able to reconcile. But at least it could give them an actual chance to do so and if not with the perpetrators, then maybe at least with their relatives or themselves. This might be crucial for reintegrating these women into society. If a huge number of the remaining members of the group are somehow still experiencing genocide in form of the social death, reconciliation is very far away. Reconciliation, I would claim, cannot take place if a substantial amount of the members of the group are excluded from this process. It can be argued that an '*internal*' reconciliation among the members of the group is needed for any '*external*' reconciliation can be truly successful.

This analysis shall not be misunderstood as concluding that the lack of applying the genocide-label to sexual atrocities is the sole reason for the stigma and issues attached to this problem. Rather, this analysis suggests that *using the G-word* about these crimes, may be a helpful tool to face and overcome this stigma as the true nature of the crime is exposed. Of course overcoming such deep-rooted stigma and perception of sexual violence is an overall feminist project not only about 'right' or 'wrong' labeling of the crimes. It is a deep discursive change which is needed. That change is not merely about changing the perception of sexual violence but is actually about changing the perception of gender and gendered roles within the community. However, that change might be helped on its way by starting to describe the crimes more adequately by pulling them out

[208] Human Rights Watch Report, "Shattered Lives – Sexual Violence During the Rwandan Genocide and its Aftermath," *Human Rights Watch/Africa,* September 1996, (available at: https://www.hrw.org/reports/1996/Rwanda.htm).

of the sphere of honor and shame and into an authentic understanding that this is serious violations of international law and of individual human beings.

In that regard I should also emphasize that genocidal sexual atrocities are not necessarily worse than other forms of sexual atrocities – but if we understand it in terms of social destruction, it can be argued to be distinct. The social destruction is a key part of genocidal sexual violence, but it is often neglected and that might be a reason why it should be articulated as a genocidal crime as that might bring focus to this socially destructive element. It is about making communities realize that they themselves can actually 'maintain a genocidal condition' after the genocide is over, by ostracizing victims of sexual violence (and other victims for that sake).

Acknowledging that sexual violence can be a genocidal crime may make the community realize that the ones who are destroying the group when genocide *is over* is in fact the group itself via the maintenance of social death. Social destruction can only exist insofar that the community itself is maintaining the destruction by excluding the members who have experienced sexual violence or other stigmatizing crimes. In that way it is about making communities realize that they have a responsibility themselves to rebuild the group by reintegrating and caring for its members no matter what they have been subjected to.

This responsibility is the Yazidi community in fact trying to take upon themselves at the moment. Spiritual leaders of Iraq's Yazidi community are trying to change the community's attitude towards women who have escaped ISIS sexual captivity by offering the women to be re-baptized into the Yazidi faith and thus become 'purified' and reintegrated into the Yazidi group. Conversion and adult baptism is normally not possible in the Yazidi faith. To be Yazidi both parents have to be Yazidi and conversion to other religions excludes you from the Yazidi community.[209] However, this historic practice is attempted altered by some spiritual leaders who emphasize that these women were forced to converted to Islam and marry the ISIS fighters. Baba Chawish is one of the religious leaders who is re-baptizing the women in the holy place Lalish: "Now we've said that the door is open for everyone who has been raped, they can still be purified and baptized (…) They are here to

[209] Susanna George, "Yazidi Society Change to try and Rescue a Generation of Traumatized Women," *Public Radio International,* May 2015, (available at: https://www.pri.org/stories/2015-05-18/yazidi-society-changes-try-and-rescue-generation-traumatized-women).

become Yazidis again."[210] This can be seen as an active way of eluding the social death by the community itself and hence to stop the "post-genocidal genocide."

Other such attempts have in fact been tried before in other cultures which experienced genocide. In Bangladesh after the genocide in 1971 the Sheikh Mujibur Rahman attempted to make a discursive shift of the attitude towards the women who had been raped by articulating them as *Birangona* – meaning 'heroine' or 'the blameless one' in Bengali. This was a conscious attempt to reintegrate them into the (yet) highly patriarchal society of Bangladesh. However, the attempt fatally failed and the word *Birangona* is now ironically associated with dishonor and women who lost their dignity.[211] Many of these women was rejected by their family, excluded from society and ended up living alone in slums outside the cities.[212]

However, at that point (the 1970s) no one really spoke about how sexual violence can be genocidal and not even that it can be a war crime or crime against humanity. As mentioned it was first during the 1990s that such discourse was created. In regard to the Yazidi case, that discourse had entered into the consciousness of the world and the international community has officially named the sexual violence not 'only' war crimes and crimes against humanity, but genocidal. Hence, awareness has been made on how the sexual violence is destroying the group by forcing the women to cease to be Yazidis. Whether this is a contributing reason why the Yazidis are doing a worthy effort to reintegrate the former captured women in order to rebuild their group, can only be a guess. However, it is indisputably very valuable for the Yazidi survivors that this practice is taking place and undoubtedly this reintegration is making reconciliation *within* the society more likely.

