UNIVERSITY OF SOUTHAMPTON

FACULTY OF SOCIAL SCIENCES

Southampton Law School

THE SUBSTANTIALITY REQUIREMENT IN GENOCIDE LAW AND THE PROBLEM OF OBJECTIVE IDENTIFICATION

by

Onur Uraz

ORCID ID 0000-0003-1761-049X

Thesis for the degree of Doctor of Philosophy

February 2020

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF SOCIAL SCIENCES

SCHOOL OF LAW

Doctor of Philosophy

THE SUBSTANTIALITY REQUIREMENT IN GENOCIDE LAW AND THE PROBLEM OF OBJECTIVE IDENTIFICATION

by Onur Uraz

This thesis examines the 'substantiality requirement' in genocide law by asking to what extent, and how, the 'substantiality' of a targeted part can be determined in objective terms. The substantiality requirement, which has become a *de facto* part of the legal representation of genocide, stipulates that a protected group should be targeted at least in substantial part for an act to constitute the crime of genocide. However, the impreciseness inherent to the notion of 'substantiality' and the uncertainties involved in locating the relevant 'whole' and 'part' cause applicative difficulties and particularly raise concerns about the lack of 'objectivity' of assessments. This thesis aims to contribute to knowledge by exploring a novel perspective to this significant, yet under examined, problem through the lenses of a relational-realist perspective.

The thesis begins by identifying the application of the requirement as an episode of the broader jurisprudential problem of how to 'connect' abstract universals to particulars. Subsequently, it is outlined that while there have been various approaches developed in literature and case law to dissipate 'objectivity' concerns by introducing further normative universals – and thus 'bridging the particularity void', these attempts have raised more moral and applicative problems than they have solved. This is because, it is argued in chapters two and three, all these approaches are built on competing substantialist misrepresentations of the nature of the protected groups and thus falsely premise a form of 'strict normativity', while also undermine the phenomenological reality of genocide at the expense of legalistic concerns.

Against this background, the thesis suggests that the contingent reality of the protected groups and processual and contextual nature of the crime should not be overlooked in construing and applying the definitional elements in order to effectively 'bridge' the gap between the legal abstraction and reality. Reflecting on this insight, chapters four and five attempt to develop a relational-realist conceptual framework and by re-evaluating the research problem through the lenses of this framework, it is argued that there exists no ontological basis or epistemological possibilities to establish a one-applies-to-all kind of norm that reference to which will justify a legal decision regarding 'substantiality' as the right decision. Rather, 'objectivity', at least in this particular context, should be thought of in terms of ensuring predictability and consistency in the identification and justification process. Considering 'objectivity' in this sense, the thesis concludes by arguing and elaborating that the identification of 'substantiality' should be reframed as a balancing process between the genealogical and analytical imperatives, which respectively imposed by the historicality and immorality of the crime. The study finally demonstrates how this balancing process may work with a case study conducted on the South Sudan Conflict.

List of Contents

LIST OF CASES

International Criminal Tribunal for the former Yugoslavia

International Criminal Tribunal for Rwanda

International Court of Justice:

Others (listed chronologically):

UNIVERSITY OF Southampton

Research Thesis: Declaration of Authorship

Print name:	ONUR URAZ

Title of thesis:	**THE SUBSTANTIALITY REQUIREMENT IN GENOCIDE LAW AND THE PROBLEM OF OBJECTIVE IDENTIFICATION**

I declare that this thesis and the work presented in it is my own and has been generated by me as the result of my own original research.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Either none of this work has been published before submission, or parts of this work have been published as: [please list references below]: -

Signature:		Date:	

Acknowledgements

I would like to thank my supervisors Dr. Regina Rauxloh and Dr. James MacLean. It has been an absolute honour to be one of their PhD students. Their constant support, patience and guidance throughout the process, made the submission of this thesis possible.

I am also tremendously indebted to all my colleagues and friends. Some special notes of gratitude must be paid to Dr. Sila Ozkara, Cansu Uraz, Att. Onur Sahin and Jon Pickering, who read and commented on the earlier drafts of the thesis; Gerard Hearne, who provided me editorial support; Dr. Alexander Chrysanthou and Dan Amargianitakis who helped me in every step of the way; Dr. Gizem Guney, who has always been there for me when I am in need; and Att. Dilsad Enhos, who has been a source of love and support.

Finally, and most importantly, I wish to thank my mother, Aysu Uraz Ozkilic, who not only made everything good that has ever happened to me possible, but also put all she has on the line for making my postgraduate studies possible. I will be forever in her debt.

Research for this dissertation is supported by the Republic of Turkey Ministry of National Education, without its financial support this work could not be achieved.

With the oversight of my main supervisors, editorial advice has been sought. No changes of intellectual content were made as a result of this advice.

Onur Uraz

February 11, 2019

ABBREVIATIONS:

AJIL: American Journal of International Law

ECCC: Extraordinary Chambers in the Courts of Cambodia

ECHR: European Court of Human Rights

ECOSOC: United Nations Economic and Social Council

EJIL: European Journal of International Law

CUP: Cambridge University Press

HRW: Human Rights Watch

ICC: International Criminal Court

ICJ: International Court of Justice

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the Former Yugoslavia

ILC: International Law Commission

LJIL: Leiden Journal of International Law

NYPL: New York Public Library

OUP: Oxford University Press

SC: United Nations Security Council

SPLA: Sudanese People's Liberation Army

SPLM: Sudanese People’s Liberation Movement

SPLA/M-IO: Sudanese People’s Liberation Army/Movement in Opposition

UK: United Kingdom

UN: United Nations

UNICEF: United Nations International Children's Emergency Fund

UNMISS: United Nations Mission in South Sudan

UNGA: United Nations General Assembly

YILC: Yearbook of the International Law Commission

US: United States

CHAPTER ONE

An Introduction to the Problem of the Identification and Justification of 'Substantiality' in Genocide Law

'How many acts of genocide does it take to make genocide?'[1] This was the infamous question that the Reuters correspondent posed in 1994 to the US State Department spokeswoman, Christine Shelly, after she declared that 'acts of genocide have occurred' in Rwanda,[2] where the true character and scope of the Interahamwe atrocities against Tutsis were not fully comprehended at the time. Remaining etched in the public memory, Shelly stumbled over the question that she ultimately had no answer for.[3] In fact, the focus of this exchange was misplaced from the perspective of a jurist, since the prevailing legal construction of genocide puts the emphasis on the intended end result, rather than the actual outcome.

According to the legal definition of the crime, which was established by Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (henceforth 'Genocide Convention')[4] and – despite the constant criticisms[5] – has been

---

[1] State Department spokesman Christine Shelly, 'Discussing the Situation in Rwanda' (28 April 1994) <https://www.youtube.com/watch?time_continue=1&v=CBfRWq0Sbhs> accessed on 21 May 2018. Also see Thomas W. Lippmann, 'Administration Sidesteps Genocide Label in Rwanda' Washington Post (11 June 1994) <https://www.washingtonpost.com/archive/politics/1994/06/11/administration-sidesteps-genocide-label-in-rwanda/4b5678ea-cd24-4e6a-afed-a34338c481b2/?utm_term=.65acc00e0640>

[2] Ibid.

[3] Ibid.

[4] The Convention for the Prevention and Punishment of the Crime of Genocide, adopted Dec.9, 1948, 78. U.N.T.S. 277 (entered into force Jan. 12,1951).

[5] Article II is widely and deservedly criticised for falling short in establishing the actual scope of the crime. Broadly speaking, two types of criticisms are directed at the definition in the legal literature: restrictiveness and ambiguity. The restrictive enumeration of the protected groups (particularly the exclusion of political groups from the list) and the narrowly defined *actus reus* element stand out as the most common examples of the former. See for example P. Behrens, 'The need for a genocide law' in P. Behrens and R. Henham (eds.), *Elements of Genocide* (Oxon: Routledge,2012), 252; B. van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', 106 The Yale Law Journal (1997), 2262-2269; L. van den Herik, 'The schism between the legal and the social concept of genocide in light of the responsibility to protect' in P. Behrens and R. Henham (eds.), *The Criminal Law*

since reproduced verbatim in international[6] and national[7] legal documents and legislation;

---

of Genocide International, Comparative and Contextual Aspects (UK: Ashgate-2007), 75-95. For two reasons, however, the restrictiveness of the legal definition does not arouse my research interest. First, issues related to the limited nature of Article II, e.g. the exclusion of political groups or the omission of the acts of cultural genocide, have been well examined in the literature. For some comprehensive discussions see, for example, D. Nersessian, Genocide and Political Groups, (Oxford: Oxford University Press, 2010); J. Morsink, "Cultural genocide, the Universal Declaration, and minority rights." *Human Rights Quarterly* 21.4 (1999), 1009-1060; R. Krieken, "Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation." 75 *Oceania* (2004), 125-151. Second, such criticisms are generally directed at political and/or pragmatic preferences or technical mistakes of the drafters. See for example M. Lippman, 'Genocide: The Crime of the Century--The Jurisprudence of Death at the Dawn of the New Millennium' 23 Houston International Law Review (2001) 471-484. However, as long as the legal texts (and customary law) stay the same criticisms and normative considerations on the definitional formulation have little impact on the contemporary judicial application of the law. Yet it is unlikely to see any change in a foreseeable future after the clear will of the State Parties of the 1998 Rome Conference to preserve the existing text has eliminated. UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), adopted Jul. 17, 1998, 2187 UNTS 90/37 ILM 1002 (1998)/[2002] ATS 15, (entered into force Jul. 1, 2002). It thus seems somewhat futile to reconstruct the legal definition, which is widely recognized and stood up to the test of time. In addition, the definition, in spite of all of its legislative flaws, is a workable one. In this sense, I agree with Leo Kuper who does not 'think it helpful to create new definitions of genocide, when there is an internationally recognized definition and a Genocide Convention which might become the basis for some effective action, however limited the underlying conception.' L. Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven: Yale University Press, 1981), 39. See *infra* notes 22 and 24 (p.6) regarding the criticism of ambiguity.

[6] See for example, Article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia Statute (SC res. 827, UN SCOR 48th sess., 3217th mtg. U.N. Doc. S/Res/827 (1993); 32 ILM 1159 (1993) (hereinafter 'ICTY Statute'); Article 2 of the Statute of the International Criminal Tribunal for Rwanda (SC res. 955, UN SCOR 49th sess., 3453rd mtg. U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994) (hereinafter 'ICTR Statute')), Article 6 of the Statute of the International Criminal Court (UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (hereinafter 'ICC Statute')); and Article 17 of Draft Code of Crimes against the Peace and Security of Mankind (51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532 (1996) (hereinafter 'Draft Code of Crimes against Peace').

[7] Despite the fact that the definition is widely reproduced in verbatim in most of the national legislations, there are few countries that modified it to a certain extent. For example, while defining genocide, the France *Code Pénal* preferred to broaden the enumeration of protected groups by using the phrase '…a national, ethnic, racial or religious group, *or of a group established by reference to by other arbitrary criterion*…' (*emphasis added*) available at <http://www.preventgenocide.org/fr/droit/codes/france.htm> accessed on 02.10.2015. Similarly, some other countries like Peru, Cuba and Costa Rica included the other groups to the scope of their national definitions. See. Article 129 of the *Código Penal* of Peru; Article 361 of the *Código Penal of* Cuba; Article 127 of the *Codigo Penal of* Costa Rica available at <http://www.preventgenocide.org/law/domestic> accessed on 02.10.2015. Portugal initially included social groups to its national legislation yet in the revision of 1995 they turned back to the original version

genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

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

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

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

(e) Forcibly transferring children of the group to another group.[8]

In case law and the literature,[9] it is generally accepted that the distinctive character of the crime does not stem from the nature of the listed acts or the basic *mens rea*[10] attached to these acts,[11] but from the accompanying 'specific intent' (also called

---

in the Genocide Convention. W. Schabas, `*Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide*` 61 Rutgers Law Review (2008) 164. For a detailed examination of the domestic practice of Genocide Convention and the legal definition of crime see W. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2nd edn, 2009), 403-409.

[8] See the conventions and documents cited *supra* notes 4,6 and 7.

[9] To name few examples, the ICTR Trial Chamber in *Kambanda* stated that '(t)he crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group as such.' *Prosecutor v. Kambanda* [1998] ICTR-97-23-S, Judgment, para.16. Also see, for example, *Prosecutor v. Kupreškić* [2000] IT-95-16-T, Judgment, para. 636; Similarly, Claus Kreß emphasized that '…the requirement of the intent to destroy, in whole or in part, a protected group as such marks the specificity of the crime and explains, if correctly interpreted, its status as crime under international law.' C. Kreß, 'The Crime of Genocide under International Law' 6(4) International Criminal Law Review (2006), 485.

[10] The *mens rea* element of genocide consists of two components; the basic *mens rea* which refers to the 'intent corresponding to the culprit's individual conduct and factual circumstances' and the genocidal intent which refers to the special *mens rea* to destroy a protected group, in whole or in part, as such. L Berster, 'Article II` in C.Tams et.al (eds.) *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Hart Publishing-Oxford 2014), 132*;* P. Behrens, 'The *mens rea* of genocide` in P. Behrens & R. Henham (eds.), *Elements of Genocide* (Oxon: Routledge 2012), 70-71.

[11] The listed acts are also criminalised in the scope of other international and domestic crime categories. For example, discriminatorily motivated intentional killing of an ethnically Bosnian Muslim by a Serbian perpetrator satisfies the *actus reus* and basic *mens rea* elements of the crime of genocide. Yet such incident might have various legal characterisations – from being considered as a domestic crime if the

'genocidal intent' or 'specific *mens rea*'),[12] which is 'the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such'.[13] That is to say, in the prevailing legal conception, and at least theoretically,[14] the legal qualification of an offence as genocide is not about 'how many acts of genocide took place',[15] but whether any of the listed acts were committed with the required specific intent,[16] which is commonly described as an ulterior goal or surplus intent 'characterised by an extended – with regard to the *actus reus* – mental element or a transcending internal tendency'.[17]

---

killing was just an isolated act to being characterised as a crime against humanity if the offence was committed as part of a widespread or systematic attack directed against any civilian population.

[12] In the literature terms 'genocidal intent', 'special intent' and 'specific intent' are interchangeably used in order to denote the specific *mens rea* element of the crime of genocide.

[13] Following the ratification of the Genocide Convention, some State Parties mistakenly understood the notion of partial destruction as related to the *actus reus* (and thus the number of actual victims). This confusion has been corrected by academic writings, the UN reports and eventually by case law as is explored further throughout chapter two. That said, some scholars are nevertheless advancing this view. M. Shaw, 'Genocide and International Law' in Y. Dinstein (eds), *International Law at a Time of Perplexity (Essays in Honour of Shabtai Rosenne)* (Dordrecht: Martinus Nijhoff, 1989), 806; P. Drost, *The Crime of State: Genocide*, (Leiden: A.W Sythoff-Leyden Publishers 1959), 84-86.

[14] The actual number of causalities and context of atrocities became crucial and almost a *de facto* element in case law due to the difficulty of obtaining direct evidence as to the perpetrators' specific intent. According to the ICTR Trial Chamber, the specific intent can be inferred from 'the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups.' *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, para 523.

[15] According to the ICTY Trial Chamber, in theory, it is possible to commit genocide by, say, killing or raping a single individual, as long as this act is committed with intent to destroy a protected group, in whole or in part, as such. *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para. 99,100. See also *Prosecutor* v *Muhimana* [2005] ICTR-95-1B-T, Judgment, para. 498,514; *Prosecutor v. Setako* [2010] ICTR-04-81-T, Judgment, para.466.

[16] K. Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Oxford: OUP, 2013), 292. According to Ambos, this also means that it does not matter in the consideration of the specific intent whether the perpetrator intends more than she can realistically accomplish. K. Ambos, 'What does 'intent to destroy' in genocide mean?'(2009) 91 International review of the Red Cross, 835. For an opposite view see S. Kirsch, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct' (2009) 42 Creighton Law Review, 352-57.

[17] Ambos, 'What does 'intent to destroy' in genocide mean?', 835. This fact has been constantly noted in case law and literature. For example the ICTR Trial Chamber in *Kambanda* stated that '(t)he crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group as such.' *Prosecutor v. Kambanda*, [1998] ICTR 97-23-S, Judgment, para.16. For some other similar

That said, the concern underlies the question asked by the Reuters correspondent, namely, what kind and extent (if any) the magnitude or scale of the crime of genocide requires is hardly unfounded and was the starting point for this research. Historically and genealogically, the social phenomenon that Article II attempted to capture through a politically compromised legal abstraction is a form of mass violence directed against the existence of certain collectives. Indeed, the *travaux préparatoires* of the Genocide Convention confirm that State Parties rejected the idea of reducing genocide to attacks against individuals.[18] Nevertheless, a plain reading of the legal definition would lead us to conclude that the intended destruction of even a single member may constitute the crime of genocide, simply because the plain reading of the term 'in whole or in part' allows such an extensive interpretation.[19]

As remarked on by the ILC, the inclusion of the term in the definition aims to connote that the intention of realising even the partial destruction of a protected group is sufficient for the commission of the crime.[20] The problem is, however, that every single individual or any size of sub-group constitutes a 'part' of the victim group in a literal sense, and thus the term, as it stands, runs the risk of diluting and emptying the very concept of genocide. This complication results from the much-criticised imprecise wording employed in Article II.[21] Yet even though the need for greater precision and

---

statements see, for example, *Prosecutor v. Kupreškić* [2000] IT-95-16-T, Judgment, para. 636; Commission on the Work of its Forty-Eighth Session, U.N. GAOR, 51st sess., U.N. Doc. A/51/10, Commentary (5) (1996), Yearbook of the International Law Commission, 1996, vol. II, Part Two, art. 17 p.44, para.5. (hereinafter 'YILC 1996 II/2').

[18] Since the object of genocide law is to protect (some) groups' right to exist, it would be teleologically illogical to argue that intended destruction of a single individual corresponds to the perpetrators' genocidal intent. Moreover, during the preparatory works of the Convention the French proposal, which argues that any attack against a single individual due to its membership to a certain group should constitute the crime of genocide has been consistently rejected with this reasoning. UN Doc. A/C.6/224; UN Doc. A/C.6/SR.73.

[19] An early commentator, Pieter Drost, commented in favour of such view. Drost, *The Crime of State: Genocide,* 85. Some further discussions as to the Drost's view will be presented in chapter 3.1.1.

[20] 'It is enough to have committed any one of the acts listed in the article with the clear intention of bringing about the total or partial destruction of a protected group.' YILC 1996 II/2.art. 17 p.44, para. 6.

[21] This has been one of the several ambiguous aspects of the legal definition that drawn much criticism. For example, the phrase 'intent to destroy' fails in clarifying either the required threshold for the establishment of genocidal intent or characterisation of intended destruction. Similarly, the definition offers no clear guidance on the identification method of the protected groups or on the function of the

improvements to the Convention's definition has been constantly expressed,[22] the political unwillingness of States prevented any change, even when opportunities were present.[23] Rather, the need for legal clarity and articulation has been addressed by progressive modification of the definition through 'the weight of precedents as these emerge from actual genocide trials'.[24]

---

somewhat enigmatic phrase 'as such'. See generally Schabas, *Genocide in International Law,* 124-134, 243-270*;* Behrens, `The mens rea of genocide` 76-80; Kreß, 'The Crime of Genocide under International Law', 492-497; A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', 99 Columbia Law Review (1999), 2259-2294; H. Vest, 'A Structure-Based Concept of Genocidal Intent', 5 Journal of International Criminal Justice (2007), 781-797; L. May, *Genocide: A Normative Account* (Cambridge: CUP, 2010), 42-59.

[22] Scott Straus observes that 'scholars are more likely to disagree than to agree about genocide's core attributes and, by extension, about a universe of genocide cases.' S. Straus, 'Contested meanings and conflicting imperatives: a conceptual analysis of genocide', 3 Journal of Genocide Research (2001), 349. The legal definition of genocide has been criticized and redefined by many scholars and jurist, which are too many to reproduce in here. For the comprehensive listing of alternative definitions see A. Jones, *Genocide: A Comprehensive Introduction* (Oxon: Routledge, 2nd edn, 2010), 16-20; S. Straus, 'Contested meanings and conflicting imperatives', 350-355. See also E. Verdeja, 'The Political Science of Genocide: Outlines of an Emerging Research Agenda', 10 Perspective on Politics (2012), 309.

[23] During the preparatory works of the Rome Statute, even though there has been some suggestion to revise the definition of genocide, the State Parties have decided to keep the existing definition mostly owing to the political reasons and concerns. See Schabas, *Genocide in International Law*, 101-108; H. von Hebel and D. Robinson, 'Crimes Within the Jurisdiction of the Court', in Roy Lee (eds), *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results* (New York: Transnational, 1999), 89. According to Guglielmo Verdirame, 'the permanence of the genocide definition over more than five decades is remarkable considering how much criticism has been directed against it since the adoption of the Genocide Convention in 1948.' He observes that while the stability of text provides 'indubitable advantages', unresolved interpretative and fundamental questions that are originated from the ambiguities in the definition, particularly as to *mens rea* requirement and the identification of four protected groups make the legal definition problematic. G. Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 International and Comparative Law Quarterly, 578.

[24] B. Lang, 'The Evil in Genocide' in J. Roth (eds), *Genocide and Human Rights: A Philosophical Guide* (New York: Palgrave Macmillan, 2005), 9. See also Tams, `Introduction`, in C.Tams et.al (eds.) *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Hart Publishing-Oxford 2014), 27-39. This means, as a consequence of having many definitional ambiguities, a great deal of discretionary power and responsibility is in effect vested in the international adjudicative and legal bodies to delineate the legal scope of genocide through the interpretation of ambiguous definitional phrases in a conceptually coherent manner. This indicates the enormous responsibility that judges have in securing the legitimacy of international criminal justice, which has been persistently questioned, by clarifying the real scope of one of the gravest crimes. On the discussion of the legitimacy of international law as well as courts and tribunals see for example A. Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25(2)

The present study primarily focuses on one such modification provided by case law and the jurisprudence regarding the required magnitude: the so-called 'substantiality requirement'.[25] Favouring teleological and historical interpretations over the textual,[26] the requirement stipulates that the term 'in whole or in part' should be in effect read as 'in whole or in *substantial* part', since, as the ILC remarks, 'the crime of genocide by its very nature requires the intention to destroy at least *a substantial part* of a particular group'.[27] Therefore, an atrocity can legally qualify as genocide only if it was committed with an ulterior destructive intent directed against a substantial part of a protected group. However, even though the substantiality requirement is derived from sound legal, historical and genealogical reasoning and has been well-established in international criminal law over the past two decades, it has not settled the legal and conceptual issue to hand, but evolved it into an ambiguity about the meaning and scope of 'substantiality'. In this respect, finding objective and consistent criteria for determining and justifying what qualifies as a substantial part continues to pose a considerable challenge to jurists. While some different methods have been established and employed over the years in case law, they are criticized for being arbitrary, subjective and at the same time in contradiction with each other when applied in conjunction. That is to say, and as is extensively surveyed in chapter two, while the

---

Leiden Journal of International Law, 491 – 501; D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' (2008) Georgetown Public Law Research Paper no: 1154117 available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps_papers> accessed on 02 October 2015; M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 European Journal of International Law, 907-931.

[25] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement, para 140. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, paras. 197-201.

[26] As Schabas points out a 'literal reading of the definition seems to support such an interpretation. Nevertheless, this construction is rather too extreme, and inconsistent with the drafting history, as well as with the context and the object and purpose of the Genocide Convention.' W.Schabas, 'The Legal Prohibition of genocide Comes of Age' (2004) 5 Human Rights Review, 49.

[27] Report of the International Law Commission on the Work of Its Forty-Eight Session, May 6-July 26, 1996, at 45, U.N. Doc. A/51/10. (*emphasis added*).

proposed methods have certain persuasive aspects, it is widely held that they all suffer from what Paul Behrens calls 'the problem of subjective substantiality'.[28]

Against this background, the study aims to conduct a discussion of the topic – which is relatively thin and lacking in depth, despite its immense practical and theoretical implications – on a more fundamental level by addressing the following research question: To what extent, and how, can the substantiality of a targeted part be justified and assessed in objective terms in genocide law? The reason why the question is formulated in this manner is closely related to the methodology of investigation, which I will elucidate in the following section.

1.1. Theoretical Underpinnings of the Research Problem and Approach of the Study

The substantiality requirement is generally problematized from two perspectives in the literature. The first, albeit rare, perspective argues against the very existence of the requirement.[29] Adherents of this perspective stress that, legally, infusing the adjective 'substantial' in such a manner stretches the law beyond permissible limits and therefore undermines the legality principle,[30] while holding the moral view that a discourse of substantiality dehumanises the victims once again and thus is inherently pervasive.[31] As chapter two further elaborates, the legal angle of such a view is untenable because, as per a clarification given in accordance with the purpose and object of the Convention, the substantiality requirement conforms to the general principles of treaty interpretation. The merit of the moral objection, on the other hand, has a great deal to do with what is understood by the concept of 'group' as the designated protected value. While the study shall elaborate on this in chapter three, it should suffice for now to note that accepting

---

[28] P. Behrens. 'The Crime of Genocide and the Problem of Subjective Substantiality' (2016) 59 German Yearbook of International Law, 321-353.

[29] See for example, Drost, *The Crime of State: Genocide*, 85. Some further discussions as to the Drost's view will be presented in chapter three.

[30] C. Fournet, *The crime of destruction and the law of genocide: their impact on collective memory* (Hampshire: Ashgate, 2007), 73-75; Drost, *The Crime of State: Genocide*, 85.

[31] Ibid.

the reductive individualism[32] that underlies this moral objection against the substantiality requirement has far-reaching and more fundamental ramifications, as it undermines the existence of genocide as a distinct crime category.

The second perspective accepts the validity of the substantiality requirement and focuses on the quest to find criteria to determine and justify the qualification of a part as substantial without undermining the principles of legal certainty and predictability. The main body of discussion on the topic revolves around this pursuit for 'objectivity', and the study to hand in fact commenced with a similar aspiration. However, the research process revealed that posing the question of enquiry in a purely doctrinal manner, with an underlying acceptance that complications related to the substantiality requirement can be fully understood and addressed through the use of legal instruments of interpretation and deductive logical induction, will not take us much further than what has already been argued and criticised. Moving beyond that discourse, on the other hand, transpires that the uniquely contingent nature of both the criminal phenomenon and its constituent concepts significantly challenge the ability of legal reasoning to lead to determinative answers by locating, establishing or extracting universals that reference to which will justify a legal decision regarding 'substantiality' as the right decision in each particular case.

To elaborate, one of the key findings of the present research, which is laid out in chapter two, is that the many interpretative disagreements and contradictions in genocide law have, in effect, emerged due to the different conceptual presumptions attached to definitional terms, albeit these presumptions are disguised by convincing legalistic and logical justifications. In other words, while genocide can have multiple conceptually coherent descriptions as an 'essentially contested concept',[33] the uncertainties in the Convention's understanding of definitional terms facilitate making equally persuasive

[32] By 'reductive individualism', the study refers to the idea that macro-level entities and holistic explanations of the social phenomena are ultimately fictional, as they can be entirely explained away by reduction to the individual level. In the sense, the protected groups hold no distinct value and cannot be protected 'as such'. See Chapter 2.2 and Chapter 3.1.

[33] Essentially contested concepts are those which disagreements over how they should be defined 'although not resolvable by argument of any kind, are nevertheless sustained by perfectly respectable arguments and evidence.' C. Powell, *Barbaric Civilization: A Critical Sociology of Genocide*, (McGill: Queen's University Press, 2011), 59, 67-69.

arguments in favour of more than one description – even with the guidance of formal methods of legal interpretation.[34] Broadly speaking, there are two main parameters that determine the 'essence' of divergent interpretative constructions of the crime. First, the being of the protected groups – and connectedly the nature of the (intended) group destruction – can be conceived in various ways from different ontological viewpoints. Second, the criminal characterization of genocide can differ depending on the understanding of interpreters about the interaction between a collective genocidal campaign and the intent and act of individual perpetrators.[35]

The problem is that the striving for formalism and certainty that primarily drives the reasoning process in genocide law unavoidably leads to adhering to substantialist and static ways of thinking about the protected groups, as well as reductive conceptions of the criminal phenomenon. The reason for this is that only through generalising about the existence of the protected groups and the nature of the criminal phenomenon in a relatively precise and stable manner does one become able to purport universal norms with a somewhat absolute character. However, as persuasively argued in recent social sciences literature,[36] the protected groups and the social phenomenon of group

---

[34] According to the general rule of treaty interpretation that is put forward by the Article 31 of the Vienna Convention on the Law of Treaties: 'a treaty should be interpreted in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose'. The Article 32 of the same Treaty designated *travaux preparatoires* of the Treaties and the circumstances of their conclusion as the supplementary means of interpretations 'when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.' See Article 31 and 32 of 1969 Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969). As is further elaborated in chapter two, even when the formal principles of treaty interpretation are applied to Article II, the Convention's understanding on the various central concepts remains highly indefinite.

[35] In fact, it may be claimed that the legal definition formally describes the crime as an individual level phenomenon since it merely makes a reference to the perpetrator's intent. Yet such view appears counterintuitive, because the destruction of a group typically entails some collective action even if not organised. See Kirsch, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct', 347. The real problem is that to what extent the larger genocidal campaign, in other words the macro level phenomena, will be the point of reference in the determination of genocidal intent of a perpetrator (and therefore constitute the basis for the assessment of substantiality of the targeted part). For an opposite view see P. Behrens, 'Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia' (2015) 28 LJIL.

[36] See, for example, Powell, *Barbaric Civilization: A Critical Sociology of Genocide;* Dirk Moses, 'Conceptual blockages and definitional dilemmas in the "racial century"': genocides of indigenous

destruction are in fact contingent relational processes, rather than static 'things' with some definitive essence or form. Consequently, 'substantialist'[37] conceptual fixations create a distressingly vast gulf between the legal abstraction and the reality, which causes considerable difficulties in the courtroom when it comes to applying universals built on substantialist presumptions to the particular.

The search for objective criteria to determine substantiality is perhaps the most complex and yet overlooked example of this, because the ways in which the most central and debated definitional terms – namely, 'group', 'intent', 'to destroy' and 'as such' – are conceptualised ultimately shape our understanding as to the notion of substantiality and its scope. These terms are, however, mostly, albeit implicitly, abstracted from either nominalist (individualistic) or structural-functionalist (collectivistic) perspectives in case law and the literature. Although the main tenets of nominalism and functionalism, their different variations and the reasons why these two perspective historically hold great significance in relation to the concept of genocide will be expanded in chapters two and three, meanings ascribed to these terms in the context of the present work must be briefly stated for the sake of clarity of the following explanations.

By nominalism, the thesis refers to the individualistic socio-philosophical idea that the fundamental constituents of the social world, in other words its 'atoms', are individuals and their actions. Any supra-individual entity is ultimately a fiction that can be explained away through a reference to the individual level, which excludes these abstract entities from being constituents and moral subjects of the social world on their own right.[38] Consequently, the idea of 'group destruction' from such a perspective eventually refers to destruction about or of individuals with some shared properties, characteristics or identities. On the other hand, by functionalism, the thesis resonates the

---

peoples and the Holocaust', 36 Patterns of Prejudice, (2002); M. Crook, 'The Mau Mau Genocide: A Neo-Lemkinian Analysis', (2013) 1 Journal of Human Rights in the Commonwealth; D. Feierstein, *Genocide as a Social Practice: Reorganizing Society under the Nazis and Argentina's Military Juntas* (New Brunswick: Rutgers University Press, 2014).

[37] In overall, substantialist thinking in the context of the study refers to the idea that constant realities or substances, whatever form they may be in, underlie the experienced phenomena. The 'substantialist fixation' referred here denotes the presumption that the protected groups, at the individual or collective level, possess a certain essence that the 'essential' characteristics of the group.

[38] L Coser, *Masters of Sociological Thought: Ideas in historical and social context* (Houghton Mifflin Harcourt, 1971) 218. See Chapter 3.1 for a detailed review.

collectivistic socio-philosophical idea that certain social entities and institutions are more than the sum of their parts. Accordingly, parts, namely individuals, act as if organs that works towards forming a functioning and stable whole, which, once formed and externalised, has a distinct existence, unique casual powers and properties that cannot be reduced to individual level. That is, certain phenomena, goods and properties only occur as long as the whole in question exists 'as such', which consequently leads to the argument that these kind of wholes are actual entities and moral subjects of the social world that can be harmed on their own right.[39]

Ascribing different meanings to the aforementioned definitional terms through the lenses of these diametrically opposite, substantialist views has created two complications concerning the research topic. First, the different approaches established to identify and justify substantiality fall into a logical contradiction with one another, as they are built on distinct conceptual presumptions. In other words, functionalist and nominalist presumptions as to the existence of the protected groups lead to disparate understandings about the nature of genocide and, consequently, 'substantiality'. Second, owing to the gap between substantialist abstractions of the protected groups and their contingent reality, any attempt to draw well-defined lines through any of the established approaches runs the risk of casting judges into a dilemma between justness and normativity.[40]

The case law on the meaning and scope of 'substantiality' ultimately aims to sidestep these complications by inventing an encompassing and flexible framework with a catalogue of loosely constructed approaches to 'substantiality', thus making each particular case fit the normative framework. Yet, in doing that, it has neither satisfied the demands of legal formalism nor provided a normative framework in which the moral correctness of particular decisions can be properly assessed.

---

[39] See Chapter 3.2 for a detailed review.

[40] The reason is that when the legal abstraction considerably drifts away from the social reality, the judge frequently finds herself in situations where applying the doctrinally correct norm appears morally troubling. In such state, the judge can prefer either not to violate the particular and fairness in expense of downplaying the universal or to be merely concerned with whether the rule subsumed the event in front of her and hide 'behind the universality of the legal reasoning'. Z. Bankowski, 'In the judgement space : the judge and the anxiety of the encounter' in MacLean, James and Bankowski, Zenon (eds.) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006), 29.

To concretise, three approaches are established (or, to more appropriately put, borrowed from scholarly writings) and applied to justify and assess the substantiality of a part in the case law of international courts and tribunals. In chapter two, an extensive review will be conducted regarding these approaches and their judicial application, but in order to fully elaborate the research problem, overly brief, one-sentence descriptions are included here. Accordingly, the *quantitative (or numerical) approach* maintains that the substantiality refers to the numerical magnitude of the number of targeted victims. In the *qualitative (or functional) approach,* substantiality denotes the functional or emblematic significance of the targeted part vis-à-vis the whole group. Finally, under the *geographical approach*, a part of a group limited to a single region or community that is geographically distinct or significant can be deemed substantial.[41] Although these approaches in effect function as reference norms, international courts and tribunals have been cautious to ensure the amplest possible space to manoeuvre by refraining from specifying what exact number or percentage qualifies as substantial; what particular functions make a part significant; or what should be the lower limit for the extent of geographical area that may qualify as substantial.[42] Moreover, while all three approaches are applied on a regular basis and occasionally in tandem with each other,[43]

---

[41] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, paras.198-200; Behrens, `The mens rea of genocide`, 86-96.

[42] Behrens, `*The Mens Rea* in Genocide', 88-93.

[43] The ICJ recently stated in *Croatia v. Serbia* that: 'The Court recalls that the destruction of the group "in part" within the meaning of Article II of the Convention must be assessed by reference to a number of criteria. In this regard, it held in 2007 that "the intent must be to destroy at least a substantial part of the particular group" and that this is a "critical" criterion. The Court further noted that "it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area" and that, accordingly, "[t]he area of the perpetrator's activity and control are to be considered". Account must also be taken of the prominence of the allegedly targeted part within the group as a whole. With respect to this criterion, the Appeals Chamber of the ICTY specified in its Judgment rendered in the *Krstić* case that "[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute, paragraph 2 of which essentially reproduces Article II of the Convention]. In 2007, the Court held that these factors would have to be assessed in any particular case. It follows that, in evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group.' (references omitted) Application of the Convention on the Prevention and Punishment of the Crime of Genocide

it mostly remains unclear how these approaches are to be weighed and balanced against each other or what justifies employing a particular approach in a certain situation. It is ultimately stated, in this respect, that the list of approaches is non-exhaustive and case-by-case assessment should constitute the basis for the order and way in which these approaches will be utilised.[44]

As one might expect, this jurisprudential construction has drawn criticism for being subjective and uncertain,[45] given that an arbitrarily favoured approach, as well as a particular way of applying that approach, directly affects the judgment of whether an individual had genocidal intent and therefore her acts constituted the crime of genocide.[46] As Paul Behrens notes, it is entirely possible that:

> …a perpetrator, who intended to kill thousands of members of a protected group, is acquitted of genocide because his Trial Chamber had applied a strict numerical approach, whereas his colleague, whose destructive intent was limited to a much smaller municipality, is convicted of the crime, because his judges placed greater emphasis on the geographical approach.[47]

(Croatia v. Serbia) [2015] ICJ Judgement, para 140. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, paras. 197-201.

[44] Prosecutor v. Krstić, (Case No. IT-98-33-A), Judgement (Apr, 19. 2004), para.14.

[45] Behrens, `*The Mens Rea* in Genocide', 88-93.

[46] The arbitrariness that the lack of order brings has been recently epitomized in the Croatia v. Serbia case before the International Court of Justice (hereinafter 'ICJ'), in which Croatia objected to the application of a 'purely numerical approach' by demanding that 'the emphasis should be on the geographical location of the part of the group, within a region, or a subregion or a community'. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement, para 140 But putting simply: why? While Croatia's statement included no substantial justification for its position, the ICJ's response was not more satisfying. The Court, after reaffirming the validity of established approaches, merely stated that the case-by-case assessment should constitute the basis for the evaluation. Ibid. para 142. Thus, the ICJ restated its position in Bosnian Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, paras.197-201.

[47] Behrens, `The Mens Rea in Genocide', 94. Moreover, when the issue of determination and justification of substantiality is understood as a mere interpretation (rule determination) problem, this kind of open-endedness may also put judges into a dilemma between adhering to the criminal law principle in dubio pro reo and fulfilling the protective aim of the Convention. On the one hand, the principle in *dubio pro reo* 'requires that in the interpretation of criminal law instruments any doubt should benefit the accused. D. Akande, 'Sources of International Criminal Law' in *The Oxford Companion to International Criminal*

What appears striking is that, despite this line of criticism having been agreed upon by most commentators[48] and raised by some State Parties at the Rome Conference,[49] the literature mostly lacks novel proposals or extensive studies to dissipate or lessen the perceived ambiguity and uncertainty.[50] Nor has it been duly explored why the offered approaches are competing to a large extent, rather than augmenting each other.[51] It appears that the insistence on perceiving the issue as a matter of rule determination and engaging with it at the doctrinal level has been the primary reason for the lack of novel considerations. Instead, carrying the analysis to the conceptual level reveals that the established approaches are built on conflicting and largely incompatible conceptual presumptions that do not adequately correspond to the social reality. In other words, linking up these jurisprudential approaches to the theoretical presuppositions that they are built upon would allow us to tackle the problems surrounding the substantiality requirement from a novel perspective.

Justice, 44. See also ICC Statute Article 22(2). Thus the defence counsels can always argue that the most favourable approach for the perpetrator should be applied in assessing 'substantiality'. Yet, on the other hand, the Convention is designed to protect the existence of listed types of groups and Article II criminalises even creating an abstract threat for the targeted group's existence by emphasising the perpetrator's intent rather than the actual result as the distinctive characteristic of the crime. When considered from this 'protective' perspective it must be sufficient proving that the accused's intention creates an abstract threat in relation to any of the established approaches to substantiality.

[48] See for example Lippman, 'Genocide: The Crime of the Century', 485*;* M. Manaktala, 'Defining Genocide' (2012) 24 Peace Review: A Journal of Social Justice, 181*;* Behrens, `*The Mens Rea* in Genocide', 86*;* Kreß, 'The Crime of Genocide under International Law', 489; P. Quayle, `Unimaginable Evil: The Legislative of the Genocide Convention` (2005) 5 International Criminal Law Review, 369; D. Alonzo-Maizlish, 'In Whole or In Part: Group Rights, The Intent Element of Genocide, and the "Quantitative Criterion"' (2002) 77 New York University Law Review, 1369-1403.

[49] During the preparatory works of the Rome Statute some parties stated that a further clarification is needed for the term 'in part', yet any clarification -other than the restatement of that the part needs to consist of more than small number of members- was given. 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol.I, UN Doc. A/51/22. p.18, para.60.

[50] As far as I am aware of, the only concrete alternative approach offered so far is Behrens's 'individualised approach', which will be extensively examined in chapter three.

[51] In fact, very few scholars elaborately commented on this issue. See for some example Fournet, *The crime of destruction and the law of genocide,* 70-71; D. Alonzo-Maizlish, 'In Whole or In Part: Group Rights, The Intent Element of Genocide, and the "Quantitative Criterion' (2002) 77 New York University Law Review.

To paint with an overly broad brush, the qualitative approach largely rests on the structural-functionalist conceptualisation of the protected groups, as it is concerned with the functional or emblematic significance of the targeted part for the whole.[52] That is, it tacitly highlights the structural-functionalist idea that even if the physical existence and biological being of a considerable number of group members are not targeted, the group – as a distinct entity – can still be targeted, destroyed or significantly harmed. In sharp contrast, favouring the quantitative approach implies a nominalist vision about the same notions by reducing genocide to acts committed with the intent to physically or biologically destroy a considerable number of people because of their (real or imagined) shared identity.[53] It must be noted that the link between these socio-philosophical positions and the qualitative and quantitative approaches is not straightforward in the judgements of international courts and tribunals, as they largely refrain from going into such theoretical deliberations. Rather, the judgments make references to certain notions as to the existence of the groups and group destruction that are strongly affiliated with these two opposing socio-philosophical positions. Similar references – in a bit more articulate manner - can be traced back to the *travaux préparatoires* of the Convention and the scholarly advancements of the qualitative and quantitative approaches to 'substantiality', which are later utilised by international courts and tribunals. In chapter two, the study aims to crystallise the link between these socio-philosophical ideas and legal doctrine by exploring the historical development of the legal conceptualisation of genocide and the idea of 'substantiality'.

The geographical approach, on the other hand, has more of a pragmatic basis since it emerged from the fact that genocide entails dominance over the victim group and such dominance is usually limited to a particular geographical area that is primarily determined by material, contextual and organisational reasons and possibilities for the perpetrators. Indeed, historically, targeted destructions have largely, if not always, been

[52] According to the ICTY Appeals Chamber in *Krstić* , 'if a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial' *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para.12.

[53] Prosecutor v. *Kayishema and Ruzindana* [1999] ICTR. 95-1-T Judgement, para.97. See also *Prosecutor v. Bagilishema* [2001] 95-1A-T, para.64.

limited to a part of a group, which is located in a specific geographical area.[54] That said, the geographical approach raises the question of, on what moral grounds, if there are any, does the mere spatial distinctiveness of a population makes it worthy of protection as such under the scope of genocide law.[55] Moreover, it is far from clear what would be the lowest limit for a relevant geographical area, given that even a village fits the description.

At this juncture, one may rightfully ask how it is that these conflicting methods, particularly the quantitative and qualitative ones, can co-exist in the same body of case law if they rely on diametrically different conceptions on the existence of the protected groups. The answer is the lack of conceptual coherence in the dominant judicial construction of the crime. International courts and tribunals do not build their interpretation of the legal definition upon a particular conceptual framework, but rather conjunctively employ ideas from nominalist and functionalist viewpoints. In this regard, the prevailing judicial construction falls into a logically self-contradictive state by describing the protected groups as 'distinct and separate entities',[56] while at the same time defending that the term 'to destroy' only refers to the intended physical and biological destruction of group members[57] – not to the intended destruction of a distinct

[54] Schabas, *Genocide in International Law*, 285.

[55] Moreover, it is rather unclear whether the geographical area in question is merely determined by the acts, intentions and capabilities of the perpetrators or should it have some form of *ipso facto* distinctiveness.

[56] *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, para.521; *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para. 79; *Prosecutor v. Stakić* [2003] IT-97-24-T, Judgment, para. 521; '…the intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group. In this regard, the General Assembly distinguished between the crimes of genocide and homicide in describing genocide as the "denial of the right of existence of entire human groups" and homicide as the "denial of the right to live of individual human beings" in its resolution 96 (I).' YILC 1996 II/2 art. 17 p.45, para. 7.

[57] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para.344; *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para 580. See Schabas, *Genocide in International Law*, 271. 'The Genocide Convention and customary international law prohibit only the biological destruction of a group, not attacks on cultural or religious property or symbols of the group. However, while such attacks may not constitute underlying acts of genocide, they may be considered evidence of intent to physically destroy the group. Forcible transfer alone would not suffice to demonstrate the intent to "destroy" a group

and separate social entity – as if the protected groups are merely the sum of individuals.[58] While the application of the former in effect contradicts a nominalist interpretation of the term 'to destroy', the latter goes against the collectivistic rhetoric that concedes that the protected groups are distinct and separate social entities.

Nevertheless, international courts and tribunals not only maintain this contradiction in their jurisprudence but also rather arbitrarily prioritise one conception over another on a case-by-case basis. What is striking is that, as Claus Kreß points out,[59] the established approaches to justify a part's substantiality play a largely unnoticed 'backdoor' role in prioritising these different conceptual perspectives on genocide, as emphasising one approach over another neatly does the trick. In a sense, then, these different approaches have been a sort of *de facto* judicial solution employed to reduce the gap between reality and abstraction, which would become unmanageable if the interpretation was solely based on one substantialist presumption.

Indeed, an interpretation constructed from the nominalist perspective alone may conform to the social and historical perceptions of genocide as a crime directed against large masses. Yet at the same time it would not only turn international criminal law into a disharmonious system by blurring the legal and moral separation between genocide and crimes against humanity, but also lead to overlooking the facts that social entities protected by the law against genocide are the irreducible locus of certain goods (e.g. language, culture, identity); and the emergence of the concept of genocide was primarily about the protection of these goods as much as individual lives. Connectedly, merely relying on the quantitative approach – as a by-product of nominalist thinking – creates morally counterintuitive outcomes in certain circumstances, because while setting an absolute numerical threshold would exclude small groups from the Convention's protection, a relative numerical threshold would impede the characterisation of a campaign where millions of people are targeted as genocide if the whole group is a numerically very large one (e.g. Chinese nation, Indian Muslims). The nominalist perspective is also unable to offer a satisfying justification regarding why the intent to

---

but it is a relevant consideration as part of the Chamber's overall factual assessment.' *Prosecutor v. Karadžić* [2016] IT-95-5/18, para.553.

[58] See, for example, Drost, *The Crime of State: Genocide*, 84,85.

[59] Kreß, 'The Crime of Genocide under International Law', 492.

destroy anything less than the whole group should qualify as 'genocidal intent' if the lives of groups solely depend on members' physical and biological existence.[60]

On the flip side of the coin, building the interpretation on functionalist presumptions and thus designating irreducible wholes as primary goods to be protected justifies the distinctiveness of genocide. In spite of this, functionalist thinking paints an implausibly deterministic picture and more concerningly essentializes identities just as perpetrators do. Furthermore, it overlooks that an essential dimension of the determination of group membership is the reciprocal in-group and out-group perceptions. That is, not every listed group and identity exists through parts functioning against and with each other (e.g. most racial groups). Connectedly, promoting the quantitative approach over others in assessing substantiality comes with certain problems. First, even if it is accepted for a moment that the protected groups are irreducible wholes with stability and certain kind of 'essence', we usually lack sufficient tools to fully explore the underlying mechanisms that generate the protected groups and their properties, such as culture or language, which leads to a highly speculative way of assessment through 'guessing' the vitality of the part for the whole's survival. Second, such an approach falls into a logical contradiction because if perpetrators target a part on the understanding that its destruction will jeopardize the existence of the whole, then they in fact intend to destroy the whole, not merely the part, through removing one of the building blocks of the social structure.

While qualitative and quantitative approaches allow one to operate between polar opposite substantialist conceptions of the crime in engaging with a particular case, the geographical approach also emerges as a tool that can accompany both approaches and, since it is liberally constructed, help to introduce a range of factors (e.g. political and social context; spatiality or perpetrators' reach) to the justification process under the guise of 'geography'. In short, established approaches to the meaning and scope of 'substantiality' do not only result from different conceptual presumptions but also function as devices to navigate between the different and conflicting conceptions of

[60] It appears also troubling from the individualistic point of view to explain that if geographical and quantitative approaches can co-exist, then, why intent to destroy a part of the group in a certain geographical area is morally worse then randomly destroying the same number of group members?

genocide. These, however, only explain –do not justify – the perceived ambiguity and arbitrariness surrounding the substantiality requirement.

To more neatly summarise, then, the prevailing approach of international courts and tribunals – i.e. using largely contradictory methods to assess the 'substantiality' of utilising a particular conceptualisation of a crime depending on the moral, circumstantial and perhaps political imperatives or expectations of that particular case – generates two particular concerns. First, this kind of approach undermines the principle of legal certainty in the process of norms application. Legal certainty, which has been pivotal to the political liberalism ideal that underpins modern criminal systems,[61] demands that legal norms and their application must be clear and foreseeable enough to provide their subjects with the means to regulate their conduct and protect them against the arbitrary exercising of public power.[62] However, the aforementioned conceptual indeterminacy as to the notion of 'substantiality' undermines this very principle and raises a concern of arbitrariness in the norms application process, as the ultimate decision regarding the existence of 'genocidal intent' may change rather arbitrarily, depending on the subjective highlighted method applied in that particular decision.

Although bringing such an ambiguity into law and its negative implications as to the principle of legal certainty have largely been the main concern of scholars who have written on the matter to date,[63] this reason alone may not explain the significance of the present research. To begin with, while the ideal of legal certainty has functioned as a fundamental value and aspiration that has structured normative debates at both national and international levels,[64] conceptions regarding the meaning and scope of certainty vary in different legal traditions, and international criminal law does not favour any particular tradition. For example, Anglo-American systems deviate from continental systems by preserving the significance of a precedent to a large extent and endorse a relatively less strict understanding of legal certainty. Moreover, there are rising

---

[61] M. Fenwick and S. Wrbka, 'The Shifting Meaning of Legal Certainty' in M. Fenwick and Wrbka, Stefan *Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives* (E-Book: Springer, 2016), 1,2.

[62] Ibid.

[63] See chapter three.

[64] Fenwick and Wrbka, 'The Shifting Meaning of Legal Certainty', 2.

demands for the law to be more flexible in today's rapidly evolving and changing social setting.[65] One may thus question the necessity of legal certainty *sensu stricto* in relation to the substantiality requirement.

While the former refers to criminal law for citizens or persons, enemy criminal law is for *hostes humani generis*, who presumably have abandoned the legal order and become enemies of the system itself. [66] For this reason, '[i]n enemy criminal law punishment has different, extreme purposes – (deontologically structured) constraints such as the principle of guilt or core procedural rights of the defendant that define liberal criminal law can be passed over'.[67] While this characterisation of international criminal law is by no means the dominant view, it may nevertheless constitute another objection to the prominence of the ideal of legal certainty within international criminal law. Finally, it is conceptually a moot point to what extent the law can be 'certain' or 'objective'. Indeed, as already indicated and will be further explained, one of the main arguments of the study is that the processual nature of the social reality, particularly in relation to the crime of genocide, largely refrains from seeing legal norms functioning as abstract universal rules, reference to which would mechanically provide justification for a particular judicial decision. Pursuing such a form of 'objectivity' at the expense of artificially stabilising the contingent social reality runs the risk of alienating legal norms from moral and social roots they stem from. It may thus be oxymoronic to explain the significance of the research as merely striving for the ideal of legal certainty.

This final point connects us to a second concern as to the existing judicial framework, which has been overlooked and yet is both crucial and far-reaching. The prevailing judicial utilisation of the substantiality requirement as a 'back door' is not a simple misconstruction, but rather emanates from the need to respond to the contingent reality

---

[65] As Fenwick and Wrbka note: 'Over recent decades, legal certainty has come under increasing pressure from a number of competing demands that are made of contemporary law, in particular the demand that the law be more flexible and responsive to a social environment characterized by rapid economic, social and technological change. In particular, the expectation that the law operates in new transnational contexts and regulates ever-widening spheres of social life has created a new degree of uncertainty about legal certainty. These social and economic transformations raise difficult questions regarding both the meaning of legal certainty, as well as its possibility and desirability.' Ibid, 2.

[66] Ibid.

[67] Ibid. 181.

of protected groups and the criminal phenomenon itself, which cannot be fully captured by a purely nominalist or functionalist conceptualisation of genocide, due to its substantialist presupposition about society. Attempting to overcome this complication in the explained way – through creating back doors – does, however, cause case law to head in a direction that lacks a proper theoretical foundation and coherence,[68] and this leads to an ambiguous legal concept of genocide based on subjective considerations. While the study will concretise this observation by exploring relevant case law – first, briefly, in the following section; and then more extensively in chapter two – it must be emphasised here that including incompatible conceptual presumptions in the same framework has created significant perplexity about the scope of the good protected by genocide law, according to which the moral correctness and desirability of decisions can be considered. Needless to say, a crisp conception as to the protected good is essential in order to be able to establish a normative foundation that will allow lawyers and the public to consider the moral correctness or desirability of judicial decisions. And once the legal conceptualisation of genocide lacks sufficient conceptual rigour in such a manner, adjudication of the crime becomes susceptible to the criticism of victors' justice or being merely show trials.

That is to say, then, the problematic judicial framework as to the notion of substantiality is not the 'disease' itself, but a symptom of larger conceptual problems regarding the legal scope of genocide and the question of to what extent and how genocide can be abstracted or represented in a legalistic manner. It is thus necessary to examine both the conceptual and doctrinal layers and their interaction in order to develop a novel perspective for assessing and justifying 'substantiality'. Indeed, as long as the underlying conceptualisations go unquestioned – as is mainly the case in the existing legal literature and case law on the topic – the discussions as to the meaning and scope of substantiality go round in circles. This is because every established approach not only largely conforms to the principles of legal interpretation but is also able to justify itself

[68] By 'coherence' the thesis refers to the modest notion of coherence rather than the Dworkinian sense. Accordingly, 'judicial decisions are coherent if arguments provided in the judgement to justify the chosen interpretation form a coherent unit. Coherence in judicial reasoning does not, therefore, depend on whether a particular ruling fits into the legal system taken as a whole.' M. Sariano 'A Modest notion of Coherence in Legal Reasoning. A Model for the European Court of Justice' (2003) 16 Ratio Juris, 305-307; E. Paunio, *Legal Certainty in Multilingual EU Law* (Oxon: Routledge, 2013), 84,85.

in relation to its implicit conceptual presumptions, while at the same time suffering from the nonconformity of those substantialist presumptions with the social reality.[69] The ultimate significance of the present study lies in establishing this very connection between the conceptual realm and the legal doctrine, and tackling issues related to the substantiality requirement, as well as 'genocidal intent', through the lens of a fresh conceptual perspective on the crime. It should be noted, then, that even though the study is ultimately concerned with the perspectives of legal and quasi-legal bodies, e.g. judges, prosecutors or commissions of inquiry, it will nevertheless greatly benefit from the perspectives of historians, sociologists, defendants and victims in advancing its arguments, since it locates the main problem as the failure to represent the multi-faceted and contingent social reality of genocide in legal terms, to whatever extent this is possible.

In this context, the study aims to undertake a conceptual and evaluative enquiry by drawing on philosophy, sociology and legal theory in addition to traditional primary and secondary sources of law.[70] This goal is to be achieved in three steps. As a first step, the study substantiates the relationship between different doctrinal approaches to substantiality and social ontology, which is one of the common nexuses for philosophy and sociology, in that it examines the nature and properties of the social world and entities within it. As pointed out, this relationship has not been straightforward in case law, where judgments are usually subtle and have indirect references regarding the nature of protected groups. Additionally, existing judicial approaches to 'substantiality' are almost exclusively borrowed from scholarly suggestions, where the relationship between socio-philosophical reflection and suggested approaches are a bit more apparent. In this sense, establishing this relationship requires tracing the references and approaches in case law to their historical and scholarly sources and, for this reason, the

[69] To put it metaphorically, engaging with the topic merely at the doctrinal layer is like trying to treat the symptoms, namely perceived ambiguity and arbitrariness in case law, without understanding the disease.

[70] As the study aims to give an 'analysis of the existing conceptual framework of and about law' (Robert S. Summers, 'The New Analytical Jurists' (1966) 41 New York University Law Review, 865) and 'testing whether rules work in practice, or whether they are in accordance with desirable moral, political, economical aims, or, in comparative law, whether a certain harmonisation proposal could work, taking into account other important divergences in the legal systems concerned'. (Mark Van Hoecke (eds.), *Methodologies of Legal Research – Which Kind of Method for What Kind of Discipline?* (Oxford and Portland, OR: Hart Publishing, 2011), p.v.).

study may appear to treat case law on a level with scholarly literature at times, as they have become rather intertwined in respect of the substantiality requirement.

After establishing this relationship and concretising the aforementioned problems that the existing jurisprudential framework generates, the second step is to tackle the conceptual foundation of these problems, which is, the study argues, that both nominalist and functionalist conceptualisations of genocide fail in duly reflecting the social reality of genocide due to their substantialist presumptions, which has resulted in a conceptually ambiguous legal representation of the crime and a back door role for the substantiality requirement. Exploring this observation allows reframing the problem of applying the substantiality requirement as an episode of a more fundamental legal theory problem, which is that of connecting normative universals with the particular. And reframing the problem in this way leads to a theoretical legal discussion about what should be understood from the idea of 'objectivity' in applying legal norms, particularly those norms that aim to represent highly contingent social processes like genocide. In a final step, the study revisits social ontology for a novel conceptual approach that may facilitate better representing the contingent reality genocide in legal terms and better guidance in applying a normative representation of the crime to the particulars of actual cases in a more consistent and predictable manner, to whatever extent that is possible.

At the final step, the study revisits the social ontology for a novel conceptual approach that may facilitate to better represent the contingent reality genocide in legal terms and to better guide lawyers in applying the normative representation of the crime to the particulars' of actual cases in a more consistent and predictable manner, to whatever extent it is possible. Through the lenses of this approach, the study considers its ultimate research question of to what extent and how can we assess 'substantiality' in 'objective' terms and makes certain suggestions. The outlined approach is thus somewhat akin to the methodology of Hersch Lauterpacht, who uses 'the critical analysis of a significant (and topical) doctrinal issue as a springboard to examine the theoretical and practical underpinnings of the discipline'.[71]

[71] A. Vrdolijak, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law' (2010) 20 European Journal of International Law, 1169.

To close the circle, taking this methodological step has significantly transformed the question of enquiry over time, because once it is realised that the social phenomenon under scrutiny is in fact a contingent process that aims at the destruction of contingent emergent 'unities', the inaccuracy of using the interrogative pronoun 'what' in posing the research question (e.g. what does constitute a substantial part of a protected group?) becomes clear. Formulating the question in such a manner relies on the false presumption that there is a given 'thing' with a relatively definitive structure and boundaries or some primordial essence or qualities (whether at the individual or collective level) that will be irrevocably distorted or endangered whenever the attack reaches a certain level of magnitude. On this substantialist premise, it is assumed that judicial reasoning can and should find and employ a one-applies-to-all kind of rule to justify whether a part of a group with such 'substantial' magnitude was targeted. However, the protected groups are in actuality ongoing and constantly, albeit relatively slowly, changing emergent realities constructed through persistent social interactions, mapping and articulation. Therefore, there is an endless number of possible answers to the abstract question of 'what constitutes a substantial part of a protected group' because what has been perceived as 'wholes', their existence and consequently the significance of their parts, is in flux depending on, inter alia, the spatial, temporal and socio-political context and conceptions.

What is more, the notion of genocide is not a natural kind or an entirely analytical construct, but a socio-legal abstraction.[72] This means that some characteristics of the crime are shaped by its genealogy. The most important of these with respect to our subject matter is that the concept of genocide historically aims to cover a specific form of atrocity against masses, and in point of fact it is exclusively included and examined in the category of mass atrocity crimes. That is, the ontological, analytical and legal dimensions are not the only parameters involved in engaging with the question of substantiality, we should also take the historical and genealogical imperatives into account, which makes the issue even more complex.

[72] H. Theriault, 'Genocidal Mutation and the Challenge of Definition' (2010) Metaphilosophy 41, no. 4, 498–501.

Therefore, it appears to be impossible, at least without putting the judges in a dilemma between justness and normative clarity, to establish a universal rule that reference to which would give a clear-cut answer and justification to the qualification of a part as 'substantial' in every particular case. The focal argument of this study is that instead of undertaking a futile and even dangerous endeavour to fix the meaning and scope of 'substantiality', we need to embrace the gap between the universal, namely the substantiality requirement, and the particular. This, however, does not imply that the pursuit of a higher degree of predictability and certainty in judicial reasoning should be abandoned or deemed unnecessary. The contention here is that one should not conceive the idea of objectivity as creating certain institutional arrangements that will practically turn the judge 'into a machine that is the agent of the universal law, programmed to apply that law whenever the conditions for its application are met'.[73] That is, the objectivity of legal reasoning should not be about the certainty of the conclusion (as in similar inputs should always give the same conclusion), but rather the predictability and consistency of the reasoning process while the judges being the bridge between the universal and the particular.[74] In respect of our research matter, this means the question of enquiry should not be about what constitutes a substantial part, but how and in what manner the judges should locate and weigh the possible factors in producing their justification for whether a part qualifies as substantial.

That said, before further elaborating on the argument and outlining the structure in which the study will advance it, the practical relevance and significance of the research problem must be articulated. Indeed, although the theoretical issues presented may be found intriguing, one may deservedly question their actual relevance. Moreover, exploring the research problem in this manner not only highlights the centrality of it in the discussions on whether particular situations legally qualify as genocide but also brings out sub-questions that must be dealt with in order to pursue the ultimate purpose of the study.

---

[73] Bankowski. 'In the judgement space: the judge and the anxiety of the encounter', 27.

[74] In this sense, the study concerns with 'certainty' in relation to the norm application process, which refers to the predictability and consistency of the reference points in the judicial process of bridging the universal norm and the particular facts.

1.2. Practical Implications and Significance of the Research Problem

To revisit the opening quote, even though the Reuters correspondent put his finger on one of the crucial ambiguities regarding genocide, when the dust settled and the scale of atrocities in Rwanda was revealed, the question of whether the genocidal magnitude was reached did not emerge as a legal point of controversy.[75] Nonetheless, the ICTR case law subtly exposed a significant complication regarding the substantiality requirement, which stems from the misfit between the intentionalist textual characterisation of genocide and the contextual aspect inherent to the crime. To elaborate, Article II represents a rather liberalistic view of genocide. It puts the emphasis on intentionality and agency by defining genocide as a specific *mens rea* crime and omitting any explicit reference to its contextual nature.[76] That being the case, the direct proof of one's mindset is almost, if not entirely, impossible to obtain.[77] For this reason, even though the case law explicitly denotes that a contextual element is not

[75] This is an understandable reaction since the atrocities took place in a fairly coordinated manner against almost the totality of Tutsi population throughout Rwanda and approximately one million people lost their lives as the result. Thus, the required magnitude has not been a significant moot point conceptually or legally. The possible different considerations on this matter might not have had significant consequences on the ultimate conviction about genocide.

[76] Moses, 'Conceptual blockages and definitional dilemmas in the "racial century"', 22.

[77] *Prosecutor v. Kayishema and Ruzindana* [2001] ICTR-95-1-A, Judgment, para. 159: 'explicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials'. *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, para. 523: 'On the issue of determining the offender's specific intent, the Cbamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.' Similarly, after establishing that a contextual element such as plan or policy is not an element of the criminal definition, the ICTY Trial Chamber in *Jelisić* nevertheless noted that 'it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system' *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para 100,101.

an element of the crime,[78] the context is nevertheless ascribed rather significant value in the inference of individual intent.[79] While this practice has been criticised in the

[78] *Prosecutor v. Mpambara* [2006] ICTR-01-65-T, Judgement, para.8. See also *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para 223 et seq: 'The offence of extermination as a crime against humanity requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship. These two requirements are not present in the legal elements of genocide. While a perpetrator's knowing participation in an organized and extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw the inference. The offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against a civilian population'.

[79] For example, the Trial Chamber in *Kayishema and Ruzindana* first felt the need to ask 'Did Genocide Occur in Rwanda and Kibuye in 1994?', independently from the acts and *mens rea* of the accused. Despite the Trial Chamber expressed that the purpose of this examination was not deciding 'whether specific acts by particular individuals amounted to genocidal acts' but rather having a 'better understanding of the context within which perpetrators may have committed the crimes alleged in the Indictment' the overall patterns and campaign are ultimately utilised as one of the main devices in inferring the genocidal intent of the accused. *Prosecutor v. Kayishema and Ruzindana* [1999] ICTR-95-1, Judgement, para 273 et seq. Also see *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, para. 523. Similarly in *Rutaganda* the Trial Chamber emphasised the role of overall context in examining the criminal responsibility of the accused: From the widespread nature of such atrocities, throughout the Rwandan territory, and the fact that the victims were systematically and deliberately selected owing to their being members of the Tutsi group, to the exclusion of individuals who were not members of the said group, the Chamber is able to infer a general context within which acts aimed at destroying the Tutsi group were perpetrated. Consequently, the Chamber notes that such acts as are charged against the Accused were part of an overall context within which other criminal acts systematically directed against members of the Tutsi group, targeted as such, were committed. *Prosecutor v. Rutaganda* [1999] ICTR-96-3-T, Judgement, para.400. Also in Akayesu the Trial Chamber noted that 'the Chamber holds that the fact that genocide was indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence it in its decisions in the present case. Its sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the Prosecutor. In spite of the irrefutable atrocities of the crimes committed in Rwanda, the judges must examine the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent Moreover, the seriousness of the charges brought against the accused makes it all the more necessary to examine scrupulously and meticulously all the inculpatory and exonerating evidence, in the context of a fair trial and in full respect of all the rights of the Accused.' para 129. The ICTY as well has frequently focussed on the macro phenomenon in order to locate intentionality of individual perpetrators. Consider the following statement in Krstić for instance: 'The Trial Chamber has thus concluded that the Prosecution has proven beyond all reasonable doubt that genocide, crimes against humanity and violations of the laws or customs of war were perpetrated against the Bosnian Muslims, at Srebrenica, in July 1995. The Chamber now proceeds to consider the criminal responsibility of General Krstić for these crimes[...]' See also *Prosecutor v. Karadžic*́ [2012] Transcript, 28751–28752; *Prosecutor v. Tolimir* [2012] IT-05-88/2-T, para 769; *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, para.523. *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 592. L. Van Den Herik, *The Contribution of*

literature for violating the principle of individual fault,[80] what has gone largely unnoticed is that it also brings an additional uncertainty about whether the reach of the perpetrator or the extent of the collective attack should be the point of reference in assessing 'substantiality'.

The most forthright example in this context has been the case concerning Jean-Paul Akayesu, who was the *bourgmestre* (mayor) of Taba commune. In *Akayesu*, the Trial Chamber first established that the attacks that took place in Rwanda amounted to genocide and what happened in Taba was part of a larger campaign.[81] This observation was then used as evidence to infer the specific *mens rea* of Akayesu concerning the destruction of Tutsis in Taba commune.[82] The issue is that the ICTR did not clarify whether the substantiality requirement was satisfied because of the magnitude of the overall campaign in Rwanda or because the Tutsis in Taba were considered a substantial part in relation to the personal position and reach of Akayesu, which would have the broader implication that the required substantiality may vary from perpetrator to perpetrator – even when they are part of the same broader campaign.

As it will be further examined in chapter two, the latter perspective constitutes the basis for the only novel proposal in the literature regarding the substantiality requirement, namely, the 'individualised approach' proposed by Behrens. According to this approach, 'substantiality' should always be assessed in relation to the particular perpetrator's reach, position, and control, predominantly because the crime is legally characterised as individual misconduct, as opposed to a macro-level phenomenon, and

---

the Rwanda Tribunal to the Development of International Law (Leiden: Martinus Nijhoff Publishers, 2005) 114; O.Quirico, *International Criminal Responsibility: Antinomies* (New York: Routledge, 2019), 295 ff

[80] K. Heller, 'International Criminal Tribunal for Rwanda – Genocide – Conspiracy to Commit Genocide – Complicity in Genocide – Mens Rea – Judicial Notice', 101 American Journal of International Law (2007), 159. Also see Behrens, 'Between Abstract Event and Individualized Crime', 927.

[81] *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, para.169 reads as 'In light of this evidence, the Chamber finds beyond a reasonable doubt that the acts of violence which took place in Rwanda during this time were committed with the intent to destroy the Tutsi population, and that the acts of violence which took place in Taba during this time were a part of this effort.'.

[82] Prosecutor v. Akayesu [1998] ICTR-96-4-T, Judgement, paras. 181,675,704,734. See for a detailed analysis Kim, *Collective Theory of Genocidal Intent*, 107-112.

the term 'in whole or in part' textually belongs to the specific *mens rea*.[83] The individualised approach will be largely contradicted because reducing genocide to mere individual misconduct goes against the social reality and the genealogical roots of genocide and runs the risk of watering down the concept. Indeed, in purely individualised thinking, even the intended destruction of a few people by a *lone genocidaire* may counter-intuitively qualify as genocide as long as the reach and control of the perpetrator are very limited. And strikingly, whenever Behrens offers a concrete example to demonstrate an individualised approach, he implicitly presupposes a collective genocidal context.[84] That is, an individualised approach paradoxically appears to be able to operate only after establishing that genocide occurred at the macro-level, but it leaves ambiguous what is the standard and required magnitude (and whether it is different) to qualify a macro-level atrocity as genocide to begin with.

Returning to the jurisprudence of international courts and tribunals, this issue was later directly addressed in the ICTY case law, where it is consistently noted that even though the perpetrator's reach and control cannot be the sole factor in arriving at a conclusion that the targeted part was substantial, it can nevertheless inform the analysis in combination with other factors and established approaches.[85] The ICTY's take on the

---

[83] See Generally P. Behrens, 'Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia' (2015) 28 Leiden Journal of International Law, 930.

[84] See chapter three.

[85] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para.13: 'The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can - in combination with other factors - inform the analysis.' Also see *Prosecutor v. Brđanin* [2004] IT-99-36-T, Judgement, para. 702: '…the determination of when the targeted group is substantial enough to meet this requirement may involve a number of considerations, including but not limited to: the numeric size of the targeted part of the group - measured not only in absolute terms but also in relation to the overall size of the entire group - , the prominence within the group of the targeted part of the group, and the area of the perpetrators' activity and control as well as the possible extent of their reach.' *Karadžić and Mladić* [1996] Transcript of Hearing, 15-16 (Evidence Hearing Against Radovan Karadžić and Ratko Mladić) ; '…in view of the particular intent requirement, which is the essence of the crime, the relative proportionate scale of the actual or attempted physical destruction of a group, or a significant section thereof, should be considered in relation to factual opportunity of the accused to destroy a group in a specific geographic area within the sphere of his control, and not in relation to the entire population of the group in a wider geographical sense.' Similarly in *Bosnian Genocide* the ICJ supported this view. While examining the argument of the Applicant that the systematic nature of atrocities over a lengthy period indicated the intent to destroy Bosnian Muslims and Croats, the Court pointed out that the genocidal intent 'has to be convincingly

matter is laudable in that it eschews reducing the criminal phenomenon to a single structuralist[86] or intentionalist[87] dimension. But at the same time, it offers little guidance or clarity pertinent to how to manage the tension between the established approaches, which are by-products of a macro-level conception of genocide, and the 'individualised approach'. Then, the question of how the individual and macro levels of the crime should be weighed when identifying the relevant part for the assessment of 'substantiality' emerges as one of the sub-problems that must be addressed in order to achieve the main objective.

While the substantiality requirement did not cause any major difficulties in terms of Rwanda, its application constituted one of the central controversies in the ICTY case law – particularly in relation to the Srebrenica situation. Consequently, the most elaborate judicial deliberations regarding the substantiality requirement have been put forward by the ICTY. To elaborate, in 1995, around 8,000 military-aged Bosnian Muslim males in Srebrenica were attacked and killed (which falls into the ambit of the *actus reus* element), while the rest of the population, approximately 32,000 people, were subjected to forced deportation (which is not included to the *actus reus*).[88] When the perpetrators of these atrocities were brought before the Tribunal, the legal question arose as to whether they acted with intent to destroy a substantial part of a protected group. The ICTY struggled in every step of assessing the substantiality requirement, which vividly concretises the theoretical critique put forward in the previous section as well as the practical significance of the research topic.

The Trial Chamber in *Krstić* initially appeared to consider 8,000 military-aged Bosnian Muslim males as the targeted part. However, the Chamber did not seem comfortable to qualify the part as substantial from a numerical standpoint alone, presumably because the number of targeted victims was relatively low both in absolute terms and as a

---

shown by reference to particular circumstances' and, thus, such a broad proposition stands out as disagreeable. The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para 200.

[86] The idea that the collective structure is the main reason for the occurrence of genocide while the agency only plays a secondary role and agents may not even desire or concern with the destruction of the victim group.

[87] The idea that genocide occurs mainly as a result of the intentions of individual(s).

[88] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 592,594.

percentage of the total Bosnian Muslim population (in Srebrenica (20%) or Bosnia (2.9%)).[89] Instead, by emphasizing the fact that the perpetrators specifically targeted military-aged men and boys, the ICTY Trial Chamber argued that 'this selective destruction of the group would have a lasting impact upon the entire group' since 'the destruction of consecutive male generations in such a patriarchal society, in conjunction with forced deportations, will bring about devastating outcomes and it will also make the recapture of the territory impossible'.[90]

While it is thus concluded that the targeted part was substantial, the Defence Counsel challenged the decision by pointing out that the Chamber used impermissible sequential reasoning.[91] The Defence Counsel argued that only military-aged men in Srebrenica were intended to be physically or biologically destroyed, and these men were a part of Bosnian Muslims in Srebrenica, which was itself already a part of Bosnian Muslims as a whole. Therefore, military-aged men, in fact, constituted 'part of a part'.[92] The Appeals Chamber rejected this objection, arguing that the Trial Chamber did not actually characterise the military-aged Bosnian Muslim men in Srebrenica as the 'part' in question, but rather considered killing them as one of many shreds of evidence of the intended destruction of the Bosnian Muslim group in Srebrenica as such.[93] Therefore, by emphasising the geographical approach in conjunction with the qualitative approach, the Appeals Chamber affirmed that the substantiality requirement was fulfilled.

Several points flow from the assessment of the ICTY. To begin with, it demonstrates that determining what constitutes the 'whole' is far from being clear-cut. Many groups in our social world can be classified as a sub-group of some larger group or as a whole in its own right, depending on how the emergence of national, racial, ethnic and religious boundaries is understood. As seems clear, conceiving the whole differently

---

[89] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para.15. Also see for 1991 census B. Coggins, *Power Politics and State Formation in the Twentieth Century: The Dynamics of Recognition* (Cambridge: Cambridge University Press, 2004),108.

[90] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 595.

[91] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para.18.

[92] Ibid; K. Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing*, (OUP- Oxford, 2014), 43-44.

[93] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, paras 19-21.

may change the entire assessment of substantiality. If so, then how and on what basis do we draw the line? That is, why do Bosnian Muslims, instead of Muslims, Bosnians, Eastern Bosnian Muslims or Srebrenica Bosnian Muslims,[94] qualify as the relevant 'whole'?

In concluding that Bosnian Muslims constituted a national 'whole', the Trial Chamber in *Krstić*, by following a general tendency in jurisprudence, tried to strike a balance between extreme structuralist and individualist viewpoints regarding the emergence of group boundaries. The former position is built on the presumption that the protected groups exist by virtue of certain self-standing properties or structures that endure independently of individual perceptions. Thus the 'whole' must be objectively discernible in the same manner as natural phenomena.[95] This approach, which not only contradicts the experienced reality but also perversely essentializes identities, quickly collapsed in *Akayesu* after the objective indicators assigned by the Trial Chamber for the protected groups failed to account for the distinction between Hutus and Tutsis.[96] The latter position, on the other hand, which was exemplified to some extent in the report of the Darfur Commission,[97] understands the protected groups as radical social

---

[94] The latter two originally proposed by the prosecution. *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 558.

[95] *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, paras 512-515. Also see *Prosecutor v. Rutaganda* [1999] ICTR-96-3-T, Judgement, para 374.

[96] That led the Trial Chamber to stretch the limits of interpretation by arguing that the object and purpose of the drafters was in fact protecting any 'stable and permanent' group. *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, paras 512-515.

[97] 'The Commission of Inquiry to investigate reports of international humanitarian law and human rights law in Darfur, Sudan', Report of the International Commission of Inquiry on Darfur to the Secretary-General. Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, Annex to U.N. Doc. S/2005/60, 1 February 2005 (hereafter: Darfur Report), para.499. The reason I say 'to some extent' is that in the following paragraph the Commission somewhat shifted towards a relational approach that has some parallels with the present study's perspective. In this regard, the Commission adds that 'it would be erroneous to underestimate one crucial factor: the process of formation of a perception and self-perception of another group as distinct (on ethnic, or national, or religious or racial ground). While on historical and social grounds this may begin as a subjective view, as a way of regarding the others as making up a different and opposed group, it gradually hardens and crystallises into a real and factual opposition. It thus leads to an objective contrast. The conflict, thus, from subjective becomes objective. It ultimately brings about the formation of two conflicting groups, one of them intent on destroying the other.' Ibid. para 500.

constructs and thus suggests that the perception of perpetrators may constitute the main point of consideration in thinking about the emergence of group boundaries. Such an understanding not only undermines the genealogical roots and moral distinctiveness of the concept of genocide, but also counter-intuitively implies that any population can qualify as a protected group as long as the perpetrator characterises it as one.

In order to avoid the pitfalls of the two extremes, the Trial Chamber in *Krstić* included both objective and subjective parameters in its assessment. Accordingly, the relevant whole was determined 'by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics'.[98] These characteristics of the group, the Chamber noted, must be identified within the socio-historical context which it inhabits.[99] Although this approach certainly appears more nuanced, it nevertheless does not illuminate how to manage a possible conflict between the perception of perpetrators and the socio-historic mapping of social groupings. That is, if the perpetrators had considered the Srebrenica Muslims as a distinct, say, ethnic whole, while there is no socio-historical evidence to support such perception, whose 'reality' should have triumphed in the courtroom? Furthermore, the proposed method also falls short in explaining what makes certain characteristics national, ethnic, racial or religious.[100] In the end, one can decide on whether the perpetrator's perception of 'otherness' was based on national characteristics only if she already knows what those characteristics refer to. That is to say, the determination and characterization of the relevant 'whole' stand out as one of the sub-issues that the study needs to address.

Moreover, the Srebrenica situation sharply concretised the conceptual contradictions in the prevailing judicial interpretation and the backdoor function of the substantiality requirement between nominalist and functionalist conceptions of the crime. The ICTY

---

[98] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 557. Agnieszka Szpak, "National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the Ad Hoc International Criminal Tribunals" (2012) 23 European Journal of International Law, 169. See also *Prosecutor v. Kayishema and Ruzindana* [1999] ICTR-95-1, Judgement, para 72.

[99] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 557.

[100] For example see Ibid. para. 559.

Trial Chamber in *Krstić*[101] and the ICJ in *Bosnian Genocide*[102] maintained that genocidal intent exclusively refers to the intended physical or biological destruction of group members. However, the aforementioned reasoning and application of the law contradicted this proclamation. It is difficult to grasp how killing the military age male population would lead to the physical or biological destruction of other members, and thus it can be concluded that the targeted part was actually all Bosnian Muslims in Srebrenica. As William Schabas aptly puts it, 'there is a world of difference between physical destruction of a group and "a lasting impact" upon a community'.[103] Yet, through upholding the qualitative approach, the ICTY effectively shifted the emphasis from the prevailing nominalist reading of the term 'destroy' to a structural-functionalist conception of a protected group as a 'distinct and separate entity'.[104]

Indeed, the ICTY's conclusion that the Bosnian Muslims in Srebrenica were the targeted part makes better sense from a functionalist perspective, given that the murder of military-aged men in conjunction with forced deportations of the rest suggests the intention to bring about a state in which the collective entity does not function. All these points not only affirm the validity of Behrens's critique that an arbitrarily favoured approach in assessing substantiality may drastically change the ultimate verdict about genocide, but they also illustrate that the prevailing judicial approach turns genocide into a morally and legally ambiguous concept. Moreover, this situation also vividly demonstrates how conceptually contradictory approaches are in fact used as tools to sidestep the possible dilemma between justness and normative clarity, which would occur in this particular situation if a strict numerical limit had been previously established.

The Srebrenica situation and related case law will be revisited in more depth throughout the study. At this juncture, however, one may query whether the Srebrenica situation

---

[101] Ibid. 580.

[102] The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para.344.

[103] W. Schabas, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia' (2001) 25 (1) Fordham International Law Journal, 47.

[104] See, for example, *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 590.

was an exception. In other words, do the research problem and the summarised complications maintain their importance today?[105] While the law against genocide, unfortunately, sustains its relevance, due to both recent situations like those in Myanmar or Syria and the trials of past atrocities (e.g. Khmer Rouge), various aspects of the issues raised are potential moot points about current cases and situations as well. For example, the recent report of a UN fact-finding mission concluded that a crime of genocide has been committed against the Rohingya people in Myanmar.[106] But even though the report persuasively demonstrates atrocities targeting the Rohingya presence in Myanmar,[107] the evidence presented does not support the proposition that the physical and biological destruction of the entire population was the objective. Rather, an important portion of the population was subjected to forced deportations as well as brutal assimilation policies.[108] To avoid this possible objection, the report took the ICTY's interpretation a step further by suggesting that if other forms of destruction are related to physical and biological destruction, they may constitute a crime of genocide.[109] In so doing, it effectively took a functionalist position and defined the Rohingya people in Myanmar as the targeted part. [110]

---

[105] Particularly given that the legal proceedings and discussions in relation to the Rwanda and former Yugoslavia situations are now mostly wrapped up and the ICC's Darfur investigation lacks any significant progress for a long time.

[106] UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', UN Doc. A/HRC/39/CRP.2, (17 September 2018) available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf> accessed on 20 March 2019.

[107] Ibid. paras 1388-1441.

[108] UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', paras 1388-1441.

[109] Ibid. para. 1412: 'Genocidal intent requires that the perpetrator intend to "destroy" the protected group in whole or in part, as such. Destruction is understood to mean physical or biological destruction, rather than the disbandment or expulsion of the group. Other forms of destruction, such as social assimilation or attacks on cultural characteristics, do not constitute genocide if they are not related to the physical or biological destruction of the group'.

[110] A similar situation also arose in a recent ECCC judgment in which, despite 20,000 Vietnamese having been killed, and most of the minority forcefully deported by the Khmer Rouge, it was concluded that genocide was intended against the entire Vietnamese minority. Prosecutor v. Khieu Samphan and Nuon Chea, [2018], Case File No. 002/19-09-2007/ECCC/TC, Summary Judgement, para 31 ff.

While the study shall draw on such ongoing situations and proceedings where it is convenient, one situation that will be particularly dwelled upon is the ongoing civil war in South Sudan. The conflict in South Sudan has been taking place between militias from several different tribes (mainly the largest two, Nuer and Dinka), whose historical struggle over competing interests turned into ethnopolitical mass violence in 2013 – two years after the country's independence. So far, around 400,000 people have lost their lives and one-third of the total population has been displaced.[111] The reasons why the South Sudan Civil War will be the main demonstrative case study are twofold.

First, there have been several spatially limited genocidal atrocities, in which the numbers of targeted victims were relatively low and the acts of genocide accompanied other destructive acts. In addition, the group boundaries and identities in South Sudan, where over 60 different tribes with numerous sub-tribes are situated, are exceptionally complex, which makes the determination and characterization of the relevant 'whole' rather challenging. That is, the South Sudan situation comprises some 'hard cases' that exhibit many of the summarised complications and therefore allows demonstrating and testing the understanding that the study will develop.

Second and connectedly, despite the resemblance of certain atrocities in South Sudan to Srebrenica, only a minority of commentators have noted that the crime of genocide may have been committed.[112] Indeed, the latest UN report suggests that the atrocities are likely to amount to crimes against humanity and war crimes, while swiftly dismissing the question of genocide.[113] Even though the South Sudan situation has not yet been examined by any tribunal or court, the UN report and the overall perception of the situation call for asking why the atrocities at Srebrenica amounted to genocide, while similar atrocities in South Sudan do not.

---

[111] F. Checchi, et al. 'Estimates of crisis-attributable mortality in South Sudan, December 2013-April 2018 A statistical analysis', (2018) available at <https://crises.lshtm.ac.uk/wp-content/uploads/sites/10/2018/09/LSHTM_mortality_South_Sudan_report.pdf> accessed on 20 March 2019.

[112] See chapter six.

[113] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2 (6 March 2018).

All in all, even if the research problem may appear to be narrowly constructed at first glance, not only does it have a significant impact on whether a situation legally qualifies as genocide, but it also requires addressing some broad and fundamental issues. Having outlined the foundations, implications and significance of the research problem, the next and final section shall capsulize the structure in which the research will advance its arguments.

1.3. Argument and Structure

The argument of the study, in a nutshell, goes as follows. The inherent conflict between the staticity of norms and concepts that together constitute the legal representation of genocide and the uniquely complex and always changing reality that these universals are predicated on put judges in an anxious place when addressing questions of appropriateness and use of the norms in question.[114] As one of these norms, the substantiality requirement is no exception and judges find themselves in a situation where they are not guided by the universals in determining and justifying whether a particular targeted part was 'substantial'. This study argues that a morally and conceptually plausible response to this issue cannot be provided by trying to fix the meaning and parameters of 'substantiality' through generating further universals at the expense of pervasively thinking about the protected groups and crime in static and reductionist terms – which not only leads to a series of moral dilemmas and conceptual contradictions but also fails to dissipate the perceived vagueness inherent to the concept of 'substantiality'. Instead, the contingency in the assessment process should be embraced, whereby it is meant that we must recognise the existence of an infinite numbers of factors, which cannot be wholly subsumed or specifically foreseen under any kind of system of representation or model that may justify the qualification of a part as substantial in a particular situation. That is, our understanding of substantiality is necessarily subject to continuous revision and rearticulation afforded by fresh encounters.[115]

---

[114] Bankowski. 'In the judgement space: the judge and the anxiety of the encounter', 26, 27.

[115] Z. Bankowski, 'Legal Reasoning from the inside out,' in ed. Tadeusz Biernat et al. *Stressing Legal Decisions* (Krakow: Polonia, 2003), 43.

Therefore, the intended contribution here is to investigate and make suggestions as to what kinds of thought processes judges should employ in locating and assessing relevant and competing factors and considering the appropriateness of extending abstract universals into a specific set of particulars that constitute underlying reason.[116] In this regard, the study ultimately submits that the determination and justification of substantiality should be perceived as a balancing process between the urge to perceive genocide as a form of mass killing/atrocity that derives from the crime's genealogy and the legal construction that designates certain collective unities as the primary protected value. The conventional substantialist positions fail to offer morally satisfying parameters to facilitate this balancing process due to the unjustified primacy given to either the structure or the individual. Instead, recognising that both criminal phenomena and the protected groups are in fact relational processes may allow better conceptualising of the nature of the good protected by law, as well as the dynamics of social phenomena, and thus pave the way to offer a more comprehensive, albeit non-exclusive, set of parameters to assess 'substantiality'. The thesis advances this argument in the following structure.

Chapter two begins with a historical account of the substantiality requirement. After chronologically summarising how the requirement has become an authoritative norm and *de facto* part of the legal representation of genocide, the chapter delineates that 'substantiality' is an open-texture concept and the meanings ascribed to it have historically varied according to the prior – and largely conflicting – conceptual commitments from which the crime, its morality, and its constituent elements are understood. However, engaging with this indeterminacy as an interpretation problem does not take the discussion much further, because referring to the formal methods of treaty interpretation does not lead to decisively favouring any particular meaning attributed to 'substantiality' so far. Following these findings, the chapter examines how international courts and tribunals have attempted to overcome this complication and

[116] E. Christodoulidis, 'Eliding the particular: a comment on Neil MacCormick's "particulars and universals"' in MacLean, J. and Bankowski, Z. (eds.) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006), p.98. It should be noted that this study aligns more with the particularist position and will elaborate on this in chapter two. As a useful summary of the universalist and particularist positions See. J. MacLean, *Rethinking Law as Process: Creativity, Novelty, Change,* (Oxon: Routledge, 2012), 16-45.

presents a critique of all the prevailing approaches to 'substantiality' and their application. This scrutiny not only explores the conceptual contradictions between the different approaches and why they nevertheless co-exist in the same body of case law, but also shows that the established judicial framework neither brings the desired predictability to the assessment process, nor helps to resolve the judges' dilemma between justness and normativity.

Chapter three explores the conceptual roots of the problems in the judicial approach towards substantiality by examining the scholarly work on the topic. The chapter illuminates that the literature mostly follows the substantialist conceptual thinking displayed in case law and that the commentators tend emphasis a particular approach to substantiality over the others depending on the philosophical presumptions attached to the definitional terms. The chapter begins by reviewing individualistic standpoints, namely: radical nominalist views that flatly rejects the validity of certain requirements; moderate nominalist perspectives that prioritizes numerical magnitude; and Behrens's 'individualised approach' that is built on a intentionalist conception of genocide perpetration and puts emphasis on the individual perpetrator's reach. It is argued here that all these perspectives fail in representing the reality of protected groups and crime, which leads to, inter alia, morally questionable understandings of 'substantiality'.

Following that, the chapter turns to collectivistic views. As already hinted at and as will be elaborated in chapter three, considering the protected groups as integrated organisms or structures that exist through parts functioning against and with each other paints an unrealistically deterministic and static picture and implicitly essentializes identities, which consequently leads to the qualitative approach, built on such a conception and originally introduced by Raphael Lemkin,[117] to create series of moral and legal complications. At this point, the study particularly focuses on Lemkin's work to advance its critique. This, however, is not merely due to the fact that many others later

[117] Lemkin drew an analogy between a protected group and a house and noted that the targeted part should be deemed substantial as long as its destruction creates an abstract threat of bringing about such structural distortion to the whole entity that it becomes impotent to make its substantial cultural or spiritual contribution to the civilisation or to the lives of its members. U.S. Congress, *Executive Session of the Senate Foreign Relations Committee*, vol. II (US Government Printing Office 1976), 370.

echoed his ideas, but also because Lemkin provides an important starting point to establish an alternative conceptual framework for two reasons.

First, the accuracy of Lemkin's diagnosis of the problem is hard to deny. Social groups[118] play an indispensable role in the formation of an individual's being, and cross-fertilization among groups' properties and powers enriches humanity. However, such powers and properties (e.g. culture, traits, language) (i) only exist as long as the collective phenomenon persists and (ii) cannot be explained away by referring to a set of individuals with particular qualities, given that properties like culture emerge and constantly transform as a result of conflicts, as much as similarities exist among individuals who define themselves and are defined by others as such. That is to say, Lemkin was correct in arguing that merely trying to protect individuals with a certain identity or particular properties would be a deficient practice.

Second, even though Lemkin appeared to follow the structural-functionalist tradition,[119] recent analyses of his work reveal the underlying uneasiness of Lemkin with classical realism[120] and a functionalist worldview.[121] Indeed, in developing his account, Lemkin occasionally draws on ideas that are strongly affiliated with relational sociology today. It seems possible then that Lemkin found himself committing to structural-functionalist terminology due to the lack of socio-philosophical alternatives at the time. That said,

---

[118] While Lemkin did not offer any listing, the Drafters of the Convention expectedly and disputatiously limit the protection with the four groups.

[119] Lemkin, 'Genocide', 15 The American Scholar (1947) 229; Also see See R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace, 1944), 91. In this way, Lemkin substantiated his view that genocide differs morally and legally from its close kin crimes against humanity and must exists as a distinct crime category.

[120] By classical realism the thesis refers to the idea that 'whatever exists does so, and has the properties and relations it does, independently of deriving its existence or nature from being thought of or experienced.' G. Jesson, 'Gustav Bergmann's Quest for the Ontology of Knowing: From Phenomenalism to Realism' in L. Addis, Jesson, Greg and Tegtmeier, Erwin (eds.*), Ontology and Analysis: Essays and Recollections about Gustav Bergmann* (Lancaster: Ontos Verlag, 2007), 107.

[121] See, for example, Douglas Irvin-Ericksen, *Raphael Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2016).

since Lemkin invented the term genocide,[122] more nuanced approaches have been developed in sociology and philosophy to explain the existence of collectives, and the criminological character of genocide has been closely scrutinised in the literature. All these developments allow both reconsidering and further developing Lemkin's perspective on crime and building a conceptual framework through which we can interpret the definition in a more coherent and reality-oriented manner.[123]

Following this train of thought and using Lemkin's account as a stepping-stone, chapter four advocates a relational realist conception of genocide and explores its implications regarding the research problem. To begin with, the chapter, by drawing on various scholars – most prominently Roy Bhaskar, Georg Simmel, Pierpaolo Donati and Manuel Delanda – establishes that enumerated groupings emerge, evolve and disappear through constantly re-confirmed meanings and significance collectively ascribed to certain – real or imagined – physical or social traits, recurring interactions, beliefs, practices or institutions and combinations of these. That is to say, the listed types of identities are forms of relations, the characteristics of which are in constant but relatively slow flux, and thus racial, ethnic, religious or national distinctions do not refer to differences in substance, but rather to an always ongoing and evolving process of collective differentiation. By implication, then, the 'whole' is in constant flux and its

---

[122] Lemkin, who was a competent etymologist, combined the Greek word genos (γένος), which means family, race, tribe, notion, kind and Latin suffix –cide that derives from the word caedis/caedo (murder, slaughter, massacre) and means killing to denote this phenomenon. See Lemkin, *Axis Rule in Occupied Europe*, 79. In translating these terms into law, drafters of the Genocide Convention conceptualized the term 'genos' as the four protected groups (whether list is convenient or not) and the term '–cide' as the intent and attempt to destroy these protected groups, as such.

[123] Reconciliation of the Lemkinian framework and the understanding presented in the legal definition is challenging for a legal scholar because while Lemkin ultimately aimed to protect all the distinct 'ways of life', the legal definition went to a different direction. The list of protected groups excluded several important groups that are the source of different 'ways of life' (e.g. political groups, gender groups); yet included nations (in political sense) and racial groups that usually consist of the assembly of several distinct, remotely related and more than occasionally conflicting 'ways of life'. That is to say, the legal definition does not merely provide protection for certain kind of 'families of mind', but rather for those collectives consist of individuals who are related to each other by an organizational structure, sense of solidarity/identity or common interest identifiable by characteristic racial, religious, ethnic or national features -even if this relatedness (e.g. organizational, interest) does not create a distinct 'culture', or as Lemkin puts a 'way of life'.

boundaries are established and constantly re-established through interacting in- and out-group perceptions regarding the posited and realised entity and its characteristics. These contingency and adaptability stand out as reasons why it is beyond possibility to establish an abstract, objective norm, referring to which will determine 'substantiality' in each particular case without causing morally questionable outcomes. The chapter suggests, in this context, that the problem of the determination and justification of 'substantiality' should not be perceived as a deficiency of 'normative strictness', but instead as an instance of the problem of applying abstract norms to each particular situation in a manner that fulfils the moral purpose of legislation without undermining the certainty[124] and coherence[125] of the norm application process.

By rethinking the problem in this manner, chapter four concludes by elaborating the following suggestion. Since the identification and assessment of 'substantiality' largely lack a meaningful ontological basis, it ultimately should be thought of as a balancing process between competing genealogical and analytical imperatives. In this context, the absolute numerical magnitude always constitutes a natural starting point, not because of any ontological reasons but due to the very genealogy of the crime. All the other factors come into consideration in the absence of such straightforward magnitude. That is, when judges are not comfortable with the absolute numerical size of the part, they should look at whether there are analytical factors that stems from the immorality of genocide to balance the genealogical urge to establish the absolute numerical magnitude. The study suggests that the main, albeit non-exhaustive analytical factors can be grouped under three headings, namely: the particular characteristics of the unity and the targeted part, spatial circumstances, and socio-political background, All these

[124] By 'legal certainty', then, the thesis refers to clarity, equality, and foreseeability of the norm application process which enable those who are subject to them to order their behaviour in such a manner to avoid legal conflict or to make clear predictions of their chances in litigation. That is 'certainty' in norm application context refers to rather the predictability and consistency of the reference points in the process of assessment with the judges being the bridge between the universal and the particular.

[125] By 'coherence' the thesis refers to the modest notion of coherence rather than the Dworkinian sense. Accordingly, 'judicial decisions are coherent if arguments provided in the judgement to justify the chosen interpretation form a coherent unit. Coherence in judicial reasoning does not, therefore, depend on whether a particular ruling fits into the legal system taken as a whole.' M. Sariano 'A Modest notion of Coherence in Legal Reasoning. A Model for the European Court of Justice' (2003) 16 Ratio Juris, 305-307; E. Paunio, *Legal Certainty in Multilingual EU Law* (Oxon: Routledge, 2013), 84,85.

points of reference, which fundamentally shift the focus to collective figurations that are in fact the ultimate concern of the law against genocide, should be considered as non-exclusive and largely interrelated factors that alleviate the genealogical requirement for a 'large number' of victims and play an essential role in justifying and assessing the substantiality of a part.

Subsequently, chapter five briefly discusses how the relevant ‘part’ for the assessment of substantiality should be located in light of the processual nature of the group destruction and contextuality of genocidal intent. The first section argues, in this respect, that the ontological framework and understanding of genocide proposed in chapter four requires designating the population that is subject to the overall process of destruction, not merely those in the listed acts, as the relevant ‘part’ for the consideration of substantiality. The second section, on the other hand, advances the argument that there exists an inherent relationship between ‘context’ and individual genocidal intent, which needs to be examined and borne in mind when determining the targeted ‘part’ by an individual perpetrator.

The arguments developed throughout the study will not only lead to a novel understanding regarding the substantiality requirement, but also as to the crime and the legal assessment of its occurrence. In this respect, chapter six will have a dual purpose. First, it shall systematise the findings of the thesis as a four-step ‘test’ to assess the occurrence of Genocide and position the proposed framework of analysis for ‘substantiality’ in the context of this test. Second, it applies this ‘test’ to the actual situations. To this end, a case study will be conducted regarding the ongoing conflict in South Sudan, by drawing some comparisons with the situations like Rwanda, Srebrenica, Vukovar and Myanmar.

Through the case study, the thesis will demonstrate how the proposed way of thinking can offer an alternative practice and better justification both in assessing the occurrence of genocide and ‘substantiality’. By mainly focusing on the divide between the main conflicting tribes, the study discusses whether some of these atrocities satisfy the substantiality requirement and may be characterised as genocide. In doing so, it advances and concretises its argument that neither the occurrence of the crime nor the assessment of the substantiality requirement can be reduced to a straightforward, simple

formula. Therefore, the purpose of the four-step ‘test’ and the case study will not be producing a definitive answer to the question of genocide and ‘substantiality’, but rather enhancing the conceptual coherence and consistency, as well as the moral responsiveness, of the assessment process. All in all, then, this is a study on ‘how to think about genocide’, rather than ‘what is genocide’.

Finally, chapter seven concludes the study, by summarising and highlighting its novel finding and arguments.

CHAPTER TWO

Emergence of the Substantiality Requirement as a De Facto Norm and its Judicial Application

This chapter provides an analysis of historical and judicial development of the substantiality requirement and critique of its application in the jurisprudences of international courts and tribunals. In introducing the concept of genocide to the World in 1944, Lemkin did not explicitly include the partial destruction of human groups in the concept he coined.[126] Such a reference first appeared at the beginning of the drafting process[127] of the Genocide Convention.[128] The precise phrase 'in whole or in part' also came into view in the very first draft convention, namely, the 'Secretariat Draft';[129] yet drafting history shows no specific discussion or descriptions regarding the phrase or its implications at that stage.[130] Eventually, the Secretariat Draft was not agreed on, and so

---

[126] Lemkin described genocide as 'a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups completely.*'* Lemkin, *Axis Rule in Occupied Europe,* 79.

[127] For a comprehensive historical account on the drafting process see Schabas, *Genocide in International Law*, 59-117, 273-277.

[128] The idea of partial destruction was included to the General Assembly Resolution 96(I) (1946), which stated that the instances of genocide 'have occurred when racial, religious, political, and other groups have been destroyed, *entirely or in part*' UN General Assembly, Resolution 96(I) 'The Crime of Genocide', 11 December 1946 (*emphasis added*). The formulation of the Resolution 96 (I) is quite similar to the draft resolution that was proposed by the delegations of Panama, Cuba, India, which was the starting point of the drafting process. Following phrase was included to the draft resolution: 'Whereas throughout the history and especially in recent times many instances have occurred when national, racial, ethnical or religious groups have been destroyed, entirely or in part;…' UN.Doc. A/BUR/50-Annex 15. Similarly an early Saudi Arabian draft included a reference to the idea of partial destruction. 'Genocide is the destruction of an ethnic group, people or nation carried out either gradually against individuals or collectively against the whole group, people or nation.' UN.Doc. A/C.6/86-Annex 15b.

[129] In the Secretariat Draft genocide was defined as 'a criminal act directed against any one of aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or preventing its preservation or development.' Secretariat Draft, UN Doc. E/447 See also J. Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate-Publishing, 2006), 139-140.

[130] It was only expressed that '(t)he systematic destruction even of a fraction of a group of human beings constitutes an exceptionally heinous crime',[130] which adds nothing more to the statements in Resolution 96(I) as to the notion of partial destruction. Secretariat Draft, Comments on Article I, UN Doc. E/447.

an Ad Hoc Committee was set up to carry out further studies on the Draft Convention.[131] A reference to the idea of partial destruction was initially included in the Ad Hoc Committee Draft as well,[132] though it was removed from the final version of the draft,[133] as some delegates feared that the ambiguity of the term might result in an excessively low threshold for the commission of the crime.[134]

It should be noted at this juncture that the records of Ad Hoc Committee meetings display some serious confusion as to whether the idea of partial destruction contemplated related to the *mens rea* or *actus reus* of the crime.[135] For example, the initial United States Draft Convention made a reference to partial destruction in the *mens rea* by following the structure of the Secretariat Draft.[136] The Soviet Basic Principles and the China Draft attached such references to the *actus reus*.[137] The France

---

[131] Consequently, the United Nations General Assembly (hereinafter 'UNGA') requested further studies from the Economic and Social Council (hereinafter 'ECOSOC') on the Draft Convention with the Resolution 180(II) and the ECOSOC established an ad-hoc committee to work on the matter. 'Draft convention of genocide', UN General Assembly Resolution 180(II), 21 November 1947; UN Doc. E/ 734, ECOSOC Resolution 117 (VI). For a detailed examination see Schabas, *Genocide in International Law*, 69-77.

[132] Venezuelan delegate initiated the discussion during the Committee meetings by asking whether the new definition that the Soviet Union offered at that point was also covering the destruction of a single person. In response, the Soviet Union explained that 'the murder of an individual could not be considered genocide unless it could be proved that it was the first of a series of *acts aimed at the destruction of an entire group*'. France felt that this point should be explicitly mentioned in the definition. Thus, Venezuela proposed the (re)introduction of the words 'in whole or in part' and therefore the definition would be read as '(genocide means) a criminal act directed at the physical destruction, in whole or in part, of a group on national, racial or religious grounds'. See UN Doc. E/AC.25/SR.10.

[133] See UN Doc. E/AC.25/SR.12, UN Doc. E/AC.25/S.24.

[134] Schabas, *Genocide in International Law*, 274.

[135] Ibid.

[136] That said, this reference was excluded in the later proposals. The United States Draft reformulated the phrase 'with the purpose of destroying it [the group] in whole or in part' in the Secretariat Draft as 'for the purpose of totally or partially destroying such group' yet no justification for this (probably mere) linguistic change was put forward. See UN Doc. E.623; UN Doc. A/401.

[137] The Soviet Union did not submit a complete draft convention but presented a set of basic principles in which the *mens rea* of the crime was formulated as aiming 'the extermination of particular groups of the population on racial, national (religious) grounds'. Thus, it did not make any reference to the notion of partial destruction in the *mens rea*. On the other hand, the text included both physical and cultural acts of genocide to the *actus reus* of the crime and Principle VII specifically mentioned the partial destruction, but only in relation to the physical acts of genocide by noting that 'the convention should include as

Draft, on the other hand, presented an entirely different understanding of genocide, arguing that it should not be considered a distinct crime category. Instead, France suggested that even an attack on the life of an individual as a member of a human group, particularly by reason of his nationality, race, religion or opinion, should be considered a crime against humanity known as genocide.[138] But despite such diversity, if we set aside France's radically nominalist understanding, which will be examined later,[139] it appears that the majority of State Parties who referred to the idea of partial destruction were eventually aiming to make the same point: the actual destruction of a fraction constitutes the crime of genocide if the act is committed with intent to destroy the entire group.[140] Therefore, the different consequences of adding such references to the *mens rea* or *actus reus* were seemingly not yet well-acknowledged.

More confusion and differing views also arose during the Sixth Committee meetings, where the concluding studies for the Convention were carried out.[141] When the Sixth Committee progressed to an article-by-article examination of the Ad Hoc Committee Draft, some state parties delivered an opinion in favour of reintroducing a reference to partial destruction.[142] In response to those proposals, France restated its position,

---

instances of genocide such crimes as group massacres or individual executions' UN Doc. E/AC.25/7. The China Draft defined the *mens rea* of genocide as 'acts directed against a national, racial, religious, or political group, for purpose of destroying its physical existence or preventing its normal development' While the China Draft did not refer to the notion of partial destruction in the scope of *mens rea*; like the Soviet Principles it considered the idea of partial destruction as a part of the *actus reus* and only related with the physical acts of genocide UN Doc. E/AC.25/9.

[138] UN Doc. E/623/Add1, Art. I.

[139] I will practically examine France's perspective later in more detail because, although it is not endorsed during the drafting process, the theory lies behind it constitutes the basis one of the conceptual point of views on genocide which still has proponents in the literature. See chapter three.

[140] The Saudi Arabian draft can be considered as an example against this general trend in which genocide was defined as the destruction of an ethnic group, people or nation carried out either gradually against individuals or collectively against the whole group, people or nation.' UN.Doc. A/C.6/86-Annex 15b.

[141] Following some brief and superficial discussions regarding its content, the ECOSOC submitted the Ad-Hoc Committee's draft convention to the UNGA without making any changes UN Doc. E/SR.218-219; UN Doc. A/PV/142.

[142] The first state party was Venezuela in that regard. UN Doc. A/C.6/SR.69 (Perez-Perozo, Venezuela). Towards the end of the same session Panama argued that even killing of a single member constitutes the crime of genocide if the act is committed with the intent to destroy a group. Therefore, Panama supported

maintaining that 'if a motive for the crime existed, genocide existed even if only a single individual were the (targeted) victim'.[143] France additionally advocated that such an understanding would be advantageous compared to the Ad Hoc Committee Draft, since it avoids the technical difficulty of deciding on a minimum number of persons constituting a group.[144]

The United States opposed this amendment, commenting that the French formulation unwarrantedly extended the scope of genocide to those incidents where a single individual is attacked due to their group membership.[145] After expressing similar concerns,[146] Egypt stated that adoption of the Norwegian proposal to reinsert the words 'in whole or in part' into the first paragraph of the definition (*mens rea*)[147] would be more favourable.[148] The United Kingdom supported this opinion, noting that:

> …when a single individual was affected, it was a case of homicide, whatever the intention of the perpetrator of the crime might be. In those circumstances, it was better to restrict the convention to cases of destruction of human groups and, if it was desired to ensure that cases of partial destruction should also be punished, the amendment proposed by the Norwegian delegation would have to adopted.[149]

In affirming this point, Norway highlighted that the proposed amendment did not broaden the concept of genocide like the one that France submitted and the term 'part'

---

the understanding that was previously put forward by the United States during the Ad-Hoc Committee's meetings. Ibid. (Aleman, Panama).

[143] UN Doc. A/C.6/SR.73 (Chaumont, France). In this spirit, the French Delegate proposed insertion of the following phrase in the first paragraph of Article II: '[genocide means] an attack on life directed against a human group, or against an individual as a member of a human group…'. Ibid.

[144] Ibid.

[145] Ibid. (Gross, United States).

[146] The delegate of Egypt noted that 'the idea of genocide could hardly be reconciled with the idea of an attack on the life of a single individual' Ibid. (Raafat. Egypt). This criticism also shared by the Yugoslavian delegate Mr. Bartos.

[147] UN Doc. A/C.6/228.

[148] Ibid. (Raafat. Egypt).

[149] Ibid. (Fitzmaurice, United Kingdom).

was supposed to refer to more than one individual.[150]

However, and rather strikingly, there are at least two statements which indicate that the Norway delegate did not in fact intend to bring about the consequence that actually occurred. To begin with, he explained that the amendment was actually similar to one that had been suggested by the Soviet Union in relation to the second part of the definition (*actus reus*), but according to him, 'the words 'in whole or in part' would be better placed in the first sentence' (*mens rea*).[151] Subsequently, he remarked that the amendment simply 'wanted to point out, with regard to the first of the acts enumerated, it was not necessary to kill all the members of a group in order to commit genocide'.[152] This clearly reveals that the Norwegian delegate overlooked the fact that adding the phrase 'in whole or in part' to the *actus reus* merely points out that actual destruction of a whole group is not a requirement in order to have committed the crime, while adding it to the *mens rea* indicates that the intent to destroy even part of a group is sufficient for fulfilment of the genocidal intent requirement.

The puzzlement in the reasoning of Norway was noticed by the Uruguayan representative, who remarked that making such an addition with this reasoning would be pointless, since 'the intent to destroy a group was implicit in all acts of genocide; it was clear that a whole group could not be destroyed with a single operation'.[153] This peculiarity was also pointed out by New Zealand, who, nevertheless, professed support for the Norwegian Amendment by relying on different reasoning. Accordingly, the addition of the words 'in whole or in part' to the first paragraph implied that genocide might be committed in those cases where the intention was not to destroy the whole group.[154] Thus, New Zealand corrected the misunderstanding. However, the Belgium delegate dissented from this conclusion, noting that he found it illogical 'to introduce into the description of the requisite intention the idea of partial destruction genocide

[150] UN Doc. A/C.6/SR.73 (Wikborg, Norway).

[151] Ibid.

[152] Ibid.

[153] Ibid. (Manini Y Rios, Uruguay).

[154] Ibid. (Reid, New Zeland).

being characterised by the intention to destroy a group'.[155] For the Belgium delegate, the intended destruction should be directed at the whole group. Intriguingly, there were no further discussions or opinions on the matter and so the Norwegian amendment, which reads as '…with intent to destroy, in whole or in part…',[156] was rushed through with an overwhelming majority.[157]

2.1. Emergence of the Substantiality Requirement as a *De Facto* Norm and the Question of Application

The purpose of introducing this brief historical summary is to highlight that applying the general principles of treaty interpretation, which are laid down in Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties, hardly gives a straightforward meaning to the term 'in part'. It should be noted that even though the Vienna Convention cannot be retroactively applied as treaty law, 'the interpretative principles embodied in it are generally taken to reflect the customary international law, and as such, can be drawn upon when interpreting the Genocide Convention'.[158] According to these general canons of interpretation, the primary purpose in interpretation should be to give terms their ordinary meanings[159] within their specific contexts and in the light of the object and purpose of the treaty in question.[160] In other words, textual, contextual and teleological methods of interpretation should be the primary means employed in determining the meaning of ambiguous definitional terms.

As stated by the ICJ, the text of a treaty has to be accepted as an authentic manifestation of the parties' intentions and in that capacity it constitutes the starting point for

---

[155] Ibid. (Kaekenbeeck, Belgium).

[156] UN Doc. A/C.6/228. This proposal also was also imported respectively by Sweden, Venezuela and China in their following amendment proposals. See UN Doc. A/C.6/230. UN Doc. A/C.6/231. UN Doc. A/C.6/232/Rev.1.

[157] (41 votes to 8, with 2 abstentions) UN Doc. A/C.6/SR.73.

[158] Tams, `Introduction', 17. Add

[159] Textual interpretation aims to elucidate the objective meaning of the text. J. Klabbers, *International Law*, (Cambridge: CUP, 2013), 52.

[160] See Article 31, para .1 of the Vienna Convention

interpretation.[161] The ordinary meaning of a term, however, cannot be thought of in isolation and in the abstract, rather it 'can only be identified if a treaty provision is seen as part of the treaty as a whole, compared to other provisions [...], perhaps even contrasted to the use of language in other treaties [...]'.[162] In addition to the phrasing and the context within which it is situated, interpreters should consider the 'object and purpose' of the treaty. A teleological reading of a text aims to fully capture the overarching intentions of the parties in concluding a treaty and can be guided, inter alia, by the introductory clauses of the treaty, its title and preamble. That said, as Christian Tams remarks,

> purposive readings are no sorcery*:* they are meant to elucidate the meaning of terms, not to invent 'extraordinary' meanings. Within those confines, object and purpose are important factors guiding the search for the true meaning of a treaty.[163]

Resorting to the drafting history, on the other hand, is ascribed a supplementary role.[164] A historical method can help to either confirm the outcomes of a textual, contextual or teleological interpretation or determine the meaning of the term in question, if applying primary interpretation methods still leaves the meaning ambiguous or leads to a manifestly absurd or unreasonable outcome.[165] But in any case, while a historical method does not govern the interpretation, it can enrich it.[166] That is, as much as the original intentions of the drafters may play a significant role in determining the scope of

---

[161] T*erritorial Dispute*, ICJ Reports 1994, 6, para 41.

[162] Tams, `Introduction', 18. Add

[163] Ibid.,19.

[164] Villiger, Commentary on the VCTL, 447

[165] Tams, `Introduction', 18.

[166] The historical method 'reflects an objective approach to interpretation focusing on the text as an expression of the parties' intentions (as opposed to their subjective views), and a desire not to freeze the meaning of treaty terms; which is of course to be respected in interpreting treaty clauses.' Klabbers, *International Law*, 53. In other words, interpreters do not necessarily have to figure out what was in the minds of the drafters. That is to say, the *travaux preparatoires* can be useful in clarifying the general understanding of the Genocide Convention and its object and purpose. Also, they may assist interpreters when straightforwardly explain the intended function of an ambiguous provision. Yet the *travaux preparatoires* do not control the interpretation process, but only enrich it where it is appropriate to recourse to them. Tams, 'Introduction', 19.

a particular clause, the goal of legal interpretation is not to fix the meaning of phrases. Rather, as the ICJ noted in its Gambia opinion, 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[167] Therefore, even though a text stays the same over time, its meaning may transform as the surrounding normative environment evolves.[168] This, of course, does not mean that a treaty can be entirely detached from its original purpose and aim. The interpretation process requires 'a good faith effort to interrogate the text and identify its meaning'.[169] All in all, in establishing this interpretative 'roadmap', in which static and dynamic factors co-exist, international law aims to organise the interpretation process of treaties by both staying true to the intention of the drafters and at the same time ensuring the appropriate effectiveness of a treaty clause in the face of change.[170]

That being the case, however, while it is rather obvious that the textual and contextual considerations of the Genocide Convention do not curb the literal meaning of the term 'in whole or in part' in any particular form, the presented historical synopsis also shows that the *travaux préparatoires* of the Convention are perplexing, rather than being helpful, regarding exploring what precisely is meant by the term,[171] which has brought some confusion over time.[172] The inclusion of the term seemingly stands out as a

---

[167] ICJ Reports 1971, 16, para. 53.

[168] Tams, `Introduction', 20.

[169] Ibid.

[170] Ibid.

[171] Schabas, *Genocide in International Law*, 276.

[172] For example, even though the implications of adding the term to the *mens rea* was clarified to some extent at the final stages of the drafting process, the equivocality in the *travaux préparatoires* nevertheless created confusions in the ratification processes of the Convention and in literature. For example, during the Senate discussion on the ratification of the Convention in the United States, 'Dean Rusk, then deputy undersecretary of state, erroneously relying upon the drafting history of the Convention, testified before the Senate' and stated that 'the international legislative history shows that…genocide meant the partial destruction of such a group (national, ethnical, racial or religious) with intent to destroy the entire group concerned.' Schabas, 'The International Legal Prohibition of Genocide', 49; U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* vol.I, (US Government Printing Office 1976), 12. This confused position stayed as a part in prolonged debates in the United States Senate until very late stages. See generally L. LeBlanc, *The United States and The Genocide Convention* (Durham and London: Duke University Press, 1991). Similar confusions are also present in

'compromise between extending genocide to cases where a single individual was attacked as a member of the group and reducing genocide to the intended destruction of whole groups'.[173] Yet while the fears over setting an excessively high threshold were successfully dissipated by the addition of the term, it failed to provide a lower limit. The only modification the drafting history brings to textual and contextual interpretations of the definition has been to clarify that the intent to destroy a single member or a very few members of a group does not fulfil the specific *mens rea* requirement. Given that the conflicting approaches of the State Parties were not reconciled during the drafting process, the inclusion of the term 'in part' can be characterized as an early example of what is called 'constructive ambiguity'[174] – that is, the scope of the term was deliberately left ambiguous in order to avoid a possible deadlock in the drafting process.[175]

Against this background, the substantiality requirement emerged through a teleological interpretation[176] of the legal definition. Its genesis dates back to the ratification process of the Convention in the United States Senate,[177] where the concerns over the ambiguity

---

the literature. See, for example, H. Travis 'On the Original Understanding of the Crime of Genocide', 7 Genocide Studies and Prevention, (2012), 32-33; Shaw, 'Genocide and International Law', 806; Drost, *The Crime of State: Genocide*, 84-86.

[173] L Berster, `Article II` in C.Tams et.Al (eds.) Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (Oxford: Hart Publishing, 2014),149.

[174] Klabbers, *International Law*, 53.

[175] C. Stahn and L. van der Herik, ''Fragmentation', 'Diversification', and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?' in L. van der Herik and C. Stahn (eds.) *The Diversification and Fragmantation of International Criminal Law,* 72.

[176] The object and purpose of a treaty can be deduced, *inter alia*, from the content of the treaty, treaties title, its preamble or introductory clauses.

[177] After President Harry Truman requested the advice and consent of the U.S. Senate to ratify the Genocide Convention, the Subcommittee on the Genocide Convention of the Senate Committee on Foreign Relations (hereinafter 'Subcommittee') held public hearings in 1950. See U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* vol. I and II (US Government Printing Office,1976). Although the Subcommittee report eventually advised in favour of the ratification, the full committee did not submit the Convention to the Senate due to intense opposition that was put forward by some senators and organizations like American Bar Association. LeBlanc, *The United States and The Genocide Convention,* 5. This was the beginning of decades-long struggle over ratification in the U.S. politics in which one of the major issues was the ambiguity of the term 'in whole or in part'. The United States did not ratify the Convention until 1988. See for some extensive accounts LeBlanc, *The United States and The Genocide Convention;* K. Carlston, 'The Genocide Convention: A Problem for an

of the term 'in part' were so severe that some opponents of the Convention described this alone as enough reason not to ratify.[178] In fact, the substantiality requirement was not the only interpretative novelty offered to defuse the opponents' objections. The Truman Administration suggested a very restrictive understanding of the term, as either a deliberate political manoeuvre to convince the opposition who were concerned that the legal definition of genocide 'might apply to the "sporadic outbreaks against the Negro population"'[179] or a genuine misinterpretation. According to this later-called 'Truman Approach',[180] the insertion of the term 'in part' aimed to denote that 'the partial destruction of a protected group with intent to destroy the entire group' would also constitute the crime of genocide.[181] As is well-recognised in the literature today, this interpretation cannot be espoused since the term 'in whole or in part' exclusively modifies the phrase 'intent to destroy' and, thus, it is linguistically beyond the bounds of possibility to claim that the term 'in part' is related to the actual consequence.[182] Moreover, the discussions during the Sixth Committee meetings show that making such

---

American Lawyer', 36 American Bar Association Journal (1950) 206-209; M. McDougal and R. Arens, 'The Genocide Convention and the Constitution', 3 Vanderbilt Law Review (1950) 683-710; B. Bitker, 'Genocide Revisited', 56 American Bar Association Journal (1970) 71-75; A. Goldberg and R. Gardner, 'Time to Act on Genocide Convention', 58 American Bar Association Journal (1972) 141-145; O. Phillips, 'The Genocide Convention: Its Effect on Our Legal System, 35 American Bar Association Journal (1949) 623-625; G. Finch, 'The Genocide Convention', 43 American Journal of International Law (1949) 732-738.

[178] LeBlanc, *The United States and The Genocide Convention,* 34.

[179] Schabas, 'The International Legal Prohibition of Genocide', 49. See for example O. Phillips and E. Deutsch, 'Pitfalls of the Genocide Convention', 56 American Bar Association Journal (1970), 641-646.

[180] Ibid.

[181] U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* Vol. I (US Government Printing Office 1976), 12. In his exchange with Senator McMahon, Dean Rusk, who testified on behalf of the Truman administration, affirmed his statement.

> 'Senator McMahon: In other words, an action levelled against one or two of a race or religion would not be, as I understand it, the crime of genocide. They must have the intent to go through and kill them all.
>
> Mr. Rusk: That is correct. This convention does not aim at the violent expression of prejudice which is directed against individual members of groups.'

[182] Schabas, *Genocide in International Law,* 276.

a definitive deduction from the *travaux préparatoires* is utterly misleading.[183] Nevertheless, this restrictive and erroneous reading – in fact even a more restrictive version of it[184] – was preserved in the United States Government's understanding and Department of State Memorandums[185] between 1950[186] and 1984,[187] notwithstanding that both opponents and proponents of the Convention constantly stressed that such an interpretation was mistaken.[188]

---

[183] Ibid. Although one can find some statements in favour of this interpretation in the drafting history, as is documented above, this interpretation by no means was clearly endorsed in the Sixth Committee. Indeed, LeBlanc notes that the Truman Approach was based on a report prepared by acting secretary of state, in which the idea that 'the intent must be destroy entire group' was inferred from some statements of the United States Delegates in the *travaux préparatoires*. LeBlanc, *The United States and The Genocide Convention*, 39.

[184] Upon the term 'substantial' came into prominence during the Senate meetings, the government representative Dean Rusk used the term in order to provide an even more restrictive interpretation. In his explanation of why genocide has never occurred in the United States, Rusk noted that genocide practically means 'the commission of such acts as killing members of a specified group and thus *destroying a substantial portion* of that group, as part of a plant [sic] *to destroy the entire group* within the territory of the United States.' U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* Vol. I (US Government Printing Office 1976), 13 (*emphasis added*).

[185] According to Department of State Memorandum 'The international legislative history shows that the United Nations negotiators intended to mean killing, mutilation and the other overt acts specified in the convention, committed as part of a plan to destroy a group, a group in its entirety within a state, and committed on a scale affecting a substantial number of persons…The United Nations records show that the words "in whole or in part" were inserted at the instance of the Norwegian delegate, who in response to a question by the United States delegate, stated "that it was not necessary to kill all the members of a group in order to commit genocide.' U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* Vol. II (US Government Printing Office 1976). 365.

[186] 'The United States Government understands and construe the crime of genocide…to mean the commission of any of the acts enumerated in article II of the convention, with intent to destroy and entire national, ethnical, racial, or religious group within the territory of the United States, in such manner as to affect a substantial portion of the group concerned.' Ibid.

[187] According to the understandings offered in 1970, 1971, 1973, 1976 and 1984, 'the United States Government understands and construes the words "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" appearing in Article II, to mean the intent to destroy a national, ethnical, racial, or religious group by the acts of specified in Article II in such manner as to affect substantial part of the group concerned.' LeBlanc, *The United States and The Genocide Convention,* 251-253.

[188] For example, Alfred Schweppe, the official representative of the American Bar Association and an opponent of the Convention, argued that the expression of such view, unless inadvertent, is in clear

The reason why the Truman Approach is included in this survey is not only to provide a complete historical account. Besides, the idea underpins the Truman Approach was later brought up by such commentators as Jordan Paust[189] and David Luban[190] to question the conceptual and moral compatibility of genocide with the notion of intended partial destruction. It is argued in this regard that considering acts committed with the intent to destroy a group 'in part' as genocide may lead to the legal definition losing its 'mooring in the group-pluralist theory of value',[191] because 'a group that is destroyed only in part is by the same token a group that survives in part, and so genocide by destroying part of a group no longer removes that group from "the family of man"'.[192] As extensively elaborated in the following chapter, substantialist understandings of genocide have had trouble in fending off these reservations.[193]

Returning to the historical review, for now, the idea that the term 'in part' should be read as 'in substantial part' emerged even before the Truman Approach. This interpretation first appeared in 1949, respectively, in the early version of Nehemiah Robinson's influential commentary on the Genocide Convention[194] and an article written by Edgar Turlington.[195] In the following year, Lemkin also supported this

---

contradiction with the text and *travaux préparatoires* . U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* vol. I, (US Government Printing Office 1976), 201.

[189] J. Paust, 'Congress and Genocide: They're Not Going to Get Away With It.' 11 Michigan Journal of International Law (1989), 94-96.

[190] D. Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur and the UN Report', 7 Chicago Journal of International Law (2006), 313.

[191] Luban, 'Calling Genocide by Its Rightful Name', 313. See also Paust, 'Congress and Genocide', 94.

[192] Ibid. 324.

[193] While the functionalists try to justify compatibility by referring to speculative considerations about the effects of a part's destruction on the whole's functions, nominalists cannot avoid blurring the moral line between genocide and crimes against humanity in offering their justifications. This inability, as I shall argue, appears to be further exposure of how the distance between the reality and substantialist conceptions of genocide raises fundamental complications.

[194] N. Robinson, The Genocide Convention, Its Origin and Interpretation (Institute of Jewish Affairs of the World Jewish Congress, 1949) Reprinted in International Convention on the Prevention and Punishment of the Crime of Genocide: Hearings on Subcommittee of the Commission on Foreign Relations, 81st Cong. 2nd Sess. (1950), 498.

[195] E. Turlington, 'The Genocide Convention Should Be Ratified', 5 Proceedings of the Section of International and Comparative Law (1949), 26-34.

purposive interpretation in his letter to the U.S. Committee on Foreign Relations.[196] For both Robinson and Lemkin, such a reading of the text was a natural consequence of the fact that genocide is genealogically intended to signify a criminal phenomenon with a certain magnitude – even though they ultimately located the source of this magnitude differently.[197] Indeed, such an interpretation draws enough conceptual, legal and historical support from the object and purpose of the Convention – which is, at its core, to protect the existence of listed types of collectives; from the socio-legal developments which led to the emergence of the concept of genocide; and from the explicit precaution of the drafters to ignore suggestions that might blur the line between genocide and other atrocity crimes.

On these premises, various prominent commentators and legal bodies validated this particular reading of the definition in subsequent years; such as, inter alia,[198] the first

---

[196] U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* vol. II, (US Government Printing Office 1976), 370. Several authorities in the Senate supported this reading as well. For example, Judge Robert Patterson, remarked that '"in part" plainly means "in substantial part" or "in considerable part." It could not makes sense otherwise, in a matter that deals with member of a group and with an intent to destroy members of a group.' U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* vol. I, (US Government Printing Office 1976), 61. Adrian Fisher, a legal adviser at the Department of State, made a similar comment when he was asked whether the term 'in part' could be interpreted as 'major portion of the group'. Fisher stated that, in the light of international legislative history, this was the intended meaning of the term 'in part' (ibid. 263). Likewise, the Statement of the American Jewish Congress noted that 'the words "in part" intended to denote a substantial portion of a group' (ibid. 535). However, the opponents of the Convention also argued against this interpretation. Schweppe, in his response to Judge Peterson, remarked 'whether we say part of the group could mean one person or whether we say substantial part again requires us to inquire into the facts…what is the group and how many were there?' He continued with an example in which he questioned (presumably by taking Robinson's commentary into account) whether targeting a very small section of a vast racial group who accommodates in a particular town should count as genocide. : ''…this whole concept of part of a group, which may be part of a group in a town, doesn't mean the whole group. Certainly it doesn't mean if I want to drive 5 Chinamen out of the town…that I must have the intent to destroy all the 400,000,000 Chinese in the world or the 250,000 within the United States. It is part of a racial group, and if it is a group of 5, a group of 10, a group of 15, and I proceed after them with guns in some community to get rid of them solely because they belong to some racial group that that the dictators don't like, I think you have got a serious question.' (Ibid. 204,205).

[197] As chapter three explores, the influential views of Robinson and Lemkin practically constitute the basis for nominalist and structural-functionalist opposites to determine and justify the substantiality, as their understandings of genocide stand on the shoulders of different conceptual presumptions.

[198] See for example The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) UN.Doc S/1994/674, para.93,94. Similarly, when the United States finally

U.N. Special Rapporteur on genocide, Nicodème Ruhashyankiko;[199] his successor, Benjamin Whitaker,[200] and the International Law Commission 1996 Draft Code.[201] The substantiality requirement has also been widely endorsed in the legal literature,[202] and it is ultimately picked up by the international courts and tribunals and became a *de facto* part of the legal definition in the case,[203] where it is treated as one of the norms to be satisfied in order to qualify a situation as genocide. Therefore, the emergence of the requirement was in effect an extension of the rule-determination process. This is because the term 'in whole or in part' was, ultimately, in the words of Philip Allott, 'disagreement reduced to writing',[204] which in effect delegated jurists to decide the normative scope of the idea of partial destruction. While such an approach is open to criticism from the viewpoint of legal formalists,[205] the substantiality requirement, as a

---

ratified the Genocide Convention in 1988 through the legislation known as 'Proxmire Act', an understanding was added that reads the term 'in whole or in part' as 'in whole or in substantial part'. Genocide Convention Implementation Act of 1987 (Proxmire Act), 18 U.S.C. § 1093 definitions (8).

[199] Nicodème Ruhashyankiko, 'Study on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/416 (1978), para 54 (emphasis added).

[200] According to Whitaker, the term 'in part' suggests 'a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership'. Benjamin Whitaker, 'Revised and Updated Report on the question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, para 29.

[201] 'Draft Code of Crimes Against the Peace and Security of Mankind', art. 17 p.45, para. 7.

[202] See M. Lippmann, The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later' 15 Arizona Journal of International Criminal Law (1998), 505. ('Requiring an intent to exterminate a "substantial part" of a group is intended to limit genocide to mass atrocities'); D. Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press, 2010), 41 ('Most authorities indicate that 'in part' really means 'in substantial part'. The reading in of 'substantial' arises out of the search for a practical way to distinguish genocide […] from ordinary 'hate' or 'bias' crimes (attacks on individuals because of their membership in that group). Behrens, 'The mens rea', 87-88.

[203] See for example see *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para. 590; *Prosecutor v. Stakić* [2003] IT-97-24-T, Judgment, para. 524; *Prosecutor v. Semanza*, [2003] IT-97-20-T, Judgment, para 316; *Prosecutor* v. *Muhimana* [2005] ICTR-95-1B-T, para. 498,514; Prosecutor v. Laurent Semanza, Case No. IT-97-20-T, ICTR Judgment, (May, 15. 2003) para 316. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para.406.

[204] P. Allott, 'The Concept of International Law', 10 European Journal International Law (1999), 43.

[205] For example, Caroline Fournet criticises the term 'in part' by noting that 'the Convention created confusion by not defining the terms it employs'. C. Fournet, *The crime of destruction and the law of genocide: their impact on collective memory*, (Hampshire: Ashgate, 2007) 70,71.

response to the constructive ambiguity in the term, aptly reflects a fundamental insight regarding this crime: genocide is inherently a crime of such magnitude that it shocks the human conscience.[206]

A ramification that arises from the requirement being an extension of the rule-determination discourse is that although the notion of substantiality serves as a useful construct to clarify and fulfil the purpose and object of the Convention, it does not signify something concrete. Instead, it is a generalisation, like most legal norms and concepts, and in that capacity it constitutes an abstract limitation that must be applied to each particular case. Therefore, in each situation, judges should function as mediators who are expected to connect[207] the abstract norm (universal) with the novel reality (particular),[208] and the institutionalisation of law provides a particular context and instruments that aim to facilitate the mediation process.[209] This, however, does not

---

[206] While declaring the criminality of genocide under international law and initiating the drafting process of the Genocide Convention, the UNGA Resolution 96(I) stated that '(g)enocide is a denial of the right of existence of entire human groups, as homicide in the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, result in great loses to humanity in the form of cultural and other contributions represented by these human groups' UN General Assembly, Resolution 96(I) 'The Crime of Genocide', 11 December 1946. Understood from a Durkheimian viewpoint, 'the collective consciousness can be defined as the totality of beliefs and sentiments common to the average citizens of the same society'. E. Durkheim, *The Division of Labour in Society* Translated by W. D. Halls (New York: The Free Press, 1997 [1893]), 79. As chapter two further explores, the minority view in the literature that challenges the very existence of the requirement simultaneously tackles the idea that the genocide constitutes a distinct crime category. Such views usually stem from radical nominalist presumptions about the protected groups and will be disagreed with, since they, in my view, seriously undermine the reality and value of the protected groups.

[207] It should be noted that in literature there are criticisms against seeing this relationship as establishing a connection. For example, James MacLean notes that 'the relationships between universals and particulars, rule-determination and rule-application, operative and evidentiary facts, legislation, adjudication and enforcement are not simply connective; rather, they involve the becoming of law through a movement that is neither universalist nor particularist, neither containing nor instantiating but always somewhere in-between. In this way, the assumption of a boundary between the legal and the extra-legal, law and life must give way to an understanding based on interconnections between different patterns of relations.' MacLean, *Rethinking Law as Process: Creativity, Novelty, Change,* 91.

[208] This, of course, is not unique to the substantiality requirement, rather the gap between the universal and the particular occurs as the unavoidable consequence of the practice of legal abstraction.

[209] In fact, it would not be an overstatement to claim that the reduction of reality to the legal concepts and then applying these abstractions to novel realities through the process of legal reasoning is the greatest achievement of law.

provide a direct answer to the question of how judges can apply the requirement to particular situations in a consistent and foreseeable manner that will reinforce the legality principle.

2.2. Searching for a Settled Meaning: Contradicting Understandings of 'Substantiality' through the Lenses of Distinct Conceptual Commitments

A common response faced with this question has been to try to refine and objectify the norm and its boundaries – that is, somewhat settling the meaning attributed to the notion of 'substantial' – through further use of interpretative instruments. Yet as should be obvious by now, very little direct help can be gleaned from the textual definition or the *travaux préparatoires* to this end, given that the requirement itself emerged as a response to the constructive ambiguity in the term 'in part'. In this sense, making further teleological and logical deductions stands out as the most plausible institutional method to arrive at a standardised understanding. However, the contentious nature of the crime and its elements, as well as the unhelpful codification history, hinder any straightforward and relatively uncontested teleological reading or logical deduction regarding the scope and meaning of substantiality in the context of the definition.

The reasons is that the codification process of the Convention exhibit an array of viewpoints and significant unresolved conceptual contradictions regarding the scope and meaning of the kernel constituents of the legal representation – which simultaneously the term 'substantial' relates to – including 'group', 'to destroy', 'as such' and 'intent'. This not only creates dilemmas for judges as regards assessing whether that specific concept applies to a particular case in hand – as the following section demonstrates –, but it also obscures the moral aspect of genocide because, after all, what is understood from the notion of 'group' – and connectedly 'group destruction' – determines the ultimate value that the criminal definition protects. Consequently, the definitional parameters through which the meaning of substantiality might be 'confined', as well as the source of magnitude that the concept aims to denote, are far from being unambiguous. This results in a peculiar situation in which different, and to a large extent conflicting, conceptions of the crime and consequently diverse meanings attributed to the notion of substantiality have emerged depending on *a priori* conceptual commitments of given interpreters who undertake teleological and deductive inferences.

A conceptual survey of legal history and social sciences reveals two major streams of vision towards genocide and consequently two ways of settling the meaning of substantiality: 'individualistic' and 'collectivistic'. As the literature review in chapter three elaborates, these labels do not refer to a single, uniform way of thinking, but rather involve different variations that have particular implications for the scope of the criminal definition and the meaning of substantiality. That said, the fundamental differences of these perspectives on the source of conflict – which is the nature and moral value of the protected groups – and their chief implications concerning the research problem can be generalised. Accordingly, from an individualistic perspective, the notion of 'group' constitutes shorthand for the totality of individuals who possess certain commonalities.[210] That is, the protected groups are ultimately fictional entities that can be explained away by reduction to the individual level and hold no distinct value.[211] Consequently, they can only be destroyed through extermination of their components or the destruction of certain qualities, properties and suchlike. However, since these commonalities are strictly tied to individuals and necessarily 'essentialised' by genociders who perceive the population in question as 'incorrigible', physical and biological attacks against individuals constitute the essence of genocidal destruction.[212] Therefore, from an individualistic standpoint, what creates the distinctiveness of the crime is the perpetrators' intent to annihilate individuals with certain specific racial, religious, national or ethnic features and identities in order to wipe out those features and identities.

An important implication of this understanding in terms of our research topic is that

---

[210] For example, in legal theory Lon Fuller sees group as an ascribed unity, a matter of subjective convenience. Indeed, according to him, there is no distinction between the unity of corporation, people waiting for 9:10 train or hams hanging in a butcher shop. L. Fuller, Legal Fictions, (Standford University Press, Standford-1957), 12,13. For opposite views see D. Newman, 'Collective Rights and Collective Interests', 49 American Journal of Jurisprudence (2004) 12; R. De George 'Social reality and Social relations', 37 The Review of Metaphysics (1983), 3. See chapter three in general.

[210] L. May, *The Morality of the Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights,* (University of Notre Dame Press, USA-1987), 11.

[211] Ibid.

[212] Behrens, 'The Mens Rea', 82-86.

there cannot be any 'qualitatively' more essential part of the group,[213] because if the protected groups are merely abstractions, then, their being is perceived as essentially tied to the existence of their members, which means that every single member as a part has more or less equal importance for the existence of the group. Echoing Robinson,[214] the term 'in part', then, must be understood as an attempt to criminalise 'localised' attacks in addition to global ones. However, since genocide is designed and conceived as a crime of a certain magnitude and such magnitude can only be related to high numbers of (potential) victims who are targeted due to their identity from an individualistic point of view,[215] a localised attack cannot qualify as genocide unless a significant number of individuals are targeted.

On the other hand, in a collectivistic standpoint, the protected groups are generally conceived as supra-individual entities that cannot be equated with the sum of individuals and their qualities, attitudes, properties. Instead, the listed groupings are social structures or organisms that exist independently from the intentions of particular individuals and hold irreducible emergent properties.[216] From this perspective, a protected group can be destroyed by damaging its structure to such an extent that it becomes unable to have the causal impact that it used to have in the social world. This means that the essence of group destruction is related to attacks against a collective entity and bringing about a state in which it no longer functions. For a collectivist, then, the (potential) destruction of listed supra-individual entities endows the unique magnitude to the crime. In this context, the targeted part may be considered 'substantial' depending on the abstract threat that its destruction will pose for the continuation of the social structure.[217] Hence, the meaning of 'substantiality' extends beyond mere

---

[213] With exception that if the destruction of a part will lead to the destruction of other members in a foreseeable future. See chapter three.

[214] N. Robinson, *The Genocide Convention a Commentary, (*Institute of Jewish Affairs-New York, 1960), 58.

[215] Barring the radical nominalist version of it. See chapter three.

[216] C. Warriner 'Groups are Real: A Reaffirmation', 21 American Sociological Review (1956), 550.

[217] Indeed for Lemkin, genocide is committed against a 'group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.' Lemkin, therefore, describes the crime, at its core, as acts committed with intent to destroy essential

quantitative assessments.[218]

At this juncture, one may plausibly ask whether the textual definition intended to convey one of these descriptions of the crime. Unfortunately, the text of the Convention is unable to provide any clear explanation on this point, since it does not define the terms it employs. Also, the Convention's object and purpose of protecting the listed type of collectives is not helpful in bringing any clarity to the conceptually contested definitional terms, since the meaning and scope of the declared object and purpose are paradoxically determined by what is understood by these terms. This leaves the *travaux préparatoires* as the last formal method of treaty interpretation to resort to. Alas the draft history includes many contradictory statements on the conceptual issues in question and no conclusive evidence to uphold a particular perspective. Therefore, both individualists and collectivists can find statements to support their views in the *travaux.*

For example, during the Sixth Committee meetings, the French delegate clearly expressed his nominalist perception of human groups by declaring that '[t]he group was an abstract concept; it was [an] aggregate of individuals; it had no independent life of its own; it was harmed when the individuals composing it were harmed'.[219] A similar argument was also later put forward by the Venezuelan delegate, who argued against the introduction of group as 'a metaphysical concept'[220] and offered a different formulation, as follows: 'destroying such [a] group totally or partially by the mass massacre of individual executions'.[221] However, it would be a major overstatement to consider these comments as decisive shreds of evidence regarding the drafters' intentions, as

---

foundations of the life of protected groups, with the aim of annihilating the groups themselves. Lemkin, *Axis Rule*, 79.

[218] This, of course, does not mean that numbers are entirely unrelated, since the intended destruction of a high number of members will nevertheless create an abstract threat to the existence of the entity. However, numbers are not relevant per se in this view, solely because the magnitude of the crime lies in the destruction of supra-individual entities.

[219] UN Doc. A/C.6/215/ Rev.1. In fact, the Soviet formulation creates the same practical conclusion with the proposals of United States and Panama in which it is emphasized even a single act of killing can be considered as genocide if the act is committed with intent to destroy the whole group.

[220] UN Doc. E/AC.25/SR.13 (Perez-Perozo, Venezuela).

[221] UN Doc. E/AC.25/SR.13 (Perez-Perozo, Venezuela).

commentators like Caroline Fournet or Pietr Drost did to a certain degree,[222] because both these statements were made to support the particular amendment proposals that were decisively rejected.[223]

The situation is not different for collectivistic statements either. For instance, the Lebanon delegate declares on the same matter that one of the most important novelties of the Genocide Convention is the mention made 'in it of the protection of the human group as such and not only of the individual, whether or not he belonged to a minority. The inherent value of human groups had at least been recognized…'.[224] On these grounds, he argued that any proposal that might undermine this achievement should be rejected.[225] But once again these collectivistic comments were not discussed by the delegates or given any general endorsement. Even though some state parties like Yugoslavia explicitly drew attention to the lack of a clear definition of the notion of 'group' in the draft;[226] this call was never heeded. Thus, as Schabas notes, 'the drafting history of the Convention does not record any meaningful discussion about the use of the term "group"'.[227]

Similarly and connectedly, the essence of group destruction was not duly elucidated during the drafting of the Convention.[228] At this juncture, a misunderstanding should be mentioned. In the case law and literature, a particular strand of argument that emerged to support an individualistic reading of the term 'intent to destroy' as the 'intent to

---

[222] Fournet, *The crime of destruction and the law of genocide*, 73. Drost, *The Crime of State: Genocide*, 84.

[223] Indeed, Fournet admits this weakness. Ibid. 73.

[224] UN Doc. A/C.6/SR.66 (Akzoul, Lebanon).

[225] Ibid..

[226] UN Doc. A/C.6/SR.63 (Bartos, Yugoslavia). See also UN Doc. E/AC.25/SR.4 (Azkoul, Lebanon) Lebanon at that stage of discussions questioned the nature of group destruction by stating that it should be made clear whether it refers 'solely to the physical extermination of individuals belonging to a group or also to cases where the group was destroyed but some of the individuals who had been its members survived'.

[227] Schabas, *Genocide in International Law*, 121.

[228] Ibid. 271. See also *Prosecutor v. Krstić* [2004] IT-98-33-A, partial dissenting opinion of Judge Shahabuddeen, (Apr. 19, 2004), para.51. Ambos, Treatise on International Criminal Law: Volume II, 38-40.

physically and biologically destroy' has been to cite the drafting records on the exclusion of acts of 'cultural genocide' and 'ethnic cleansing' and maintaining that this reflects the resistance in the spirit of discussions against extending the concept of destruction beyond the biological and physical destruction. For example, in *Croatia v. Serbia,* the ICJ noted that 'the travaux préparatoires of the Convention show that the drafters originally envisaged two types of genocide, physical or biological genocide, and cultural genocide, but that this latter concept was eventually dropped in this context. It was accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group.'[229] From this point of view, the Court argued – regarding those acts of genocide in relation to which the term 'intent to destroy' can be more broadly construed – that causing serious mental harm within the scope of Article II (b) must be limited to only those 'acts carried out with the intent of achieving the physical or biological destruction of the group, in whole or in part',[230] while the forcible transfer of children within the meaning of Article II (e) entails 'the intent to destroy the group physically, in whole or in part, since it can have consequences for the group's capacity to renew itself, and hence to ensure its long-term survival'.[231]

Yet, the ICJ's reading of the preparatory works and its analysis appear somewhat misleading because the distinction made between physical/biological and cultural genocide by the drafters of the Convention was predominantly about the acts of genocide. Putting it differently, in trying to draw a distinction between two 'types' of genocide, the point of divergence was not the genocidal intent – which was same for both suggested types, namely 'intent to destroy a protected group' –, but the means of

---

[229] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement, para 136. Similarly, the *Krstić* Trial Chamber noted in relation to the interpretation of the term to destroy that 'Although the Convention does not specifically speak to the point, the preparatory work points out that the 'cultural' destruction of a group was expressively rejected after having been seriously contemplated. The notion of cultural genocide was considered too vague and too removed from the physical or biological destruction that motivated the Convention.' *Prosecutor v. Krstić* [2001] IT-98-33-T, para 576. See generally L. Van der Herik, 'The Meaning of the Word "Destroy" and its implications for the Wider Understanding of the Concept of Genocide' in V. Wilt et al. (eds), *Genocide Convention: The Legacy of 60 Years* (Leiden; Martinus Nijhoff Publishers, 2012); Behrens, 'The Mens Rea', 82-86; Schabas, *Genocide in International Law*, 270-273.

[230] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement, para 136.

[231] Ibid.

destruction. It is quite clear that the drafters of the Convention only added five acts to the text and upon some moral, practical and cultural considerations (whether one agrees with them or not) left out acts of cultural genocide with the possible exception of transferring children. Conversely, the issue raised here is not about acts of genocide, since the term 'intent to destroy' is related to the specific *mens rea* element rather than the *actus reus.* Therefore, the real question is whether the intention to physically and biologically destroy a set of individuals or the intention to destroy a supra-level entity or something else qualifies as 'genocidal intent'. In other words, the question here is about what should be understood from the end state, that is the state in which a group is deemed 'destroyed' and thus should be aimed by the perpetrators for their acts to constitute the crime of genocide.

A counter argument in favour of an individualistic reading of the term 'to destroy' may be that the predominantly physical and biological character of the *actus reus* requires understanding the specific *mens rea* accordingly.[232] However, such an argument is circular and would only hold true if it is *a priori* accepted that the protected groups are merely assemblages of individuals since this would automatically indicate a linear and exclusive correlation between the lives of members and survival of the group. On the other hand, if the protected groups are 'separate and distinct entities', as the case law itself suggests, then, the intent to destroy a group and listed acts of genocide cease to be mutually inclusive because the existence of a social unit cannot be completely equated with the existence of individuals. In this way, while a crime of genocide occurs only when the listed intentional acts are committed with an 'intent to destroy', such intent may become manifest through entirely different kinds of acts.[233] In other words, 'genocidal intent' and 'acts of genocide' can exist separately and only when they are both present in a case can we speak of the commission of a crime of genocide in a legal sense.

The bottomline is that due to the lack of conceptual clarity of the Convention regarding the notions of 'group' and 'destruction', it becomes possible to make equally persuasive

---

[232] Schabas, *Genocide in International Law,* 271.

[233] See for a similar kind of argument D. Singleterry '"Ethnic Cleansing" and Genocidal Intent: A Failure of Judicial Interpretation?' 5 Genocide Studies and Prevention: An International Journal (2010) 56.

textual, teleological, historical and logical interpretative deductions from opposing conceptual perspectives and, thus, to settle the meaning attributed to the notion of 'substantial' in conceptually contradicting ways. As a result of this inability of the Convention to provide a clear answer to the underlying conceptual questions, the *a priori* individualistic or collectivistic (or any other) conceptual commitment of a given interpreter becomes the *de facto* determiner of the scope of the crime –and thus the idea of substantiality.

2.3. Lack of a Conceptual Rigour: An Ambiguous Conceptualisation of Genocide in Case Law

The summary presented so far indicates the inevitability for lawyers to select – consciously or not – between different conceptual viewpoints in offering a legal construction of the crime and therefore to engage with the normative question of which conceptualisation of genocide, and accordingly 'substantiality', would more effectively represent the multi-faceted reality of the criminal phenomenon and justify its place in the international criminal system. While the question of 'which perspective' itself is a considerably complex one and will be mainly tackled in chapters three and four, the current approach of international courts and tribunals makes the matter more complicated, as the prevailing judicial interpretation is conceptually self-contradictive for it retains an individualistic perspective when interpreting the term 'to destroy', while at the same time it understands the terms 'group' and 'as such' from a collectivistic perspective.[234] Such an approach creates an ambiguous legal concept of genocide by obscuring the protected 'good', which should serve as the moral anchor in assessing whether an atrocity constitutes the crime.

The practical importance of this contradiction and its relation with the assessment of 'substantiality' most vividly came into prominence in the cases related to the Former Yugoslavia. In commenting on the notion of 'group' in genocide law, both the ICTY and the ICJ chiefly used the collectivistic rhetoric by characterising the protected groups

[234] N. Koursami, *The 'Contextual Elements' of the Crime of Genocide* (Hague, T.M.C Asser Press, 2018), 2.

as 'separate and distinct' entities[235] and thus followed the footsteps of the ICTR jurisprudence, which denotes that '"destroying" has to be directed at the group as such, that is, *qua* group'.[236] In the words of the ICTY Trial Chamber in *Sikirica*, while 'it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group'.[237]

This conception of 'group' is also closely related to what is understood from the term 'as such'.[238] In establishing their interpretation of the term, the ICTY, ICTR and ICJ frequently cited and paraphrased[239] the following understanding proposed by the International Law Commission:

---

[235] See for example *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para 552; *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, para.52; *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para. 79; *Prosecutor v. Stakić* [2003] IT-97-24-T, Judgment, para. 521; Prosecutor v. Brđanin, [2004] IT-99-36-T, Judgment, para. 698; Prosecutor v. Popović et al. [2010] Case No. IT-05-88-T, Judgment, para.821.

[236] *Prosecutor v. Kayishema and Ruzindana* [1999] ICTR. 95-1-T, Judgment, para. 99.

[237] *Prosecutor v. Sikirica* et al [2001] IT-95-8-T, Judgment on Defense Motion to Acquit, para. 89. Similarly it is remarked by the ICTR Trial Chamber in Akayesu, 'the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. […] the victim of genocide is group itself and not only the individual.' *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, para.521. Similarly, the ICTY Trial Chamber in Popović remarks that 'the ultimate victim of the crime of genocide is the group.' *Prosecutor v. Popović* et al., [2010] IT-05-88-T , para. 821.

[238] During the preparatory works of the Convention, the Venezuelan delegate Mr. Perez Perozo, offered the insertion of the term 'as such' in first place, explained that his 'purpose was to specify that, for genocide to be committed, a group –for instance, a racial group- must be destroyed qua group'. UN Doc. A/C.6/SR.77.

[239] *Prosecutor v. Sikirica* (et. al) [2001] IT-95-8-T, Judgment on Defence Motion to Acquit, para. 89; *Prosecutor v. Krajišnik* [2006] IT-00-39-T, Judgment, para.856. While declaring the criminality of genocide under international law and initiating the drafting process of the Genocide Convention, the United Nations General Assembly (Hereinafter 'UNGA') Resolution 96(I) stated that '(g)enocide is a denial of the right of existence of entire human groups, as homicide in the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, result in great loses to humanity in the form of cultural and other contributions represented by these human groups' UN General Assembly, Resolution 96(I) 'The Crime of Genocide', 11 December 1946. Also see *Prosecutor v. Stakić* [2003] IT-97-24-T, Judgment, para. 521: '…the intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group'. For similar statements see *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, para.521; *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para. 79; In *Sikirica* the Trial Chamber reemphasized that 'The evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group. That is the significance of the phrase "as

> …the intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group. In this regard, the General Assembly distinguished between the crimes of genocide and homicide in describing genocide as the "denial of the right of existence of entire human groups" and homicide as the "denial of the right to live of individual human beings" in its resolution 96 (I). [240]

In *Bosnian Genocide*, the ICJ elaborated the same view by noting that 'It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. [...] The words "as such" emphasize that intent to destroy the protected group'.[241]

That said, it should be noted that the individualistic conceptions of the terms 'group' and 'as such', albeit to a lesser extent, are also available in the case law. For example, the ICTY Trial Chamber in *Karadžić* does not use the 'distinct and separate' entity rhetoric at all, but rather states that the term 'as such' 'shows that the crime of genocide

---

such" in the chapeau.' *Prosecutor v. Sikirica* et al. [2001] IT-95-8-T,Judgement on Defence Motions to Acquit, para. 89. Similarly the ICJ in Bosnian Genocide stated that 'The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.' See also. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para 187. See also Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. GAOR, 51st sess., U.N. Doc. A/51/10, Commentary (5) (1996), Yearbook of the International Law Commission, 1996, vol. II, Part Two, art. 17, p. 45, para. 7 (hereinafter 'YILC 1996 II/2'): '[T]he intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group.'; the Whitaker Report (UN Doc. E/CN.4/Sub.2/1985/6), para. 38: '[C]rimes ... must be directed at the collectivity or at them in their collective character or capacity. Motive, on the other hand, is not mentioned as being relevant.'. The UN General Assembly Resolution 96 (I) distinguished the crimes of genocide and homicide by stating that whilst genocide is the "denial of the right of existence of entire human groups" and homicide is the "denial of the right to live of individual human beings'. See also the Whitaker Report (UN Doc. E/CN.4/Sub.2/1985/6), para. 38: '[C]rimes ... must be directed at the collectivity or at them in their collective character or capacity. Motive, on the other hand, is not mentioned as being relevant'.

[240] Article 17 of Draft Code of Crimes against the Peace and Security of Mankind (51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532 (1996) (hereinafter 'Draft Code of Crimes against Peace').

[241] See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para. 187.

requires intent to destroy a collection of people because of their particular group identity based on nationality, race, ethnicity, or religion'.[242] Similarly, in the literature, some commentators, like May, argue that the term 'as such' should be understood as denoting 'some sort of vague discriminatory animus motivated the crime'.[243]

Yet such an interpretation of the term 'as such' appears to be not entirely tenable. First of all, an examination of the *travaux préparatoires* largely rules out this interpretation, which is, according to Schabas, a common mistake that a plain reading of Article II allows one to make.[244] This is because, during the drafting process, propositions to add a motive element to the legal definition[245] encountered serious resistance from a considerable number of delegates.[246] In the face of these objections, the proposed formulation was replaced with the term 'as such', and in that capacity the term was ultimately a fig leaf for hiding disagreements.[247] Although the exact intended consequences of the addition are far from evident, it seems clear that the introduction of a motive element is not a possibility, given that the opposing delegates accepted the term 'as such' not because it was merely some kind of reformulation of the previously proposed motive element but a denotation of something else.

Moreover, making this reference hardly seems justifiable from a conceptual standpoint. The intent to destroy a protected group can be formed from very different motives. Take, for instance, a genocidal campaign in which the mere aim of the offenders is to gain economic wealth for their nation by destroying another one. While it may be argued that relatively more malicious motives, such as pure racial hatred, must lead to more severe sentences,[248] it seems implausible to claim that a crime of genocide is not committed in the given hypothetical example simply because the motive was not

---

[242] *Prosecutor v. Karadžić* [2016] IT-95-5/18, para 551.

[243] May, *Genocide: A Normative Account*, 144.

[244] Schabas remarks that this is a common mistake since such reading. Schabas, *Genocide in International Law,* 294-305.

[245] The proposal stipulated that the intended destruction should be on the grounds of the national, ethnic or racial origins or religious belief of the group's members See U.N. Doc. A/C.6/SR.75-77.

[246] Ibid.

[247] Berster, Article II, 152. Schabas, *Genocide in International Law,* 295-305.

[248] See for such a proposition May, *Genocide: A Normative Account,* 149-154.

'discriminatory'.[249] In the end, the destruction of a protected group leads to very particular harm, regardless of the motive[250] that led up to such destruction.[251] In any case, these minority views do not change the fact that in interpreting the terms 'group' and 'as such' the jurisprudence of international courts and tribunals designates the collective entity as the 'good' to be protected, as opposed to group of individuals with certain shared (real or imputed) identity.

However, when it comes to determining the meaning of the term 'to destroy', the dominant approach in the case law effectively reduces the protected groups to the physical beings of individuals by denoting that the term only refers to the intended physical and biological destruction of group members, 'not the destruction of the

---

[249] Indeed these moral peculiarities led May to ultimately suggest that it would be much more plausible deleting the term 'as such' permanently. Ibid. 130,137.

[250] One particular objection may be that if a protected group itself poses a threat to humanity the Convention should not protect its existence (see for example Mr. Azkoul's statement in Un Doc. E/AC.25/SR.2). While such concern is understandable, it should be considered under the scope of defences. See Berster, Article II, 101,102.

[251] '...intent must be to destroy the group as "a separate and distinct entity", the term "as such" also implies that the victims of the crime must be targeted because of their membership in the protected group, although not necessarily solely because of such membership'. *Prosecutor v. Blagojević et al.* [2007] IT-02-60-A, Judgement, para. 699. See also *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, para.521; *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para. 561; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para. 187. This point has been considered as the [re]introduction of the motive-element by some commentators. (see for example Berster, Article II, 153-155). However, such considerations appear to be conflating the discriminatory intent and the discriminatory motive. Although these two often go hand in hand, they are conceptually distinct. The former indicates the goal of treats in certain people differently for whatever motive, that is 'points to an end state that one wants to accomplish'; the latter indicates the desire to discriminate (May, *Genocide: A Normative Account,* 146). In this context, the discriminatory intent is a natural consequence of conceiving the protected groups as distinct and separate entities, since destroying such entities becomes possible only when certain individuals are discriminatively targeted. Yet, this does not necessarily entail an 'animus or ill-will displayed towards the people who are to be targeted'. Ibid. See also M. Storey, 'Kruger V The Commonwealth: Does Genocide Require Malice? 21 U.N.S.W.L.J. (1998) 226-228; P. Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence', 3 Journal of International Criminal Justice, 1003. Although, the interpretation problem of the term 'as such' deserves a more extensive examination, this brief review should be made it clear that the dominant interpretation of the terms has better doctrinal and conceptual support. See for some interesting conceptual discussions P. Boghossian, 'The Concept of Genocide', 12 Journal of Genocide Research (2010), 76-79.

national linguistic, cultural, or other identity of a particular group'.[252] In *Popović,* the ICTY Trial Chamber expressed this view by remarking that '[t]he term "destroy" in customary international law means physical or biological destruction and excludes attempts to annihilate cultural or sociological elements.'[253] In a similar vein, the Trial Chamber noted in *Stakić* that a clear distinction must be drawn between the intended physical destruction of the group and its mere dissolution.[254] In this way, the individualistic idea that the physical and social 'existence' of a group can be separated is endorsed.

The legal reasoning for this interpretation largely rests on the aforementioned misreading of the drafting history, i.e. discussions and preferences regarding acts of genocide are relied on while determining the scope of the term 'destroy' in the mens rea element. So much so that the ICTY Appeals Chambers in *Krstić*, by citing similar considerations of the ILC and Schabas, considered such an interpretation as part of customary international law and upheld the Trial Chamber's decision which effectively reads the term as 'intent to physically or biologically destroy'.[255] Although this interpretation is undeniably the dominant view in case law, it has occasionally been challenged as well.[256] For example, Judge Shahabuddeen points to this misreading in his

---

[252] *Report of International Law Commission on the Work of its Forty-Eighth Session,* 6 May-26 July 1996, G.O.A.R., 51st Session, Supp. NO 10 (A/51/10) (1996), 90,91. Also see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para.344; *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para. 580. *Prosecutor v. Semanza*, [2003] IT-97-20-T, ICTR Judgment, para 315; Behrens, `The mens rea of genocide`, 82-86; F. Jessberger, 'The Definition and the Elements of the Crime of Genocide' in P. Gaeta (ed.), The UN Genocide Convention: A Commentary (Oxford University Press 2009), 107.

[253] *Prosecutor v. Popović* et al. [2010] IT-05-88-T, Judgment, para.822. See also *Prosecutor v. Karadžić* [2016] IT-95-5/18, Judgment, para.553.

[254] *Prosecutor v. Stakić* [2003] IT-97-24-T, Judgment, para. 519.

[255] Prosecutor v. Krstić, [2004] IT-98-33-A, para 25.

[256] *Prosecutor v. Krstić* [2004] IT-98-33-A, partial dissenting opinion of Judge Shahabuddeen, para.48, 55. Judge Shahabuddeen expressed his doubt in his dissenting opinion by pointing out that the 'intent certainly has to be to destroy, but, … there is no reason why the destruction must always be physical or biological.'; *Prosecutor v. Krajišnik* [2006] IT-00-39-T, Judgment, para.854. Also see *Prosecutor v. Blagojević* et al. [2005] IT-02-60-T, Judgment, para. 666. German Federal Constitutional Court followed this understanding as well Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) [2000] 2 BvR 1290/99, para. 1848,1850. See also German Supreme Court cf. BGHst [2001] No.3 StR 372/00

Partially Dissenting Opinion and remarks that the *travaux préparatoires* are not clear concerning the meaning of the term 'to destroy'.[257] Similarly, the ICTY Trial Chambers in *Krajišnik* followed the minority view by stating that '"destruction", as a component of the mens rea of genocide, is not limited to the physical or biological destruction of group members'.[258]

Intriguingly, the *Krstić* Trial Chamber in fact accepts this point to a certain extent – despite clearly stating that only the intended physical or biological destruction meets the *mens rea* requirements of genocide – by attributing evidentiary importance to the other acts of group destruction in inferring genocidal intent.

> ...[W]here there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.[259]

In doing that, the Chamber perhaps tries to reconcile two irreconcilable positions, yet such an approach is doomed to fail due to the logical contradiction inherent in it. That is because, if the genocidal destruction is strictly about the annihilation of the physical or biological being of individuals, then, 'intent to destroy' cannot be inferred from other kinds of discriminatory atrocities – e.g. deportation, attacks against cultural property – as these are strictly beyond the scope of the intent to physically or biologically destroy.

This conceptual contradiction can also be located in some domestic constructions and applications of genocide law. One of the most prominent examples was the prosecution

---

Judgement, paras. 45 64, 80. See G. Boas et al., *International Criminal Law Practitioner Library - Volume II: Elements of Crimes under International Law* (Cambridge: Cambridge University Press, 2008) 165-167. See chapter three for a detailed review.

[257] Prosecutor v. Krstić, [2004] IT-98-33-A, Partial dissenting opinion of Judge Shahabuddeen, para.51. See also Ambos, *Treatise on International Criminal Law Volume II*, 38-40.

[258] *Prosecutor v. Krajišnik* [2006] IT-00-39-T, Judgment, para.854. Also see *Prosecutor v. Blagojević* et al. [2005] IT-02-60-T, Judgment, para. 666.

[259] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para 576.

of Mengistu Hailemariam and other top members of the *Derg*[260] for their role during the 'Red Terror' in Ethiopia.[261] While the Ethiopian Federal High Court's decision in *Mengistu Hailemariam et al*. in 2006 was significant in the sense that it was one of the numbered successful prosecutions of genocide before a domestic court – particularly in the African context, the formulation of the crime in Ethiopian law and its application to the case has drawn some criticisms. The violation of fair trial rights, trials in absentia and the victors' justice concerns have been the main procedural criticisms directed to the fourteen years long trial process.[262]

As to the definition of genocide, Ethiopian Criminal Law differs from the Convention. While it preserves the intent element as it is, additions of political unities to the list of protected groups and the act of forced deportation to the *actus reus* are where the domestic definition diverged from the international definition.[263] The main concern in the literature regarding the application of this to the case has been determining the protected group. *Mengistu* and his accomplices systematically targeted any opposing group or organisation during the 'Red Terror'. The Court bundled all these under the guise of 'political groups opposed to the *Derg* Government'.[264] Such an approach

---

[260] The Provisional Military Administration Council of Ethiopia.

[261] See for a detailed examination M. Tessema, *Prosecution of Politicide in Ethiopia: The Red Terror Trials*, (Hague: Asser Press – Springer, 2018).

[262] Ibid. pp. 241-263.

[263] Article 281 of the 1957 Penal Code in its English version reads: 15 Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace: (a) Killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or (b) Measures to prevent the propagation or continued survival of its members or their progeny; or (c) The compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death

[264] *Special Prosecutor v. Colonel Mengistu Hailemariam* et al., Federal High Court, First Division Criminal Bench (Judges: Wubshet Kibru, Medhin Kiros and Nuru Seid), File No.1/87, Rulings, January 21, 2003, pp 11-20. (Cited in G. Aneme 'The Anatomy of Special Prosecutor v. Colonel Mengistu Hailemariam et al. (1994-2008)' (The International Journal of Ethiopian Studies, 2009), 19)

ultimately defines the targeted group negatively, which is something explicitly ruled against in the ICTY case law.[265]

In addition, what goes rather unnoticed has been that while the Federal High Court understood the term 'to destroy' in accordance with the prevailing view in the ICTY and ICTR case law – as the intended 'physical or biological destruction', it somehow concluded that the *Derg* Government aimed to exterminate the entire political opposition in Ethiopia. However, in addition to the fact that the inclusion of forced deportation to the *actus reus* conceptually contradict with the 'physical or biological destruction' reading of the term 'to destroy', the evidence did not conclusively indicate that blanket physical destruction was the goal. While the number of deaths during the 'Red Terror' is already highly contested and ranges from 2.000 to 250.000,[266] the patterns of acts did not support a finding that in this direction. Indeed, the indictment as well refers to the non-physical destruction by stating that the defendants 'kill or cause the killings of members of political groups and cause injury to their physical and mental health or cause their total disappearance by *banishing them in a manner calculated to cause them social harm* or cause their death.'[267] A solution to this would be arguing that the defendants targeted a 'substantial part' of the group, however, the judgment did not go into any such discussion. Thus, as it stands, *Mengistu Hailemariam et al*. constitutes another example to conceptual contradiction highlighted here.

If we return to the international context, the contradiction becomes even more striking and irremediable in the face of the 'only reasonable inference' doctrine that has played an essential role in the proceedings of international courts and tribunals. The ICTY Trial Chamber in *Tolimir* succinctly explains the doctrine by noting that since finding overt indications of genocidal intent is a rarity, 'it is permissible to infer the existence of genocidal intent based on "all of the evidence taken together", as long as this inference

---

[265] *Prosecutor v. Stakić* [2006] IT-97-24-A, Judgment, para. 25-26

[266] Tessema, *Prosecution of Politicide in Ethiopia,* 48.

[267] Special Prosecutor v Colonel Mengistu Haile-Mariam & others Federal Supreme Court, Criminal File 30181, 26 May 2008, 17. (cited in F. Tiba, 'The Trial of Mengistu and other Derg Members for Genocide, Torture and Summary Execution in Ethiopia' in Murungu,C and Biegon,J (ed), Prosecuting International Crimes in Africa, PULP (Pretoria University Law Press), Pretoria, South Africa, p.169)

is "the only reasonable [interpretation] available on the evidence"'.[268] But if perpetrators, say, choose to demolish the houses and artefacts of victims and deport some of them en masse instead of physically or biologically attacking them – as was the case in Srebrenica or Vukovar – do these facts alone not rule out the possibility of claiming that the intent to physically or biologically destroy the group in question is the only reasonable inference? Indeed, such an argument has been consistently brought before the ICJ[269] and ICTY[270] by defence counsels.

It also appears that this matter will become an important aspect of *Gambia v. Myanmar* before the ICJ – hearings of which started in the concluding stages of the present study, since one of the main arguments put forward by Myanmar representatives, led by Schabas, is that genocidal intent against Rohingya Muslims is not the only reasonable inference because relatively very small numbers of Rohingya Muslims are physically or biologically targeted while most of the population is either forcefully deported or subjected to other oppressive measures.[271] The ICJ's assessment of these arguments vis-à-vis Myanmar are highly anticipated, since previous reasonings of the Courts were inconsistent.

Indeed, on the one hand, as regards the atrocities that took place in the Vukovar region in Croatia v. Serbia, the ICJ concurred with the reasoning of the ICTY Trial Chamber in *Mrkšić*, in that the Chamber argued that the atrocities against the Croats of Vukovar constituted a punishment for the declaration of independence by Croatia, 'as an example to those who did not accept the Serb-controlled Federal Government in Belgrade'.[272] According to the ICTY and the concurring ICJ, when this is considered in conjunction with the fact that only 3,000 Croats out of 21,000 were physically targeted while the rest of the Croats of Vukovar were forcefully evacuated, 'the existence of intent to physically destroy the Croatian population is not the only reasonable conclusion that

---

[268] Prosecutor v. *Tolimir* [2012] IT-05-88/2-T, Judgment, para. 475

[269] See in general Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement. para.345.

[270] Prosecutor v. *Mrkšić et al.* [2009] IT-95-13/1–A Defence Appeal Brief, paras. 53 - 57.

[271] See ICJ, *Gambia v. Myanmar* [2019/19], Verbatim Records, p.21ff.

[272] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement. para.429.

can be drawn from the illegal attack on Vukovar'.[273] Such an interpretation is conceptually consistent with the dominant reading of the term 'to destroy', and it highlights an individualistic conception of genocide where the being of a group of individuals with a certain shared identity is designated as a protected good by the crime.

On the other hand, in the *Bosnian Genocide*, both the ICJ and ICTY inferred a genocidal intent on the part of the perpetrators in relation to the atrocities in Srebrenica, where the situation was similar to Vukovar. By essentially arguing that the destruction of military aged men, one fifth of the overall Srebrenica community, in conjunction with the forced deportation of the rest of the population would 'inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica',[274] the ICJ and ICTY concluded that the perpetrators' intention was to destroy the Bosnian Muslims in Srebrenica. The ICTY attempted to reconcile this reasoning with the dominant interpretation of the term 'to destroy' by emphasising the possible effects of eliminating two or three generations of the male population as regards the biological survival of the Bosnian Muslims of Srebrenica.[275] Yet such an argument appears weak, since the young and elderly male population were also deported along with the female members, and thus the group could still biologically procreate. It seems that the only way for the ICJ and ICTY to conceptually reconcile its reasoning with the dominant interpretation of 'to destroy' would be to define the victim group as 'military aged Bosnian Muslims of Srebrenica', yet both judicial bodies avoided this for very precise reasons, as will be explored in the following section.

The inference of genocidal intent against the Bosnian Muslims of Srebrenica effectively discards an individualistic reading of the term 'to destroy' and can only be sensible if the distinct and separate entity of the group is highlighted. This is because an entity, understood from a realist/ collectivistic perspective, either has a distinct existence or does not, which means that the end state sought by the perpetrators refers to a particular

---

[273] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] Judgment, para 429.

[274] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, paras.28-33; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para. 1295

[275] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para 595.

'non-existence situation', regardless of the method chosen to reach this state. Once this perspective is taken, the meaning of 'intent to destroy' extends beyond the mere physical existence of members. To be more precise, if groups are indeed 'separate and distinct' entities, then claiming that they may be socially destroyed while physically surviving is nothing but irrational, as their existence cannot be categorised as social, biological or physical.[276] Such a distinction becomes possible if the entity is fictional, as individualists claim, yet case law, apparently, does not concede that. In this context, claiming that the entire Bosnian Muslims of Srebrenica was targeted while 80 per cent of the population was forcefully deported, instead of being physically or biologically attacked, conceptually makes sense if the protected good is understood as the collective entity, rather than a particular group of people. Indeed, all the acts listed by the ICJ and ICTY in inferring the genocidal intent of the perpetrators indicate the aim of annihilating the collective entity, but not necessarily the physical and biological existence of a majority of group members.

To summarise, what is demonstrated here is not a mere contradiction between liberal and restrictive interpretations of the legal definition, as some commentators may submit, but rather an episode of how the legal scope of genocide becomes unstable between these two distinct conceptions of the protected good and thus conceptualisation of the crime itself, which undermines legal certainty and coherence. To put it in perspective, if the ICJ in *Gambia v. Myanmar* highlights the individualistic conception of the crime by putting emphasis on an individualistic reading of the term 'to destroy', it may agree with Myanmar's argument about the lack of genocidal intent. If, however, the Court takes a more collectivistic stance, as it did in effect in Srebrenica through the back door of the substantiality requirement, it can establish a genocidal intent. This very situation underscores the lack of conceptual rigour and case law leading to an ambiguous legal concept of genocide based on subjective considerations. As will be extensively explored in the next section, the conceptual ambiguity summarised so far has not only allowed the validation of those contradictory perspectives towards 'substantiality' in the same

[276] See for a similar argument A. Woolford, 'Ontological Destruction: Genocide and Canadian Aboriginal Peoples', 4 Genocide Studies and Prevention (2009) 87-88. To restate they may be destroyed through the acts of social, biological or physical acts of destruction, but the end state that the perpetrators aims for is a singular reality that cannot be characterized in that manner.

body of case law, but these contradictory perspectives have also served as an essential back door in accentuating a particular conceptualisation of the crime over others.

2.4. Judicial Approaches to the Determination and Justification Problem of 'Substantiality': Using the Requirement as a Backdoor

Following the terminology used by the ICJ in *Bosnian Genocide*,[277] there are three well-established approaches that the adjudicative bodies utilise as reference points in their assessment and justification of 'substantiality', namely quantitative, qualitative and geographical. Although it is constantly pointed out in case law that these approaches are not exhaustive and thus other factors may be taken into account,[278] thus far, the established approaches effectively function as the main, if not the sole, factors in applying the substantiality requirement to a particular case.[279] However, both the overall framework and each individual approach are largely criticised in the literature.

As to the latter, the established approaches are faulted for being arbitrary and unclear, in that they do not prescribe any precise limitation – whether it is an absolute or proportional number, criteria of functional significance, or a minimum threshold for the relevance of a geographical area. Moreover, since each approach is implicitly built on a particular conceptual presumption about a group's existence, their merits tend to be challenged from an opposite perspective. As to the former, it has been pointed out that there is no well-defined order in applying these approaches and thus the judges in a given case can convict or acquit an accused by arbitrarily upholding one (or more) of these competing approaches. In this section, I will first summarise and evaluate those criticisms directed at each individual approach, and then add some comments as to the use of the requirement as a backdoor and the inadequacy of the overall framework.

2.4.1. Quantitative Approach

In the quantitative approach, the idea of 'substantiality' denotes the magnitude of the

[277] I am following the terminology that is used by the ICJ on these approaches. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para. 198-200.

[278] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para.12.

[279] See for example Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement, para. 142.

number of victims.[280] The numerical scale stands out historically as the most common reference point accredited to assess and justify 'substantiality'.[281] However, even though the quantitative approach appears *prima facie* to be the most straightforward approach and is given a certain form of priority in case law, [282] it gives rise to some severe moral and legal complications and ambiguities. First of all, an issue raised concerning this approach is whether '"substantial part" refers to an absolute or relative number of victims'.[283] The early remarks of the ICTR Trial Chamber in *Kayishema and Ruzindana* have the connotation that the absolute magnitude of the number of victims is necessary, as it is noted that the term '"in part" requires the intention to destroy a considerable number of individuals who are part of the group.'[284]

Yet, in subsequent years, the ICTY jurisprudence held that while no certain absolute minimum magnitude is required, numerical substantiality in absolute terms should nevertheless be taken into consideration, alongside relative magnitude.[285] In affirming this point, the Appeals Chamber in *Krstić* remarked that the 'number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the

---

[280] *Prosecutor v. Kayishema and Ruzindana* [1999] ICTR-95-1-T, Judgment, para.97 See also. *Prosecutor* v. *Bagilishema* [2001] 95-1A-T, Judgment, para.64.

[281] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgment, paras. 8-12; Prosecutor v. *Bagilishema* [2001] 95-1A-T, Judgment, para.64; *Prosecutor v. Semanza* [2003] IT-97-20-T, ICTR Judgment, para 312; See also Ambos, *Treatise on International Criminal Law*, 42; Berster, 'Article II', 149.

[282] The ICTY Appeals Chambers in Krstić defines the quantitative considerations as a necessary starting point. *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgment, para 12. The Chamber also adds 'Trial Chambers in Jelisić and Sikirica referred to this factor (significance of the targeted part) as an independent consideration which is sufficient, in and of itself, to satisfy the requirement of substantiality. Properly understood, this factor is only one of several which may indicate whether the substantiality requirement is satisfied Similarly, the ICJ in *Bosnian Genocide* declares that it gives particular priority to the quantitative approach in its assessment. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para.201

[283] B. Bryant, 'Substantive Scope of the Convention', 16 Harvard International Law Journal (1975), 692.

[284] *Prosecutor v. Kayishema et al.* [1999] ICTR-95-1-T, Judgment, para.97.

[285] *Prosecutor v. Brđanin* [2004] IT-99-36-T, Judgment, para. 702. *Prosecutor v. Sikirica et al*. [2001] IT-95-8-T, Judgment on Defense Motion to Acquit, para, 65.; N. Jørgensen. 'The Genocide Acquittal in the Sikirica Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea', 15 Leiden Journal of International Law, (2002) 392-396.

overall size of the entire group'.[286] As far as is observed, the dominant approach in international courts and tribunals has been to give precedence to relative magnitude, while nevertheless taking the absolute number of victims into account in order not to exclude cases where rationally small parts of very large groups are intended to be destroyed.

However, even if one accepts this dominant perspective in case law, it still appears challenging and unclear how to determine the 'whole' that the part is relevant to. As Bunyan Bryant observers, '[t]he more generalized the definition of the group, the more the number of victims becomes a less substantial part of the group. The more specifically the group is defined, the more likely the number of persons affected will be a substantial part of the group.'[287] To concretise, assume that a perpetrator intends to destroy Greeks in Germany, where around 300,000 of them live. What is the 'whole' in such a case, Greeks in Germany, in Europe or the World? Regarding this issue, the International Law Commission notes that the intention of a perpetrator does not necessarily have to be achieving 'the complete annihilation of a group from every corner of the globe',[288] however this tells very little about how to determine the relevant 'whole'. The possible arbitrariness this indeterminacy may lead was most strikingly demonstrated in *Sikirica,* in which the Trial Chamber practically treated the Bosnian Muslims in Prijedor as the 'whole' without explaining 'why' and calculated the numerical substantiality of the targeted part in Keraterm Camp in relation to the total Bosnian Muslim population in Prijedor.[289] The Chamber, after establishing that the total Bosnian Muslim population in the region was 47,581, concluded that approximately 1,000–1,400 Bosnian Muslim victims in Keraterm camp constituted 2–2.8 per cent of

[286] Prosecutor v. Krstić [2004] IT-98-33-A, Judgment, para.12. confirmed by Prosecutor v. Karadžić [2013] IT-95-5/18-A, para. 66. The ICJ, on the other hand, simply notes that 'the part targeted must be [numerically] significant enough to have an impact on the group'. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para.198.

[287] Bryant, 'Substantive Scope of the Convention', 692.

[288] Article 17 of Draft Code of Crimes against the Peace and Security of Mankind.

[289] *Prosecutor v. Sikirica, (et. Al)* [2001] IT-95-8-T, Judgment on Defense Motion to Acquit, paras. 69-72.

the whole Bosnian Muslim population in Prijedor and such a number was not quantitatively substantial.[290]

As Kai Ambos notes, in this respect, 'it is clear that by narrowing down the concept of group to very small part or units of a broader group, the scope of the crime may become in fact unlimited'.[291] With a similar thinking, Angela Paul objects to the idea that a single municipality may constitute a substantial part of a protected group, as this disproportionately lowers the threshold for the crime.[292] On the other hand, an even more haunting issue is whether there is an objective and meaningful basis to consider a part in this manner, other than the fact that it is targeted by the perpetrator. If not, would it not undermine the group-centric approach of the Convention? I will return to this issue in a moment when examining the geographical approach.

Finally, the quantitative approach is criticised for being unclear on what exact percentage or numerical size constitutes a substantial part.[293] As Lawrence LeBlanc points out, arithmetic calculations in the assessment of the substantiality requirement

---

[290] Ibid. See generally Jørgensen. 'The Genocide Acquittal in the Sikirica Case', 392-396.

[291] Ambos, *Treatise on International Criminal Law Volume II,* 43. See also *Prosecutor v. Brđanin* [2004] IT-99-36-T, Judgment, para.965, 966.

[292] A. Paul, *Kritische Analyse und Reformvorschlag zu Art II Genozidkonvention* (Springer 2008), 317 (cited in Behrens, `The *Mens Rea* in Genocide', 93).