Acknowledging genocide in general is about the *external* reconciliation – meaning among the victims and the perpetrators and possibly the surrounding world. Acknowledging sexual violence as genocide is to a large extent about the *internal* reconciliation – meaning among the surviving members of the targeted group. The external reconciliation will most probably be much more likely to succeed if internal reconciliation is also obtained as such reconciliation would include the group as a whole and not only a part of it. Whether applying the genocide-label to sexual violence is

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[210] *Ibid*.
[211] Anushay Hussain, "The War Heroine Speaks: A Special Series on Women Bangladesh's Independence War," *Anushayspoint,* 17 July 2012, (available at: https://anushayspoint.com/2012/07/17/i-am-the-war-heroine-speaking-a-special-series-on-women-bangladeshs-war-of-independence/).
[212] Seifert, *supra* note, 176, 37.

exactly having the effect of ending stigma and hence contributing positively to reconciliation internally and externally is very hard to verify. However, if we can broaden our understanding of how genocide can in fact continue *after* genocide through the social death, we might be able to help change the attitude towards these individuals by making the affected communities realize their own responsibility in seriously *ending genocide*.

Raising awareness about how sexual violence can constitute genocide not only in its legal definition, but also through the intentional effects that this crime causes – *i.e.* the social death – could make communities refuses to subjugate to this genocidal logic. To acknowledge sexual violence as a genocidal crime regards the *internal* reconciliation-process as it is about creating a synchronized reality between the victims of that crime and the rest of the community. It is about ensuring justice not only at a criminal level but also at a structural level. If such justice is obtained, the group will stand much stronger. An *internal* reconciliation process might be just as valuable as an *external* reconciliation process and the former may even be what makes the latter truly possible.

Interim conclusion and way forward

The role of the genocide-label in *external* reconciliation is quite challenged. Acknowledgement of the violations committed is argued to be essential for reconciliation, and in relation to genocide that will imply that the G-word is attached to the situation in question. For many victims and victimized states, it seems to matter a great deal that the genocide-label is being used to acknowledge what happened, not only by the perpetrators but sometime also by the rest of the international community.

Acknowledgement can be a valuable way of expressing that what has happened first of all *did happen* and second of all *was wrong.* Hence, it can be seen as a way of stepping out of the genocidal condition as it emphasizes a belief in the dignity and humanity of the individuals concerned. Using the G-word can be a symbolic way of compensating as it can rebuild trust among victims and perpetrators which can cultivate reconciliation and make it easier to reestablish life. However, due to the moral stigma which is attached to the genocide-label, the perpetrators are often very reluctant about using it. Moreover, if they still carry the genocidal ideology they cannot see the act done as wrong or genocidal. Denial is a common feature of post-genocide and it is regarded as the last stage of genocide. This is making reconciliation after genocide inherently difficult.

However, denial is not only hurting the victims but also the perpetrators themselves as it is damaging their reputation and image. If we could transcend the collective demonization of the perpetrators which is attached to the genocide-label it might be possible to make the perpetrators understand that a recognition is also in their own interest as they would appear as more credible actors at the international scene. While denial is only maintaining their immoral character, acknowledgment can bring them back into the sphere dignity and integrity. Organizations which are working with transitional justice and reconciliation could for instance start to actively include the distribution of such understanding in their work.

However, reconciliation can (and needs to) take place on more levels than that between perpetrators and victims. *Internal* reconciliation is often a neglected part of the overall reconciliation-process but is no less important, I will claim. Acknowledging that sexual violence can be a genocidal crime – not 'only' via the genocidal crime itself, but also via the socially destructive effects that this crime causes – can open the possibility of internal reconciliation as these genocidal effects will be exposed to the community. The community might realize its own responsibility in ending this genocidal condition by reintegrating its members and thus repair what the perpetrators intended to destroy – the group.