[293] Jordan Paust was one of the earliest commentators who brought this criticism in his examination of the *Proxmire Act* which was issued to ratify the Convention in the U.S. in 1989. According to understanding added by the *Proxmire Act* 'the term 'substantial part' means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.' Genocide Convention Implementation Act of 1987 (Proxmire Act), 18 U.S.C. § 1093 definitions (8). Paust argued in this context that the arbitrariness of the terms 'substantial' and 'viable entity' put nearly an impossible threshold since one might imagine that even a perpetrator who committed the acts of genocide against millions of people may defend herself by claiming that the part was not numerically substantial enough to be accused with genocide. If Hitler had been prosecuted in the scope of *Proxmire Act*, according to Paust, he could have easily claimed that he practically intended to destroy less than half the Jews of the World and this does not constitute a substantial part. Paust added that 'even if the phrase "substantial part" could theoretically include just more than one third, one forth or ten percent, why we want such threshold quotas set against what the world still knows as acts of genocide?' The significant evil involved (and the fundamental difference between murder and genocide) hinges not upon percentages of group extermination, but upon the singling out of victims of a certain group because they are member of such a group.' Paust, 'Congress and Genocide: They're Not Going to Get Away With It.', 94-96.

tend to degenerate into a 'numbers game'.[294] For example, in addition to the aforementioned *Sikirica* case, in *Krstić* – even though the geographical and qualitative approaches eventually determined the ultimate conclusion – the Appeals Chamber nevertheless felt a need to calculate and note that Bosnian Muslims in Srebrenica constituted 2.9 per cent of the total Bosnian Muslim population.[295] Another example is the *Jelisić* case in which the Trial Chamber accommodated demographic calculations regarding Brcko region and Luka camp in assessing whether the accused, Goran Jelisić, had specific intent.[296] In the *Croatia v. Serbia* judgment, the ICJ concluded that a little under half of the Croat population in Croatia constituted a substantial part.[297]

It appears that establishing any certainty and consistency in such numerical considerations is impossible, because while determining a certain percentage would lead to unwanted consequences concerning very large or small groups, setting an absolute minimum threshold may either exclude small groups or, if it is set too low, become meaningless.[298] Moreover, even if one sets such an exact threshold, one can hardly justify why, say, ten but not nine per cent qualifies as substantial. Consequently, in the quantitative approach, 'the question whether the threshold has been met, and genocide therefore committed, depends on very subjective parameters'.[299]

2.4.2. Qualitative Approach

---

[294] L. LeBlanc, 'The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding', 78 AJIL (1984), 380. It is also argued that such considerations are 'depriving victims once more of their individuality'. Behrens, `*The Mens Rea* in Genocide', 88-89. Indeed, in Sikirica the Trial Chamber used a disturbing language by stating that 'the number of Bosnian Muslims and Bosnian Croats detained in the Keraterm camp, and who were victims within the terms of Article 4(2)(a), (b), and (c) [of the ICTY Statute], is '*negligible'. Prosecutor v. Sikirica, (et. Al)* [2001] IT-95-8-T, Judgment on Defense Motion to Acquit, para 74. (*emphasis added*).

[295] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgment, para.15.

[296] *Prosecutor v. Jelisić* [1999] Judgment, Case No. IT-95-10-T, Judgment, paras 74, 80, 89,102..

[297] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement, para.406.

[298] 'a strict quantitative requirement would reach the perverse conclusion that the smallest, most vulnerable groups are categorically excluded from protection. This is clearly contrary to the object and purpose of the Convention'.Alonzo-Maizlish, 'In Whole or In Part: Group Rights, The Intent Element of Genocide, and the "Quantitative Criterion"', 1397.

[299] Behrens, `*The Mens Rea* in Genocide', 89.

In the qualitative approach, the term 'substantial part' refers to a functionally or emblematically significant – but not necessarily numerically large – segment of a group. This view is built on the assumption that the destruction of such a segment will unavoidably jeopardise the existence of the group as an entity in that particular context and fits the lexical meaning of the term substantial, which according to the Cambridge Online Dictionary means 'large in size, value, or importance'.[300] The very first example of this approach was used in the U.S. Senate meetings by Adrian Fisher.[301] Fisher pictured a hypothetical situation in which the perpetrators have 'a plan to kill, say, all of the Catholic priests in a particular country, and that plan is for the purpose of destroying the Catholics as a religious group'.[302] That is, although the plan is not to kill a substantially large number of group members, the hope is that 'by the elimination of the leaders, the group would dissolve and cease to exist as a religious group'.[303] The often-cited formulation of this approach is found in the Whitaker Report, in which it is noted that a 'substantial part' may also refer to 'a significant section of a group such as its leadership'.[304]

The qualitative approach particularly became central and was further elaborated in cases related to the situation in the former Yugoslavia.[305] In *Jelisić*, the ICTY Trial Chamber explained that genocidal intent may consist 'of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the

---

[300] Cambridge Advanced Learner's Dictionary & Thesaurus, available at <https://dictionary.cambridge.org/dictionary/english/substantial> (accessed on 20 March 2019).

[301] U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* Vol. I (US Government Printing Office 1976), 362.

[302] Ibid.

[303] Ibid. 263.

[304] 'The Whitaker Report', para.29 (emphasis added).

[305] Similarly in Tolimir, the Court held that 'Although the numerosity of the targeted portion in absolute terms is relevant to its substantiality, this is not dispositive; other relevant factors include the numerosity of the targeted portion in relation to the group as a whole, the prominence of the targeted portion, and whether the targeted portion of the group is "emblematic of the overall group, or is essential to its survival",3136 as well as the area of the perpetrators' activity, control, and reach.' *Prosecutor v. Tolimir* [2012] IT-05-88/2-T, para.749. Also See *Prosecutor v. Popović et al.* [2010] IT-05-88-T, Judgment, para.822. See also *Prosecutor v. Karadžić* [2016] IT-95-5/18, Judgment, para.553; *Prosecutor v. Blagojević and Jokic*, [2007] IT-02-60-A, Judgment, para. 668.

survival of the group as such. This would then constitute an intention to destroy the group "selectively".'[306] Similarly, the Appeals Chamber in *Krstić* remarked that the prominence of the targeted part 'within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute].'[307] It is also observed in the case law that an attack on significant parts 'must be considered in the context of the face of what happened to the rest of the group'.[308] The ICJ in *Bosnian Case* notes in this respect that the qualitative approach 'cannot stand alone'.[309]

Following this train of thought, the *Krstić* Trial Chamber argued when reaching the conclusion that the crime of genocide was committed in Srebrenica that the extermination of military-aged men in conjunction with the forcible transfer of the rest of the Bosnian Muslim population would have 'a lasting impact upon the entire group'.[310] In elaborating this view, the Chamber noted that while the disappearance of generations of men had a devastating impact on the survival chances of a traditionally patriarchal society, it also precluded 'any effective attempt by the Bosnian Muslims to recapture the territory'.[311] Although both the Trial and Appeals Chambers claimed that

---

[306] *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para. 82.

[307] The targeted portion must be a "significant enough [portion] to have an impact on the group as a whole". *Prosecutor v. Krstić* [2004] IT-98-33-A Judgment, para.8. See also *Prosecutor v. Tolimir* [2012] IT-05-88/2-T, 749.

[308] Ibid.

[309] See also. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement para. 201. Similarly in Krstić, the Appeals Chamber noted that the 'Trial Chambers in Jelisić and Sikirica referred to this factor (significance of the targeted part) as an independent consideration which is sufficient, in and of itself, to satisfy the requirement of substantiality. Properly understood, this factor is only one of several which may indicate whether the substantiality requirement is satisfied.' *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgment, para 12, in footnote (references omitted). This view is also shared in the literature. Scholars who have concerns that the application of the qualitative approach own its own will disproportionately lower, stated that 'a certain (quantitative) threshold must always exist'. Ambos, *Treatise on International Criminal Law: Volume II*, 44 (with further references).

[310] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para.595.

[311] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para.595. The Appeals Chamber in Krstić , in affirming the Trial Chambers consideration, noted that ' The Trial Chamber was also entitled to consider

these considerations solely concern 'the likelihood of the community's physical survival' by emphasising that the destruction of military-aged men 'had severe procreative implications for the Srebrenica Muslim community',[312] this appears to be a failed attempt to tailor their verdict to fit the established individualistic interpretation of the term 'to destroy'.[313]

To explain, first of all, as Schabas rightfully asks, 'Would someone truly bent upon the physical destruction of a group, and cold-blooded enough to murder more than 7,000 defenceless men and boys, go to the trouble of organizing transport so that women, children, and the elderly could be evacuated?'[314] This deliberate avoidance of the perpetrators was a strong indicator of that their goal was not physical destruction of the entire group. Second, as is already pointed out, many male members of the group, who were mostly under the age of sixteen, were not physically targeted, which suggests that the perpetrators also did not intend to bring about biological destruction of the whole group, since the surviving members remained together and could procreate. Third, it is completely irrelevant to speak of recapturing Srebrenica if the genocidal intent is only about the physical and biological destruction of members. Therefore, as observed by Claus Kreß, both the ICTY and the ICJ introduced the collectivistic conception of group destruction (in his words the social concept of group destruction) 'through the backdoor

---

the long-term impact that the elimination of seven to eight thousand men from Srebrenica would have on the survival of that community. In examining these consequences, the Trial Chamber properly focused on the likelihood of the community's physical survival. As the Trial Chamber found, the massacred men amounted to about one fifth of the overall Srebrenica community. The Trial Chamber found that, given the patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of such a sizeable number of men would "inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica." Evidence introduced at trial supported this finding, by showing that, with the majority of the men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction.' *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgment, para.28.

[312] Ibid.

[313] For a similar view see Kreß, 'The Crime of Genocide under International Law', 490-492.

[314] W. Schabas, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgment of the International Criminal Tribunal for the Former Yugoslavia', 25 Fordham International Law Journal (2001), 46.

of the words "in part"'.[315] Indeed, as Kreß notes, 'the emphasis on a *qualitative* interpretation of the words "in part" [is] referring, by necessity, to the entire group as a social entity'.[316]

Apart from that, just like the quantitative approach, the qualitative approach has also been subjected to some severe criticisms. To begin with, it is argued that it runs against the primary purpose of the substantiality requirement because 'significant' segments of a group usually constitute a very small fraction in terms of their size.[317] However, this criticism is only valid from an individualistic perspective, in which it is thought that a scale of individual victims is what constitutes the magnitude of the crime. From a collectivistic perspective, the magnitude of the crime emerges from the possible destruction of a distinct supra-individual entity, and thus the assessment and justification of a part should be thought about accordingly.

Another line of criticism has been that the qualitative approach improperly broadens the list of the protected groups by considering certain segments of society which were deliberately excluded from the list of protected groups as significant 'parts'.[318] For Behrens, this is particularly problematic in terms of the political leadership of a group, given that political groups were excluded from the remit of the Genocide Convention as the drafters considered them 'characteristically unstable'.[319] Consequently, such reintroduction of political sections would be technically and logically problematic, since 'political groups would then appear to be not stable enough to warrant protection on their own, but sufficiently stable to represent national, racial and other protected groups'.[320] This argument appears untenable on two counts.

---

[315] Kreß, 'The Crime of Genocide under International Law', 492.

[316] Ibid. 490 (*Emphases in original).*

[317] Behrens notes that 'It is very purpose to allow consideration of a "more limited number of persons for the assessment of the 'part of the group", and it is a realistic concern that such limitation can considerably lower the threshold which substantiality was supposed to established.' Behrens, `The *Mens Rea* in Genocide', 91-92.

[318] Ibid. 92.

[319] Ibid.

[320] Ibid.

First, in the qualitative approach, it is not political groups but the political leadership of a national, ethnical, racial or religious group that is considered a significant part. These two do not correspond to the same thing since in cases where political leadership is considered a significant part; the victim of the crime is not a political group but one of the listed groups. Second, the qualitative approach does not claim that the political leadership (or any other part in question) constitutes a significant part per se in terms of every protected group. In this collectivistic way of thinking, destruction of the political leadership satisfies the substantiality requirement only in those situations where such destruction would irrevocably endanger the existence of the whole.

What is more, some critics have pointed out that the premise of the qualitative approach is highly immoral, as it represents a disturbingly elitist perspective in making a distinction between certain segments of society in terms of their social status.[321] It is also suggested that this approach runs the risk of following the 'thinking the perpetrators had laid down'[322] by perpetuating the 'discrimination among the membership of that group and [giving] it legal sanction'.[323] It appears hard to deny the merits of these criticisms in relation to the rhetoric that the ICTY used in its judgments. The most striking example in this regard is the *Sikirica* case. In examining the status of detainees in Keraterm,[324] the Trial Chamber used rather dismissive language by stating that 'among those detained were taxi-drivers, schoolteachers, lawyers, pilots, butchers and café owners. But there is no specific evidence that identifies them as leaders of the community.'[325] Indeed, it appears that the idea of a part's 'significance' is usually associated with high-class strata or privileged segments in case law and related legal documents,[326] in which political, administrative, business and religious leaders; law

---

[321] According to Caroline Fournet, this approach practically means 'that the elite of a group would be considered as a substantial part of this group' and relying on social status of victims in order to qualify the crime is extremely inappropriate. Fournet, *The crime of destruction and the law of genocide,* 72-73.

[322] Behrens, `The *Mens Rea* in Genocide', 92.

[323] Ibid.

[324] *Prosecutor v. Sikirica, et. al* [2001] IT-95-8-T, Judgment on Defense Motion to Acquit, paras 77-80.

[325] Ibid para. 80. Also see *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para. 82; *Prosecutor v. Krstić ,* [2001] IT-98-33-T, Judgment, para 585-587

[326] It is not therefore possible to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Br~ko to the

enforcement and military personnel; academics and intellectuals are offered as examples of significant parts.[327]

However, this situation does not arise because functional assessment is inherently elitist but rather misleading in listings in case law. As chapter three explores, collectivists, like Lemkin, consider a part's functional significance not according to its social status, but according to the abstract effect that its destruction might have on the 'whole' in that particular circumstance.[328] For example, if, say, a national group suffers a severe famine, farmers and any other segments that provide food for the group need to be considered as more significant than, say, academics and intellectuals for the survival of the group in those specific circumstances.

On the other hand, the issue of whether such an approach gives 'a legal sanction to discrimination' is once again closely related to the difference between collectivistic and individualistic perspectives. From a collectivistic standpoint, the significance of a part in that particular circumstance is not about what the perpetrator believes, but rather objective reality about the structure of the targeted entity. For individualists, however, this way of thinking is problematic, since for them every member of the group has equal importance for its survival and such considerations of significance may merely be in the imagination of the perpetrators.

Finally, it has been pointed out that assessing the significance of a certain part for the survival of the whole is a speculative practice.[329] Indeed, as can be inferred from the discussions so far, setting out an exhaustive and objective list of 'significant parts' is an improbable task to achieve as it strictly depends on the particular circumstances of a given genocidal situation and the perceived structure of the group in question. It should be finally noted that, although most of the criticisms directed at the qualitative approach

---

point of threatening the survival of that community' *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para. 93. See also *Prosecutor v. Stakić* [2003] IT-97-24-T, Judgment, para. 509; *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgment, para.12; *Prosecutor v. Popović et al*. [2010] IT-05-88-T, para.865.

[327] The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) UN.Doc S/1994/674, para.93,94.

[328] U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* Vol. II (US Government Printing Office 1976), 370.

[329] Schabas, *Genocide in International Law,* 284.

are disputed here, this should not be understood as support for this approach. As elaborated in chapter three, I will argue against the validity and merit of the qualitative approach, but for different reasons.

2.4.3. Geographical Approach

When it comes to the geographical approach, there seems a general agreement on the validity of this approach. It is suggested that, given that historically no perpetrator intended to destroy a group on a global scale,[330] neglect of the geographical approach would create a blunt genocide law by setting the threshold for the substantiality requirement to an almost unachievable level.[331] The central tenet of the geographical approach is that genocide does not require intending 'to achieve the complete annihilation of a group from every corner of the globe';[332] rather, intended destruction might be limited to a specific geographical area.[333]

This approach gained practical importance for the first time in 1982, when over one thousand people[334] in the Sabra and Shatila refugee camps in Beirut were killed when Israeli forces invaded southern Lebanon and allegedly allowed Phalangists militia to attack the camps. The United Nations General Assembly ('UNGA') referred to this highly localised massacre as 'an act of genocide' in a resolution (98 votes to 19, with 22 abstentions).[335] Although there have been some objections to the merits of this

---

[330] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para.13. Also see Schabas, *Genocide in International Law* 285.

[331] Berster, 'Article II', 148.

[332] YILC 1996 II/2, art. 17, p. 45, para.9.

[333] *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para. 83; Also see *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para. 590. *Prosecutor v. Brđanin* [2004] IT-99-36-T, Judgment, para.966.

[334] H. Sune, 'The historiography and the memory of the Lebanese civil war' (2011) available at <http://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/historiography-and-memory-lebanese-civil-war> accessed on 10 July 2016.

[335] UN. Doc. A/Res/37/123D available at http://www.un.org/documents/ga/res/37/a37r123.htm accessed on 10 July 2016; UN.Doc. A/Res/37/PV.108 available at <http://dag.un.org/bitstream/handle/11176/304023/A_37_PV.108-EN.pdf?sequence=1&isAllowed=y> accessed on 10 July 2016.

assessment and its legal validity,[336] the idea that genocide can be committed against part of a group in a certain geographical area was not challenged. Indeed, the Trial Chamber in *Krstić* explicitly cited this very the UNGA resolution as arguing that genocide can be committed in a confined geographical area.[337] As the ICJ noted in *Bosnian Genocide*, it is widely accepted in case law today that part of a group might be limited to a single region or even a community.[338]

The idea of 'localised genocide' has been a key element in the former Yugoslavia situation alongside the qualitative approach. The ICTY particularly investigated whether genocide was committed against Bosnian Muslims in some specific geographical locations such as Brcko, Prijedor and Srebrenica. Similarly, while Croatia accused Serbia and Montenegro before the ICJ of committing genocide against Croats in several cities and regions (particularly in Vukovar);[339] in the countercase issued by Serbia and Montenegro, it is claimed that Croatia committed the same crime against ethnic Serbians in Krajina.[340] The most elaborate defence of the geographical approach was produced by the *Krstić* Trial Chamber as follows:

---

[336] Some State Parties, such as the United States or Singapore, merely declared that it was a mistake to use the term genocide in this specific case. Ibid. Also see Schabas, *Genocide in International Law,* 524.

[337] Prosecutor v. Krstić, Case No. [2001] IT-98-33-T, Judgment, para. 589. Having said that, the Trial Chamber noted that the decision of the UNGA was more a political one rather than legal. See also Behrens, `The Mens Rea in Genocide', 93.; Schabas, *Genocide in International Law,* 285, 286.

[338] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para.199. Similarly the Sikirica Trial Chamber held that 'customary international law permits the characterisation of genocide even when the discriminatory intent only extends to "a limited geographic zone". Whether the group belongs to a country or a region or a single community, it is clear that it must belong to a geographic area, limited though it may be.' *Sikirca Prosecutor v. Sikirica et. Al* [2001] IT-95-8-T, Judgment on Defense Motion to Acquit, para.68. The Trial Chamber in Jelisić also remarked that 'an attempt to eliminate the group is made may be limited to the size of a region or even a municipality'. *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para. 83. Also *see Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, para.704,733.

[338] *Sikirca Prosecutor v. Sikirica et. al* [2001] IT-95-8-T, Judgment on Defense Motion to Acquit, para.68. Behrens, `The *Mens Rea* in Genocide', 93.

[339] See in general Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement.

[340] Ibid. paras. 463-475.

> The intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. [...] A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area.[341]

The main concern regarding the geographical approach is that accepting genocide can occur even in municipalities may greatly lower the threshold for the crime and undermine the purpose of the requirement.[342] In the face of this concern, individualistic and collectivistic suggestions would once again be very different. On the one hand, individualists are likely to argue that the perpetrator's subjective conception of a part as distinct from the whole should be considered as a sufficient basis and thus, as long as a certain minimum magnitude in the number of targeted victims exists, the substantiality requirement should be considered satisfied. This appears to be a logical stance to take from an individualistic perspective since if a protected group has no objective existence and distinct value, dividing it into parts will hinge on subjective assessments one way or the other. Moreover, since the crime of genocide is ultimately committed by individuals, it might be argued that each 'perpetrator's reach' should be taken into consideration. Behrens, in this context, suggests that targeting one hundred people cannot be interpreted in the same way for a foot soldier and a general when examining the

---

[341] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para. 590 (emphasize added); See also *Jelisić* [1999] IT-95-10-T 14 , paras. 82,83.

[342] *Prosecutor v. Stakić* [2003] IT-97-24-T, Judgment, para. 523. In addition to this, Schabas pointed out that 'Although the concept of genocide on a limited geographic scale seems perfectly compatible with the object and purpose of the Convention, it does raise questions relating to the plan or policy issue. Localized genocide may tend to suggest the absence of a plan or policy on a national level, and while it may result in convictions of low-level officials within the municipality or region, it may also create a presumption that the crime was not in fact organized on a larger scale.' Schabas, 'Was genocide committed in Bosnia and Herzegovina?' 42,43.

substantiality requirement due to the obvious difference in their reach.[343] It appears that the *Krstić* Appeals Chamber endorses this view to a certain extent, noting that 'the intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him'.[344] For collectivists, on the other hand, since the protected 'good' in genocide is the supra-level entity itself, a geographical part of the group should be discernible on some objective basis from the whole in order to be subject to protection per se. It is, however, not clear what that objective basis should be. All in all, there exists no clear indication in case law regarding how a lower limit to be set to the relevance of a geographical section in the context of genocide law.

2.4.4. A Critique of the Prevailing Judicial Framework

As the review conducted here has made clear, none of the established approaches in case law have been free of criticism. In addition, case law lacks any tangible clarification or order about how these approaches will be evaluated against each other, aside from occasionally denoting that numerical significance is critical and has priority over other approaches.[345] That said, given the lack of an absolute or relative numerical threshold,[346] this primacy merely means that the number of victims cannot be preposterously low. Indeed, as judge Dalveer Bhandari observes in *Serbia v. Croatia*, the hierarchical primacy given to the quantitative criterion has been jettisoned in favour of a more equal balancing effort and the three established approaches are now being

---

[343] Behrens, `The Mens Rea in Genocide', 95.

[344] The Chamber continues: 'While this factor alone will not indicate whether the targeted group is substantial, it can -in combination with other factors- inform the analysis' *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgment, para.13. Also see *Prosecutor v. Brđanin* [2004] IT-99-36-T, Judgment, para. 702: .'…the determination of when the targeted group is substantial enough to meet this requirement may involve a number of considerations, including but not limited to: the numeric size of the targeted part of the group - measured not only in absolute terms but also in relation to the overall size of the entire group - , the prominence within the group of the targeted part of the group, and the area of the perpetrators' activity and control as well as the possible extent of their reach'.

[345] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement. para 201; See in general Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement, paras 142, 406.

[346] '[T]here is no threshold of the number of victims necessary to establish genocide'. Semenza Trieal Judgment para 316. *Prosecutor v. Tolimir* [2012] Trial Judgment, para. 749.

applied, at least by the ICJ, in a flexible and egalitarian manner.[347] Having said that, Bhandari also remarks that the Court once again failed 'to lay down clear parameters that would provide guidance to future adjudicative bodies grappling with this concept (substantiality)'.[348] That is to say, the ICJ ultimately restated its position in *Bosnian Genocide* in which it was admitted that '[m]uch will depend on the Court's assessment of those and all other relevant factors in any particular case'.[349] In a similar vein, the Appeals Chamber in *Krstić* ultimately remarked that the applicability of each approach, 'as well as their relative weight, will vary depending on the circumstances of a particular case'.[350]

In short, then, three distinct meanings are given to the idea of substantiality promulgated in the form of a tripartite test by international courts and tribunals, such that, in their application, judges have the utmost discretion, in both emphasising one approach over another and the way a particular approach is applied. As is rather obvious, such a framework fails to satisfy the expectations of legal formalism, given that neither the scope of the norm nor the process of determination of substantiality is predictable. A striking demonstration of the unpredictability in the determination process can once again be found in the contrast between the ICJ's assessments regarding atrocities against Bosnian Muslims in Srebrenica and Croats who were targeted under the plan for a 'Greater Serbia'.[351] In relation to the former, the Court followed[352] the ICTY's assessment, according to which:

> although the Bosnian Muslim population in Srebrenica constituted a numerically small percentage of the Bosnian Muslim population, the

[347]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015], Separate Opinion of Judge Bhandari, para.11.

[348] Ibid. Para 8.

[349] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement. para 201.

[350] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgment, para.14.

[351] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement, paras 212, 408, 420.

[352] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement. para 296.

> enclave's seizure was of particular strategic importance due to its geographic proximity to Serbia, its symbolic stature as a refuge for Bosnian Muslims, and the fact that its elimination despite its status as a safe area would be demonstrative of the potential fate of all Bosnian Muslims. The Chamber agrees with this analysis and, accordingly, finds that the Bosnian Muslims in Srebrenica constituted a substantial part of the Bosnian Muslim population.[353]

In reaching this conclusion the ICTY and the ICJ considered the Bosnian Muslims as a relevant part by emphasising geographical and qualitative approaches, despite the fact that only 8,000 military-aged males were subject to acts of genocide, while the rest of the population was forcefully deported.[354] Therefore, a collectivistic conception of genocide (so-called 'social conception')[355] triumphed in these particular cases, and thus conceptual unconformity was dissipated through effectively undermining the individualistic interpretation of the term 'to destroy' in favour of a collectivistic understanding.

On the other hand, in *Croatia v. Serbia*, the ICJ did define the targeted part as the entire Croatian population living in the regions of Eastern Slavonia, Western Slavonia, Banovina/ Banija, Kordun, Lika and Dalmatia. After establishing that this section comprised approximately 1.7 million people – a little less than half of the entire Croat population in Croatia – the Court declared that the relevant part qualified as 'substantial' when the numerical significance of the part was considered in conjunction

---

[353] *Prosecutor v. Karadžić* [2016] IT-95-5/18, Judgment, para.5672 (citing Prosecutor v. Krstić [2004] IT-98-33-A, Judgment, para.15,16).

[354] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para 15,16. In this sense, the contradiction in the ICTY Trial Chamber's reasoning in *Akayesu* has similarities with judicial reasonings regarding the Srebrenica situation. The key observations led the ICTY and ICJ to infer 'genocidal intent' against Srebrenica Muslims group (approx. 40.000) were the (possible) negative impacts of the murder of two-three male generations (8.000 military aged male) on the overall 'survival' of a patriarchal society; the reduced possibility of recapturing Srebrenica by the victim group; and the forced deportations accompanied the killings. Reliance on these observations in the inference process is logically contradictive in the face of narrow conception of group destruction, since they have very little or no relevance to 'physical and biological destruction' of the group, but its social existence.

[355] E. Novic, *The Concept of Cultural Genocide: An International Perspective,* (Cambridge: CUP, 2016), 58.

with the fact that these geographically distinct sections were particularly targeted by the offender group in pursuing their expansion plan. Following that, the Court examined whether there was a pattern of conduct that exclusively indicated the genocidal intent of the perpetrators. In deciding that a genocidal intent was not the only reasonable inference that could be drawn from the conduct documented, the Court, inter alia,[356] drew on that the figure of 12,500 actual death and held that the number of Croat deaths was 'small in relation to the size of the targeted part of the group'.[357]

Although the intention here is not to dispute the final decision of the Court, there are two points that demonstrate the argument presented in the chapter. First, unlike the Srebrenica situation, the Court only included those who were killed as relevant victims for assessment and did not take into account the number of Croats who, according to the Court, were victims of the acts specified in Article II (b) of the Convention.[358] Besides, the Court noted, concerning acts of forced displacement, that these acts 'essentially had the effect of making the Croat population flee the territories concerned. It was not a question of systematically destroying that population, but of forcing it to leave the areas controlled by these armed forces.'[359] It appears, in this respect, that the ICJ preferred to dwell on an individualistic conception of the crime in assessing substantiality in this particular situation. Second, both the ad hoc judge Budislav Vukas[360] and judge Bhandari[361] point out in their respective opinions that it is questionable why the judgment did not elaborately consider the possibility of genocide concerning only one of those regions, particularly given that 'Croatia's case focused heavily on the specific region of Eastern Slavonia, and in particular the city of Vukovar and its environs'.[362]

---

[356] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement, para 407-439.

[357] Ibid. para.437.

[358] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement, 435.

[359] Ibid.

[360] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015], Separate Opinion of Judge Vukas, para. 5.

[361] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015], Separate Opinion of Judge Bhandari, para. 40 ff.

[362] Ibid. para 40.

Indeed, the atrocities in Vukovar resemble Srebrenica, in that the population and the manner of attack (around 21,000 Croats situated in the city at the time of the attack, 3,000 of whom were killed, while the rest were forcefully deported), as well as the emblematic significance of the city.[363] This contrast stands out as a demonstration of vagueness and indeterminacy in the implementation of the geographical approach.

This comparison not only further highlights the impact of assessment of substantiality with respect to the ultimate verdict, but also provides further support for Kreß's analysis that application of the substantiality requirement functions as a backdoor between two distinct conceptions of genocide,[364] which endows judges with a significant level of discretion in tailoring the meaning and scope of a crime in their encounter with a particular case. However, this framework does not rescue judges from that anxious place between the universal and the particular because, in addition to undermining the legality and thus the normative quality of the law, it significantly obscures the moral value protected by the criminalisation of genocide, which deprives us of the main anchor in assessing the fairness of a particular judgment.

2.5. Conclusion

In this chapter, the study has advanced four main ideas. First of all, it is established that the substantiality requirement emerged as a result of a teleological interpretation of the definition and it is part of a rule-determination process as clarification provided for the term 'in part'. That being the case, recourse to formal methods of treaty interpretation does not instruct judges in any meaningful way as regards their practices of rule application, i.e. in determining the meaning and scope of 'substantiality' in actual situations. Second, it is proposed that while the meaning of substantiality necessarily varies depending on one's understanding of the nature of protected groups and group destruction, historically, two competing perspectives have emerged regarding these notions and, connectedly, two possible conceptualisations of the crime, namely, individualistic and collectivistic. While the former considers protected groups as aggregations of individuals with a listed kind of shared identity and, thus, essentially understands substantiality in terms of the high number of (targeted) individual victims,

[363] Ibid. para 25.

[364] Kreß, 'The Crime of Genocide under International Law', 492.

the latter conceives protected groups as distinct and separate higher-level entities that come into being through individuals functioning together and, thus, assesses substantiality according to the targeted part's significance for the functioning of the whole.

Third, the chapter has demonstrated that the dominant approach in the case law lacks conceptual rigour, as it defines protected groups from a collectivistic perspective, while interpreting the idea of (intended) group destruction from an individualistic standpoint. This results in an ambiguous legal concept of genocide based on subjective considerations in case law. This is because, depending on the emphasis put by judges on the collectivistic or individualistic aspect, different understandings of genocide may prevail and be applied to factually similar situations, as demonstrated by the comparison drawn between the ICJ's assessments in relation to the Vukovar and Srebrenica atrocities.

Fourth, after offering an individual critique of the three established jurisprudential approaches to 'substantiality' and establishing that all three approaches are vulnerable to some serious criticisms due to their lack of precision and the morally questionable outcomes they may lead to, the chapter argued that these essentially contradictory approaches, particularly the qualitative and quantitative approaches, have not only emerged as a result of the conceptual ambiguity in the judicial construction of the crime, but also serve as a back door in shifting the emphasis between collectivistic and individualistic conceptualisations of the crime. In this sense, instead of considering the problems related to determining substantiality as a mere interpretative challenge – which only leads to circular and dead-end discussions as the next chapter will demonstrate – it is suggested here that the matter in hand is in fact part of a broader conceptual difficulty regarding the legal representation of genocide.

All in all, the prevailing judicial approach towards the assessment and justification of substantiality brings more problems than it solves. What appears certain, however, is that the present judicial framework and the back-door role of the requirement emerged out of necessity. Indeed, if mere individualistic or collectivistic conceptualisations of the crime, and thus the related approach to substantiality, consistently produced morally satisfying outcomes, then such a back door would not be utilised at all. Nevertheless,

this does not change the fact that endeavouring to overcome this complication through devising back doors leads to puzzlement about the good protected by genocide law, according to which the moral correctness and desirability of decisions can be measured, as well as the undermining of legal predictability and coherence.

The question must be asked, then, why the aforementioned necessity emerges in the first place. The study shall argue that it stems from the inability of individualistic and collectivistic perspectives to represent the reality of protected groups, which in turn creates morally counter-intuitive outcomes when they are applied to particular cases. The next chapter elaborates on this idea by reviewing the literature on the substantiality requirement, which largely mirrors the binary individualism/ collectivism dichotomy and therefore allows a critique of not only the scholarly views offered regarding the substantiality requirement and its assessment, but also the underlying conceptual commitments that the individualistic and collectivistic perspectives, and certain variations, adhere to.

CHAPTER THREE

The Substantiality Requirement in the Legal Literature: Uncovering Binary and Substantialist Thinking

The dilemma between individualistic and collectivistic conceptions of crime is historically fundamental to broader genocide studies,[365] and such binary thinking, even though its centrality is overshadowed by doctrinal argumentation, also underpins different interpretations and conceptions in the legal literature. The present chapter aims to thematically review scholarly work on the substantiality requirement by further highlighting this connection and elaborating why a morally and legally satisfying understanding for the determination and justification of 'substantiality' could not have been developed from either socio-philosophical perspective – which has ultimately led to the problematic judicial framework summarised in the previous chapter.

It should be restated here in relation to the notions of individualism and collectivism – and all the related concepts, e.g. nominalism, realism or functionalism – relied upon in this and the following chapters, that this thesis is concerned (unless otherwise stated) with their meanings in the field of social ontology. Social ontology, which is a nexus of philosophy and sociology, examines the nature, properties and morality of the social world and its entities, most prominently social groups. In this respect, there is a natural relationship between genocide studies and social ontology, since the ideas developed in social ontology regarding the existence and value of groups ultimately define the scope of the 'good' harmed by genocide. Genocide law, too, is not immune to the reach of social ontology. As chapter two began to demonstrate, any assessment of the crime necessarily builds on a conscious or unconscious assumption regarding the existence and morality of protected groups, since the nature of genocidal destruction can only be determined in accordance with the nature of the 'thing' being destroyed. To draw an analogy, in order to conceptualise the murder of an individual and determine the moral

[365] S. Lee, 'The Moral Distinctiveness of Genocide', 18 The Journal of Political Philosophy (2010), 335-356. Powell, *Barbaric Civilization: A Critical Sociology of Genocide*.

gravity of such an act, one first needs to have an understanding or make an assumption regarding what it is to be a human and the value attached to this being.

Curiously, however, the legal scholarship has shown a very limited interest in the natural relationship between social ontology and genocide law, with the notable exception of Larry May, who has advocated a neo-nominalist perspective on the protected groups and elucidated a legal conceptualisation of genocide accordingly. The majority of scholarly works have briefly hinted at their individualistic or collectivistic understanding of the being and value of protected groups, mostly by relying on the viewpoints uttered in *travaux* or by early influential commentators. This lack of interest in social ontology results in legal approaches to genocide being trapped in early 20th century thinking regarding protected groups, which predominantly exhibited a binary clash of two substantialist[366] viewpoints on the social world, of individualism and collectivism. This creates a peculiar circularity since the binary and substantialist thinking in the case law and literature stems from taking individualistic and collectivistic conceptions as granted, but the relevance of such thinking is also downplayed in the legal literature due to this very approach, i.e. not contesting the conceptual foundations of the most fundamental concept of the legal construction of this crime.

Focusing on the centrality of individualistic and collectivistic conceptual viewpoints on the prevailing legal construction of genocide and offering a critique of them would not only help the law understand the relevance of binary and substantialist thinking in its construction of genocide, but also provide a novel perspective on and explanation of the struggles that lawyers (and politicians) have had in representing the crime through the lenses of these conceptual perspectives. This is indeed one of the main objectives of this chapter. The selection of scholarly works also reflects this sensitivity, as the thesis either focuses on early influential scholars, – most prominently Robinson and Lemkin, whose conceptual takes on the crime have heavily influenced case law and subsequent

[366] To remind, substantialist thinking in the context of the study refers to the idea that constant realities or substances, whatever form they may be in, underlie the experienced phenomena.

scholarly works – or on minority views that deviate from these two conceptual standpoints on certain conceptual points.

In their radical forms, individualistic and collectivistic perspectives of society constitute two polar opposites; which means, as much as they differ, there nevertheless exists a commonality that puts them on the same axis. In this sense, what the two perspectives have in common is being inherently 'substantialist' in ontological terms – that is, they adhere to a doctrine that presumes that indivisible units of concrete reality are singular and stable substances, entities in which various properties inhere.[367] Difference emerges from the diversity of opinions about what is the true or most relevant substance of social reality. While individualism accredits individuals and their traits, such as experience and rationality, with being the true substance of social reality, for collectivists social structure is 'what really exists, individual persons being mere products of the society in which they are born'.[368]

Of course, these two descriptions do not exhaust all the possibilities but merely denotes the most radical forms of the two socio-philosophical views. There are a number of different in-between positions,[369] those that are relevant to the research topic will be referred to in this chapter.[370] The point is, however, that all these variations principally consider one or another type of entity as the primary substance that should constitute the locus for attaining meaning and bringing explanations to the social reality experienced. Thinking in this manner appears *prima facie* plausible, presumably because we are accustomed to objectifying reality, given that the only way to make sense of and survive in an ever-changing world is to locate similarities and stabilities, then analyse them and adjust our actions accordingly. However, problems arise when these convenient representations, gleaned from our individual and collective experience, begin to be

---

[367] MacLean, *Rethinking Law as Process: Creativity, Novelty, Change*, 71.

[368] M. Delanda, *Assemblage Theory* (Edinburg: Edinburgh University Press, 2016), 10.

[369] Ibid.

[370] That is, the study will not focus on those purely philosophical views on groups which cannot be backed by empirical investigations or verifiable by our ordinary perception, such as the 'platonic realism' or 'eliminativist'. See W. Ramsey, 'Eliminative Materialism' in E. Zalta (eds.), *The Stanford Encyclopedia of Philosophy* (Summer edn, 2013) <http://plato.stanford.edu/archives/sum2013/entries/materialism-eliminative/> accessed on 13 April 2016.

treated as static and ever-present forms with an inseparable essence. In other words, when we start to assume that what needs to be accounted for is change, rather than relative stability, our representations are doomed to miss the reality.

This is because everything that we experience and objectify, from the largest mountains to the smallest atoms, from human beings to the smallest animals, is actually in a state of becoming and constant change – whether it is fast or slow, at the microscopic level or observable to the naked eye. In this sense, 'reality is more akin to a continuous flux, where things merge into each other and the essential qualities seem to be more correctly describable in terms of relatedness than separateness'.[371] Therefore, no essential quality exists on its own; everything 'exists' only in relation to others. The state of flux is even more apparent in respect of societal facts, such as money, individuals or groups, as they are socially constructed realities, which means their relative stability is attached to normative reoccurrences of certain collective acts and meanings collectively and consistently attributed to certain acts, traits and interactions. However, all these underpinning relations and perceptions are subject to constant change. For these reasons, artificially collapsing this social complexity to a single dimension or some stable qualities unavoidably creates a mismatch between the empirically experienced and the analytically conceived reality.

Equipped with this perspective, the contention here is that thinking about the protected groups in individualistic or collectivistic terms fails to represent their complex and ever-changing reality, which leads to incomplete and single dimensional accounts of the nature of group destruction and thus the immorality of genocide. The protected groups are not rule-governed, mechanical systems with clear-cut boundaries, nor are they constituted by parts that functionally complement each other in a flexible homeostasis. That said, there are certain properties, such as language or culture that cannot be individually held by any of the constituents; but exist, persist and are transformed by virtue of the existence of such collective phenomena. This means that the protected groups also cannot be explained away by mere reference or reduction to the qualities of constitutive units or any kind of 'essence'.

---

[371] MacLean, *Rethinking Law as Process: Creativity, Novelty, Change*, 9.

In this context, collectivistic perspectives mostly contradict the former insight, which leads them to falsely presume that there exist objectively locatable 'substantial' parts and thus posit a logically contradictive and speculative approach to the substantiality requirement. Individualistic viewpoints, on the other hand, fail in recognising that these groups are not fictitious but rather emergent realities with unique properties constructed through persistent social interactions, mapping and articulation. Consequently, their destruction cannot be merely reduced to the destruction of individuals or their particular traits. The following paragraphs shall further advance these arguments through demonstrating how the perspectives offered in the literature that shaped the existing jurisprudential approaches to assess and justify substantiality fail to offer a morally and logically satisfying formulation due to the gap between reality and their underlying substantialist presumptions.

3.1. Individualistic Conceptions of the Protected Groups and the Substantiality Requirement

Rejection of the objective reality, or at least the distinct value of the protected groups, appears to be a common tenet of individualistic approaches.[372] This view hinges on the nominalist idea that individuals and their actions constitute the basic units of the social world like 'atoms',[373] and thus there cannot exist any social 'thing' that is larger than the individual,[374] which is 'the upper limit and the sole carrier of meaningful conduct'.[375] The 'models' that we use to explain social phenomena are therefore mere idealisations and abstractions of the social reality that emanates from the intentional

---

[372] Which arguably arises from championing the subjectivist sociology originally introduced by Georg Simmel and Max Weber. See generally F. Vandenberghe, 'Simmel and Weber as ideal-typical founders of sociology' (1999) 25 Philosophy and Social Criticism, 57-80.

[373] M. Weber, *Basic Concepts in Sociology* (New York, Citadel Press, 1964) 29; L Coser, *Masters of Sociological Thought: Ideas in historical and social context* (Houghton Mifflin Harcourt, 1971) 218.

[374] Warriner, 'Groups are Real: A Reaffirmation', 549. See also C. Powell, *Barbaric Civilization: A Critical Sociology of Genocide* (McGill-Queen's University Press-2011) 32.

[375] M. Weber, *Economy and Society I* (Berkeley: University of California Press, 1978) 4-5, 15-18. Accordingly, an individualistic standpoint 'simply denies that any special mode of access to social facts is required for knowledge of them to be obtained. Since statements about social objects are equivalent and reducible to statements about individual people, it must follow that every law expressed in social terms is expressible as a law about individuals'. A. Quinton, 'Social Objects' (1975-1976) 76 Proceedings of the Aristotelian Society, 12.

social actions of individuals.[376] The concept of 'group', as one such 'model', designates certain common subjective beliefs, dispositions, feelings or interactions of individuals[377] and can always be reduced to understandable actions, 'that is without exception, to the actions of participating individual men'.[378] By deliberately or intuitively resting on these theoretical grounds, the individualistic literature on genocide law characterises the protected groups as 'abstract entities'.[379] The abstract entities, unlike their individual parts, can be considered as neither 'ultimate constituents'[380] nor ultimate moral subjects[381] of the social world. That is to say, they do not have any 'real' existence and

---

[376] For Max Weber, all social actions emanate from the psychological states of human individuals. 'Action is "social" insofar as its subjective meaning takes account of the behaviour of others and is thereby oriented in its course'. Weber, *Economy and Society*, 4; G. Katsiaficas et. al., *Introduction to Critical Sociology* (Ardent Media, 1987) 20-25. Similarly, Simmel remarks that 'in the last analysis only individuals exist' and social structures have existence only 'in personal minds'. G. Simmel, 'The persistence of social groups' (1898) 3 The American Journal of Sociology, 665. Having said that, as Powell notes, Weber recognizes that the intended action may lead to unintended consequences. An important purpose of sociology 'is to help diminish those unintended consequences by giving social actors improved knowledge of the likely consequences of their actions.' Powell, *Barbaric Civilization*, 26.

[377] For example Weber defines ethnic groups as 'those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, or because of memories of colonization and migration; this belief must be important for the propagation of group formation; conversely, it does not matter whether or not an objective blood relationship exists.' Weber, *Economy and Society*, 389 similarly he argues that nation means 'a community based on feeling (gefühlsmässige Gemeinschaft), for which its own state (eigener Staat) would be an adequate expression; therefore, it normally tends to bring about such a state'. Cited in N. Zenonas. 'Max Weber on Nations and Nationalsim: Political Economy before Political Sociology.' (2004) 29 The Canadian Journal of Sociology, 394.

[378] H. Gerth and C. Mills, *From Max Weber: Essays in sociology* (Oxford: Oxford University Press, 1946) 55.

[379] For an examination and critique of conceptualising the social groups as 'abstract entities' see P. Sheehy, *Reality of Social Groups* (UK; Ashgate Publishing Group, 2006) 28.

[380] J. Watkins, 'Methodological Individualism and Social Tendencies' in M. Brodbeck (eds.), *Readings in the Philosophy of the Social Sciences* (Macmillan, New York-1968) 270-271. As we shall see the interrelational individualism prescribes ontological existence of relationships as distinct from individuals and therefore differs from this view by admitting the distinct existence of relationships in the world.

[381] S. Winter, 'On the Possibility of Group Injury' (2006) 37 Metaphilosophy, 413; M. Hartney 'Some Confusions Concerning Collective Rights' (1991) 4 The Canadian Journal of Law and Jurisprudence, 297.

so cannot be harmed as such.[382] Despite this common understanding, there are nevertheless a variety of perspectives on its implications as to the substantiality requirement and its scope.

3.1.1. Nominalist Accounts of Pietr Drost and Nehemiah Robinson

In one of the earliest monographs on the Convention, Drost defends arguably the most radical nominalist approach to the crime by echoing the French position in the drafting process. According to Drost, 'merely a number of persons contemplated as [a] distinct aggregate or assemblage forms the object of protection under the Convention'.[383] The 'group as such' formulation, in this context, must not be conceived as denoting a distinct entity, but rather a miscellany of individuals subjectively categorised by their particular common features, whether mental, physical or cultural.[384] This understanding leads Drost to describe the nature of group destruction as entirely related to the lives of individuals by remarking that 'an intentional destruction of a human group as such can be put into effect *only* by the deliberate destruction of human life'.[385] Genocide is therefore simply a 'collective homicide',[386] which is directed against the physical existence of individuals and not against their material or mental goods or any higher entity.[387]

---

[382] See also Simmel, 'The persistence of social groups', 3 American Journal Sociology 666. 'The relation of human beings to each other are so complex, so ramified, and so compact that it would be a wholly hopeless task to resolve them into their elements, and we are consequently compelled to treat them as unities rather than as self-existing structures. It is, therefore, only a methodological device to speak of the essence and the development of the state, of law, of institutions, of fashion, etc., as if each of these were a unified entity. We cannot resolve the unitary aspect which they present to us into its components, and it is, therefore, a scientific interim-filler if we treat this aspect as a something that has an independent existence'.

[383] Drost, *The Crime of State: Genocide*, 85. That being said, Drost does not really substantiate his ontological commitment.

[384] Ibid. 84,85.

[385] Ibid. 124 (*emphasis added*).

[386] Ibid. 60 He also remarks that 'genocide as a species of homicide is the physical (and biological) destruction of human lives'. Ibid. 125.

[387] Ibid. 11. 'Even downright vandalism or iconoclasm, how abominable, pernicious and sinister it may become, does not present the collective homicidal character of genocide'. Ibid 41. This view also found some support in social sciences. See, for example, F. Chalk and K. Johassohn, *The History and Sociology*

From this perspective, Drost submits that 'genocide is being committed when homicides take place "with a connecting aim", i.e. directed against people with specifically designated common characteristics'.[388] This, however, does not mean that the crime requires a specific numerical threshold of targeted victims that must be met. For Drost, even though the Convention is designed to prevent and punish attacks against a large number of persons, its provisions do not impose any particular restrictions in respect of the size, prominence or distinctiveness of the targeted 'part' for an act to qualify as the crime of genocide.[389] Rather, as long as a perpetrator acts 'with the intent to commit similar acts in the future and in connection with the first crime', killing a single victim due to her national, racial, ethnic or religious characteristics should constitute such a crime.[390] The key question must then be whether the perpetrator has the intent of 'group murder' when committing the act.[391] Thus, the term 'in whole or in part' merely denotes that the perpetrator does not necessarily have to target the entire group and nothing more.

One thing that cannot be denied about Drost's approach is its conceptual coherence. If there exists nothing else to destroy other than multiples of individuals with perceived sameness when we speak of 'groups', it becomes rather pointless decoupling group

---

of Genocide (Yale University Press 1990) 35. 'Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator; I. Charny, 'Toward a Generic Definition of Genocide' in Andreopoulos (eds.), *G., Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press, 1997) 76. 'Genocide in the generic sense means the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defenselessness of the victim.'; A. Jones, *Genocide: A Comprehensive Introduction* (London; New York: Routledge, 2006) 22: 'I consider mass killing to be definitional to genocide. The inclusion of what some would call "ethnocide" (cultural genocide) is important, valid, and entirely in keeping with Lemkin's original conception. It is also actionable under the UN Convention; but in charting my own course, I am wary of labelling "genocide" cases where mass killing has not occurred.' Also see S. Stein, 'Conceptions and Terms: Templates for Analysis of Holocausts and Genocide' (2005) 7 Journal of Genocide Research, 171.

[388] Drost, *The Crime of State: Genocide,* 85.

[389] Ibid.

[390] Ibid.

[391] Ibid.

destruction from mass murder or atrocities.[392] As a result, while the term 'intent to destroy' can only be interpreted as the physical and biological destruction of individuals who are demonised by the perpetrator, the enigmatic term 'as such' should be construed as the denotation of such demonisation; in other words, the fact that victims are not targeted in their individual capacity but as result of a blanket collective characterisation or classification.[393] Understanding the crime in this manner presents two options when interpreting the term 'in part'. By resorting to historical or teleological interpretation methods, one can insist that the intended murder should target a large number of human beings, or by predominantly dwelling on a textual reading of the provision one can concede that the existence of intended 'group murder' is sufficient to fulfil the specific *mens rea* element. Drost clearly prefers the second and thus practically implies that, concerning our research question, the substantiality requirement is redundant.

Drost's interpretation of the term 'in part' and his general understanding of the crime also have a certain convenience. First of all, it avoids all the theoretical and practical difficulties that arise in determining the 'substantiality' of a part. Second, while some commentators find it morally questionable to characterise a certain percentage, number or segment of a group as 'substantial',[394] Drost's understanding avoids such moral dilemmas. Third, it may become challenging, particularly in a collectivistic view, to explain how the harm stemming from destroying a 'racial group' can go beyond the sum of harms inflicted on individuals. This is because, while 'race', as is commonly understood, proved to be a scientifically empty concept,[395] some may find it dubious

---

[392] If the groups don not hold value as such, it also appears rather pointless to restrict the types of protected groups. Indeed Drost was critical about the list of protected groups. He noted that: 'Nobody wil [sic] deny that indiscriminate assassination of "anonymous" persons appertaining to any group distinct by "sex, language, political or other, opinion, social origin, property, birth or other status" constitutes a crime of genocide as much of international concern as the wilful extermination of haphazard victims belonging to a group of a national, racial, ethnical, religious character. For these reasons it is submitted that the definition of genocide in Article II defeats the object of the Convention.' Ibid. 124.

[393] Ibid.

[394] See for example, C. Fournet, *The crime of destruction and the law of genocide: their impact on collective memory* (Routledge-2016) 71-72. Behrens, `The *Mens Rea* in Genocide', 91-92.

[395] C. Mukhopadhyay et. al, *How real is race?: a sourcebook on race, culture, and biology* (Rowman & Littlefield, 2013) 5-93; Also see generally E. Barkan. *The retreat of scientific racism: Changing concepts*

that a 'racial group' has any social value like ethnic, national or religious groups.[396] By rejecting the distinct reality and value of any protected group, Drost simply implies that the harm of genocide is always the sum of harms inflicted on individuals.

However, construing the legal definition and the term 'in part' from this perspective, is above all, doctrinally problematic, because it relies on Drost's misapplication of the formal methods of treaty interpretation.[397] It is rather clear that genocide is inherently a crime directed against the masses and reducing genocide to 'small-scale' mass murders (or atrocities) simply contradicts the object and purpose of the Convention, i.e. preserving the manifold richness and plurality of humanity[398] through safeguarding 'the very existence of certain human groups'.[399] Probably, being aware of this oversight, Drost tries to substantiate his argument by making an inaccurate reference to the drafting history. He claims that the French proposition, which reads as '(genocide means) an attack on life directed against a *human group, or against an individual as a member of a human group* […]',[400] expresses the same idea that the words 'in whole or in part' aim to cover and the only reason why France withdrew this amendment proposal was this commonality between the purposes.[401] However, this information is

---

of race in Britain and the United States between the world wars (Cambridge: Cambridge University Press, 1992).

[396] See generally B. Carter, *Realism and Racism: Concepts of Race in Sociological Research* (London: Routledge, 2000). Indeed, Drost notes, while discussing the idea of cultural genocide, that 'It is not clear what is meant the inclusion of a racial group among the protected groups. If such a group possesses a common language, religion or culture, it is protected as such in its particular properties. If a racial group does not possess any specific, common characteristics, it needs no protection because it cannot suffer by cultural genocide.' Drost, *The Crime of State: Genocide*, 41.

[397] As Tams aptly notes, according to the general canons of treaty interpretation the text of the Convention can be read in isolation. Rather, it needs to be considered in the light of the context and the object and purpose. Tams, `Introduction`, 17-21.

[398] The UN General Assembly Resolution 96 (I).

[399] *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, (1951), 8.

[400] Drost, *The Crime of State: Genocide*, 84 (*emphasis added*).

[401] Ibid. 84. It needs to be noted that, it does not seem surprising why Drost feel a particular sympathy for French approach in general. Throughout the drafting process French delegation was explicitly pushing for a nominalist understanding of genocide. During the Sixth-Committee meetings, the French delegate Charles Chaumont clarified the philosophical underpinning of their view by emphasizing that: 'The group is an abstract concept: it is an aggregate of individuals; it has no independent life of its own; it was

not true. On the contrary, France's proposition, which aims to broaden the scope of genocide to discriminatory motivated killings, was explicitly rejected during the meetings[402] and the term 'in whole or in part' was in fact added in order to exclude cases where a single member or a small number of members are targeted.[403] Therefore, neither historical nor teleological interpretation supports Drost's view, even though a plain reading of the text allows him to reach the conclusion summarised.

At this juncture, a legally more suitable nominalist interpretation is given by Robinson, who also concedes that a protected group in genocide law refers to 'an assemblage of persons regarded as a unit because of their comparative segregation from others'.[404] Perceiving groups from this ontological viewpoint, Robinson indicates that what separates genocide from other 'racially motivated'[405] atrocities must be that, in

---

harmed when the individuals composing it were harmed. The French Amendment…had the advantage of avoiding a technical difficulty likely to arise, …namely, that deciding the minimum number of people constituting a group.' UN Doc A/ C.6/SR.73.

[402] Indeed the United States was critical regarding the views of France and remarked that the French formulation unwarrantedly extended the scope of genocide to those incidents where a single individual was attacked due to its group membership. UN Doc. A/C.6/SR.73. (Gross, United States). In a similar vein, the delegate of Egypt noted that 'the idea of genocide could hardly be reconciled with the idea of an attack on the life of a single individual' and stated that the adaptation of the Norwegian proposal, (see UN Doc. A/C.6/228) which reinsert the words 'in whole or in part' to the first paragraph of the definition (*mens rea*), would be more favourable. Ibid. (Raafat. Egypt). The United Kingdom supported this view by emphasizing that 'when a single individual was affected, it was a case of homicide, whatever the intention of the perpetrator of the crime might be. In those circumstances, it was better to restrict the convention to cases of destruction of human groups and, if it was desired to ensure that cases of partial destruction should also be punished, the amendment proposed by the Norwegian delegation would have to adopted.' Ibid. (Fitzmaurice, United Kingdom). See also Greenawalt, 'Rethinking Genocidal Intent, 2290; Kreß, 'The Crime of Genocide under International Law', 489.

[403] As an affirmation of this point, Norway emphasized that the proposed amendment (inclusion of the term "in whole or in part") does not broaden the concept of genocide like the one that France submitted and the term 'part' supposed to refer more than one individual. UN Doc. A/C.6/SR.73 (Wikborg, Norway).

[404] Robinson, *The Genocide Convention a Commentary* 58. (*emphasis added*). It should be noted at this stage that Robinson uses the term assemblage in its literal meaning. The term 'assemblage' later gained different connotations through the emergence of Deleuzian philosophy and Manuel Delanda's assemblage theory. As the next chapter will elaborate on, such understanding of 'assemblage' comes fairly close to the perspective of the present study. See Delanda, *Assemblage Theory*; G. Deleuze and F. Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* translated by B. Massumi, (London: Continuum, 2003 [1980]), 503.

[405] I use this term in a broad sense that includes racial, religious, national or ethnic mass atrocities.

genocide, the perpetrators do not only 'ill-treat' people with certain characteristics but aim to wipe them out, either from the Earth or more usually from a particular area. The logic underlies the inclusion of the term 'in part' must, then, be to criminalise 'localised genocides' in addition to global ones. That said, this reasoning alone bears the danger of setting an extremely low threshold for the crime, because it paves the way for the qualification of acts committed with the intent to destroy only a few members of, say, an ethnic group who live in a village as genocide, which not only significantly blurs the moral line between genocide and discriminatorily motivated murders or pogroms,[406] but also runs against the genealogy of the concept of genocide, the moral gravity imputed to the crime and the intention of the drafters.[407]

In this context, requiring numerical substantiality of the targeted victims turns out to be teleologically essential for Robinson, since the imputed moral gravity of genocide and the acceptance of partial destruction as genocide can only be reconciled through the requirement of a high number of (potential) victims in a nominalist understanding. That is to say, if the substantiality requirement is indeed 'a remnant of the concept of genocide as a crime of certain magnitude',[408] this magnitude can only refer to a high number of targeted victims from Robinson's perspective.[409] From this viewpoint, he ultimately submits that the inclusion of the phrase 'in part' indicates that committing

---

[406] Indeed, this was one of the arguments put forward by the opponents of the Convention in the U.S. Senate. Alfred Schweppe, for example, remarked that '…this whole concept of part of a group, which may be part of a group in a town, doesn't mean the whole group. Certainly it doesn't mean if I want to drive 5 Chinamen out of the town…that I must have the intent to destroy all the 400,000,000 Chinese in the world or the 250,000 within the United States. It is part of a racial group, and if it is a group of 5, a group of 10, a group of 15, and I proceed after them with guns in some community to get rid of them solely because the belong to some racial group that that the dictators don't like, I think you have got a serious question.' U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* vol. II (US Government Printing Office 1976), 205.

[407] Kreß, 'The Crime of Genocide under International Law', 490-491.

[408] Behrens, `The *Mens Rea* in Genocide', 87.

[409] Yet as Edgar Turlington notes, 'it is impossible to determine, either from language of the convention or from an examination of the record (the *travaux préparatoires*), how large a part of a group a person must have the intent to destroy to make his act with such intent constitute genocide' Turlington, 'The Genocide Convention Should Be Ratified', 33. It will always up to judges to decide on the numerical threshold. Robinson, *The Genocide Convention,* 63.

one of the listed acts[410] with the intent to destroy 'a multitude of persons of the same group because of their belonging to this group, must be classified as genocide *even if these persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial*'.[411] This reading of the definition was made by Robinson in 1949 and heavily influenced the case law and essentially provided the basis for the quantitative and geographical approaches to substantiality.

Yet, even though Robinson's account appears to be in conformity with the formal rules of treaty interpretation, it raises various applicative and moral problems. The study already pointed out the relevant applicative challenges (such as deciding how many individuals would qualify as 'substantial' or difficulties in determining the scope of the relevant geographical area). What seems ontologically unjustifiable, on the other hand, is that although targeting more people may be considered morally worse, Robinson and the case law fail in accounting for why should an attack with the intent to destroy half of a group constitute a different crime from another in which ten per cent are targeted with the same intent? From a different angle, we can also ask why targeting the whole group constitutes the same crime as targeting half of it?[412] Alonzo-Maizlish suggests, in this respect, that any numerical criterion will unavoidably be arbitrary since it is always possible to ask why a certain percentage or number is set as the limit.[413] This line of

---

[410] In fact Robinson uses the term 'acts of homicide' ibid 63. Yet as the legal definition clearly shows (and also Robinson noted in his work p. 64), the acts of genocide do not only comprise of homicide. Therefore, it is plausible to conclude that with this term Robinson was in fact denotes the 'acts of genocide'.

[411] Ibid 63 *(emphasis added).* In a similar vein, Turlington notes that genocide 'aims at the destruction all or substantially all the inhabitants of a given country who are identifiable as of the same national ethnical or racial origin or the same religious belief.' E. Turlington, 'The Genocide Convention Should Be Ratified', Proceedings of the Section of International and Comparative Law (American Bar Association), 27. On the other hand, Turlington apparently misinterprets the *actus reus* as he remarks that the actual number of victims also has to be substantial (Ibid. 27,32).

[412] Fournet, *The crime of destruction and the law of genocide*, 70.

[413] Alonzo-Maizlish, 'In Whole or In Part', 1397; Behrens shares this concern as well who states that there exists an arbitrariness in assessing the quantitative approach, which is highly concerning since 'this ultimately means that the question whether the threshold has been met, and genocide therefore committed, depends on very subjective parameters'. See Behrens, `*The Mens Rea* in Genocide', 89. Behrens also calls for attention to that such approach deprives 'victims once more of their individuality.'

criticism, however, is only partially agreed by the thesis, since, as it will be advanced in chapter four, while requiring relative or absolute numerical magnitude indeed lacks any ontological and thus objective basis, the requirement of absolute magnitude nevertheless emerges a genealogical imperative which should be taken into account in the reasoning process, even if it is not the ultimate point of consideration or cannot be standardised.

Moreover, there are some protected groups that are constituted by a very limited number of individuals. If the moral gravity of genocide were strictly attached to the magnitude of the number of potential victims, then, the situations of such groups would create a paradox, as their destruction would fall outside the legal protection provided by the Convention. As noted by Alonzo-Maizlish, any approach that sets an absolute minimum magnitude would run against the object and purpose of the Convention, as it would *ipso facto* exclude the smallest and most vulnerable groupings from the protective scope of the Convention.[414]

3.1.2. A Conceptual Critique of Nominalist Accounts

The source of these practical and moral difficulties appears to be the incomplete representation of the reality of the protected groups. Perceiving the experienced and observed unity of individuals as something ascribed 'as a matter of subjective convenience',[415] in other words as fictional entities, appears to be built on the assumption that people are born with or somehow 'individualistically' gain certain

---

Ibid. Indeed, the ICTY Trial Chamber in Sikirica used a disturbing language by stating that 'the number of Bosnian Muslims and Bosnian Croats detained in the Keraterm camp, and who were victims within the terms of Article 4(2)(a), (b), and (c) [of the ICTY Statute], is *negligible*'. *Prosecutor v. Sikirica et al*. IT-95-8-T, Judgment on Defense Motion to Acquit, para 74. (*emphasis added*). See also Fournet, *The crime of destruction and the law of genocide* 70-71; Berster, 'Article II', 150. Despite this careless wording of the Tribunal, however, it needs to be borne in mind that the unique evil of genocide is the destruction of the group, as such. That is to say, there is principally nothing wrong with that the assessment primarily focuses on the group's existence, as such, rather than individuals'. Therefore, this concern is more about the poor choice of word, but not a technical misunderstanding.

[414] 'Proportionately, even one murder may be "reasonably significant" if the group is small enough and the intent has been satisfied otherwise. Were this not the case, a strict quantitative requirement would reach the perverse conclusion that the smallest, most vulnerable groups are categorically excluded from protection.' Alonzo-Maizlish, 'In Whole or In Part', 1397-1398.

[415] In legal theory Lon Fuller sees group as ascribed unity as a matter of subjective convenience. Indeed, according to him, there is no distinction between the unity of corporation, people waiting for 9:10 train or hams hanging in a butcher shop. Fuller, *Legal Fictions*, 12-13.

qualities, properties or characteristics, which they are subjectively classified according to some. Such an understanding, however, is bound to fail to account for the properties and causal powers accredited to those unities[416] – such as culture or language – or capacities and abilities that individuals are only able to have as members.[417] The true value of such groups lies in the fact that these properties and powers occur, persist and are transformed as long as unity continues and cannot be explained away with a direct reduction to the properties, actions or beliefs of individual constituents.[418] Moreover, our social identities, values or characteristics are not things that people are born with or gained entirely with free will, instead they are enacted by the society individuals are born into or prefer to be part of, which is, in the case of the protected groups, usually

---

[416] H. O'Connor and Y. Wong, 'Emergent Properties' in E. Zalta (eds.), *The Stanford Encyclopedia of Philosophy* (Summer edn, 2015) available at <http://plato.stanford.edu/archives/sum2015/entries/properties-emergent> accessed on 01 September 2015

[417] Describing the protected groups in such a reductive manner also fails in explaining the resistance of the group identity against the change in their membership. If, say, Mormons as a religious 'group' is merely a diachronical set [M= m1, .m 2, m3….. mn] of persons who were, are and will possess the quality of 'Mormoness'; then logically when a member changes the identity of the set should change simultaneously. That is, when m1 is excluded from the set 'M' or n1 is added to it, set logically becomes something other than the set 'M'. Yet, this conflicts with our intuitive conception regarding the identities of protected groups, which have resistance against the change in their membership. That is, even if we switch some members of Mormons, the existence of the group would continue in the more or less same manner. Few more or few less Mormon makes no real difference in the general modal belief about Mormons as a 'group'. D. Ruben 'Social Wholes and Parts' (1983) 92 Mind, 221; D. Ruben 'The Existence of Social Entities' (1982) 32 The Philosophical Quarterly, 301-303. Same criticisms will also be valid if we describe the protected groups as 'mereological sums' (The relations of part to whole and the relations of part to part within a whole) which can be formulated as 'for any whole x, if x has y as one of its parts then y is part of x in every possible world in which x exists'. R. Chisholm, 'Parts as Essential to Their Wholes' (1973) 26 The Review of Metaphysics, 582-583; A Varzi, "Mereology" in E. Zalta (eds.), *The Stanford Encyclopedia of Philosophy* (Spring edn, 2016) available at <http://plato.stanford.edu/archives/spr2016/entries/mereology> accessed on 11 April 2016. One response to these lines of criticisms is that the absence of some influential Mormon people could have totally changed the characteristics of the actual group that we know today. This is a valid argument, yet at the same time hardly supporting the idea of construing groups as sets or sums, because even though Mormons would have different identifying qualities (like traditions, properties etc.) compare to our actual world if some of individual members do not exist, we could still signify the same group, namely Mormons, by considering the historical development. That is to say, Mormons as an entity can exist with completely different set of people, whereas the existence of certain set of people does not entail the existence of Mormons. See Sheehy, *Reality of Social Groups*.

[418] R. De George, 'Social Reality of Social Objects' (1983) 37 The Review of Metaphysics, 3.

constructed long before our individual existences.

The point here is that describing the protected groups as subjectively singled out 'units' leads to overseeing this complex nature and centrality of them and mistakenly reducing 'genocidal intent' to the intended physical and biological destruction of a set of individuals. Construing the legal definition from this deficient conceptual framework brings several consequences that undermine the notion of genocide. First of all, the crime becomes all about the protection of individuals and loses the connection with its historical aim, which is to protect the plurality of identities and cultures as well as the intellectual vigour of humanity.[419] Second, and connectedly, if it is simply a mass atrocity on discriminatory grounds, why, then, do we need genocide as a distinct crime category? In the end, crimes against humanity also aim to protect the same 'goods' against the same (in fact, even more) acts.[420]

A critique may remind us, at this point, that in genocide the aim is to wipe out individuals with certain characteristics, which causes an additional harm. Such an account for the unique harm of genocide can indeed be found in the case law. For example, the ICTY Trial Chamber in *Kupreškić* notes that 'when persecution escalates to the extreme form of wilful and deliberate acts designated to destroy a group or a part

[419] 'Genocide is a denial of the right of existence of entire human groups, as homicide in the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, *result in great loses to humanity in the form of cultural and other contributions represented by these human groups*' UN General Assembly, Resolution 96(I) 'The Crime of Genocide', 11 December 1946 (emphasis added); 'The world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world.' Lemkin, *Axis Rule*, 91.

[420] The interpretation of the term 'in part' appears as particularly important at this juncture. The reason is that, a widespread or systematic attack automatically means targeting a part of the group, usually a substantial number of members. But if such an attack involves the acts of genocide, then, what is the moral difference between that and committing the same acts with intent to destroy the group 'in part'. To put it more concretely, in a case where, say, the acts of extermination are committed against half of the group members because of their national, ethnic, racial or religious identity, what exactly makes these acts of killing an instance of genocide rather than persecution.

of a group, it can be held that such persecution amounts genocide'.[421] This might have been a valid point if genocide could only be committed with the intent to destroy a group 'in whole' or acts like causing serious mental harm were not part of *actus reus*. But since this is not the case, the difference between protected 'goods' in genocide and crimes against humanity, and therefore their moral difference, become extremely thin from a nominalist conception.

Third, accepting that a protected group may only exist in the minds of perpetrators runs against the genealogical roots of the concept of genocide. This issue has lately gained prominence in genocide law, particularly after the Darfur Commission took an extreme subjectivist view and remarked that:

> …collective identities, and in particular ethnicity, are by their very nature social constructs, imagined identities entirely dependent on variable and contingent perceptions, and *not* social facts, which are verifiable in the same manner as natural phenomena or physical facts.[422]

By noting this, the Commission practically concluded that a victim group may only be the product of the perpetrators' imagination.[423] But once again, why do we need the crime of genocide at all then? When we reject the distinct value of groups as such, the moral difference between killing one million people randomly and by reason of their 'subjectively' attributed identities significantly diminishes, because in both cases nothing more than the existence of individuals is destroyed, and thus the harm does not extend beyond the sum of harms inflicted on the victims. Thus, as Kreß observes, an extreme subjectivist understanding converts 'the crime of genocide into an unspecific crime of massive human rights violations based on discriminatory motive'.[424] On these problematical grounds, nominalist conceptions of the crime either lead to rejection of

---

[421] *Prosecutor v. Kupreškić* [2000] IT-95-16-T, Judgment, para. 636. See also *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para.79.

[422] 'The Commission of Inquiry to investigate reports of international humanitarian law and human rights law in Darfur, Sudan', Report of the International Commission of Inquiry on Darfur to the Secretary-General. Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, Annex to U.N. Doc. S/2005/60, 1 February 2005 (hereafter: Darfur Report), Para.499.

[423] For a similar view see generally M. Shaw, *What is Genocide?*, (Polity Press, 2007).

[424] Kreß, 'The Crime of Genocide under International Law', 461.

the substantiality requirement or turn it into a reformulation of the 'widespread or systematic' attack requirement in the definition of crimes against humanity.

The former perspective, associated with Drost, not only runs against the drafting history or the manifested object and purpose of the Genocide Convention, but also erases the distinctiveness of genocide as a crime category, which makes international criminal law an incoherent system. A particular account that must be mentioned at this juncture belongs to Fournet. Aware of these criticisms, Fournet, who mostly shares Drost's conception of substantiality as well as the subjectivist view of the Darfur Commission,[425] argues that what makes genocide a morally distinct crime is not the distinct reality and value of groups, but instead the 'dehumanising intent' and 'racialization process'.[426]

The former denotes the intent of perpetrators to deprive victims of their positive human qualities in order to erase their individual and collective memories.[427] According to Fournet, it is historically clear that genocide does not only imply the destruction of life, but 'also involves the destruction of death and, once both the lives and the deaths of the victims are destroyed, the whole existence of the group targeted is annihilated'.[428] That is to say, in Hannah Arendt's words, genocide aims to destroy 'the fact of existence itself'.[429] 'Racialization', on the other hand, refers to the idea that genocide is committed against a set of people who are pre-defined by the offenders through a subjective 'hereditarization' of their particular individualistic characteristics.[430] To support her argument, Fournet claims that speaking of groups 'as such', as if they have objective existence, is rather problematic because, on the one hand, this would mean recognising the racial 'fantasy' and 'fanaticism' of genociders;[431] on the other hand, it

---

[425] In terms of the 'substantiality requirement', Fournet has almost identical views with Drost. See Fournet, *The crime of destruction and the law of genocide* 69-74.

[426] Ibid. 1-37, 47-61.

[427] Ibid. 13-18.

[428] Ibid. 14.

[429] H. Arendt, The Origins of Totalitarianism, (New York: Meridian Books, 1962), 442.

[430] Fournet, *The crime of destruction and the law of genocide*, 7, 52-55.

[431] Ibid. 56-61.

creates a defence mechanism for offenders who may try to prove that they did not target one of the listed groups 'as such'.[432]

Fournet will be challenged in several respects. To begin with, although dehumanising intent is one of the most important aspects of the crime of genocide, it is not exclusive to it. Instead, most 'racism-based' crimes involve dehumanising intent.[433] Besides, dehumanisation does not necessarily involve putting an end to the physical or biological existence of victims. The entire history of slavery proves this point on its own. Subsequently, if victim groups may only have an imaginary existence, then how come we can speak of a collective memory to be destroyed? Fournet appears to be contradicting with herself on this point, mainly because 'collective memory' requires a genuine 'collective' that exists beyond the imagination of the offenders. Her criticism of the omission of acts of cultural genocide from the Convention also indicates this conceptual confusion, since the idea of cultural genocide also presupposes the existence of a 'genuine' culture.[434] One particular concern that Fournet rightfully raises, on the other hand, is that, most of the time, genociders also target individuals who are not part

---

[432] Ibid.

[433] R. Matthews, 'Privilege, Torture and Nonkilling' in J. Pim *Nonkilling* (eds.), *Security and State* (Creighton University, 2013) 279-297 available at <http://m.nonkilling.org/pdf/nksecurity.pdf#page=279> accessed on 21 June 2018; F. Dalal, 'Racism: Processes of detachment, dehumanization, and hatred' (2006) 75 Psychoanalytic Quarterly, 131-161.

[434] By relying on the notion of 'dehumanization' Fournet argues that the omission of acts of cultural genocide, led the Convention failing 'to acknowledge specificity of genocidal acts, the purpose of whose is the dehumanization of the victims. If the cultural heritage of the group targeted for destruction is eradicated, this group will disappear from collective memory, its whole existence will be eliminated, all traces of this group's life one Earth will be annihilated -and the genocide, the destruction, will be completed.' Fournet, *The crime of destruction and the law of genocide* 43. Yet, this argument seems quite perplexing and conceptually confused to me, because if the targeted group may only exist in the perpetrators mind and not in reality, then how come we can speak of the destruction of a culture. Either Fournet sees the culture as entirely individualistic thing which is fundamentally wrong as is explained, or she contradicts with her own account which claims that the victim groups do not necessarily have objective existence. Drost, for example, avoids such criticisms since it would disturb the conceptual coherence of his account. Rather he argues that the concern of the Convention is not protection of cultural traits of a group of human beings, such as language or traditions. The destruction of culture, which he considers as fundamentally different than the extermination of human groups, should be dealt with under the scope of minority rights and out of the domain of penal law. Drost, *The Crime of State: Genocide* 11,31,59.

of the group, which was best exemplified during the Holocaust.[435] However, pointing this out and arguing that genocide might be committed against an entirely imaginary group are two very different things. In the former, an actual group with a 'genuine' identity, culture, traditions or customs is still being targeted; while in the latter, only a set of individuals are the subject of harm.

Another issue with Fournet's argument, in this context, is the conflation of notions like 'race' or 'nationality' with racial or national 'groups'. The idea of 'race', as is commonly understood, has no scientific grounds. Similarly, as Benedict Anderson famously argued, the idea of 'nation' or 'ethnicity' is 'imagined' by people and thus national or ethnic groups are entirely social constructs.[436] But, as shall be explained further in chapter four, accepting that an entity is socially constructed does not necessarily mean that it has no distinct existence or value, in other words, that it is 'imaginary'.[437] Recognising the social reality of national, ethnic or racial groups has nothing to do with sharing the 'fantasy' and 'fanaticism' of perpetrators. The demonisation of an entity as such is the 'fantasy' and 'fanaticism' that the law against genocide aims to tackle, not the fact of social groups. From this angle Fournet's criticisms appear to be misplaced. All in all, it cannot be said that Fournet has remedied the radical nominalist account of Drost.

The latter perspective, which is associated with Robinson, tries to provide a universal reference point for justifying the qualification of a part as 'substantial', rather than renouncing the requirement – by apparently formulating the problem as what does or should constitute a substantial part. However, in addition to bringing the ostensibly unavoidable difficulty of determining the scope of a 'single community' or 'substantial number', collapsing genocide to geographically limited discriminatory mass murder fails to provide a moral justification for why the intent to destroy anything less than the whole group (or at least a very large portion of it) should qualify as 'genocidal intent', if the social phenomenon called 'groups' is mere shorthand for a subjectively segregated

---

[435] Fournet, *The crime of destruction and the law of genocide* 6-7; See N. Elias, *The Germans* (E. Dunning and S. Mennell trns, New York: Columbia University Press.1996) 315-316.

[436] See B. Anderson, *Imagined communities: reflections on the origin and spread of nationalism* (revised edn, London: Verso, 2006).

[437] Elder-Vass, *The Social Construction of Reality* 25. Delanda, *Assemblage Theory*, 10.

population and thus their existence entirely depends on the physical and biological existence of their members. By the same token, it also appears problematic for Robinson to substantiate why the intent to destroy part of a group in a certain geographical area is morally worse or distinct than randomly destroying the same number of group members, if there is no distinct value attached to the group or its parts. Of course, one may point out the particular evil in intending to wipe out particular identities or traits from certain areas through mass murder. But if these identities and traits are ultimately individualistic, then, the harm of the crime equals the sum of the harms inflicted on these individuals, and then there are not many reasons left for genocide to continue to be a distinct crime category.

That said, a critic may point out at this juncture that if the existence of genocide as a distinct crime category has fulfilled its historical mission or become unnecessary in the face of recent social and legal developments, then it would be pointless to strive to create an artificial distinction to keep the concept legally alive.[438] In the end, the close kinship between the crime of genocide and crimes against humanity is a well-documented fact.[439] Moreover, for some scholars like Schabas, the moral separation between the two crimes is very thin indeed: 'crimes against humanity and genocide were forged in the same crucible and were used at Nuremberg almost as if they were synonyms. The distinction only emerged because of the nexus with an armed conflict that Nuremberg had imposed upon crimes against humanity.'[440] The current legal definition of crimes against humanity omits the war nexus element and encompasses all acts of genocide, which means that wherever any of these acts are committed in a widespread or systematic fashion against a group on discriminatory grounds already

---

[438] See for views in this direction see Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report', 303-308; B. Misztal, 'Protect, but from What? Genocide as a Concept of Moral and Legal Universalism' in Bieńczyk-Missala, Agnieszka and Sławomir (eds.), Dębski, *Rafal Lemkin: A Hero of Mankind* (Poland: Polski Instytut Spraw Miedzynarodowych, 2010) 289-311; Also see the citations no.2 and 3 in Behrens, `The *mens rea* of genocide`, 237.

[439] See generally P. Sands, *On the Origins of "Genocide" and "Crimes Against Humanity*" (London: W&N, 2016); Also see W. Schabas, 'Rafal Lemkin, Genocide and Crimes Against Humanity' in Bieńczyk-Missala, Agnieszka and Sławomir (eds.), Dębski, *Rafal Lemkin: A Hero of Mankind* (Poland: Polski Instytut Spraw Miedzynarodowych, 2010) 233-257.

[440] W. Schabas, 'Origins of the Genocide Convention: From Nuremberg to Paris' 40 Case Western Reserve Journal of International Law (2007), 53.

constitutes a crime of persecution.[441] Schabas submits that expansion of the scope of crimes against humanity and the disappearance of the war nexus has turned genocide into almost an aggravated and specific form of crime against humanity.[442]

However, such arguments do not appear entirely tenable. The protected groups are still undeniable components of the society that facilitates our day-to-day survival, constitutes the benchmarks of our value system one way or another, shapes our identities and so on.[443] Sadly, attacks against these groups as such are still a part of our modern reality as well. In this regard, even some of the most sceptical commentators on the concept of genocide admit that the idea of groups refers to some actual 'phenomena' that profoundly affect individuals' being and the destruction of 'group constituting relations' brings about significant harm.[444] The criminalisation of genocide specifically aims to preserve the continuation of those collective 'phenomena', while it is not the case for crimes against humanity. That is to say, beyond the lives of individuals, the criminalisation of genocide seeks to preserve the social and cultural heritage, language, identity, traditions and all possible future contributions of a particular social unity.

---

[441] That being said the definition of crimes against humanity much broader compared to genocide as it includes more acts and protects any groups. According to the definition in the Rome Statute Article 7: '"crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[442] Schabas, *Genocide International Law*, 252. This view also find some support in the jurisprudences of international courts and tribunals see for example *Prosecutor v Kupreškić et al.* [2010] IT-95-16, para. 636. See for an extensive critique of this view P. Akhavan, *Reducing Genocide to Law* (Cambridge, 2012).

[443] D. Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press, 2010) 48-49.

[444] See for example May, *Genocide: A Normative Account,* 27-35; L. May, *The Morality of the Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights* (University of Notre Dame Press, USA-1987) 11-13.

These goods, however, cannot be preserved through mere protection of the rights of individuals because they are intrinsic to the unity, not its parts.[445] Protecting unity as such thus has an additional value and importance. Therefore, although the scope of crimes against humanity has expanded and significantly overlaps with genocide, it still does not address the core problem that the prohibition of genocide aims to grapple with, which is maintaining the manifold richness of humanity by preventing the destruction of certain social entities through which people grow and develop in their social and cultural dimensions.[446] That is, the social reality still affords a tangible need for genocide as a distinct crime category, both legally and socially, and our interpretations of the definition should respond to this need.

3.1.3. A Very Brief Look at the Neo-Nominalist Account of Larry May

Being aware of the aforementioned complications surrounding classical nominalism, May offers a neo-nominalist[447] approach to genocide. Although the normative study of May does not add much directly to discussions about the substantiality requirement, the reason why a brief review is included here is that May neatly locates the conceptual problem in the judicial conception of genocide in the same direction as the present study and offers an intriguing understanding of the crime. Nevertheless, his ideological fascination with neo-nominalism seemingly leads him to be antagonistic towards the concept of genocide.

To elaborate, May irrefutably better represents the reality of group destruction compared to Robinson or Drost by recognising the centrality of relations and

---

[445] D.Elder-Vass, *The Social Construction of Reality* (New York: Cambridge University Press, 2013) 17; D. Elder-Vass, *The Causal Power of Social Structures: Emergence, Structure and Agency* (New York: Cambridge University Press, 2010) 22-23. This is, of course, not to deny that all these emerge by virtue of the ways in which constituting parts of the social unit organise and interact. 'A causal power or emergent property is a capability of an entity to have a certain sort of causal effect on the world in its own right – an effect that is something more than the effects that would be produced by the entity's parts if they were not organized into this sort of whole.' Elder-Vass, *The Causal Power of Social Structures,* 66.

[446] R. Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin,* in Donna-lee Frieze (eds.), (New Heaven&London: Yale University Press, 2013) 181; *Prosecutor v. Krstić*, [2004] IT-98-33-A, Judgement, para.12.

[447] Although May names his approach simply as 'nominalist', I am following the terminology of Warriner in order to separate May's accounts from the ones that merely conceives the protected groups as completely reducible to individuals and their traits. See Warriner, 'Groups are Real', 549-551.

relatedness with respect to the beings of 'groups'. In his neo-nominalist consideration, the term 'group' does not refer to a complete fiction that can be entirely reduced to individuals and their traits, but rather to an actual social phenomenon, which has consequences in the physical world.[448] However, this does not entail, according to May, 'reifying' groups as real entities or changing the main tenet of an individualistic perspective. Rather, the phenomena in question can be explained away in individualistic terms by reduction to an 'individuals-in-relation' formula. May further explains this line of thinking by noting that 'social relationships have reality in that they structure or unify a group of individual human persons so that these persons can act and have interest different ways than they could on their own. […] The relationships are not themselves reducible to psychological, or other, features of individual human persons.'[449] Thus, by imputing ontological reality to relations and reducing groups to *individuals standing in relations,* May aims to explain individualistically the emergent properties and causal relevance attributed to 'putative groups', while reducing harm to the individual level.[450]

An important aspect of May's account is that the unity of people is not seen as a mere subjective ascription, as classical nominalism assert. May rejects the idea that groups may entirely exist in the minds of perpetrators; rather, he notes that they must be identifiable 'both to the members, and those who observe the members, by characteristic

---

[448] There are also other alternative individualistic philosophical explanations to social groups. Yet owing to the physical limits of this study; their lack of reflection in legal sphere; and as they suffer more or less same problems with the May's neo-nominalist understanding, I did not include these views. See for example R. Sawyer, 'Nonreductive Individualism. Part I – Supervenience and Wild Disjunction' (2002) 32 Philosophy of the Social Sciences; C. List and K. Spiekermann, 'Methodological Individualism and Holism in Political Science: A Reconciliation' (2013) 107 American Political Science Review.

[449] May, *The Morality,* 23. Similarly, Carol Gould adds in this respect that 'groups are not reducible to the individuals distributively, taken apart from these relations' C. Gould, 'Group Rights and Social Ontology' in Sistare et al. (eds.) *Groups and Group Rights*, (University Press of Kansas, USA-2001) 45; Groups 'exist only in and through the individuals related to each other in the group and cease to exist when these relations no longer hold' C. Gould, *Globalizing Democracy and Human Rights* (Cambridge, University Press UK-2004), 121. That is to say, the property of French nation to be 'tolerant' does not mean that every single member holds this property; rather it is created through complex interactions among members. Sheehy, *Reality of Social Group* 37-40.

[450] C. Gould, 'Group Rights and Social Ontology' in Rex Martin and Gerhard Sprenger (eds.), *Challenges to Law at the End of the 20th Century: Rights* (Franz Steiner Verlag, Germany-1997), 57.

features'.[451] The underlying reason for this is that, in his neo-nominalist view, the idea of group harm does in fact denote harm to the common interest and identity. According to May, these harms are the major unique loss that genocide causes. However, if a perpetrator attacks an entirely imaginary collective, there would be no harm against a common identity or interest. Another important observation of May is that he explicitly recognises, by drawing on the ideas of Hugo Grotius, that a group can be destroyed not only via the destruction of its parts but also of its 'form',[452] which refers to the relatively stable structure and distinctive relationships of the group.[453] Therefore, May avoids limiting the meaning of the term 'intent to destroy' to the physical and biological destruction of members.

May certainly presents strong arguments that will be largely agreed with in chapter four as the thesis develops its own account. Nevertheless, there exists an inherent unconformity between May's neo-nominalist view and the idea of genocide. To put it simply, how can 'genocide', a term that etymologically refers to group murder, be a credible concept if groups do not refer to a distinct good. Unsurprisingly, May's ideological commitment to neo-nominalism forces him to explain the harm of genocide by referring to Claudia Card's concept of 'social death', which focuses on the identity and status loss of genocide survivors.[454] While its premise is undisputable, the idea of 'social death' fails in capturing the importance of the loss of or damage to unique properties like traditions, language or culture for not only that particular group of people, but also for the whole of humanity, our common heritage and, most importantly, our future – since preserving the development of these unique traits and perspectives in the mix of humanity enhances the possibilities for future advances. Rather, Card's account primarily focuses on the psychological troubles that experienced by survivors.

Indeed, May ultimately admits that the moral distinction between crimes against humanity and genocide becomes rather thin in his neo-nominalist account as well,

---

[451] May, *Genocide: A Normative Account*, 30.

[452] Ibid. 34; H. Grotius, *On the Law of War and Peace* (1926) (F. Kelsey tr, Oxford: Clerandon Press, 1925), 312-313.

[453] Ibid. 35.

[454] C. Card, 'Genocide and social death.' (2003) 18 Hypatia, 63-79.

which makes it questionable for him whether we still need the crime of genocide at all.[455] The question that must be asked at this juncture is whether following a nominalist position is an absolute necessity in the face of the social reality. This is certainly not the case. Even though nominalism has a long history, as May's references to Hobbes and Ockham demonstrate, in the literature, there is no evidence or tendency that indicates the superiority of nominalist views.[456] More importantly, there is actually no concrete reason in May's arguments to rule out the distinct reality and value of groups.

This is because, like all known entities – such as molecules, humans, buildings, dogs or books – groups emerge as a result of constant configuration of their parts that are related or organised in a certain way, as May already recognises. While in the case of a human, for example, the composition of cells, flesh, muscles, bones and so on gives rise to a body that is able to run, think, act and so on; the relatedness of individuals in a particular way gives rise to groups that hold emergent properties, such as culture or language, that are intrinsic to the composite entity, not to the composition itself or its parts.[457] Consequently, the reduction of humans or groups to a *parts-standing-in-relation* formula provides an explanation of how properties or powers 'result from the properties of parts and the way they are organized',[458] yet this does not eliminate the distinct reality and the value of humans or groups, nor do the emergent properties of higher-level entities become redundant to the explanation.[459] It seems that May mainly considers a Hegelian understanding of totalities as a possible alternative and overlooks that admitting the reality of totalities does not automatically preclude the possibility of analysis.[460] At the same time, he falls into a common trap of 'social constructivists',

---

[455] May, *Genocide*, 94.

[456] As Berel Lang notes, 'For whatever weight one attaches to it, a recent poll that received 931 responses from professional philosophers in the United States had asked them, on the question of the existence of "abstract objects," whether they "accept or lean toward Platonism or nominalism." Their responses favored Platonism over nominalism by 39.3% to 37.7%, with 22.9% preferring an unspecified "Other."' available at <http://philpapers.org/surveys/results.pl> accessed on 01 November 2016. B. Lang, 'Between Genocide and "Genocide"'(2011) 50 History and Theory, 290.

[457] Of course, the analogy between the dogs and groups is not seamless or implies an organicist view.

[458] Elder-Vass, *The Causal Power of Social Structures*, 24.

[459] Ibid.

[460] I. Hackling, *Social Construction of What?*, (Massachusetts: Harvard University Press, 2000), 49.

who, as Ian Hacking points out, think of construction in a merely metaphorical sense and ignore 'its literal meaning, that of building or assembling from parts'.[461]

Admittedly, May's arguments on genocide deserve a more extensive examination, but in order to not lose focus on the research question and due to the physical limitations, the study will stop here and use these arguments in developing its approach when it is convenient. In the final analysis, May's account is notably illuminating in terms of locating the conceptual inconsistencies in the judicial conceptualisation of genocide and also demonstrating that even an 'innovative' nominalist reconstruction of criminal representation is doomed to fail to represent the harm intrinsic to the crime and justify its distinctiveness due to the fact that its substantialist insistence on reducing the phenomenon of protected groups to a single dimension undermines their complexity and unavoidably overlooks the irreducible goods inherent to these entities. Having offered a critique of the nominalist accounts to genocide and substantiality the study will now turn to the 'individualised approach' of Behrens, who, differently from the writers that have been examined so far, puts a specific emphasis on the tension between the collective nature of genocide and individual criminal responsibility in considering our research question. This adds another dimension to our discussion.

3.1.4. The Question of Perpetrators' Reach and Control: The Account of Paul Behrens

Behrens also rejects the idea that the protected groups are distinct social entities.[462] Yet, unlike Drost or Robinson, he offers a certain explanation, which nevertheless turns out to be somewhat superficial and unpersuasive.[463] Putting it simply, for Behrens, although some religious groups or tribes that are united by common practices and beliefs can be

---

[461] Ibid.

[462] It is not entirely clear whether Behrens philosophically rejects the idea that the groups are real, or merely due to the legal and practical concerns. The later seems more likely, because as a doctrinal scholar Behrens tends to try to substantiate his arguments in favour of the individualistic reading of the legal definition by mostly utilizing the formal methods of treaty interpretation. Yet, as is already discussed, the formal methods of treaty interpretation do not allow us to reach an objective and uniform conclusion. By using the same methods, other scholars reach exact opposite conclusions. It seems to me that he simply injects his underlying theoretical ideas into the interpretation through applying these formal methods.

[463] Although it should be noted that at the time Robinson and Drost wrote their studies neither the case law nor the literature about genocide was nearly extensive as today.

considered as social units, ‘to consider the millions of people who constitute a racial or a national group as an interconnected social unit is a much bolder step that does not always find a basis in reality’.[464] As far as can be understood from his reasoning, Behrens sees the idea of a ‘social unit’ in a very restrictive sense and has in mind ‘close-knit’ entities, like family or cooperation. However, he does not offer any justification for why we should think the idea of ‘social unity’ in such a manner. This makes his conclusion unconvincing, because, as will be discussed further in chapter four, there are different degrees and ways of social unity.[465]

Behrens further points out that even if some protected groups can be considered ‘social units’ and destroyed in more ways than listed, the omission of cultural genocide from the Convention makes it clear that ‘none of the characteristics of the protected groups were considered to inform the concept of destruction’.[466] In this sense, extending ‘genocidal intent’ beyond the intended physical and biological destruction of members would contradict the deliberate decision of the drafters in favour of protecting the existence of listed groups only against specified acts.[467] Behrens provides additional justification for the preference of the drafters, noting that:

---

[464] Behrens, `The *Mens Rea* in Genocide’, 85.

[465] Nevertheless, Behrens’ consideration may reveal some understandable doubts about the racial groups. That is because, if racial groups are understood as merely individuals sharing hereditary physical traits or characterises as the ICTR does in Akayesu, this would mean that people with blue eyes may also qualify as a racial group despite the fact that those individuals do not endorse or enforce any particular norms (*Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, para.514). As will be discussed in chapter four that the ICTR’s description oversimplifies the idea of ‘racial groups’. Racial groups do not exist *per se*, but not imaginary as well. Rather, due to the subjectively imposed segregation, measurements or social discrimination to a group with certain hereditary physical traits or characterises over time, the oppressor and oppressed groups developed certain objective norms and becomes genuine groups. Black community in the US stands out as the most vivid example of this.

[466] He draws this conclusion from the ILC’s 1996 Report in which the commission notes that drafting history of the Convention shows that ‘the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense. […] (T)he text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of "cultural genocide" contained in the two drafts and simply listed acts which come within the category of "physical" or "biological" genocide.’ YILC 1996/2, p.46, art.12, para.17. Behrens, `The *Mens Rea* in Genocide’, 86.

[467] For a similar view see Kreß, ‘The Crime of Genocide under International Law’, 487.

> The consideration of all kinds of destruction can conceivably lead to such an extensive understanding of the crime that the very characteristics that should shape the concept of "genocide" would disappear. The existence of national groups, for example, could effectively be terminated through mere changes in the legal personality of the state[…][468]

However, in addition to understanding national groups only in legalistic sense, this reasoning conflates the issues of the acts of genocide and the idea of group destruction.[469] As chapter two has already pointed out, if the protected groups are perceived as distinct entities, then their destruction refers to a single state, a situation of non-existence. It is true that there are means of destruction other than physical and biological that can lead to such a state of existence when groups are perceived in this way; however, there cannot be such divergence concerning the state of being destroyed.[470] Understood from this perspective, the 'intent to destroy a group' can exist without the acts of genocide occurring. That said, such an understanding raises the question of what the legal qualification would be for a situation where only a single act of genocide occurs in the context of a collective assault that targets the destruction of the entity through other means. This is a complication to resolve for those who argue for a broader interpretation of the term 'to destroy'.

Notwithstanding that Behrens manifestly conceives the protected groups in individualistic terms, he recognises and extensively documents the problems not only in relation to the qualitative approach, but also regarding the quantitative and geographical

---

[468] Behrens, `The *Mens Rea* in Genocide', 85,86.

[469] As chapter two demonstrated, the former point seems rather clear in genocide law, while the later is not, which leaves room for interpreters to inflict their own conceptual perspectives to the interpretation. In his dissenting opinion in *Krstić*, Judge Shahabuddeen also draws attention to this point. '*The travaux préparatoires* relating to the Genocide Convention are of course valuable; they have been and will be consulted with profit. But I am not satisfied that there is anything in them which is inconsistent with this interpretation of the Convention. However, if there is an inconsistency, the interpretation of the final text of the Convention is too clear to be set aside by the *travaux préparatoires*. On settled principles of construction, there is no need to consult this material, however interesting it may be' *Prosecutor v. Krstić* [2004] Case No. IT-98-33-A, partial dissenting opinion of Judge Shahabuddeen, paras.51-53.

[470] Arguing the otherwise would be no different than claiming that burning a computer destroys it, while breaking it down into its constituent pieces and putting those pieces in other devices is not.

approaches as well.[471] That said, Behrens neither dwells on the underlying conceptual reasons for the limitations and problems these approaches cause, nor does he explicitly reject the validity of any of the established approaches in favour of another.[472] Instead, he aims to sidestep these complications by offering an alternative and rather intentionalist solution,[473] according to which justifying and assessing the qualification of a part as 'substantial' should always be considered in relation to a particular perpetrator's reach and control.[474]

The underlying logic of this suggestion is deeply rooted in the way Behrens understands the crime. For Behrens, the Genocide Convention is built on two main principles, namely, protective and stigmatic.[475] While the former primarily denotes 'safeguarding the existence of human groups', the latter signifies the unique stigma that the crime carries, which, according to Behrens, 'goes far beyond that attached to ordinary offences and possibly beyond that which other international crimes carry'.[476] These two principles constitute two opposite poles in the interpretation process. On the one hand, stigma entails a particular threshold, on the other, protective principles call for widening the protective scope of the Convention.[477] Behrens argues that these two principles were equally powerful when the Convention was created and only a few international instruments that penalised and punished individual criminal conduct existed. Yet, over time, new instruments and norms in international criminal law have emerged through which the protection of groups can also be achieved.[478] For Behrens, in the wake of these developments, it would be difficult to justify the existence of genocide as a distinct crime category merely if the protection is vital.

---

[471] See particularly Behrens. 'The Crime of Genocide and the Problem of Subjective Substantiality'.

[472] Behrens, `The *Mens Rea* in Genocide', 86-94.

[473] See for intentionalist and structuralist traditions towards the perpetration of genocide Moses, 'Conceptual blockages and definitional dilemmas in the 'racial century', 22; N. Pleasants, 'Ordinary Men: Genocide, Determinism, Agency and Moral Culpability', 48 Philosophy of the Social Science (2018) 4-8.

[474] Behrens, `The *Mens Rea* in Genocide', 95, 245.

[475] Ibid. 239

[476] Ibid.

[477] Ibid.

[478] Ibid. 250.

On these grounds, Behrens suggests that, since genocide law still plays an ostensibly meaningful role in contemporary international law, its significance must lie in 'the stigma it confers on the perpetrators of the crime'.[479] Notably, the ICTY Appeals Chamber in *Krstić* highlighted this very aspect in stating that 'the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.'[480] One of the two aspects of this stigma, for Behrens, is the power of the word 'genocide' and the severity the minimum sentence for it tends to lead to, comparing war crimes and crimes against humanity.[481] The second, and more important aspect, on the other hand, is that:

> The stigma of genocide attaches to the conduct and mindset of an individual carries particular meaning. Crimes against humanity and war crimes are, by their very nature, embedded in the framework of a macro phenomenon: it is the specific context that, for instance, distinguishes 'ordinary' murder from murder that falls within one of these categories. In genocide law, this contextual requirement is missing, and that allows judicial consideration to focus on the person of individual perpetrator –the stigma is rooted not in outside phenomena but in the choices of individual. That paves the way for the conclusion that every human being is capable of committing a wrong that stands at the very apex of the hierarchy of international crimes, and therefore has the ability and responsibility, within his own reach, to prevent the commission of genocide.[482]

Understanding the crime from this perspective, Behrens suggests that 'the spectre of

---

[479] Ibid.

[480] Prosecutor v. *Krstić*, (Case No. IT-98-33-A), Judgement (Apr, 19. 2004), para.37.

[481] See for a critique of the difference in minimum sentencing Akhavan, *Reducing Genocide to Law*. Akhavan simply questions that if there is no hierarchy between the international crimes as the ICTY lately noted, (*Prosecutor v. Stakić* [2006] IT-97-24-A, Judgement, para.375), why there is a tendency to punish the acts of genocide more severely.

[482] Behrens, `The *Mens Rea* in Genocide', 251. (footnote is omitted); Behrens. 'The Crime of Genocide and the Problem of Subjective Substantiality', 346.

arbitrariness that haunts'[483] all three established approaches to the substantiality requirement can be overcome by an individualised approach, according to which a particular perpetrator's personal reach and control – to be more precise, her circumstances, position, personality and authority – should always constitute the main point of reference in assessing and justifying the substantiality of a part. That is, judges should use the opportunities presented to the perpetrator in her particular situation as a yardstick when assessing substantiality in relation to that particular perpetrator.[484] Behrens notes that the adoption of this approach is built on the view that substantiality should be not thought of as a static parameter, 'but a factor that is inseparable from the person of the perpetrator'.[485]

Behrens demonstrates this view by inviting us to think of an army general and a foot soldier and pointing out that while targeting a hundred people may indicate that the foot soldier has done what one could to achieve the destruction of the group within her reach,[486] the intent to destroy the same number of group members may not constitute a substantial part in respect of the army general.[487] He thus notes 'under the individualised approach, there are no reasons why even a low-ranking foot soldier should not be capable, on his own, to adopt behaviour that qualifies as genocide'.[488]

Behrens also submits that even though this approach initially appears to lack objective factors, and it seems the relevant part can vary widely from case to case, further consideration proves otherwise. This is because an individualised approach in fact 'employs an objective and immutable yardstick'.[489] Such an understanding, according to Behrens, enhances predictability and is in much better conformity with the fundamental criminal law principle of *nullum crimen sine lege* because:

---

[483] Behrens. 'The Crime of Genocide and the Problem of Subjective Substantiality', 349.

[484] Ibid.

[485] Ibid. 344.

[486] Ibid. 346.

[487] P. Behrens, 'Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia', 28 LJIL (2015), 930.

[488] Behrens, `The *Mens Rea* in Genocide', 245.

[489] Behrens. 'The Crime of Genocide and the Problem of Subjective Substantiality'. 349.

> [w]here the application of this method is concerned, the perpetrators are not asked to reach a correct understanding of substantiality on the basis of static parameters – they are not required to know whether a municipality or a detention camp qualifies in that regard or whether 2% or 3% constitute a sufficiently substantial proportion of the population. The question is simpler than that: The task of the international criminal tribunals is to evaluate whether, in the context of the perpetrator's own field of control and in their own field of vision, the targeted part of the group had been substantial. That is an objective and verifiable standard; and once this element has been positively established, it is difficult for any perpetrator to claim that the foreseeability of this part of the crime had not been in existence.[490]

This approach has found limited recognition in the jurisprudence of international courts and tribunals, which already do not appear unequivocal regarding to what extent the assessment of genocide can be individualised.[491] Even in the judgements in which the principles of 'individualised approach' acknowledged, the pronouncements were noticeably cautious. The ICTY Appeals Chamber in *Krstić*, for example, notes that: 'The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can – in combination with other factors – inform the

---

[490] Ibid. 350.

[491] For example, in overturning a Trial Chamber decision in *Karemera et al.*, the Appeals Chamber famously argued that 'the Rwandan Genocide is a part of world history, a fact as certain as any other, a classic instance of 'a fact of common knowledge.' (*Prosecutor v. Karemera et al.* [2006] ICTR 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, para 33.) By that means, the Tribunal took judicial notice of genocide, which deviates from the earlier cases in which merely 'the fact that widespread killings were perpetrated throughout Rwanda in 1994' was taken as the judicial notice. (See. *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, 114; *Prosecutor v. Semanza* [2000] ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 29). Thus, the Appeals Chamber has diminished the burden of proof in terms of genocidal intent by drifting away from construing genocide as a primarily 'individual misconduct' to 'macro phenomena'. This also means that the extent of genocidal context, which the individual's act is carried out, takes precedence over the perpetrator's reach in the consideration of the substantiality requirement. See R. Faulkner, 'Taking Judicial Notice of the Genocide in Rwanda: The Right Choice', 27 Penn St. Int'l L. Rev., 896. For criticism against this decision See G. Sluiter and K. Vriend, 'Defending the 'Undefendable'? Taking Judicial Notice of Genocide' in H. G. Van Der Wilt, Harmen van der Wilt (eds.), *The Genocide Convention: The Legacy of 60 Years.*

analysis.'[492] More importantly, the possible extent of perpetrator's reach has always been considered as part of the geographical approach, rather than standing on its own in the judgements where it is taken into account.

Some other judicial bodies were explicitly tentative about an 'individualised approach' as it could lower the threshold for the crime significantly. The Trial Chamber in *Stakić* denoted its hesitancy to establish the crime of genocide when 'the specific intent extends only to a limited geographical area, such as a municipality'.[493] Sharing this view, the ICJ noted in *Bosnian Genocide* that the issue of perpetrator's reach must be weighed against the quantitative significance of the part targeted because 'the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met'.[494] Behrens, however, argues against such a conclusion, noting that if the specific intent is the distinctive element of the crime, as is widely accepted in case law, 'then genocide is a concept which dictated on elements which are highly personal

---

[492] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para.13. Also see *Prosecutor v. Brđanin* [2004] IT-99-36-T, Judgement, para. 702.: .'…the determination of when the targeted group is substantial enough to meet this requirement may involve a number of considerations, including but not limited to: the numeric size of the targeted part of the group - measured not only in absolute terms but also in relation to the overall size of the entire group - , the prominence within the group of the targeted part of the group, and the area of the perpetrators' activity and control as well as the possible extent of their reach.'; Also see *Karadžić and* Mladić [1996] Transcript of Hearing, 15,16 (Evidence Hearing Against Radovan Karadžić and Ratko Mladić): '…in view of the particular intent requirement, which is the essence of the crime, the relative proportionate scale of the actual or attempted physical destruction of a group, or a significant section thereof, should be considered in relation to factual opportunity of the accused to destroy a group in a specific geographic area within the sphere of his control, and not in relation to the entire population of the group in a wider geographical sense.' Similarly in *Bosnian Genocide* the ICJ supported this view. While examining the argument of the Applicant that the systematic nature of atrocities over a lengthy period indicated the intent to destroy Bosnian Muslims and Croats, the Court pointed out that the genocidal intent 'has to be convincingly shown by reference to particular circumstances' and, thus, such a broad proposition stands out as disagreeable. The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para 200.

[493] *Prosecutor v. Stakić* [2003] IT-97-24-T, Judgment, para. 523.

[494] The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Judgement, (Feb, 27. 2007), para.199. That is, the Court opined that the certain quantitative threshold needs to be required. However, the problematic nature of such approach is pointed out above.

to the individual perpetrator'.[495] In this respect, he submits that the assessment should strongly depend on personalised factors and implies that even the victims in a particular building may qualify as substantial depending on the particular reach of the perpetrator.[496]

Behrens's individualised approach is manifestly the most detailed alternative approach proposed in the literature to date for the determination and justification problem of substantiality. However, it has several questionable and confusing aspects that weaken its persuasiveness. First, the proposition that the significance of the protective principle has diminished is built on the nominalist perspective regarding the protected groups, which, as should be clear by now, is far from being uncontested. Indeed, accepting that the protected groups have distinct reality and value would drastically reverse this proposition because, then, an important difference between the protective scopes of other international criminal instruments and genocide arises.

Second, although Behrens mentions unique 'stigma' and builds his approach on the presumption that this stigma requires a particular threshold, his approach fails to justify a conceptual source for such stigma and significantly lowers the stigmatic threshold for the crime. Collectivists, for example, may argue that the dual harm of genocide (harming both the collective entity and individuals) justifies the stigma; yet, Behrens does not perceive the protected groups as distinct 'social units' and therefore cannot rely on the idea of dual-harm. He also refuses Robinson's or Schabas's arguments that genocide should always be committed against a large number of people[497] by overly individualising the genocidal intent element. But then it must asked that what conceptually justifies the stigma attached to genocide? Seemingly, Behrens underscores that the particular meaning that the mindset of an individual carries is what the stigma of genocide attaches to.[498] However, the individualised approach effectively reduces genocide to the intentional physical and biological destruction of members within reach of a particular perpetrator, which drastically blurs the moral line between discriminatory

---

[495] Behrens. 'The Crime of Genocide and the Problem of Subjective Substantiality'. 349.

[496] Ibid.

[497] Schabas, *Genocide in International Law*, 277-282.

[498] Behrens, `The *Mens Rea* in Genocide', 251.

mass murder, a crime against humanity of extermination or persecution, and genocide. Connectedly, the individualised approach significantly undermines the idea that the main protected value in genocide law is the existence of listed 'groups', whether they are conceived as a distinct unit or as an individualistic phenomenon.

This brings us to the third and most fundamental issue. Put simply, does understanding the crime of genocide as primarily an individual level of misconduct rather than a macro-level phenomenon reflect the social and criminological reality of the criminal phenomenon in question?[499] It hardly seems so. Even though the legal definition does not include an explicit reference to it,[500] genocide by its very nature is a macro-level phenomenon just like its close kin crimes against humanity.[501] If genocide law aims for protection of the group itself, then, as Kreß notes, 'it is clear that a single human being

[499] The terminology is borrowed from Stefan Kirsch. S. Kirsch, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct' (2009) 42 Creighton Law Review, 347. Kirsch's article transpires the particular tension between two different conceptual approaches regarding the crime. On the one hand, one may construe genocide as an individual misconduct in which, although the collective aspect of genocide is not entirely disregarded, the mindset and acts of the individual perpetrator forms the foundational parameters in qualification of the crime and responsibility of the perpetrator. In emphasising this point the ICTY denoted that it is "not sufficient that the [individual] perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group. The destruction, in whole or in part, must be the aim of the underlying crime. *Prosecutor v. Blagojević et al.* [2007] IT-02-60-A, Judgment, 656. On the other hand, in construction of genocide as macro level phenomena, the background context that the individual act takes place has a particular importance in the determination of the accused intent. By taking this premise, the ICJ in *Croatia v. Serbia* formulated the question of the genocidal intent as: 'Is there a pattern of conduct from which the only reasonable inference to be drawn is an intent of the Serb authorities to destroy, in part, the protected group?' Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] Judgment, para 407, 441, 515. Behrens, as is expected, is very critical about the assessment ICJ's assessment in *Croatia v. Serbia*. See Behrens, 'Between Abstract Event and Individualized Crime'.

[500] 'This bizarre structure of the crime definition of genocide has caused a constant conceptual friction because genocide itself is, by its innate nature, definitely a collective crime, as is also the case of other core international crimes. Thus the current crime definition significantly betrays the true nature of genocide: a crime committed by a group against another group.' S. Kim, *Collective Theory of Genocidal Intent* (Springer, 2016) 100.

[501] Schabas, *Genocide in International Law*, 305. Indeed, the ICC Elements of Crimes later made a clear reference to the context. Elements of the International Criminal Court, PCNICC/2000/1/Add.2 (2000).

will not, except in the most exceptional circumstances,[502] be capable of destroying a protected group or a part thereof".[503] The logic underlying Behrens's arguments appears to be that the social and legal meanings of genocide are two different things and should not be conflated.[504] While it is unconcealed that the definitions of genocide in social sciences[505] and its common perception by public differ compared to the legal definition, all these ultimately aim to represent the same social phenomenon that shocks the moral consciences of humanity. That is to say, the purpose of law is not to create its own reality, but rather, systematically, to represent and respond to the social reality it engages with as accurately as possible. The distinction that Behrens draws is thus understandable, but not justifiable, and it should not govern the interpretation process of the definition. As Stefan Kirsch aptly remarks

> without any support from an organization in which other individuals participate, a single individual's intention to destroy a protected group turns into a vain wish or a mere attitude which courts have not found capable of qualifying as a crime of genocide because an individual's mindset, by itself, is not suited to trigger criminal liability. Specifically, at least according to modern criminal law, an individual's guilty mindset, by itself, does not deserve punishment as punishment is reserved for individuals whose actions

[502] Schabas remarks in this context that 'The theory that an individual, acting alone, may commit genocide is little more than a sophomoric hypothèse d'école, and a distraction for international judicial institutions.' W. Schabas, 'Darfur and the "odious scourge': the commission of inquiry's findings on genocide' (2005) 18 Leiden Journal of International Law, 877.

[503] Kreß also notes that 'The structure of the crime of genocide poses quite a problem. The definition lacks an explicit 'contextual' element and thus appears at first sight to be drafted from the perspective of the 'lone individual' seeking to destroy a protected group as such. However, it is clear that a single human being will not, except in the most exceptional circumstances, be capable of destroying a protected group or a part thereof.' Kreß, 'The international court of justice and the elements of the crime of genocide' 620.

[504] See generally Behrens, 'Between Abstract Event and Individualized Crime'. See also A. Altman, 'Genocide and Crimes Against Humanity: Dispelling the Conceptual Fog', 29 Social Philosophy and Policy (2012), 306-308.

[505] See supra note 340.

cause harm or violate protected goods.[506]

Therefore, the very nature of the social phenomenon that the definition aims to represent requires attention being paid to the context level when assessing the elements of the crime and the responsibility of individual perpetrators. What seems striking at this juncture is that, even though Behrens denies any such necessity in theory, his example of an army general and a foot soldier in fact contradicts his suggestion, because it implicitly presupposes a genocidal context in which both individuals situate.

This puts the individualised approach in a dilemma. If Behrens truly claims that cases where such context is missing should also be considered as genocide, as long as the intent is established and the perpetrator in question did what one could have done to the extent of her reach, it would vastly undermine the entire purpose and genealogy of the crime of genocide. Say, for example, that a disturbed individual picks up a weapon on an ordinary day, goes out onto the streets and starts to shoot members of a particular racial group, explicitly stating that she wants them to be wiped from the face of Earth, then she should be convicted of genocide. Such a conclusion would not only turn genocide into an 'ordinary' crime, but also seem implausible in light of the object and purpose of genocide law. If, on the other hand, such a collective context is necessary, then, it means we should first establish whether a genocidal context is present – whatever that means – and after determining that an individualised approach can be applied, which is apparently not what Behrens has in mind.

To sum up, neither the nominalist approaches offered by scholars like Drost or Robinson, nor Behrens's intentionalist understanding of genocide, duly represent the criminological reality and the scope of the harm genocide causes, as their individualistic presupposition as to the nature and value of the protected groups leads to overlooking the irreducible goods inherent to these entities. By extension, individualistic approaches to substantially lead to either undermining the entire concept of genocide or reducing the crime to geographically limited discriminatory mass murder without being able to morally justify why such mass atrocities should be categorised differently from other

[506] Kirsch, 'The Two Notions of Genocide', 353 It needs to be noted that, this does not mean that theoretically one person cannot commit the crime of genocide. Indeed, the ICTY in *Jelisić* accepted this possibility. *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para. 99,100.

discriminatory mass crimes. Moreover, even though the quantitative and geographical approaches offered in the individualistic genus appear to identify objective factors from the outset – such as a certain percentage or a particular geographical area –, this in fact 'masks a highly subjective procedure – for the determination of the relevant units lies within the discretion of the individual chamber'.[507]

The reason for this perceived lack of objectivity is in fact straightforward from the viewpoint of the thesis: the beings of the protected groups cannot be fully reduced to the individual level and each particular group, in every specific spatial and temporal circumstance, has a distinctly unique nature that cannot be abridged to a generalised formula, which unavoidably leads to the perceived subjectivity as found in the quantitative and geographical approaches. Having reviewed the individualistic approaches, the study will now turn to collectivistic approaches.

3.2. Collectivistic Conceptions of the Protected Groups and the Substantiality Requirement

Unlike individualistic approaches, the legal literature largely lacks a systematic collectivistic reading of the legal definition,[508] with the exception of Lemkin, who, however, passed away long before the Convention was effectively put into use and thus offered more of a theoretical framework. The most significant reflection of collectivistic thinking in the legal literature and case law has been the counter-nominalist characterisation of the protected groups as 'distinct and separate' entities or units, which has led to an alternative and broader interpretation of the term 'to destroy'. This understanding was famously highlighted in a decision by the Federal Constitutional Court of Germany, where it is argued that:

> [The] statutory definition of genocide defends a supra-individual object of legal protection, i.e. the social existence of the group […] The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the

[507] Behrens. 'The Crime of Genocide and the Problem of Subjective Substantiality', 349.

[508] In social sciences and humanities, on the other hand, there are efforts to provide a more systematic collectivistic conception of the crime. See for example B. Lang, *Genocide: The Act as Idea*, (Philadelphia: University of Pennsylvania Press, 2017).

group.[509]

Similarly, while challenging the dominant individualistic interpretation of the term 'to destroy', the ICTY Trial Chamber in *Blagojević* noted that such acts as transferring a population 'could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was'.[510] Both of these judgments thus aimed to address the conceptual contradiction in the prevailing judicial understanding by taking a collectivistic stance and extending the idea of group destruction in the *mens rea* element beyond the physical and biological destruction of group members. This interpretation also later found some additional support in the ICTY and ECHR jurisprudence,[511] as well as in the literature.[512] One of the most frequently cited views in this direction was put forward by Judge Shahabuddeen in his dissenting opinion in *Krstić*, who noted that

> The proposition that the intended destruction must always be physical or biological is supported by much in the literature. However, the proposition overlooks a distinction between the nature of the listed "acts" and the "intent" with which they are done. From their nature, the listed (or initial) acts must indeed take a physical or biological form, but the accompanying intent, by those acts, to destroy the group in whole or in part need not always

---

[509] Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) [2000] 2 BvR 1290/99, para. (III)(4)(a)(aa). (Cited in *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 579.).

[510] *Prosecutor v. Blagojević et al.* [2005] IT-02-60-T, Judgment, paras. 658-666.

[511] For example, in *Krstić,* Judge Shahabuddeen disagreed with the majority opinion by pointing out that while reaching a decisive conclusion from the *preparatory works* is not possible on the matter, in terms of the Article II 'there is no reason why the destruction must always be physical or biological. *Prosecutor v. Krstić* [2004] IT-98-33-A, partial dissenting opinion of Judge Shahabuddeen, para.51. Similarly, the ICTY Trial Chambers in *Krajisnic* followed the minority view by noting that '"destruction" as a component of the mens rea of genocide, is not limited to physical or biological destruction of the group's members.' *Prosecutor v. Krajišnik* [2006] IT-00-39-T, para 854. Also see *Jorgic v. Germany* (ECHR) [2007] 74613/01, Judgment, para. 36,47,41,97,104,105.

[512] This way of an understanding is by no means unprecedented or an exception. See Berster, `Article II`, 81-86; Ambos, *Treatise on International Criminal Law: Volume II,* 44; G. Werle and F. Jessberger, *Principles of International Criminal Law* (Oxford: Oxford University Press, 2nd edn, 2014) 295-302; M. Sirkin, 'Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations' (2010) 33 Seattle University Law Review, 525,526.

lead to a destruction of the same character.[513]

Lars Berster locates four doctrinal footings that support a collectivistic interpretation of the definition. First, an individualistic understandings fail to explain why causing mental harm to members of the targeted group is designated as an act of genocide by Article II lit. (b). As Berster points out, even in cases where all members of the targeted group have been subjected to serious mental harm, the physical existence of the members remains intact.[514] Also, causing mental harm cannot be considered a form of obstructing procreation within the group – and thus a part of the biological destruction, since 'the prevention of births within a group by mentally damaging group members is covered by paragraph (d), and such an interpretation would then render the inclusion of "causing of serious mental harm" in Article II lit. (b) superfluous'.[515]

This point is somewhat recognised by the ICTR in Akayesu, given that the Trial Chamber's judgment argued that mass rape can be committed with genocidal intent,[516] not merely on the ground that physical/ biological destruction was targeted by these acts, but also on the ground that sexual assaults were predominantly used in order to humiliate and degrade Tutsis; break their spirit and psychological well-being; spread terror and thus aim to destroy the social being of the group.[517] It must be noted that this 'innovative' ruling provides another striking example of how evasiveness in specifying the ontology of genocide weakens the persuasiveness of the legal reasonings produced through the prevailing judicial construction of the crime. According to the Trial Chamber, in Rwanda, where between 100,000 and 250,000 women were sexually

---

[513] Prosecutor v. Krstić, Case No. [2004] IT-98-33-A, partial dissenting opinion of Judge Shahabuddeen, para.48.

[514] Berster, Article II, 81,82; Also see H. Travis 'On the Original Understanding of the Crime of Genocide' (2012) 7 Genocide Studies and Prevention, 34.

[515] Ibid.

[516] '[T]he Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women [...] and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole'. *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, paras. 731-734. See for an analysis of the ICTR jurisprudence G. Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda* (London: Cameron May, 2007) 137-139.

[517] *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, para 732.

assaulted in the course of widespread attacks against Tutsis,[518] rape constituted an integral step 'in the process of destruction of the [T]utsi group – destruction of the spirit, of the will to live, and of life itself'.[519] In a technical sense, it seems rather obvious that acts of rape cause serious bodily or mental harm to members of the group and thus fall into the ambit of Article II (b).

However, the haunting question is how rape can be committed with 'genocidal intent' if the term 'to destroy' must be read as the (intended) physical or biological destruction of members. Such a conception of 'genocidal intent' significantly limits the scope of paragraph (b) of Article II, simply because general intent accompanies the act (intent to cause serious bodily or mental harm) and specific intent (intent to physically or biologically destroy) appears to be rarely, if ever, compatible. When it is thought about in this context, the fact that mass rape distorts the social fabric of the group loses its relevance and the prevailing judicial reading of 'genocidal intent' dictates limiting the scope of 'genocidal rape' to those situations where the overarching aim of mass rape is physical or biological destruction of the group. The idea of 'genocidal rape' must then cover very few situations, such as systematically using sexual assault to force pregnancy and thus bring about biological destruction or transmit infection and prompt the 'slow death' of group members.

Yet in the case of Rwanda, the evidence does not indicate such an overarching aim in any decisive manner. Rather, rape was a demonstration of hatred of the victim group and an episode in the multidimensional destruction process of Tutsis. At this point, the

---

[518] See United Nations, 'Background Information on Sexual Violence used as a Tool of War' available at <http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml> accessed on 21 June 2016)

[519] *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, para 732.These attacks had indeed manifold effects on the Tutsi group. In addition to the obvious physical and psychological damages occur in any case of rape, the so-called 'genocidal rape' has led to, inter alia, victims becoming socially outcast and excluded (because the victims of rape were perversely conceived as defiled and incapable of bearing children); forced pregnancies; people fleeing their homes owing to the threat of rape; escalation of the sexually transmitted infections and stigmatization; divorces and preventing marriages; abandonment or murder of children that were the products of rape; division of families and so on. In short, 'genocidal rape' permanently crippled the very social fabric of the victim group. (See. Ronit Lentin, *Gender and Catastrophe* (London: Zed Books, 1997); C. Chinkin (1994), 1-17; Jasminka Kalajdzic, 'Rape, Representation, and Rights: Permeating International Law with the Voices of Women' (1996) 21 Queens L.J., 479).

logical peculiarity in the reasoning becomes clearer because while the Chamber describes mass rape as a step in the 'process of destruction', and an act which results in 'destruction of the spirit', these characterizations have little significance once the Chamber insists on confining the concept of 'genocidal intent' to intended physical or biological destruction. In this sense, the contradictions in the Trial Chamber's reasoning have similarities to the judicial reasoning of the ICTY regarding the Srebrenica situation

Second doctrinal footing highlighted by Berster is that a collectivistic interpretation is more in line with the 'Convention's fundamental concern of upholding the cultural, spiritual and genetic multiplicity of mankind'.[520] This point is even conceded by some opponents of a collectivistic interpretation, such as Kreß.[521] At this juncture, one may nevertheless insist that although the drafters of the Convention recognised the reality of the protected groups, they nevertheless aimed to restrict the definition to those instances where the goal of the perpetrator is to annihilate members of a group.[522] However, even though such thinking might truly be in the minds of some delegates in the aftermath of the Holocaust, jumping to such a conclusion would ultimately be unsustainable, because even though there had been numerous attempts during the drafting process to include the term 'physical destruction' in the *mens rea* element,[523] any such reference was, in the end, omitted. Moreover, the variety in the acts of genocide disaffirms such a sweeping conclusion, given that acts like transferring children and inflicting bodily harm hardly fit with the 'physical and biological destruction' restriction.

A related concern raised by Larrissa van den Herik is that a collectivistic interpretation of the term 'to destroy' may unduly broaden the scope of the crime and blur the

---

[520] Berster, 'Article II', 81. See also Prosecutor v. Krstić, [2004] IT-98-33-A, Judgement, para.36.

[521] Kreß notes that 'the primary goal of the international rule against genocide to protect the existence of certain groups in light of their contributions to world civilization, a campaign leading to the *dissolution of the group as a social entity* is directly relevant to that goal. The social concept of the term "destroy" is thus more in line with the most basic object of the rule against genocide.' Kreß, 'The Crime of Genocide under International Law', 486.

[522] Behrens seemingly argues this See Behrens, `The mens rea of genocide`, 82-85.

[523] Particularly by the Soviet Union and France. See U.N. Doc. No. E/CN.4/SR.73 (24 Jun 1948), 13–4; U.N. Doc. A/C.6/SR.73 (13 Oct 1948), 94; Soviet Union: Amendments to Article II of Draft Convention on Genocide, A/C.6/223 and Corr. 1 (7 Oct 1948).

distinction between genocide and crimes against humanity.[524] According to van den Herik – who also draws on the argument that the division between the two crimes has lost a great deal of its legal significance and become more of a symbolic one over time – [525] the co-existence of the crime against humanity of persecution and genocide prevents any great legal need for an 'expansive interpretation of the crime of genocide'. For van der Herik, it appears more plausible to substantiate the symbolic difference by reserving the term for the most 'atrocious' forms of the crime of persecution through a restrictive interpretation.[526] As has already been pointed out, however, accepting that the protected groups hold distinct value draws a significant line between protecting the group 'as such' and protecting individuals *en masse.* Moreover, and as is recognised in the case law,[527] the presumption that genocide is inherently more heinous than crimes against humanity is a superfluous and mistaken one that largely emanates from the socio-political perception of the 'G' word.[528] Instead, the two are different kinds of crimes that protect different kind of goods, despite the notable overlaps.

Third, in formulating Article II lit. (c), the drafters of the Convention felt a need to demand that deliberately inflicted measures on the group must be 'calculated to bring its *physical* destruction in whole or in part'.[529] Berster derives an *argumentum a contrario* from this explicit use of the term 'physical' and concludes that 'the general term "destruction" in the *chapeau* is broader and extends to dissolving the social bonds between group members'.[530] That said, some scholars oppose such a deduction. Behrens, for example, sees the explicit mention of 'physical destruction' in Article II lit. (c) as an example of *ex abundante cautela* rather than *argumentum a contrario* and suggests that the term 'intent to destroy' must be read in a similar direction to paragraph

---

[524] Van der Herik, 'The Meaning of the Word "Destroy"', 58.

[525] Schabas, *Genocide in International Law,* 250-256.

[526] Ibid.

[527] In favour of this view see Prosecutor v. Stakić [2006] IT-97-24-A, Judgement, para.375

[528] See generally Akhavan, *Reducing Genocide*. For further deliberations on the power of the word genocide Also see M. Bazyler, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (Oxford: Oxford University Press, 2016) 59-62; Lang, *Genocide: The Act as Idea*, 19 fwd.

[529] *Emphasis added.*

[530] Berster, 'Article II', 81,82.

(c).[531] Kreß, on the other hand, does not share these two arguments, noting that:

> The meaning of the word "destroy" cannot be reduced to the physical destruction of the members of the group as it exists at the time of the overall genocidal campaign, but all possible results of overall campaigns which take the form of a *pattern* of one or more of the prohibited acts. This idea is expressed by the Trial Chamber in *Krstić* by referring to physical or *biological* destruction and the latter term must then be construed so as to include the forcible transfer of children on a mass scale. This careful broadening of the concept of "destroy" beyond mere physical destruction makes sense also from the systematic perspective because it attributes a different meaning to the word "destroy" within the context of genocidal *intent* in comparison with the meaning of "physical destruction" within the context of the prohibited act (paragraph (c)) concerned. Hence the argument *e contrario* mentioned above in support of the social concept of the word "destroy" is refuted.[532]

Interpreting the term 'to destroy' in this manner, Kreß suggests that the qualitative approach to substantiality should be applied in a restrictive way, in which only those parts that are essential in a given context for the physical and biological survival of the group should qualify as functionally substantial.[533] A hypothetical example of this might be a case where the perpetrators physically target only farmers and other food suppliers to the group, while a widespread famine is in progress.[534] As far as is observed, however, that the ambiguity inherent in the definition and *travaux* makes all these three understandings doctrinally defendable.

Finally, Berster claims that 'the *travaux préparatoires* demonstrate that, by extending paragraph (b) to mental harm, the Sixth Committee consciously chose to widen the protective scope of Article II beyond the physical (and biological) existence of

---

[531] Behrens, `The *mens rea* of genocide`, 85.

[532] Kreß, 'The Crime of Genocide under International Law', 487.

[533] Ibid. 492.

[534] Berster, `Article II`, 151.

groups'[535] and specifically cites the discussions in the 81st meeting of the Committee to support this argument.[536] However, although Berster's citation of this particular meeting in fact backs up his argument, once the drafting history is considered in its entirety, such a citation cannot be considered as decisive evidence.[537]

Notwithstanding the lengthy doctrinal discussions on and significant body of opinions in favour of a broader construction of the term 'to destroy', most of the contemporary legal studies and pronouncements have used the rhetoric of 'distinct entity' as if it signifies something obvious, and thus added very limited comments about its implications.[538] Kai Ambos, for example, concedes that the group, 'as a social, supra-individual entity', is the primary protected value in genocide law,[539] yet his work only includes two brief comments regarding the existence of those entities. First, he notes that 'such groups are recognised to be *unique social entities* and not just the aggregate of individuals who compose them';[540] and second, he defines a protected group – drawing on the description given in the Secretariat Draft Commentary –[541] as 'a permanent unity of people, which distinguishes itself from the rest of the population on the grounds of common characteristics shared by its members'.[542] Similarly, according to Alonzo-Maizlish, the Convention recognises that certain groups 'have value within the world community in and of themselves', and indeed deserve protection 'as such'.[543] But he also does not give any particular explanation as to the mechanisms that produce

---

[535] Ibid.

[536] UN Doc. A/C.6/SR.81.

[537] See Schabas, *Genocide in International Law,* 295-305.

[538] At this juncture, readers may point out that this was also the case for the individualists examined in chapter three with exception of May. However, the situation in here is different. Individualists such as Drost or Robinson, although do not give an extensive account in relation to their perception of the nature of protected groups, nevertheless provide a crucial reference to a particular philosophical and sociological literature through using the 'assemblage of people' rhetoric. However, such indicator does not exist or explicit in writings of the proponents of the 'collectivistic' approach.

[539] Ambos, *Treatise on International Criminal Law,* 45; also see 4.

[540] Ibid. (emphasis in original).

[541] UN Doc. E/447.

[542] Ambos, *Treatise on International Criminal Law,* 5.

[543] Alonzo-Maizlish, 'In Whole or In Part: Group Rights', 1380.

the value in question.

That said, in discussing the scope and content of the substantiality requirement, most of these commentators resonate with Lemkin's arguments, which implies that the protected groups is most likely understood from a structural-functionalist standpoint. If that is the case, – and speaking in purely conceptual terms – it is not the numerical size of the targeted part *per se*, but its functional significance for the overall entity that must be designated as the main parameter to assess substantiality, which, as elaborated in the next sub-section, is what Lemkin suggests to some extent. While this qualitative approach to 'substantiality' is largely endorsed – at least as one of the options – in the literature that perceives the protected groups as distinct and primary 'goods' to be protected, no further justification or in-depth analysis offered; but rather, the arguments in case law are largely reproduced. Moreover, it appears that the lack of conceptual rigour has led to some conceptual contradictions, which are revealed by the discussions on the extent to which numerical considerations should be taken into account, and how.[544]

Most striking example of this is the arguments on whether the substantiality

[544] For example, from a structuralist standpoint as well a very large portion of a group should principally be considered as 'substantial'. Yet unlike individualistic accounts, the validity of this presumption should, logically, be predicated on the estimation that the destruction of a large portion will irrevocably endanger the entity's existence. However, accounts of such scholars as Berster or Ambos appear uncertain on whether their acceptance of relative magnitude is built on this premise. According to Berster, 'it would seem uncontested that a substantial number of members relative to the group's total size qualifies as a "part" in terms of Article II. For instance, directing one's destructive intent against two thousand persons may well be sufficient if the group totals no more than five or six thousand members. Below this level of certainty, however, legal interpretation is inevitably forced into a macabre numbers game: Would twenty, fifteen or ten percent of the entire group be worthy of the Convention's protection? Facing such predicament, international legal bodies have at times deemed remarkably small ratios to be sufficient. Most prominently, the 1995 massacre that occurred at Srebrenica was found to constitute genocide by both the ICJ and the ICTY, though the targeted group of Bosnian Muslims in Srebrenica numbered around 40 000 and hence represented no more than 2.9 % of the Bosnian Muslim population. In 1982, the U.N. General Assembly was satisfied by an even smaller percentage, finding that the massacres committed against Palestinian civilians in the Sabra and Shatila refugee camps in Beirut by a Lebanese Phalangist militia amounted to genocide. According to the present view, a proportion of around 3 % alone would clearly undercut the numeric threshold of substantiality.' (references omitted).Berster, 'Article II', 150; Ambos, on the other hand, notes that 'the number of individuals targeted must be evaluated in relation to the size of entire groups and on a case-by-case basis.' Ambos, *Treatise on International Criminal Law* 42.

requirement implies a certain absolute or minimum magnitude. According to Berster, for example, the *travaux préparatoires* suggest that a numerical limit should be set 'below which genocide is *per se* excluded, however crucial these members may seem for the whole group's existence'.[545] Ambos similarly advocates that this is a necessity which emanates from the nature of the crime and notes that 'there are limits to the expansion of the genocide offence by reducing the size of the protected groups more and more, that is, a certain (quantitative) threshold must always exist'.[546]

However, it is puzzling how the designation of the listed groups as distinct protected goods can accompany such a definitive argument from a conceptual standpoint. Indeed, Berster, for example, unintentionally reveals this conceptual incongruity in rejecting the idea that genocide also entails an absolute maximum threshold, 'beyond which a substantial part is given irrespective of its relative size'[547] by noting that

> it may seem intolerable that, for instance, the intentional killing of ten million members of a highly populous group would go unpunished under the Convention […] Nevertheless, such results, counterintuitive as they may seem, are inherent to the Convention's group-centred perspective and are unavoidable without altering the definition of genocide and its protective purpose.[548]

This exact reasoning can also be applied in rejecting any absolute minimum magnitude. Perhaps given the uneasiness of this conceptual contradiction, Berster adds that '[i]n

---

[545] Berster, `Article II`, 150. Although Berster tries to back up his argument by making a reference to the *travaux preparatoires,* his reference includes no direct citation and as is already established the *travaux* includes full of contradictive statements and misunderstandings as to the term 'in whole or in part'. Therefore, claiming that the *travaux* entails the existence of a minimum absolute (numerical) magnitude appears an overstatement.

[546] Ambos, *Treatise on International Criminal Law,* 44.

[547] Berster, `Article II`, 150. This line of arguments is frequently found in academic writings and the study will agree with them, not for ontological but genealogical reasons. For example, in arguing the arbitrariness of the ICTY's conclusion in Sikirca, where %2 failed from 'the substantiality test', Alonzo-Maizlish points out that if a perpetrator holds intent to destroy %2 of the Indian Muslims (which corresponds to approximately 3 million people), 'it seems improbable that the arbitrary number of two percent…would fail to pass the reasonably substantial test'. Alonzo-Maizlish, 'In Whole or In Part', 1398.

[548] Berster, `Article II`, 150.

light of the fact that some nations, ethnicities and religious groups are extremely small in size, the required minimum should be set very low'.[549] However, accepting a very low number (whatever it may be) in this respect simply makes the idea of a minimum absolute magnitude completely redundant.

It is true that the substantiality requirement aims to establish that genocide is a crime of a certain enormity. However, if the protected groups do indeed constitute a distinct and primary value to be protected, then, the unique[550] source of this heinousness lies in the destruction of the higher-level entity, regardless of the number of targeted individual victims. Although both Berster and Ambos appear to be confirming this point in principle by granting that the protected legal interest in the crime is the contributions of these entities to 'humankind and preservation of the pluralistic world',[551] their arguments regarding the required numerical magnitude conflicts this suggestion by, in the words of Alonzo-Maizlish, associating 'the moral magnitude of genocide with a presumption that the crime *only* exists when large numbers of people have been killed'.[552]

That being said, Alonzo-Maizlish's account too has its own conceptual problems concerning the substantiality requirement. After conducting an elaborate critique of existing approaches to substantiality, Alonzo-Maizlish argues for completely excluding the requirement from the interpretation process, stating that '[a]djudicating the intent element should continue as an exercise in the application of the plain meaning of the statute to the facts before a court',[553] rather than importing 'extralegal concepts into the

---

[549] Ibid.

[550] As is already hinted, from an individualist's perspective, the only plausible conclusion to reach is that the destruction of large number of victims due to their certain characteristics is what creates the unique gravity of genocide (since the intended partial destruction is suffice). Yet the answer would be more or less same if this question were asked about the crime against humanity of persecution. A collectivistic perspective can avoid from such conclusion by arguing that the unique moral magnitude of genocide emanates from the destruction of a higher-level entity.

[551] Ambos, *Treatise on International Criminal Law Volume II,* 6,7; Also see Berster, `Article II`, 85.

[552] Alonzo-Maizlish, 'In Whole or In Part', 1394 (*emphasis added).*

[553] Ibid. 1402.

prosecution'.[554] According to him, the consideration of the specific *mens rea* element must concern the 'single factual question of whether or not a defendant intended to destroy the group',[555] and while the substantiality of the targeted part may carry evidentiary weight in implying the existence of this specific *mens rea*, it should not affect the determination of whether the perpetrator holds it. This argument merely tries to find a way to sidestep the issue, but it fails since the issue has nothing to do with whether a 'defendant intended to destroy the group'. Rather, the question that needs to be engaged with is when a perpetrator intends to destroy only part of the group, on what grounds do the targeted part, whether it consists of a handful or millions of people, become relevant in the eyes of genocide law in a given situation.[556]

Against this background, returning to the roots of the 'collectivistic' take on genocide and engaging with Lemkin's work would help to better understand and scrutinise the conceptual arguments that underpin the collectivistic position and its implications for the research topic. Indeed, even though his doctrinal contributions have been more limited, Lemkin has produced a relatively more precise, elaborate and internally coherent collectivistic framework of the crime of genocide. Yet the Lemkinian framework is not problem-free at all due to its functionalist and organicist presumptions about the protected groups. Functionalism, in this particular context, refers to the conceptual orientation that views a social whole as a system of interdependent parts whose functions contribute to the stability and survival of the system, while, in turn,

---

[554] Ibid.

[555] Ibid. 1401.

[556] An interesting point made by Alonzo-Maizlish is that 'If one hundred members of a small protected group live in a large city, and an enemy group kills ten of those members in an attempt to eliminate the group from that city, then all of the substantive elements of the crime have been met, regardless of the "small" number of murders. Proportionately, even one murder may be "reasonably significant" if the group is small enough and the intent has been satisfied otherwise.' Alonzo-Maizlish, 'In Whole or In Part', 1397. However, this hypothetical example has its flaws. It is clear that Alonzo-Maizlish defines the one-hundred members in that city as if the whole group rather than the part of a wider group and states that the intent of the offenders was to eliminate these hundred people, even though ten is actually killed. Thus, this would actually be a case where the group is targeted as a whole. The real problem in this example is on what grounds are we considering these one-hundred people separately from the wider group, in other words as if a whole. Indeed, he later notes that such calculation is highly 'dependent on further determinations of both the geographic scope of inquiry and the numbers of the total group.' Alonzo-Maizlish, 'In Whole or In Part', 1398.

individual parts flourish and gain significance by virtue of being part of the whole, not in their individual capacity. Functionalism is an essentially holistic view in that it stipulates that wholes, as fundamental components of reality, have an existence. As an affiliated view, organicism essentially argues that some systems resemble organisms in having parts that function in relation to the whole to which they belong. From an organicist perspective, then, protected groups can be considered as 'organic unities'. However, such a perception of the protected groups, as it will be elaborated in a moment, contradicts the experienced reality of these entities and fail in providing a complete account to the phenomenon in question, which consequently renders the qualitative approach to substantiality, which was basically invented by Lemkin, essentially erroneous and in fact even inapplicable.

3.2.1. Lemkinian Approach to Genocide and the Substantiality Requirement: An Overview

The focus on groups *per se* was in fact an anomaly in the post-war humanitarian law regime in which the protection of individuals constituted the primary concern.[557] Indeed, the introduction of genocide to the international legal framework was not only challenged from the very beginning for fear of, in the words of Hersch Lautherpacht, a situation that 'if one emphasizes too much that it is a crime to kill a whole people, it may weaken the conviction that it is already a crime to kill one individual',[558] but it is also seen as more of a 'sentimental' reaction to the Nazi atrocities by some.[559] However, the breadth of Lemkin's concerns about the destruction of human groups was broader than the image of the Holocaust[560] and dated back to before the Second World War.[561]

---

[557] D. Moses, 'Raphael Lemkin, Culture, and the Concept of Genocide' in Donald Bloxham and A. Dirk Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford-2010) 19.

[558] Letter Schwelb to Humphrey, 19 June 1946, PAG-3/1.3, Box 26, United Nations War Crimes Commission 1943–1949, Predecessor Archives Group, United Nations Archives, New York (UNWCC Archives). (cited in A. Vrdolijak, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law' (2010) 20 European Journal of International Law, 1184) Also see P. Sands, *On the Origins of "Genocide" and "Crimes Against Humanity*" (London: W&N, 2016) 385.

[559] See Y. Bauer, 'The Place of the Holocaust in History' (1987) 2 Holocaust and Genocide Studies, 211–215.

[560] David Moshman observes that 'the dominance of a Holocaust-based conception of genocide' is the fundamental conceptual constrain on contemplating about the crime. D. Moshman, 'Conceptual

As early as 1933, Lemkin tried to introduce two new international crimes in order to protect the existence of certain groups, namely, the crimes of barbarity[562] and vandalism,[563] which were precursors of the concept of genocide.[564] For Lemkin:

> The awakening of the world conscience is traced to the times when the world community took an affirmative stand to protect human groups from extinction. Bartolomé de las Casas, Vitoria, and humanitarian interventions,

---

Constraints on Thinking about Genocide'(2001) 3 Journal of Genocide Research, 432. It is indeed hard to deny that without the Nazi atrocities against Jews and other groups, the word genocide may not even exist. But the way Lemkin understands the crimes was much broader than the scope of Holocaust. Lemkin was noticed that the group hatred, discrimination and destruction were not specific to Jews or to 19th and 20th Centuries or limited to acts of Nazi atrocities. This can be easily gleaned from his unfinished *magnum opus* 'The History of Genocide'. See S. Jacobs, *Lemkin on Genocide* (New York & Plymouth: Lexington Books, 2012).

[561] As is documented in his autobiography and the studies regarding his life, Lemkin noticed (and was disturbed by) the ethnic discrimination and persecution at the very early ages. His attention was not only attracted by anti-semantic pogroms and hatred but also by other historical group-targeted violence. In fact, his interest to mass atrocities started at the age of twelve when he read Quo Vadis by Henryk Sienkiewicz, which is a book about the persecution of Christians during the reign of Roman Empire in the first-century. Frieze, *Totally Unofficial: The Autobiography of Raphael Lemkin* 1; Samantha Power, *A Problem from Hell: America and the Age of Genocide* (London: Flamingo, 2003) 20; On the other hand, according to Cooper, Lemkin deliberately downplayed the fact that his interest to mass atrocities was sparked by his Jewish background in his autobiography and interviews. Cooper, *Raphael Lemkin*, 12.

[562] 'Whosoever, out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, undertakes a punishable action against the life, bodily integrity, liberty, dignity or economic existence of a person belonging to such a collectivity, is liable, for the crime of barbarity, to a penalty . . .'), Raphael Lemkin, 'Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations', conference paper at the 5th Conference for the Unification of Penal Law (Madrid, 1933) translated in Lemkin, 'Genocide as a Crime under International Law', 41 American Journal of International Law (1947), 146.

[563] 'Whosoever, either out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, destroys its cultural or artistic works, will be liable for the crime of vandalism, to a penalty. . .') Ibid.

[564] Sir Hartley Shawcross pointed out at UN General Assembly meetings in 1946 that had Lemkin's overture was accepted in 1933 Nazi crimes that committed without nexus with war could also be prosecuted by the Nuremberg Tribunal. Also, this was perhaps the first step of Lemkin's 'one man crusade' against genocide, which has become overtime 'an all-consuming obsession: he left adjunct posts at Yale and New York University, neglected himself, forgot to pay his rent, was evicted, went without food while spending all his days lobbying, cajoling, and brow-beating diplomats, politicians, public figures, and newspapermen about genocide.' Michael Ignatieff, 'The Unsung Hero Who Coined the Term "Genocide" (2013) New Republic available at <https://newrepublic.com/article/114424/raphael-lemkin-unsung-hero-who-coined-genocide> accessed on 13 March 2016.

> are all links in one chain leading to the proclamation of genocide as an international crime by the United Nations.[565]

But why was the protection of certain groups as important as the protection of individuals for Lemkin? The chief concept in this respect is 'culture', which, according to him, plays a vital role in the formation of individuals' being and provides unique perspectives whose cross-fertilisation enriches and advances humanity. However, Lemkin submits that the preservation of culture cannot be achieved through mere protection of individuals and their individual rights, because culture is irreducibly inherent to social entities.[566] From this viewpoint, Lemkin submits that 'culture-bearing groups' should be the subject of legal protection[567] and notes that:

> The world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies the constructive cooperation and original contributions, based upon genuine traditions, genuine culture and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world.[568]

This quote helps us to identify the two pillars on which Lemkin constructed the idea of genocide: 'culturalism' and 'groupism'. The former denotes the central importance of culture as a force determining the behaviours of individuals and the functions of society. The central proposition of 'culturalism' is that individuals are not capable of perceiving the world other than through the lens of their culture. Lemkin follows Bronislaw Malinowski's ideas in explaining the mechanism and essentiality of culture. Accordingly, culture is a need that derives from the basic needs of a pre-cultural

---

[565] R. Lemkin, 'Proposal for Introduction to the Study of Genocide', NYPL, Reel 3, Box 2, Folder 1.

[566] Lemkin, *Axis Rule in Occupied Europe* 91. R. Lemkin, 'Genocide', NYPL, Reel 4, Box 3, Folder 1-2, 1.

[567] D. Irvin-Erickson, 'Genocide, the 'family of mind' and the romantic signature of Raphael Lemkin', 15 Journal of Genocide Research (2013), 287.

[568]. Lemkin, 'Genocide' (1947) 15 The American Scholar, 229. Also see Lemkin, *Axis*, 91.

biological life.[569] Over time, culture, as a 'derived need', has been integrated into society and 'enabled the fulfilment of individual basic needs because it constituted the systematic totality of a variety of interrelated institutions, practices, and beliefs'.[570] In this capacity, culture has become essential and uniquely valuable to every society. On these premises, Lemkin submits that '[i]f the culture of a group is violently undermined, the group itself disintegrates and its members must either become absorbed in other cultures which is a wasteful and painful process or succumb to personal disorganization and, perhaps, physical destruction'.[571]

On the other hand, culture has a symbiotic relationship with groups for Lemkin.[572] Accordingly, the 'genos' exists by virtue of its culture. But, at the same time, Lemkin points out that the 'genos'[573] aims to convey the idea of a 'basic social unit', which is 'originally conceived as an enlarged family unit having the conscience of a common ancestor – first real, later imagined'.[574] It is in this 'genos', Lemkin continues, that 'the peculiar spirit of the group grew and where a peculiar way of life developed',[575] and through which individual members grew and developed their social, cognitive and spiritual dimensions, as well as their value systems.[576] This statement reveals his 'groupism', i.e. the conception of groups as substantial entities of the social domain, which endow meaning on the lives of individuals and constitute the spiritual resources

---

[569] Moses, 'Raphael Lemkin, Culture, and the Concept of Genocide', 25. See also B. Malinowski, *The Scientific Theory of Culture and Other Essays* (Chapel Hill: University of North Carolina Press, 1944) 72–3.

[570] Ibid.

[571] R. Lemkin, 'The Concept of Genocide in Anthropology', NYPL, Box 2, Folder 2. He adds elsewhere that 'Attacks upon such groups are in violation of [their] right to exist and to develop within an international community.' Lemkin, 'Genocide', 229.

[572] Nations were the primary focus for Lemkin who notes that 'nations are an essential element of the world community' and their destruction resulted 'in the loss of its future contribution to the world'. Lemkin. *Axis*, 91. Moses, 'Raphael Lemkin, Culture, and the Concept of Genocide', 22-24.

[573] Lemkin, who was a competent etymologist, combined the Greek word genos (γένος), which means family, race, tribe, notion, kind and Latin suffix –cide that derives from the word caedis/caedo (murder, slaughter, massacre) and means killing to denote this phenomenon.

[574] R Frieze, *Totally Unofficial*, 181.

[575] Ibid.

[576] Ibid.

of mankind.[577]

'Groupism' in Lemkin's account appears to be partially inspired by Gottfried Herder's 'national cosmopolitanism'[578] and Giuseppe Mazzini's universalist 'symphony of nations' idea.[579] Herder conceives nations as naturally grown entities, as opposed to states that are artificially created by politics.[580] In Herderian thinking, national groups are the source of unique morals, values, aesthetics, beliefs – that is, a perspective of the world – and thus they are essential for any artistic and cultural human achievement.[581] While Herder emphasises the value of cultural relativism for human creativity in this manner and calls for respecting, preserving and advancing national groupings,[582] states are defined as the main oppressors of this 'cultural diversity'. Drawing on this romantic view, Lemkin remarks that the history of genocide proves that 'Music, art, literature,

---

[577] Ibid. In his unpublished work Lemkin explains that 'The philosophy of the Genocide Convention is based on the formula of the human cosmos. This cosmos consists of four basic groups: national, racial, religious and ethnic. The groups are protected not only by reasons of human compassion but also to prevent draining the spiritual resources of mankind' S. Jacobs, *Lemkin on Genocide* (Lexington Books-2014), 3. For Lemkin, genocide is committed against a 'group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group'. Lemkin, *Axis*, 79.

[578] Herder is a controversial figure as his view on nationalism sometimes affiliated with the rise of German Nationalisms. See for example, against Herder's legacy K Popper, *The Open Society and its Enemies* (first published in 1945, London: Routledge, 2002) 264,265, and in favour of its contributions to cultural pluralism C. Taylor, "The Importance of Herder," in E. Avishai Margalit (eds.), *Isaiah Berlin: A Celebration* (Chicago: University of Chicago Press, 1992). See for further discussions and citations S. Benhabib, 'International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin' (2009) 16 Constellations 349 (endnote 64). Even though it seems hard to infer such conclusion from his account, some even accused Herder for including racist connotations. See for such view C. Murray, *Encyclopedia of the Romantic Era, 1760-1850, Volume 2* (New York: Fitzroy Dearborn, 2004) 1194. See against this view F. Barnard, *Herder on Nationality, Humanity, and History* (Montreal: McGill-Queen's University Press) 27.

[579] Moses, 'Raphael Lemkin, Culture, and the Concept of Genocide', 23-25.

[580] J. Herder, 'Essays on Origin of Language' in F. Bernard (eds.), *J.R Herder on Social and Political Culture* (1969) 117; R. Howse and K. Knop, 'Federalism, Secession, and the Limits of Ethnic Accommodation: A Canadian Perspective' (1993) 1&2 New Europe Law Review, 310. See also A. Patten, '"The Most Natural State" Herder and Nationalism' (2010) 4 History of Political Thought.

[581] Benhabib, 'International Law and Human Plurality', 333, 341.

[582] M. Forster, *After Herder: Philosophy of Language in German Tradition*, (Oxford: Oxford University Press, 2010), 43. See in general J. Herder, 'On the change of taste (1766)', in Michael N. Forster (trans.), *Herder: philosophical reader* (Cambridge: Cambridge University Press, 2002).

come from the people. When the state takes over culture, painting degenerates into wall posters and propaganda and the cantata into a parade march. This history of the generations made this clear long before Nazi Germany.'[583]

However, as both Dirk Moses and Douglas Irvin-Erickson note, Lemkin's adherence to Herder's ideas does not indicate that he holds an entirely communitarian world view.[584] As Irvin-Erickson masterfully observes:

> Philosophically, cultural relativity and moral universalism are usually taken as mutually exclusive positions. But Lemkin felt he was under no obligation to choose either. So, he chose both. He believed that the liberal rule of international law could abolish the universal moral offense of genocide in order to protect cultural relativity. […] This romantic-liberal, relativist-universalist dichotomy in Lemkin's thought finds its clearest form in Lemkin's archival writings when he wrote that in law 'cultural relativity can be a doctrine of hope rather than despair'. In the liberal rule of law's endeavor 'at unifying the world for peace', he continues, 'this doctrine [of cultural relativity] has a two-fold significance. It means that we must respect every culture for its own sake. It also means that we must probe beyond specific cultural differences in our search for a unified conception of human values and human rights. We know that this can be done'.[585]

Indeed, as much as by Herder's thoughts, Lemkin was influenced by the 'liberal nationalism' of Mazzini,[586] who, according to Lemkin, was 'the prophet of the nineteenth-century idea of nationality in a humanist, democratic form with a strong

---

[583] R. Barlett, 'Pioneer vs. an ancient crime', 'Public statements and interviews', The Christian century, 18 July 1956, Raphael Lemkin Papers, NYPL. (Cited in Irvin-Erickson, 'Genocide, the 'family of mind', 277) That being said Lemkin does not limit the oppression of social group with the state oppression.

[584] D. Moses, *Empire, Colony, Genocide* (New York: Berghahn Books, 2013), 11; Irvin-Erickson, 'Genocide, the 'family of mind', 275-277.

[585] Irvin-Erickson, 'Genocide, the 'family of mind'', 277.

[586] M. Walzer, 'Nation and Universe', The Tanner Lectures on Human Values, Delivered at Brasenose College, Oxford University, May 1 and 8, 1989, 550 available at <http://tannerlectures.utah.edu/_documents/a-to-z/w/walzer90.pdf> accessed on 21 March 2018.

admixture of romanticism'.[587] Mazzini compares the totality of nations to an orchestra in which every nation plays its instrument.[588] For Lemkin, Mazzini's nationalism simply prescribes a political system where each nation maintains its cultural independence, while interacting in a peaceful and harmonic manner, which offers world citizenship to the people.[589] This symphony of nations and the world citizenship of people are exactly what the law against genocide aims to enhance and protect.[590] Noticeably, this very idea has lately been reinforced by the preamble of the ICC Statute in which it is stated that one of the goals of the Statute is to protect the 'delicate mosaic of the cultures of all peoples pieced together in a shared heritage'.

On these theoretical foundations, Lemkin holds that destroying or crippling 'culture-bearing' groups does in fact involve the destruction of humanity's wealth and is an assault that hinders the evolution of humankind.[591] In examining the issue of how groups can be destroyed or crippled, Lemkin argues that genocide cannot be equated with 'denationalisation' or mass murder. While the former is unable to convey the biological and physical aspects of genocide,[592] the latter does not 'indicate the losses in terms of culture represented by the nation's victims'.[593] As far as is observed, the conceptual difference between mass murder and genocide appears to be quite clear in

---

[587] Lemkin, The new word and the new idea, NYPL, 8.

[588] *The Living Thoughts of Mazzini*, ed. I. Silone (Westport, Conn: Greenwood Press, 1972), 55.

[589] Lemkin, 'The new word and the new idea', 7, 8.

[590] Ibid.

[591] Although she has a different conception of groups Ardent makes the following, similar remark: 'If a people or a nation, or even just some specific human group, which offers a unique view of the world arising from its particular vision of the world […] is annihilated, it is not merely that a people or a nation or a given number of individuals perishes, but rather that a portion of our common world is destroyed, an aspect of the world that has revealed itself to us until now but can never reveal itself again. Annihilation is therefore not just tantamount to the end of the world; it also takes its annihilator with it.' H. Arendt, "The Promise of Politics," in *The Promise of Politic*s (Jerome Kohn eds, New York: Schocken Books, 2005) 175.

[592] According to Lemkin this term does not 'convey the common elements of one generic notion and they treat mainly the cultural, economic, and social aspects of genocide, leaving out the biological aspects, such as causing the physical decline and even destruction of the population involved.' Lemkin, *Axis* 80.

[593] Memorandum from Raphael Lemkin to R. Kempner, 5 June 1946. United States Holocaust Memorial Museum, R. Kempner Papers (RS 71.001).

Lemkin's framework.[594] Yet why is a physical or biological attack an indispensable part of genocide if groups can also be destroyed without recourse to these methods?

In the Lemkinian understanding, culture-bearing groups comprise multiple dimensions, such as linguistic, spiritual, physical, biological, social etc. Genocide is a crime that is directed towards all these aspects of group life, rather than a single one.[595] This is because the hatred of genocide is not merely directed towards members of a group, but the group as an entity. This requires some further destructive social practices that will eliminate the possibilities of the 'undesirable' group to re-emerge in the future. For Lemkin, genocide represents a 'complex synthesis of a diversity of factors'[596] and therefore '[p]hysical and biological [acts of] genocide are always preceded by cultural [acts of] genocide or by an attack on the symbols of the group or by violent interference with religious or cultural activities. In order to deal effectively with the crime of genocide one must intervene at the very inception of the crime.'[597] This conception is in line with the perspective that will be advocated in chapter four, which is that group destruction is a process that qualifies as 'genocide' in legal terms when it turns into 'a total attack' against the entity, i.e. when the oppression and destruction reach a level at which patterns of acts of genocide occur.

Understanding the crime from this viewpoint, Lemkin explains that reference to the idea of partial destruction should be understood as a denotation of the crime of genocide that also includes those cases in which a perpetrator intends to cripple a protected group permanently.[598] In saying 'cripple permanently', Lemkin refers to a state in which the group becomes structurally distorted to such an extent that it becomes impotent to make its substantial cultural or spiritual contribution to civilisation or to the lives of its

---

[594] Lemkin maintained that the crime of genocide is not 'necessarily mean the immediate destruction of the nation except when accomplished by mass killings of all members of a nation', rather it is committed with the purpose of destroying 'the essential foundations of the life of a national group'. Lemkin, *Axis,* 79.

[595] Moses, 'Raphael Lemkin, Culture, and the Concept of Genocide', 34.

[596] Raphael Lemkin 'Description of the Project', NYPL, Reel 3, Box 2, Folder 1.

[597] Raphael Lemkin, 'Memorandum on the Genocide Convention', AHJS, P-154, Box 6, Folder 5.

[598] R. Lemkin, 'Genocide as a Crime under International Law' (1947) 41 American Journal of International Law, 147.

members – regardless of how many members may sustain their existence after the attack.[599] He further elaborates this functionalist thought in his letter to the U.S. Senate. After drawing attention to the fact that the Convention does not speak about destroying parts of a group but about destroying a group in part, Lemkin draws a parallel between the destruction of a group and of a house to elaborate the distinction. Accordingly, destroying 'a house in part means to effect such changes in the house that it can no longer be considered as a house',[600] even if most of its constituting parts still do exist. By analogy, the intended destruction of a group 'in part' must be substantial enough to affect the entirety of group in such an irrevocable and fundamental way.[601] That is to say, numbers are not important *per se* in this view. Instead, the functional significance of the part for the survival of the social structure is what really matters. Indeed, in his autobiography, Lemkin says that when he heard about the Norwegian proposal for inclusion of the term 'in part', he thought of 'the prophetic saying of Carlyle that "ten men can make a national culture"'.[602]

3.2.2. A Critique of the Lemkinian Approach and the Conceptual Fallacy of the Qualitative Approach

The house analogy reveals the functionalist presumptions of Lemkin. As noted by Christopher Powell, Lemkin was reflecting the terminology and understanding of his era: 'The dominant conceptions of social structure in the twentieth century have generally been synchronic, or static: structure is a pattern that exists at a given moment in time; when it reproduces itself over time, it does so in the same fixed form.'[603] However, such an understanding proved to be insufficient to capture the reality and thus

---

[599] In this sense, he notes that, 'mass murder does not convey the specific losses to civilization in the form of the cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics.' U.S. Congress, *Executive Session of the Senate Foreign Relations Committee*, vol. II (US Government Printing Office 1976) 370.

[600] Ibid.

[601] Ibid. This reasoning is later cited by some ICTY Chamber: 'the targeted portion must comprise a significant enough portion to have an impact of the group as a whole.' *Prosecutor v. Tolimir* [2012] IT-05-88/2-T, Judgement, para. 749; *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para. 8.

[602] Frieze, *Totally Unofficial,* 166. According to Frieze, Lemkin was most probably referring to Thomas Carlyle. Ibid. 255 (endnote 18)

[603] Powell, 'What do genocides kill?' 537; Also see Powell, *Barbaric Civilization,* 8.

created some major conceptual and moral problems with Lemkin's account.

Taking his house analogy as a starting point, a house exists by virtue of different parts complementing each other and this gives rise to a distinct 'whole' that has emergent functions, which the individual parts cannot hold on their own. In such a structure, every part has a particular role and, as is rather evident, some parts like pillars or the roof have a more essential role for the whole continue to function. This is not to deny, of course, that the very concept of 'house' is also a social construct, in that our socio-historical conventions determine what does or does not make a structure a 'house' or what kinds of relationships between the parts need to be established. Nor is this denying that each individual house, like any other perceived entity, is in a constant state of change and has its unique properties and circumstances. Nevertheless, the conventions that determine what makes a structure a 'house' are well established and strictly tied to the function that the existence of the whole is expected to fulfil. Moreover, a house is a passive entity, which means it cannot react or transform on its own when faced with an action.

Unlike houses, however, culture-bearing groups are not purposefully created or do not organically come into being to fulfil an overarching function, which determines their identity, value or existence. Contrarily, a structure cannot qualify as a house unless it fulfils the primary functions attached to the concept of 'house'. To be more precise, the identities of culture-bearing groups are not dependent on some objective standards or their ability to fulfil a particular purpose, but on reciprocal in- and out-group perceptions about the existence of the group and its identity. For example, the Turkish nation in the 18th century has very little in common with today's nation, including the content of language or cultural practices. Despite this, however, they have the same overarching identity, namely 'Turkish'. This is possible because there is no stable and unique structure that gives a collective that particular identity. Instead, the continuation of a 'Turkish identity' and the transformation of its content are as a result of socio-historical processes. What is more, the main constituents of social groups, namely individuals, do not necessarily complement each other, as is the case with a house. Most of the time, social groups exist by virtue of or despite the conflicts between its constituent parts.

Moreover, the relatedness among the parts of culture-bearing groups is by no means mechanical or organic and such groups may always adapt to new circumstances in order to survive – although, in most case, at the expense of significantly transforming their properties. In this context, arguing that particular parts are essential for survival of the 'social unit' will always be a form of speculation. Indeed, history proves that classes, individualities or clans that were once considered essential for a collective's existence have disappeared over time, but the 'collective' has transformed and survived. This very fact was highlighted by the ad-hoc judge Milenko Kreća in his dissenting opinion in *Croatia v. Serbia.* Kreća criticised the ICTY's consideration that the destruction of military-aged men in conjunction with forced deportations 'would inevitably result in the physical disappearance of the Bosnian Muslim population in Srebrenica',[604] noting that '[l]ife, however, proved the Tribunal's prediction wrong. Following the conclusion of the Dayton Agreement, the Muslim community in Srebrenica was reconstituted, so that today the number of the members of the two communities — the Muslim and the Serbian — is equalized'.[605]

A connected objection against functionalist thinking was raised by Paust, who argues that the survival of a very small portion might suffice for the continuation of an entity, perhaps 'even more unified in its group identification and determination'.[606] By drawing attention to the same point,[607] Luban argues that if the protected groups possess value *qua* groups and the protection of group pluralism is what makes genocide a morally and technically distinct crime, then, considering acts committed with the intent to destroy a

---

[604] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para. 595.

[605] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] Dissenting Opinion of Judge Kreća, 522, para. 104.

[606] Paust notes in his critique of the 'Proxmire Act' that 'if ninety-five percent of a group of thirty-five million men, women and children was brutally and systematically exterminated at the hands of some nationwide conspirators, would a defense be that the remaining five percent, now even more unified in its group identification and determination, was never targeted and still constitutes a viable entity? Under such a definition, must "the group as a viable entity" be exterminated or an intent to do so be proven beyond a reasonable doubt before genocide recognizably exists?' Paust, 'Congress and Genocide: They're Not Going to Get Away With It', 96,97.

[607] According to Luban, 'a group that is destroyed only in part is by the same token a group that survives in part, and so genocide by destroying part of a group no longer removes that group from "the family of man" D. Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur and the UN Report' (2006) 7 Chigaago. Journal of International Law, 324.

protected group 'in part' as genocide leads to the legal definition losing its 'mooring in the group-pluralist theory of value'.[608] Such a reservation should nevertheless be treated with caution, because it downplays some possible functionalist justifications, e.g. the targeted part may be important for 'the family of man' *per se* or it might be essential for the continuation of certain contributions of the whole to humanity. That said, in defence of Lemkinian thinking, even if genocide survivors may still constitute an entity with a similar identity after a relatively successful attack against the group, such an entity would be different in terms of its spiritual contribution to humanity, since the cultural production of the group would diminish drastically. For example, 'Native Americans' still 'exist', but their cultural richness and productiveness are incomparable with the pre-genocide conditions.

However, aside from the fact that making an assessment of 'importance' would still constitute a highly speculative practice, it also brings the awkward connotation that groups are as worthy as their input to humanity. Moreover, even if such a morally troubling premise is accepted, who will decide the possible contributions of the relevant part or the 'whole', and more importantly, how? In the end, our society is a network of extremely complex and always-changing relations. A particular part of the group, or even a particular person, which is considered 'less valuable' at the time may contribute immensely to humanity in the future or even start a chain reaction that will lead to great advancements. This simply highlights how the distance between the contingent reality and static and substantialist conceptions of groups may lead to problematic and morally questionable practices.

Furthermore, explaining the value of groups and, thus, the immorality of genocide through referring to the loss to 'genuine culture' or 'possible contributions' would be rather challenging in the context of the legal definition. To elaborate, in inventing the concept of genocide, Lemkin did not use the term 'nation' as a denotation of certain

[608] In fact, the criticism raised by Luban constitutes even a larger problem for nominalists given that a particular identity can continue to exist even when a handful of members survive. Indeed, in order to overcome this complication Luban ultimately suggests revising the definition in a manner that the crime against humanity of extermination will also be considered as genocide *per se.* Ibid. 313. This, however, makes it questionable why do we need the crime of genocide at all then.

types of political entities. Rather, following Henri Focillon,[609] he equated the concept with 'families of mind' and included a wide range of collectives under the rubric of 'nations', insofar as he even considered 'those who play cards, or those who engage in unlawful trade practices or in breaking up unions' under this notion.[610] According to Lemkin all these 'families of mind' were the loci of distinct 'ways of life' and worth protecting as such. Consequently, for Lemkin, almost any group that produces a distinct way of life must be protected by a law against genocide in order to preserve the manifold richness of humanity.[611]

Desirable as such a perception may seem, the legal codification process evolved differently. The scope of protection has been limited to four specific types of groups, which makes it unlikely to keep perceiving protected value as merely distinct 'ways of life'. This is because while religious and ethnic groups are indeed generally the locus of particular 'ways of life', racial and national groups (unlike the Lemkinian use, the Convention appears to use the term 'nation' to denote political entities) do not necessarily have the same characteristics or may consist of an assembly of several distinct, remotely related and more than occasionally conflicting 'ways of life'. That is to say, the legal definition does not merely provide protection for certain kinds of 'families of mind', but rather for those unities that consist of individuals who are related to each other by a sense of solidarity/ identity or a common interest identifiable by features characterised as racial, religious, ethnic or national – even if this relatedness does not create a distinct 'culture', or as Lemkin puts it a 'way of life'.

Lemkin, however – even though not pleased with the limited listing –[612] ultimately stated that the listed types were the most central groupings of humanity[613] and continued to defend their value and existence with functionalist and organicist reflections, which created further complications in his account. For example, for Lemkin, these groupings

---

[609] Lemkin, 'Genocide', 1. Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide*, 65.

[610] Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide*, 85.

[611] Irvin-Erickson notes in this respect that 'Genocide, Lemkin reasoned, could be conducted against criminals because states often criminalized certain types of subjectivities and ethnic identities'. Ibid.

[612] Frieze, *Totally Unofficial: The Autobiography of Raphael Lemkin,* 162,163.

[613] Ibid.

emerge as a result of the consciousness of a common ancestor becoming imagined over time, yet he nevertheless thinks that there must be some initial 'real' common ancestors as well.[614] Such a description stems from thinking about the protected groups as natural phenomena, as extended 'family units'. In other words, Lemkin thought of groups as if they are organic unities,[615] which are marked by stages of birth, growth, expansion, decline and death.[616] Yet this conception is rather problematic, since it unintentionally essentializes racial, ethnic, religious and national differences by endowing some kind of 'authenticity' on them and thus constitutes an anachronistic view.[617] In other words, it implicitly affirms the existence of a stable 'essence', while also naturalising social identities and the boundaries between them.[618] Indeed, Philippe Sands has documented

---

[614] Ibid. 181.

[615] Straus notes in this context that: 'A necessary condition of genocide may be, then, that the victim group is considered an organic unit —a natural, reproducing, essentially united collectivity, however fictive such a belief might be. In analysing genocide against groups not commonly thought to have a biological foundation, the task is to demonstrate an organic logic in the perpetrator's conception of the group'. S. Straus, 'Contested meanings and conflicting imperatives' (2001) 3 Journal of Genocide Research, 366.

[616] 'if we read Lemkin closely, he was unambiguously a holist. In Axis Rule he talks about nations as having a life of their own, analogous to the life of individual human beings.' Powell, 'What do genocides kill?'',533. Moreover, Lemkin presents these groups as if they exist independently of individuals and their subjective intentions. This counterintuitive perception immediately brings the accusation of reification against his account, since it appears untenable to think that the structure can exist without the agency. Ibid. 533-537.

[617] Powell, *Barbaric Civilization*, 79; S. Holmes, 'Looking away' (2002) 24 London Review of Books, 3–8 and M. Ignatieff, 'The Danger of a World without Enemies: Lemkin's Word' (2001) The New Republic.

[618] Alexander Hilton notes that 'From an anthropological perspective, the reification of race, ethnicity, religion, and nationality seems both ethnocentric and misleading. To argue that race is immutable, a key trope of debate when the UNCG [Genocide Convention] was being promulgated (and one that was made when notions of biological race still predominated), is to implicitly reassert an essentialised conception of race that has been used by perpetrator regimes and has long since been shown by people like Boas to be a social myth. Race is a social construction and, like ethnicity, religion, and nationality, is clearly, and often highly, mutable. Perhaps one of the more informative illustrations of this point is the not-so-distant assertion that the Irish were a race of savages. Or one can travel to a country like Brazil, where racial categories have very different valences. More disturbingly, the UNCG has created a set of privileged protected groups while leaving others unprotected and analytically invisible. By starting with contextualized, as opposed to rigid, pre-existing socio-legal categories, a critical genocide studies might help us understand how a wide variety of identities, including non-Western ones, crystallize in a variety of genocidal situations.' A. Hilton, 'Critical Genocide Studies' (2012) 7 Journal of Genocide Studies, 9. Also see R. Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (New York: Columbia University Press, 1997) xi.

that at the time he invented the concept 'genocide', Lemkin was warned by one of his close colleagues, Leopold Kohr, of falling into a trap by adopting the 'biological thinking' that genociders follow.[619]

Although such a criticism is by no means unfounded, it seems hard to reach the conclusion that Lemkin actually intended to affiliate the idea of group with an ever-present 'essence' when his works are taken as a whole. As Irvin-Erickson observes, Lemkin was in fact troubled with the extreme communitarian views that explain the existence of 'organic wholes' with such ideas as common blood or territory.[620] Rather he saw mythologies such as common ancestors as part of the cultural experience of groups, which enrich the human experience.[621] Therefore, it seems more plausible to conclude that he was a 'cultural nationalist'.[622] Nevertheless, this does not change the fact that the terminology he uses allows making essentialist[623] inferences or remedy the problems that emanate from Lemkin's primordialist belief that the protected groups are the central groupings of all social life as ancient and natural phenomena, and therefore 'essential elements of the world community'.[624]

This belief is simply inaccurate because the discourses of nationalism, ethnicity or race are modern phenomena – not universal categories – and do not have any 'natural' basis.[625] Indeed, biological studies prove that there are no genealogical foundations for

---

[619] Sands, *On the Origins of "Genocide"* 183.

[620] Irvin-Erickson, 'Genocide, the 'family of mind'', 275.

[621] Ibid. 276.

[622] It needs to be noted that Lemkin did not reject the idea that Lemkin recognises the fact that while the protected groups are the sources of 'esprit de corps, the way of life, the traditions, the forces of cohesion and solidarity' as well as 'the spirit of exclusiveness, suspicion and hatred of other groups' "Thus the genos is both the unit against which the crime is directed and the unit from which it originates. Genocide is a crime perpetrated by one genos against another'. He adds that: 'Here we are dealing not with causal events but with deeply entrenched anthropological and sociological patterns.' Frieze, *Totally Unofficial* 181.

[623] Essentialism refers to the Platonist idea that an entity has a set of attributes that are necessary to its identity and function.

[624] Powell, 'What do genocides kill?, 541; Crook, 'The Mau Mau Genocide: A Neo-Lemkinian Analysis', 23.

[625] Powell, 'What do genocides kill?', 540,541.

our social categorisation of 'races'.[626] Similarly, Anderson convincingly argues that nationalist or ethnic narratives that make references to ancient common ancestors or a mythical shared history are in fact the products of a modern ethno-nationalist project,[627] one which aims to 'assemble history into the collective memories of imagined communities',[628] and which usually has no real empirical basis. It is a theoretical fallacy, then, to perceive the protected groups as highly integrated organisms that exist as organic edifices, 'with biological, cultural, social and economic levels all of which symbiotically depend on each other'.[629] Rather, these groups are socially constructed, processual realities, even though they become causally efficacious once they have been constructed and externalised by society.[630] Their significance is historically bound rather than transhistorically so.[631]

---

[626] See American Association of Physical Anthropologists, 'AAPA statement on biological aspects of race' (1996) 101 American Journal of Physical Anthropology; A. Montagu, *Statement on Race: An Annotated Elaboration and Exposition of the Four Statements on Race Issued by the United Nations Educational, Scientific, and Cultural Organization* (Oxford: Oxford University Press, 1972) 157–153. R. Miles, *Racism after "Race Relations"* (London: Routledge, 1993).

[627] B. Anderson, *Imagined communities: reflections on the origin and spread of nationalism*, (revised edition, London: Verso, 2006) 187. Also see K. Kovach, 'Genocide and the Moral Agency of Ethnic Groups' (2006) 37 Metaphilosophy, 342: 'It is a mistake to save preconceived ideas of what ethnicity is all about by attributing mass ignorance and dull-mindedness to individuals who identify ethnically with groups in spite of the fact that the groups with which they identify cannot claim to be biologically self-perpetuating entities that can trace their beginnings far into the past.'

[628] Powell, *Barbaric Civilization* 79; 'The sense of ancestry is frequently linked to an origin story, which helps provide a sense of solidarity and belonging as well as a sense of difference from other ethnic groups. Ethnic categories are fluid and multiple; thus a person might identify him- or herself (or be identified) as Chinese, Han, Cantonese, Chinese-American, or American depending on time and place. Many other sorts of groups are also bound by an origin myth, which provides them with a sense of solidarity, belonging, and identity.' Hinton, 'Critical Genocide Studies', 5,

[629] Crook, 'The Mau Mau Genocide: A Neo-Lemkinian Analysis', 23.

[630] It is also noted that 'Even so, while identity, like culture, is a social construct it does not mean it lacks identifiable form, meaning or moral significance'. H. Rashed and D. Short, 'Genocide and settler colonialism: can a Lemkin-inspired genocide perspective aid our understanding of the Palestinian situation?'(2012) 16 The International Journal of Human Rights, 1146.

[631] It needs to be remembered, in this context, that although these four groups were controversially determined as the most 'fundamental' ones of the human cosmos upon highly politicised discussions during the drafting process of the Convention; they in fact had not existed for the very big portion of human history as we understand them today (perhaps with exceptions of religious groups if they are

All these deficiencies render the Lemkinian answer to our research topic rather weak and problematic. While Lemkin's house analogy offers a *prima facie* plausible and internally coherent answer to the problem of determining and justifying a part's substantiality, the non-conformity between the underpinning functionalism and the social reality of protected groups render this later called 'qualitative approach' implausible and impracticable. To elaborate, the whole idea of functional significance relies on the presumption that if a part is destroyed, then the functioning of the entire organism will be jeopardised. Yet, because the protected groups do not fit this description and, in fact, are relationally constructed entities with a high capability for adaptivity, Lemkin or any other 'collectivistic' account that relies on a functionalist imaginary has been unable to theorise the forces that bind individuals into a group and create a distinct culture or identity. Our everyday social reality rapidly eliminates a possible romantic explanation that different individual organs function together to give rise to an entity. The inner dynamics of any of the listed groups reveal no such homogeneity or corporation-like systematic coherence. Rather, the emergence of such entities is a result of complex, largely unorganised patterns of interactions and struggles between the individual parts. For this reasons, any assessment regarding a part's functional significance is in fact nothing more than speculation (or, even worse, a generalisation made in an elitist manner), whether it is done by perpetrators or judges.

Moreover and connectedly, the qualitative approach to substantiality is conceptually self-contradictive, because when a perpetrator attacks a part with the knowledge or hope that its destruction will jeopardise the group's existence in that particular context, the target here would not be the part itself but the 'whole'. Remember one of the first examples of the qualitative approach given at U.S. Senate meetings by Fisher.[632] Fisher pictured a hypothetical situation in which the perpetrators have 'a plan to kill, say, all of the Catholic priests in a particular country, and that plan is for the purpose of destroying the Catholics as a religious group'.[633] The hope of the perpetrators is, therefore, that 'by

---

conceived broadly). Thus, it can be deduced from history that in the course of time some of these groups may lose their significance, whereas some other may become much more prominent.

[632] U.S. Congress, *Executive Session of the Senate Foreign Relations Committee,* Vol. I (US Government Printing Office 1976), 362.

[633] Ibid.

the elimination of the leaders, the group would dissolve and cease to exist as a religious group'.[634] In this example, concluding that the destructive intent directed at the 'part', namely priests, would be logically contradictive, because the purpose of the perpetrators is not to destroy the part as such or the group in part, but rather the whole group through pulling out one of its building blocks.

Indeed, this logical fact was implicitly affirmed when the Appeals Chamber in *Krstić* corrected the Trial Chamber's reasoning and stated that Bosnian Muslims in Srebrenica were the targeted part, not the 8,000 military-aged males. That is to say, the Appeals Chamber in fact used the imputed functional significance merely to infer the extent of the genocidal intent, which affirms that considering functional significance as a parameter to determine substantiality is a dead-end approach.[635] In short, then, the functionalist terminology and ideas that Lemkin relies on involve weak presupposition and axioms that contradict the experienced social reality. This not only undermines the overall value, persuasiveness and convenience of his account, but also leads to this highly problematic understanding of substantiality.

3.3. Conclusion

In concluding the previous chapter, it was suggested that the ambiguous judicial conceptualisation of genocide, the back-door role of the 'substantiality requirement' and the complications that arise in applying each established approach to substantiality all emerged as a result of individualistic and collectivistic conceptions of protected groups, and connectedly group destruction, falling short of fully reflecting the ontological reality and moral value of these social entities, so that they fail to produce morally desirable legal outcomes in certain situations on their own. For this reason, a conceptually obscure framework has been preferred – in which individualistic and collectivistic elements contradictorily coexist and therefore judges are able to alter the emphasis through the back door of the substantiality requirement, depending on the particular characteristics of the situation, even though this has been done at the expense of also obscuring the moral 'good' that the law aims to protect. The present chapter has

[634] Ibid. 263.

[635] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para.18.

elaborated on this argument by reviewing the individualistic and collectivistic positions in the literature, particularly of those commentators whose views have been historically instrumental in the development of the judicial framework, and demonstrated that a socio-philosophical perspective fails to offer a morally and legally satisfying understanding of the crime and, connectedly, a determination and justification of 'substantiality'.

The central idea advanced in this chapter is that the source of shortcomings is the same for both perspectives, namely, attempting to legally represent the always-changing reality in static terms and largely excluding the centrality of temporal, spatial and genealogical factors. In other words, even though their most radical versions present a binary dichotomy, all variations of individualistic and collectivistic conceptualisations of genocide are situated on the same continuum, as they all rely on substantialist thinking. That is, both perspectives postulate a static and substantial being or essence as the source of the 'good', i.e. protected groups, to be protected by the law – whether it is individuals and their identities or social entities with presumably stable functions, structures and characteristics – and then try to make sense of the crime by taking this single surface of what is multi-dimensional and always changing the reality as the focal point. This leads to an unmanageable gap between the social reality and legal representation, which results in moral defects in each way of conceptualising the crime, and connectedly in the methods offered by these viewpoints to assess and justify 'substantiality'. Indeed, all the accounts summarised in the chapter, with the exception of Behrens, try to attribute a particular meaning to the idea of substantiality as if it is a natural phenomenon awaiting detection, while this is not the case.

As the analysis regarding individualistic accounts suggests, any attempt to reduce the phenomenon of protected groups to the individual level by presuming that individuals are the only true 'substance' of the social world, and thus explaining the harm of genocide merely by referring to the harms inflicted on individuals, overlooks the harms to 'irreducible goods', most prominently culture and language – which endure as long as unity lasts and, as such, cannot be explained away with a direct reduction to the properties, actions or beliefs of individual constituents. While the classical nominalist accounts of Drost and Robinson dissipate the moral distinction between discriminatory mass atrocities and the destruction of a 'collective' entity through this kind of reductive

conception, the neo-nominalist account of May unduly reduces the distinctive moral evil of the crime to the 'social death' of survivors. As will be further explored in the following chapter, the harm in destroying 'irreducible goods' extends beyond the harm inflicted on member of the group, as it significantly diminishes the possibilities for the realisation of the creative potential of humanity.

It is demonstrated in this chapter that misconceptualisation of the crime in this manner also results in complications related to the application of quantitative and geographical approaches to substantiality, which was devised by individualistic scholarship to assess and justify 'substantiality'. On the one hand, it is difficult to morally justify why a certain number or percentage of individuals constitutes a 'substantial part', given that each individual has the same value for the 'being' of the group in individualistic thinking. On the other hand, it is hard to justify why targeting a part in a certain geographical area is morally worse or distinct, rather than randomly destroying the same number of group members, if there is no distinct value attached to the group or its parts.

Being aware of these complications, Behrens, who also perceives protected groups from a nominalist standpoint, aimed for a legalistic solution to the problem of 'substantiality' and offered that, since the definition concerns the genocidal intention of individuals, the 'substantiality' of a part should be calculated differently for each perpetrator, depending on their reach and control. The chapter, however, has argued against this suggestion, since overlooking the significance of the collective context would seriously undermine the historical purpose of the concept of genocide by paving the way for peculiar situations, e.g. convicting a lone, 'racist' serial killer for genocide if she did everything she could within her reach, desiring a protected group to be destroyed. And ironically, even the example of an army general and a foot solider that Behrens uses to support his 'individualised approach' implicitly presupposes a collective genocidal context. What is more, it is pointed out that, in this approach, it becomes challenging to find the moral source of the unique stigma attached to genocide, on which Behrens puts significant emphasis in order to assure the distinctiveness of genocide from his nominalist standpoint.