It is about creating an understanding that there are several ways to be destroyed and to respect that there are distinct ways in which a person can be subjected to genocide. Genocide is a group crime indeed, but it affects individuals. Such understanding could open up for a better and more adequate response to this invisible tragedy not only by the community itself but also by the international community. The international community could contribute to a discursive shift in the perception of the victims by investing in programs which are raising awareness of sexual violence, stigma and social death and which are empowering women to take active part in the reconciliation-process to make their voices heard.

Organizations involved could communicate with leaders of the communities, whether religious or political, about the problem which could possibly equip them better to make an active effort to unify their group by altering the attitude towards these victims. In addition, financial support to post-genocidal societies should be distributed in a manner which is not overlooking these victims but includes the offer of legal, social, medical and psychological help to the victims in a cultural sensitive manner. Ultimately, this effort might be crucial for the success of the overall

reconciliation-process. If the group itself is not internally reconciled the external reconciliation might at best be artificial or fragmented.

Conclusion and suggestions

Whether the genocide-label matters is context-dependent. That is not surprising as such, however, what is surprising is how little that has in fact been taken into consideration when genocide is discussed. What has primarily characterized the 'genocide debate' is its aimlessness. Instead of discussing the *effects of applying* the genocide-label the debate has mostly been occupied with discussing whether or not the label *can be applied*. In too many cases the G-word has been an aim in itself.

This approach has turned out to be particularly destructive and undermining for preventing and stopping genocide. When time and energy should have been spend on determining how to take meaningful and effective action to either avert or to stop a tragedy, we have instead been continuously stuck in an irrelevant semantic debate over whether or not the situation in question can qualify as genocide. In 2007 the ICJ clarified that a *legal* obligation to prevent genocide does in fact exist. However, that still requires that the genocide-label – in its legal definition – is attached to the given situation. If genocide prevention should be truly effective we cannot wait for it to be determined as genocide, because that will necessarily imply that it is too late to prevent it. Relying on the legal definition of genocide in the attempt to prevent or stop genocide will only maintain the misleading focus on *what it is* instead of *what to do*. The genocides in Rwanda and Darfur have regretfully exemplified this problem far too well.

Additionally, the imaginary 'crime hierarchy' which has placed genocide above other atrocities crimes combined with the genocide definition's legal preciseness has permitted international actors to disclaim responsibility to take action. A discourse seems to exit in which only genocide is perceived as being a real action-trigger and that is counterproductive in several ways. As the US's (non)handling of Darfur showed, a genocide finding does not even guarantee action. Even more importantly, this discourse makes the determination to act rely on the strict legal wording of the genocide definition which is not only hard to meet but also quite arbitrary whether it will be met. Moreover, this perceived crime hierarchy downplays other serious atrocity crimes which are no less

dreadful and devastating than genocide. It is a *moral* obligation not to rely on a *legal* definition to make a *political* determination about whether or not to save human lives.

If the international community started to focus their attention on taking action against *mass atrocity crimes* it would not only transcend the inappropriate neglect of these horrific crimes, it would also mean that action would be taken against a possible precursor to genocide, without having to name it as such. R2P provided the vocabulary and potential for taking such action. However, norms only exists insofar that we use them. If the veto has proved an obstacle to the use of the norm in too many cases, the veto needs to be revised. 'RN2V' can be used as a starting point to cultivate an understanding that *nothing* justifies inaction in case of mass atrocity crimes. Case-studies has revealed that regardless of whether we speak about preventing or stopping genocide, the genocide-label in its legal definition has been an obstacle for doing either. Therefore it must be concluded that in regard to preventing and stopping genocide, the genocide-label *should not* matter.

Punishing genocide necessarily implies that the genocide-label is used in the conviction. However, whether punishing genocide have a deterrent effect or not is difficult to verify as so few have in fact been convicted for the crime of genocide. Deterrence is nonetheless often assumed to be an almost inevitable effect of punishment. But as the genocidal-mind is so influenced by the genocidal narrative it is very questionable whether the prospect of being punished will ever have a deterrent effect on *genocidaires*. Moreover, a genocide conviction does not necessarily imply a higher sentence than other mass crimes, just *because* it is genocide. Despite the fact that this is actually a very encouraging finding, as sentences should surely not be measured in *labels* but rather in *severity* and *scale*, it can be concluded from a purely practical perspective that the genocide-label *does not* matter for punishment as the label implies no tangible effects as such.