In contrast, the collectivistic conceptualisation of genocide, the theoretical foundations of which were essentially established by Lemkin, successfully ensures the moral

distinctiveness of the crime by ascribing distinct existence and moral value to the listed groups on their own. However, as the analysis has established, the functionalist and organicist underpinnings of Lemkinian thinking essentialize identities and thus imply the same pervasive logic as the perpetrators. As demonstrated, such conceptualisations contradict the experienced reality. The protected groups are not constituted by parts that functionally complement each other, nor are they organic unities. These groupings, with the possible exception of religious groups, are essentially a modern phenomenon that does not have any 'natural' basis and did not come into being to fulfil a particular function. Their parts rarely, if ever, exhibit homogeneity or systematic coherence. Furthermore, racial groups and nations do not usually produce distinct 'ways of life', which was one of the main explanations offered by Lemkin to justify the distinct moral 'good' of listed entities, as they usually consist of several distinct and frequently conflicting parts. Protected groups are also highly adaptive, and their identities do not rely on any 'essence', but rather on processual continuity over time complemented, by reciprocal perceptions.[636]

As a consequence, collectivistic perspectives falsely suggest that a 'substantial' part is objectively locatable by presuming that substantiality can be calculated according to the function of the targeted part for the continuation of the whole. However, due to the mismatch between this conception of protected groups and their adaptive and contingent reality, a qualitative method cannot go any further than producing some informed speculation. It is also emphasised that the qualitative method involves a self-contradiction, since by targeting a supposedly functionally essential part, the perpetrators do in fact aim at the destruction of the whole, and thus intend to destroy the group in its entirety.

All things considered, all the theorists mentioned in this chapter are only able to make partially convenient arguments in conceptual terms, as their approaches tend to focus on a particular dimension of the multi-faceted reality of protected groups and mistakenly locate a 'substance' to be preserved. While individualists have largely overlooked the irreducible goods that genocide harms by their reductive approaches in which 'individuals' constitute 'substance', collectivists essentialised identities, mistakenly

[636] Chapter four will extensively elaborate on this point.

representing groups as if they are structures made of parts with particular roles and considering this structure itself as 'substance'. As a result, individualistic approaches to substantiality are morally unjustifiable in any meaningful sense and they unavoidably extinguish the moral distinction between genocide and crimes against humanity, as collectivistic approaches turn out to be inherently conflicting and largely speculative. That said, the thesis shall argue in chapter four that Lemkin does nevertheless provide a valuable conceptual starting point to move beyond this binary and substantialist thinking. This is because, on the one hand, Lemkin presents the most encapsulating understanding of the harm that genocide causes; on the other hand, despite using functionalist terminology, a closer look to his work reveals his unease with such an approach.

At this stage, one may ask, even if these two viewpoints are problematic for the reasons explained, whether the conceptually 'flexible' approach established in the case law through the back-door role of the substantiality requirement ultimately strikes an acceptable balance, in other words a way to manage the gap between reality and abstraction, and we may be better off not fixing what is not broken. This, however, is not the case. Obscuring the protected good in such a manner threatens the predictability and coherence of the case law, while at the same time bringing an ambiguity about the moral harm of genocide. The most vivid example of this, to reiterate, is the recent *Gambia v. Myanmar* case before the ICJ. If the Court repeats the essentially collectivistic approach that it has put forward through the back door of 'substantiality' as in the Srebrenica situation, then a verdict of genocide is more likely. On the other hand, Myanmar has a strong case if the Court follows an individualistic approach, as it did in the Vukovar situation. And unsurprisingly, emphasising the Court's argument in relation to Vukovar and drawing the minimum of attention to the decision regarding the Srebrenica situation has been the strategy for Myanmar so far.[637] It needs to be emphasised that the difference between the two decisions does not merely stem from a divergence in interpretation of the law or the facts, it more fundamentally reflects two different, and yet deficient, understandings of the immorality of genocide. As a result, while the standards applied to both cases appear the same on paper, in effect, the back door of substantiality allows altering the standards by shifting the conceptual emphasis.

[637] See ICJ, Gambia v. Myanmar [2019/19], Verbatim Records, p.21 ff.

Chapters two and three therefore established that substantialist viewpoints lead to moral complications and indeterminacies, as well as logical contradictions, in legally representing genocide and, connectedly, in assessing and justifying the 'substantiality' of a part. This leaves us with the question of how to think about genocide and 'substantiality' in order to reduce the gap between legal construction and social reality. To this end, rather than relying on presumptions about the value and being of protected groups and the criminological nature of the crime, one needs to closely examine the 'good' in question in order to establish what exactly the criminal concept aims to protect, as well as the nature of the criminological phenomenon. Only then is it possible to investigate how, and to what extent, the contingent reality of genocide, in both ontological and criminological terms, can be duly represented within the scope of a legal definition and whether it is possible at all to establish a simple, easy-to-understand and predicable test to assess situations of genocide, and 'substantiality' in these situations.

In the following chapter, the study shall first elaborate on the contingent reality of protected groups and their destruction by moving beyond binary and substantialist thinking and exploring the implications of this step for assessment of the substantiality requirement and the general problem of 'objectivity' in the application of a normative representation to particular cases. Second, in chapter five, it will be explored how to conceptualise the naturally existent criminological relationship between the contextual (collective) and individual levels when considering genocidal intent and, consequently, the substantiality requirement.

CHAPTER FOUR

Beyond Binary and Substantialist Thinking: Embracing the Contingency in the Identification and Justification of 'Substantiality'

The present chapter aims to suggest a novel way of thinking about 'substantiality' through moving beyond binary and substantialist thinking ensconced in the prevailing judicial and scholarly approaches with regard to the being and value of the protected groups. Even though the Lemkinian approach has been largely criticised in the previous chapter, Lemkin's deep-seated uneasiness with regard to a functionalist and organicist worldview that reveals itself in his unpublished works[638] and autobiography[639] nevertheless provides us with a pathway to move beyond the binary individualism/ collectivism dichotomy.[640] These relatively less-examined works disclose that Lemkin by no means contemplates properties like 'culture' as static or in essentialist manner, but rather points out that 'gradual changes occur by means of the continuous and slow adaptation of the culture to new situations. The new situations arise from physical changes, creative energies within the culture and impact of outside influences.'[641] Similarly, his writings indicate that Lemkin was also well recognised that 'families of mind' are ultimately socially constructed, historically contingent and mind-dependent,

---

[638] See in general Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide.*

[639] Frieze, *Totally Unofficial: The Autobiography of Raphael Lemkin.*

[640] The dilemma to hand is a straightforward and well-known one. On the one hand, we cannot think the protected groups as mere 'thought-objects' as individualists do, since the emergent properties and powers of the protected groups -like culture or language- cannot be 'explained away' by reduction to the individual level. These are attached to the groups as such, not to the agents. On the other hand, we cannot 'reify' groups or essentialize identities by undermining the role of agency in the generation of these powers and properties. Indeed, even if it is a fact that the protected groups have their own lives, properties and histories apart from their individual members' personal lives, properties and histories; they stop to persist without the certain pattern of acts and relations of individual members exist.

[641] Lemkin, 'The Concept of Genocide in Anthropology' in Moses (eds), *Raphael Lemkin, Culture, and the Concept of Genocide*, 27. Lemkin also notes that 'Obviously throughout history we have witnessed decline of nations and races. We will meet this phenomenon in the future too, but there is an entirely different situation when nations or races fade away after having exhausted their spiritual and physical energies, and there is a different contingency when they are murdered on the highway of world history. Dying of age or disease is a disaster but genocide is a crime.' Ibid. Also see Moses, *Empire, Colony, Genocide*, 27.

even if they have irreducible emergent properties and hold value as such.[642]

It may be claimed, in this respect, that Lemkin was unable to establish a convincing ontological framework to back up his insights and stuck with the functionalist and organicist arguments of his era that essentialised and mystified racial, ethnic, religious and national differences and implied a deterministic and static existence for the protected groups – even though Lemkin principally aimed to argue the contrary.[643] That said, since Lemkin invented the term genocide, more nuanced approaches have been developed in sociology and philosophy, which has prompted scholars like Martin Crook to revitalise the Lemkinian approach by freeing it from its functionalist and substantialist connotations.[644] The arguments in the present chapter can be seen as an extension of this novel – in the words of Crook – neo-Lemkinian line of thought,[645] given that the present study also aims to preserve the majority of Lemkinian insights into the value of groups, while rethinking the philosophical and sociological underpinnings of those insights from a relational realist perspective, which offers an alternative way to think about elements of the crime and, thus, the substantiality requirement.

From this viewpoint, the first part of the chapter begins to advance the study's perspective by offering a socio-philosophical examination of the contingent being of the protected groups. Elucidating the being of these entities requires a three-step investigation. First, the meaning and scope of the notions of ethnicity, race, nation and religion in relation to the social groupings should be clarified. Second, the emergence and boundary-setting processes of such entities, as well as the underlying mechanisms of their persistence need to be explored. Third, the morality of the protected groups as the locus of certain 'goods' demands attention. This three-step examination ultimately invites us to rethink the immorality of genocide and highlights the limitations of 'objective universals' in legally representing genocide and connectedly in assessing and justifying 'substantiality'. It is subsequently submitted in the second part that this very

---

[642] See Irvin-Ericksen, *Raphael Lemkin and the Concept of Genocide,* ch 3 fwd.

[643] Irvin-Ericksen, *Raphael Lemkin and the Concept of Genocide,* 84 ff.

[644] Crook, 'The Mau Mau Genocide: A Neo-Lemkinian Analysis', 22.

[645] Ibid.

contingent nature of the protected groups dictates that the search for 'objectivity' in the context of the substantiality requirement should not be understood in relation to 'strict normativity', but rather ensuring the predictability and consistency of the reference points in the assessment and application of the norm to the particular situations without undermining the purpose of the requirement and the immorality of genocide. Having established this, the chapter ultimately suggests that the identification and justification of substantiality should be rethought as a balancing process between competing genealogical and analytical imperatives and identifies the major, but non-exhaustive, parameters and moral considerations that must be central to and instructive for this process of balancing.

4.1. Contingent Reality of the Protected Groups

4.1.1. Concepts of Nationality, Race, Religion and Ethnicity

The concepts of ethnicity, nation, race and religion are not natural phenomena and they do not exist in their own right, rather they emerge through collectively ascribing and constantly re-confirming significance and meaning given to certain physical or social traits, recurring interactions, beliefs, practices or institutions and permutations of them. That is to say, the contents of these four types are necessarily contextual and only relatively stable. For example, the meaning assigned to 'race' in the United States context has been chiefly based on skin colour as a result of how relations developed between 'slaves' brought from Africa and European settlers. But it is easy to imagine another situation in which, say, eye colour or height becomes the 'racial' trait to which social significance is ascribed.[646] The challenge for lawyers, in this context, and by the help of social scientists, is to isolate the 'form' of relatedness (e.g. the social form of racial groupings and separation) from 'content', through finding 'synthesizing

[646] Indeed this has been proved through an experiment by Jane Elliott. In 1968, Elliot decided to divide her third grade class into groups on the basis of eye-colour. This arbitrary divide immediately led to brown-eyed children being mocked and discriminated by the 'better' blue-eyed children. Then she flipped the situation and showed that the brown-eyed children, when on top, exacted the same punishments onto their blue-eyed classmates. T Stewart et al. 'Do the "Eyes" Have It? A Program Evaluation of Jane Elliott's "Blue-Eyes/Brown-Eyes" Diversity Training Exercise 1.' 33 Journal of Applied Social Psychology (2003), 1898-1921.

principles' from the raw material of experience.[647] This constitutes an essential starting point for legal discourse, because merely taking perpetrators' characterisations of differentiation would not only give them some leeway to avoid charges of genocide (e.g. arbitrarily describing the relation as 'political') or render definitional listing pointless (whether one agrees with it or not[648]), but also overlook the 'good' that is aimed to be protected by the law against genocide.

Although offering an elaborate account concerning the present-day 'form' of these concepts is beyond the scope of this research, it appears nevertheless necessary to provide (unavoidably temporal and contingent) conceptual abstractions in order for the rest of the arguments to make more sense. To begin with, it is now well established that the concept of race – as it is understood by society – is not a biological fact but is rather produced through relations and symbolic or physical markers such as narratives or practices. Recognising this, 'race' can be defined in its broadest terms as any phenotypical trait to which significance and meaning are collectively ascribed in a particular socio-historical setting or interaction. Indeed, merely being a distinctive trait does not mean that it *de facto* defines a 'race' in social terms. For example, one's big toe may be longer than one's index toe, and vice versa, depending on genetic and environmental factors. Yet such a trait does not constitute a marker that creates racial distinction in social terms unless significance and meaning are collectively ascribed to it.

---

[647] G. Simmel, *Georg Simmel on Individuality and Social Forms*: *Selected Writings* edited by D. Levine (Chicago: University of Chicago Press, 1971), xv.

[648] It must be remarked at this juncture that the limitation of the protected groups with these four types precludes the legal concept of genocide to be truly 'universal' since all four types of groups may lose their significance at some point in the future. Furthermore, such limitation violates the principle of equality before the law, as the Convention ultimately endorsed a non-egalitarian perspective as to the lives of individuals and the forms of their spiritual bonds. Feierstein, *Social Practice of Genocide*, 17. Even more strikingly, 'by creating protected and unprotected groups of persons, the 1948 Convention actually legitimates the fundamental hypothesis underlying all acts of genocide, namely, that the lives of some are less significant than the lives of others.' Ibid. 17. On the contrary, Lemkin's conception was much more flexible and universal since the society always involves one or many 'families of mind' regardless of their form.

Similarly, early conceptions of 'ethnicity' as something inherited and fixed have been debunked. It is likewise evident that 'religion' cannot be thought of as inherited and immutable, but instead something acquired. The main differences between these concepts stem from the fact that they rely on different symbolic markers and types of relations. It can be broadly stated that ethnicity is any cultural or linguistic feature, tradition or practice; and religion is any creed, beliefs, doctrines, practices or rituals to which significance and meaning are collectively ascribed in a particular socio-historical setting or interaction. 'Nation', on the other hand, has a slightly different character from the previous three and can be abstracted as any political community inhabiting a particular territory that has become conscious of its autonomy, unity and particular interests. In this sense, it is a form of collective mentality and identity that may emerge for various reasons, including ethnocultural similarities, functional needs and so on.[649]

Understanding the four concepts in this manner avoids, above all, essentializing and naturalising national, religious, ethnic or racial differences through objectifying symbolic markers as if they ever present, stable and have meaning outside context, relation and time. Similarly it does not entirely subjectify them, which undermines the definitional listing and overlooks that the reality of the four concepts as social – but not scientific – facts. Instead, it is suggested here that the way any such differentiation is conceptualised (e.g. ethnic, racial) is a practice of ongoing social abstraction and categorisation built on relations, properties and traits that are collectively perceived as related to the idea itself (e.g. ethnicity, race). That is to say, while there is a continuously reciprocal and circular relationship between 'form' and 'content', the 'content' that underpins the 'form' and the perceptions concerning the 'form' itself are in constant transformation. But this does not change the fact that ethnicity, nationality, race and religion all are collectively determined, relatively stable 'forms' of relatedness at any moment in time that exist independently from any particular individual's mindset, and these 'forms', at least loosely, determine whether a particular – actual or imagined – differentiation on the historical continuum can be characterised in one of the listed ways at that point of time. Having thus established how the concepts of nationality, ethnicity, race and religion should be understood and what 'form' of

[649] See R. Brubaker, Ethnicity Without Groups (Massachusetts: Harvard University Press, 2006), 37-41.

collective relatedness are they likely to be referring to at this point of history, we can now move on to exploring how groupings in these terms emerge and persist.

4.1.2. Emergence and Boundaries of the Protected Groups

For the following explanations to make better sense, it is essential to briefly elaborate on the thesis' perspective regarding the 'reality'. As has been perhaps already overstated, the reality is analogous to a constant flux, where the rule is 'change' and the exception is 'relative stability', which means that what requires explanation, above all, is how and why we perceive an entire process, or spatial or temporal parts of it, as a static object. It should be emphasised that stability is always relative and determined by individual and collective spatial and temporal limitations. A mountain that I look at from a few miles away for some days may seem to me to be an unchanging object, but if I had the opportunity to observe its details over the course of a enough period, it would become clear that the mountain, like everything else, is undergoing constant transformation, from size to shape. Nevertheless, it would probably continue to be 'that' mountain in my perception, as long as it preserves what is already coded by the society and myself as the 'form' of a 'mountain', because our minds can only make sense of the world and survive in it through locating continuities and similarities and objectifying and categorising them.

On the other hand, change is more rapid concerning other processes. For example, if I forget an 'egg' on the dinner table, what I am going to find a few weeks later will be only remotely similar to what I left there. Nevertheless, my mind will perform the trick and, by minding historicality and spatial continuity consider what I found as the same 'egg', simply changed somewhat. In actuality, however, what I considered an egg is a process of things merging together and dissolving back, and what is observed is simply two different stages of the process. 'Reality, then, is this process of creative advance in which many past events are integrated in the events of the present and, in turn, are taken up by future events. Events particularise ultimate creative power; the world is the realisation of a selection of creative potentials.'[650] That is, the nature of reality is '"becoming", rather than sheer existence of "being"', it is '"many-becoming-one", in a

[650] MacLean, *Rethinking Law as Process*, 51.

sequence of integrations at every level and moment of existence.'[651] Thus, what we considered as 'thingness' is in fact continuity over time.[652]

This situation is nevertheless much more complex for social 'objects' or 'wholes' like groups, because aside from having an extremely fluid and spatially scattered composition, individuals are not merely observers of a process where 'things' are merging together, they are also those 'things' that constitute the social object. That is, social wholes, unlike natural wholes, do not exist independently of the activities they govern.[653] In the case of social entities, wholes do not totalise their parts, which means parts retain a relative autonomy. Moreover, the objectification process (i.e. perceiving a process as an object) has a different nature given that it requires a greater level of collective like-mindedness. That is to say, social wholes are concept-dependent in that they would not exist entirely independently of agents' conceptions regarding their activity and being.[654] Against this background, then, to understand the nature of the protected groups, we should first account for how individuals merge together or are at least perceived in that way.

On this point, Georg Simmel, who is considered to be the scholar who gave sociology its 'relational turn',[655] provides valuable insights. To summarise his general sociological perspective, Simmel rejects the (i) organicist views defended by Auguste Comte and Herbert Spencer, who stress the fundamental continuity between nature and society and understand society as an organism in a deterministic fashion, as well as (ii) the idealist conception, which sees society as a convenient label for something that does not have 'real' existence, that is existence outside of the subjective perceptions of individuals. Modern relational sociology extends this dissent to the theories of three major classical sociologists, Marx, Durkheim and Weber, on the grounds that they inaccurately considered social relations to be the product of some 'factors'. In doing so, they tended

---

[651] Ibid.

[652] A. Abbott, *Processual Sociology* (Chicago: The University of Chicago Press, 2016), 16.

[653] D. Judd, *Critical Realism and Composition Theory* (London: Routledge, 2003), 51.

[654] As Judd notes, 'Even if agents are incorrect regarding their concept of what they are doing, they must possess some concept of what it is they do. Otherwise, people's activities would be determined and they would simply be automatons'. Ibid.

[655] P. Donati, *Relational Sociology: A New Paradigm for the Social Sciences* (Oxon: Routledge, 2011), 6.

to unduly highlight one factor over others and lost at least one significant dimension of society in their explanations.[656] As Pierpaolo Donati puts it:

> Any sociology having recourse in the last instance to material factors, such as Marx's, loses the subject. Any sociology having recourse in the last instance to individual factors, such as Weber's, loses the autonomous non-individual dynamics of action with their internal (non-subjective) determinations, their collective logic and order, and unintended consequences. Any sociology having recourse in the last instance to functional factors (such as Durkheim's division of labour or functional differentiation) loses subjective meanings, while any sociology having recourse in the last instance to cultural factors (such as the late Durkheim) loses those structural concepts which are independent of human representation and consciousness.[657]

As opposed to these traditional views, Simmel argues that society cannot be treated as a 'thing' or explained by mere reference to individuals' psychology,[658] but rather 'the social is the relational as such'.[659] That is, society should be conceived as 'being one another, for one another, against one another which, through the vehicle of drives or purposes, forms and develops material or individual contents and interest. The forms in which this process result gain their own life.'[660] Simmel names this entire process 'sociation', which he succinctly defines as 'the form (realised in innumerable, different ways) in which individuals grow into units that satisfy their interests'.[661] Simmel further notes that '[t]hese interests, whether they are sensuous or ideal, momentary or lasting, conscious or unconscious, casual or teleological, form the basis of human societies'.[662]

---

[656] Ibid. 5,6.

[657] Ibid. 6.

[658] 'Sociology asks what happens to men and by what rules they behave, not insofar as they unfold their understandable individual existences in their totalities, but insofar as they form groups and are determined by their group existence because of interaction.' G. Simmel, *The Sociology of Georg Simmel* translated and edited by Kurt Wolff (New York: The Free Press, 1950), 11.

[659] Donati, *Relational Sociology*, 6.

[660] Simmel, *The Sociology*, 43.

[661] Ibid. 41.

[662] Ibid.

Through this conception of society, Simmel contends that the supra-individual entities that we are accustomed to casually refer to in our daily lives are in fact transient or permanent unities formed by constantly occurring, ceasing and re-occurring reciprocal interactions among humans 'that have become crystallised as permanent fields, as autonomous phenomena. As they crystallise, they attain their own existence and their own laws, and may even confront or oppose spontaneous interaction itself.'[663]

At the theoretical level, among the many important implications of this way of thinking, the most important of all for our research is that it obviates the tendency to make distinctions between macro, meso or micro levels of social reality, because in relational understanding 'the social universe is "flat"',[664] which means all 'entities' exist on the same ontological level, diverging merely in scale and type. As DeLanda remarks, in this respect:

> …communities or organizations, to stick to these examples, are as historically individuated as the persons that compose them. While it is true that the term "individual" has come to refer to persons (or organisms in the case of animals and plants) it is perfectly coherent to speak of individual communities, individual organizations, individual cities, or individual nation states.[665]

Indeed, a relational understanding highlights the fact that any entity ultimately results from constant and persistent interactions between a set of other emergent unities and is historically individuated. Returning to the egg on the table, it is ultimately molecules growing into a unit with a certain form over a particular period of time. While this unity changes moment by moment (e.g. the egg going rotten), we historically individuate it and objectify the entire process as an 'egg'. The labelling of such a unity under the guise of 'egg', on the other hand, is a result of our collective categorisations of different 'forms' of unities. This means, in essence, every individual unity is in fact singular and unique, simply because, as Simmel reminds us, form can be realised in innumerable,

---

[663] Ibid. 10.

[664] R. Prandini, 'Relational sociology: a well-defined sociological paradigm or a challenging 'relational turn' in sociology', 25 International Review of Sociology (2015), 6.

[665] M. DeLanda, 'Deluzian Social Ontology and Assemblage Theory' in *Deluze and the Social* ed. M. Fuglsang (Edinburgh, Edinburgh University Press (2006), 252. For an opposing view see P. Donati, 'Manifesto for a critical realist relational sociology', 25 International Review of Sociology (2015), 91.

different ways.[666] But, at the end of the day, we categorise the reality for our convenience according to forms we single out.

Yet as is pointed out, social wholes are different to organic or material ones in that they are necessarily concept-dependent as social constructs, which means their formations, perseverance, boundaries and identities depend on collectively shared perceptions of both members and outsiders. In this respect, the construction of social unities, as well as their relative stability and identification vis-à-vis other unities, has roots in both the process of *externalisation* and the reciprocal interaction between in-group and out-group perceptions.[667]

The former refers to human interactions condensing or coalescing into something more than mere content by becoming stylised modes of expression even after the original impetus for relatedness or practices has gone or been transformed.[668] In other words, individuals establish distance from their producing and its product (in our case the constantly occurring, ceasing and re-occurring reciprocal interactions that underpin the groups), such that they can take cognisance of it and make of it an object in their consciousness.[669] This obviously does not mean that the group becomes a self-existing entity at any point in time,[670] but rather that we largely ignore the fact that what gives rise to the properties or powers attributed to these entities is the complex, ramified and heterogeneous interactions among people over time and the meaning attributed to

---

[666] Simmel, *The Sociology of Georg Simmel*, 6.

[667] For a similar view see May, *Genocide*, 46-50.

[668] G. Simmel, *Simmel on Culture: Selected Writings* ed. D. Frisby and M. Featherstone (London: Sage Publicaiton, 1997), 4. Thus, forms are freed from its ties with content (at least to a certain extent) and become ends in themselves.

[669] P.Berger and S.Pullberg, 'Reification and the Sociological Critique of Consciousness', 35 New Left Review (1966) 60; R. Bhaskar, *The Possibility of Naturalism: A Philosophical Critique of the Contemporary Human Sciences 3rd ed.*, (London Routledge 1998 *first published in 1979*), 6.

[670] As Prandini puts, the 'social wholes' 'are structures of interaction between actors, networks which cease to exist if their individual elements in relations cease to exist: no society without relationships.' Prandini, 'Relational sociology', 8. Any attempt to think the social entities outside of persons and their relations is an error of mysticism. Similarly describing them as self-standing entities with an authentic essence is against the social reality we experience.

them.[671] National, ethnic and religious groups are the most obvious examples of this fact, given that the moment (though extremely hypothetical) people collectively stop externalising or attributing meaning and significance to certain differences, similarities, re-occurring interactions or practices and delimiting the social world according to different parameters, all the listed types of groups will disappear, at least in the 'form' we know them today. Yet individuals tend to perceive the way in which the social world is demarcated as if it is 'natural', which paradoxically nourishes the way world is delimited and attributes significances and meanings accordingly.

As to the latter, the Blackwell Encyclopaedia of Sociology defines an in-group as 'a social unit an individual belongs to, interacts with, and shares a sense of "we-ness" with'.[672] Following this generic definition, in-group perception in the context of this study can be understood as individuals perceiving themselves as a collection of people who have something alike in racial, religious, national or ethnic terms and believe that what they have in common – whether it is a certain set of relations, similarities, traits, interests or permutations of them – is significant in one way or another in terms of their identity or relationships with others. An out-group, on the other hand, is defined as 'a social unit or group of people that an individual neither belongs to nor identifies with'.[673] Once again, following this encyclopaedic definition, the out-group perception of a national, racial, religious or ethnic group can be thought of as outsiders identifying a set of individuals as a unit according to certain characteristic features, relations or interests and altering their behaviour in their interactions accordingly.[674] Both in-group

---

[671] Simmel aptly remarks that 'the relations of human being to each other are so complex, so ramified, and so compact that it would be a wholly hopeless task to resolve them into their elements, and we are consequently compelled to treat them as unities rather than self-existing structures.' Simmel, 'Persistence of Social Groups', 666. See also Judd, *Critical Realism and Composition Theory*, 51.

[672] M McCallion, 'In-Groups and Out-Groups', in The Blackwell Encyclopedia of Sociology edited by G. Ritzer (2007) available at <https://doi.org/10.1002/9781405165518.wbeosi046> accessed on 19 May 2018.

[673] Ibid.

[674] As Fredrik Barth notes 'The identification of another person as a fellow member of an ethnic group implies a sharing of criteria for evaluation and judgement. It thus entails the assumption that the two are fundamentally 'playing the same game', and this means that there is between them a potential for diversification and expansion of their social relationship to cover eventually all different sectors and domains of activity. On the other hand, a dichotomization of others as strangers, as members of another

and out-group perceptions are always ongoing achievements where group boundaries are collectively generated, affirmed and employed to mark differences between 'us' and 'them'.[675] In other words, there are no fixed boundaries, they are always changing and only relatively stable.

In the field of social psychology, the works of Henri Tajfel and John Turner reveal some valuable insights regarding how individuals evaluate others as 'in-group' and 'out-group' members and ascribe significance to this distinction. Accordingly, this process involves three steps: social categorisation, social identification and social comparison. As to the first, human beings have an intrinsic tendency to objectify stabilities in an always-changing world and then categorise these to be able to survive and function. According to Tajfel and Turner, our way of acting in the social sphere is no different, which leads us to objectify certain similarities as well as reoccurring phenomena, events or acts and then categorise them in one way or another in order to achieve some convenience in our relationships and understandings. The second step, social identification, refers to the practice of adopting the identity of the collective one has categorised oneself as belonging to, which creates an emotional significance for identification with the group and binds one's self-esteem, at least to a certain extent, to group membership. Finally, social comparison refers to the phenomenon whereby once an individual categorises and identifies themself as part of a group, s/he tends to compare her group with others.[676]

---

ethnic group, implies a recognition of limitations on shared understandings, differences in criteria for judgement of value and performance, and a restriction of interaction to sectors of assumed common understanding and mutual interest.' F. Barth, 'Introduction' in *Ethnic Groups and Boundaries: The Social Organization of Culture Difference* edited by F. Barth (Illinois, Waveland Press Inc., 1969) 15.

[675] Ibid. See also regarding the centrality of cognition in the construction of identity Brubaker, *Ethnicity Without Groups*, 17, 18, 64 ff.

[676] H. Tajfel and J. Turner *An integrative theory of intergroup conflict. The social psychology of intergroup relations?* (Oxford: Academic Press, 1979) 47; H. Giles and J. Giles, 'In-Groups and Out-Groups' *in Inter/Cultural Communication: Representation and Construction of Culture* edited by A. Kurylo (California; Sage Publication, 2013) 141 ff. Further studies of Tajfel have revealed that members tend to minimise the perception of differences between in-group members and in a way 'imagine' the group as a socially homogenous entity, while maximising the difference between their group and out-groups. Moreover, members also show a tendency to favour in-group over out-group and focussing on positive experiences that the in-group brings, while negative experiences tend to be remembered in respect of the out-groups. H. Tajfel "The achievement of group differentiation" in *Differentiation between*

In-group and out-group perceptions built on these bases play a major role not only in shaping individuals' social being, but also in the creation and constant re-creation of a relatively persistent form of relatedness among individuals by reinforcing each other.[677] Indeed, the boundaries and distinctive characteristics of most, if not all, social groups are determined through the configuration and the perception of relations and dispositions (that is, collectively positioning an affiliated group against others, and vice versa).[678] This, however, does not change the fact that each unity and its boundaries and characteristics 'change' moment by moment, albeit at a relatively slow pace, because the collective perceptions and underlying relations are in a constant process of 'becoming'. This fact usually comes most strikingly to the surface when a comparison is made between two states of unity in relatively distant timeframes. For example, only a few similarities can be found, say, between the Turkish nation in 1818 and 2018, from its language, to components, to spatial limits, to the way the most basic relations take place. Nevertheless, these unities have a particular 'form', which is currently labelled as a 'nation', and the observable continuity on the historical spectrum leads us to historically individuate the entire process as the Turkish nation and includes essentially different social configurations under the guise of the same identity.

Overall then, and oversimplifying somewhat, we can infer from our experiences and historical evidence that the national forms in which individuals grow into a unity have emerged as a result of certain needs, such as protection, social order or maximising the

---

groups: Studies in the social psychology of intergroup relations Edited by H, Tajfel, (London: Academic Press, 1978), 77–100; H. Tajfel, "Social identity and intergroup behavior", 13 Social Science Information (1974), 65–93.

[677] In his examination on ethnic groups and boundaries, Barth emphasises the naivety of assumption that each tribe and people has maintained its culture through a bellicose ignorance of its neighbours. Rather he observes that empirical studies proved two important things: (i) 'ethnic distinctions do not depend on an absence of mobility, contact and information, but do entail social processes of exclusion and incorporation whereby discrete categories are maintained despite changing participation and membership in the course of individual life histories.' (ii) '[E]thnic distinctions do not depend on an absence of social interaction and acceptance, but are quite to the contrary often the very foundations on which embracing social systems are built. Interaction in such a social system does not lead to its liquidation through change and acculturation; cultural differences can persist despite inter-ethnic contact and interdependence'. Barth, 'Introduction', 9, 10.

[678] 'One society distinguishes itself from others by the way in which its relations are qualified and by the way in which the networks of relations that define it are configured.' Donati, 'Manifesto for a critical realist relational sociology', 91.

obtainment of resources. Similarly, it can be argued that, alongside sharing the same beliefs, needs like practising rites, protection from persecution and spreading a belief system can be thought of as initial sources of religious forms of unity and their distinctive practices and identities. Ethnic groups have an even more 'organic' basis, given that while human beings have an intuitive need to communicate and exist together for survival and means, relations or practices, which later become symbolic markers of a culture, and social norms to be followed by its members – such as language, traditions or dress codes – have arisen to better facilitate satisfying these needs. To re-emphasise, however, all the relationships, practices or means that emerge in such a manner do not automatically lead to the emergence of a distinct 'social whole', this only occurs when individuals externalise and persistently individualise a particular process of unity through both in-group and out-group perceptions.[679]

Racial groups are omitted from this analysis because they have a much more artificial basis. Racially conceived identities, practices or traditions do not usually initially rely on any distinctive in-group social relation or individual needs. Rather, they come into 'being' only after arbitrarily or socio-historically created meaning and significance are attributed to certain physical traits.[680] To exemplify, initially there was no 'black' identity, practices or traditions among the slaves brought to the U.S. All these emerged

[679] Therefore, the differentiation has an objective dimension because the underlying 'reason' to which the specific meaning and significance collectively attributed has its own life outside of any particular individual's mind-set (e.g. phenotypical features, traditions, linguistic rules or stories about the group's origin). Yet at the same time, it has a subjective dimension in that these reasons do not dictate de facto social groupings or the nature of social relations. Rather, the collective convictions and relations of individuals determine the kind of commonalities and differences that the sense of 'we' and 'them' will be built on. To put in perspective, whilst the existence of different skin colours has an undeniable reality, the scope of 'whiteness' or 'blackness' in a particular situation is completely related to the way relations and perceptions are structuralized. During the apartheid in South Africa, for example, mixed race children were perceived as 'black'. This had nothing the do with the fact that there is an observable difference in skin colours. In a different social context, these children could have been defined as members of the white group depending on the way collective perceptions are developed and structuralised.

[680] In should be noted that some scholars like as Marilynn Brewer argues 'ingroup identification is independent of negative attitudes toward outgoups and that much ingroup bias and intergroup discrimination is motivated by preferential treatment of ingroup members rather than direct hostility toward outgroup members.' M. Brewer, 'The Psychology of Prejudice: Ingroup Love or Outgroup Hate?', 55 Journal of Social Issues, 429. See also C. Lingaas, 'Imagined Identities: Defining the Racial Group in the Crime of Genocide', 10 Genocide Studies and Prevention (2016).

as a result of collective relations and in- and out-group perceptions first based on the practice of slavery, and later discrimination. As Tajfel observes in this respect,[681] 'blackness' only later gained an ethno-racial dimension. Indeed, a distinct black culture was embraced through such movements as 'black is beautiful' and some traits or practices (music genres like rap or jazz, or hairdos like afro) began to be associated with an Afro-American identity. Tajfel calls this process of building cultural practices and markers of racial identification 'social creativity', which implies a cognitive process whereby low-status group members either modify their perceptions of the in-group's standing by introducing alternative dimensions of comparison to positively distinguish the in-group from relevant out-groups or 'reevaluate existing group characteristics to enhance in-group perceptions'.[682] In short, racial groups and related practices and traditions emerge as a result of arbitrarily or socio-historically drawn boundaries around the phenotypical traits of individuals.[683]

The theoretical framework laid out thus far has elucidated the creation, externalisation and boundary setting of the collectives – which will be central for our discussion on the determination of the relevant 'whole' and 'part' – as well as how their overarching identities persist despite the configuration of an underlying unity and its boundaries, and thus emergent properties are in constant, albeit relatively slow, change. That being said, some important aspects of the lived experience still require explanation, namely the mechanisms that ensure the relative stability of configuration and, connectedly, the ontological basis of these unities' irreducible reality and distinct value.

4.1.3. Irreducible Reality and Relative Stability of the Protected Groups

To begin with the reality of the protected groups, the present study argues that a relational realist approach[684] can offer the most nuanced explanation for the existence

---

[681] Tajfel, 'The achievement of group differentiation', 77–100.

[682] Ibid.

[683] See also Brubaker, *Ethnicity Without Groups*, 55-60.

[684] As opposed to the 'radical' versions of relational thinking, which regard only social relations as the analysis of unit and abandon the substance. See for elaboration C. Powell et al. 'Introduction' in *Conceptualizing Relational Sociology: Ontological and Theoretical Issues* edited by C. Powell and F. Dépelteau, (New York; Palvgrave MacMillian, 2013), 12; M. Emirbayer, 'Manifesto for a Relational Sociology', 103 The American Journal of Sociology (1997), 282 cf.; Prandini, *Relational sociology,* 6.

and persistence of the protected groups. Realism, in the context of the study, refers to the idea that 'social wholes', most relevantly the protected groups, are neither fictional entities nor ontologically reducible to the individual level. Rejecting the former means that these entities have objective truth, which, at least to a certain extent, exists independently of our subjective perceptions about them.[685] Rejecting the latter means that these entities are not mere shorthand for some individualistic phenomena and thus cannot be explained away by ontological reduction. On the other hand, relational thinking in the present context refers to the idea that the social entities in question cannot be thought of as 'things' with a fixed and constant essence, rather they are entities that are continually re-constituted, re-shaped and re-organized by the ongoing flow of reciprocal relations of not only their members, but also the entire society. In this way, then, the study distances itself from ascribing a fixed essence to social objects.[686]

To elaborate, even though 'social wholes' emerge through the objectification of a process of unity and particular meanings attributed to it – as the previous sub-section established, such unity constantly produces emergent properties; properties of a whole that are not present in its parts, which effectively blocks the possibility of eliminative reduction.[687] Indeed, as Walter Buckely notes 'if social groups are not "real entities" then neither are individual organisms, cells, molecules, or atoms, since they are all 'nothing but' the constituents of which they are made'.[688] Properties like culture or language emerge and transform, moment by moment, as a result of interactions and

---

[685] The study therefore distances itself from the radical constructionism that largely eliminates the distinction between ontology and epistemology by asserting that 'the real is what knowledge indicates as real'. N. Luhmann, *Social Systems*, translated by John Bednarz et al. (California: Stanford University Press, 1984), 479.

[686] As is recognized by the recent literature, relational approach and realism are not necessarily mutually exclusive. See for example Donati, 'Manifesto for a critical realist relational sociology', 91. As Christian Smith puts, 'All that exists and every way it works requires relations and substances' C. Smith, *What is a Person?':Rethinking Humanity, Social Life, and the Moral Good from the Person Up* (Chicago: University of Chicago Press, 2010), 232. Dave Elder-Vass also argues that the modest version of social constructionism does not conceptually contradict the critical realist understanding. Elder-Vass, *The Social Construction of Reality,* 14.

[687] Elder-Vass, *The Social Construction of Reality,* 17.

[688] He further adds that 'But this 'nothing but' hides the central key to modern systems thinking – the fact of organization of components into systemic relationships'. W. Buckely, *Society: A Complex Adaptive System* (Durham: Gordon and Breach Publishers, 1998), 36.

states of mind that create, preserve and change the unity. Yet, they cannot be explained away by reduction to any constituent properties or states of mind, or to a mere aggregation of them, because these properties are not just the sum of the impacts constituting parts would have if they were not configured or did not interact in those particular ways in the course of process. Instead, the process of unity as such is the locus of those temporally and spatially limited emergent properties.

Evidently, this conception of reality is emergentist. *Emergence* refers to the idea that a 'whole' has causal powers and properties[689] that are not possessed by its parts, which endows an ontological autonomy on the whole in relation to its parts.[690] According to this view, then, 'everything in our world is, or is made up of, emergent entities',[691] which are constantly produced and reproduced through the relational organisation of pre-existing emergent entities.[692] In sharing this perspective, Paul Sheehy notes that '[t]he existence of a group is contingent on patterns of interrelations being such that the individuals are united into whole or body [not in a functional sense though], which comes to exert an impact on the world – typical amongst which is an impact on the members themselves'.[693] Thus, the notion of group has to be conceptual, which means it cannot be totally perceivable, but only empirically identified through its causal

---

[689] A causal power or emergent property is a capability of an entity to have a certain sort of causal effect on the world in its own right – an effect that is something more than the effects that would be produced by the entity's parts if they were not organised into this sort of whole.' Elder-Vass, *The Causal Power of Social Structures,* 66. According to Roy Bhaskar, the founding father of critical realist thinking, the generative mechanisms are responsible for the distinct causality and emergent properties of higher-level entities. R. Bhaskar, *A Realist Theory of Science* (Oxon: Routledge, 2008 [1975]), 45-56. The generative mechanisms can be defined as 'processes in which the parts of the entity interact to produce its powers. Such mechanisms are particular to specific kinds of entities because they depend on the entity having a particular kind of parts, organised in such way that the process that produces the power concerned can occur. Mechanisms, in other words, depend on the composition and structure of the entities concerned'. D.Elder-Vass, *The Social Construction of Reality*, 17.

[690] Bhaskar, *The Possibility of Naturalism,* 37-44, 97-107.

[691] D. Elder- Vass, "The emergence of social structure and the question of naturalism", 4 available at < http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.534.2419&rep=rep1&type=pdf> accessed on 01 May 2018.

[692] Elder-Vass, *The Causal Power of Social Structures,* 4.

[693] Sheehy, *Reality of Social Groups*, 100.

effects.[694] Moreover, as David-Elder Vass remarks, while parts should include human beings for an entity to be 'social', the parts of these social wholes may not be limited to humans.[695] This becomes particularly important in genocide studies when we think of groups as indigenous people[696] or symbolic markers that play a significant role to create a sense of we-ness and drawing boundaries with out-groups.[697]

That said, unlike most organic entities, social groups are produced by what DeLanda calls *relations of exteriority*, which means that 'being part of the whole' does not fully define the characteristic of parts, which can survive outside the unity as well. That is to say, 'parts retain a relative autonomy, so that they can be detached from one whole and plugged into another one entering into new interactions'.[698] However, in our specific research topic, being forcefully deprived of a whole, with which individuals define themself and establish and form their personality, value system, language and many other aspects of their life under the influence of it, creates significant harm for those people, even if they preserve their physical existence. This is, therefore, the ontological basis of what Card and May call status and identity loss.[699]

---

[694] Bhaskar, *The Possibility of Naturalism*, 49.

[695] Elder-Vass, *The Social Construction of Reality*, 21.

[696] Mohammed Abed, for example, asserts that many indigenous groups are 'territorially bounded'. For him, therefore, removing these groups from their land or to control their interaction with it is inevitably a genocidal practice. M. Abed, 'Clarifying the Concept', 37 Metaphilosophy (2006), 326.

[697] All these may bring the questions about reification. If reification, as a fallacy, means misplaced reality, this is clearly not the case here. Being readily unperceivable does not make social wholes any less 'real' than atoms or magnetic fields from an emergentist ontological stance. Elder-Vass also considers another conception of reification in relation to critical realist account as follows: 'Reification, however, is sometimes also taken to imply that in treating something as a thing we commit ourselves to the belief that it is static or unchanging and to a denial of the causal significance of its parts or of the agents that contribute to its causal significance. But neither of these is true of the argument of this book and neither, in any case, reflects an accurate understanding of the nature of things. Social structures, like many other things, are far from static and like other things with causal powers, their causal powers always depend on the interactions between their parts. Social structures are indeed things, but they are dynamic things whose powers depend on the activities of people.' Elder-Vass, *The Causal Power of Social Structures*, 66.

[698] M.DeLanda, *Deleuze: History and Science*, (New York: Atropos Press, 2010) 3.

[699] Card, 'Genocide and social death', 63-79; May, *Genocide: A Normative Account*, 94.

As a relational realist perspective thus ontologically substantiates the irreducible reality of these social entities as a locus of certain goods – e.g. language or culture, it needs to be explained what is the source of relative stability of groups and how they can be causally efficacious over individuals? These questions are central to be able explain the distinct moral wrong of genocide and require a twofold answer. First of all, from a relational perspective, and in more general terms, only the present ever actually exists and all 'casual effects of the past must work by affecting the present shape', whether in the direction of maintaining the status quo or change.[700] As Charles Hartshorne puts it, '[t]he future, for all life, is what the past implies plus step by step decisions, none of which is concretely given until it has actually been taken… '.[701] This idea, which will be essential to our explanation of immorality of genocide in the next sub-section, indicates that the past shapes possibilities for the future, by enhancing or restraining them from certain aspects on both the individual and collective scales, through forces such as 'physical or biological objects, memory and deliberate record retention'.[702]

For individuals, this process is rather straightforward since body and mind carry forward 'records of the past in quite literal ways'.[703] For social wholes, on the other hand, the situation is more complex. According to Andrew Abbott, the historicality of social entities has various different aspects, such as (i) corporeal which refers to buildings, physical infrastructure, cities and so on; (ii) memorial, which refers to the presence of memory in the minds of members; and (iii) recorded, which refers to 'records embodying the past in the form of writing, film, digitization, or some other form of long term storage'.[704] This very 'historicality' is essentially a conceptual, psychological and physical mapping that influences the moment-by-moment decisions of individual members through their relations with their environment. But before elaborating on that, while such a list locates the physical and mental sources of reproduction of the social entity and its 'goods', it does not explain how the normative tendency to reproduce works. In other words, even though we may accept that 'goods'

---

[700] Abbott, *Processual Sociology,* xiii.

[701] C. Hartshorne, *Creative Synthesis and Philosophic Method*, (La Salle, ILL: Open Court 1970). 92-94.

[702] Abbott, *Processual Sociology,* 24.

[703] Ibid. Also see A. Abbott, 'Historicality of Individuals', 29 Social Science History (2005).

[704] Abbott, *Processual Sociology,* 26.

like culture or language are 'embodied' in this way and present themselves to individuals, how can they be causally efficacious? What exactly prompts individuals to reproduce (or transform) the underpinning relations that produce the entity and its goods?

Although the author of this study does not share all the various aspects of it, the account of Roy Bhaskar is instructive in this respect. According to the *transformational model of social activity* offered by Bhaskar:[705]

> Society is both the ever-present condition (material cause) and the continually reproduced outcome of human agency. And praxis is both work, that is, conscious production, and (normally unconscious) reproduction of the

[705] See A. Collier, *Critical Realism: An Introduction to Roy Bhaskar's Philosophy* (London and New York: Verso, 1994), 142-145. In constructing this model, he considers both Weberian and Durkheimian understandings as useful but erroneous by arguing that: 'Society does not exist independently of human activity (the error of reification [of Durkheim]). But it is not the product of it (the error of voluntarism [of Weber]). That said, Bhaskar agrees with Emile Durkheim in that structure always precedes human agency and constitutes the material causes of individuals' action; that is, he concedes the coercive power of structure on the individuals. Bhaskar, *The Possibility of Naturalism,* 37 See E. Durkheim, *Suicide* (London: Routledge & Kegan Paul 1952 [1897]), 38. Indeed, it is simply a fiction to think that human beings can exist autonomously given that even before birth their existence depend their relatedness with other individuals. Powell, *Barbaric Civilization,* 39. A very simple example of this relatedness is that to be able to speak one needs language. Yet language is not a property of individuals but rather belongs to a whole as such. That is, our 'very subjectivity is formed out of the practical and taken-for-granted set of skills, attitudes, understandings by which each of us conducts our life, and these develop only through our relationships with each other. The essential human condition is not being, but being with others.' Ibid. A human being turns into a social agent always within and through interactions. That means, individuals are in fact 'an observational scientific reduction. 'They born and live only in groups, and the very transformation into human beings is completely shaped by socialization processes.' Prandini, 'Relational sociology', 7. Yet, on the other hand, Bhaskar also takes Max Weber's caveat that the structures of society must not be reified, but operate through the mediation of human agency and social activity. Bhaskar, *The Possibility of Naturalism,* 35. Bhaskar also rejects the dialectic relationship model that offered by Peter Berger which advances that society 'produces the individuals, who produce society, in a continuous dialectic'. Thus it describes agent and structure as two moments of the same process, and simply rejects their autonomy from each other. P.Berger and S.Pullberg, 'Reification and the Sociological Critique of Consciousness', 35 New Left Review (1966) and P.Berger and T.Luckmann, *The Social Construction of Reality* (London: Penguin, 1967). For Bhaskar, however, this view is misleading, as is leading to acceptance that 'encourages, on the one hand, a voluntaristic idealism with respect to our understanding of social structure and, on the other, a mechanistic determinism with respect to our understanding of people.' Thus, Bhaskar concludes that while trying to avoid them, this model falls into trap both reification and voluntarism. See for his extensive discussion. Bhaskar, *The Possibility of Naturalism,* 34-39.

> conditions of production, that is society. […] [P]eople do not create society. For it always pre-exists them and is a necessary condition for their activity. Rather, society must be regarded as an ensemble of structures, practices and conventions which individuals reproduce or transform, but which would not exist unless they did so.[706]

Bhaskar makes it clear that he offers this model in relation to the entire 'society', not regarding any social groups.[707] Indeed, while it is plausible to think that society is ever-present in the sense that the moment interaction between individuals starts 'society' emerges and all other individuals are born into a 'society' with already-existing norms, ways of living and so on, social groupings cannot be naturalised, as they are ultimately constructed. But once they (or perhaps more apt, underpinning relations and practices) are constructed, objectified and embedded, all other principles appear to be applicable to the protected groups as well. That is, the conscious activity of agents, for the most part unconsciously, reproduces and transforms these particular social unities.[708] The relative stability of groups is due to the very nature of how the reproduction process unfolds.

To concretise, we are born with certain physical traits and always thrown into some linguistic, social, cultural and political contexts and influenced by them – one way or another, consciously or unconsciously. A juvenile learns her mother tongue or follows certain cultural practices not because she desires to be a member of that particular ethnic group, but simply to be able to communicate and survive. She, therefore, endorses and enforces certain norms (e.g. linguistic, dress code) under the normative influence of their immediate social circle and does not ascribe any particular meaning to these practices. That lasts, of course, until recognising that some of the practices s/he follows are ascribed specific social importance both by those who follow the same practices as well as outsiders in their relations. Similarly, a black child in the United States can perceive that her skin colour is different from some other people, but only after coming

---

[706] Bhaskar, The Possibility of Naturalism, 36,38.

[707] Bhaskar criticizes Durkheim and others for equating social groups and society. Ibid. 31-34.

[708] Bhaskar's example to this phenomena goes as follows 'people do not marry to reproduce the nuclear family or work to sustain the capitalist economy. Yet it is nevertheless the unintended consequence (and inexorable result) of, as it is also a necessary condition for, their activity.' Ibid. 38.

across in- and out-group social practices and relations that impute meaning and have consequences for this difference can s/he start to conceive 'blackness' as an identity.

All these require us to acknowledge that our very spiritual being is unavoidably moulded under the normative influences exerted by the social unities mediated through the members of the groups. We are subject to such normative influence because of the roles that we are assigned in social life – most of the time unintentionally (particularly in respect of the protected groups). These roles, which may be loosely likened to Simmel's 'social types',[709] can be exemplified as 'citizen', 'believer', 'African-American' and so on. Each role has different content and characteristics, depending on the 'whole', and function as a proxy for individuals and the social whole in the reproduction of relations and perceptions in the process of continuous reproduction and transformation of unity.[710]

If one is born into, say, a Turkish family, it means that one is instantaneously assigned the role of 'Turkish' and will immediately start to feel the influence of relevant social norms – from how one is fed and develops a palate; to linguistic norms that need to be followed; to dress code and so on. These social norms and practices are imposed on a member by their immediate circle (e.g. encouragement to pronounce a word in a certain way or to look and act in a certain manner and so on), because they believe or think that following these norms and practices is right or desirable as a member of the social whole. However, so-to-speak 'rightfulness' or 'desirableness' does not merely comprise the personal opinions of the immediate circle. Rather, these are crystallised social norms, practices or relations that come into being as a compromise among individuals over time, and these are affected by elements such as historical factors; spatial proximity; the reciprocal interaction between in- and out-group perceptions; forms of political association; the impact of leader figures and so on. Thus, exercising social influence cannot be merely considered as individuals acting in their individual capacity, rather they also act as 'representatives and intermediaries' of the unity in which they are externalised.[711] Indeed, if a member of a group deviates from collective norms endorsed

[709] Simmel, *Georg Simmel on Individuality and Social Forms*, 141.

[710] Ibid.

[711] Elder-Vass, *The Social Construction of Reality*, 23-26.

by the group, such behaviour will not only be disapproved of by other members, but they will most likely exercise social pressure to make that person follow those particular norms.[712]

These indicate a circular relationship in terms of the constant reproduction of a 'social whole', because members believe that there is a collective of which they are part and they hold normative beliefs or a disposition that a member of the group should endorse and enforce certain norms and practices; yet because a set of individuals think in a similar manner, the social whole can exist and exert influence on individuals. Expressed in relational terms, repeated interactions between individuals give rise to 'conventions' (norms), which in turn improve co-ordination and social equilibrium.[713] From this perspective, ideas that form the content of a national, ethnic, racial or religious 'culture' are in fact normative beliefs that exist as the mental properties of individuals, and what makes these ideas a collective culture is their institutionalised endorsement and enforcement and the process of *objectification.*[714]

Furthermore, the members do not necessarily need to have complete knowledge about the extent of the actual group. The actual size of, say, an ethnic group (namely people who perceive themselves as part of the group and fall under its normative influence) and an imagined group in someone's mind may be different. While such delusions do not change the fact that unity exists, this poses an interesting dilemma in relation to the

---

[712] In *The Rules of Sociological Method*, Durkheim explains this as follows: 'the public conscience exercises a check on every act which offends it by means of the surveillance it exercises over the conduct of citizens, and the appropriate penalties at its disposal. In many cases the constraint is less violent, but nevertheless it always exists. If I do not submit to the conventions of society, if in my dress I do not conform to the customs observed in my country and in my class, the ridicule I provoke, the social isolation in which I am kept, produce, although in an attenuated form, the same effects as a punishment in the strict sense of the word. The constraint is nonetheless efficacious for being indirect. I am not obliged to speak French with my fellow-countrymen nor to use the legal currency, but I cannot possibly do otherwise. If I tried to escape this necessity, my attempt would fail miserably. As an industrialist, I am free to apply the technical methods of former centuries but by doing so, I should invite certain ruin. Even when I free myself from these rules and violate them successfully, I am always compelled to struggle with them.' E. Durkheim *The Rules of Sociological Method and Selected Texts on Sociology and its Method*. Edited by S. Lukes and translated by W. Halls, (The Free Press. New York-1982, first published in 1895), 2-3.

[713] Prandini, 'Relational sociology', 8.

[714] Elder-Vass, *The Social Construction of Reality*, 44.

crime of genocide. As historically exemplified, in-group and perpetrators' perceptions do not precisely match in cases of genocide. For example, during the Holocaust, some individuals of the Catholic faith who adhered to German traditions and language were labelled Jews due to the identity of their grandparents and consequently sent to labour camps. As May notes, it would have absurd consequences only to consider out-group perception, since perpetrators may entirely imagine a group that does not exist at all, and considering such a case as genocide would undermine the group-centric approach of the Convention by including an 'ordinary' mass atrocity under this rubric.[715] The thesis submits that, in such circumstances, people who are not members of the victim group cannot be considered victims of genocide, since the main protected value of the crime is the unity. That is to say, we cannot talk about genocide if the perpetrators made a substantial mistake and, say, targeted a million people, assuming they were members of a particular group, while in reality 'only' a handful of victims defined themselves as group members. A meaningful conformity between in and out-group perceptions is necessary to genocide to occur, as long as our focus remains as the protection of social unities.[716]

Another interesting issue arises at this point regarding whether an initially arbitrary selection by the perpetrators may give rise to a protected group. This appears less likely in terms of ethnic, religious or national groups because of the way these groups emerge. Yet the creation of racial groups may be entirely initiated by the perpetrators. Due to their very 'artificial' nature and definition, the relations that underpin racial groups may be very simple, such as sharing the same life chances. Indeed, if the perpetrators in a country define, say, blue-eyed people as the victim group, that will lead to a very primitive connection between these people as they will suddenly start to share the same

[715] May, *Genocide*, 46.

[716] Ibid. This logic also applies to the situations in which the individuals deny identifying themselves as a part of a group, yet follows the most central norms affiliated to that group. This may be the case particularly in terms of ethnic groups. One may, say, can only speak Turkish but still insist on defining herself as Kurdish due to her ancestral heritage. Or an individual may be a child of, say Spanish father and French mother, and whilst her primary language is French, she may nevertheless define herself as Spanish. I will again submit that in such circumstances we cannot consider that individual as a victim of genocide against Turkish or French ethnicity, due to the aforestated reasons.

life chances and, given the impact of out-group perceptions, they will unavoidably develop in-group perceptions on the basis of race.

If we return to the conceptual analysis, it should be noted that the reproduction process does not take place in an automated way,[717] which means there is no mechanicistic relationship between the normative effect of the entity and the individual's reproduction of relations or practices. The 'social whole' can only exert influence on individuals by virtue of its history to follow certain practices,[718] and the strength of this influence varies according to the nature of the collective. Individuals can always refuse to follow the norm. Obviously, rejecting a norm that the social role requires will probably have social consequences, but an individual can always make that choice. This is, in fact, becoming more common in our contemporary society where the division of labour prevails, since an individual is a member of many unities that affect one's being. Moreover, collective deviance from certain norms would transform the properties of the unity.

In short, then, as Otto Bauer puts it, a protected group is 'a community of character that has grown out of a community of fate'.[719] They are not 'things' or organisms with definitive structures, nor are they fictional and their existence can be explained away through reduction to individuals' properties and states of mind. The protected groups are entire processes that exhibit emergent properties and arise and persist through two reciprocal phenomena. First is the conception of members and outsiders that there is a unity among a collection of people who have something in common in racial, religious, national or ethnic terms, and what is in common is significant.[720] Second, through the crystallisation and objectification of interactions among the members of such unities there emerges a normative belief that certain practices, rules or ways of acting must be followed as a result of the social role assigned to them as group members. By constantly reproducing and transforming these practices, interactions and social norms the 'social

---

[717] That is, social entities do not exist entirely independent of human consciousness and mechanically creates self-producing patterns of action. Powell, *Barbaric Civilization,* 8.

[718] Elder-Vass, *The Social Construction of Reality*, 22.

[719] O. Bauer, The Question of Nationalities and Social Democracy, trans. Joseph O'Donnell, ed. Ephraim J. Nimni (Minneapolis: University of Minnesota Press, 2000), 7.

[720] Simmel, 'Persistence of Social Groups', 665.

whole' not only becomes able to exert influence, but in-group perceptions are also reinforced and group characteristics gain relative stability.[721] In this context, and as is further elaborated in the next chapter, while group destruction is a process that ultimately aims to put an end to the continuation of a listed type of dynamic figuration, the crime of genocide marks the very final stage of this process, where acts of physical and biological destruction are used as one of the main means to achieve this end.

4.1.4. Immorality of Genocide

Moving beyond substantialist thinking and recognising the complex and contingent reality of the protected groups facilitates avoiding unduly reducing the moral harm of genocide to a singular dimension by overlooking other experienced harms or mystifying the evil of genocide by referring to metaphysical concepts. On established theoretical foundations, it can be stated that the uniqueness of the moral harm of genocide stems from its threefold nature. The first and most obvious harm that emerges from the crime is the physical and biological harm inflicted on victims. As is evident, while the destruction of 'social wholes' without committing physical and biological acts of destruction is usually a viable option,[722] what separates genocide from these other ways is it being a total attack. This point was also emphasised by Lemkin who argued that genocide cannot be equated with 'denationalisation'.[723] The second aspect of genocidal harm is the identity and status loss of survivors, which has already been extensively elaborated by various scholars such as Card,[724] May[725] and Louise Wise.[726]

---

[721] This conception comes fairly close to the one which is proposed by Michael Crook, according to whom, the protected groups can be best conceived as '"totalities" made up of many determinations and relationships dialectically in a constant process of 'becoming', in German meaning both "coming to be" and "ceasing to be". [...] Genocide is therefore the forcible disruption or interdiction of the process of cultural change or reproduction of the *social figuration'*. Crook, 'The Mau Mau Genocide: A Neo-Lemkinian Analysis', 21. For a similar view see Powell *Barbaric Civilization: A Critical Sociology of Genocide*.

[722] L. May, 'How is Humanity Harmed by Genocide?', 10 International Legal Theory (2004), 2.

[723] Lemkin, *Axis,* 80.

[724] Card, 'Genocide and social death', 63-79.

[725] May, *Genocide: A Normative Account*, 94ff; See also in general May, 'How is Humanity Harmed by Genocide?'.

On the other hand, the third facet of genocidal harm is largely overlooked by the individualistic tradition due to its rejection of social wholes being the locus of certain distinct goods, while the collectivistic tradition has not been able to ontologically substantiate it. Put straightforwardly, the crime of genocide, in addition to the aforementioned harms, causes an unnatural rupture in the process of humanity's social evolution by destroying a significant number of possibilities for the realisation of a selection of creative potentials that could have occurred if the particular form of relatedness or identity had continued to follow its natural course. Lemkin himself, in fact, constantly hovered around this idea, yet could not fully justify it in an exact manner. Indeed, the cosmopolitanist ideals of Lemkin were underpinned by his acceptance that the interactions between different 'ways of life' enrich the lives of individuals as well as bringing harmony to society. For Lemkin, common morality and spiritual development could be achieved by respecting our differences and peaceful interactions between different ways of life. From this perspective, and under the influence of the writings of Bauer and Karl Renner,[727] Lemkin assumed that the ideal of preserving goods like culture or language might be assured by the protection of national-cultural autonomy.

The key point here is that Lemkin rejected the idea that a person can only belong exclusively to a single overarching and fixed organic national, religious or any other identity. In other words, in the Lemkinian view, every individual has their own unique richness owing to them being moulded by the influence of various social groups. In that sense, he considered groups themselves as substantial sources of spiritual development and uniqueness as individuals.[728] For Lemkin, the tragedy of genocide is that it aims to eliminate entire 'groups from society; to engineer a future free of particular groups; to destroy physical, social and cultural imprints of the group; and to ensure that the

---

[726] L. Wise, 'Social death and the loss of a 'world': an anatomy of genocidal harm in Sudan', 21 The International Journal of Human Rights (2017), 838-865.

[727] Irvin-Erickson, *Raphael Lemkin and Concept of Genocide*, 59-65.

[728] From this perspective, groups constantly evolve and at a point of time may dissolve or emerge with (or swollen by) another group. As long as these processes do not happen through force and as a result of a purpose of destroying the group, they are not subject of the genocide law.

individuals of that group, their achievements, their arts, and their ideas would be forever unremembered'.[729]

However, even though Lemkin made constant references to such concepts as loss of culture, cultural diversity or the spiritual richness of humankind[730] – just like UN Resolution 96(1) which mentions that genocide 'results in loses to humanity in the form of cultural and other contributions represented by these human groups' – his explanation of what these harms actually refer to was not far from the romantic nationalism that he in fact aimed to position himself against.[731] This is because understanding groups as substantial structures or organisms necessarily leads to the counter-factual implication that there is an unchanging essence or particular function that underpins the value and existence of the social whole and makes it worthy of preservation as such. This suggests almost a metaphysical representation of culture and unintentionally essentializes identities, just as perpetrators do.

The ontological framework offered here liberates the Lemkinian approach from such a paradox. Once we view the protected groups as historically individuated and dynamic processes, culture or any other crystallised norms or practices that underpin such a social whole in fact refer to the historicality of the group, which does not totalise members, but rather enhances or restrains them when, step by step, deciding their future. In other words, the culture or normative influence of a group that is imposed on its members through the elements listed by Abbott is being constantly integrated into events in the present and is, in turn, taken up by future events in the process of creative advancement. Putting it in slightly less theoretical terms, social wholes constantly provide interpretative schemas, which are a series of mental and material 'filters' for their members to rely on and understand and respond to events. The choices individuals make are influenced, for better or worse, by these 'filters'. Understanding the

---

[729] Irvin-Douglas, *Raphael Lemkin and Concept of Genocide,* 17.

[730] Lemkin, 'The Concept of Genocide in Anthropology' NYPL, Reel 3, Box 2, Folder 2; Lemkin, 'Description of the Project' NYPL, Reel 3, Box 2, Folder 1.

[731] D. Irvin-Erickson, *The Life and Works of Raphael Lemkin: A Political History of Genocide in Theory and Law*, Doctoral Dissertation, The State University of New Jersey, available at <https://rucore.libraries.rutgers.edu/rutgers-lib/45631/PDF/1/play/> accessed on 31 March 2019, 335-337.

immorality of genocide in these terms successfully omits any communitarian connotation that may undermine Lemkin's introduction of the law against genocide as a part of the 'human rights project' of the post World War era.[732]

To sum up, then, the destruction of a social entity extinguishes or significantly diminishes not only the unique possibilities or restrictions that such interpretative schemas provide for the future advancement of members and the social whole, but also dissipates or shrinks the possibilities of interaction between different interpretative schemas that occur through the interaction between members of different social wholes. In other words, genocide destroys a significant volume of opportunities for the realisation of a range of creative potential through the destruction of a social whole and this is how, in addition to causing the other two types of harms, it damages the process of humanity's social evolution.[733] These moral harms caused by genocide should function as conceptual anchors when thinking about the idea of 'substantiality', as it will elaborated in the next section.

4.2. Embracing the Contingency in Identifying and Justifying 'Substantiality'

4.2.1. Limits of 'Objective Universals'

The elaborated reality of protected groups has important implications in respect of the legal representation of genocide and its application to particular cases. Any modern legal system consists of a set of rules, which are universals that represent the experienced reality in an abstract and impersonal manner and aim to govern social relations through the lens of a particular value system. Arguably, the greatest

[732] For Lemkin ontological and moral status of the protected groups were two different things. Lemkin was a realist as to ontological status of the groups and thus argued that they have existence over and above the sum of individuals consists of them. Yet, for Lemkin, the reason to protect the group as such was ultimately to protect the right of individuals to express their very being and perspective. Ibid. 423-427.

[733] For a largely concurring account, which was published after the writing of this section, see S. Lederman, 'A Nation destroyed, an existential approach to the distinctive harm of genocide', 19 Journal of Genocide Research (2017). By drawing on Hannah Arendt's conception of genocide, Lederman suggests an 'existential' explanation of the unique hard of genocide, according to which: 'the distinctive loss in genocide was not a moral loss, strictly speaking, but rather an existential loss to humanity. By destroying a nation in whole or in part, genocide robs us of a variety of possible ways of experiencing and understanding the world.' Ibid. 112.

achievement of law has been this very ability to reduce the whole complexity of real-life situations to abstract generalisations in a normative manner and to apply normative generalisations[734] back to novel situations through the process of legal reasoning and case-by-case decision-making – thus achieving its moral, ideological or instrumental purposes. However, abstraction comes, for almost any kind of normative rule, at the expense of unavoidable gaps between '"formal" and "substantive" rationality; between the ideal and the actual; between "rules-as-represented" and "rules-as-guides-in-practice"; between "the model of reality" and "the reality of the model"'.[735] This is because the reality itself is too complex and contingent to be fully reduced to abstract and static terms, and the law cannot predict or contain all the possible elements that a particular situation may comprise. Thus, there will always be a gap between the universal and the particular. Indeed, one of the central points of discussion in legal theory has been how the legal reasoning process can most efficiently bridge this gap between the reality and legal norms,[736] which is called the 'particularity void' by Michael Detmold.[737] In other words, an ongoing debate concerns how judges can most efficiently and accurately assess 'the appropriateness of extending the universal [...] to *this* particular set of particulars'.[738]

This, of course, should not be perceived as an underestimation of the law's normative

---

[734] On 'normative generalisations' see K. Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method', 49 Yale Law Journal (1940), 1359-1364.

[735] J. MacLean, *Towards a Process Theory of Law: The Jurisprudential Implications of the 'Process' Philosophy of Alfred North Whitehead,* Doctoral Dissertation, The University of Edinburgh, 174 (footnotes omitted) available at *<https://www.era.lib.ed.ac.uk/bitstream/handle/1842/2666/PHD%20James%20Bishop%20MacLean.pdf?sequence=1&isAllowed=y>* accessed on 21 March 2019.

[736] See in general J. MacLean and Z. Bankowski (eds.) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006).

[737] M. Detmold, Law as Practical Reason, 48 Cambridge Law Journal (1989), 457. Also see N. Simmonds, 'Judgement and Mercy', 13 Oxford Journal of Legal Studies (1993) 52. W. Lucy, *Law's Judgement* (Oxford, Hart Publishing, 2017) 118-120.

[738] E. Christodoulidis, 'Eliding the Particular: A Comment on Neil MacCormick's Particular's and Universal's' in J. MacLean and Z. Bankowski (eds.) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006), 98. It should be noted that this study aligns more with the particularist position and will elaborate on this in chapter two. As a useful summary of the universalist and particularist positions see MacLean, *Rethinking Law as Process,* 16-45.

achievement. Indeed, for the most part, legal representations are precise and effective enough so that the 'particularity void' rarely comes under a spotlight when so-called hard cases arise. As a simple example, take the 70 mph speed limit on UK highways for cars: a rule that has a fairly unambiguous and uncontested moral, logical, technical and legal locus and rather straightforward application. Moreover, the norms and concepts that together form the rule (e.g. 70 mph speed limit, definition of a vehicle) are relatively easy to reduce into law with more or less definitive boundaries and technicalities, and without creating major moral or applicative loopholes. Despite all that, however, we can still imagine an extreme situation where an elderly driver who has slowed reflexes drives an old car at 70 mph (assuming that the driver has a licence and the car is legally permitted) and causes an accident because s/he could not stop in time.

Such rare cases highlight the interface between the theoretical and the practical and put judges into a dilemma between normativity and justness, given that the sheer reference to the norm justifies the driver's decision to drive at 70 mph and indicates no violation, whereas our moral intuition and logical assessment of particular facts would likely to lead us to suggest that that particular driver should not have driven at 70 mph in that particular circumstance. While the 'particularity void' is thus an unavoidable outcome of the legal abstraction process – even when the abstracted phenomenon and its moral locus are relatively simple and straightforward – the crime of genocide poses an exceptional challenge in this context due to the level of complexity of the criminal phenomenon and the fact that the central notion of the legal representation, namely the protected groups, which determines or affects the conceptual scope of almost any other distinctive element of the crime, has a uniquely contingent being as is comprehensively argued in this chapter.

To elaborate, one of the ideals that is strived for by most legal scholars, particularly in the continental law tradition, has been 'strict normativity',[739] which entails the adoption

[739] D. Richemond, 'Normativity in International Law: The Case of Unilateral Humanitarian Intervention', 6 Yale Human Rights and Development Journal (2003), 51-67. On the other hand, 'normative flexibility', which is largely, albeit due to various political quarrels and inabilities, endorsed in the textual definition, creates a flexible legal framework in expense of jeopardising the principle of legal certainty. In other words, the lack of precision in the definitional formulation that is perceived and complained in the legal literature is not a mere result of incompetence of the drafters or political quarrel between the state parties,

of a clear framework for the representation of a legal concept in order to ensure legal certainty and consistency in its application.[740] However, this can only be achieved through 'freezing' or at least 'standardising' the meanings of constitutive norms and concepts to a certain extent (e.g. defining the qualities that make a vehicle a car or an exact numerical limit for speeding). While this very practice is the main source of the 'particularity void' in relation to any legal abstraction, in the case of genocide, it has the potential to increase the gap between the universal and the particular to such a degree that judges frequently find themselves in an anxious place between normativity and justness when assessing the appropriateness of extending the universal to the set of particulars before them. This is because 'stabilising' the meanings of constitutive concepts and norms only becomes possible when the contingency of the protected groups is neglected in representation by adhering to substantialist and reductionist understandings, which significantly estranges the legal concept from the social phenomenon it aims to represent.[741] Consequently, trying to achieve 'strict normativity' comes at the expense of the very real possibility of undermining the moral underpinnings of the criminal definition in the process of application.

The application and justification problem of 'substantiality' is one of the major aspects of this very issue. As is established, the overall approach in the literature and case law has been, to a great extent, to try to bridge the gap between the normatively ambiguous universal, namely the substantiality requirement, and the facts of particular situations by generating further universals through stabilising and generalising the being of the protected groups. This has, however, created more problems than it has solved in applying the requirement. In addition to a series of moral dilemmas and conceptual contradictions demonstrated in previous chapters, the overall framework has also been stuck in limbo while trying to avoid the moral problems that would have emerged from

---

but also, to a certain extent, stems from the impossibility of reducing the complex social reality of genocide to a strict framework with well-defined lines.

[740] Ibid. 47.

[741] Indeed, the study has already pointed out how the essentialist thinking put the Trial Chamber into a a though place in determining whether Tutsis was a protected group, or, on the same issue, how the entirely subjective understanding of the Darfur Commission blurred the moral line between genocide and crimes humanity. Similarly the reductive and individualistic interpretation of the term 'to destroy' created a moral dilemma in the Srebrenica situation and forced the Tribunal to recourse backdoors to by-pass its own interpretation.

stringently fixing the meaning and parameters of 'substantiality' (which resulted in the numerical approach without a particular numerical threshold, the functional approach without specifying relevant functions, the geographical approach without defining appropriate criteria).

This brings us to the question of 'objective identification' and the first part of our research question, which is: 'To what extent' can the substantiality of a targeted part be justified and assessed in objective terms. To put it straightforwardly, if the idea of objectivity is understood as generating a certain institutional arrangement or universal rule, reference to which would provide a straightforward answer and justification in considering the 'substantiality' of a part, then, the study submits that the reality of the protected groups significantly limits, if not completely dismisses, the moral and logical desirability and use of such 'objective universals' in applying the substantiality requirement to particular situations. This has two interrelated reasons stem from the summarised nature of protected groups.

First, determining the 'whole' in any objective, scientific-like manner is not a viable possibility in light of our ontological explanations. The opposite of this observation has been implied by the structural-functionalist tradition, since if a social entity has discernible and stable characteristics, boundaries and structure, then, there must exist an objectively locatable whole. This essentialist implications, however, is clearly not the case since national, racial, religious and ethnic groupings do not refer to differentiation in substance. Instead, they are a particular 'form' of ongoing and evolving process of collective differentiation, which means there do not exist ever-present elements that necessarily qualify a definitive set of people as one of the listed types of groups. What defines a group as an ethnic, religious, racial or national group 'as such' is the form of relatedness they have with others and the in- and out-group perceptions that are developed in respect of the character and content of this relatedness.[742] Therefore, while the boundaries of such groups are in constant flux, the whole-part relationship is always relative. Indeed, almost all the targeted groups to date can be thought of, in the abstract, as a part of some broader protected group or as a distinct whole depending on one's

[742]. This very fact was most strikingly demonstrated by the aforementioned the struggles of the ICTR Trial Chamber in *Akayesu*. *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, paras 512-515.

perspective.[743] Consequently, any abstract rule to determine the whole is likely to fail in light of this contingency.

That said, reducing the determination of the 'whole' to entirely subjective parameters is also counterintuitive and the statement that 'nearly any part can be thought of also as a whole, and vice versa', is only correct in the abstract, that is, in neglect of the socio-political, spatial and temporal contexts, and genealogical characteristics of the group. Take the Tutsis in Rwanda and Burundi as an example. On what grounds were these two groups recognised as distinct 'wholes' at the time of the Rwandan genocide, even though they are both clearly parts of the global Tutsi ethnic group? One may postulate their geographical distinctiveness as the reason; but why, then, can the Tutsi group in Kigali not be considered in the same way? Our common perception tells us that there must be something more that nourishes such a distinction other than subjective perceptions or mere geographical delimitations.

From the perspective the thesis advanced so far, what separates a unity as a 'whole' from any overarching kinship is its additional and distinct solidarity and identity that emerge on a national, ethnic, religious or racial basis (or combination of any of these, e.g. ethno-religious) as a result of socio-historic and sociopolitical factors, including the destructive relation between the unity and the perpetrators.[744] In other words, while the unity in question preserves those forms of relatedness common to the overarching identity, as well as the in-group and out-group perceptions that mark it as a fragment of the overarching identity on the historical continuum, it develops an additional identity and form of relatedness with specific social and political histories and attachments that

[743] For example, 1- Jews→European Jews; 2- Muslims→Myanmar Muslims →Rohingya Muslims; 3- Vietnamese→Cambodian Vietnamese; 4- Muslims→Bosnian Muslims→Srebrenica Muslims.

[744] Although the overlapping of groupings has drawn some attention in the literature, it has not been considered in terms of the whole-part relationship. Schabas for example argued that the four groups 'overlap, and help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection' Schabas, *Genocide in International Law*, 129. This view found support in the case law as well. *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para 555,556; *Rutaganda* [1999] ICTR-96-3-T, Judgement, para.56. For critique this approach see Kreß, 'The Crime of Genocide under International Law', 473-476.

are recognised and sanctioned by in- and out-group perceptions as distinct.[745] When cases of genocide are surveyed, it becomes clear that victim 'wholes' are usually separate from their overarching kinship on such bases combined with spatial distinctiveness, e.g. 'Rwandan Tutsis' (ethnic/national), 'Bosnian Muslims' (national/religious) or 'Myanmar Rohingya' (ethnic/religious), which led them to develop distinct 'minority' identities in relation to their oppressors, and usually distinct patterns of relations, interactions and social norms as well as unique self-perceptions.

Against this background, the thesis suggests that in considering whether a targeted population constitutes a distinct 'whole' on its own or is a 'part' of any overarching groupings in that particular context and time, judges should examine the socio-historical continuum and consider whether the population in question developed a distinct identity on one of four dimensions listed in the definition (or combination of any) through reciprocal in- and out-group evaluations, which ultimately led the perpetrator group to target it because of that distinct identity, as opposed to being a section of a broader identity.

In fact, in attempting to balance the objectivist and subjectivist extremes of previous case law, the Trial Chamber in *Krstić* endorsed a similar way of consideration by putting the emphasis on the socio-historic context and perceived distinctiveness.[746] In concluding that the 'whole' in question could not be considered as 'Srebrenica Muslims' but rather 'Bosnian Muslims', the Trial Chamber first made a quick reference to the political history of Yugoslavia, noting that '[o]riginally viewed as a religious group, the Bosnian Muslims were recognised as a "nation" by the Yugoslav Constitution of 1963'.[747] Following that, the Chamber observed that this very conception continued over time and was reinforced through in- and out-group perceptions.

> [T]he highest Bosnian Serb political authorities and the Bosnian Serb forces operating in Srebrenica in 1995 viewed the Bosnian Muslims as a specific

[745] See for a somewhat similar argument *Prosecutor v. Mladić,* [2017] IT-09-92-T, Prosecutor's Final Brief, para. 385.

[746] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 557.

[747] Ibid. para 559.

> national group. Conversely, no national, ethnical, racial or religious characteristic makes it possible to differentiate the Bosnian Muslims residing in Srebrenica, at the time of the 1995 offensive, from the other Bosnian Muslims. [...] In addition, it is doubtful that the Bosnian Muslims residing in the enclave at the time of the offensive considered themselves a distinct national, ethnical, racial or religious group among the Bosnian Muslims. [...] Evidence shows that they rather viewed themselves as members of the Bosnian Muslim group.[748]

It should be noted that, even though the Chamber explicitly stressed the importance of socio-historic embeddings in the identification process,[749] its overall enquiry was rather superficial. This, however, seems understandable, given that the objection of the defence council was against the qualification of 'Srebrenica Muslims' as the relevant whole instead of 'Bosnian Muslims'. Moreover, the distinctiveness of 'Bosnian Muslims' was a point of general knowledge and indeed had not been challenged at any point in the ICTY proceedings.

On the other hand, the Chamber seemingly conferred a primacy on the stigmatisation attributed by the perpetrators to the victim group in assessing its boundaries and characteristics,[750] which raises the problematic suggestion that if the in- and out-group perceptions are in conflict with the perpetrators' characterisation, the latter should triumph. While it is true that the arbitrary stigmatisation of a particular population, especially in cases of racial partings, may be the main catalyst for the emergence of a particular 'form' of differentiation, such differentiation creates a 'distinct' group only through reciprocal in- and out-group perceptions, which usually, if not always, lead to the crystallisation of certain practices, relations and world views over time as a part of this distinct unity. However, implying that the perceptions of the perpetrators may suffice to determine the boundaries of the 'whole', as well as its characteristics, is counter-intuitive because, then, any population may qualify as one of the listed types of groups just because they are labelled by the perpetrators in that way. This would not

[748] Ibid.

[749] Ibid. 557.

[750] Ibid.

only go against the group-centric approach of the Convention and the very social reality of these groupings, but also undermine the moral distinctiveness of the crime, given that if the perpetrators merely destroy a 'group' in their imagination, that would only cause physical and mental harm to individuals and this effectively equates genocide with mass murder/ atrocity in terms of the moral harm caused.

It appears unlikely, however. that the Chamber in fact intended such an implication. It rather seems that the Chamber tried[751] to avoid completely dismissing the subjectivist views put forth in *Jelisić*[752] and *Nikolić,*[753] in its attempt to harmonise the extreme views in previous case law. In any case, however, it should be noted that the boundaries of a protected group are social realities, albeit contingent and complex ones, that cannot be determined or understood merely by the perpetrators' or victims' perceptions. Rather, determination of the relevant 'whole' requires a multi-faceted examination that includes the victim group's relatedness to the perpetrators and third parties on the historical continuum and reciprocal in- and out-group perceptions that are developed in respect of the character and substance of this relatedness. This does not mean that there should exist a perfect uniformity among the in-group, out-group, and perpetrators' perceptions as to the boundaries and characteristics of the victim group, rather a reasonable overlap is sufficient. All that, however, does not change the ultimate observation that the 'whole' is not a natural fact and every single protected group has its unique conditions that are imposed by temporal, spatial, socio-historical and political conditions and relations, which determine its boundaries in different ways. Thus, it is not likely to generate an 'objective universal', reference to which will give a clear-cut identification of the relevant 'whole' in each case, which obviously is an essential first step to be able to discuss the 'substantially' of a targeted part.

The second reason that underpins the moral and logical implausibility of postulating an 'objective universal' is that the contingency and adaptability of the protected groups largely, if not completely, exclude the possibility of offering an abstract ontological

---

[751] Ibid.

[752] *Prosecutor v. Jelisić* [1999] IT-95-10-T, para 70.

[753] *Prosecutor v. Nikolić,* [1995] IT-94-2-R61 Review of the indictment pursuant to Rule 61, Decision of Trial Chamber I, para.27

rationale[754] that will principally justify deeming a part 'substantial'. Of course, one may still insist on 'strict normativity' – at the cost of undermining the empirical and analytical reality – by assuming that the being and value of the protected groups can be explained away through ontological reduction or picturing these groups as 'things' with some stable essence or structure. However, the contradiction between reality and such understandings prevents analytically deducing any definitive, rule-like formulation and unavoidably leads to either setting an ontologically arbitrary 'tipping point' – which may effectively exclude small groups from protective scope[755] and thus go against the very core of the Convention as an instrument that primarily aims to protect the most vulnerable minority groups; or producing a list of 'essential functions' that make a part *de facto* substantial in relation to the whole – which is evidently illogical given that, even if we accept there 'exists' a structure, the 'functional importance' of a part (e.g. political leadership) differs from group to group, as well as temporally and spatially.

Alternatively, determination of the limits for numerical, geographical, functional or any other form of significance may be left to judges of that particular case by thinking about normativity in a less rigorous sense. This position, which is effectively the present state in case law, appears more plausible in that it allows taking the particulars of a situation into account in setting any form of threshold. However, sacrificing 'strict normativity' in this way still does not salvage the established judicial framework from being incoherent and producing unconvincing justifications. As is emphasised, the lack of conceptual rigour obscures the immorality of genocide and turns it into a hollow concept with immense stigma and legal and political implications. Moreover, even when judges of a particular case are bestowed the power of determining the threshold for that specific situation, such a threshold is still unjustifiable in any ontologically robust manner – despite the underpinning substantialist presumptions implicitly promising a form of universal justification.

Indeed, on the one hand, the entire ICTY jurisprudence involves lengthy numerical

[754] As the study will suggest in the final section, genealogical factors is in fact imposes such abstract reasons, however analytically implausible it is.

[755] As is already pointed out, if the bar is set too-low to include as many groups as possible, then, the whole requirement loses its meaning.

calculations as to the size of the targeted parts,[756] which usually end up with a short statement that declares whether the Chamber considers the relevant percentage or number surpasses the threshold in their minds – whatever that threshold may be. But which moral and analytical elements or parameters define that threshold? It appears manifestly impossible to ascertain an objective universal, reference to which can connect the judgment regarding a threshold with the data and thus justify, say, why 5 rather than 8 per cent constitutes the threshold, because determining what magnitude of mass murder or atrocity has sufficient moral gravity to count as 'genocide' would essentially be a contingent consideration that lacks any ontological basis in the face of the explained reality of groups. This is particularly true when the definition is interpreted from an extreme individualistic viewpoint, since denying the distinct value of protected groups implies that each part is equally important for the whole and this effectively excludes any possible moral or analytical 'anchor' that can guide the determination and justification of the threshold.

On the other hand, functionalist approaches posit such an 'anchor' by perceiving the protected groups as ontologically distinct and in principle suggest assessing a part's significance in relation to its function in the whole's survival. Such an assessment is, however, not a viable option in the face of the empirical and analytical reality that these groups are not organisms or structures that 'exist' to fulfil a particular task, nor do they exist by virtue of parts functionally complementing each other in a certain structural formation (as opposed to a house or a car). Instead, as Simmel remarks, 'the relations of human being to each other are so complex, so ramified, and so compact that it would be a wholly hopeless task to resolve them into their elements, and we are consequently compelled to treat them as unities rather than self-existing structures'.[757] Moreover, as the previously quoted works of Luban or Paust and the separate opinion of Kreća emphasise,[758] the protected groups as social entities are adaptive to new circumstances and may always survive, even possibly developing more dense relationships and in-

---

[756] See for example *Prosecutor v. Sikirica, et al.* [2001] IT-95-8-T, Judgment on Defense Motion to Acquit, paras. 69-72.

[757] Simmel, *Persistence of Social Groups*, 666. See also Judd, *Critical Realism and Composition Theory*, 51.

[758] See supra footnotes 557-561 and the accompanying text.

group perception, after a relatively successful attack. That is to say, then, it is beyond the bounds of possibility to assess in any objective manner to what extent a targeted part is actually essential for the perseverance of the whole or whether its destruction actually reduces the survival chances of the whole. This ultimately leads to making quixotic and unattainable speculations as to the part's importance in determining 'substantiality'. It is for these reasons that the established judicial framework fails to offer satisfactory justifications for its judgments, whereas the existence of these distinct conceptions of the crime within the same framework – that even play a 'backdoor' role – is what makes it incoherent and arbitrary.

At this juncture, one may ask whether, if we move beyond a substantialist misconception, would it then be possible to produce at least a 'universalizable' justification of 'particular'. 'Universalizability', a notion largely affiliated to Neil MacCormick in legal theory, refers to the idea that a judge 'must decide today's case on grounds which [she is] willing to adopt for the decision of future similar cases'.[759] In other words, 'the judge's final ruling acknowledges that the case, however unusual, however unlikely to be repeated, has to be viewed in law as a type-case, as a universally stated situation'.[760] This kind of universal justification[761] appears theoretically possible

---

[759] N. MacCormick, *Legal Reasoning and Legal Theory* 2d ed. (Oxford: Oxford University Press, 1994), 75.

[760] N. MacCormick, 'Particulars and Universals' in MacLean, James and Bankowski, Zenon (eds.) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006), 16. That said, '[s]ince any ruling can be universalized, the judge must be able to decide which of two or more universalized rulings he should choose. MacCormick called this the problem of second order justification and explained that it must involve two distinct types of interpretive argument, namely (i) arguments from consistency and coherence, and (ii) consequentialist arguments. For, he explained, any ruling must make sense both in the legal system and in the world. A given ruling meets the consistency requirement if, and only if, it does not contradict any other norm in the legal system; it meets the coherence requirement if, and only if, it makes sense in the legal system. Consequentialist arguments, on the other hand, ask the judge to choose the ruling that yields the best consequences. This type of argument comes into play only if the arguments from consistency and coherence do not yield an answer to the interpretive question.' S. Torben 'Deduction, Legal Reasoning, and the Rule of Law. Book Review of: Rhetoric and the Rule of Law: a Theory of Legal Reasoning by Neil McCormick'. 23 Constitutional Commentary (2006), 122.

[761] It needs to be noted that the notion of 'universalizability' has been both largely criticised and cherished. However these discussions beyond the physical limits of this work. See for some examples Christodoulidis, 'Eliding the Particular'; S. Veitch, '"A Very Unique Case": Reflections on Neil MacCormick's Theory of Universalization in Practical Reasoning' in MacLean, James and Bankowski, Zenon (eds.) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006), at. 143; F.

in relation to the assessment of substantiality in the sense that the particular facts of a case can be subsumed under a certain universally stated principle of action,[762] and, however unlikely it is, whenever a similar set of facts emerges the established principle of action can be applied to that novel situation.

However, in practice, the being of the protected groups renders such thinking epistemologically unlikely. This is because, above all, the protected groups and their process of destruction are usually so complex, wide in range and contingent that it is nearly impossible to duly locate the factors and relations that underpin the group and thus establish satisfactory universal criteria in ontological terms to consider the substantiality of its parts. Moreover, even if we can somehow overcome our epistemic and spatial limitations and locate all the major elements of the group's being, the fact that a protected group ultimately refers to a process on the historical continuum imposes an impassable temporal limitation, in the sense that the ontological significance of its parts changes moment by moment as the process unfolds and cannot be fully determined before the process in question ends – unless the assessor is an omnipotent being that exists beyond space and time.

Connectedly, such an understanding may create rather pervasive argumentation. For example, once the Jewish group is properly understood as an ongoing process of constant becoming, one may even make the absurd argument that the part targeted in the Holocaust, namely the European Jews, cannot be considered 'substantial', given that the victimisation of the Holocaust created a denser network of relatedness and in-group identity; the vast post-war reparations helped the group to develop a privileged position that it has never held in world history; and thus the Holocaust has in fact improved the conditions of the unity in question. While from a purely ontological standpoint this argument may make some sense, it is obviously unacceptable according to any moral standards and goes against the very logic of genocide law.

Eveline, *Fundamentals of Legal Argumentation*, (Utrecht: Springer, 2017) 95 ch. M. Costerbosa, 'Some Reflections on the Relationship Between Law and Morality – Neil MacCormick's Point of View' in *Law and Democracy in Neil MacCormick's Legal and Political Theory* A. Menéndez and, J. Fossum (eds.) (Dordrecht: Springer, 2011), at. 95.

[762] N. MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005), 99.