Nonetheless, there is an inherent value in holding *genocidaires* accountable, not so much for the punishment in itself but rather for the trials *expression* of moral truth. In this expression (*i.e.* the judgment) it *does* matter that the genocide-label is applied in order to make the expression reflect that it is *this particular* crime which is morally wrong and internationally disvalued. Hence, gaining criminal justice for the crime of genocide can contribute to constructing a *normative* world order. However, as the case of Darfur revealed it should be carefully considered *when* such justice-process is initiated. Justice is the companion of peace, but justice must never become a substitute for action.

When atrocities are *ongoing* and the prospect for peace is yet far ahead, the quest for accountability might not be the best tool to use as a starter to end these atrocities. Before making an ICC referral it must be carefully considered based on each case, whether there is a reasonable prospect of enforcing arrest warrants and not further ripping up the conflict. Together international security and law is a powerful couple and so is the UNSC and the ICC. But when the UNSC dismisses its responsibility by merely passing on its main tasks to the ICC which was never tailored to be a peace-enforcer, the division of labor is getting too blurred and the workload of the ICC is getting unfairly and fruitlessly heavy. International security and law sustains each other, but it still requires that each takes its own share if the other shall flourish. Focus must first of all be on ending the violence and in this attempt it is not relevant whether we call it genocide or atrocity crimes. Therefore the genocide-label only matters for justice insofar that it is not interrupting the pursuit for peace – and that is often when the situation is stabilized and the conflict is no longer severely ongoing.

When genocide is over acknowledgement of the violation can be argued to be crucial for reconciliation as it can help erase suspiciousness by expressing that what happened was wrong and thus reestablish trust and a moral equilibrium. Acknowledging genocide necessarily implies that the genocide-label is used to describe the violence. However, due to the moral stigma that the genocide-label carries, perpetrators are often reluctant about using the G-word. Case-studies shows that this is often impeding reconciliation as the need of the perpetrators and victims may be contradicting. While the G-word seems essential for many victims, the perpetrators often feel burdened and shamed by the G-word.

This is an inherently difficult issue, but a suggestion could be to start working on moving beyond the collective demonization of the perpetrators. Potentially it could create an understanding in the perpetrators that they are also benefitting from recognizing the violation, as it can actually be seen as a chance of stepping out of the category of immorality. Organizations and actors involved in the reconciliation process could advantageously help enhance such understanding. Another part of reconciliation is the *internal*. Few have paid much attention to the need for reconciliation *within* the victimized group after mass atrocities. Due to the stigma and shame attached to sexual violence this crime is especially disruptive for the group's internal healing.

With the *Akayesu* judgment it was manifested that sexual violence can constitute the crime of genocide under the UNCG. Such acknowledgement might be really important as it can help sensitize the society into an understanding that this crime was also part of the overall genocide and not merely a side-effect nor an honor violation. However, I will argue that we need to broaden our understanding of the genocidal character of sexual violence even further if this acknowledgement should have truly positive and changing effects for reconciliation. We need to acknowledge that genocide can in fact be said to continue *after* genocide due to the *social death* and that this is particularly outspoken for survivors of genocidal sexual violence.

By interpreting the case studies there are reasonable indications that perpetrators intended to cause the *social death* through the sexual violence. Testimonies from the survivors further reveals that this *social destruction* did in fact occur for many victims in many different cases as they were ostracized by their community. Said in another way; the perpetrators succeeded in *socially destroying* the victims. A broadened understanding of how the effects of genocidal sexual violence can be said to continue to be genocidal after it is 'over' might open up for a more adequate and knowledgeable response and make the victimized communities realize that ending this "post-genocidal genocide" is a responsibility they themselves can take upon them.

It takes more than a label to change such deep-rooted problem. However, what I suggest is that acknowledging that sexual violence can be genocide, and that this genocidal condition can be maintained after the genocide through the social death, can be a tool to generate focus on this problem and start altering the attitude towards the victims. Such change could gradually repair the group which would make it stand stronger, more unified and more prone to *external* reconciliation as well. Essentially the overall conclusion of this analysis is that there is a serious need of a more conscious use of the genocide-label. This consciousness can be sustained by continuously returning to the question about whether or not using the genocide-label in each situation actually implies a reasonable potential for ending suffering – whether physical or mental.

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