All in all, then, postulating universal normative rules for determining when a part qualifies as 'substantial' is not a plausible course of action for tackling the 'particularity void', since the ontology of the listed groups is contingent to an extent that precludes postulating a morally and ontologically defensible normative generalisations as to 'substantiality'. This, however, does not mean that the identification and justification of substantiality stuck in a binary dilemma between being an entirely subjective assessment and undermining the immorality of genocide. Instead, the study suggests that objectivity, at least in this particular context, should be understood as ensuring consistency and coherence of the thought process of locating the relevant factors and how to balance these factors in considering the appropriateness of extending the universal norm, that is the requirement, into that specific set of particulars, instead of trying to create a definitive universal law that sharply determines the conditions for the application. This transforms the striving for 'objective identification' from being a futile and even dangerous search for ever-present elements that make a part 'substantial' into examining how and in what manner judges can consistently and coherently locate and weigh the possible factors in producing their justification for whether a part qualifies as substantial.

4.2.2 Rethinking the Determination and Justification of 'Substantiality' as a Process of Balancing

This thesis suggests that the elaborated reality of the protected groups dictates embracing the contingency of the assessment process and contemplating it as a moral rather than ontological or normative form of consideration. As far as is observed, in the absence of meaningful ontological and normative constraints, there appear to be two, largely competing, imperatives that must inform the determination and justification process of substantiality, namely (i) genealogical imperative that stems from the historical development of the concept of genocide and (ii) analytical imperatives that stem from the protective purpose of the law. The application and justification of 'substantiality' should be rethought as a process of moral balancing through judicial reasoning between these two competing imperatives[763] in a manner that fulfil the object

[763] The distinction offered here is built, to a certain extent, on the one proposed by Moshman between the proto-type based and formal concepts of genocide. See generally Moshman 'Conceptual Constraints on

and purpose of the law against genocide.

4.2.2.1. Genealogical Imperative: The Imagery of Holocaust

To begin with the former, genocide, like many legal abstractions, is not merely an analytical construct. It is coined and endorsed as the denotation of a collective moral reaction to certain historical events and in that capacity is a representation of the public consciousness. Although the theoretical arguments and historical incidents that underpin the concept date back much further than 1944 – as Lemkin himself continuously emphasises and even includes ancient events like destruction of Carthage in his historical elaborations of the phenomenon[764] – the Holocaust is frequently raised and is undeniably the landmark moment for the genealogy of the concept.

On the theoretical front, David Moshman extensively explains how our thinking constrained by our conceptual structures and the concepts we rely on, broadly classifying, are either proto-type based or formal.[765] The former are 'defined on the basis of prototypical instances',[766] while the latter 'on the basis of a set of necessary and/or sufficient conditions'. To put differently, then, our conceptual structures are underpinned by (i) the deductions from the experiences and (ii) the analytical deliberations that largely stem from the intellectual practice of distancing from subjectivity. On this theoretical basis, Moshman observes that one of the main conceptual constrains on thinking about genocide is that the Holocaust has been taken to be prototypical. As a result, there emerges a tendency to 'determine whether some event or set of events constitute s genocide on the basis of its similarities to and differences

---

Thinking about Genocide'. Moshman essentially argues that the proto-typical conception of genocide and its formal and analytical constructions are largely competing and pose conceptual constrains to our understanding of the crime – most of the time from two opposing perspectives.

[764] Lemkin, 'Proposal for Introduction to the Study of Genocide', NYPL, Box 2, Folder 1. This, however, seems morally questionable given that it retroactively applies today's moral standards to the past event. Yet, Lemkin appears to find no moral violation in this approach, probably because of that he thinks morality, or at least some moral rules, as universal, inherent to the very being of humans and thus ever present.

[765] Moshman 'Conceptual Constraints on Thinking about Genocide', 431,432.

[766] Ibid. 432.

from what we have taken to be the prototypical genocide.'[767]

It is rather evident that the main purpose of the law is to create a formal, impersonal representation of a social phenomenon by distancing itself from any particular experience. The legal definition of genocide results from such an endeavour and indeed stipulates a set of necessary and/or sufficient and abstract conditions to characterise a particular event as genocide. All the efforts to create a formal concept of genocide, however, does not change the fact that the Holocaust not only predominantly defines or affects the public imagery on the concept of genocide and functions as an anchor in the historical inquiries of the crime[768] but also constrains, at least to a certain extent, the notion's conceptual and legal construction through constant – conscious or unconscious – comparison with a given case in hand and the Holocaust.[769] In other words, while it is clear that the prototypical conceptualisation of genocide has no official impact, it nevertheless becomes explicitly and implicitly influential in the interpretation and

---

[767] Ibid. 435.

[768] See for example R. Melson, 'Paradigms of Genocide: The Holocaust, the Armenian Genocide, and Contemporary Mass Destructions' 548 *The Annals of the American Academy of Political and Social Science* (1996), at. 156. M. Bilewicz, 'Holocaust as the Prototype of Genocide. On Some Problems with the Modern State Crime Paradigm', 16 Analyses of Social Issues and Public Policy (2016) at 321; Hinton, 'Critical Genocide Studies'. See also in general A. Rosenbaum (ed.), *Is the Holocaust Unique?: Perspectives on Comparative Genocide* 3rd Ed. (New York: Routledge, 1970).

[769] Moshman 'Conceptual Constraints on Thinking about Genocide', 433. From the legal theory perspective, this constant transformation of the meaning and scope of legal norms, however uncomfortable for legal scholars as it goes against the pretense of the legal system as a set of precise and definitive norms, is the reality itself. As Edward Levi extensively argues, in this context: 'The movement of concepts into and out of the law makes the point. If the society has begun to see certain significant similarities or differences, the comparison emerges with a word. When the word is finally accepted, it becomes a legal concept. Its meaning continues to change. But the comparison is not only between the instances which have been included under it and the actual case at hand, but also in terms of hypothetical instances which the word by itself suggests. Thus the connotation of the word for a time has a limiting influence-so much so that the reasoning may even appear to be simply deductive. But it is not simply deductive. In the long run a circular motion can be seen. The first stage is the creation of the legal concept which is built up as cases are compared. The period is one in which the court fumbles for a phrase. Several phrases may be tried out; the misuse or misunderstanding of words itself may have an effect. The concept sounds like another, and the jump to the second is made. The second stage is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desired.' E. Levi, ' An Introduction to Legal Reasoning', 15 University of Chicago Law Review (1948), 506.

refinement of the formal concept.[770] Moreover, since genocide, as a phenomenon, is ultimately a socially constructed reality,[771] the inability of legal institutions of responding, one way or another, to the reality from which the legal concept stems would leave a morality gap between the legal concept and moral consciousness that legitimises the implications attached to the concept and, thus, diminishes the power of the formal concept.

By simplifying to an extent, the imagery of the Holocaust as the 'ultimate evil' is arguably built on three major element: magnitude, bureaucracy (planning) and modernity (science). To begin with the latter two, the world history has been no stranger to mass attacks and murder, even though the scale of the Holocaust has been a rarity. However, the Holocaust was not only 'shocking' due to its exceptional magnitude or pervasive underlying theory, but also because of its uncanny planning and execution.[772] During the *Pohl* Case before the Nuremberg Military Tribunals ('NMT') judge Micheal Musmanno, in commenting one of the witness testimonies that remarks the killing by gas was not 'effective enough', noted that the increase in business, i.e. mass destruction of individuals, entailed more up-to-date methods. 'The trend of modernity toward mechanization and assembly line methods was not overlooked even in this most modern of achievements – genocide – a business so novel that a new name had to be coined for it. Genocide, the scientific extermination of a race.'[773]

Indeed, for many, it was beyond possible to perceive the planning and resources devoted to the process of destruction, even when was Germany fighting for its very

---

[770] B. Van Der Merwe, 'Reflections on the trivialisation of genocide: Can we afford to part with the special stigma attached to genocide?', 29 South African Journal of Criminal Justice (2016),136.

[771] Theriault, 'Genocidal Mutation and the Challenge of Definition', 498–501.

[772] In his concurring opinion in the Pohl Case, judge Musmanno notes that 'Barbarous tribes in the wilds of South Pacific jungles have fallen upon other tribes and destroyed their every member; in America, Indian massacres have wiped out caravans and destroyed whole settlements and communities; but that an enlightened people in the 20th century should set out to exterminate, one by one, another enlightened people, not in battle, not by frenzied mobbing, but by calculated gassing, burning, shooting,' Micheal Musmanno, 'Concurring opinion, in the Pohl case'. TWC, Vol 5, p.1128.

[773] Ibid. p.135.

existence towards the end of the war.[774] The NMT and the subsequent literature extensively documented the institutions, such as the Office of the Reich Commissioner for the Strengthening of Germanism and SS *Einsatzgruppen*, and planning – e.g. transportation of the victims, their exploitation by the industry, 'sterilisation' and ultimately extermination, that were devoted to the 'Jewish problem'.[775] Alongside the meticulous planning, the use of technology and science has shocked the consciousness of humanity, particularly of the so-called civilised world, because to that date the modernity and advancement were affiliated with humanism and civilization, and conceived as an achievement that separates 'civilised' nations from the barbaric ones. The Holocaust tore down this conception through its extensive use of scientific advancement in order to effectively execute the 'final solution'. The following observation of the NMT in *Medical Case* was perhaps the most vivid revelation of this:

> Mankind has not heretofore felt the need of a word to denominate the science of how to kill prisoners most rapidly and subjugated people in large numbers. This case and these defendants have created this gruesome question for the lexicographer. For the moment we will christen this macabre science 'thanatology,' the science of producing death. The thanatological knowledge, derived in part from these experiments, supplied the techniques for genocide, a policy of the Third Reich, exemplified in the 'euthanasia' program and in the widespread slaughter of Jews, gypsies, Poles, and Russians. This policy of mass extermination could not have been so effectively carried out without the active participation of German medical scientists.[776]

To this date, practices that can be affiliated to these elements of the Holocaust imagery,

---

[774] 'Even when Germany was retreating on all fronts, many troops sorely needed on the battlefield were diverted on this insane mission of extermination. In defiance of military and economic logic, incalculable manpower was killed off, property of every description was destroyed all remained unconsidered as against this insanity to genocide.' 'Einsatzgruppen Case", TWC, Vol 4, p.450.

[775] See W. Seibel, G. Feldman, *Networks of Nazi Persecution: Bureaucracy, Business and the Organization of the Holocaust* (New York: Berghahn, 2005)

[776] 'The Medical Case", TWC, Vol 1, p.37.

e.g. biological absorption claims in Australia,[777] the camps in Rakhine State, greater Serbia plan, all bring out the word of 'genocide' regardless whether the conditions stipulated in the formal concept are met. That being said, the Rwandan Genocide has a certain level of affect that reducing the connection between the concept of Genocide and the Holocaust-like planning and technological execution.

On the other hand, the other element of the Holocaust imagery, which is the magnitude of the crime, has been playing a noticeable role in understanding and conceptualising genocide. Undeniably, the Holocaust has been one of the largest deliberate mass destruction in the human history. In his concurring opinion in the *Pohl* case, Musmanno pointed out how 'inconceivable' was the magnitude of the crime as follow:

> The murder of 6,000,000 human beings is entirely beyond the capacity of man's imagination and one instinctively refuses to believe. But the curtain of incredulity has lifted and the armor of incomprehensibility no longer protects. The evidence is in and what was utter fantasy and a mere macabre playing with numbers, is proved fact. The figure 6,000,000 is written in digits of blood, and no matter which way one turns their crimson horror is upon one. Still, the cumulative shock of 6,000,000 dead is not felt unless one attends a murdering party of a small fraction of that ungraspable number.[778]

As Moshman notes, in this respect, due to the very image and perception of the Holocaust, '[i]n the realm of mass atrocities, genocide is conceptualised as the evil beyond all others, the ultimate measure of all human rights violations'.[779] Irrefutably, an element that underpins the common conception of genocide as the 'gravest' mass atrocity and reflects the proto-typical event has been the enormity of the number of victims in absolute terms – whether it is analytically and ontologically sensible or not. Unsurprisingly, a common element among most interpretations of the term 'substantial' – however problematic they are in terms of conceptual rigor and consistency – has been

---

[777] Katherine Elinghaus 'Biological Absorption and Genocide: A Comparison of Indigenous Assimilation Policies in the United States and Australia' (4 Genocide Studies and Prevention: An International Journal, 2009, at.59).

[778] Musmanno, 'Concurring opinion, in the Pohl case'. TWC, Vol 5, p.1129.

[779] Moshman 'Conceptual Constraints on Thinking about Genocide', 440.

that the term implies the significance in the absolute number of victims. Strikingly, even Lemkin himself, while presenting the 'house analogy' to advance his 'non-individualistic' conception of 'substantiality' in the U.S Congress, felt the urge to note that genocide is essentially a crime committed against large masses.[780]

This genealogical aspect of genocide cannot and should not be overlooked in the reasoning process when applying the substantiality requirement, unless one concedes to undermine the collective moral consciousness underpins the criminalisation of genocide which is well entrenched in society today. To put it into perspective, imagine a situation where a million Chinese people are targeted. Assuming that other elements of the crime are established, it is hard to find any analytical reason that can supersede the collective moral urge underpinned by the genealogy of the concept for characterising such an atrocity as a crime of genocide (e.g. the part constitutes less than one per cent of the whole or its destruction – if ever possible – does not destroy a significant volume of opportunities for the realisation of a range of creative potential).

As already established, however, it is beyond possibility to ontologically and deductively institute a certain maximum or minimum numerical standard that would not be arbitrary and the argument here does not imply any such threshold that relies on ontological reflections. Instead, what is suggested here is a moral contemplation that reflects the collective consciousness of humanity[781] regarding the concept and social

---

[780] U.S. Congress, *Executive Session of the Senate Foreign Relations Committee*, vol. II (US Government Printing Office 1976) 370. Lemkin stated that, if it would have helped easing the concerns in the US Senate that the Convention may be invoked in relation to 'negro lynching' in the USA, the following understanding may be introduced: 'On the understanding that *the Convention applies only to action undertaken on a mass scale* and not to individual acts even if some these act are committed in the course of riots or local disturbances'

[781] Admittedly the term 'collective moral consciousness' requires some extensive explanations, which unfortunately not possible to provide here due to the physical limitation of the thesis. To summarise in an unduly brief manner, I use the concept largely in Durkheimian sense. See Durkheim, *The Division of Labour in Society*, 83, 57-88. As is famously known, Durkheim defines two forms of social 'solidarity', mechanical and organic. See for an interesting philosophical examination on this distinction P. Thijssen, 'From mechanical to organic solidarity, and back: With Honneth beyond Durkheim', 15 European Journal of Social Theory (2012), 454-470. The former refers to a form of cohesion that emerges from the homogeneity of individuals. Individuals feel connected through similar practices, lifestyle, values and beliefs, which give rise to a 'collective conscience' that works internally in individual members to cause them to cooperate and shared similar sentiments. This form of solidarity is usually considered as more

phenomenon it signifies, and thus judges hold a necessary margin of discretion in assessing whether the size of a part entails considering it as 'substantial' in light of genealogy of the crime. While such an assessment is certainly subject to a level of fluidity depending on the particulars of the situation as well as the course of time, the present study suggests that judges need to be stringent in their reliance on this genealogical factor and only in those situations where the scale of (intended) atrocities demonstrates a near unchallengeable gravity should this factor be sufficient on its own to justify the substantiality of a part. When judges are in doubt regarding whether such gravity is reached, then, a balancing process between this genealogical imperative and analytical factors should be initiated. In other words, the assessment process should transform into an examination of whether the analytical imperatives that stem from the protective scope of the law may justify the qualification of a relatively less populous part as substantial.

In this sense, the thesis partially agrees with the ICTR Appeals Chamber in *Krstić,* who noted that '[t]he numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry',[782] as well as with the ICJ in *Bosnia v. Serbia* in which the Court stated that other factors must

primitive and tribal. Organic solidarity, on the other hand, refers to integration that arises out of interdependence of individuals, which in turn emerges as a result of growing division of labour. Organic solidarity is primarily a consequence of modernity, which has led to societies to rely less on imposing uniform rules on everyone and more on regulating the relations between different groups. Despite this tendency of evolving towards the latter form of solidarity, however, the criminal law is an exception that reflects the primitive mechanical solidarity of society in the sense that it aims to reflect the totality of beliefs and sentiments common to average members of the same society in respect of a particular course of conducts. That is to say, the main moral justification of a criminal regulation is the 'collective consciousness' of the societies, i.e. an act is criminal when it offends strong and defined states of the collective consciousness. Criminal acts either manifest a gap between the characteristics of the offender and the collective consciousness, or they offend against the organ of the common consciousness (the state). While speaking of this kind of 'collective consciousness' at the international sphere is considerably challenging due to the immense diversity, the traumatic experiences like the Holocaust create moments in which the humanity returns to its mechanical solidarity and express it through repressive law. Nevertheless, I recognise that such a conception of the matter opens the door for criticism of 'Eurocentrism' given that it is still debatable to what extent the law against genocide has reflected a universal 'consciousness'. Also see A. Addis, 'Genocide and Belonging: Process of Imagining Communities', 38 University of Pennsylvania Journal of International Law (2017), 1086ff.

[782] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para.12.

be weighed against the numerical criterion.[783] The reason why my agreement is only partial lies in the statement of the ICTY follows the quoted observation, which also endorsed by the ICJ,[784] that 'the number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group'.[785] As the study has already extensively discussed,[786] bundling these two numerical considerations under the guise of the 'quantitative approach' indicates to and stems from a particular, and deficient, substantialist ontological presumption, while, from the perspective of this study, consideration of the absolute magnitude is dictated by no particular ontological presupposition but by the very genealogy of the concept. Moreover, the relative magnitude may utmost, if ever, constitute a point of analytical consideration and essentially competes with the absolute numerical magnitude requirement.

4.2.2.1. Analytical Imperatives: Fulfilling the Object and Purpose

This brings us to the second pillar of the assessment, which is analytical imperatives that stems from the formal concept of genocide. By analytical imperatives, the study refers to the entire range of possible reasons that stem from the purpose and object of the law against genocide, i.e. the protection of the listed types of groups as such, and may constitute an opposite force in the process of reasoning against the explained genealogical imperative. The reason why I describe assessment and justification as a process of balancing is that analytical reasons generally cannot entirely overrule the genealogical factor, as this would lead to counterintuitive conclusions. Imagine, in this context, a hypothetical situation in which a very small part of the Indian nation situated in a distinct village is targeted. In light of the threefold immorality of genocide explained in the previous section, one may perfectly advance an argument that the part

[783] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, para. 199.

[784] The ICJ in Bosnian Genocide remarked as to the quantitative approach that 'the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole'. Ibid., para, 198.

[785] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para.12.

[786] See chapter three.

in question should be considered ‘substantial’. Indeed, an attack directed against 50–100 people may be considered a mass atrocity since determining what constitutes a ‘mass’ is a fairly relative consideration; the harm to the well-being of individuals is certainly part of such a campaign; the status and identity loss of the survivors can also be claimed given that the ‘Indians of village x’ is also a form of sub-identity, the loss of which may cause harm to the survivors; and finally, one cannot decisively argue that opportunities for the realisation of a range of creative potential is not destroyed by such an attack, since it is epistemologically not possible to decide what kind of creative potential might have been realised (in the end, in an alternative future, one of the victims could have led her country to many great things).

Thinking about ‘substantiality’ based on only analytical reasons would, then, have the potential to significantly water down the concept of genocide and create a gap between its status in the collective consciousness and its formal conceptualisation. Moreover and connectedly, one of the intended utilities of the substantiality requirement is balancing against such extreme arguments and so, in a way, producing an (unavoidably speculative) assessment of probability hinges on whether a significant enough moral harm on the explained basis might/ will occur in a future where the targeted part is destroyed. To be more precise, due to our epistemological constraints and the processual nature of reality, it appears unlikely to produce fully informed decisions as to the actual harm of genocidal activity other than that which immediately occurs (e.g. murder). That is, the harms of identity and status loss, as well as the destruction of creative potential, may occur in variety of ways and on scales that cannot usually be foreseen at the time of a judgment regarding ‘substantiality’. In this sense, one of the functions of the ‘substantiality requirement’ should be understood as including only those situations in the guise of ‘genocide’ where occurrences of such harms in significant proportions become likely possibilities as a result of an intended genocidal campaign and thus reflect and justify the legal and social stigma attached to the concept.

Having established this, it should be noted from the outset that it is not possible to offer an exhaustive list that defines the entire range of analytical imperatives due to the contingency inherent to the crime, which creates infinite numbers of possible factors that cannot be wholly subsumed or specifically foreseen under any kind of system of representation or model. Nevertheless, as far has been observed, the main and largely

interrelated analytical factors that alleviate the genealogical imperative for a 'large number' of victims can be grouped under three broad, non-exhaustive, headings: (i) the particular characteristics of the whole or the targeted part, (ii) spatial circumstances and (iii) sociopolitical embeddings and context. All of these broadly formulated factors essentially shift the focus of assessment to the protection of the 'collective figurations' and should be considered in the context of the explained immorality of genocide. It cannot be stressed enough, at this juncture, that this taxonomy is proposed for mainly explanatory convenience, which means that all these broadly defined factors are largely interrelated, function together and can rarely stand alone in a process of justification. That is, they do not signify a particular method or approach, but together with all the other possible reasons they function as points of consideration, reference to which may or may not provide sufficient moral justification for claiming a part's substantiality in the process of reasoning.

To begin with the first one, the particular characteristics of a protected group or targeted part may become prominent factors in the process of balancing. In respect of the part's characteristics, the most likely example is those situations in which a part is differentiated from the whole through defining a separate social boundary that is usually built on a distinctive spatial, contextual or material character. Such differentiation, however, does not go as far as leading, at least at the time of the attack, to the emergence of reciprocal in-group and out-group perceptions that draw ethnic, national, religious or racial boundaries vis-à-vis the overarching whole, but rather creates a distinct sub-group identity. Examples of this include Black Sea Turks[787] or Yorkshire people in England,[788] whose members usually speak particular dialects, have distinct cultural practices, largely recognise themselves and are recognised as having these particular sub-group identities but not as distinct ethnic, religious, racial or national groups. To reiterate, however, there is no clear-cut formulation to establish when such a sub-group transforms into a distinct 'whole', since this assessment requires an

[787] M. Meeker, 'The Black Sea Turks: Some Aspects of Their Ethnic and Cultural Background', 2 International Journal of Middle East Studies (1971), 318-345.

[788] Pete Woodcock, 'Cornwall and Yorkshire show regional identities run deep in England, too', The Conversation (2015) available at <https://theconversation.com/cornwall-and-yorkshire-show-regional-identities-run-deep-in-england-too-41322> accessed on 20 March 2019.

examination of the socio-political-historical continuum and the particular in-group and out-group perceptions that emerge as a result of these processes. That is, judges are ultimately required to explore on what basis and how we can historically individuate the unity in question. Thus, this explanation already indicates a great deal of intersectionality with other factors, given that spatial distinctiveness and socio-historical processes underpin these sub-group identities.

The underlying moral reason for this consideration should be rather straightforward. The destruction of such sub-groups, in addition to causing physical harm to individuals, destroys particular established ways of living and identities attached to those sub-groups and thus causes both identity and status loss and reduces the opportunities for the realisation of a range of creative potential of humanity. However, one may still rightfully ask in light of these elaborations how small such a sub-group may be, given that even the destruction of a village may result in these moral harms. It is already pointed out that one of the functions of the substantiality requirement is to make an analytical assessment about the likelihood of the occurrence such harms in significant proportions and thus reflect the moral consciousness that underpins the law and justifies the stigma of the crime. In this respect, the characterisation of excessively small sub-groups as a substantial part is a remote possibility. That said, we must be cautious (and also it is against the ontological perspective put forward here) to make sweeping declarations like scholars, such as Paul, who state that considering a single municipality as a substantial part 'disproportionately lowers the threshold for the crime'.[789] In extreme and rare situations, e.g. the destruction of the last members of an ancient and valued sub-group, even such a small part may be considered 'substantial' enough to trigger the very collective moral consciousness that underpins the law. It can nevertheless be stated, as a generalisation, that the smaller the part becomes, the more the moral strength and persuasiveness of the analytical factors should become compelling and forcible to justify a judgment of 'substantiality'.

In respect of the particular characteristics of the 'whole', the most likely situation is a whole already consisting of relatively small numbers of individuals. That is to say,

[789] Paul, *Kritische Analyse und Reformvorschlag zu Art II Genozidkonvention,* 317 (cited in Behrens, `The *Mens Rea* in Genocide', 93).

rather than just a 'part' of the group, even the group itself may not be large enough to indubitably satisfy the aforementioned kind of 'absolute magnitude'. Given that one of the main purposes of the Genocide Convention is to provide protection for these most vulnerable 'minorities', such factor may constitute a strong reason to qualify less populous parts as 'substantial'. That said, once again, the smaller the size of the group becomes, the more the strength of this argument is also likely to diminish. This is because, targeting half of a group that consists of, say, 200,000 people is more likely to cause significant damage to individuals, and that particular identity, and especially opportunities for the realisation of a range of creative potential, compared to a case where half of a group that consisting of 1,000 people is targeted. In the latter kind of situation, then, further or stronger spatial, sociopolitical or any other factors are more likely to be required to justify the characterisation of such a part as 'substantial' (e.g. being an oppressed minority in a distinct region separate from the rest of the whole). This, however, does not mean the former kind of situation *de facto* justifies a judgment of 'substantiality', but, as should be clear for now, all the particular facts of the situation should be taken into consideration to inform and support (or disprove) the ultimate decision.

Second, the spatial circumstances denote combinations of all the conditions and practices of social life that are linked to the relative positions of collective unities and their parts with regard to one another. As Simmel remarks in his article on the persistence of groups:

> The first and most obvious element of the continuity of [a] group unit is the continuance of the locality, of the place and soil on which the group lives. Territory constitutes the abiding substratum for all change of their contents. To be sure, the continuance of the locality does not of itself alone mean the continuance of the social unity, since, for instance, if the whole population of a state is driven out or enslaved, we speak of a changed civic group in spite of the continuance of the territory. [...][I]t is only one such element, for there are many groups [that] get along without a local substratum.[790]

[790] Simmel, Persistence of the Social Groups, 667, 668.

This quote neatly explains why spatial distinctiveness must be an important factor in the consideration of 'substantiality', as it is intended to be denoted by the geographical approach in case law, since through its interaction with the place and soil on which it is situated, a part may develop distinct characteristics as a sub-group or attain a particular socio-historical-political significance that might justify its consideration as 'substantial' despite being relatively small in size. That said, mere geographical distinctiveness would rarely be sufficient given that, then, any geographically distinct part (e.g. a village or small town) would de facto qualify as substantial. Once again, spatial distinctiveness as a factor should be supported by others, especially when the size of the group is smaller. The Srebrenica situation comes to mind as the most vivid demonstration of this fact, where spatial distinctiveness is greatly supported by sociopolitical reasons in determining that the Bosnian Muslims in Srebrenica qualify as a 'substantial part'.

Sociopolitical factors, in the context of our argument, refers to the idea that a part, whether it is situated in a particular geographical area or discerned in any other way, may gain a temporal significance in that particular social and political context. That is to say, the destruction of such a part shocks the collective moral consciousness, due to either the meaning and significance it attained in that particular context and time (e.g. the Sabra and Shatila refugee camps[791]) or due to its emblematic and strategic significance for the broader conflict. The latter factor, in conjunction with spatial distinctiveness, was central to the ICTY's justification as to the Srebrenica situation. As explained in chapter three, contrary to the way it represented its conceptual argument, the ICTY in effect used the qualitative approach not to establish the substantiality of the part but to determine the relevant part. After establishing through this argumentation that the Bosnian Muslims of Srebrenica was the relevant part, the Tribunal then had to justify on what basis this part of the broader Bosnian Muslim group qualified as 'substantial'.

At that time, the Bosnian Muslim population in the enclave mostly consisted of those who had immigrated from other parts of Bosnia in order to seek protection, since the

[791] UN. Doc. A/Res/37/123D available at. <http://www.un.org/documents/ga/res/37/a37r123.htm> UN.Doc.A/Res/37/PV.108 available at <http://dag.un.org/bitstream/handle/11176/304023/A_37_PV.108-EN.pdf?sequence=1&isAllowed=y> accessed on 10.07.2016.

Srebrenica enclave was declared a safe zone by the UN.[792] In this respect, it would be an overstatement to speak of a form of distinct sub-group identity that emerged in the socio-historical process vis-à-vis the whole Bosnian Muslim group. Against this background, in conjunction with spatial distinctiveness, the Tribunal heavily relied on sociopolitical factors in considering the relevant part as 'substantial', noting that:

> …the Srebrenica enclave was of immense strategic importance to the Bosnian Serb leadership because (1) the ethnically Serb state they sought to create would remain divided and access to Serbia disrupted without Srebrenica; (2) most Muslim inhabitants of the region had, at the relevant time, sought refuge in the Srebrenica enclave and the elimination of the enclave would accomplish the goal of eliminating the Muslim presence in the entire region; and (3) the enclave's elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their defencelessness and be "emblematic" of the fate of all Bosnian Muslims.[793]

That is to say, while the ICTY laid out a conceptually problematic framework in abstract as explained throughout the study, in actuality its ultimate consideration came fairly close to the understanding proposed here. Rethinking the ICTY's reasoning from the conceptual framework established so far (and also in the light of arguments presented in the next chapter as to determination of the relevant part) frees its overall reasoning from conceptual contradictions and enhances the persuasiveness of the justification of 'substantiality' – even though it will always be challengeable from various standpoints due to the contingency inherent to the crime and the assessment of substantiality ultimately being a balancing process. That said, considering the fact that the Tribunal's ultimate pronouncements of genocide are rarely challenged by the public or in academic circles, it would not be an overstatement to note that the ICTY's decision reflected the collective moral consciousness in a reasonably successful way. On the other hand, the lack of a similar kind of sociopolitical factor may better justify the reasoning as to the Vukovar situation, in which the genealogical imperative was also

---

[792] UN S/RES/819 [1993].

[793] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 774.

weak and the other analytical factors were more or less similar to the Srebrenica situation. Unlike Srebrenica, however, the sociopolitical factor was less persuasive to qualify the targeted part as 'substantial'.[794]

At this juncture, it needs to be made clear what the proposed understanding adds to the existing judicial approach. In the end, the ICTY and ICTR case law has already ensured a flexible framework with a catalogue of loosely constructed and a non-exhaustive list of approaches, and thus one might even go as far as to assert that the framework presented here has been 'repacking' the existing approaches with a new 'wrapping'.[795] Such criticisms, however, would be misplaced. In general, emancipating the existing framework from its underlying substantialist and binary presumptions ensures the conceptual coherence of the overall reasoning process, better represents the multi-dimensional and complex reality of genocide and, connectedly and even more importantly, helps to avoid obscuring the protected value by the law according to which moral fairness should be considered. In addition, the proposed understanding has three major concrete implications that are specific to the assessment and justification of 'substantially'.

First, it effectively omits any contradicting approaches that have been used as backdoors to advance a particular conception of genocide. This is because, on the one hand, the proposed framework excludes any kind of functional methods of assessment (qualitative approach) by successfully demonstrating their moral and ontological implausibility. On the other hand, it argues that the quantitative approach, as presented in case law, is also implausible because while the consideration of 'absolute magnitude' stems from the genealogy of the crime, relative magnitude, at best, may constitute an analytical reason that does not complement but rather competes with the 'absolute magnitude' requirement. Thus, while the quantitative approach is ultimately incoherent, the present study avoids such incoherence by successfully dismantling its elements and properly positioning them.

---

[794]. Although Judge Bhandari makes the claim that Vukovar gained the same emblematic significance, his reasoning offers a less concrete and persuasive arguments compared to the one made by the ICTY in relation to the Srebrenica. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015], Separate Opinion of Judge Bhandari, para.25.

[795] I would like to thank Att. Onur Sahin for advising me to make this clarification.

Second, the existing judicial framework provides very little guidance in relation to how to weigh different approaches against each other. Although it is implied that the quantitative approach has some form of primacy over others, neither the relationship between absolute and relative magnitude nor the issue of how to take other approaches in to consideration has been clarified. The proposed understanding overcomes this complication by offering a holistic approach and exploring how to think about the competing factors. Third, the proposed understanding shifts the discourse on substantiality away from the impossible task of finding universal and static formulations to justify the assessment of 'substantiality' through ontological deliberations, and towards embracing the contingency inherent to the determination process. Thus it suggests establishing an assessment process based more on moral and genealogical considerations, which requires judges to find a balance between the genealogical stigma attached to the crime and the moral goal of protecting the listed collective entities.

4.3. Summary and Conclusion

Due to the complexity of the ideas advanced here, this final section will both summarise these main ideas and draw a conclusion. The present chapter has argued for going beyond substantialist thinking in legally conceptualising genocide and, connectedly, in assessing and justifying 'substantiality' by exploring a relational realist conception of protected groups. In doing that, it has sought to avoid the pitfall of characterising protected groups in a static and essentialist or reductive manner, which causes a deficient understanding as to the immorality of genocide and, thus, morally and practically problematic understandings of 'substantiality', as chapters two and three established. A relational realist conception allowed encapsulating the complex and contingent being of protected groups – to whatever extent that is possible, which consequently enhanced our comprehension of the crime and the multi-faceted harm that makes it distinctive in a moral sense. Taking this step ultimately led to a novel analysis and understanding as to our ability to legally represent the crime and, connectedly, the assessment and justification of 'substantiality'.

The first part of the chapter examined the ontology of protected groups by respectively focusing on three main aspects of their being. First, it is established that the concepts of ethnicity, race, nation and religion are certainly not natural phenomena, but they are also

not entirely fictitious and thus subjective. Rather they are relatively stable 'forms' of relatedness, which nevertheless change moment by moment – albeit usually at a very slow pace, depending on the relations that underpin the 'form' and the collectively and constantly re-confirmed significance and meaning ascribed to them. These 'forms' loosely determine the borders regarding what kinds of relatedness can be described as racial, religious, national or ethnic differentiation. Thus, it is suggested that, in each particular case, judges are required to consider the present-day 'form' of these concepts, and then establish whether that particular differentiation on the historical continuum can be characterised as one of these forms of relatedness.

Second, the emergence and boundaries of protected groups were scrutinised. At this point, largely relying on Simmelian sociology, it is emphasised that the nature of reality is 'becoming', rather than static existence. For any kind of entity, including protected groups, what we perceive as 'thingness' is ultimately a relative continuity over time, i.e. becoming one in a sequence of integration of many parts, which in turn emerge in the same manner. Equipped with this perspective, it is established here that due to certain social needs and commonalities, individuals have felt the need to grow into national, ethnic, racial[796] or religious forms of unity, i.e. they have developed relatively constant and persistent relations, perceptions and practices that are collectively affiliated with these notions. However, developing these kinds of practices, perceptions and relations, e.g. sharing and practising a particular religious belief or having the same physical traits, does not automatically give rise to a distinct 'social whole'. Such an entity only emerges when individuals externalise a particular process of unity through reciprocal in-group and out-group perceptions, which is a fundamental process in the emergence of these entities and their identification vis-à-vis other unities.

These two perceptions, as well as the underpinning relations and practices of a group, are always ongoing achievements and thus group boundaries and characteristics are necessarily only relatively stable. This processual nature of groupings, in other words being in a constant process of 'becoming', eliminates the possibility of individuating them by any reference to an 'essence'. Instead, they are necessarily historically

[796] To restate, racial form of unities has usually an artificial basis, since the pattern of related social practices and perceptions predominantly emerge after arbitrarily or socio-historically created meaning and significance are attributed to certain physical traits.

individuated. In short, then, protected groups emerge and establish their boundaries as a result of individuals' externalisation of their collective patterns of relatedness and practices as if they are natural phenomena, and constantly attributing meaning and significance to these in delimiting the social world.

Third, the nature of protected groups' reality and their persistence were explored. Once it was recognised that reality is 'becoming' rather than 'being', it became apparent that the ontological autonomy, and thus distinct value, of an entity does not emerge from any kind of essence, but rather from the 'unity' producing causal powers and properties that its parts do not possess individually or in sum. What then makes protected groups ontologically distinct and valuable as such is that, even though their emergence and continuation are contingent on patterns of relations and an objectification (externalisation) process, properties like culture or language ultimately belong to the groups as such, i.e. they can be explained, but not explained away, by reduction to the individual level.

While the study has thus substantiated its claim that protected groups have a distinct value as separate entities, it has also been important, in order to understand the nature and harm of group destruction, to establish how these groups are able to be be causally efficacious for their members by way of prompting them to produce relations that largely preserve and occasionally transform the properties and powers of the entity. It is argued that in relational thinking only the present exists and all the causal effects of the past influence the present shape through affecting the decisions taken. In other words, the past enhances or restrains possibilities for the future from certain aspects through presenting physical, biological and psychological forces. For example, the body and mind of a human being at any point in time carry forward her past to the present and enhance or restrict possible decisions and outcomes for her. Similarly, protected groups have the same impact once they are collectively externalised, and their historicality may include buildings, conventions, norms, biological heritage and so on. Indeed, individuals are always born or thrown into certain social unities and they face the normative influence exerted by these social groups, or more precisely their historicality, through their relations with members of the groups and their environment.

Therefore, there exists a circular relationship because individuals think that there is a

social whole and hold the normative belief that a member of the group should act in accordance with certain norms, while the group can exist and influence individuals due to a set of individuals sharing this way of thinking and externalising the entity collectively. All in all, it is founded that protected groups are subject to processes that produce emergent properties, which endows them with ontological autonomy and distinct value. Two reciprocal phenomena underpin the being of these entities. First, there are shared in-group and out-group perceptions that a collection of people have something in common in racial, religious, national or ethnic terms, and this commonality is significant. Second, as a result of externalisation, there arise normative beliefs among members and also outsiders that certain practices, rules or ways of acting must be followed as a result of the social role assigned to them as group members.

As a result of this three-step examination, it is established that the idea of group destruction, in other words the notion of 'intent to destroy' a protected group, refers to the aim of putting an end to the continuation of one of these listed kinds of 'processes'. This idea will be further elaborated in the next chapter. On the other hand, recognising the complex nature of protected groups allowed identifying that the distinct immorality of genocide stems from its threefold harm. First, it physically and mentally harms individuals. Second, it causes identity and status loss of survivors, since being deprived of the normative influence of a collective which had played an essential role in the self-definition of individuals creates significant harm, even if they preserve their physical existence. While these two harms are well recognised in the literature, the third harm of genocide is either largely omitted, or, as in the case of Lemkin, has failed to be ontologically substantiated. The theoretical framework laid out in the chapter enabled us to address this situation. To restate, protected groups are constantly providing interpretative schemas for individuals and influence their choices, for better or worse. Through the interaction between different groups, these different interpretative schemas constantly interact with each other and thus evolve. This creates a unique richness for humanity. The destruction of a unity and thus its emergent properties and causal powers extinguishes or significantly lessens the possibilities for the realisation of a selection of creative potential that could have otherwise occurred. It thus suggested that protection against this threefold harm should serve as a moral anchor in constructing a legal understanding of genocide.

However, recognising the complexity and contingency innate to the protected 'good' also accentuated the limits of legal representation in relation to the crime and revealed that reducing genocide to a simple, easy-to-apply legal test is beyond reach for ontological reasons. The second part of the chapter advanced this argument by focusing in particular on the substantiality requirement. 'Strict normativity', i.e. attempting to bring 'certainty' to norm application processes by 'stabilising' the meanings of definitional terms and formulating the law in the form of a series of relatively 'objective' tests, may be effective as regards less contingent phenomena and rarely puts judges into dilemmas between normativity (following the normative universal) and justness (responding to the particulars of the case). Yet the unique contingency of protected groups significantly reduces the effectiveness of such a practice in relation to genocide, because not only does every group have a unique way of 'becoming', but also its 'being' is in constant transformation. Thus, any attempt to reduce their being, and connectedly their destruction, to a static formula would unavoidably leave many possibilities beyond the scope of law and undermine the moral goal of genocide law if judges prefer to uphold normativity.

The chapter has emphasised that attempting to generate such institutional arrangements or universal rules as to the determination of 'substantiality' has been the most vivid example and it located the two main ontological reasons for this. First, determining the 'whole' in any scientific-like manner appears to be beyond the bounds of possibility since, in light of the ontological explanations provided, the boundaries of groups are in constant flux and the whole-part relationship is always relative and contingent. That said, the study specified that the boundaries of a group are nevertheless not entirely subjective, but what makes a unity a 'whole' in relation to its overarching kinship is the socio-historical and sociopolitical factors that create an additional and distinct solidary and identity. Therefore, it is suggested that in determining a whole-part relationship, judges must assess whether the population in question developed a distinct identity through reciprocal in- and out-group perceptions on a historical continuum for one of four dimensions listed in the definition, which ultimately led the perpetrators to target it because of that distinct identity. As is obvious, however, this examination, which is an essential starting point for the assessment of substantiality, cannot be reduced to an 'objective' test, given that each 'process' of differentiation is unique and contingent.

Second, the contingency and adaptability of protected groups largely exclude the ability of the law to offer a universal justification for 'substantiality'. Suggesting any decisive element or threshold would ultimately be nothing but arbitrary or speculative, since there is no particular essence to be destroyed but rather a process. Moreover, it is established that aiming to find an ontological justification for each specific case by trying to predict the possible impact of intended partial destruction is also a vain practice, since protected groups and their destruction are such complex and contingent processes that only an omnipotent being may duly locate all the relevant factors and relations that underpin the groups, as well as know the actual consequences of the intended destruction. Thus, it is concluded that instigating an ontologically justifiable universal norm that consistently produces morally acceptable outcomes for the assessment and justification of 'substantiality' is beyond the bounds of possibility.

Against this background, the study suggests that rather than vainly striving to further crystallise a universal norm in order to bring certainty to the rule itself, we must turn our focus to the general thinking process on 'substantiality' and thus clarify the rule-application process in order to avoid a dilemma between making an entirely subjective assessment and undermining the moral goal of the law. By reframing the issue as a rule-application, rather than a rule-determination, problem, it is suggested that the assessment and justification of 'substantiality' should be rethought as a balancing process between genealogical and analytical imperatives.

The genealogical imperative stems from the historical imagery attached to the criminal phenomenon as a collective moral reaction to proto-typical events, most prominently the Holocaust. This imagery plays an informal role in the legal construction and refinement of the concept through constant, usually implicit, comparison of a given case in hand with proto-typical events. One of its main aspects is that genocide is a crime against large masses. Given that the collective moral gravity attached to the law against genocide is largely related to this imagery, it would be counterintuitive to conclude, for whatever reason, that a high number of targeted victims in absolute terms may not constitute a 'substantial' part. It needs to be re-emphasised that this consideration implies no ontological basis, unlike the existing quantitative approach (which also includes relative magnitude for this reason), but rather reflects how collective moral consciousness underpins criminalisation. Judges therefore hold a margin of discretion in

considering whether the size of a targeted ‘part’ is large enough to trigger this collective moral consciousness and the study suggests that the standards should be stringent if this genealogical reason will be the only one involved in concluding that a part is substantial.

The analytical imperatives are the entire range of reasons that emanate from the purpose and object of protecting listed groups and must be measured in light of the explained moral harm of genocide. While these factors are necessarily non-exhaustive, given the contingent nature of groups, the study has identified three major kinds, namely (i) the particular characteristics of the whole or targeted part, (ii) spatial circumstances and (iii) sociopolitical embeddings and context. It is ultimately argued that the assessment of substantiality is a balancing process, in the sense that the stronger the genealogical imperative becomes the more that analytical factors may play a lesser role in its justification, while the smaller the number of victims in absolute terms means analytical factors must be more compelling, in that the occurrence of the threefold harm of genocide in significant proportions becomes likely.

Overall, the chapter has laid out the main novel contributions of the thesis to the body of knowledge, which can be grouped under two headings. First, while substantialist thinking about genocide has been gradually abandoned in the broader social sciences due to its deficient representation of the crime, lawyers still largely build their accounts on substantialist presumptions. The chapter has offered a relational realist alternative in order to move beyond substantialist ways of thinking about genocide. By taking this step, the chapter has not only revealed the contingent reality of protected groups and its implications for legal representation, but also refrained from unduly reducing the moral harm of genocide to a single dimension. Instead it has offered a comprehensive take on the immorality of genocide, which ontologically justifies the criminalisation of genocide as a distinct category. Recognising the contingent reality of protected groups revealed that reducing the legal representation of the crime to a set of straightforward ‘tests’ is beyond reasonable possibility without creating a moral and applicative problematic framework. Second, these findings lead us to conclude that the assessment and justification of substantiality should not be thought as a rule-determination problem, but rather a rule-application problem. As a result, instead of offering any universal norms, i.e. definitive ‘methods’, the chapter has offered a novel framework for analysis by

rethinking assessment and justification as a balancing process between genealogical and analytical imperatives.

Having established the study's perspective on the assessment and justification of 'substantiality', the next chapter will address an important doctrinal complication regarding the research topic, which has occasionally been mentioned or hinted at so far – particularly in respect of Behrens's individualised approach, namely, how the 'targeted part' should be located in light of the processual nature of group destruction and the contextuality of 'genocidal intent'.

CHAPTER FIVE

Locating the Relevant 'Part' in Light of the Processual Nature of Group Destruction and the Contextuality of Genocidal Intent

The present chapter addresses the question of how and on what grounds should the part that will be relevant to the assessment of 'substantiality' be determined? It seems evident that the discussion of a part's substantiality can only be instigated after identifying the relevant 'part'. However, the incongruity between the legal formulation and the social phenomenon renders the identification process by no means straightforward. There are two main sources of complexity in this regard.

First, while the intentional destruction of a group is commonly, if not always, a multi-dimensional process, the legal definition characterises such process as 'genocide' only when it reaches the level where it involves at least one of the listed acts committed. Yet, in respect of our research topic, this raises the question of whether the relevant 'part' is one that the listed acts of genocide are (intended to be) directed at or one that has been the target of the broader destructive process. This was the source of confusion in the Srebrenica situation, as to whether the military-aged male population or the entirety of Bosnian Muslims in Srebrenica was the targeted part.

Second, and connectedly, the lack of definitional reference to the inherent relation between contextual embeddings and the formation of individual genocidal intent not only constitutes a misrepresentation of the social phenomenon by inaccurately implying that the crime of genocide can be committed by anyone regardless of her position or surroundings, but also creates uncertainty concerning on what doctrinal and conceptual grounds the extent of a collective attack can be the point of reference in determining the relevant 'part' targeted by a perpetrator. By respectively engaging with these two aspects of the problem through the lenses of the ontological and moral framework established in chapter four, this chapter ultimately aims to offer its novel understanding and make suggestions regarding how to locate the relevant 'part'.

5.1. Processual Nature of Group Destruction and Locating the 'Part'

5.1.1. Processuality of Group Destruction and Genocide

The thesis has already founded that once individualistic thinking and thus restrictive interpretation of the term 'to destroy' are abandoned, it becomes clear that 'intent to destroy' may be formed without 'acts of genocide' being committed and only when they are both present does the crime of genocide occur in the legal sense.[797] In other words, while genocide necessarily requires 'intent to destroy a protected group as such', not every atrocities committed with such an intent qualifies as 'genocide' in legal sense. As also pointed out, this understanding is in effect introduced in the ICTY case law, albeit through the backdoor of the qualitative approach to 'substantiality',[798] as well as in the recent UN report on the Myanmar situation with an *argumentum a contrario*: 'other forms of destruction, such as social assimilation or attacks on cultural characteristics, do not constitute *genocide if they are not related to the physical or biological destruction of the group*'.[799]

It seems worth noting that thinking about group destruction in this manner not only appears to be in better conformity with the Lemkinian explanation of the distinctiveness of the criminal phenomenon of genocide since Lemkin emphasised that genocide differs from denationalisation and mass murder as a form of 'total attack' that assaults all or several aspects of group life,[800] but also better represents the socio-historic reality,[801]

---

[797] That said, the Appeals Chamber in *Karadžić* recently advanced the non-processual understanding of 'genocidal intent' by arguing that the 'intent for permanent removal' does not indicate to the 'intent to destroy'. *Prosecutor v. Karadžić* [2019] MICT-13-55-A, Judgment, para 717-730.

[798] See chapters two and three

[799] UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', UN Doc. A/HRC/39/CRP.2, (17 September 2018), para. 1412 (*emphasis added*).

[800] For Lemkin genocide signifies 'a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group. Lemkin, *Axis Rule*, 79.

[801] See for some detailed examination of histories of genocide D. Stone (ed.), *The Historiography of Genocide*, (New York: Palgrave Macmillan, 2008); R. Gellately and B. Kiernan, *The Specter of*

which should be taken into account in the interpretative construction process in order to fulfil the protective and punitive objectives of genocide law.

To elaborate, it seems evident from the historical evidence and common logic that group destruction is a 'process',[802] the origins or stages of which cannot be easily standardised or essentialised. As Henry Theriault cogently observes, the very idea of group destruction is a shifting social construct that is subject to 'mutations' in its forms and methods, which requires us to build conceptual and legal frameworks that allows to be sensitive to unique contexts and the changing nature of the social phenomenon.[803] That being said, the past events indicate that the group destruction process typically involves various dimensions that target the 'historicality' of the collective such as destroying books, monuments, graveyards; assaulting languages, traditions; or interfering in economics, politics, alongside attacking the physical and biological well-being of group members.[804]

The Holocaust has been the primary example of this processuality. While the acts against the very existence of Jewish people have been committed throughout the Nazi reign, the 'final solution' was not revealed and implemented before the Wannsee Conference in 1942.[805] Rather each aspect of the lives of Jewish people was gradually targeted, i.e. from legally prohibiting Jewish people from carrying out certain practices and confiscating their wealth, to sending them to the Ghettos, to building forced-labour camps and finally destroying them in masses. The underlying intent was the same throughout the entire process: eliminating the Jewish identity in Europe. The mass annihilation was not the only possible or suggested way to achieve this goal. Indeed, in

---

Genocide: Mass Murder in Historical Perspective, (Cambridge: CUP, 2003). M. Levene, *Genocide in the Age of the Nation State: The Rise of the West and the Coming of Genocide* (London: I. B. Taurus, 2005).

[802] S. Rosenberg, 'Genocide is a process, not an event', 7 Genocide Studies and Prevention (2012), 16-23.

[803] Theriault, 'Genocidal Mutation and the Challenge of Definition', 498–501.

[804] As the means of group destruction, the extermination of individuals or their biological subjugation is the most common and well-examined aspect. These techniques include, but not limited to, killing, prevention of births, forced impregnation, (See S. Fisher, 'Occupation of the Womb: Forced Impregnation as Genocide', 46 Duke Journal of International Law (1996)), forced marriages, starvation, and biologic interventions (e.g. forcing all black people to get medical 'treatment' in order to change their skin colour).

[805] C. Gerlach, 'The Wannsee Conference, the fate of German Jews, and Hitler's decision in principle to exterminate all European Jews.' The Holocaust. (Routledge, 2002) 116-171.

the process that leads to the 'final solution', there were different suggestions such as deporting the Jewish people to afar away spot in order to achieve the goal.[806] However, and mostly due to the need of labour, the ultimate decision was keeping them in the camps until they become 'unnecessary' and ready to be killed.

The process of destruction usually, but not necessarily, moves from morally 'less' heinous acts, such as the forbidding of language or destruction of books, towards more substantial assaults, like forced deportations or physical destruction; and it may continue after the physical destruction of members through the denial of any assault, thus insulting the memories of the victims, or the destruction of any remnants that belong to the group in order to prevent any possibility of its revival. Such acts ultimately aim to destroy the sense of 'we-ness' and interdict the reproduction of the underpinning group relations. For example, in most religious, national or ethnic groups the existence of, *inter alia*, the monuments, holy sites or sanctuaries as the symbolic markers of the group nourish the sense of 'we-ness'. Demolishing such 'markers' has been used as an aspect of group destruction due to their impact on the 'spirit' of the entity. Indeed, in Srebrenica, Mosques, houses and monuments of Bosnian Muslims were demolished alongside the selective killings of individual members. Similar scenes also took place during the Holocaust, in which not only the bodies of Jewish people, but also everything related to their culture and collective being were destroyed.

In addition to destroying their 'physical' historicality, ceasing the reproduction of the underpinning relations and practices of the targeted unity has also been a historically common aspect of group destruction. Most commonly, attacks against family structure (such as forced separation/isolation) are resorted by the perpetrators, given that the family is the most basic unit of almost any society and its dissolution will unavoidably undermine the relations that give rise to that society. Similarly, forbiddance of practising religion; national or ethnic ceremonies, usage of the group's language; cooking particular foods; or wearing symbolic clothes have all been historically utilised by the perpetrators. In most historical cases these acts preceded and/or accompanied the physical and biological aspects of destruction in order to transform the victim society in

[806] C. Browning, 'Nazi Resettlement Policy and the Search for a Solution to the Jewish Question, 1939-1941', 9 German Studies Review (Oct., 1986), pp. 497-519.

an irreversible fashion even if the total annihilation project fails.

As Daniel Feierstein points out, in this respect, the social phenomenon[807] in question is:

> a deliberate attempt to change the identity of the survivors by modifying relationships within a given society. This is what sets modern genocide apart from earlier massacres of civilian populations, as well as from other processes of mass destruction. The fact that genocide has proved so effective in bringing about social changes — equalled only by revolutionary processes— suggests that it is not simply a spontaneous occurrence that reappears when historical circumstances are favourable. Rather, it is a process that starts long before and ends long after the actual physical annihilation of the victims, even though the exact moment at which any social practice commences or ceases to play a role in the "workings" of a society is always uncertain.'[808]

This view echoes Lemkin, who notes in his autobiography that '[g]enocide is a crime perpetrated by one genos [or more frequently by a section of the genos in the name of the genos] against another. [...] Here we are dealing not with casual events but with deeply entrenched anthropological and sociological patterns'.[809]In short, what is emphasised here is that, at the conceptual level, genocide should not be equated to the group destruction, since even though the underlying intent is the same for the both, the former denotes a particular, and arguably the final, stage in the latter, where particular acts are utilised in order to achieve the overarching goal. In other words, what separates

---

[807] Feierstein uses the term 'genocide' in broader, non-legal sense.

[808] Feierstein, 'Genocide as a Social Practice, 12.

[809] Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, 182. Also see G. Fletcher and J. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 Journal of International Criminal Justice (2005), 545: 'Genocide is not merely one individual seeking to annihilate an entire ethnic group. History teaches us that genocide is the attempt to wipe out an ethnic group by another ethnic group. It is for this reason that genocide brings strong collective shame and guilt to a nation that has perpetrated it. Indeed, this shame and collective guilt may very well persist even after the individuals involved have passed from the scene.' See also J. Ohlin, 'Group Think: The Law of Conspiracy and Collective Reason', 98 Journal of Criminal Law and Criminology (2007), 170: 'Genocide is the historical clash between peoples locked in existential battle—one group seeks the destruction of the other and implements a policy or plan designed to bring about that group destruction.'

genocide from other forms of group destruction is not the 'intent to destroy', but the acts accompanied to this intent.

5.1.2. Genocidal Intent and Locating the 'Part'

In light of these insights and the ontological arguments presented so far regarding the protected groups, the idea of group destruction – in other words the conceptual scope of the definitional term 'to destroy' – can be theorised as the *forcible suppression, destruction or transformation of 'crystalized' interactions and practices that underpin the objectivicated unity and/or the elimination of in-group mechanisms that are established to preserve the collective significance and meaning attributed to the relevant interactions, traits and practices.*[810]

It cannot be emphasised enough that this very conceptualisation signifies the intended end state that can be achieved through various acts, from the total annihilation of members to 'mere' forced cultural assimilation.[811] As elaborated by the ontological explanations provided in chapter four, the existence of the protected groups depends on

---

[810] This conception comes fairly close to the one which is proposed by Michael Crook, according to whom, the protected groups can be best conceived as '"totalities" made up of many determinations and relationships dialectically in a constant process of 'becoming', in German meaning both "coming to be" and "ceasing to be". [...] Genocide is therefore the forcible disruption or interdiction of the process of cultural change or reproduction of the *social figuration'*. Crook, 'The Mau Mau Genocide: A Neo-Lemkinian Analysis', 21. For a similar view see Powell *Barbaric Civilization: A Critical Sociology of Genocide*.

[811] To elaborate, as one may infer from the description and ontological examinations proposed, the existence of the protected groups depend on three pillars: (i) physical presence of individuals; (ii) the collective belief about the unity of a set of people on ethnic, national, religious or racial grounds; and (iii) the endorsement and enforcement of the certain practices, rules or ways of acting because of the normative beliefs developed and acquired through interaction that they are required by virtue of the social role assigned as group members. In the process of group destruction, it would usually be sufficient to target only one of these pillars, given that they are interconnected and it is hard for the group to survive when one them is destroyed. Indeed, if individuals are physically destroyed we cannot speak of their beliefs, relations or interactions. Similarly, if the collective belief about the unity of a set of people is missing, there will be no interactions, sense of 'we-ness' and solidarity among individuals in ethnic, national, religious or racial terms. Consequently, there will be no 'crystallised' and 'objectivicated' interactions, practices or norms that define a distinct and relatively stable social unity. Finally, if there is no normative belief about the endorsement and enforcement of the certain practices, rules or ways of acting, then, the group cannot re-produce and relatively stabilise its distinctive emergent properties like culture, language and so on. And also the sense of 'we-ness' may not survive, given that they are constantly re-enforced by the structured relations among the individuals.

three pillars: (i) physical presence of individuals; (ii) the collective belief about the unity of a set of people on ethnic, national, religious or racial grounds; and (iii) the endorsement and enforcement of certain practices, rules or ways of acting because of the normative beliefs developed and acquired by the members through their interactions and the social role assigned to them as group members.

In the process of group destruction, it may be sufficient to target only one of these pillars, given that they are interconnected and it is hard for the group to survive when one them is destroyed. Indeed, if individuals are physically destroyed we cannot speak of their beliefs, relations or interactions. Similarly, if the collective belief about the unity of a set of people is absent, there will be no interactions, sense of 'we-ness' and solidarity among individuals in ethnic, national, religious or racial terms, as well as practices or norms that define a distinct and relatively stable social unity. Finally, if there is no normative belief about the endorsement and enforcement of the certain practices, rules or ways of acting, then, the group cannot re-produce and relatively stabilise its distinctive emergent properties like culture, language and so on.

This understanding of group destruction implies that the 'intent to destroy' may transpire long before the commission of acts of genocide and, more strikingly, may even be successfully implemented without the crime of genocide occurring, with the exception of racial groupings.[812] Even though the drafters of the Convention, unlike Lemkin,[813] drew a moral distinction between different acts and in effect suggested that the destruction of a group through the listed acts has a greater moral gravity that

---

[812] This is because, as is already noted, the racial identities are usually polarised and augmented not through relations among members, but through the in and out group perceptions. And since the physical traits are the 'things' that the in and out group significance and meaning attributed to, the destruction of a racial group will almost always have exclusively physical or biological nature and thus constitute the crime of genocide.

[813] '[Genocide] refers to a coordinated plan aimed at destruction of the essential foundations of the life of national groups so that these groups wither and die like plants that have suffered a blight. The end may be accomplished by the forced disintegration of political and social institutions, of the culture of the people, of their language, their national feelings and their religion. It may be accomplished by wiping out all basis of personal security, liberty, health and dignity. When these means fail the machine gun can always be utilized as a last resort. Genocide is directed against a national group as an entity and the attack on individuals is only secondary to the annihilation of the national group to which they belong' R. Lemkin, 'Genocide- A Modern Crime' 4 Free World (1945), 39.

supposedly better justifies the stigma attached to the term 'genocide',[814] this does not change the fact that intended destruction is directed against the 'unity' and manifested through all the acts of the destruction process.

In other words, any of the destructive acts, whether listed in Article II or not, can help in establishing 'genocidal intent' and its scope,[815] even though the crime of genocide is committed in the legal sense only when one or more of the listed acts are carried out. In the end, the culprits may find it more convenient to impose different measures on different components of the social unit to reach their ultimate destructive goal. For example, the thesis previously highlighted *Mengistu Hailemariam et al.* in Ethiopia,[816] in which the Court followed the individualistic reading of the term 'to destroy' in deciding that the entire political opposition was targeted by the perpetrators, as the evidence indicated that the physical attacks was selective and mostly secondary to the broader acts of group destruction. While the inference 'genocidal intent against the whole group' thus created a conceptual contradiction in the reasoning, rethinking the situation from the proposed perspective makes it possible to better justify the Court's decision in conceptual terms, as long as the Court insist that the intention was 'to destroy entire political opposition'.

5.1.3. A Brief Look to the Dilemma in *Tolimir*: Should a Few Genocidal Acts Qualify a Process of Destruction as Genocide?

The ICTY jurisprudence appears to answer this question in the affirmative. The most striking example of this was the *Tolimir* case, in which both the ICTY Trial and Appeals Chambers accepted in theory that the killing of three leaders from the Zepa region in conjunction with the forcible transfer of the remaining population and with the destruction of houses and mosques may indicate the genocidal intent against the Bosnian Muslims in Zepa as such, which was considered a substantial part of Bosnian

[814] Schabas, *Genocide in International Law*, 207-221.

[815] This view is widely recognised in the case law. See supra note 65.

[816] See supra page 76.

Muslims by both Chambers.[817] That said, the analyses and ultimate conclusions of the Trial and Appeals Chambers differed.

By referring to the UN Commission of Experts Report[818] and legal findings in *Jelisić*,[819] the Trial Chamber inferred a genocidal intent on the basis that 'the murder of Hajrić, Palić and Imamović was a case of deliberate destruction of a limited number of persons selected for the impact that their disappearance would have on the survival of the group as such'.[820] According to the Trial Chamber, these killings, in that particular context, indicated beyond any reasonable doubt that the underlying intention was to destroy part of the Bosnian Muslim population in Zepa.[821] It should be noted, at this juncture, that this line of argument constitutes further proof of the inapplicability of the qualitative approach to 'substantiality', given that the Chamber, as in the Srebrenica cases, used the qualitative approach not in order to establish that the three leaders were a substantial

---

[817] Prosecutor v. Tolimir [2012] IT-05-88/2-T, Judgment, para. 777; Prosecutor v. Tolimir [2015] IT-05-88/2-A, Judgment, paras. 263.

[818] Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN Off. Doc., S/1994/674 para 94: 'If essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others - the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose. Similarly, the extermination of a group's law enforcement and military personnel may be a significant section of a group in that it renders the group at large defenceless against other abuses of a similar or other nature, particularly if the leadership is being eliminated as well. Thus, the intent to destroy the fabric of a society through the extermination of its leadership, when accompanied by other acts of elimination of a segment of society, can also be deemed genocide.'

[819] By citing Prosecutor v. Jelisić [1999] IT-95-10-T, Judgment, para. 82, the Trial Chamber in *Tolimir* notes that 'the Jelisić Trial Chamber finding that genocidal intent may be manifest in two forms: as well as consisting of the desire to exterminate a very large number of members of the group, genocidal intent may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such.' Prosecutor v. Tolimir [2012] IT-05-88/2-T, Judgment, para. 777.

[820] Prosecutor v. Tolimir [2012] IT-05-88/2-T, Judgment, para. 782.

[821] Ibid.

part as such, but rather as a 'backdoor' to a non-individualistic conception of the term 'to destroy'.

Although the Appeals Chamber agreed with the theoretical basis of this reasoning,[822] it did not share the conclusion as it pointed out that the judgment lacked evidence as to 'whether the VRS members who detained and murdered the three Zepa leaders intended, for instance, to use their actions in a way that would intimidate and expedite the removal of the Bosnian Muslims of Zepa, prevent their return, or impact their survival as a group in any other way'.[823] In elaborating this observation, the Appeals Chamber further noted that:

> …[t]he Trial Chamber accepted in its conclusion that there was such an impact, but it did not consider or analyse whether or how the killings of the three Zepa leaders after the Bosnian Muslim civilian population of Zepa had been transferred to safe areas of BiH specifically affected the ability of those removed civilians to survive and reconstitute themselves as a group.[824]

According to the Appeals Chamber, the killing of the three leaders weeks after the forced deportations was not strong enough evidence to conclude that the inference of genocidal intent was the only reasonable inference that could be assumed.[825] The Appeals Chamber, therefore, stated that the Trial Chamber 'erred in holding that the record established beyond reasonable doubt that Hajric, Palic, and Imamovic were killed by the Bosnian Serb Forces with the specific intent of destroying part of the Bosnian Muslim population as such and thus that their murders constituted genocide'.[826]

---

[822] 'The Appeals Chamber finds no legal error in the Trial Chamber's statement that the selective targeting of leading figures of a community may amount to genocide and may be indicative of genocidal intent. [...] Recognising that genocide may be committed through the killings of only certain prominent members of the group "selected for the impact that their disappearance would have on the survival of the group as such" aims at ensuring that the protective scope of the crime of genocide encompasses the entire group, not just its leaders. Prosecutor v. Tolimir [2015], IT-05-88/2-A, Judgment, paras. 263.

[823] Ibid. para. 266.

[824] Ibid. para. 267.

[825] Ibid. para. 269.

[826] Ibid. para. 269.

The reasonings of both Chambers demonstrate not only most of the conceptual confusions summarised so far, but also the speculative nature of functionalist thinking as well is its inapplicability. Indeed, at the ontological level, it is not easy to justify why the Srebrenica atrocities qualify as genocide and the Zepa killings do not, given that in both situations the criminal acts that 'genocidal intent' was inferred from were very similar (predominantly killings in conjunction with forced deportations). The main argument of the Appeals Chamber, in this context, appears to be that the killing of three leaders was not likely to affect the survival of the whole and thus inferring that these acts were committed with the 'intent to destroy the group as such' failed to be beyond reasonable doubt.[827] However, there is no objective unit of measurement or temporal ability that can successfully determine such a possible affect. Moreover, if the intent is related to the destruction of 'the group as such', then, the entire destruction process should be considered as a whole to determine the existence of the 'intent to destroy'.

At this juncture, one may point out that the Appeals Chamber in *Tolimir* occasionally indicated that its assessment was in relation to the possible impact on 'the physical survival of the group as such',[828] which can be considered as adherence to an individualistic conception of the crime and thus a restrictive understanding of the 'qualitative approach'.[829] This argument, however, fails to explain on what conceptual grounds, then, the Chamber refers to the possibility of recapturing the area as a point of consideration of the same matter.[830]

It seems reasonable to assume that the Appeals Chamber did in fact find itself in a dilemma, because while the textual definition and the established ICTY jurisprudence did indeed support the Trial Chamber's inference of the 'intent to destroy' against

---

[827] Ibid.

[828] The Appeals Chamber noted that 'the evidence does not allow for the conclusion that the murders of the three Zepa leaders had a significant impact on the *physical survival* of the group as such so as to amount to genocide.' Ibid. (*emphasis added*)

[829] See *supra* footnotes 484 and 485 and the accompanying text.

[830] '...there are no findings or references to evidence as to whether the VRS members who detained and murdered the three Zepa leaders intended, for instance, to use their actions in a way that would intimidate and expedite the removal of the Bosnian Muslims of Zepa, *prevent their return, or impact their survival as a group in any otherway*.' (*emphasis added*) Prosecutor v. Tolimir [2015], IT-05-88/2-A, Judgment, paras. 263.

Zepa's Bosnian Muslims, the historical and genealogical roots of the crime rendered the conviction of genocide in this particular situation rather counter-intuitive. As Kreß observes, in this respect:

> if a person kills one member of a protected group or causes serious bodily or mental harm to him or her, thereby furthering an *overall* campaign which, as our perpetrator knows, is directed to the dissolution of the group as such "merely" by the systematic destruction of the cultural latter's heritage, the perpetrator would have to be convicted for genocide on the basis of the social [collectivistic] concept of destruction. This would be contrary to the more modest aspiration which lies at the origin of the international rule against genocide and which has not been superseded by subsequent developments.[831]

The problem here, as far has been observed, mainly stems from the common conviction that the specific *mens rea* element is the sole source of distinctiveness of the crime and exclusive to it.[832] On this presumption, the only choice for the Appeals Chamber was to challenge the existence of the specific intent since three killings already satisfied the *actus reus* element. This forced the Chamber to make a rather speculative and strange assessment as to whether the killing of the three leaders (part of the part) was significant enough in that particular context for the survival of the targeted part and thus committed with the required intent. Yet, as argued so far, the common conviction as to the specific *mens rea* is misplaced because the intent towards the destruction of a protected group, properly understood as a process, can be formed and implemented without the crime of genocide even occurring.[833] Instead, what makes genocide unique, in the legal sense, is

---

[831] Kreß, 'The Crime of Genocide under International Law', 487.

[832] Greenawalt, 'Rethinking genocidal intent', 2264: 'Genocide is a crime of specific or special intent, involving a perpetrator who specifically targets victims on the basis of their group identity with a deliberate desire to inflict destruction upon the group itself'. See also for similar remarks Schabas, *Genocide in International Law*, 259, 262, 264ff; *Prosecutor v. Omar Hassan Ahmad Al Bashir* [2009] ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 120 with fn. 140; *Prosecutor v. Brđanin* [2004] IT-99-36-T, 1 para.695.

[833] A related complication that stems from the proposed conception of genocidal destruction is that it is rather difficult to exactly locate at what point in the course of the gradual process the intent of destruction arises, given that there is a fine line between, say, assimilating a group and its destruction. Admittedly,

that it marks (supposedly) the final stage of the group destruction process, in which the overarching intent tried to be achieved with resorting to the listed acts.

This observation, however, does not exactly solve the dilemma of the Appeals Chamber. In this context, an important and welcomed advancement has been the divergence of the ICC Elements of Crimes from the ICTY jurisprudence by stipulating that, in addition to being committed with the required intent, a listed type of conduct must take 'place in the context of a manifest pattern of similar conduct directed against that group' or 'could itself effect such destruction'[834] to be legally qualified as genocide. Although the introduction of such a 'quasi-contextual' element came with some confusion as to its scope, as well as dissenting views with regard to its validity,[835] it nevertheless creates an analytically more sensible and coherent legal framework by acknowledging that the distinctiveness of the crime cannot be solely justified by the specific *mens rea* element and, connectedly, aptly identifies the contextuality of the genocidal intent, which shall be elaborated in the next sub-section.

For now, it should be sufficient to note that recognising the contextuality inherent to the crime in this manner resolves the dilemmas like the one that emerged in *Tolimir* without undermining the social reality and thus leads to a sounder legal reasoning. Indeed, endorsing the ICC Elements of Crimes' representation of genocide allows us to identify the fact that the intent underlying the overall campaign in Zepa was likely the destruction of Bosnian Muslims as a social unit and the three killings were part of the destruction process. Yet these killings do not constitute the crime of genocide in the legal sense because they could not themselves effect such destruction, nor were they part of an emerging or established pattern of similar conduct. That is to say, these killings did not suggest that the group destruction process had reached to that particular stage, with the listed acts being used as one of the major, or the sole, means of deliberate destruction. The study shall elaborate on this point in the following section.

---

this complication emerges even when the definition is interpreted in the strictest individualistic terms and it is utterly unlikely to come up with a general abstract formula to facilitate such consideration. That is to say, in the absence of direct evidence – such as an explicit plan – judges are obliged to infer the intent of the perpetrators from contextual surroundings and the nature of the offence.

[834] Elements of Crimes, art 6(a)(4) (emphasis added). Ibid arts 6(b)(4), 6(c)(5), 6(d)(5), 6(e)(7) (same).

[835] R. Clark 'The mental element in international criminal law: the Rome Statute of the inter-national criminal court and the elements of offences.' 12 Criminal Law Forum (2001), 326. See section 5.2.

Overall, however, conceptualising the crime in the proposed way effectively resolves the dilemma as to whether the 'part' targeted by the listed acts or the part subjected to the broader destruction process constitutes a relevant 'part' for the assessment of 'substantiality' in favour of the latter.

5.2. Contextuality of Genocidal Intent and Determination of the 'Part'

Rethinking genocide as a stage of the group destruction process brings the question of at what point this process evolves into the crime of genocide. As is indicated in concluding the previous section, recognising the contextuality inherent to the crime is an essential step since thinking the otherwise would create a counterintuitive construction of the crime, where committing a singular act of genocide in order to further a broader group destruction process qualifies as genocide. This, however, poses a doctrinal challenge given that a contextual element is not a part of the legal definition. It is also unclear that how the relationship between the context and individual genocidal intent works and what is the impact of this relationship to the assessment of substantiality requirement. The rest of the chapter shall focus on these matters.

The drafters of the Convention deliberately avoided including a contextual element in the definition, not only because agreeing on the scope of such an element would be challenging, but also, and more importantly, in order to include possible exceptional situations to the protective scope, such as those where group destruction takes place without a plan or policy or is committed by a lone *genocidaire*.[836] Although these underpinning concerns and logic seem understandable, the definition eventually misrepresents the criminal phenomenon as if it is, by default, mere individual misconduct, while such cases (i.e. lone *genocidaire*), should they ever happen, would in fact be exceptions.[837]

5.2.1. On the Nature of Genocidal Intent

At the theoretical level, there are two main theoretical positions as regards genocide perpetration: 'liberal' and 'post-liberal'. Liberal theory puts the emphasis on

[836] *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, 99,100.

[837] W. Schabas, 'State Policy as an Element of International Crimes', 98 Journal of Criminal Law and Criminology (2008), 976.

intentionality and agency as definitive factors of the crime, whether individuals or states (if one accept this is possible) express such intent.[838] The ultimate idea here is that genocide exists only when volition is expressed in relation to the end result. On the other hand, post-liberal theory highlights impersonal structural determinants and social forces, which ultimately implies that genocide may occur as a form of structuralised relation and without any expression of desire as to ultimate destruction. This structuralist characterisation has emerged particularly in the face of trouble explaining the destruction of native communities by settlers.[839] From the study's viewpoint, however, this debate once again relies on a false and unnecessary individualism/ structuralism dichotomy in explaining the nature of the crime. While individualists neglect the role or importance of the context, structuralists undermine the essentiality of intent in the emergence of genocidal relations so as to impute responsibility.

At the doctrinal level, a literal reading of Article II suggests that any individual, regardless of her surroundings, can form a destructive intent against a substantial part of a protected group. As the review of Behrens's 'individualised approach' in chapter three revealed,[840] from a conceptual viewpoint, endorsing such a purely 'intentionalist' perspective would only have been possible if the ontological distinctiveness of groups was refuted and the idea of 'substantiality' entirely confined to the subjective side of the crime, in the sense that the substantiality of a part may vary depending on the reach and control of the perpetrator.[841] The study has already extensively argued that such an approach is ontologically unconvincing, as well as in conflict with the genealogical roots of genocide. For this reason, the following paragraphs will largely avoid repeating these arguments against an intentionalist take on perpetration and, instead, briefly elaborate how the proposed ontological framework necessarily implies that the formation of individual genocidal intent is 'contextual' and, connectedly, on what doctrinal and conceptual grounds 'context' can and should constitute a point of

---

[838] See Moses, 'Conceptual blockages', 22; Chalk and Jonassohn, *The History and Sociology of Genocide*, 22, 23.

[839] Ibid.

[840] See chapter three.

[841] Behrens, `The mens rea of genocide`, 76-80. Behrens, 'Between Abstract Event and Individualized Crime', 927.

reference in locating the relevant 'part' while attributing individual criminal responsibility.

Put straightforwardly, any conceptual framework that suggests determining the scope of 'substantiality' through parameters that are unrelated to a perpetrator's control and reach – whether it is an absolute numerical limit set for policy reasons, or ontological and moral considerations as to the whole's being or something else – necessarily requires recognising the interaction between the formation of 'genocidal intent' and 'context'.[842] This is because individuals are, in general, not naturally in a situation to express a meaningful, act-oriented will directed towards the destruction of such a substantial part. As Adil Ahmad Haque observes, in this respect, 'an individual can desire but cannot intend to partially or totally destroy a group unless she believes she possesses or can acquire the capacity to do so, either individually or in concert with others'.[843] This very statement hinges on the nature of 'intentionality' and the fact that an individual cannot 'intend' to achieve something that is utterly impossible; rather, such an ambition would be nothing more than a vain wish. In other words, a reasonable belief about possessing sufficient means to achieve an ultimate end is a pre-condition for the formation of an act-oriented will.

To put it in perspective, one cannot express a meaningful act-oriented will to move at 80 mph when she runs, given that this is not inherent quality of a human being. But in the right context and surroundings, for example if she is driving a car, expressing meaningful intent as to the ultimate result of 'moving at 80 mph' becomes possible. It must be noted, however, an objective ability to achieve the end result is not what is meant in here. Rather the test is about whether the individual in question has sufficient causes to develop reasonable belief as to the realisation of the ultimate goal at the time of the attack. It is not important whether the judgement of perpetrators about their

---

[842] Behrens, 'Between Abstract Event and Individualized Crime', 927.

[843] A.Haque, 'International Crime: in Context and in Contrast' in R. A. Duff et. Al (eds), *The Structures of The Criminal Law* (Oxford, Oxford University Press, 2011), 119. Similarly Kreß notes that 'An individual perpetrator cannot realistically desire the destruction of a protected group to occur as a result of his or her individual genocidal conduct. The perpetrator's desire must rather be related to the result to be brought about by the collective activity to which he or she contributes.' Kreß, 'The Darfur Report and Genocidal Intent', 566. See also Kim, *Collective Theory of Genocidal Intent,* 176. For an opposing view see in general Koursami, *The 'Contextual Elements' of the Crime of Genocide.*

ability turns out to be misplaced in actuality or they misjudged their actual power. The main issue to look at is whether it is reasonable enough for an average individual to develop such judgement in those particular circumstances with the knowledge available to her. What is more, the concept of genocide deals with a very particular and immense sociological phenomenon and should not be diluted by including those individuals who are in serious delusions or mentally ill.[844]

The Holocaust is one the best examples to briefly highlight the context dependence of 'intent to destroy'. The desires of Hitler or Himmler to 'destroy' the Jewish people would have been insignificant if the entire mechanisms of bureaucracy and, for whatever reasons, willing individuals were not available. In other words, even though Hitler and his leaders 'matched the light' for the Holocaust and planned and led the process in every step of the way, it turned into a fire because the 'gunpowder' was there, i.e. anti-Semitic tendencies of the European society, hatred among German people against the conditions imposed upon them by the Versailles Treaty and so on. Here the aim is not to reduce the evil of Hitler and the other leaders of the Nazi government, but rather to highlight that individual desires towards group destruction become significant only in particular 'contexts'. This, however, does not mean that only leadership can be held responsible for genocide. Such an argument was put forward in *RuSHA* by the defendant Greifelt who argued that

> [t]he conception of genocide cannot be regarded on the plane of conventional penal law. An individual cannot murder an entire people. If one wants to arrive at this legal construction, one has to start out from the premise that a people can only be murdered by a people. Since, however, any penal guilt is the guilt of an individual and thus the collective guilt cannot lead to punishment of an individual, the individual cannot become guilty of genocide by leading his people to genocide. A prerequisite is that he can exercise a

[844] One may criticise this approach for assuming that genocidaires are reasonable human beings. Yet here, I do not use the term 'reasonable' to make a moral judgement, but rather to denote the ability to conceive the nature of actions and their consequences in a particular context. Hitler may have been thought as the most immoral person of history, yet this does not change the fact that he was reasonable in his acts and endeavour towards his immoral objective, namely destruction of the European Jews. If, on the other hand, few students initiate a 'campaign' with their revolvers to destroy, say, the Scottish Nation, they should be hospitalised for mental illness rather than being charged with genocide.

> decisive influence on the development of the criminal will of the people that is being led toward genocide.'[845]

Here the starting point of the argument, i.e. genocide is a crime by a collective against another and thus cannot be thought or conceptualised as an ordinary criminal phenomenon, is rather undeniable and it is what the prevailing 'intentionalist' construction of genocide suffers from in trying to reduce an inherently collective phenomenon to the intentionality individuals. However, where Greifelt's argument fails is that as much as the ordinary individuals need the leadership to be organised and thus become able to develop the criminal intent, the leadership requires people who will endorse and enforce their master plan towards the desired destruction.

To putting it differently, the destructive desire of both leadership and foot-soldiers turn into a meaningful act-oriented will if they collectively share a common understanding and execute. As it will be elaborated further in this and the next chapter, the group destruction process has an ontologically distinct nature and cannot be fully reduced to the act or desire of any individual perpetrator. Every individual has a particular role and level of affiliation with the 'collective genocide' and should be held responsible according to the nature and level of her relatedness with the collective plan and act (i.e depending on sharing the goal or does not sharing but knowingly act). Thinking the otherwise would have bailed out almost every foot soldier in the Holocaust and denied the fact that they were collectively holding the power to say 'no' and prevent the crime. Another point, in this regard, is that the extent of dominance and control of the destructive process that is determined by the physical, technological and political factors determines the nature and extent of 'intent to destroy'. This point will be theorised and elaborated in the next chapter.

Furthermore, even if 'intent' is conceived in a more liberal manner that includes 'wishes' under the guise of the concept, this would still not be sufficient to trigger criminal responsibility in terms of the crime of genocide. As Kirsch points out, in modern legal systems, punishment is reserved not for mere wishes or attitudes but for

---

[845] 'The RuSHA Case", TWC, Vol IV, p.702.

individuals whose actions cause harm or violate protected goods.[846] Imagine a hypothetical case where a lone offender tries to transfer children from a large victim group to her own group with the ambition to destroy the group in substantial part. Given that the scope of offence is clearly limited to the personal reach and strain of the offender, such an act is practically no different from trying to kill a healthy human being by throwing a small, empty plastic bottle at her, in other words an 'impossible crime'.[847] It is thus hard to deny that characterising such an offence as 'genocide' would significantly water down the concept and estrange it from the very phenomenon that the law aims to tackle.[848] It should be therefore recognised that what turns an individual's desire to destroy a protected group from a vain wish into a meaningful act-oriented will that can trigger criminal liability for genocide is the contextual embeddings and circumstances.[849]

5.2.2 Contextual Embeddings of Genocidal Intent

As far as is observed, such contextual factors may occur in two different forms in respect of the crime of genocide. First, an individual may attain sufficient means to

---

[846] Kirsch, 'The Two Notions of Genocide', 353.

[847] If the nature of the act or the mean employed is inadequate or ineffectual for a criminal result to occur or for protected interest to be violated, the act in question should be considered as an impossible crime (ineptitude impossibility). In such circumstances the perpetrator acts in delusion that her criminal conduct can harm the protected good while it is objectively impossible and thus should be found not guilty for committing the crime in question. That being said, in cases where the intentional act in question satisfies the elements of another crime, the perpetrator will still be held responsible for that crime. In our hypothetical example, whilst the offender who individually transfers the children cannot be held responsible for committing genocide -as she does not have the possible means to destroy a substantial part of the group; she will likely to be charged with other offences such as kidnapping or hate crimes. See on the matter R. Spjut, 'When Is an Attempt to Commit an Impossible Crime a Criminal Act' 29 Arizona Law Review (1987), 247ff. F. Conde, 'Rethinking the Universal Structure of Criminal Law.' 39 Tulsa Law Review (2004), 945,946.

[848] At this point, a critic may also object to the validity of this argument by reminding that the legal definition of genocide does not require the result to occur, namely the actual destruction of a substantial part. That is to say, she may argue that the reasonableness about the nature of act and its results are irrelevant. Although the observation that genocide being essentially a conduct crime does not seem open to contention considering the legal formulation, it does not change the fact that the criminal intent has to be directed to achieve a result; which means the perpetrator must be able to express an act oriented will with regard to the destruction of a substantial part.

[849] See for a concurring view A. Kimura, 'Genocide and the modern mind: intention and structure', 5 Journal of Genocide Research (2003).

target a substantial part on her own, such as individually possessing weapons of mass destruction. It is obvious that this so-called case of the *lone genocidaire* is an exception, which has not been realised so far,[850] and even if it is realised someday, it does not pose any significant conceptual problem for the assessment of the legal elements, including locating the relevant 'part'.[851] In this respect, the discussions hereafter comes with the caveat of 'barring *lone genocidaire* cases', unless otherwise stated.[852]

---

[850] It needs to be noted at this juncture that the plausibility and merit of this possibility have been a point of contention in the literature for some time. For some commentators, this possibility does not exist 'except in the hypothetical exam questions of international criminal law professors' (J. Ohlin, 'Organizational Criminality' in Elies van Sliedregt et al.(ed), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), 116.) and is more of 'a sophomoric *hypothese d'ecole* and a distraction for judicial institutions' (Schabas, 'Darfur and the "odious scourge': the commission of inquiry's findings on genocide', 877.). Similarly, Van der Wilt notes: 'It would be simply preposterous for an individual to boast that by his actions alone he could achieve the goal of destroying a whole group. In the normal situation, the perpetrator of genocide may at the most feel confident that his conduct might contribute to the concerted action of annihilating the group' H. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction. Reflections on the van Anraat Case', 4 Journal of International Criminal Justice (2006), 242. Also see Kreß, 'The international court of justice and the elements of the crime of genocide', 621.

[851] This unlikely scenario poses no challenge since, then, all the elements of genocidal intent become entirely related to the individual and thus if (i) the destructive ambition was directed against a part of the group that is 'substantial' and (ii) she possesses the material or intrinsic means that turn this ambition from a vain wish to an act oriented will as to the ultimate destruction then it is safe to conclude that the individual in question was acted 'with intent to destroy a substantial part of a protected group as such'.

[852] It is worthy to note that A strong argument against the notion of *lone genocidaire* comes from George Fletcher and Jens David Ohlin, who note that '[w]hile it may be theoretically possible for one individual to engage in a genocidal attack, there is no reason to think that such a mass murder would be one of the most serious crimes of concern to the international community as a whole'. (J. Ohlin, 'Group Think: The Law of Conspiracy and Collective Reason', 98 Journal of Criminal Law and Criminology (2007), 1970.) As Fletcher and Ohlin further points out 'Genocide is not merely one individual seeking to annihilate an entire ethnic group. History teaches us that genocide is the attempt to wipe out an ethnic group by another ethnic group. It is for this reason that genocide brings strong collective shame and guilt to a nation that has perpetrated it. Indeed, this shame and collective guilt may very well persist even after the individuals involved have passed from the scene.' G. Fletcher and J, Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 Journal of International Criminal Justice (2005), 545. While Fletcher and Ohlin's arguments are hard to argue against, they nevertheless do not justify excluding the possibility of *lone genocidaire*. This is because, in genocide what is at stake not only lives or rights certain number of individual (as individualists may argue), but also the richness and the shared morality of human cosmos. And if an individual has sufficient means or is in a proper circumstance to express a meaningful desire as to the destruction of one of such entities (however unlikely it is), there seems no good reason to

Second, an individual becomes capable of expressing a meaningful destructive intent against a 'substantial part' of a protected group by virtue of being part of a collective offence, not in her individual capacity. As Kreß notes on this point: '[a]n individual perpetrator cannot realistically desire the destruction of a protected group to occur as a result of his or her individual genocidal conduct. The perpetrator's desire must rather be related to the result to be brought about by the collective activity to which he or she contributes.' What this suggests, then, is that establishing the elements of genocidal intent for an individual perpetrator necessarily requires examining her relatedness to the collective activity. In his dissent to the majority opinion of the Appeals Chamber in *Karadžić,* Ricardo De Prada seemingly shared this though by noting that

> ...a definition of the crime of genocide - which intends the protection of human groups - almost completely articulated on the basis of the intention or particular purpose of the person committing the act, in the sense that it should be specific and exclusively focused on the intent to destroy the group as such, makes no sense. Rather, it should have more objective bases, addressing: (i) the "genocidal acts", the core of which should conform with the most characteristic' defining elements of genocide, namely, as means to intend the end of, "to destroy, in whole or in part", a group; and (ii) the effective contribution of the perpetrator to the collective destruction of a protected group.[853]

However, determining how this assessment can and will be made at doctrinal and conceptual levels is a significant point of controversy, particularly given that the legal definition lacks any reference to a 'context element'. The jurisprudences of international courts and tribunals have usually stated that no particular circumstance surrounding a criminal conduct needs to exist for the crime of genocide to be committed.[854] Despite this, however, the collective nature of genocide and the discourse of context have been

---

exclude –or, putting it differently, no harm to include- these unlikely *lone genocidaire* scenarios to the legal and conceptual framework of genocide. Indeed, the Elements of Crimes included this possibility.

[853] *Prosecutor v. Karadžić* [2019] MICT-13-55-A, Dissenting Opinion of Judge Prada, para 837.

[854] See for example *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para 100; *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para.10; *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, para.114-116.

introduced to the judgements through the door of 'evidence'. For example, after establishing that a contextual element such as plan or policy is not an element of the criminal definition, the ICTY Trial Chamber in Jelisić nevertheless noted that 'it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system'.[855] Likewise, in the landmark case of *Akayesu*, the ICTR Trial Chamber remarked that 'intent is a mental factor which is difficult, even impossible to determine', and it decided that, in the absence of a confession from the accused, intent may be inferred from several contextual factors.[856]

Similar statements are common in the ICTY and the ICTR jurisprudences, where the context is not considered either as a distinct element of the crime or in relation to the existing elements, but ascribed an evidentiary value in the process of inference. Moreover, while the international courts and tribunals do not avoid using the term 'genocide' in macro-sense to describe the overall context without identifying any particular perpetrator, these findings as to the overall context are constantly and effectively used in inferring genocidal intent and thus establishing individual responsibility. [857]

As a result of this extensive reliance of the ICTR and ICTY on the 'context' in inferring individual genocidal intent, as well as the inclusion of a 'quasi-contextual' element in the ICC Elements of Crimes, a considerable academic and judicial discussion has been

---

[855] *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para 101.

[856] The Chamber listed the factors as follow: '(a) "the general context of the perpetration of other culpable acts systematically directed against that same group", whether committed "by the same offender or by others"; (b) "the scale of atrocities committed" ; (c) the "general nature" of the atrocities committed "in a region or a country"; (d) "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups" ; (e) "the general political doctrine which gave rise to the acts" ; (f) "the repetition of destructive and discriminatory acts"; and (g) "the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group — acts which are not in themselves covered by the list (. . .) but which are committed as part of the same pattern of conduct"' Prosecutor v. Akayesu [1998] ICTR-96-4-T, Judgment, 523, 524.

[857] *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, paras. 112-129, 523. *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 592. L. Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff Publishers, 2005), 114.

devoted to this topic.[858] That said, due to the obvious limitations of the study, offering a detailed examination of the different positions on the 'contextual element' is not possible. Instead, the overall discussion in the literature will be first briefly summarised and then the study's position and its implications for determining the relevant 'part' targeted by a perpetrator will be advanced.

5.2.3. Doctrinal Approaches Against the Contextual Element

The first group of commentators argue that 'context' can play no or very little role in the legal assessment of genocide since 'on the level of substantive law, there is no reason why the acts and intent of individuals should not qualify as genocide, even if a wider pattern were absent'.[859] This line of thought has argued against inferring 'individual genocidal intent' through referring to a 'genocidal context' as well as the 'manifest pattern' requirement introduced in the ICC Elements of Crimes. Kevin Jon Heller, for example, was quite critical of the ICTR's approach of first establishing that the fact that

---

[858] See for example P. Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence', 3 Journal of International Criminal Justice (2005), 996; Koursami, *The 'Contextual Elements' of the Crime of Genocide;* G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford; Oxford University Press, 2005), 211; Heller, 'International Decisions: Prosecutor v Karemera, Ngirumpaste, and Nzirorera' 159. O. Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', 14 Leiden Journal of International Law (2001), 402.

[859] Behrens, 'Between Abstract Event and Individualized Crime' 928. Drost, *The Crime of State, Genocide*, 85: 'both as a question of theory and as a matter of principle nothing in the present Convention prohibits its provisions to be interpreted and applied to individual cases of murder by reason of the national, racial, ethnical or religious qualities of the single victim if the murderous attack was done with the intent to commit similar acts in the future and in connection with the first crime.' The ICTR Trial Chamber in *Mpambara* summarises the view that the criminal definition of genocide does not require focusing on the external context or criminal result, but exclusively to the intent and act of the accused in question as follows: 'The actus reus of genocide does not require the actual destruction of a substantial part of the group; the commission of even a single instance of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group.' *Prosecutor v. Mpambara* [2006] ICTR-01-65-T, Judgement, para.8. See also *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para 223 et seq. 'The offence of extermination as a crime against humanity requires proof that the pro- scribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship. These two requirements are not present in the legal elements of genocide. While a perpetrator's knowing participation in an organized and extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw the inference. The offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against a civilian population.'

an overall attack took place in Rwanda amounts to genocide – independent of the acts and *mens rea* of the particular accused – and then discussing the role of the accused in this context of 'overall genocide', which constituted the evidentiary basis of inferring 'individual genocidal intent'.[860] Heller pointed out, in this respect, that 'the fact that other unnamed individuals specifically intended to destroy a protected group does not make it more likely that the defendant harboured the same specific intent'.[861]

Against such criticisms, the Trial Chamber in *Kayishema and Ruzindana* felt the need to state that the purpose of examining 'whether the events in Rwanda as a whole, reveal the existence of the elements of the crime of genocide'[862] was not to decide 'whether specific acts by particular individuals amounted to genocidal acts',[863] but rather to have a 'better understanding of the context within which perpetrators may have committed the crimes alleged in the Indictment'.[864] Behrens, however, accurately notes that this

---

[860] Ibid. para 169 reads as 'In light of this evidence, the Chamber finds beyond a reasonable doubt that the acts of violence which took place in Rwanda during this time were committed with the intent to destroy the Tutsi population, and that the acts of violence which took place in Taba during this time were a part of this effort.' Likewise, in Kayishema and Ruzindana the Trial Chamber again felt the need first to ask the question: 'Did Genocide Occur in Rwanda and Kibuye in 1994'. After establishing that the group destruction was taking place at the macro level, the Chamber used this observation in inferring genocidal intent of individuals. Prosecutor v. Kayishema and Ruzindana, [1999] ICTR-95-1, Judgement, para 273 et seq. See for a detailed analysis Kim, *Collective Theory of Genocidal Intent*, 107-112. The ICTY as well has frequently focussed on the macro phenomenon in order to locate intentionality of individual perpetrators. Consider the following statement in Krstić for instance: 'The Trial Chamber has thus concluded that the Prosecution has proven beyond all reasonable doubt that genocide, crimes against humanity and violations of the laws or customs of war were perpetrated against the Bosnian Muslims, at Srebrenica, in July 1995. The Chamber now proceeds to consider the criminal responsibility of General Krstić for these crimes [...]'. *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para. 559.*Prosecutor v. Tolimir* [2012] IT-05-88/2-T, para 769. Also see, N. Jørgensen, 'Genocide as a Fact of Common Knowledge', 56 International and Comparative Law Quarterly (2007), 885 ff.

[861] Heller, 'International Criminal Tribunal for Rwanda', 159.

[862] *Prosecutor v. Kayishema* and Ruzindana [1999] ICTR-95-1-T, Judgment, para. 274.

[863] Ibid.

[864] Ibid para 274 Similarly, in *Rutaganda* the Trial Chamber emphasised the role of overall context in examining the criminal responsibility of the accused: 'From the widespread nature of such atrocities, throughout the Rwandan territory, and the fact that the victims were systematically and deliberately selected owing to their being members of the Tutsi group, to the exclusion of individuals who were not members of the said group, the Chamber is able to infer a general context within which acts aimed at destroying the Tutsi group were perpetrated. Consequently, the Chamber notes that such acts as are charged against the Accused were part of an overall context within which other criminal acts

was not exactly the case, as the circumstantial factors took 'on a significance which reaches far beyond that of a mere element of evidence'.[865] Indeed, a noteworthy example of this was the *Jelisić* case in which, despite the overwhelming evidence that proves the ambition of the accused to destroy a part in the Brcko region,[866] the ICTY Trial Chamber was still hesitant to establish that Jelisić acted with 'genocidal intent' and felt the need to make a reference to the broader context as follows: 'the Trial Chamber considers that, in this case, the Prosecutor has not provided sufficient evidence allowing it to be established beyond all reasonable doubt that there existed *a plan to destroy* the Muslim group in Brcko or elsewhere *within which the murders committed by the accused would allegedly fit'*.[867]

Similar to Heller, Behrens submits that such an approach simply creates a shortcut to avoid a detailed examination of an individual's mindset by assuming that they had 'genocidal intent' because they acted as part of a certain collective pattern.[868] According to him, 'context' has in practice been treated as an element of the crime, albeit under the cover of 'evidence', and has undesirably introduced what he calls an 'ordinary image' of genocide to the legal discourse, while the very definition of the crime defines it as a

---

systematically directed against members of the Tutsi group, targeted as such, were committed.' *Prosecutor v. Rutaganda*, [1999] ICTR-96-3-T, Judgement, para.400.

[865] Behrens, 'Between Abstract Event and Individualized Crime', 927. Behrens particularly criticizes the ICJ's approach in *Croatia v. Serbia*, in which the ICJ deviated from the understanding that genocide is a conduct characterized by the intent of the perpetrator, and asked the question of 'Is there a pattern of conduct from which the only reasonable inference to be drawn is an intent of the Serb authorities to destroy, in part, the protected group?' as the starting point of its consideration. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] Judgment, para 407.

[866] *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para 18.

[867] Ibid. (*emphasis added*).

[868] Behrens, 'Between Abstract Event and Individualized Crime', 924. To be clear, Behrens does not deny that pattern can be accepted as evidence to infer the intent to destroy, but only in those circumstances where it has such nature that 'it could only point to the existence of such intention'. His contention is that the 'context' has been practically treated as an element of the crime, albeit under the cover of 'evidence', which undesirably introduced, what he calls the 'ordinary image' of genocide to the legal discourse, while the very definition of the crime defines it as a conduct characterized by the intent of individuals His contention is that the 'context' has been practically treated as an element of the crime, albeit under the cover of 'evidence', which undesirably introduced, what he calls the 'ordinary image' of genocide to the legal discourse, while the very definition of the crime defines it as a conduct characterized by the intent of individuals. Ibid. 927.

conduct characterised by the intent of individuals.[869] Behrens clearly positions himself against this tendency in the courtroom and argues that it leads to losing 'sight of certain elements of the specific intent of individuals'[870] by focusing on the abstract, macro-level phenomenon of genocide, instead of investigating the mindset of individuals.[871]

The concerns of Behrens and Heller are understandable, given that they perceive genocide as an 'individualised crime' and argue for adherence to a strict textual interpretation. Mainly for this reason, they submit that relying too much on collective patterns of facts in inferring the genocidal intent of individuals undermines the principle of legality and shifts the focus from the mindset of individuals to macro-level tendencies.[872] From the study's perspective, however, both the judicial tendency in question and its individualistic criticism are problematic. In respect of criticisms, even though the legal definition does not include any reference, 'contextual element' is inherent to genocide since individual genocidal intent almost always emerges in relation to and by virtue of the context. Denying this very nature of the crime would be to sacrifice the social reality to rigid legalism. That does not mean, of course, that the individual's intentionality ceases to be the key element in establishing her responsibility and its level. Yet, such intentionality necessarily develops in connection with the context. Consequently, its existence and elements cannot be thought of and assessed in

---

[869] Ibid. Behrens refers to the Croatia v. Serbia case before the ICJ as an example and points out that the ICJ rejected the allegations of genocide by heavily referring to the absence of the pattern, while 'specific events which, through statements by perpetrators or acts carried out by individuals, may well have indicated the existence of genocidal intent, were dismissed as 'isolated incidents'' Ibid. 927 (reference is omitted). He also refutes any possible invocation that the ICJ deals with state responsibility rather than individual criminal responsibility by pointing out that this does not change the legal parameters and 'the identification of the mens rea of individual perpetrators is an indispensable requirement'. Ibid. 929.

[870] Ibid 924.

[871] Ibid. 926. Behrens also notes that 'The Court does not dismiss the importance of intent, but the way it establishes it is through a method which sits better with genocide as a macro phenomenon.' He also notes in elsewhere, 'it is a decision which, again, illustrates the different framework that applies to international criminal justice: the price for bringing genocide into the courtroom is that the individual now takes centre stage and that the main concern now has to be not the existence of a wider campaign or an underlying plan, but the establishment of individual liability.' P. Behrens, 'Intent, Abstraction and Prevention: Lessons from the Law on Genocide' (2016), 12 available at <SSRN: https://ssrn.com/abstract=2896483> accessed on 20 March 2019.

[872] See also Greenawalt, 'Rethinking Genocidal Intent', 2281.

isolation from the surrounding circumstances.[873] On the other hand, ascribing a mere evidentiary role would also be to downplay the status of 'context' as an integral segment.[874] Therefore, although the study will ultimately suggest a somewhat similar assessment method to the one used by the ICTR Trial Chambers, the context should not be considered merely an independent strand of evidence, it is rather a necessity for individual genocidal intent to be formed.

The 'manifest pattern' requirement in the ICC Elements of Crimes has also been criticised from the same viewpoint for undermining the principle of legality. Otto Triffterer, for example, argues that the Elements of Crimes transgresses the criminal definition as it introduces a new element instead of clarifying the existing definition.[875] For Triffterer, such a requirement is not admissible 'to limit the punishability of genocide or the jurisdiction of the Court for such crimes', since the Elements of Crimes have a secondary status and cannot contradict the Statute or modify it.[876] Triffterer's criticisms regarding transgression of the Elements of Crimes are hard to deny, because the relationship between the 'manifest pattern' requirement and the statuary definition is obscure. Given this lack of clarity, the requirement may be taken as an additional

---

[873] As far as I observe, Behrens's arguments as to the Croatia v. Serbia case in fact demonstrates how problematic his approach is, rather than the ICJ's. To pose a simple question, if the widespread acts of genocide were not committed on ethnic basis during the Yugoslavian Civil War; or if during the peacetime, say, a Serbian soldier publicly expressed her wish for the destruction of all Croatian in Yugoslavia and try to kill any of them in her reach, could we still conclude that these were cases of genocide? In Behrens's take on genocide as an 'individualized crime' the answer would be affirmative, which, in my view, appears preposterous because it renders the existence of 'genocide' concept entirely redundant. In such thinking the protected value status of the 'group' would completely disappear and genocide would turn into a formless, discriminatory based mass atrocity, which is already covered under the scope of other crime categories.

[874] This understanding then implies that 'context' is important only when the evidence about the 'individual intent' is not convincing on its own. That is to say, ascribing mere evidentiary role to the 'context' would be implicitly recognizing that an individual can develop an act oriented will regardless of 'context'.

[875] Triffterer, 'Genocide, its particular intent to destroy in whole or in part the group as such', 401.

[876] Ibid. 399. The setting of international criminal law does not allow adding an additional element to the crime through the Elements of Crimes of the ICC, since the document issued to facilitate the identification of the respective elements of crimes and cannot be in conflict with the definitions in the Rome Statute. Kreß, 'The crime of genocide and contextual elements', 304.

element, rather than an articulation of statutory elements.[877] Thus, any attempt to introduce the 'context' to the legal assessment process must successfully argue that it is a logically inherent, not an additional, element of the legal definition.

5.2.4. Doctrinal Approaches For the Contextual Element

With this in mind, the opposite position maintains that the context is already an implicitly present component of the structure of the crime.[878] Thus, the 'contextual element' of genocide differs from the 'widespread or systematic' attack requirement of crimes against humanity in that being inherent to the definition and the ICC Elements of Crimes merely clarifies this very fact. On this basis, Sangkul Kim, for example, argues that:

> …[t]hough it has never been said overtly, the term 'genocide' as used by international criminal courts has [a] double meaning – i.e. 'collective genocide' and 'individual (conviction of) genocide'. The former encompasses the latter, providing an overall factual circumstance in which an individual perpetrator is to be legally found guilty of individual genocide. [...] Since there is no specific statutory basis to define the notion of 'collective genocide', it is, legally speaking, a theoretical concept. Yet, a review of relevant case law reveals that the function of this concept is real and significant. [879]

Kim, then, essentially confirms Behrens's criticisms that the practice of case law exceeds treating 'context' as a mere evidentiary tool, but does not conceive this as a threat to the legality principle since he considers the 'contextual element' as intrinsic to the crime.[880] This very understanding eventually leads Kim to dispute the general

---

[877] See, for example, Public Redacted Version of the Prosecutor's Application under Article 58 filed on 14 July 2008, Situation in Darfur, The Sudan (ICC-02/05^157), Pre-Trial Chamber I, 12 September 2008, 14 July 2008, 209.

[878] See for example Vest, 'A Structure-Based Concept of Genocidal Intent', 781-797.

[879] Kim, Collective Theory of Genocidal Intent, 164.

[880] From this point of view, Kim argues that 'an individual genocidal intent imputed from outside an individual mind. [...] In this scheme of thought, the author or originator of genocidal intent is impersonal' He further observes that 'the conceptual framework of genocidal intent has a vertical structure, in

conception of genocide as a crime of *mens rea*.[881] Instead, he describes genocide as a sort of 'result crime' – a crime 'that can be committed only within objective contextual circumstances of a legally meaningful scale'.[882] This is because, for Kim, targeting a substantial part can become the subjective intention of an individual only in 'a genocidal campaign larger than the actions of the individual perpetrator'.[883]

Although the present study clearly shares the idea that 'context' is inherent to the structure of the crime and the conception of genocide as a crime of *mens rea* is incomplete, understanding genocide as a result crime seems to be an overstatement in the current legal framework.[884] The proof and formation of genocidal intent may not always require a wide range of destructive results. A genocidal plan put into action may be externally interrupted in its early stages, that is, before a substantial part is destroyed, but after a pattern of listed acts has occurred. This hypothetical example refutes Kim's overly dismissive conviction that actual destruction of a substantial part is the only route

---

particular, a top-down liability attribution structure. This understanding tends to cast a doubt on the individualistic approach to genocidal intent which assumes a concept of genocidal intent within the mind of a perpetrator. That is, what the vertical structure of genocidal intent postulates is an individual genocidal intent imputed from outside an individual mind—i.e., from collective genocidal intent that exists at another level. In this scheme of thought, the author or originator of genocidal intent is impersonal.' Ibid. 129.

[881] Ibid. 138, 177. He notes that 'the 'crime of mens rea'—is an absolute misconception. Rather, [...] the crime of genocide does require the objective contextual element involving a physical and/or biological destruction of at least a substantial part of a group resulting from the collective genocidal intent, which is also of an objective characteristic, existing external to the individual state of mind. Due to the quasi-element nature of the collective dimension of genocide at the 'context level', there is no room for an individualistic *mens rea* alone to secure a genocide conviction without the establishment of the 'collective genocide' beforehand.' Ibid. 74.

[882] Ibid. 138. Kim also suggests that the substantiality requirement constitutes a *de facto* 'concrete threat' requirement and when the 'manifest pattern of similar conduct' expression thought in conjunction with this fact, it plays the same role with 'widespread or systematic' attack requirement in crimes against humanity. Ibid. 104, 137, 138.

[883] Ibid. 140-141. In Krstić, while criticizing the Trial Chamber's reference to the ICC's Elements of Crimes, the ICTY Appeals Chamber emphasised this point as follows: 'reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite.

[884]*Prosecutor v. Krstić* [2004] IT-98-33-A, Judgement, para 224. Kreß, 'The crime of genocide and contextual elements', 304.

to establish 'collective genocidal intent'.[885] Instead, a more appropriate conclusion would be to consider genocide as a 'collective conduct crime'. Furthermore, Kim's term 'collective genocidal intent' is somewhat obscure, because he does not really define the term while using it to refer to a collective 'shared intent',[886] 'overall intent'[887] and 'genocidal plan and policy',[888] as well as to an abstract, macro-level genocidal campaign.[889] As the study will argue in the next sub-section, this entire discourse of 'collective intent' is problematic and also unnecessary.

Kreß, on the other hand, suggests that the reference to 'context' in the ICC Elements of Crimes can at most be thought of as a 'quasi-contextual' element that articulates the *mens rea* of the crime.[890] That is to say, the requirement neither stipulates a 'collective

---

[885] In fact, this weakness is also admitted by Kim in a footnote by noting that 'As to my argument for viewing genocide as a result-crime, the word 'targeting' might pose some conceptual difficulties. What I mean is that the act of 'targeting' itself seems to be well compatible with the notion of 'conduct-crime' (as opposed to 'result-crime'). A close example would be the war crime of 'intentionally directing attacks against the civilian population' as provided in Article 8(2)(b)(i) of the ICC Statute which is generally classified as a 'conduct-crime' in respect of which no showing of 'result' is required. The mere fact of using weapons of mass destruction (without a proof of subsequent actual destruction of a substantial part of a group) might constitute strong evidence of intent to target a substantial part of the group.' Kim, Collective Theory of Genocidal Intent, 142 (at footnote). Yet he ultimately stands for his conception of genocide as a 'result-crime' noting that 'in view of the very nature of genocide being a crime of mass scale, it still makes sense to regard a destruction of a substantial part of a group as a collective result of actions undertaken on a mass scale'. Ibid.. However, the first part of this statement not necessarily requires the conclusion that genocide should be conceived as a 'result-crime'. That is because defining genocide as a 'conduct-crime' does not change the fact that 'genocide' is ultimately a crime directed to a mass population, given that it always includes collective conducts and the ultimate aim of these conducts is the realization of group destruction which usually, if not always, requires 'mass destruction/harm'.

[886] Ibid. 202.

[887] Ibid. 175.

[888] Ibid.

[889] Ibid. 106.

[890] Kreß, 'The crime of genocide and contextual elements', 298. The ICC Pre-Trial Chamber, on the other hand, considered the element as a requirement of 'concrete threat' and noted that 'the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide – as an *ultima ratio* mechanism to preserve the highest values of the international community – is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical'. *Prosecutor v. Al-Bashir* [2009] 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al

genocidal intent' element nor implies a widespread or systematic attack prerequisite (given that emerging pattern and *lone genocidaire* possibilities are included to the formulation), it simply uncovers the reciprocal interaction between the circumstantial factors and individual's ability to express an act-oriented will towards group destruction.[891] While this interpretation is challengeable, in that the text of the 'manifest pattern' requirement is grammatically constructed in a way that articulates the *actus reus*, Kreß nevertheless opines through his reading of the drafting process that the requirement must be understood as an:

> objective point of reference for the determination of a realistic genocidal intent. [...] While it is true that the last common Element is worded in the form of an objective circumstantial element, it is submitted that the concept of realistic intent constitutes the preferable way to capture the substance of what the drafters of the Elements had in mind.[892]

Although it must be agreed, given Kreß's consideration, that one of the reasons for introducing the 'manifest pattern' requirement was to articulate the fact that the formation of 'genocidal intent' requires a particular contextual setting, the textual formulation nevertheless clearly emphasises conduct. Indeed, other scholars like Robert Cryer even suggests on this basis that '[c]onduct does not refer to the mental element of the offence at all'.[893] Moreover, the distinction Kreß implies between 'realistic intent' and 'unrealistic intent' must be disagreed with in light of our explanations, since the latter ultimately refers to a vain wish or mere desire rather than 'intent'.

Bashir', ICC-02/05-01/09-3, para.124. See for a critique of this consideration Kreß, 'The crime of genocide and contextual elements'.

[891] Indeed, approaching the issue in this manner better explains why the ICTY and the ICTR paid so much attention to 'collective context' or the ICTY Trial Chamber in *Jelisić,* despite all the statements of the accused and other evidence, still felt the need referring to the context.

[892] Kreß, 'The crime of genocide and contextual elements', 298.

[893] Cryer continues '[h]ence this part of the Element under consideration can be fulfilled by a non-genocidal campaign of 'similar conduct' (i.e. killings, and/or the other physical elements of genocide) against the civilian population. When discussing crimes against humanity, the Majority found precisely such a campaign. Against such a background, it suffices for a conviction for genocide that the particular defendant had genocidal intent' R. Cryer, 'The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision', 7 Journal of International Criminal Justice (2009), 291.

It also appears that Kreß is inclined to confine the contextual element entirely to the subjective side of the crime, most probably because of his underlying conception of genocide as a crime of *mens rea*, which is a position opposed throughout this study. From the viewpoint advanced so far, a middle ground between Kreß's moderate and Kim's radical understandings seems to better reflect the reality of the criminal phenomenon. That is, Kim must be agreed with, in that the contextual element inherent to genocide relates to both *actus reus* and *mens rea*.[894] In this understanding, *actus reus* at the context level refers to acts of multiple individuals that indicate a (emerging or established) pattern of similar conduct.[895] This very requirement is one of the aspects that morally and legally separate genocide from other forms of group destruction. That said, unlike what Kim suggests, the contextual element of genocide is not related to the result of the crime nor does it indicate a particular quantitative threshold. Rather, it only puts emphasis on that to be able to speak of the crime of genocide in legal terms, commission of the listed acts should not remain as individual incidents.

On the other hand, *mens rea* at the context level refers to a common understanding that underpins these conducts – which may be a part of a broader destruction process and not shared by all offenders. This latter point may in fact be criticised for contradicting the drafting history of the Elements of Crimes. As Cryer notes, in the drafting process, 'there was discussion about whether or not it was necessary to specify that the other acts need not be committed with genocidal intent, but this was felt unnecessary, as it was "already evident" in the Element'.[896] Yet, as it will be explained in a moment, what is

---

[894] Kim, Collective Theory of Genocidal Intent, 165.

[895] The question of what constitutes a pattern of conduct should be determined according to the particulars of the case. For example, when there is an explicit plan or policy one can conclude even from the few incidents that the it is an emergent or even established pattern of conduct, whereas the threshold should be higher for 'unorganised' campaigns of discriminatory atrocities.

[896] Cryer, 'The Definitions of International Crimes', 291. Indeed, the preparatory works indicate that 'manifest pattern' element not necessarily refers to a 'collective genocidal intent' or requires a 'genocidal plan'. V. Oosterveld, 'The Context of Genocide' in Roy S Lee et al (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 48-49. M. Cupido, 'The Contextual Embedding of Genocide A Casuistic. Analysis of the Interplay between Law and Facts', 15 Melbourne International Law Journal (2014) 24. Cryer further notes in this context: 'This might be the case, but reflects a significant, if common, misunderstanding of the Element, which does not require a genocidal plan or policy. By its terms, it requires that the relevant conduct must occur against

referred to here is not a form of 'shared intent', but rather an overall normative background that facilitates 'individual genocidal intent' and determines its scope and limits. That is to say, the contextual element of genocide simply clarifies the logical fact that genocide ultimately emerges through the interaction between the context and individual levels both in terms of acts of genocide and genocidal intent. The following sub-section will offer some conceptual support for this perspective and identify its implication to locate the relevant 'part' in attributing individual responsibility.

5.2.5. Conceptual Underpinnings of the Contextuality of 'Genocidal Intent' and its Implication to Locating the Relevant 'Part'

The perpetration of genocide involves two conceptual layers, namely context and individual. The relation between the two symbiotically unfolds, that is, neither has primacy over the other. Individual genocidal intent, which is the central notion for attributing the criminal responsibility, commonly occurs as a 'we-mode of intentionality'[897] as regards the ultimate consequence, since it is based on a justified presumption or knowledge that a sufficient number of others are acting or will act towards materialising the desired consequence. Yet 'we-mode intentionality' not necessarily refers to a 'shared intent',[898] but rather it denotes the 'group depended reasoning', which means it does not indicate to a uniform mental state of individuals or to an extra-mental aspect. Indeed, reducing the context level to a form of 'shared intentionality' is an overly restrictive approach. Also, the claim that 'collective intent' may be external to the individual's inner state of mind appears vulnerable to criticism in the face of the general acceptance in the social sciences that the formation of intentionality requires a certain psychological consciousness state. Any argument against this common conception should be well justified. However, accounts like Kim's

---

the background of a 'manifest pattern of similar conduct', which is not the same thing. R. Cryer, 'The Definitions of International Crimes', 291.

[897] To be more concrete, an individual perpetrator intentionally acts with the thinking or awareness of 'we are destroying the group x', rather than the purpose of destroying the collective on her own (since the formation of the latter mental state by an unaffiliated individual is utterly impossible in normal circumstances).

[898] The concept of shared intentionality usually refers to the shared contributory or participatory intention in assuming that other members has the same will to perform their contributions J. Searle, *The Construction of Social Reality* (New York, The Free Press, 2010), 52-53.

lack such conceptual justifications despite suggesting that 'collective genocidal intent' may be extra-mental.[899]

As to the idea of 'shared intent', John Searle, one of the so-called 'big four' of collective intentionality scholarship (alongside Michael Bratman, Margaret Gilbert and Raimo Tuomela),[900] constitutes a good starting point. Searle argues that '[s]ince society consists entirely of individuals, there cannot be an independent group mind or group consciousness. All consciousness is in individual minds, in individual brains.'[901] In this understanding, subjective feelings and beliefs of a collective's parts are the sources of their 'solidarity' and render possible engaging in collective action that cannot be understood as the summation of individual intentional behaviours.[902] Such subjective feelings and beliefs arise out of relations and the 'structure', which allow individuals coming to have the same intentions in the collective sense that they would not hold them if they were not members of the group.[903] Yet, unlike Kim suggests, this is not an extra-mental phenomenon; rather, 'shared intent' refers to individuals' developing the same mental state through their relations.

---

[899] Kim, Collective Theory of Genocidal Intent, 174.

[900] C. Aruda, 'From Individual to Collective Intentionality', 46 Philosophy of Social Sciences (2016), 319.

[901] J. Searle, 'Collective Intentions and Actions', in Phillip R. Cohen, Jerry Morgan, and Martha E. Pollack (ed), *Intentions in Communication* (Cambridge, Mass.: MIT Press, 1990), 401–15.

[902] Ibid. 401-415. Searle's account has been criticised because while he rejects the idea of 'collective mind', he nevertheless argues that collective intentions cannot be reduced to individual intentions plus beliefs. Also see J. Searle, *Making the Social World: The Structure of Human Civilization* (New York: Oxford University Press, 2010), 47. For his critics see for example H. Schmid, 'Can Brains in Vats Think as a Team?', 6 Philosophical Explorations 6 (2003) 201–217; A. Zaibert, 'Collective Intentions and Collective Intentionality,' in D.R. Koepsell and L.S. Moss (eds.), *John Searle's Ideas about Social Reality – Extensions, Criticisms and Reconstructions* (Oxford: Blackwell 2003) See also M. Weber, *The Theory of Social and Economic Organizations* (A. Henderson and T. Parsons (trs), OUP 1947 NY), 136.

[903] Therefore, as Larry May notes about such an approach, collective intent only exists 'where individuals reach unanimity of judgment on the basis of a common interest shared by all group members and a common desire to succeed in a particular project oriented towards the common interest'. L. May, *Morality of Groups* (University of Notre Dame Press, 2009), 58. A less atomistic, but in essence similar version of Searle's view is held by Michael Bratman, according to whom collective intentionality essentially needs to be understood as a set of individual intentions with common contents M. Bratman, 'Shared Intention', 104 Ethics (1993), 97-113; M. Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge & New York: Cambridge University Press, 1999), 93-131.

Searle's view is, however, by no means an unassailable position. Margaret Gilbert, for example, criticises Searle's account, in that it merely recognises solipsistic intentions and overlooks the normative role of structure in the emergence of collective intentions.[904] Gilbert points out that, in most cases, individual members of a collective may not share certain collective goals at all; yet they nevertheless contribute to the realisation of them for different underlying reasons. That is to say, the normative influence of 'structure' does not always lead individual members to come to have the same intentions or intentions with common content regarding a collective objective. For example, in most cases of genocide, a number of individuals merely execute high-level orders without sharing or even being aware of an overarching collective goal to destroy.

When we think that Kim occasionally equates collective intent with 'plan or policy', it may be argued that he was in fact referring to this phenomenon. Yet, it is hard to see what this adds to his account, other than recognising that an enabling context is essential for individual genocidal intent to emerge as an enabling factor. Confining the context to the idea of 'collective intentionality' thus seems unnecessary. Perhaps the most promising attempt to save Kim's arguments about the externality of 'collective genocidal intent' would be to draw on the work of Tracy Isaacs, who argues that intentional agency in fact does not necessarily require consciousness. According to her:

> …we may understand collective intentions as states of affairs, identifiable in part by their functional roles. As long as they function at the collective level of action in the same way that individual intentions function at the level of individual action, then we may think of them as intentions. [...] The collective intention is neither a simple aggregate of individual intentions nor an individual intention with an irreducibly collective orientation.[905]

---

[904] M Gilbert, 'Remarks on collective belief' in Frederick Schmitt ed. Socializing Epistemology. Maryland: Rowman & Littlefield (1994); M. Gilbert, *On Social Facts* (New York: Routledge, 1999); See generally M. Gilbert, 'Searle and Collective Intentions' in Savas L. Tsohatzidis (ed), *Intentional Acts and Institutional Facts: Essays on John Searle's Social Ontology* (Dordrecht; Springer 2007), 31-48. Margaret Gilbert understands a collective intention as number of individuals makes a joint commitment to perform some actions as if they are single individuals. Once the joint commitment is established individuals obliged to do their parts. Joint commitment, according to Gilbert not necessarily has to be 'willing', which means joint commitment may result from coercion. Ibid.

[905] T. Isaacs, *Moral Responsibility in Collective Context* (Oxford; OUP, 2011) 37, 48.

In other words, Isaacs objects to limiting the idea of intentionality to mental states and argues rather that collective intentional structures are what give rise to collective intentions and collective actions. She therefore emphasises that the source of collective intentionality is the structure, which means that in order to explore the content and nature of collective action, we should look into how the group structure worked to give rise to a particular event or process.[906] Indeed, a policy of an organisation may not be endorsed by any of its members but may simply emerge and be executed as a compromise. What this means in terms of our topic is that, while genocide may occur at the macro-level, it is ultimately possible that no individual being was responsible as a principal perpetrator for its commission. While one may recognise this distinct possibility, it is still not clear why we stick with the problematic 'collective intentionality' rhetoric. It seems that what emerges in such a circumstance is a collective 'norm' to be executed and followed. That is, it is not a form of intentionality, but rather a norm or way of behaving that emerges through 'objectivicated' relations.

The idea of a 'we-mode of intentionality' reflects this very insight, since it does not denote an overarching shared or extra-mental state but is related to a normative ethos that allows individuals to develop the sense that 'we' are or will be accomplishing x.[907] Therefore, the present study understands the context level as relationally developed

---

[906] [S]tructures yield a level of intentional action that is distinct from the intentional action of the individuals who perform their organizational [or broadly put group] roles. The collective level is distinct, insofar as the organization's actions flow from its intentions. The individuals' actions flow from their intentions, and their intentions are not constitutive of the intentions of the organization, even if the individuals' actions are at least partly constitutive of the organizations' actions. The collective action that follows is the product of the collective's intention. It is theoretically possible that an organization might intentionally pursue a course of action that is not the action that anyone in the organizational structure intended that the organization pursue. Ibid. 28-30 Isaacs gives the following example 'In the organization case, there is a sharp disconnect between the individuals' and the collective's intentions. The most significant feature of this analysis is that in order to understand the organizational intention there is no need to refer to the intentions of individuals. The content of their intentions is entirely beside the point. If organizational decisions are taken in the form of votes on motions, for example, it may well be that individuals whose roles require them to participate in the decision cast their votes on the basis of personal reasons. Nonetheless, the decision is the organization's intention, irrespective of individuals' reasons for voting as they do. Ibid.

[907] R. Tuomela, *Social Ontology: Collective Intentionality and Group Agents*, (Oxford; OUP, 2013), 6. See for a detailed criminological examination of 'Genocidal Context' K. Anderson, *Perpetrating Genocide: A Criminological Account*, (Oxon: Routledge, 2018) 43-65.

normative destructive dispositions, interactions and practices directed against a protected group in a particular timeframe and space by a set of people who sporadically or systematically came or were brought together in order to have a reasonable chance of achieving this ultimate aim.[908]

To elaborate this definition, 'destructive context' may emerge in one of two ways: mechanically or organically. The latter is a rather rare possibility, in which normative practices and disposition directed against the destruction of a group emerge without a concrete organisational scheme, but through social interactions among and collaborations between individuals gradually growing into destructive norms against a particular protected group. For example, the ethnic hatred of a population may lead to widespread practices of group destruction. In this sense, social norms among the offenders transform to an extent that allows the systematic and progressive destruction of a collective entity without any moral remorse.[909] On the other hand, in an organisational structure, such norms and practices come into existence through top-down imposition in an organisational scheme, usually in the form of introduction of a plan or policy. Yet, in both cases, 'context' relationally emerges as a form of objective practices and ways of acting. Indeed, even in an organisation, individuals do not automatically implement destructive norms, this requires structural relatedness and abiding by the requirements of such a relation.

It should be emphasised at this juncture that it is not necessary for all offenders to hold the 'intent to destroy' when they act, and thus to be individually responsible as the principal perpetrators of genocide. That is to say, while the 'context' is the form of objective relations among individuals directed against the destruction of a substantial

---

[908] Anderson, *Perpetrating Genocide,* 43-65.

[909] For a similar view see I. Tallgren, 'The Sense and Sensibility of International Criminal Law', 13 European Journal of International Law (2002), 575: 'instead of being exceptional acts of cruelty by exceptionally bad people, international crimes are typically perpetrated by unexceptional people often acting under the authority of a state or, more loosely, in accordance with the political objectives of a state or other entity.' Also see M. Drumbl, 'Collective Violence and Individual Punishment: Criminality of Mass Atrocity', 99 Northwest University Law Review (2005), 567: 'Whereas for the most part ordinary crime deviates from generally accepted social norms in the place and at the time it was committed, extraordinary crime has an organic and group component that makes it not so obviously deviant in place and time (although it certainly deviates from *jus cogens* norms and basic conceptions of human decency)'.

part of a group and thus can be observed and detected somewhat objectively in retrospect, it does not tell us straight away that any individual who acts in this 'context' automatically holds an individual genocidal intent. Hence, while it is not possible for an individual to form the genocidal intent out of 'context', the presence of such a 'context' does not directly indicate the existence of intent for each contributor. Indeed, in the organisational scheme of an army, low- or mid-level offenders may not even be aware of the context or may not share the ultimate goal. The context therefore allows individuals to target a substantial part, but not impose intentionality as regards the ultimate result.[910]

Therefore, locating the 'genocidal context', whether it manifests itself as the implementation of an organisational plan/ policy or normative relations/ practices among offenders, is a pre-condition to establish individual responsibility and its form. This is, however, not because the context layer precedes over the individual level or is more important (it has already been emphasised that they emerge and grow together, symbiotically), but because the legal assessment is always retrospective and the existence of individual genocidal intent is dependent on the existence of a 'context'.

Broadly speaking, then, there exist three options. The first is that an individual may act without awareness of the 'context' or overall goal and merely supports the campaign for some reason (e.g. the execution of an order). In such circumstances, it is not a viable option to convict these individuals for genocide because of the lack of the required *mens rea*. The second option is that an individual may be aware of the context and, for whatever reason, supports the campaign without sharing the goal. Such an individual needs to be considered an accomplice, given that she was aware of the context and acted with the knowledge that she was contributing to the group's destruction. And the third

[910] The only exception here, in terms of formation of genocidal intent, would be the high-level perpetrators in an organization scheme. Indeed, when a head of an army issues a clear order to her troops to destroy a protected group, she is *de facto* in a position that gives her sufficient causes to develop reasonable belief as to the realization of the ultimate destruction. Therefore, we may speak of the genocidal intent of a high-level perpetrator even without the actual context emerges. Nevertheless, there are still two options following such an order. The first is the implementation, which indicates the crime is completed in terms of the head of army. The second option is that the mid and low-level perpetrators reject to implement and thus the situation stands out as an attempted genocide in relation to the head of army. Thus the position of the perpetrator plays a crucial role in the determination of responsibility and assessment of the elements.

option is that an individual may satisfy both elements, which requires conviction for the crime. This approach, on the one hand, reduces the heavy and unrealistic emphasis on agency and intentionality in the legal discourse through recognising the essential role of 'contextuality', while at the same time it does not overemphasize 'contextual' factors and weakens 'the fundamental insight that genocide, as a criminal offence, requires a finding of individual misconduct and responsibility'.[911]

The implication of this understanding in relation to assessment of the substantiality requirement is that determining the extent of the targeted part in relation to an individual offender requires an examination of the nature of her relatedness to the collective configuration in that particular context, as well as the characteristics of the configuration. That is because, any individual is able to harm a group to some extent, whether by killing few members or kidnapping a child, yet an individual becomes able to target a *substantial* part of the victim group almost always by virtue of being part of a collective and thus through the 'we-mode' of intentionality. Here, it must be assessed whether the accused committed herself to the group's destructive ethos and to the relevant we-reasoning and we-acting with knowledge of the context. That said, awareness here does mean having precise knowledge about the exact extent of the targeted part, since in most cases this is mostly impossible and unnecessary. Rather it is sufficient that the accused have an overall awareness about the likelihood that a substantial part of a group is being targeted by 'we'.

All in all, on these doctrinal and conceptual bases, the extent of the relevant 'part' in assessing the responsibility of an individual perpetrator can and should be determined by the extent of the collective activity that she deliberately supports with her intentional acts. In fact, it may even be claimed that this understanding was to some extent echoed in the recent Appeals Chamber judgement in *Karadžić,* in which the Chamber remarked that 'the intent to destroy a group as such is circumscribed by the "area of the perpetrators' activity and control" and the "extent of [the perpetrators'] reach"'.[912] Given

---

[911] Kirsch, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct', 360.

[912] *Prosecutor v. Karadžić* [2019] MICT-13-55-A, Judgement, para 727.

that the term ‘perpetrator’ in is used in its plural form, it may be argued that the judgment ultimately denotes that the relevant part for the assessment of ‘substantiality’ is necessarily determined by the scope of the collective activity.

5.3. Summary and Conclusion

This chapter has argued that the processuality of group destruction and contextual embeddings of individual genocidal intent should not and cannot be overlooked in legally conceptualising genocide perpetration and, connectedly, determining the relevant ‘part’ that will be subject to an assessment of substantiality. In developing this argument, the chapter has ultimately sketched out a conceptual framework to rethink the perpetration of the crime, one that deviates from the dominant ‘intentionalist’ view in jurisprudence and thus proposes a fresh understanding of how to locate a relevant ‘part’ in assessing ‘substantiality’, while deciding on genocidal intent and imputing criminal responsibility.

The framework outlined is nourished by the relational-realist understanding established in chapter four and hinges on two main propositions, which constitute the novel contributions of the chapter. To begin with, it is maintained that the notions of group destruction and genocide, albeit intrinsically related, should not be equated since the former involves any kind of destructive process directed at the destruction of a group while the latter refers to a particular stage in the destruction process in which certain acts are resorted to. Drawing this distinction, which became possible due to the conceptual conviction that groups have an irreducibly distinct existence, led to two important practical conclusions.

First, it rebuts the opinion that a special mens rea endows the crime with distinctiveness, as the ‘intent to destroy’ can exist and the goal of group destruction can be achieved without the crime of genocide being committed. Rather, genocide occurs, and is unique in that sense, when this particular intent meets the kinds of acts listed. Second, and connectedly, the ‘intent to destroy’ necessarily underpins the entire process of destruction as it is directed at a ‘collective entity’, which means that the entire range of destructive acts informs the assessment regarding the existence and extent of an ‘intent to destroy’.

With regard to the substantiality requirement, this implies that the relevant part is the one targeted by the entire process of destruction, not merely one that is subject to acts of genocide. Taking this perspective effectively ends the conceptual inconsistencies that occurred in assessments regarding situations like Srebrenica. To put it in perspective, as opposed to the unconvincing argument of the ICTY that the killing of 8.000 military-aged men in conjunction with forced deportation of the rest indicates the intended physical and biological destruction of the group, the proposed perspective allows one to infer that the goal was to destroy the Srebrenica Muslims without recourse to weak argumentation and back doors, as the ICTY did, through putting the emphasis on a qualitative method to determine 'substantiality'.

For the dominant jurisprudential perspective, a similar kind of dilemma is also pending in relation to the Myanmar situation, where the ICJ is expected to decide on the request for provisional measures at the time this chapter is being concluded. This is because, the listed acts of genocide are employed against a relatively small part of the group (e.g. it is estimated that over 24,000 people were killed and over 18,000 raped),[913] while the majority of the population were faced with other measures, most prominently forced deportation (over 750,000 people).[914] Contrarily, from the proposed perspective, it can be concluded – without recourse to any back door – that the Myanmar government is acting with 'intent to destroy' the Rohingya Muslims, since the 'intent to destroy' is related to the process of destruction against a collective entity – not merely to acts of genocide – and the evidence clearly indicates a process of destruction against the Rohingya Muslims, from which the 'intent to destroy' can be established.

However, reframing the crime as a stage in a broader group destruction process comes with questions of at what point a process reaches the stage of 'genocide' and how should the responsibility of individuals be thought in such a framework, particularly considering that their individual reach and control rarely allow expressing their meaningful, act-oriented will for the destruction of a 'substantial part'. These questions led the chapter to its second proposition, which is that an individual's ability to form an

[913] According to a report by the Ontario International Development Agency (OIDA) See Habib, Mohshin & Jubb, Christine & Ahmad, Salahuddin & Rahman, Masudur & Pallard, Henri. (2018). Forced Migration of Rohingya: The Untold Experience.

[914] Ibid.

‘intent to destroy’ against a ‘substantial part’ is necessarily contextual and the nature of the context always defines whether the destruction process reached the stage of genocide. Therefore, what qualifies an ‘intent to destroy’ as ‘genocidal intent’ for an individual perpetrator is the accompanying acts and specifics of the context that acts are committed in in connection with that context. In advancing and elaborating this suggestion, the chapter respectively developed a series of connected arguments.

First of all, a distinction is drawn between ‘intent’, which refers to a meaningful and act-oriented will, and ‘desire’, which is a vague ambition that does not go any further than being a vain wish for the individuals in question, since it is related to something unachievable due to a lack of enabling means and surroundings. In other words, an individual can act with ‘intent’ only when she develops a reasonable belief regarding the possibility of achieving the goal in question. Making this distinction led to the subsequent argument that ‘genocidal intent’ is necessarily contextual, because developing a reasonable belief in relation to the destruction of a substantial part becomes possible only in particular ‘contexts’. As situations such as an individual possessing weapons of mass destruction are hypothetical exceptions that will probably never be realised (and pose no doctrinal challenges in assessing actus reus or mens rea, even if they do ever happen), the chapter exclusively focused on the common contextual element for all the genocidal situations that have occurred so far, namely, a collective offence.

As the next step, the chapter simultaneously explored the nature of interaction between ‘context’ and ‘genocidal intent’ and how to doctrinally incorporate the ‘context’ into legal assessment. It is argued that the majority of positions in the case law and literature either downplay the role of ‘context’ by sacrificing the law’s ability corresponding to the social reality to sheer legalism or interpret the ‘context’ as an additional element in light of the ICC Elements of Crimes, which not only causes problems as regards legality but also misrepresents the criminological nature of genocide, since the context is inherent to the crime, not an additional element.

Against this background, it is argued that the context is already an imbedded component of the crime. However, the chapter does not postulate an obscure collective intentionality, nor does it entirely incorporate the context into the subjective aspect of

the crime. Instead, it is maintained that 'context' plays a dual role. On the one hand, in relation to actus reus, it refers to multiple of acts of genocide, which indicates an emerging or established pattern of similar conduct. In other words, for a collective attack aimed at the destruction of a group to qualify as genocide, the commission of some listed acts is not sufficient (unless these acts themselves could effect such destruction). Rather, there needs to exist an emerging or established pattern of similar conduct, which indicates that the destruction process has evolved into the stage of 'genocide'. The assessment of whether certain conduct constitutes a pattern necessarily depends on the particulars of the situation and needs to be assessed by judges on a case-by-case basis. Points like the density, nature or quantitative enormity of conduct may inform such an analysis. This understanding reflects the socio-historical and criminological reality of the criminal phenomenon and crystallises the difference between genocide and other stages of group destruction.

On the other hand, in relation to mens rea, 'context' denotes a mutual understanding that underpins conduct directed at group destruction, including listed acts of genocide. By mutual understanding, however, it does not refer to a form of ontologically obscure extra-mental intentionality or shared intent. Instead, it is an overall normative ethos that enables 'individual genocidal intent' and determines its scope and limits. To restate this, given its centrality to the argument, a normative ethos refers to a relationally developed normative destructive disposition, interactions and practices directed against a protected group in a particular timeframe and space by a set of people who came together in order to have a reasonable chance of achieving this ultimate aim. This normative ethos, which can either emerge organically as a form of normative relations and practices or mechanically as an organisational plan or policy, allows individuals to develop the sense that 'we' will accomplish the destructive goal, which cannot be achieved individually, and due to this enabling relationship it largely informs the nature and limits of 'individual genocidal intent'. In this context, it is submitted that individual genocidal intent is ultimately a 'we-mode' of intentionality, which denotes 'group-dependent reasoning'.

Owing to this dependence of individual genocidal intent on the existence of a particular context, examining the 'group's normative ethos' and whether the perpetrator committed herself to it with knowledge of the context is a necessary assessment to make

in establishing individual genocidal intent and responsibility. The study exposes three possibilities in this respect. An individual (i) may act without awareness of the context and not share the overall goal and thus lack the required mens rea (e.g. executing an order); (ii) may act with awareness of the context but without sharing the goal, which makes the accused an accomplice (e.g. Krstić); (iii) may act by sharing the goal and with awareness of the context, which makes her a principal perpetrator. By layering genocide perpetration in this way and reducing the unrealistic emphasis on agency, the study better reflects the criminological reality of the crime and adheres to the logical tendency of attributing the highest level of condemnation to those most responsible for the overall campaign.

As regards the research problem, recognising the embeddedness of contextuality on these conceptual and doctrinal grounds leads to the conclusion that the extent of the relevant 'part' in assessing the responsibility of an individual perpetrator must be determined not according to her personal reach and control, but rather according to the extent of the collective activity that she knowingly furthers. In this way, the extent of a collective attack becomes a point of reference in determining the relevant 'part' targeted by a perpetrator.

The Srebrenica and Myanmar situations can once again be briefly revisited to put this second proposition into perspective. In Srebrenica, the 'context' was rather straightforwardly in existence in relation to both actus reus and mens rea. As to the latter, there was a clear plan undertaken in an organizational scheme directed at the destruction of the Srebrenica Muslims, mainly through killings and forced deportations. Thus, a normative destructive ethos was uncontestably present. At this point, it should be noted that the ICTY Appeals Chamber's ultimate consideration in *Krstić* was in essence in line with the argument of the chapter in that not all contributors to the normative ethos necessarily hold a genocidal intent. The Appeals Chamber overturned the Trial Chamber's decision of considering Krstić as a principal perpetrator by establishing that despite his awareness of the 'normative ethos' (which the Chamber characterised as a criminal enterprise by relying on the Joint Criminal Enterprise

doctrine) and his contribution to it, he did not share the goal of destruction and thus was only an accomplice.[915]

It should also be pointed out that, in those cases related to Srebrenica, the extent of the normative destructive ethos in effect determined the relevant 'part' for the assessment of substantiality. Indeed, no single perpetrator was in a position to achieve the goal in their individual capacity and what enabled them to express a meaningful and act-oriented will regarding the destruction of Srebrenica Muslims was a normative ethos that emerged as a result of their connectedness and common perceptions. Although the ICTY mentioned the 'importance' of individual reach and control, in theory, for the assessment of individual genocidal intent, its ultimate assessment consistently considered the Srebrenica Muslims as the relevant part for the perpetrators, with different individual reach and control, due to their relatedness to the collective action. As for actus reus, while killings were the second main act of destruction, their systematic and selective nature and the relative and absolute magnitude of the number of killings clearly indicated that acts of genocide were not singular incidents, but rather were used as one of the main means of destruction and thus the overall process of destruction had reached the stage of genocide.

In Myanmar, on the other hand, the Rohingya people of Rakhine State – who, as the previous chapter mentioned, constitute a 'whole' as a result of additional and distinct solidarity and identity that emerge as a combination of national, ethnic and religious bases as a result of socio-historic and sociopolitical factors –[916] have been subject to discrimination and persecution for a very long time. Applying the outlined understanding that stems from the second proposition of the chapter indicates that the decision on whether genocide occurred against the Rohingya people will depend on the assessment regarding the 'context' in relation to *actus reus*.

With regard to mens rea, the normative destructive ethos is disturbingly clear. While 'dehumanizing apartheid' against Rohingya has been underway for more than a few decades and gradually included stipulations that aimed to assimilate and 'denounce'

---

[915] *Prosecutor v. Krstić* [2004] IT-98-33-A, para 138,139.

[916] UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', para 1420.

their identity, it is likely to be argued that 2012 marked the beginning of a transformation from persecution to destruction. In 2012, after a governmental decision to 'tighten the regulations against Rohingya',[917] almost all aspects of the Rohingyas' existence were targeted (e.g. restricting marriages, limiting construction of religious buildings, control of birth rates), particularly through operations by the armed forces since 2017 – which included killings, demolition of villages, rape and so on – so members were forced to migrate. Therefore, there exist clear normative interactions and practices that emerged in an organizational structure directed against a protected group, which enables individuals to form 'intent to destroy' against the Roghinya people, not merely against members in their reach and control. Depending on their interaction with the normative ethos on the explained grounds, those individuals who committed acts of genocide can be held responsible as principle or secondary perpetrators.

The proposed approach can be compared with the UN fact-finding commission's consideration on the matter, which follows the dominant approach in case law and considers all these factors in relation to the future inference process of genocidal intent of unnamed individuals.[918] However, despite the constant emphasis that the occurrence of genocide cannot be established in the abstract as a macro-level event,[919] all these findings regarding destructive acts can in essence be used in order to establish that genocide occurred without specifying any individual perpetrators. This logical contradiction arises due to downplaying the embedded role of context and thus contradicting the criminological reality as well as the restrictive understanding of 'intent to destroy'. The proposed understanding ultimately offers a much more nuanced and coherent conception that avoids such contradictions and reflects the complex and processual reality of the crime by reducing the unrealistic emphasis on 'individual intent' and recognising (barring a lone genocidaire exception) that it is necessary to

[917] UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', para. 78.

[918] UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', para 1417 ff. While the report identifies six commanders in total as the most responsible for the overall atrocities, in establishing the occurrence of genocide it does not examine the intentionality of any of these alleged perpetrators.

[919] See, for example, ibid. 1520 1417

establish the existence of group destruction at the collective level to be able to assess individual responsibility.

On the other hand, the question of whether a 'context' exists in relation to actus reus is less straightforward. While it is evident that acts of genocide are being committed in a relatively widespread manner in Rakhine State, it is debatable whether they indicate an emerging or established pattern of similar conduct and thus become one of the main means of destruction or occur in a reactionary manner in order to facilitate other means of destruction. An assessment of this point should include, inter alia, consideration of the number of genocidal acts (it appears that more than 10 per cent of the group was subject to such acts); whether these acts occurred as a part of an organizational plan (which is a point that has not yet been decisively proved and denied by Myanmar); whether they are being deliberately undertaken with a strategic purpose in order to achieve ultimate destruction, as was the case in Srebrenica, or occur in a disorganized fashion. While the purpose and limits of this study preclude us from going into a detailed examination of this point, UN fact-finding reports claim that acts of genocide are being carried out in a systematic manner,[920] which would incline one to conclude that the group destruction process has reached the stage of genocide.

It should be noted that the emphasis on 'context' here also creates a much more sensible framework compared to the dominant understanding of perpetration. Indeed, a dominant understanding allows us to make a counterintuitive argument that if a single individual perpetrator commits a listed acted with the required intent in Rakhine State, this would qualify the situation as genocide. One may claim that in such a situation, the crime of genocide occurs only in relation to that individual; however, this not only creates a strange situation in relation to the issue of state responsibility, but also, and more significantly, goes entirely against the social phenomenon that the law aims to correspond and water down the concept of genocide significantly.

All in all, the present chapter has examined the issue of how to locate the relevant part, which ultimately entailed rethinking genocide perpetration. Through arguing that (i) the idea of 'intent to destroy' relates to the entire process, not merely to acts of genocide, and that (ii) the crime of genocide is necessarily 'contextual', which relates to both

[920] Ibid. paras. 1392-1410.

actus reus and mens rea, and allows individuals to develop a ‘we-mode’ of reasoning, which enables them to express an act-oriented will beyond their reach and control, the chapter has established that the relevant part must be assessed according to the extent of the broader destructive process, not in relation to the reach and control of the perpetrators in question.

The thesis has thus completed constructing its perspective on the research matter and established a conceptual framework to assess ‘substantiality’. That said, the range and depth of the conceptual and, albeit to a lesser extent, doctrinal analyses have also carved out a general understanding of how to represent and assess the entire criminal phenomenon. The next chapter will first formalise this general understanding in a more systematic way, which will also accompany the conceptual framework established to assess ‘substantiality’, and then will apply these by examining the ongoing South Sudan situation in detail, in comparison to Rwanda and Myanmar.

CHAPTER SIX

A Case Study: The Question of Genocide in South Sudan and the Substantiality Requirement

As is pointed out in concluding chapter five, the conceptual and doctrinal arguments produced so far are not only led to a series of conclusions and a conceptual framework regarding how to locate the relevant 'whole' and 'part' and to assess 'substantiality; but also displayed a certain novel understanding regarding how to think about genocide and examine its existence. The present chapter has a dual purpose. The first is presenting this understanding in a more systematic manner by formulating it as a four-step test for judicial application and position the proposed framework for analysing 'substantiality' in the context of this test. The second is exploring how this test and, connectedly, the framework of analysis regarding the substantiality requirement are to be applied in concrete cases.

To this end, the chapter will mainly focus on the ongoing South Sudan situation, which has been claimed by some, albeit minority, circles to be a possible case of genocide.[921] While examining the South Sudan situation in the light of this four-step test, some comparisons will be drawn with the Rwanda situation and the ICTR case law since the situations exhibit evident similarities, which permit highlighting how the findings and discussions of the study may improve the process of assessment. That being said, other judicial pronouncements, like those on the Srebrenica and Vukovar situation, will also be referred to for the comparative examination, particularly in respect of applying the 'framework of analysis' regarding the substantiality requirement.

It should be noted from the outset that the goal of the case study is not to defend the thesis coming up with straightforward solutions to the problems it posed – i.e. clear-cut methods to determine 'substantiality' or that genocide has occurred. Making such a

[921] M. Kranz, '5 genocides that are still going on today', Business Insider UK (22 Nov 2017) available at <http://uk.businessinsider.com/genocides-still-going-on-today-bosnia-2017-11/#the-nuer-and-other ethnic-groups-in-south-sudan-2> accessed on 29 March 2018; C. Pinaud, 'Violence against civilians in South Sudan: From multi-ethnic cleansing to genocide' (6th International Network of Genocide Scholars Global Conference on Genocide, Aix-Marseille University,7 July 2018).

claim would ostensibly contradict the main conceptual argument of the study that the ontological and criminological underpinnings of the crime preclude creating normative universals that allow deciding on these matters in a morally satisfying manner through theoretical analysis. Instead, determining these matters will always ultimately be left to the judges' holistic investigations and necessarily subjective considerations of evidence, because contingency requires a reactive application of the law in order to fulfil the moral purpose of it and our concern should not be positing definitive universals that 'mechanise' rule application by minimising the role of judges. Rather, the process itself, i.e. the questions that must be asked by judges, should be clarified.

In this context, the case study here has two further demonstrative goals. First, it illustrates how the contingency inherent to the criminal phenomenon constantly puts the traditional substantialist and intentionalist ways of thinking into the spot in terms of issues like establishing the protected status of the groups, relevant part or whole, 'substantiality' of the 'part', and ultimately 'genocide' itself. Second, it crystallises the 'questions' that needs to be asked as well as the process of assessment, which offers not a definitive 'zero-sum test' to decide on 'substantiality' and the occurrence of genocide, but a systematic and conceptually coherent way of engaging with these questions.

Within this context, the South Sudan situation constitutes an intriguing demonstrative study for two reasons. First, the way group differentiation emerged, which was well documented by anthropologists, allows vividly demonstrating the thesis' argument that the protected groups are contingent processes of unities. Second, the study aimed to avoid clear-cut cases as well as those extensively scrutinized by adjudicative bodies and scholars, since focusing on relatively less examined, contemporary and legally 'knife-edge' situations may enrich the thesis' original contribution and better represent the usefulness of the proposed understanding. The conflict in South Sudan fits this description seamlessly, given that both the existence of genocide and 'substantiality' of the targeted parts are contentious; and in fact the dominant view, at least so far, has been that the crime of genocide has not occurred in South Sudan.[922]

[922] In addition, engaging with the situations pre-dates the Second World War in the scope of genocide law would be legally problematic. This is not to deny that the idea of genocide has an extensive background in terms of the way international community built up an urgency to protect certain collectives as such and

It needs to be noted, however, that the purpose here is not to provide a factually or legally exhaustive examination, but rather to demonstrate how the proposed perspective allows rethinking the legal discourse by moving beyond the structuralism/ nominalism dichotomy in examining questions related to 'genocide' in general and the 'substantiality requirement' in particular. It should also be noted that the situation shall be examined only at the macro-level, both due to the evidentiary limitations and the very perspective of the study explained in chapter five.[923]

The first part of the chapter introduces the history of South Sudan conflict and then moves on to briefly summarise the different legal and political assessments on the situation, which exhibits the several deficiencies regarding the legal conceptualisation of genocide highlighted throughout the study. The second part conceptualises the study's four-step test by positing a set of (non-exhaustive) questions concerning each step that can facilitate the assessments of concrete cases. Following that the study applies this four-step examination to the situation by drawing some comparison with the ICTR and ICTY case law, as well as the Myanmar situation. In applying the 'test', the study aims not only to focus on the overall conflict but also those localised situations, which will allow to compare them with the Srebrenica and Vukovar situations in respect of the assessment of 'substantiality'.

6.1. A Brief History of the South Sudan Conflict and Discussions on its Legal Status

---

also in the intellectual personality of Lemkin. Yet that does not change the fact that the very concept as a particular form of moral and legal condemnation has been largely shaped as a response to what happened in the Second World War. In other words, although the forcible eradication of groups has been an unfortunate fact for centuries, its condemnation as a distinct moral and legal wrong under the rubric of the concept of genocide has gained an unquestionable place in the consciousness of international community only after the Holocaust. Judging the past with the moral and legal norms and standards of today may be considered as a misplaced revisionism and paves the way for unjust outcomes. Indeed, the well-established legal principle of non-retroactivity is based on this very conception. This is also the reason why in the Nuremberg Trials the term genocide was always used as a particular form of crimes against humanity, as opposed to a distinct crime category, and excluded from the final judgement. For these reasons and despite that there are intellectually intriguing and relevant situations such as Circassians (1894-97) or Tasmanian Aborigines (1826-29), the survey has been limited to the post Second World War. See, for example, R. Walter, *The Circassian Genocide* (New Brunswick: Rutgers University Press, 2013); T. Lawson, *The Last Man: A British Genocide in Tasmania* (London: I.B. Tauris, 2014).

[923] See chapter 5.2.2.

6.1.1. Background: A Nation-Building Process Gone Wrong

In 2011, after years of civil war between the North, which is predominantly Arab Muslims, and the South, which is largely Christian/ Animist and non-Arabic, South Sudan has become the newest country in the world. Although the people of South Sudan showed a great deal of uniformity in the independence referendum, where almost 99 per cent voted in favour of separation, the territory making up South Sudan consists of over 60 different tribal groups,[924] most of which historically had constant conflicts among them to control dwindling cattle grazing land or water-points precipitated by drought, as well as because of the traditional practice of cattle raids.[925] Yet, during the process of establishing a 'nation' out of these divergent tribes, the traditional conflicts between them started to gradually evolve into ethno-political strife thanks to the ambition of the South Sudanese elite for control of the State.[926]

Fully-fledged ethno-political civil war broke out in late 2013, when the militia of the two largest groups, namely Dinka and Neur, who were the central building blocks of the integrated bureaucracy and armed forces (the Sudanese People's Liberation Army (SPLA) and the Sudanese People's Liberation Movement (SPLM)), began to fight each

---

[924] M. Fadlalla, *Customary Laws in Southern Sudan: Customary Laws of Dinka and Nuer* (New York, iUniverse, 2009), 15. When the sub-tribes are taken into account the number exceeds five-hundred. See D. Wai, 'The Southern Sudan and the People' in Dunstan M. Wai (eds), *The Southern Sudan: The Problem of National Integration* (London: Frank Cass, 1973), 9.

[925] Traditionally, cattle raids are a livelihood sustaining practice, which allows restocking herds after droughts. It has also an important cultural function, as it provides the means for young men to get married. Furthermore, access to water and pastures has central importance for the survival of the local communities in South Sudan. See ECC Platform Library, 'Conflict between Dinka and Nuer in South Sudan' available at <https://library.ecc-platform.org/conflicts/natural-ressource-conflict-south-sudan-dinka-vs-nuer> accessed on 31 March 2018; T. Loyuong, 'Why are the Dinka and Nuer are Killing Each Other in South Sudan' (2014) available at <https://tloloyuong.wordpress.com/2014/01/23/explaining-current-internal-armed-conflict-in-south-sudan-to-german-audience-from-an-ethnic-lens/> accessed on 20 April 2018.

[926] The ultimate prize for these elite was obtaining control over the assets and abundant natural sources, particularly oil, that provide 97 per cent of government revenue and 60 per cent of GDP. A. De Waal, 'Introduction: Making Sense of South Sudan' (2016) African Affairs available at <https://academic.oup.com/DocumentLibrary/afraf/Introduction%20South%20Sudan.pdf> accessed on 21 May 2018.

other.[927] That said, the ethnicization and politicisation of tribal conflicts already had a long history[928] dating back to the Second Sudanese Civil War, particularly to 1991, in which the initial division was sparked by a disagreement over whether the SPLA should keep pursuing its original aim of creating a united, secular and democratic Sudan or demanding independence from the North.[929] The insistence on the latter position by the authoritarian SPLA chairman at the time, John Garang, who was a Dinka, eventually triggered a failed coup attempt by Rick Machar, a Nuer general in the movement. Following that, the SPLA split into two and both Machar and Garang played the tribe card to consolidate and enhance their power and leadership. While Dinka was the largest group in the country, Nuer influence in the armed forces was considerable. [930]

After years of fighting, this embroilment eventually ended up with Rick Machar and most of the other rebellious forces rejoining the SPLA in the late 1990s, but the damage done by the infighting was extensive.[931] Most notably, this was the first time in the long

---

[927] Ø. H. Rolandsen and N. Kindersley, 'South Sudan: A Political Economy Analysis' (2017) Norwegian Institute of International Affairs, 6 available at <https://brage.bibsys.no/xmlui/bitstream/handle/11250/2460927/NUPI_rapport_+South+Sudan_Rolandsen_Kindersley.pdf?sequence=2> accessed on 21 May 2018.

[928] Ibid. 4,5; Non-scientific, yet intriguing demonstration of the growing ethnic tension can be observed in the comments over the 2008 census in the following news web-page: Sudan Tribute, 'South Sudan census results officially released' (7 June 2009), available at <http://www.sudantribune.com/South-Sudan-census-results,31411> accessed on 21 May 2018.

[929] Report of Carnegie Council for Ethnics in International Affairs, 'A Second 'Split' for South Sudan? Ethnic Violence, the State, and Whether Peter Gatdet is the Most Dangerous Man in South Sudan' (2011) available at <https://www.carnegiecouncil.org/publications/articles_papers_reports/0093> accessed on 31 May 2018.

[930] L. Blanchard, 'The Crisis in South Sudan' (2013) Congressional Research Service, 5 available at <http://www.refworld.org/pdfid/52cff1494.pdf> accessed on 02 April 2018.

[931] One of the major consequences was that the Khartoum government took the control of the strategic oil fields in the Nuer region. When the crises broke in 1991, the Nuer forces massacred Dinka in the southern upper region, while their communities suffered important losses in the central and western Upper Nile. In 1993, Machar forces changed its name from 'SPLA-Nasir' to 'SPLA-United' after some non-Nuer officers of the SLPA also joined the movement. On the top of that the Sudanese government did not miss the opportunity to provoke the division between the 'rebellions'. At the early stages of the conflict, the SPLA-United lost its ground against both the Khartoum government and the SPLA, which eventually led to the loss of access to an international border. This forced Machar to contact with the Khartoum government to supply arms and ammunition and Khartoum was more than happy to answer the call. The Sudanese government thus became even more influential on the rebellion movement and eventually forced Machar to sign a separate agreement with the Sudanese government. That led to a fraction in the

history of conflicts between these tribes that large numbers of civilians, including women, elders and children, were targeted because of their identity, and thus customs began to be abandoned.[932] The conflict damaged the internal stability in an unprecedented way, broke the trust between the two largest tribes and paved the way for further conflict. There have been numerous other incidents since 1991, and these demonstrate the transformation of tribal relations in South Sudan into an ethno-politic power struggle.[933] Therefore, as Douglas Johnson summarises, the conflict we are

---

SPLA-United movement and a Nuer against Nuer conflict. Ibid. 3. Also see J. Jok, and S. Hutchinson, 'Sudan's Prolonged Second Civil War and the Militarization of Nuer and Dinka Ethnic Identities', 42 African Studies Review (1999), 125–145.

[932] As Tongun Lo Loyuong notes, '[t]he oral customary law or the gentlemen's agreement that regulate any combat in these traditional societies, including those motivated by cattle raids, women, children and the elderly are sacrosanct and not to be harmed. Even deserters are also allowed to go free'. Loyuong, 'Why are the Dinka and Nuer are Killing Each Other in South Sudan' (2014). Jok Madut Jok and Sharon Hutchinson also notes in this respect the 'new form of warfare transgressed all the ethical limits on violence that had been honoured by previous generations of Nuer and Dinka leaders, swiftly transforming earlier patterns of intermittent cattle-raiding into no-holds-barred military assaults on Dinka and Nuer civilian populations armed with little more than spears'. Jok and Hutchinson, 'Sudan's prolonged second civil war and the militarization of Nuer and Dinka ethnic identities', 131.

[933] For example, right after the peace settlement with Sudan in December 2005, the armed youth of Lou Nuer tribe (a sub-group of the broader Nuer tribe, locates in central and eastern Greater Upper Nile region (see Map No.2), known as 'White Army', with worrying of losing their regional power and control, refused to conform to the disarmament programme introduced by the government and approved by the Nuer leadership -with the rationale that a functioning government can only be established after the various armed groups are disarmed. The resistance led to the SPLA interference, which resulted with thousands of deaths, demolishment of houses and villages. M. Arnold and C. Alden, '"This gun is our food": Disarming the White Army militias of South Sudan', 7 Conflict, Security & Development (2007), 361-385. The transformation of conflict's nature also marked in the tribal warfare throughout 2009 and 2011, which took place predominantly between Murle and Lou Nuer. In both cases, the conflict has started due to the 'traditional' cattle raids. Yet as a result of growing ethno-political tension between the groups since the Second Sudanese Civil War, which has become even more apparent after a number of insurgencies that the 2010 elections sparked, the way these conflicts unfolded has been different. Historically, the traditional practice of cattle raiding and the following conflicts became normalised in these communities and the society had developed very specific peace-making procedures. Yet in 2009 and 2011 both parties once again have targeted unnamed civilians through collective retaliation on the basis of ethnicity and forced displacement. So much so that, it is reported that the White Army wowed to 'exterminate' Murle people in the town of Pibor of Jonglei state (see Map No.1). P. Martell, 'South Sudan tribe vows to 'exterminate' rival group', *Mail and Guardian* (2 January 2012) available at <https://mg.co.za/article/2012-01-02-south-sudan-tribe-vows-to-exterminate-rival-group> accessed on 22 May 2018; also see 'South Sudan - Tribal Warfare 2009' and 'South Sudan - Tribal Warfare 2011' Global Security <https://www.globalsecurity.org/military/world/war/south-sudan-2009.html> and <https://www.globalsecurity.org/military/world/war/south-sudan-2011.html> accessed 01 May 2018.

witnessing today partially had its 'origins in unresolved tensions following the split in the SPLA in the 1990s, and the incomplete reintegration of anti-SPLA forces into the SPLA after 2005'.[934]

Despite this background, a delicate political balance was nevertheless established following the referendum and independence in 2011. Accordingly, the SPLA leader, Salva Kiir, who took this position following the death of Garang in 2005, became the president of the country. The Nuer general Machar became his vice-president and the other ministries were shared by the members of various tribes. Yet, several commentators promptly observed that the newly established balance had no chance of surviving, not merely because an inherent ethnic tension exists, but due to a political[935] and economic[936] structure built on sand.[937]

---

[934] D. Johnson, 'Briefing: The crisis in South Sudan,' 113 African Affairs (2014), 302.

[935] In his congressional testimony at February 2010, the CIA director Dennis Blair accurately remarked in the midst of all these conflicts that 'a new mass killing or genocide is most likely to occur in Southern Sudan' D. Blair, 'Annual Threat Assessment of the US Intelligence Community for the Senate Select Committee on Intelligence', US. Intelligence Community Annual Threat Assessment (2 February 2010), 37. There are several political reasons located in the literature regarding the unavoidable doom for this political system. An underlying structural catalyst for the conflict was the very set-up and practices of the SPLA/M. Cherry Leonardi argues that the SPLA/M is not a rebellious youth movement against the existing political order as some think, but simply a different political order built on the premises of a different class of elite. (C. Leonardi, '"Liberation" or capture: Youth in between "hakuma", and "home" during civil war and its aftermath in Southern Sudan,' 106 African Affairs (2007), 391–412; C. Pinaud, 'South Sudan: Civil war, predation and the making of a military aristocracy', 113 African Affairs (2014), 192–211.) Leonardi observes that the SPLA has been intriguing for the young southern Sudanese because it was offering almost the only remedy for their sense of disempowerment 'not by their parents or older generations, but by Government of Sudan repression and increasingly by the behaviour of SPLA soldiers' (Ibid. 401). Yet, the monopolisation of the material benefits of the newly established country by the military elite of the SPLA after the independence caused certain resentment on the side of youth. This simply made it easier for some of them to turn against the SPLA/M when the civil war (re)started in 2013. A related structural problem is the way militia has been organised. On the one hand, the inability and unwillingness to establish a modern, national and depoliticized army put the newly established country in constant danger of armed conflict between ethnic sections who are loyal to their own commanders.

[936] First of all, as Luke Patey notes, when the financial hyper-dependence on oil is combined with corruption, poor planning and a lack of long-term planning, which are all familiar foes of the oil-producing countries of the region, conflict between those parties who are not pleased with the way income is distributed becomes unavoidable. (L. Patey, 'Crude Days Ahead: Oil and the resource curse in Sudan', 109 African Affairs (2010), 617–636.). On the other hand, the corrupt 'big-tent' system that Kiir has maintained was utterly unsustainable, since the moment already tight funds dried up his leadership would become open to challenge. That did not take long, as in 2012 the price of oil plummeted, pipeline

The gradually growing political turmoil turned into a civil war on 15 December 2013. President Kiir accused Machar of plotting to overthrow him in a *coup d'état.* After a faction in the SPLA/M surfaced, Kiir ordered that all troops in the capital, Juba, be disarmed. However, army leaders later returned arms to troops of Dinka ethnicity, which led to fighting breaking out after many troops of Nuer ethnicity questioned the decision. Therefore, the arm split into two: the SPLA/M led by Kiir and the SPLA/M-IO led by Machar and supported by the paramilitary White Army movement. The political power struggle between the elites thus turned into inter-tribal violence.[938] Later, particularly after 2016, other ethnic groups also started to take part in the struggle and more than a dozen armed groups emerged and also rebel in-fighting took off. In August 2018, the peace talks ended with a deal, and since then hostilities have been

---

fees increased and production lowered as a consequence of conflict with the North. Alex De Waal perfectly summarises how the corruptly built system sparked the civil war as follows: 'At independence, more than half of the total budget was spent on the army, with salaries and allowances for the bloated military as much as 80% of that bill. The army was essentially a constellation of ethnic militias, each loyal to its particular commander-cum-paymaster. It was exempt from austerity measures imposed after the oil shutdown − not because it was needed for national defence, but because the 700 generals had sufficient clout to hold President Salva Kiir to ransom, with ill-concealed threats should they not be paid. President Kiir's strategy for remaining on top of his diverse, fractious and quarrelsome generals, and other members of a kleptocratic elite, was a 'big tent' policy: he paid them all off by allowing them to steal from state coffers. Vast sums of oil money disappeared into private pockets, or were recycled lower down the food chain into patronage payoffs.' A. De Wall, 'South Sudan's corrupt elite have driven a debt-free and oil-rich country to ruin', International Business Times (2016) <https://www.ibtimes.co.uk/south-sudans-corrupt-elite-have-driven-debt-free-oil-rich-country-ruin-1570845> accessed 09 April 2018.

[937] All the factors summarised in the previous two footnotes called the corrupt political mechanism that Kiir had created to sustain stability and solidarity into question. This led Kiir to change his approach to hold onto power. From January to July 2013, Kiir replaced many high-level officials, dismissed several deputy chiefs as well as more than 100 generals in the armed forces. In July, after a multi-million-dollar financial scandal and also alleging that his rivals were trying to rekindle the infighting in 1991, he dismissed his entire cabinet, including vice president Machar. Machar immediately challenged Kiir's leadership by arguing that the nation teetered on the edge of a one-man regime and announced he would run for the presidency in the 2015 elections.

[938] A. De Waal, 'When kleptocracy becomes insolvent: The brute causes of the civil war in South Sudan,' 113 African Affairs (2014), 347–369. See also United Nations Mission in South Sudan [UNMISS], 'Interim Report Human Rights Crisis in South Sudan', Human Rights Division 21 February 2014, 5,6. Available at <https://unmiss.unmissions.org/sites/default/files/hrd_interim_report_on_crisis_2014-02-21.pdf> accessed on 15 April 2018.

considerably (although relatively) diminished.[939] However, the implementation of the peace agreement has been stalling significantly, which has caused a great deal of anxiety – particularly as no concrete steps have been taken towards the unification of rebel and government forces into a national army.[940]

The results of the conflict turned out to be catastrophic. So far, around 400.000 people have been killed[941] and gang rape started to be perceived as normal in this warped environment.[942] UNICEF has also recently stated that as many as 19,000 child soldiers have been recruited during the conflict.[943] According to the latest UN data,

---

[939] Other important advancements has been that in May 2018, a US proposal for further UN sanctions of South Sudan government has been accepted by the UN Security Council and sanctions are still in force. UNSC Resolution No. 2418(2018), available at <https://www.un.org/press/en/2018/sc13361.doc.htm> accessed on 14 March 2019. In addition, during the summer of 2018 the escalating violence in former Unity State condemned by the UN Officials, including the Special Adviser on the Prevention of Genocide, who remarked that that the on-going violence may constitute atrocity crimes. 'In the last two weeks, reports from the former Unity state indicate intense fighting between Government forces, the Sudan People's Liberation Army (SPLA), and the SPLA-in Opposition (SPLA-IO). Preliminary investigations by the United Nations have uncovered alarming patterns of serious human rights violations and abuses, including killings, pillaging, abductions, rape and gang-rape committed by both parties during the fighting, leading to forced displacement of the population. The Special Representative of the Secretary-General on Sexual Violence in Conflict, Pramila Patten, the Special Representative of the Secretary-General for Children and Armed Conflict, Virginia Gamba, and the Special Adviser on the Prevention of Genocide, Adama Dieng, jointly remarked that these violations could constitute atrocity crimes. Office of the Spokesperson for the UN Secretary-General, 'Highlights of the Noon Briefing by Farhan Haq Deputy Spokesman for Secretary-General' (11 May 2018) available at <https://www.un.org/sg/en/content/highlight/2018-05-11.html> accessed on 31 May 2018.

[940] See H. Holland, 'South Sudan peace deal doomed if disputes not settled: think-tank', *Reuters* (13 March 2019) available at <https://af.reuters.com/article/topNews/idAFKBN1QU1KS-OZATP> accessed on 15 March 2019.

[941] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', Human Rights Council Thirty-fourth session, A/HRC/34/63 (6 March 2017), 12 para.53. See for the most detailed numerical examination to this date F. Checchi, Et al. 'Estimates of crisis-attributable mortality in South Sudan, December 2013-April 2018 A statistical analysis', (2018) available at <https://crises.lshtm.ac.uk/wp-content/uploads/sites/10/2018/09/LSHTM_mortality_South_Sudan_report.pdf> accessed on 20 March 2019.

[942] For example, in 2016, a United Nations Population Fund survey found that 72 per cent of women in UNMISS PoCs in Juba alone had reported having been raped since conflict broke out. South Sudan Protection Cluster, *Protection Trends: South Sudan, 2015 – 2016* (2017), 14.

[943] UNICEF Press Release, 'Hundreds of children released from armed groups in South Sudan', (2018) available at <https://www.unicef.org/press-releases/-children-released-armed-groups-south-sudan>

approximately 2.45 million people are seeking refugee status and 1.76 million have been internally displaced, whilst 7.5 million people need humanitarian assistance and protection.[944] Against this background, the question of whether genocide was committed should be taken seriously, particularly because the dynamics of the conflict shifted even more dramatically after the short-lived peace brokered in 2016 and targeting civilians en masse, a scorched earth policy and forced deportations became military tactics to ensure control over areas, instead of merely targeting opposing militias.

6.1.2 Recent Assessments of the Situation: Ongoing or Impending Genocide

This question of genocide regarding the South Sudan will likely to grow in importance in the coming years, given that the efforts and pressure have been growing in favour of the establishment of a Hybrid Court for South Sudan,[945] as envisaged in the (so far unsuccessful) peace agreements made in 2015 and 2018,[946] and the crime of genocide included in the Draft Statutes.[947] While it is well documented that acts of genocide already took place on a massive scale during the conflict, it appears that the question of 'genocidal intent' constitutes a point of divergence. In this context, two opposing perspectives can be noticed: a minority view that suggests genocide has (had) already

---

accessed on 01 June 2018; S. Crittle, '"I didn't know if he was alive": Former child soldier reunited with family in South Sudan', UNICEF (2018) available at <https://www.unicef.org/stories/i-didnt-know-if-he-was-alive-former-child-soldier-reunited-family-south-sudan> accessed 1 June 2018.

[944] United Nations Office for the Coordination of Humanitarian Affairs 'Humanitarian Bulletin South Sudan', (30 April 2018), 1 available at https://reliefweb.int/sites/reliefweb.int/files/resources/180430_OCHA_SouthSudan_Humanitarian_Bulletin1.pdf (accessed on 2 May 2018).

[945] See for example Human Rights Watch, 'South Sudan: Stop Delays on Hybrid Court' (2017) available at <https://www.hrw.org/news/2017/12/14/south-sudan-stop-delays-hybrid-court> accessed on 11 May 2018; Adama Dieng, 'Note to correspondents: Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on his meeting with leaders of the South Sudan Council of Churches' (2018) available at <https://www.un.org/sg/en/content/sg/note-correspondents/2018-04-26/note-correspondents-statement-adama-dieng-united-nations> accessed on 1 May 2018.

[946] Intergovernmental Authority on Development, 'Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS)', Addis Ababa, Ethiopia (12 September 2018).

[947] It must be noted that the definition of genocide contained in the initial Draft Statute for the Hybrid Court reproduces the Genocide Convention, with an additional provision which specifying that 'acts of rape or any other form of sexual violence' also constitutes an act of genocide. Draft Statute of the Hybrid Court for South Sudan, Article 2.

been taking place and a majority view that argues South Sudan is (was) on the verge of genocide. The arguments in support of both these views, however, have many questionable aspects that highlight the so far outlined conceptual weaknesses regarding the legal representation of the crime and assessment process of its occurrence.

6.1.2.1. An On-Going Genocide?

The former view drew much attention when uttered by the International Development Secretary of the UK, Priti Patel.[948] During her visit to South Sudan in early 2017, Patel shared her observations in a salient interview, in which she noted that a 'scorched earth policy' was underway; villages were being burned down; women were being raped; food was being used as a weapon of war; and people were cutting each other's throats – all as a result of tribal conflict – and 'so, on that basis', she concluded, 'it's genocide'.[949] In reaching this conclusion, she appeared to be reducing genocide to an ethnicity-based mass atrocity without paying much attention to the legal definition of the crime and did not comment on the issue of genocidal intent. It appears that the genealogical imagery of the crime was central to Patel's consideration rather that the analytical factors.

To give her her due, Patel did not intend to offer an exhaustive legal account in that interview. That said, her views are by no means exceptional[950] and cannot be

---

[948] R. Muhumuza, 'UK goes beyond UN to say South Sudan violence 'is now genocide'' *Independent* (13 April 2017) available at <https://www.independent.co.uk/news/world/africa/south-sudan-africa-genocide-uk-priti-patel-un-violence-a7681361.html> accessed on 9 May 2018; E. Biryabarema, 'UK says killings in South Sudan conflict amount to genocide' *Reuters* (12 April 2017) available at <https://www.reuters.com/article/us-southsudan-war/uk-says-killings-in-south-sudan-conflict-amount-to-genocide-idUSKBN17E2TF> accessed on 9 May 2018.

[949] Ibid.

[950] 'South Sudan; Where Oil is Thicker Than Blood' (Raddington Report, 2017) <https://raddingtonreport.com/south-sudan-rwanda/> accessed 9 May 2018; 'Why Didn't the U.S. or UN Stop the Genocide in Sudan?' *Haaretz* (18 October 2017) <https://www.haaretz.com/us-news/why-didn-t-the-u-s-or-un-stop-the-genocide-in-sudan-1.5458692> accessed 9 May 2018; David de Chand, 'A critique of the IGAD protocol for peace in S Sudan' *Sudan Tribute* (30 August 2014) <http://sudantribune.com/spip.php?iframe&page=imprimable&id_article=52212> accessed 9 May 2018; Michael Bachelard, Kate Geraghty, 'Starvation, exodus and genocide sees world's newest nation South Sudan suffer' *The Sydney Morning Herald* (5 July 2017) <https://www.smh.com.au/world/we-have-become-the-most-vulnerable-people-on-earth-starvation-exodus-and-genocide-in-worlds-newest-nation-20170627-gwzhn7.html> accessed 9 May 2018.

straightforwardly dismissed as a politician's reactionary comments. Indeed, some genocide scholars too tend to characterise the situation as an ongoing genocide or 'genocidal conflict'.[951] This kind of an analysis, however, suffers from certain problems. First, any conception that reduces genocide to 'a mass attack against individuals with the same identity' oversimplifies the phenomenon that the law aims to engage with. A mass atrocity on a tribal basis does not *de facto* indicate a crime of genocide, nor does it prove the existence of intent directed against an entity as such. Second, even if we accept that such a perception implies self-evidence of genocidal intent, it nevertheless leaves uncertain whom or what possesses the intent: President Kiir, generals in the field; foot soldiers? Or is it not necessary to attribute any intent to individuals but rather conceive of genocide as a form of collective relation?

Perhaps one of the most striking displays of how confusing the genocidal intent issue can become is the assessment made by Genocide Watch, which expectedly pays much attention to the situation. Genocide Watch aptly describes group destruction as a process and offers an oft-cited ten-stage framework.[952] This framework aims to cover the totality of the process of group destruction and it interprets the legal definition in the strictest terms by noting that the process legally turns into 'genocide' only in the ninth stage, namely, the stage of extermination.[953] Evidently, such a view is in line with the conceptual framework offered by the present study, which also distinguishes genocide from the broader notion of group destruction.

---

[951] See for example James Waller, 'Confronting Evil: Engaging Our Responsibility to Prevent Genocide', (Oxford; Oxford University Press 2016), 211-214, 267. Pinaud, 'Violence against civilians in South Sudan: From multi-ethnic cleansing to genocide'.

[952] These stages are: I. Classification; ii. Symbolization; iii. Discrimination; iv. Dehumanization; v. Organization ;vi. Polarization; vii. Preparation; viii. Persecution; ix. Extermination; x. Denial. See. G. Stanton, 'Ten Stages of Genocide', Genocide Watch available at <http://www.genocidewatch.com/ten-stages-of-genocide> accessed on 11 May 2018.

[953] 'Extermination begins, and quickly becomes the mass killing legally called "genocide". [...] Acts of genocide demonstrate how dehumanized the victims have become. Already dead bodies are dismembered; rape is used as a tool of war to genetically alter and eradicate the other group. Destruction of cultural and religious property is employed to annihilate the group's existence from history.' Ibid.

In August 2016, Genocide Watch issued a 'genocide emergency' for South Sudan and declared that the situation had reached stage nine,[954] which is still underway according to the organisation.[955] At this point, then, the logical expectation would be for Genocide Watch to encourage international organisations and the ICC to take the necessary steps to identify and prosecute those responsible for the genocide, as their assessment, according to their own ten-stage framework, simply indicates that the conflict constitutes genocide in a legal sense by reaching stage nine of group destruction process.

However, this has not been the case. In concluding their declaration, immediately after stating that the overall situation is at stage nine, it is opined that 'Salva Kiir and Riek Machar and their military commanders should be investigated for war crimes by the International Criminal Court' and the UN Mission in South Sudan 'should be given a mandate to arrest perpetrators of war crimes and crimes against humanity'.[956] Thus, any reference to responsibility for genocide is omitted. All this simply implies the following conclusion: 'there is an ongoing genocide in South Sudan, but no particular individual is responsible for it'. Obviously, this cannot be a conclusion that Genocide Watch wants to reach.

There appear to be two interrelated reasons for Genocide Watch's conflicting conclusion. First, although the report considers the entire conflict to be 'genocidal', it does not specify any normative disposition and practices directed against a particular group as such with temporal and spatial specificity. In this sense, the term genocide is ultimately being used in a generic sense, rather than referring to a particular process of destruction. In particular, overlooking the spatiality of genocide waters down the conclusion in the South Sudan context, where the conflict is scattered and has various facets. Seeing the entire conflict as genocide would indeed be an overstatement in light of evidence presented by various sources. Second, once the contextuality is downplayed

---

[954]'South Sudan: Genocide Emergency', Genocide Watch (2016),1,2 available at <http://docs.wixstatic.com/ugd/e5b74f_222ef50c81a34e02b07b195cc1fbb286.pdf> accessed on 18 May 2018.

[955] Ibid. See the following country page <http://www.genocidewatch.com/south-sudan> accessed on 18 May 2018.

[956] Ibid.

and genocidal intent is thought about in an unrealistically 'intentionalist' fashion, it becomes almost impossible to charge someone for genocide before the genocidal campaign succeeds to a certain extent in situations like South Sudan, given that while the genocidal intent of low and mid-level perpetrators is almost always established through a connection to the context level, the high-level perpetrators are usually not bold or 'unwise' enough to reveal their genocidal plans.

All these struggles to legally substantiate the claims of genocide indicate to the erroneousness of relying on a purely 'intentionalist' legal conceptualisation, which visibly does not reflect the social nature of the crime. This does not imply that the claims of genocide in relation to South Sudan are fitting and yet the existing legal framework fails in responding to this social reality. There is a more fundamental issue revealed here, which is that since the prevailing conceptualisation of genocide ties the determination of the crime entirely to the individual *mens rea* and downplays the fact that the crime is ultimately a collective act – which necessarily either precedes or symbiotically emerges from individual intent and determines not only the nature of that individual intent but also the extent and existence of the crime – the prevailing conceptualisation fails to generate proper and effective questions to consider genocide.

This puts judges, scholars and other legal bodies into a constant dilemma. As is mentioned in concluding the previous chapter, the UN fact-finding mission's consideration regarding the Myanmar situation is the most recent example of this. The report tries to adhere to the dominant 'intentionalist' conception of the crime by constantly reiterating that the crime of genocide can only be established in relation to particular individuals and their intentionality, but then uses all the collective factors and acts of destruction as elements to infer the *mens rea* of unspecified individuals and through this line of logic concludes that genocide is likely to be occurring in Myanmar.

To be more precise, the report in fact identifies six particular individuals, including the Tatmadaw Commander in Chief, as the 'most responsible' for atrocities against Rohingya and asks for sanctions against them.[957] However, the overall assessment regarding the occurrence of genocide does not specifically focus on the *mens rea* of any

[957] UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', para. 1384.

of these individuals, but rather exclusively on collective patterns. One may point out the limits of the mandate of the fact-finding mission as the source of this conceptual anomaly, yet this would only highlight the thesis' point further, since it would be asking experts to comment on the occurrence of a crime which presumably entirely depends on the individual *mens rea* without examining any perpetrators' intentionality.[958]

The conceptual contradiction in the assessment method is thus obvious and dissipating this very contradiction is one of the aims of the four-step test that the second part will introduce. The UN fact-finding reports on Myanmar also give an opportunity to draw some comparisons with the similar UN reports regarding South Sudan, where, despite the similar acts occurring on a discriminatory basis and in fact in larger scales, the genocidal intent was not inferred. Instead, as the next sub-section will elaborate on, it is noted that there exists a 'danger of genocide'.

6.1.2.2. An Impending Genocide?

The argument that the conflict bears the danger of evolving into genocide, but it is not there yet was a common one among the UN officers. For example, Secretary-General Ban Ki-Moon stated in late 2016 that '[t[he risk of these mass atrocities, which include recurring episodes of ethnic cleansing, escalating into possible genocide is all too real'.[959] The UN special advisor on the Prevention of Genocide, Adama Dieng, similarly pointed out that '[t]he signs are all there for the spread of this ethnic hatred and targeting of civilians that could evolve into genocide, if something is not done now to

---

[958] 1418. On the basis of information before it, and mindful of the limits of its mandate, the Mission has not concluded that particular individuals committed the identified prohibited acts with the requisite special intent, giving rise to individual criminal responsibility for genocide. Instead, the Mission assessed the body of available information in light of the jurisprudence of international tribunals, and considered whether the factors that have allowed for the reasonable inference of genocidal intent in other contexts and cases, are present in the case of the Rohingya in Rakhine State. This exercise has been undertaken to assist in any subsequent determination of genocidal intent on the part of particular perpetrators, properly identified, before a court of law.

[959] Ban Ki-moon, 'The world has betrayed South-Sudan' (2016) United Nations Secretary General available at <https://www.un.org/sg/en/content/sg/articles/2016-12-16/ban-ki-moon-world-has-betrayed-south-sudan> accessed on 11 May 2018.

stop it'.[960] Yasmin Sooka, the chairperson of the UN Commission on Human Rights in South Sudan, also shared this view, noting that 'the stage is being set for a repeat of what happened in Rwanda and the international community is under an obligation to prevent it'.[961] Similar comments are also attached to the Commission on Human Rights report in March 2017.[962]

---

[960] Adama Dieng, 'Note to Correspondents: Media Briefing by Mr. Adama Dieng, United Nations Special Adviser on the Prevention of Genocide on his visit to South Sudan' (2016) United Nations Secretary General available at <https://www.un.org/sg/en/content/sg/note-correspondents/2016-11-11/note-correspondents-media-briefing-mr-adama-dieng-united> accessed on 11 May 2018.

[961] Yasmin Sooka, 'Statement by Yasmin Sooka, Chair of the Commission on Human Rights in South Sudan at the 26th Special Session of the UN Human Rights Council', (*UN Human Rights Office of the High Commissioner,* 14 December 2016) available ay <https://unmiss.unmissions.org/un-human-rights-experts-says-international-community-has-obligation-prevent-ethnic-cleansing-south> accessed on 11 May 2018.

[962] 'Warning signs and enablers for genocide and ethnic cleansing include the cover of an on-going conflict to act as a "smoke screen", several low-level and isolated acts of violence to start the process, the dehumanization of others through hate speech, economic volatility and instability, deliberate starvation, the bombardment of and attacks against civilians, forced displacement and the burning of villages.' Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-fourth session, A/HRC/34/63, 2017), 17 para.82. The discourse of genocide was slightly reduced during the late 2017, mostly because of the relative decline in the atrocities and eventually unfulfilled agreement for the cessation of hostilities. So much so that, the new Secretary-General, Antonio Guterres made a highly premature comment by noting that the possibility of genocide is significantly reduced in South Sudan. 'South Sudan genocide risk 'considerably diminished:' UN head'' Fox News World (08 March 2017) available at <http://www.foxnews.com/world/2017/03/08/south-sudan-genocide-risk-considerably-diminished-un-head.html> accessed on 01 May 2018. Yet the violence has re-escalated in the following months. 'Ceasefire in South Sudan 'a Distant Prospect', Peacekeeping Chief Tells Security Council, Citing Disagreements among Warring Parties', United Nations (8 May 2018) available at <https://www.un.org/press/en/2018/sc13327.doc.htm> accessed on 30 May 2018; The UN Security Council Resolution 2406 (15 March 2018) available at <https://www.un.org/press/en/2018/sc13327.doc.htm> accessed on 30 May 2018. See also. M. Pinna, 'South Sudan: Fresh fighting flares, five years into civil war' *Euronews* (09 May 2018) available at <http://www.euronews.com/2018/05/09/south-sudan-fresh-fighting-flares-five-years-into-civil-war> accessed on 30 May 2018. Also, the number of different armed groups that involved to the conflict now more than dozen. The last of these groups has been established by the former army general, Thomas Cirillo, who resigned as deputy chief of logistics for the South Sudanese military in February and claiming that he established a new rebel group consists of 30.000 men, which is closely associated with the Equatorian groups, particularly Bari. See N. Manek, 'New Rebel Group Threatens to Intensify South Sudan's War' *Bloomberg* (8 May 2017) available at <https://www.bloomberg.com/news/articles/2017-05-08/new-rebel-group-threatens-to-intensify-south-sudan-s-civil-war> accessed on 21 May 2018.

Most prominently, the extensive report of the UN Human Rights Commission in 2018 stated that the collected evidence offers reasonable suspicion to hold more than 40 South Sudanese officials responsible for war crimes and crimes against humanity.[963] However, the report did not dwell on the question of genocide, which is a point will be returned to in a moment. In the face of the UN sanctions imposed following the circulation of the report,[964] the South Sudan government alleged that the idea of an embargo has been built on biased reports and stated that the ongoing allegations 'of genocide only instilled fear and the use of moral equivalence had only emboldened other armed groups'.'[965]

In overall, UN officers and bodies did not go any further than expressing their fear that genocide might 'start' if preventative steps were not taken, even though mass killings, deportations and a scorched earth policy are already underway on a very large scale. Such assessments, however, beg the question of what prevented the process from 'turning' into genocide. The possible answer would obviously be the lack of 'genocidal intent'. However, this creates a contradiction with the understanding presented in the Myanmar report. If the reason for such a conclusion is that there is no conclusive or direct evidence regarding the individual genocidal intent, then, that would lead to the application of different standards for the two situations since such evidence also lacks in Myanmar. The other reasons may be that there are not enough factors for the 'inference' of genocidal intent.

In the Myanmar report, the UN fact-finding mission, by relying on the case law of the ICTR and ICTY, singled out five possible factors 'relevant to genocidal intent'[966]: 1-

---

[963] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session, A/HRC/37/71, 2018).

[964] Upon the Commission report, the UN Security Council and the African Union decided to impose sanctions, including arms embargo. The UN Security Council Resolution 2406 (15 March 2018) available at <https://www.un.org/press/en/2018/sc13249.doc.htm> accessed on 30 May 2018; African Union joins growing chorus demanding sanctions on South Sudan war' *Reuters* (29 January 2018) available at <https://www.reuters.com/article/us-african-union-summit-southsudan/african-union-joins-growing-chorus-demanding-sanctions-on-south-sudan-war-idUSKBN1FI2IO> accessed on 30 May 2018.

[965] The UN Security Council Resolution 2406 (15 March 2018).

[966] UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', paras. 1419-1435.

the broader context within which the acts occurred and the widely prevalent rhetoric of hatred and contempt;[967] 2- the specific utterances of high-level authorities as well as of direct perpetrators prior, during and after the violence;[968] 3- the existence of discriminatory plans and policies that seek to change the demographic and ethnic composition;[969] 4- a systematic plan of destruction;[970] 5- the brutality of acts and campaign.[971] By establishing the existence of these factors, the experts concluded that 'the factors allowing the inference of genocidal intent are present'.[972] Yet, as will be expanded, these factors are all present in the South Sudan situation as well, at least in relation to certain areas, and yet the UN experts stayed strictly away from going into a discussion regarding an 'inference of genocidal intent'. It appears, then, that there must be something more that turns an attack into a crime of genocide, which needs to be clarified. Otherwise, the situation would resemble Christine Shelly's exchange with the Reuters reporter on the Rwandan Genocide, which is quoted at the beginning of the thesis.

Otherwise, the situation would resemble Christine Shelly's exchange with the Reuters reporter on the Rwandan Genocide, which is quoted at the beginning of the thesis. Of course, UN officers have been much more careful about their statements and unlike

---

[967] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, paras. 93, 527; *Prosecutor v. Popovic et al*, IT-05-88-T, Judgment and Sentence, 10 June 2010, para. 1177; *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgment, 28 April 2005, para. 496.

[968] *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgment, 13 December 2004, paras. 360-364. *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgment, 13 December 2004, paras. 360-364; *Prosecutor v. Popovic et al*., IT-05-88-T, Judgment, 10 June 2010, para. 1177.

[969] *Prosecutor v Karadzic*, IT-95-5/IT-18-1-R-61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94.

[970] *Prosecutor v Jelisic*, IT-95-10-A, Judgment, 5 July 2001, para. 47; *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 523; *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, paras. 93, 289, 534-535, 537; *Prosecutor v Muhimana*, ICTR-95-1B-T, Judgment, 28 April 2005, para. 496.

[971] *Prosecutor v Jelisic*, IT-95-10-A, Judgment, 5 July 2001, para. 47. *Prosecutor v Ndindabahizi*, ICTR-2001-71-T, Judgment, 15 July 2004, para. 461.; *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 121.; *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgment, 28 April 2005, para. 496

[972] UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', para. 1441.

Shelly have never used the term 'acts of genocide'. But the overall (il)logic stays the same. The general tendency is to list all the mass atrocities,[973] most of which fall into the ambit of the Genocide Convention, and then state the country is on the brink of genocide. Although the legal and social consequences of calling the situation 'genocide' may have a deterring effect for UN officers and bodies, as some allege,[974] it seems that the difficulty surrounding the idea of 'genocidal intent' is the real explanation for the lack of clarity in the assessments produced. Indeed, as one commentator aptly observes, '[o]ne can only debate the "intent" of the actors; potentially the only factor that stands in the way of calling what has been happening in South Sudan "genocide"'.[975]

In this context, it appears that the UN position, as might be expected, abides by the conception of 'genocidal intent' in the ICTY and ICTR jurisprudence by both advancing the restrictive reading of the term 'intent to destroy' and downplaying the processual and contextual nature of individual genocidal intent. Because of this perception, they, most prominently the Human Rights Commission, cannot advance a progressive discussion on the question of genocide since, on the one hand, it is nearly impossible to obtain any direct evidence of genocidal intent in this particular context, and, on the other hand, there exists no large enough pattern of destruction, at least from the UN Human Rights Commission's perspective, that supports decisively inferring the individual genocidal intent, but rather localised atrocities that resemble the Srebrenica Genocide.

Furthermore, even if we imagine that UN bodies have somehow been able to locate individual genocidal intent, it is unclear if there would be any quantitative limit in relation to the number of individuals holding the intent. That is, if a South Sudan army

---

[973] 'There is already a steady process of ethnic cleansing underway in several areas of South Sudan using starvation, gang rape and the burning of villages. Many told us it's already reached a point of no return.' Yasmin Sooka, 'Statement by Yasmin Sooka, Chair of the Commission on Human Rights in South Sudan at the 26th Special Session of the UN Human Rights Council'.

[974] H. Amin, ' South Sudan Genocide 2017 & Memories of Ombachi Church Massacre' (*UAH* 09 March 2017) available at <http://ugandansatheart.blogspot.co.uk/2017/03/uah-oped-south-sudan-genocide-2017.html> accessed on 21 May 2018.

[975] M. Brand, 'South Sudan: Will Calling it Genocide Make a Difference?' (*Jewish World Watch* 09 December 2016) available at <https://www.jww.org/blog/south-sudan-will-calling-genocide-make-difference/> accessed on 21 May 2018.

officer expresses his/her genocidal intent in relation to a campaign that has already taken place, would it make that entire episode ‘genocide’ or would it only make the individual in question a ‘genocidaire’, without making any assessment of the nature of that particular campaign. Either conclusion appears to be counterintuitive and to run against the social reality. As much as an individual’s intent cannot suddenly turn a campaign into the ‘deliberate destruction of a collective’, holding a single individual accountable for a crime that can be committed by a collective would simply be unjust.

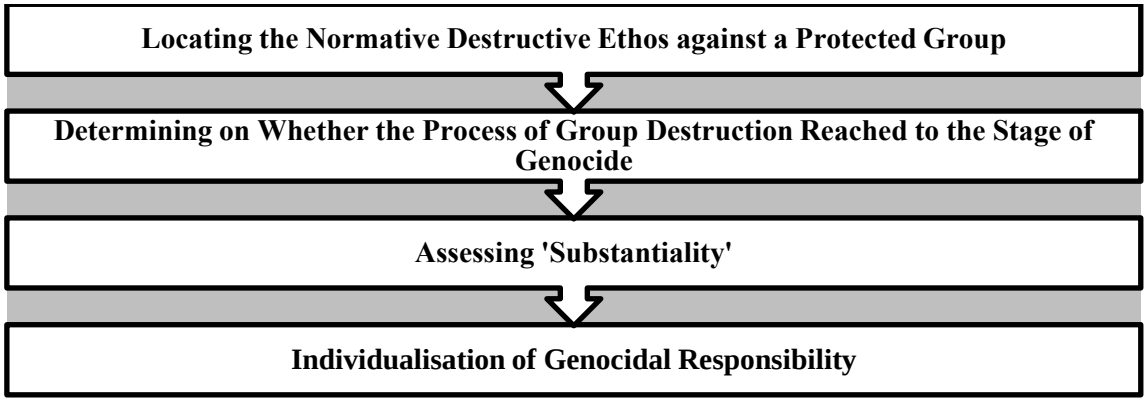
All in all, it becomes apparent that the question of genocide cannot be duly assessed by centralising individual intent. The analysis regarding the two distinct positions also highlights the lack of clarity and efficiency of the process of assessment, in the sense that it is not clear which questions, how and in what order should be asked. It is obvious and legally required that the protected group’s status, and the accused’s *actus reus* and *mens rea,* need to be established in order to attribute criminal responsibility. However, as is argued throughout the study, while the former is ultimately a sociological phenomenon, the latter two necessarily emerge and become sensible in a particular enabling ‘genocidal context’. This collective context and its symbiotic relationship with individuals’ acts and intentionality are central to the crime and must be recognised for a more effective and coherent assessment process.

To this end, the following paragraphs will first conceptualise and elaborate a four-step test, which effectively restructures the assessment process by reducing the heavy emphasis on the subjective side in considering the occurrence of the crime. Through restructuring the examination in a ‘from context to individual’ manner, a conceptually more coherent and effective assessment process may be ensured. Following that, the chapter will apply this four-step test, and connectedly its framework of analysis regarding ‘substantiality’, to the South Sudan situation by drawing certain comparisons mainly with the Rwanda and Myanmar situations. To restate, however, the purpose of this demonstration will not be claiming the superiority of the proposed understanding in definitively establishing genocide or ‘substantiality’ (since coming up with such formula is ontologically not possible), rather the intended achievement is producing a clear and conceptually coherent roadmap to how to think about the crime and ‘substantiality’ and demonstrate how it may work.

6.2. A Four-Step Examination for Establishing Genocide and Responsibility

The arguments presented throughout the study ultimately highlighted the processuality of the crime and argued for its centrality in the legal examination. Within this context, the thesis suggests that – barring the exception of *lone genocidaire* – the legal assessment should follow the social patterns of the phenomenon and thus move from the broader group destruction process to genocidal destruction and, finally, to individual responsibility. To restate, the reason why the examination of elements in relation to individual perpetrator should come later is that their destructive intentions and acts against a group become 'functional' and should bear legal consequences depending on their relatedness to the broader collective process.

The so far outlined findings and discussions have produced all the necessary conceptual elements that can underpin such an understanding and the purpose of this section is simply to systematise these findings as a four-step test, which can be schematise as follows:



The following sections will respectively elaborate on these steps and generate questions that can guide the assessment of these points. Two things must finally be noted before moving on to a detailed examination. One is that almost none of the substance matters of these 'steps' are entirely alien to the case law of international courts and tribunals – as will be established through the references. However, they are usually introduced into the assessment process through back doors like 'substantiality' or inferences of genocidal intent, and without ensuring the conceptual coherence of the reasoning which created the so far explained conceptual cacophony and lack of clarity of the assessment process. The following framework aims to draw a roadmap that avoids such pitfalls.

Second, and to re-emphasise, the contingency inherent to the crime rules out offering a definitive list of reference points or reducing the content of each step to a set of 'yes/no' questions, which means this is ultimately a framework that can only be concretised to a certain extent. The eventual consideration and conclusions will thus always depend on judges' reactions and conceptions regarding the particulars of the case to hand.

6.2.1. Locating a Normative Destructive Ethos against a Protected Group

The identification of a normative destructive ethos against a protected unity constitutes the necessary starting point for the assessment. As is explored in chapter five, the individual genocidal intent is a 'we-mode of intentionality' and thus requires enabling contextual attitudes and aspirations that allow the perpetrators to cultivate the consciousness that 'we' shall achieve the group destruction, which cannot be realistically achieved by any individual perpetrator on her own. A normative destructive ethos denotes this common understanding (but not necessarily a shared goal) that underpins these destructive acts and which is defined by the thesis as relationally developed normative dispositions, interactions and practices by a set of people directed towards the destruction of a protected group or its part, as such, in a particular timeframe and space. Thus, it denotes an overall destructive process that relationally emerges, which has an ontologically distinct status as it extends beyond the sum of individual impacts and may exist independently of individuals' intentions and perceptions regarding it.

The process of destruction, however, may or may not ultimately qualify as genocide depending on the accompanying acts. That being said, the determination of a destructive ethos is an essential starting point, not only because it enables the 'individual genocidal intent', but also determines the extent and nature of it since 'intent to destroy' relates to the collective process itself.[976] This step of the assessment effectively requires two connected analyses.

Determining to the Protected Status of a Victim Group

One of these is consideration of the protected status of the group that has been the target of a destructive ethos. As is rather well known, the determination of protected group

[976] See chapter four for a detailed justification of this argument.

status has always been one of the points of contention in genocide law. Chapter Four suggested an alternative understanding by revealing the contingent nature of these groupings and, connectedly, arguing against entirely objectifying or subjectifying their assessment. In light of the arguments presented in Chapter Four, this analysis entails engaging with two questions.

First, it must determined what 'form' of collective relatedness the concepts of nationality, ethnicity, race and religion are likely to be encapsulating at that point of history. As is established, the 'form' of these concepts is necessarily contingent on the 'content' of relations defined as such. From this viewpoint, it is suggested that the current 'form' of this relatedness may be abstracted as follows:

- *Race* is any phenotypical trait to which significance and meaning are collectively ascribed in a particular socio-historical setting or interaction.
- *Ethnicity* is any cultural or linguistic feature, tradition or practice to which significance and meaning are collectively ascribed in a particular socio-historical setting or interaction.
- *Religion* is any creed, beliefs, doctrines, practices or rituals to which significance and meaning are collectively ascribed in a particular socio-historical setting or interaction.
- *Nation* is any political community inhabiting a particular territory that has become conscious of its autonomy, unity and particular interests.

Following abstracting the 'form' of these four types, judges should move on to the next and second question, which entails assessing whether the victim group developed one of these 'forms' of relatedness vis-à-vis others on the socio-historical continuum through the externalisation of their process of unity and corresponding in-group and out-group perceptions. As chapter four established, the listed 'types' of relationships, practices, traits or means do not automatically lead to the emergence of a distinct 'social whole' on one of the listed terms unless individuals persistently individualise a particular process of unity through both in-group and out-group perceptions. Thus, a socio-historical examination of the relatedness between the victim and perpetrator groups and the overall perception of this relationship should be examined in order to decide whether it constitutes one of the listed 'types' of relatedness.

Admittedly, this examination cannot be easily reduced to particular questions. However, the thinking process may be summarised as follows. To begin with, the origins of the differentiation process, i.e. the reasons (factual or imaginary) initially underlying distinct in-group and out-group perceptions, should be located. For example, in Rwanda, different origin stories and life practices were these reasons, which was indicative of an ethnic type of relatedness. Subsequently, the evaluation of the process must be paid attention to. Here there appear to be three possibilities. First, the reasons may reproduce themselves. Second, they, and connectedly the 'form' and corresponding perceptions, may transform or merge over time (i.e. a religious differentiation may transform into a racial or a racial-religious one). Third, the initial reasons may actually largely or entirely disappear, yet due to certain sociopolitical reasons the parties continue to ascribe meaning and significance to these archaic features in the same terms. This was the case in Rwanda, where political and socio-economic divergences fuelled continuation of the differentiation, and yet, despite the cultural or linguistic features, tradition and practices of the groups having become fairly similar, in-group and out-group perceptions continued to rely on outworn ethnic features.[977]

Through such a socio-historical analysis that focuses on the process itself, it becomes possible to provide a more complete examination regarding whether the victim group qualifies as one of those listed. All in all, by rethinking the matter in this way, the legal assessment can avoid from an essentialist approach that pervasively searches for an ever-present element, which proved to be deficient in *Akayesu*,[978] as well as from completely undermining the social reality of the definitional listing by entirely relying on subjective perceptions, as it was suggested by the Darfur Commission.[979]

Establishing the Presence of a Destructive Normative Ethos

The other analysis should concern the determination of whether a normative destructive ethos exists, which also entails focusing on two interrelated questions: 1- Has the

[977] See p.210.

[978] *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, paras 512-515.

[979] 'The Commission of Inquiry to investigate reports of international humanitarian law and human rights law in Darfur, Sudan', Report of the International Commission of Inquiry on Darfur to the Secretary-General. Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, Annex to U.N. Doc. S/2005/60, 1 February 2005 (hereafter: Darfur Report), Para.499.

perpetrator group mechanically or organically developed normative destructive dispositions, interactions and practices in relation to the victim group against the existence of the targeted group or part of it as such? 2- Have these relations evolved or evolving into one-sided dominance in a particular timeframe and space? The assessment of both questions requires a holistic examination of the situation and evidence, and this cannot be reduced to a definitive listing, since each destructive relation has different aspects depending on the unique nature of the victim group and its relatedness.

That being said, in relation to the first question, the most common factors that may inform the assessment can be singled out and in fact they are constantly being uttered in the ICTR and ICTY case law, albeit under the guise of 'factors that can individual genocidal intent be inferred from'. In *Akayesu*, which was the first-ever genocide prosecution in an international tribunal, the ICTR Trial Chamber established that

> it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.[980]

To date, all successful genocide prosecutions before the ICTY and ICTR have not only relied on this argumentation, but also detailed it. To broadly classify, the case law specifies that the following elements may be factors in inferring 'intent to destroy': (i) patterns of targeting group members, artefacts and property; (ii) the use of derogatory language and hate speech against the victim group; (iii) a plan or policy that indicates a goal of changing the demographic and ethnic composition of an area; (iv) the scale of the atrocities and the means and weapons employed in undertaking attacks. Accordingly, if the 'intent to destroy a protected group' is the only reasonable inference

[980] Prosecutor v. Akayesu, [1998] Case No. ICTR 96-4-T, Judgement, 523.

in light of these and any other relevant contextual factors, judges can establish the specific *mens rea* of the accused, even in the absence of direct evidence.

What must be highlighted here is that the ICTY and ICTR have both recognised that overall destructive action and disposition against the targeted group as such, not only acts of genocide, inform the analysis regarding individual intentionality.[981] Such an understanding is in conformity with the arguments presented in the study regarding the processuality of group destruction. The study also agrees with the observation of the ICTY Appeals Chamber in *Stakic*, where it is noted that an inquiry into genocidal intent should not be compartmentalized through consideration of each piece of evidence piece-meal and in isolation. Rather an inference of genocidal intent must be based on all the contextual evidence taken together. [982]

However, as opposed to the understanding in case law, the thesis argues that a normative destructive ethos, which includes the totality of dispositions, interactions and practices directed against the destruction of the targeted group as such, constitutes not merely 'contextual evidence' to infer individual intent, but rather an inherent aspect of the crime as such. This is because, it not only enables individual genocidal intent, but also determines its nature and extent. In other words, the 'intent to destroy' for an individual can only exist in relation to a normative destructive ethos, which means that establishing a destructive ethos is a precondition to be able to proceed to an examination of individual intent and thus establish the occurrence of genocide.

In fact, the case law occasionally flirted with this idea. For example, the ICTY Appeals Chamber in Krstić noted that '[t]he inference that a particular atrocity was motivated by genocidal intent may be drawn [...] even where the individuals to whom the intent is attributable are not precisely identified.'[983] Such an argument clearly makes much more sense in the framework proposed, if what the Chamber has referred to as 'unattributed genocidal intent' is rethought as a 'normative destructive ethos'. Indeed, the Appeals Chamber's final judgment in *Krstić* creates a bizarre situation when constructed through the prevailing intentionalist conceptualization since it then simply says that some

[981] See *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para 576

[982] ICTY, *Prosecutor v. Stakic*, [2006] IT-97-24-A, Judgment, para. 55.

[983] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgment, para 34.

unidentified party had genocidal intent, which qualifies the situation as genocide, and yet such intent was lacking in relation to *Krstić*, who was only responsible as an accomplice who knowingly aided and abetted these unspecified others' commission of genocide.[984]

The proposed framework creates a more coherent understanding by suggesting that the *Krstić*'s responsibility should be determined according to its mode of relatedness with the normative destructive ethos, not with some unspecified individuals who presumably, but not definitively, hold 'genocidal intent'. In the final analysis, then, the thesis suggests that judges should examine all the dispositions, interactions and practices of the perpetrator group in their relation with the victim group and assess whether these were normatively directed against the destruction of the victim group. By emphasising the normativity, the thesis aimed to exclude the unlikely situations where the unrelated individual destructive practices somehow concur against a protected group. As is explained in chapter five, the normativity refers to a form of common understanding and coherence underpin these conducts, which can emerge organically through a linear relatedness in the perpetrator group and/or mechanically through vertical relatedness in an organisational structure.

In relation to the second question, deliberate group destruction should not be conflated with the 'unequal power relations', where due to social reasons and advancements one group in effect destroys the other, mostly through natural assimilation or absorption. Instead, the concept of group destruction historically aims to denote an unnatural paradigm shift for the relatedness of the victim and perpetrator groups, which led to the process where the perpetrator group to develop and impose the aforementioned destructive practices. This does not mean that in each case there will be a particular event that marks the shift. Such a shift may be relatively subtler and gradually take place.

As is also rather obvious, the 'imposition' of such destructive practices in an effective manner requires a temporally and spatially limited one-sided dominance, because otherwise (i.e. where the targeted group can effectively protect itself) the relationship turns into a conflict, rather than genocidal destruction. The temporality and spatiality of

[984] Ibid. paras. 137-139

the dominance are primarily determined by material, contextual and organisational reasons and possibilities for the perpetrator group. It should be clarified, however, that the 'dominance' may occur in the course of a conflict, where the one side temporally and/or spatially establish such domination over the victim group or more likely a part of it, as it was best exemplified during the conflict in Yugoslavia.

The thesis thus suggests that, through examining the historical and factual evidences, judges should establish that the perpetrator group has developed 'dominance' over the victim group in a particular timeframe and area, which allowed the unfolding of the normative destructive ethos. This is an essential first step in establishing the general existence of genocide, considering the responsibility of individual perpetrators in general, and determining the targeted part in assessing substantiality in particular. That said, it is not the final step as a normative destructive ethos, and connectedly an 'intent to destroy', is not exclusive to genocide.

6.2.2. Determining on Whether the Process of Group Destruction Reached to the Stage of Genocide

Locating the normative destructive ethos against a protected group indicates the presence of the necessary embeddings for an individual to form the 'intent to destroy' and it is likely that those who acted in the destruction of the group held such intent. However, the arguments so far have made it evident that the formation of the 'intent to destroy' can occur without a crime of genocide being committed. Forced assimilation or ethnic cleansing, for example, can also be underpinned by the 'intent to destroy' a protected group. It should be noted here that the thesis necessarily diverges on this point from the dominant view of the international courts and tribunals, which have drawn a distinction between the intentionality underlying these crimes and genocide.[985]

In *Bosnian Genocide*, for example, after defining ethnic cleansing as 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area', the ICJ noted that

[985] M. Sirkin,'Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations', (33 Seattle University Law Rev. (2010)), 509. (emphasis in original).

> the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.[986]

This conception stems from the idea that intended 'physical or biological' destruction of a group differs from the intended 'social' destruction of it.[987] However, chapter four extensively demonstrated that this view is untenable in light of the ontological nature of the protected groups and ultimately conflates the acts of destruction with the overarching intent. 'Intent to destroy' refers to a singular state in future where the collective entity does not exist and that state can be achieved through different means, nature of which changes the nature of the criminal action.

As is demonstrated in chapter five, this inaccuracy in conceptualising the groups and their destruction put the ICTY in a difficult position in *Tolimir*, where the Trial and Appeals Chambers reached to different conclusions as to whether destruction of three community leaders in conjunction with the forced deportations indicate to the occurrence of genocide. Similarly, the ICJ also fell into a conceptual contradiction in *Bosnian Genocide* by noting, in the very same paragraph it draws the distinction between the *mens rea* of two crimes, that ethnic cleansing 'can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II',[988]. However, this observation only makes sense if the intent underlies the both crime is the same.

---

[986] *Bosnian Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, paras.190.

[987] As the ICTY has observed, while 'there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'' (Krstic´, [2001] IT-98-33-T, Judgment, para. 562), yet '[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.' (Stakic´, [2003] IT-97-24-T, Judgment, para. 519.) *Bosnian Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, paras.190.

[988] *Bosnian Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgement, paras.190.

From the perspective advanced throughout the study, it is founded that what makes genocide a distinct crime is not merely the specific *mens rea* element, but that this specific *mens rea* meets with a particular set of acts and thus the group destruction process reaches the most severe stage. The question is, however, when does a process reach to this stage. It would be counter-intuitive and contradict the socio-historical roots of the crime to argue that commission of a single listed act turns a process to the crime of genocide, unless the single act itself is able to cause the destruction on its own. Instead, it is argued that, by welcoming the formulation of the ICC Elements of Crimes in this direction, a normative destructive ethos against a protected group reaches to the stage of genocide when there is an existing or emerging pattern of similar conducts (i.e. acts of genocide) directed against the group.

As a result, the second step of the assessment is to consider whether patterns of acts of genocide are taking place or if there exist clear indicators that there are such emerging patterns in the context of a destructive ethos. Admittedly, proving that there is an emerging pattern constitutes a challenge and may only be possible if an organisation has begun to carry out an explicit destructive plan. On the other hand, several factors should be considered in assessing whether there is an established pattern, inter alia, frequency and density of acts of genocide, absolute and relative (in comparison with other acts of destruction, e.g. deportation) scale of acts, the systematic and/or planned nature of acts, the selectivity of acts (e.g. targeting people whose killing will enhance the effectiveness of the overall process). If, as a result of their holistic assessment, judges arrive at the conclusion that patterns of acts of genocide have emerged or are emerging, it then becomes possible to establish the general existence of genocide – provided that the part targeted by the process was substantial.

6.2.3. Assessing 'Substantiality'

In this respect, the assessment of 'substantiality' constitutes the third step. In order to avoid over-repeating the arguments throughout the study, only a brief summary will be included here. First and foremost, it needs to be restated that since the 'intent to destroy' related to a normative destructive ethos on the explained grounds and 'substantiality' is a part of the subjective side of the crime, the spatial and temporal extent of the destructive ethos determines the subject of the assessment of substantiality.

Once the targeted unity has been thus ascertained, it can be examined whether it qualifies a 'whole' or a 'substantial part' according to the understanding revealed in chapter four. This requires a twofold examination. First of all, it should be assessed whether the population in question constitutes a distinct 'whole'. If the targeted population has no overarching 'kinship', the conclusion will be straightforwardly positive (e.g. targeting the Muzo tribe as such). On the other hand, if there is an overarching kinship (e.g. Tutsi ethnic group in relation to Rwanda Tutsis), it needs to be considered whether the targeted unity, socially, politically, historically and/or spatially, has developed an additional and distinct solidarity and identity emerging on a national, ethnic, religious or racial basis (or any combination of these).

Making this assessment requires multi-faceted scrutiny that involves the victim group's relatedness to its kinships and the third parties on the historical continuum and reciprocal in- and out-group perceptions that are developed in respect of the character and substance of this relatedness. Therefore, judges must aim to locate distinct pattern of relations, interactions and social norms, as well as reciprocal perceptions that indicate the population in question developed a distinct identity on one of four dimensions listed in the definition, which ultimately led the perpetrator group to target it because of that distinct identity, as opposed to being a section of a broader identity. The most obvious example to this is Rwandan Tutsis, who constituted a whole on the basis that they developed a distinct national/ethnic identity that separates them from their overarching kinships as such (namely Rwandan nationality and Tutsi ethnicity).

If, however, there is no indication of such distinctiveness on the historical continuum, as it was the case in terms of Srebrenica Muslims or Vukovar Croats, then it should be moved on to considering whether the targeted 'part' was substantial. To be able to make this examination, before all, the 'whole' that the 'part' relates to must be determined on the grounds explained in the previous paragraphs and chapter four. Following that, the thesis suggested that the assessment of 'substantiality' is ultimately a balancing process between genealogical and analytical imperatives. To putting in simply, the former relates to the magnitude in absolute number of individuals that constitutes the 'part' and stems from the historical imagery and stigma attached to the criminal phenomenon as a collective moral reaction to the proto-typical events, while the latter refers to all the possible reasons that stem from the protective purpose of preserving manifold richness

of humanity through safeguarding 'unique interpretative schemas' that is provided by these listed types of collective entities.

While providing a definitive listing of analytical factors is not a possible practice due to the contingency inherent to the protected groups, the thesis broadly identified three major elements that may inform the balancing process, namely (i) the particular characteristics of the whole or the targeted part (e.g. holding a distinct sub-group identity that does not emerge on one of four listed types of identities or a 'whole' already consisting of relatively few members); (ii) spatial circumstances (e.g. geographical distinctiveness. To restate, however, this factor can rarely stand alone); and (iii) sociopolitical embeddings and context (e.g. gaining a temporal significance in a particular social and political context, as it was case for the Bosnian Muslims of Srebrenica).

It is ultimately concluded that judges should strive to find a balance between these two imperatives, which means the stronger that analytical factors get, the smaller the 'part' in an absolute sense that may be considered 'substantial', while in the absence of forceful analytical factors, a more stringent standard should be applied in respect of numerical considerations in absolute terms. When considering the moral convincingness of analytical factors, an assessor needs to consider the likeliness and severity of the threefold harms of genocide if the intended destruction of the targeted 'part' was achieved.

All in all, then, the proposed framework allows establishing the general existence of genocide prior to assessing individual liability, which is an approach that stems from and reflects the very nature of genocide. Indeed, despite the prevailing 'intentionalist' conceptualisations of the crime in theory, both the ICTR and ICTY frequently recourse to such a practice in actuality.[989] Most prominently, the ICTR Trial Chamber in *Kayishema and Ruzindana* explicitly denoted that 'finding the question of "whether genocide took place in Rwanda in 1994 . . . so fundamental to the case against the accused that the Trial Chamber feels obliged to make a finding of fact on this issue"

[989] *Prosecutor v. Karadžic* ́[2012] Transcript, 28751–28752; *Prosecutor v. Tolimir* [2012] IT-05-88/2-T, para 769; *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgment, para.523. *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 592.

prior to addressing issues of individual liability'.[990] The presented systematisation of the thesis' findings in the form of a four-step test provides a more coherent and sound conceptual footing for such a practice and offers a particular way of thinking about the crime that better reflects the ontological and criminological realities of genocide. Accordingly, if judges find the existence of a destructive normative ethos; establish that acts of genocide were becoming and became a major means of destruction in this normative ethos; and, finally, are convinced that the target unity constitutes a 'whole' or a 'substantial part' on the explained grounds, it can be concluded that a crime of genocide has occurred. Individual responsibility should be assessed according to the nature of the perpetrators' relatedness to this collective ethos and action.

6.2.4. Individualisation of Genocidal Responsibility

The final stage should be the 'individualisation of genocidal intent' via an examination of whether the accused deliberately committed herself to the perpetrator group's destructive ethos and to relevant we-reasoning and we-acting in acting towards group destruction. As the study has already pointed out, this final step largely falls outside the limits of our discussion and must be explored in more detail in a future work – particularly its relation with 'modes of perpetration' should be elaborated. At this stage, however, it should be sufficient to reiterate that the level and nature of relatedness of the individual in question to the destructive ethos must determine her level of responsibility.[991]

In this context, (1) if one acts without awareness of the normative destructive ethos and sharing the goal of destroying the victim group, but instead contributes to the collective action in some irrelevant manner, she should not be individually held responsible for genocide. (2) If one acts with awareness of the destructive ethos and yet contributes to it without holding the goal of destroying the group, as was case for *Krstić* according to the ICTY who were executing orders with awareness of the destructive ethos yet did not individually share the goal,[992] that person should be held responsible as an accomplice.

---

[990] *Prosecutor v..Kayishema and Ruzindana* [1999] ICTR-95-1, Judgement, para 72.

[991] For an intriguing study in this direction see K. Anderson, 'Judicial Inference of the 'Intent to Destroy' A Critical, Socio-legal Analysis' (17 Journal of International Criminal Justice, 2019)

[992] *Prosecutor v. Krstić* [2004] IT-98-33-A, Judgment, para 34.

(3) The principal responsibility should be reserved for those who both aware of the destructive ethos and contribute to it with the goal of ultimate destruction of the group.

In any case, however, the existence and extent of the specific *mens rea* is related to the collective ethos and action that the individual relates to, rather than her individual qualities, reach and control. In other words, there exists a reciprocal and symbiotic relationship between the collective ethos and action and the individual's genocidal intent and acts, since genocide occurs at the collective level as a result of individuals' participation, while in turn individuals become able to commit the crime as a result of the formation of this collective destructive ethos and patterns of genocidal acts.

This section therefore systematises the novel conceptual framework that has been effectively developed and elaborated throughout the study as a four-step test to be applied to decide on the risk or existence of genocide. The next and final section of the chapter will apply this framework to the South Sudan situation by making some comparisons with other situations and the case law of international courts and tribunals.

6.3. A Comparative Assessment of the South Sudan Situation through the Proposed Framework

In the first section of the chapter, it is demonstrated that the recent legal assessments regarding the South Sudan situation exhibit many deficiencies stem from the misconceptualization of the crime and the lack of clarity of the assessment process. Those who argue for the qualification of the situation as genocide were not able to produce a convincing argument to substantiate their claims largely due to failing in reconciling the processual and contextual nature of the crime with the substantialist and 'intentionalist' legal conceptualisation. On the other hand, those who considered the situation as an 'impending genocide' was emphasising the lack of 'genocidal intent'. However, they were unable to explain why 'genocidal intent' was inferred in relation to Rwanda or Myanmar but not South Sudan, despite that those factors singled out to infer genocidal intent were also largely present in the latter (in fact, from some aspects, the South Sudan situation has been more 'severe' than Myanmar). Moreover, the possibility of genocide was not duly considered in relation to spatially limited atrocities in South Sudan, which begs the question what was different compared to Srebrenica or Vukovar

that even a discussion of genocide has not taken place regarding those localised atrocities.

The established four-step test aims to provide a clearer and conceptually more coherent roadmap to think about the crime. This section shall apply this overall framework to the South Sudan situation and demonstrate how the framework presented in the thesis can improve the assessment process of genocide in general and the determination of 'substantiality' in particular. In order to highlight the contribution of the study, comparisons will be made to other cases. In respect of the overall situation, the ICTR case law and UN reports regarding the Myanmar situation will be visited. In respect of those localised atrocities, which will be selectively examined, the ICJ's and ICTY's assessment processes regarding Srebrenica and Vukovar will also be utilised for comparative analysis, particularly for examining 'substantiality'. It needs finally to be noted that, due to the limitations of the study and the lack of identified individual perpetrators in South Sudan, the final step of the proposed framework, i.e. the individualisation of genocidal liability, will be omitted. In other words, the following paragraphs will particularly focus on demonstrating the process of establishing genocide at the context level, and a demonstration and conceptual elaboration of how the relation between collective genocide and individual perpetrator should be thought about in the process of attributing responsibility should await a future study.

6.3.1. Did a Normative Destructive Ethos against a Protected Group emerged in South Sudan or a Part of it?

As the framework specified, the necessary first step for the assessment of genocide is considering whether the perpetrator group has developed a normative destructive ethos against a protected group in a particular timeframe and space. This requires analysing the protected status of the targeted group and whether the relatedness between the groups evolved into a one-sided, destructive dominance that proves the normative destructive ethos. In respect of the former, there are some noticeable similarities between Rwanda and South Sudan, which allows producing some comparative analysis. In respect of the latter, the thesis will split the analysis into two segments. The first segment will consider whether there existed such destructive ethos in entire South Sudan by once again drawing some comparisons with Myanmar and mostly Rwanda,

since the ICTR explicitly considered and established the general existence of genocide in Rwanda and considered it as a fact of common knowledge. The second segment will consider the existence of such destructive ethos in relation to the four, arguably most severe and emblematic, localised attacks, namely the Attacks of Bentiu (2014), Juba (2013), Pajok (2017) Yei River (2016-2017).

6.3.1.1. A Processual Account of Nuer and Dinka Differentiation: Establishing the Protected Group Status by Moving Beyond the Dichotomy of Objective and Subjective Criteria

A Very Brief Overview of the Demographics of South Sudan

It is estimated that more than 13 million people were living in South Sudan before the conflict.[993] According to statistical data, the most populous group was the Dinka, accounting for approximately 36% of the overall population, while the second largest group, the Nuer, constituted 16% of the total.[994] These two groups were followed respectively by: Azande (6%), Bari (4%), Shiluk (3%), Arap (3%), Murle (1%) and other smaller tribes. In terms of their origin and language, the groups in South Sudan can be broadly categorized into three categories: Nilotic, Nilo-Hamitic and South-Western groups.[995]

The Nilotic people are believed to be indigenous to the Bahr el Jebel area (See Map No.1), they speak Nilotic, a sub-branch of Nilo-Saharan language family.[996] Overall, they have similar physical traits and cultural traditions and mainly believe in Christianity or traditional animist religions. Cattle-keeping has historically and culturally been important for the Nilotic people, including some for whom cattle no

[993]Central Intelligence Agency, 'The World Factbook: South Sudan', available at <https://www.cia.gov/Library/publications/the-world-factbook/geos/od.html1> accessed on 18 May 2018.

[994] Ibid.

[995] T. Falola and D. Jean-Jacques (eds), 'Republic of South Sudan', *Africa: An Encyclopedia of Culture and Society* vol.3 (California: ABC-CLIO, 2015) 1131.

[996] See M. Goodman and G. Dimmendaal, 'Nilo-Saharan languages', *Encyclopaedia Britannica* available at <https://www.britannica.com/topic/Nilo-Saharan-languages> accessed on 23 May 2018.

longer have any practical importance. Sixty percent of the total population is Nilotic in South Sudan, including the main groups: Dinka, Nuer and Shilluk.[997]

The term Nilo-Hamitic denotes the eastern and southern branches of Nilotic languages that interacted with Hamitic languages. Tribes like Bari and Mandari in South Sudan are part of this language family.[998] There are series of cultural and phenotypical similarities between the Nilotic and Nilo-Hamitic peoples, even though their stories of origin are different.[999] One important difference, however, is that cattle-keeping does not hold the same historic importance in Nilo-Hamitic culture. Unlike the Nilotic people, who are semi-nomadic, the Nilo-Hamitic people, such as Bari (situated near the south, around the capital city of Juba), are predominantly sedentary communities who mostly make their living from farming.[1000]

Finally, there are those tribes predominantly situated in the South Western region and who speak languages belonging to either the Niger-Congo language family, like the Azande, or the Sudanic language family, like the Mundu.[1001] These are non-Nilotic groups who have different stories of origin and are also sedentary communities. Having said that, most of these non-Nilotic groups started to share many cultural traits with the Nilotic tribes in South Sudan, so much so that the Azande and Bari comprise a different

---

[997] Nilotic people include the Dinka, Nuer, Shiluk (Collo), Kachiopo, Jie, Anyuak, Acholi, Maban, Kuma, Lou (Jur), Bango, Bai, Gollo, Endri, Forgee, Chod (Jur), Khara, Ngorgule, Forugi, Siri, Benga, Agar, Pakam, Gok, Ciec, Aliap, Hopi, Guere, Atuot, Appak, Lango, Pari, Otuho and Ajaa. Falola and Jean-Jacques, 'Republic of South Sudan', 1131.

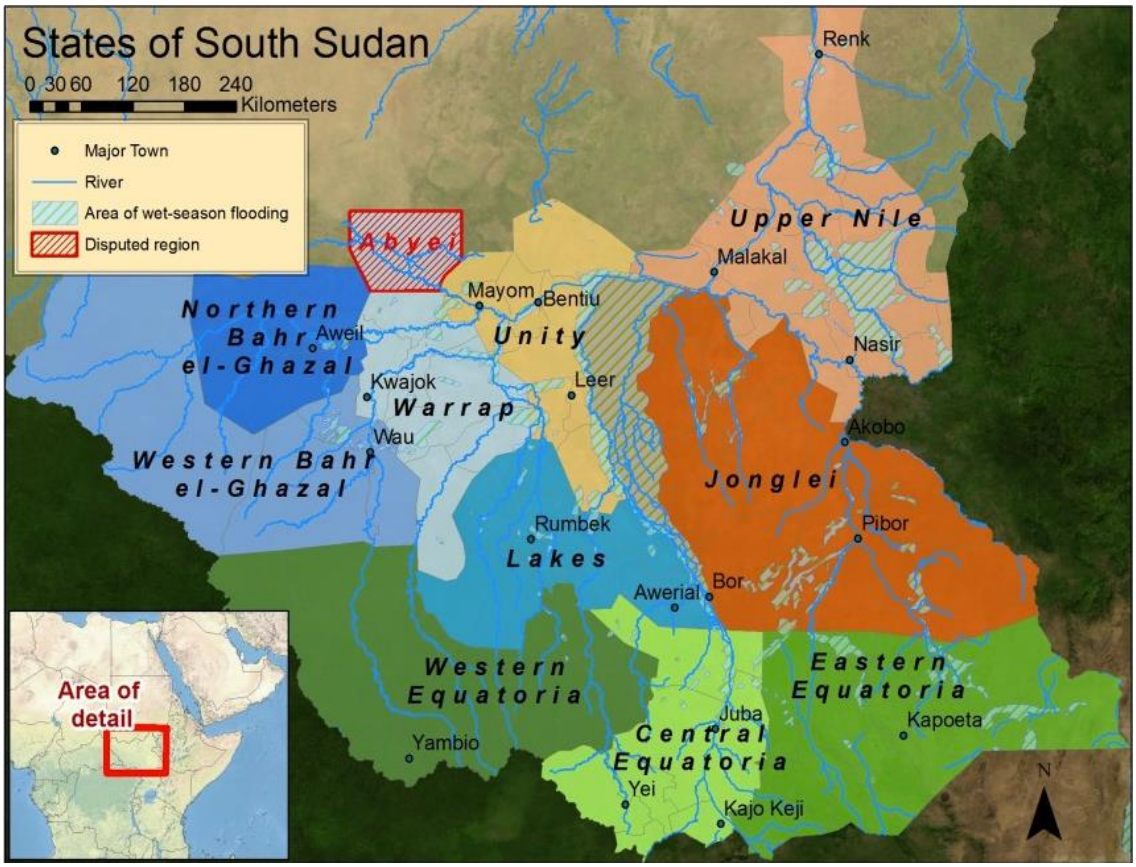
[998] Nilo-Hamitic groups include the Bari, Mundari, Murle, Kakwa, Pojula, Nyangwara, Kuku, Latuko, Lokoya, Toposa, Buya, Lopit, Tennet and Diginga. Ibid.

[999] See in general A. Breidlid et al.(eds), *A Concise History of South Sudan: New and Revised Edition* (Kampala: Fountain Publishers 2014).

[1000] 'The common cultural feature of the Equatorians is that they are mostly sedentary communities, who farm their ancestral lands and grow many unique tropical crops and fruits. However some Equatorians such as some members of the Bari ethnic group also keep cattle in addition to farming. This is the case for instance with my relatives in my village located just several miles north of Juba International Airport. And one can also visibly see this in the Mundari tribe just further north. The Mundari tribe is a subset of the Bari ethnic group.' Loyuong, 'South Sudan: Why Are the Dinka and Nuer Killing Each Other in South Sudan?'.

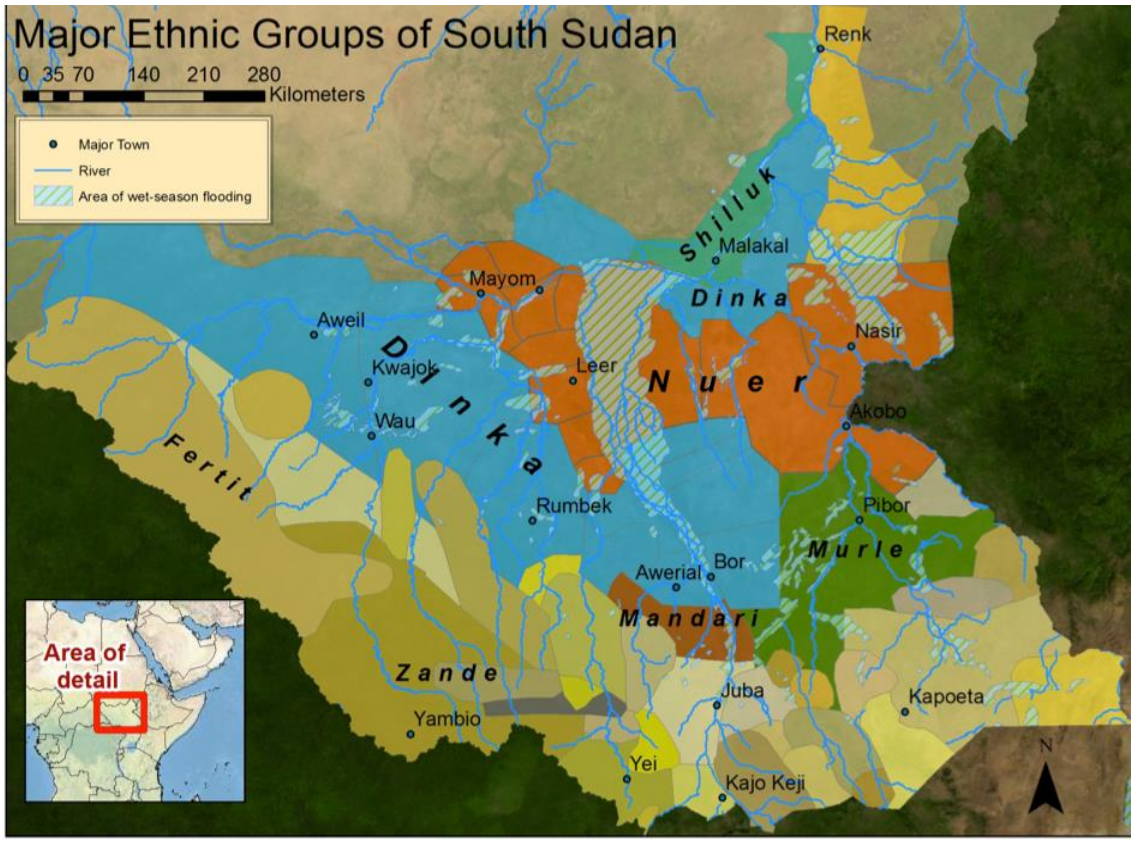
[1001] The South-western Sudanic groups includes Kresh, Balanda, Banda, Ndogo, Zande, Madi, Olubo, Murus, Mundu, Baka, Avukaya, and Makaraka. Falola and Jean-Jacques, 'Republic of South Sudan', 1131.

ethnic group collectively referred to as Equatorians, situated in the south part of South Sudan. While even this very brief overview demonstrates how complex are the tribal relations and distinctions in South Sudan,[1002] due to the obvious limitations, it would not be possible to examine the situations of all the conflicting tribes. Rather, the thesis will selectively focus on the most central tribes in the conflict, namely Dinka and Nuer. The obvious reason for this selection is the proximity of these collectives. That is, while it is relatively easier to mark the differences between one of these groups and, say, Bari or Azanada, since the differences between linguistic and cultural features are sharper, the Dinka and Nuer have more similarities in terms of all four types of groupings listed by the Convention.



[1002] There are some additional complexities that have emerged in the context of the civil war. Although the conflict mainly started between the Dinka and Nuer groups, militias from Shilluk, Azande, Bari, Murle, Latuka, Fertit and Jur groups later got involved as well. Moreover, the militias of these tribes do not act en masse.

Map No.1: States of South Sudan before 2016[1003]



Map No.2: Major Ethnic Group of South Sudan[1004]

Objective v. Subjective Criteria in the ICTR Case Law: A Faulty Dichotomy to Determine the Protected Group Status

From this aspect, the situation of Nuer and Dinka is akin to that between Tutsis and Hutus in Rwanda. As occasionally referred to throughout the study, the ICTR had difficulty in establishing the protected group status of Tutsis. Theoretically speaking, the case law of the ICTR became stuck between essentialist and radical social constructivist thinking about the identity of collectives. The former presumes that an ever-present essence or quality signifies the distinction between collectives and thus that

[1003] The source of the Map: Reporteros de Investigacion, 'Ambición, petróleo y sangre en el corazón de África' available at <https://reporterosdeinvestigacion.com/2018/07/06/ambicion-petroleo-y-sangre-en-el-corazon-de-africa/> accessed on 21 March 2018.

[1004] The source of the Map: Reporteros de Investigacion, 'Ambición, petróleo y sangre en el corazón de África' available at <https://reporterosdeinvestigacion.com/2018/07/06/ambicion-petroleo-y-sangre-en-el-corazon-de-africa/> accessed on 21 March 2018.

is what needs to be located. Such essentialist thinking, underpinned by substantialist presumptions, was most strikingly demonstrated in *Akayesu*, where the Trial Chamber initially tried to locate certain 'objective indicators' for the four concepts and assess whether any of these indicators underpin the different identities of Tutsis and Hutus.[1005] However, in light of the definitions offered by the Chamber – which supposedly represent the essential indicators of each concept –[1006] it was not possible to define Tutsis as a distinct religious, national, ethnic or racial group in relation to Hutus. Both Tutsis and Hutus were citizens of Rwanda and consisted of predominantly Catholic individuals; had similar racial traits and largely shared the same culture. According to one source,[1007] they were traditionally speaking their common language, Kinyarwanda, with different accents, yet there has been no clear-cut distinction *en masse,* because the members of the groups significantly blended in. Moreover, a mere reference to such a linguistic difference would have been insufficient in explaining the actual breadth of these identities, which can be captured only through a socio-historical examination. This led the Chamber not only to inappropriately[1008] stretch the limits of interpretation by arguing that the object and purpose of the drafters was in fact to protect any 'stable and permanent' group,[1009] but also to both admitting that the definition of an ethnic group may change in the course of time[1010] and subtly recognising the contextual and processual nature of social groupings by noting: 'at the time of the alleged events, the

[1005] *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, paras 512-515.

[1006] The chamber defined race as the 'hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors'; religious groups as those sharing 'the same religion, denomination or mode of worship'; national group as 'a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties'; and an ethnic group, as 'a group whose members share a common language or culture'. Ibid.

[1007] M.A. Bryan, *The Bantu Languages of Africa: Handbook of African Languages (*Oxon: Routledge, 2018 (1st ed. published in 1958)), 115.

[1008] Indeed, this understanding has been largely criticised, as it is not possible decisively inferring the 'stable and permanent' group interpretation from the *travaux*. Expectedly, the interpretation has not been owned in the following decisions of the ICTR or ICTY. See for example D. Amann, 'Group Mentality, Expressivism, and Genocide', 2 International Criminal Law Review (2002), 103-109.

[1009] *Prosecutor v. Akayesu* [1998] ICTR-96-4-T, Judgement, paras 512-515.

[1010] Ibid. para. 172 (quoting expert witness Alison Des Forges).

Tutsis did indeed constitute a stable and permanent group and *were identified as such by all'*.[1011]

The implausibility of the so-called objective approach formulated in *Akayesu* was noted in subsequent case law. To avoid the doctrinal and conceptual complications of an objective approach, a subjective approach that is built on radical social constructivist thinking is introduced. Radical social constructivism argues that 'reality' is a social construct, and that we cannot have objective or direct access to 'a real world out there'. Thus, in any sense, entity and concept are ultimately subjective and cannot be objectively known.

From this point of view, the ICTR Trial Chamber in *Kayishema and Ruzindana* famously noted that an ethnic group is 'one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)'.[1012] The ICTY Trial Chamber in *Jelisić* went even further by omitting any reference to an objective criterion. It remarked that attempting 'to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation'.[1013] It is suggested, in this respect, that self-perception or being characterised by perpetrators as such should be sufficient for a group to qualify as 'protected'.[1014]

Although this so-called subjective approach offers flexibility, when the four concepts are not defined and self-identification or identification by others gains admission as a

---

[1011] Ibid. para. 702 (Emphasis added).

[1012] *Prosecutor v. Cayishema and Ruzindana*, [1999], Trial Chamber, Judgment, para 98.

[1013] *Prosecutor v. Jelisić* [1999] IT-95-10-T, Judgment, para 70. Also see *Prosecutor v. Rutaganda* [1999] ICTR-96-3-T, Judgement, para.56.

[1014] Similarly in Kayishema, the Trial Chamber modified the ethnic group definition offered in Akayesu by adding to the proposed definitions that 'or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)'. *Prosecutor v. Kayishema* and Ruzindana [1999] ICTR-95-1-T, Judgement, para. 98. Also see Prosecutor v. Bagilishema [2001] 95-1A-T, para. 65: 'if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group'.

sufficient criterion, this would not only render the definitional listing hollow, but also contradict the reality that all four concepts are ultimately socially constructed facts, which means they signify a particular 'form' of relatedness that imposes limitations on the scope of their meaning. For example, even if some perpetrators characterise, say, homosexuals as a 'race' and act against them with intent to destroy – however outrageous such an assault is – it would simply be counter-intuitive in light of the social reality, which draws limits of what 'form' of relatedness race is, to characterise such a 'gender' group as a 'race' and thus conclude that the atrocity qualifies as genocide in legal terms.[1015] In this sense, the subjective approach is on point in its criticism of essentialist thinking, but it completely changes the scope of the criminal definition, undermines the definitional listing and that the reality of the four concepts as social – but not scientific – facts.

Indeed, merely focusing on subjective identifications fails in representing what actually differentiated Tutsis and Hutus on ethnic grounds. Instead, the study established that each listed 'type' of groupings refers to a particular, socially determined and contingent 'form' of relatedness that the definition of which is in constant transformation. The study offered a (contestable) current abstraction for each listed 'form' of relatedness in the previous section and suggested that, after undertaking the same practice, judges should assess whether the victim group developed one of these 'forms' of relatedness vis-à-vis the perpetrator group and others in the socio-historical continuum through the externalisation of their process of unity and corresponding in-group and out-group perceptions. Applying this approach thus requires a socio-historical examination.

In the Rwanda situation, language, traditions, culture and religion were largely shared by Tutsis and Hutus. The differences between them mostly stemmed from differences in their places of origin (Tutsis are believed to have arrived from Ethiopia according to the 'Hamitic Hypothesis',[1016] while Hutus were natives), occupation (Tutsis were mostly, but not entirely, aristocratic herders of cattle, while the majority of Hutus were peasant tillers of the soil) and, to an extent, physical appearance (Tutsis are taller – by an

[1015] See May, *Genocide*, 30-33, 40-58.

[1016] G. Stanton, 'Could the Rwandan genocide have been prevented?, 6 Journal of Genocide Research (2004), 213.

average of 12 cm – with lighter skin, while Hutus are darker, shorter and stocky). In that sense, beliefs, observations and myths about differences in hereditary socio-cultural features were the main elements underpinning the differentiation. As noted by Gregory Stanton, on these grounds there was 'preferential endogamy, marriage within the group, a key characteristic of ethnic groups as well as of castes. In this strictly patrilineal society, a person took the group identity of the father.'[1017] What turned these differences into the establishment of rigid in- and out-group perception on the basis of ethnicity was the practices of Belgian colonisers. By virtue of their perverse theories, colonisers designated Tutsis a privileged community, one which carried more 'white' features, and gave them priority in education, the church, the economy and government service. 'Colonial rulers thus exacerbated the traditional classification divisions'[1018] and led to these tribal groups ascribing meaning and significance to their hereditary social features in ethnic terms.

To put it more straightforwardly, then, the initial reasons for differentiation between Hutus and Tutsis had largely disappeared at the time of the attack, but due to novel sociopolitical causes the groups continue to ascribe meaning and significance to these archaic features on the same terms. While political and socio-economic divergences fuelled the continuation of the differentiation between Hutus and Tutsis in actuality, in-group and out-group perceptions continue to rely on outworn ethnic features and thus differentiation preserves its ethnic character. Since the proposed approach concerns the processual relatedness of the groups when defining their 'form' of differentiation, it neither pervasively searches for an ever-present element, nor merely reduces the differentiation to arbitrary characterisations of the conflicting parties.

A Processual Alternative to Determine the Protected Group Status

The situation is fairly similar in terms of Nuer and Dinka and the proposed approach can be further concretised by being applied to explain their ethnic 'form' of their differentiation. If we try to explain and characterise the Dinka and Nuer identities through searching for objective indicators, the ultimate result would be far from reasonable just like happened in the Rwanda situation. To begin with, the Nuer and

[1017] Ibid.

[1018] Feierstein, *Genocide as Social Practice*, 22.

Dinka cannot be defined as distinct religious or racial groups based on any 'objective' parameters. Indeed, while there is no certain phenotypical difference attributed discriminatory meaning and significance in the course of communal relations, both groups largely follow either Christianity or a traditional animist religion,[1019] are parts of the same Nation (understood in restrictive, legalistic sense as in case law) and have developed no significant divergence on any such basis.[1020]

Moreover, at the time of the conflict it appeared that the Nuer and Dinka peoples had largely similar cultural elements as well as being closely connected through perennial interactions, inter-marriage and cross-fertilization of culture. That said, the linguistic difference was sharper in South Sudan compared to Rwanda. Despite the Nuer and Dinka languages belonging to the same family of languages, including a considerable amount of common vocabulary and being recognized as more similar to one another than to any other languages,[1021] there are nevertheless certain differences between alphabets, grammars and articulation. Indeed, when the conflict began in Juba in December 2013, the key role of language in the identification of victims was reported; they were allegedly asked 'yin acÉ'l?', which means 'what is your name?' in Dinka, and those who were unable to answer were attacked.[1022]

Although this may initially appear to indicate that the objective approach works well in this case, language itself does not provide a *de facto* distinction. It is noted by Aidan Southall that although Nuer and Dinka are thought of as two sharply distinct languages in Western literature, this does not in fact represent the complexity of the linguistic situation. He observes that the Dinka have a very large and scattered population, and

---

[1019] The Assessment Capacities Project (Hereinafter ACAPS), 'South Sudan Country Profile' (2015), 2 available at <https://reliefweb.int/sites/reliefweb.int/files/resources/s-c acaps_country_profile_southsudan_august2015.pdf> (accessed on 31 May 2018).

[1020] 'Nuer and Dinka Religion.', *Encyclopaedia of Religion* available at <http://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/nuer-and-dinka- religion> accessed on 1 June 2018; A. Southall, 'Nuer and Dinka Are People: Ecology, Ethnicity and Logical Possibility', 11 Man New Series (1976), 481,482.

[1021] Southall, 'Nuer and Dinka Are People', 466.

[1022] 'Choosing to be a Dinka: selecting ethnicity remains an elite privilege', African Argument (2014) available at <http://africanarguments.org/2014/02/28/choosing-to-be-a-dinka-selecting-ethnicity-remains-an-elite-privilege/> accessed on 22 May 2018.

they lack any central organisation and speak many dialects. Some of these dialects are closer to certain Nuer dialects rather than other Dinka dialects.[1023] For example, the Atuot speaks a language of their own which is considerably closely to Nuer language, even though they are not defined as part of Nuer. And strikingly, while the Atuot were not a target for the government, as they did not join the SPLA/M-IO, their language nearly allowed them to be mistaken. An objective approach is also not able explain the status of the large number of people who have mixed origins. One striking example is the Minister of Health, Riek Gai, who used to be recognized as a Nuer but turned out to be an important ally for Kiir. Yet currently, many Nuer are highlighting his Dinka origins and label him a Dinka.[1024]

These examples are not merely exceptional cases, but rather a demonstration of the deeper problems involved in essentialist presumptions. Attributing essence to the listed concepts is not only problematic because it implicitly validates the pervasive perceptions of the perpetrators, but also because it conceptually treats characteristic features like language or culture as if they are pre-existing entities that underpin the groups. Moreover, the majority of individuals do not fully possess the traits affiliated with their ethnicity or endorse and enforce all the norms of the group. Their sense of belonging is established through various reasons and may diverge from general conceptions about the group on many points. This means, when we talk about an ethnic group, we are not examining an entity made of the same or similar parts, but a processual network whose emergent powers and properties are determined through relations among parts and matters of density rather than uniformity.[1025] An entirely subjective approach, on the other hand, would fail to recognise that these two identities

[1023] Southall, 'Nuer and Dinka Are People', 464 (see footnotes as well).

[1024] 'Straddling Divides', The Economist (2014) available at <https://www.economist.com/blogs/baobab/2014/02/talking-south-sudans-top-general> accessed on 22 May 2018.

[1025] Essentialist thinking also leads to highly normative and constraining definitions regarding the listed types. The way 'nationality' defined as the most obvious example, since the concept was reduced to a legal bond that endows rights and imposes responsibility by the ICTR and ICTY, while it has much broader scope in the contemporary social relations, which I tried to cover in chapter five by (non-exhaustively and fallibly) abstracting it as 'any political community inhabiting a particular territory that has become conscious of its autonomy, unity, and particular interests'.

are ultimately socially constructed 'facts' and cannot be entirely reduced, in ontological or explanatory terms, to the subjective conceptions of a set of individuals.[1026]

The understanding proposed by the study avoids the pitfalls of both these extremes by suggesting that these distinct groups must be understood as processes of unity and thus a proper account and characterisation of their differentiation can only be provided through a socio-historical investigation of relations and in- and out-group perceptions as to this differentiation process. Considered from this perspective, it becomes apparent that the sense of togetherness for people in both groups lies in their complex sociation processes, which were initially differentiated by the search for better life chances and led to the emergence of divergent systems of social relations, livelihoods, traditions and sense of identity.[1027] Even though most differences have diminished or evolved over time and thus the cultures of the two groups have become more similar than ever before, different Nuer and Dinka identities continue to exist in the society through the constant

[1026] See chapter four.

[1027] The Nuer and Dinka cannot be thought of as distinct national groups, even under the broad definition the study suggested. On the one hand, the shared sense of 'we-ness' in these communities (in-group perception) is not built on a collective consciousness of political autonomy, unity and interests. Nor do the objectivicated interactions and practices underpin in-group perceptions have such a nature. On the other hand, outsiders did not identify the Nuer or Dinka peoples as units with those relations and interests that pertain to 'nations' at this point of history. Indeed, despite all the conflicts over time, neither of these groups has developed a collective tendency that challenges South Sudanese national identity, even if they may not yet fully embrace that overarching national identity either. It appears that tribal thinking still reigns over the society, which is largely organized as clans, so that 'nationality' as a modern phenomenon continues to be a somewhat alien concept. It may be argued that the Nuer and Dinka elites have an end game to create two distinct nations, and eventually states, out of these tribes, but the evidence does not indicate that such a premise has been endorsed by the general public so far. As Madut Kon notes, 'it remains a challenge [...] creating an agreed upon national identity with a collective sense of cultural, ethnic, political, and common history of nation building. The perception of a self and group as a distinct ethno-tribal entity is much greater within the larger South Sudanese society, than any national symbols that may identify them as one nation.' M. Kon 'Institutional Development, Governance, and Ethnic Politics in South Sudan', 3 Journal of Global Economics (2015), 149. See also in general, Kuajien Lual Wechtuor et. Al, *The Nuer Nation* (CreateSpace Independent Publishing Platform 2016); Al Jazeera, 'Sudan: Transcending tribe' (2011) available at <https://www.aljazeera.com/photo_galleries/africa/201111010324526960.html> accessed on 1 May 2018; A. Boswell, 'The genocidal logic of South Sudan's "gun class"', IRIN (2016) available at <https://www.irinnews.org/opinion/2016/11/25/genocidal-logic-south-sudan%E2%80%99s-%E2%80%9Cgun-class%E2%80%9D> accessed on 11 May 2018.

re-configuration and re-definition of the relations, traits and beliefs that underpin and reinforce the same sense of 'we' and 'them'.[1028]

The process of Nuer/Dinka diversification has drawn much attention in anthropology since the mid-1990s. Although some issues are still debated in the literature, the research conducted so far appears sufficient to map how these two identities arose and were sustained. One unequivocal starting point in this context is that the Nuer and Dinka communities have, to a large extent, common Nilotic origins[1029] and their ancestors lived as several distinct tribes[1030] with social traditions and organisations that most likely resemble the ones later attributed to the Dinka.[1031] That said, the way that two distinct ways of living and speech communities emerged has been a point of controversy in the literature.

According to one plausible view,[1032] with gradual rise in population combined with the ecological limits of cattle nomadism, which has been essential mode of living for these tribes, inter-tribal competition for resources began and this led to raids and conflicts a few centuries ago. To elaborate, the natural homeland of the Nuer and Dinka communities, the basin of the Bahr el Jebel and the Bahr el Ghazal, has an unusual ecology, as the wet and dry seasons compel the communities to migrate annually for grazing. Historically, the disadvantageous position of certain tribes forced 'greater concentration and wider seasonal movement therefore several village communities have to mix with one another in the dry season, sharing water, pasture and fishing and so achieving greater spatial and also moral density'.[1033] When this necessity combined

---

[1028] As Maurice Glickman notes 'In examining the Nuer and the Dinka we are confronted neither with two 'nations ' in the sense of unified and exclusive units nor so much with a single 'plural society' but rather with two similar social systems between which there is a movement of people and certain differences in habitat and economy'. M. Glickman, 'The Nuer and the Dinka; A Further Note', 7 Man New Series (1972), 586.

[1029] E. Evans-Pritchard, *The Nuer (*Oxford: Clarendon Press I940), 3: Southall, 'Nuer and Dinka Are People', 463-464; P. Newcomer, 'The Nuer Are Dinka: An Essay on Origins and Environmental Determinism', 7 Man, New Series (1972), 5-11.

[1030] Southall, 'Nuer and Dinka Are People', 465.

[1031] Newcomer, 'The Nuer Are Dinka', 7.

[1032] Ibid.

[1033] Southall, 'Nuer and Dinka Are People', 471.

with gradual population growth, geographically disadvantaged tribes invaded other lands and thus committed aggression against their neighbours in order to survive.[1034] This brought about both processes of inter-tribal interaction and group differentiation. While these interactions predictably increased the already existing commonalities among the proto-Nuer tribes, the differentiation began to spread a sense of 'we' and 'them' and generated the conception of the totality of some clans as singular units.[1035]

Moreover, the very need to invade other areas required larger scale co-ordination and a centralised political structure among geographically disadvantageous tribes.[1036] The process of social mutation[1037] underpinned by these needs spawned a distinct way of living marked by linguistic differentiation; a pyramidal system of segmentary grouping; a greater degree of co-ordination; a superior pattern of mobilisation; and distinct cultural elements, which later affiliated with the Nuer group. Other tribes did not have imposed on a wide range of movement by the dry season or floods, as they had more convenient access to resources. Such convenience resulted in a lack of political unification among these tribes, despite the fact that they settled in continuous areas and shared similar ways of living and linguistic commonalities.[1038] Thus they preserved the status quo for a long time, which was later associated with the Dinka group.[1039] This very process of differentiation also brought along contrasts in social and political systems (e.g. how the

[1034] Newcomer, 'The Nuer Are Dinka', 8. That is, the phenomenon of communities living in more arid areas and regions herding their cattle towards areas with available pasture during the wet (flood) season and towards water sources during the dry session unavoidably created an adversarial relationship and conflicts over these essential resources. T. Richardson, 'Pastoral Violence in Jonglei', ICE Case Study No. 274 (2011) available at <http://mandalaprojects.com/ice/ice-cases/jonglei.htm> accessed on 01. June 2018.

[1035] M. Sahlins,' The segmentary lineage: an organisation of predatory expansion', 63 American Anthropology (1961), 333.

[1036] Southall, 'Nuer and Dinka Are People', 470.

[1037] Ibid.

[1038] Ibid.

[1039] Newcomer, 'The Nuer Are Dinka', 7.

society was divided or roles assigned to spiritual or political leaders), which are extensively covered in the literature.[1040]

However, taking an ecological perspective alone cannot fully explain the socio-historical reasons that result in two different identities. The cultural role of cattle raids in the South Sudan context should also be taken into account. In pastoral communities, ownership of cattle signifies social standing and wealth, it is often used in marriage and other social practices. The role cattle raids played in identity differentiation became intertwined with ecological factors. This is because, the superior co-ordination, warrior skills and mobility which the 'disadvantaged' tribes gained through invasions also gave them an upper hand in cattle-raiding practices.[1041] The lack of unity among the Dinka people and thus resistance occurring in a fragmented manner facilitated the success of raids and this very perception. An interesting point is that, for a long time, the Dinka clans did not take any significant steps to establish better resistance. Most of the time they preferred to drive their cattle away rather than resist. Raided clans also did not seek help from others, but rather sought refuge by abandoning their land to the raiders. It is argued that, in addition to their organisational features, the ritual and spiritual creeds of these clans played a role in such a reaction.[1042] All in all, this process has created and reinforced two distinct identities of 'attacker/ captor/ raider' and 'attacked/ captive/ raided'.[1043]

These lines have also been reinforced through linguistic approximations and overarching designations. The attacker clans called themselves 'Naath' and any group which they habitually raid 'Jaang', while the proto-Dinka clans were calling themselves

---

[1040] See for example Southall, 'Nuer and Dinka Are People', 492 ff.; Glickman, 'The Nuer and the Dinka', 586 ff.

[1041] Indeed, for a long time the Nuer people had not considered Dinka people as a serious adversary. Southall, 'Nuer and Dinka Are People', 476,485.

[1042] Ibid.483-485. That, of course, does not mean that Dinka community was entirely passive, they commit the counter-raiding, yet considerably less frequently and successfully.

[1043] Ibid. 474.

'Jieng'.[1044] The meaning of both Jieng and Naath is 'people', which affirms that neither community used these terms as a reference to some form of political unit, but rather as an expression of their own way of communal being and lifestyle.[1045] It is important to remember that 'the crystallisation of the perceived contrast between raiders and raided, as attaching special sense to the relations between specific neighbouring populations [...], may have been a long and gradual process, during which the distinction between Naath and Jieng would have been fluctuating, irregular and by no means clearcut'.[1046]A particular factor that made the relationship between the communities highly dynamic and irregular is that Naath (Nuer) clans were inclusive and absorptive when it comes to acquiring new members from rival tribes.[1047] While the frequency of common cultural elements has obviously been an important facilitator in the process, Edward Evans-Pritchard also observes that the Nuer developed mechanisms that helped to convert the population in invaded lands.[1048]

It is thus frequently argued that the Nuer did in fact gradually emerge from the Dinka, since a large proportion of its population were Dinka and were absorbed or converted after waves of invasion.[1049] The mythologies of the two groups are strikingly demonstrative in this respect. As Evans-Pritchard notes,[1050] while the Nuer mythology lacks a clear creation myth, there are many foreign elements from Dinka and Shilluk in

---

[1044] Evans-Pritchard, *The Nuer,* 120, 224, 234; Southall, 'Nuer and Dinka Are People', 464. Southall also points out that the very beginnings of the linguistic divergence of Naath from Jieng may go back at least two millennia earlier. Ibid. 479.

[1045] Southall, 'Nuer and Dinka Are People', 487.

[1046] Ibid. 475.

[1047] Evans-Pritchard, *The Nuer,* 221. As Maurice Glickman notes, 'the mutant grouping (Nuer) comes to occupy more land than it loses, resulting in more and more territory being placed under the new social system. The people are not moved around much in this process; defeated groups are fitted into the mutant group as it expands.' Glickman, 'The Nuer and the Dinka', 592.

[1048] '...Nuer scorn Dinka and persistently raid them, but they do not treat those Dinka who are members of their community differently from its Nuer members, and we have seen that persons of Dinka descent form probably at least half the population of most tribes. These Dinka are either children of captives and immigrants who have been brought up as Nuer, or are themselves captives and immigrants who are residing permanently among Nuer. [...] it is said 'caa Nath'; 'they have become Nuer' Evans-Pritchard, *The Nuer,* 221.

[1049] Sahlins, 'The segmentary lineage', 476, 479.

[1050] Evan Evans-Pritchard, *Nuer Religion* (Oxford: Clarendon Press, 1956), 6.

it when the issue of creation comes up. More strikingly, a particular myth of the Nuer that justifies raids against 'Jieng' pictures the Dinka as thieves who steal calves promised to the Nuer by tricking God and saying that God charged the Nuer 'to avenge the injury by raiding Jieng's cattle to the end of time'.[1051] Southall also points out that the belief systems of these groups are closely interlocked and the Nuer culture and religion cannot be completely understood without referring to its Dinka origins.[1052]

All these indicate that when the Egyptian-British colonial rule was established there already existed distinct identities in the society. However, the evidence also shows that the Naath and particularly the Jieng peoples were using these terms as delineations of their ways of life, not as reference to some form of unified collectives. Very similarly to the Rwandan conflict, the ultimate crystallisation of identities and the emergence of overarching 'imagined' communities gradually took place through the encounter with modernity and concepts of race, ethnicity and nation under colonial rule. Indeed, the names 'Nuer' and 'Dinka' were imposed by the colonial administration upon the identities of 'Naath' and 'Jieng' and were treated differently on certain bases. This had a unifying effect, which led to transcendence of the sense of 'we-ness' and 'them-ness' beyond approximate circles and towards imaginings of singular collective entities.

Paradoxically, the differences in the ways of living have diminished throughout the 20th century with, *inter alia*, the rising prominence of oil as a resource, a common war against the North, a reduced advantage for the Nuer in the conflicts due to the introduction of firearms and so on. Instead, the tribal conflicts evolved into political struggles underpinned by the desire of elites for control of the country and its resources. The pivotal issue, however, has been that the general public does not share the same motivation with the elites or self-conception as a political unity, while the elites need to mobilize the people in order to achieve their goals. Therefore, maintaining ancient hatreds and confrontations, which have stayed on the surface due to reasons like the continuing cattle-raiding practices, as well as highlighting the diminished but still existing sociocultural distinctions, has become essential for the mobilization and consolidation of collectives.

[1051] Southall, 'Nuer and Dinka Are People', 480-482.

[1052] Ibid. 464,465.

Within this context, the in- and out-group perceptions that underpin the different group identities still hinge upon beliefs and conceptions related to cultural, linguistic and hereditary social features and practices, even though the distinction between different ways of life has diminished in actuality.[1053] Additionally, the preservation of 'we' and 'them' perceptions in a circular fashion creates new forms of relations, traits and practices that reinforce these feelings and constantly re-shape structures (e.g. the 'traitor' rhetoric used against the Nuer or a growing emphasis on differences in belief systems). This means that there always exists the possibility for a re-definition of relations on national or religious terms in the future. Yet, at this moment and in the context of the conflict, these differences too are perceived as an extension of the differentiation in ways of living rather, than on their own.

All these indicate that the existence of an ethnic (or any other kind) of social group is a dynamic social process and merely referring to symbolic markers (e.g. language) precludes one from capturing the nature of the dynamic entity in question. This is not to deny, of course, that language has turned out to be an important symbolic marker for distinct group identities and also an important means to reinforce the sense of 'we' and 'them' as a normative practice. Yet, while linguistic differences may mark and reinforce distinction, they do not generate underpinning 'sociation' and perceptions of differentiation. Indeed, individuals have an intuitive need to communicate and have to live together for survival. Means, relations and practices, such as language, traditions or dress codes, are developed to better facilitate the satisfaction of those needs. They only gradually become social norms to be followed by members through crystallisation and symbolic markers of culture as a result of emerging in-group and out-group perceptions in relation to 'others' on the socio-historical continuum.[1054]

[1053] '[...] [A]mong these ethnic groups, the psycho-social prediction of peoples' interactions, identity, sense of belonging, and political thoughts are shaped by ethnic norms, clan and tribal affiliations, followed by region and individual's villages. For these reasons, ethnic feuds at local or communal level are easily transformed to the dynamics of power-sharing, political disagreement and ethno-tribal conflicts at the national level.' Kon 'Institutional Development, Governance, and Ethnic Politics in South Sudan', 148.

[1054] This has been the reason why the study has suggested abandoning Lemkin's (unwilling) substantialist conception of the protected groups and instead understanding them as collective autonomisation, differentiation and convergence processes built on the in- and out- group perceptions about (real or

All in all then, the Nuer-Dinka divide not only fits the contemporary conception of ethnicity (a set of people who (i) collectively ascribe significance and meaning to their common cultural, linguistic or hereditary features, traditions and practices that emerge as a result of their socio-historical relations and (ii) develop or sustain in-group and out-group perceptions on the basis of what they have or had in common), but also highlights the relational and complex nature of the creation and preservation of these different identities.[1055] It is thus demonstrated that the proposed framework successfully establishes a novel way of thinking to determine the protected status of the groups without unduly essentializing or subjectifying the 'identities', as it was the case in the ICTR case law.

6.3.1.2 The Question of the Normative Destructive Ethos

Having established that the differentiation in South Sudan is of ethnic 'form' and thus falls into the ambit of the Genocide Convention, we can move on to the second segment of the analysis, which requires assessing whether the perpetrators developed a normative destructive ethos against an ethnic group or part of it – whether all around the country or in spatially limited areas. To remind the reader, it is suggested that this assessment be built on two main queries: 1- whether the perpetrator group developed normative destructive dispositions, interaction and practices in their relation with the victim group and 2- whether these relations evolved or are evolving into one-sided dominance in a particular timeframe and space?

Overall Normative Destructive Ethos: Where does the Difference lie between South Sudan, Rwanda and Myanmar?

These questions can firstly be considered in relation to the overall atrocities in South Sudan. As the reader may already have noticed, all the previously quoted statements and discussions on whether genocide is being committed in South Sudan date back no

putative) common relations, traits or interests that are conceived as racial, religious, ethnic or national by society. From this viewpoint, neither the Dinka nor the Nuer people *de facto* constitute an ethnic group because of linguistic or any other form of difference. It is therefore not possible to find out a clear-cut formulation to determine who is Nuer or Dinka at individual or collective level. Such divide always relationally emerges and requires a socio-historical examination of the process of group differentiation and boundary setting, which has a complex nature and should and will be considered in its totality.

[1055] See for a similar conception of Nuer identity Brubaker, *Ethnicity Without Groups*, 48-52.

further than 2016, despite the conflict going on since December 2013. This is no coincidence. The nature of the conflict changed significantly after July 2016, when the peace deal signed in August 2015 was broken[1056] and the conflict has largely moved from being an ethnically underpinned power struggle towards an existential battle among the various ethnic groups. This change was particularly marked by the systematic targeting of civilians; scorched earth policies; widespread practice of ethnic cleansing; ethnically targeted hate speech and incitement to violence; as well as the symbolic markers of communities turning into usual military targets.[1057]

To elaborate, in August 2015, as a result of intense international pressure, the SPLM/A and SPLM/A-IO signed a 'Compromise Peace Agreement' and formed a transnational government. According to the agreement, Machar once again became vice-president[1058] and, in fear of being killed, came to the capital to be sworn in with his forces in April 2016.[1059] An important development during this relatively 'peaceful' period was that, in December 2015, the Kiir government increased the number of states from 10 to 28 (and later to 32) along ethnic lines and each new state was assigned a mayor loyal to Kiir

---

[1056] Tragically '[s]ince the beginning of the conflict, waves of negotiations resulted in at least 11 agreements committing the warring parties to peace. All were broken almost immediately.' J. Meservey, 'South Sudan: Time for the U.S. to Hold the Combatants Accountable' (2017) Backgrounder 3202, 4 <https://www.heritage.org/sites/default/files/2017-04/BG3202.pdf> accessed 13 May 2018

[1057] The UN Security Council Resolution 2406 (15 March 2018): 'The Security Council [...] [r]ecalling its strong condemnation of all instances of attacks against civilians, including violence against women, children, and persons in vulnerable situations, ethnically targeted violence, hate speech, and incitements to violence, and further expressing deep concern at the possibility that what began as a political conflict could continue to transform into an outright ethnic war, as noted by the Special Adviser for the Prevention of Genocide Adama Dieng,'; United States Holocaust Memorial Museum, 'Press Release: Museum Statement on Risk of Genocide in South Sudan' (28 November 2016) available at <https://www.ushmm.org/information/press/press-releases/museum-statement-on-risk-of-genocide-in-south-sudan> accessed on 13 May 2018: 'The Museum also notes the alarm raised by the UN Special Advisor for the Prevention of Genocide, Adama Dieng, who expressed dismay that "inflammatory rhetoric, stereotyping and name calling have been accompanied by targeted killings and rape of members of particular ethnic groups, and by violent attacks against individuals or communities on the basis of their perceived political affiliation'. See also Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 2018), 44.

[1058] J. Meservey, 'South Sudan: Time for the U.S. to Hold the Combatants Accountable', Backgrounder (2017), 3.

[1059] Ibid.

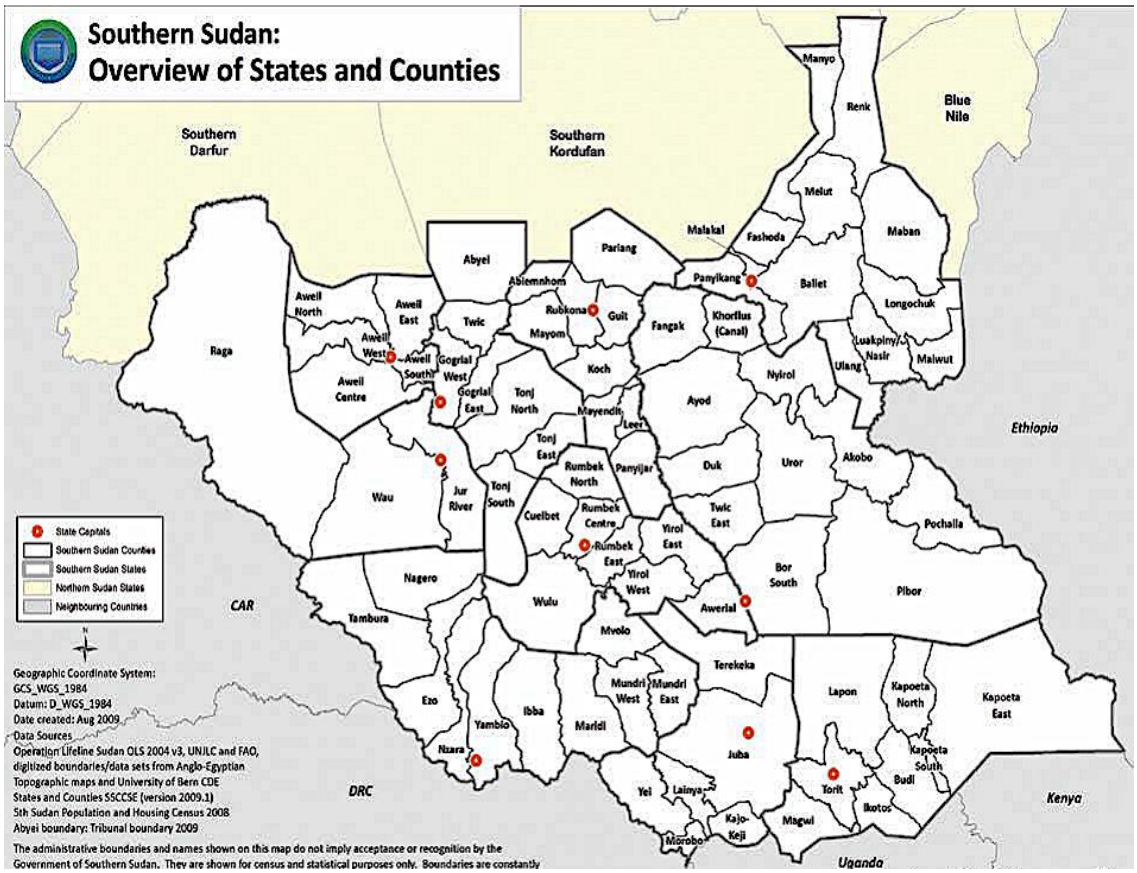
(see Map Nos. 3 and 4).[1060] The way new borders were drawn gave the Dinka a strategic upper hand and expectedly caused uneasiness among various tribes.[1061]

Map No.3: The Federal States of South Sudan after 2015[1062]

[1060] Presidential Order, No. 36/2015; In January 2017, President Kiir announced the creation of additional states, bringing the total to 32. Establishment Order No. 36/2015 October 2015; Government of Republic of South Sudan, *Republican Order, 02/2017*, 14 January 2017.

[1061] A. Sperber, 'South Sudan's Next Civil War Is Starting' *Foreign Policy* (22 January 2016) available at <https://foreignpolicy.com/2016/01/22/south-sudan-next-civil-war-is-starting-shilluk-army/> accessed on 25 May 2018.

[1062] The source of the Map: D. Gai, 'The role of federal government in services delivery in South Sudan 28 states' PaanLuel Wël Media Ltd. in Columnists (2016) available at <https://paanluelwel.com/2016/02/07/the-role-of-federal-government-in-services-delivery-in-south-sudan-28-states/> accessed on 20 February 2019.



Map No.4: States and Counties of South Sudan[1063]

As a result, some groups refused to stay or become part of the peace agreement. For example, Shilluk formed the 'Tiger Faction New Forces' in October 2015 and refused to adhere to the agreement.[1064] In the face of allegedly SPLA-backed attacks and cattle-herder occupations following the new border regime, militias from the Azande,[1065]

[1063] The Source of the map: <https://erininjuba.files.wordpress.com/2011/03/south-sudan-map-counties1.png> accessed on 21 March 2019.

[1064] Ibid.

[1065] S. Foltyn, 'Horrific attacks prompt South Sudan's communities to form armed groups' The *Guardian* (7 December 2015) available at <https://www.theguardian.com/global-development/2015/dec/07/south-sudan-horrific-attacks-prompt-communities-take-arms> accessed 25 May 2018.

Fertit and Equatorian groups also either declared their alliance to the SPLA/A-IO or established regional forces.[1066] In this tense environment, Machar's troops and presidential guards clashed in July 2016 and once again Machar had to flee.[1067] 'Kiir then stocked most of the government positions reserved by the peace agreement for the SPLM/A-IO with loyalists, effectively cutting off any hope that non-Dinkas had of political representation.'[1068]

All this has created further factions. For example, Thomas Cirillo, a Bari general of the SPLA, accused Kiir of acting on an ethnic basis in February 2017 and established the National Salvation Front (NAS).[1069] The Equatorian leaders and forces in the SPLM/A-IO later joined the NAS, claiming favouritism towards Nuers in the SPLM/A-IO, which led to further rebel conflicts.[1070] On top of that, separation between Dinka clans occurred after Kiir fired Paul Malong Awan after some disagreements in May 2017,[1071] Awan left the capital with his forces and in April 2018 established the South Sudan

---

[1066] International Crisis Group, 'South Sudan's South: Conflict in the Equatorias' (Report No. 236, 25 May 2016) available at <https://www.crisisgroup.org/africa/horn-africa/south-sudan/south-sudan-s-south-conflict-equatorias> accessed on 25 May 2018.

[1067] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 6 March 2018), para 38. 'Following skirmishes in Juba between the SPLA and SPLA-IO in early July 2016, significant fighting broke out in the city on 8 July 2016, resulting in widespread killings and rape of civilians, and extensive property damage and looting. At least 36,000 people were displaced, and 300 killed in fighting between the SPLA and the SPLA-IO, that involved the use of combat helicopters, tanks and heavy weapons.'; See also Ø. Rolandsen and N. Kindersley, *South Sudan: A Political Economy Analysis* (2017), 7.

[1068] Meservey, 'South Sudan: Time for the U.S. to Hold the Combatants Accountable', 7; United Nations Security Council, 'Interim Report of the Panel of Experts on South Sudan Established Pursuant to Security Council Resolution 2206 (2015) available at <http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/963> accessed on 31 March 2018.

[1069] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2 (6 March 2018), 9.

[1070] 'South Sudan army captures rebel-held town, senior rebel defects' *Reuters* (28 July 2017) available at <https://www.reuters.com/article/us-southsudan-unrest-idUSKBN1AD1N4?il=0> accessed on 01 May 2018.

[1071] South Sudan president replaces the army chief' *Reuters* (9 May 2017) available at <https://www.reuters.com/article/us-southsudan-military-idUSKBN18528T> accessed on 01 May 2018.

United Front.[1072] Sooka simply summarised the complexity of the conflict as follows: 'You have so many different groups of armed actors, including the military who are talking about dealing with a rebellion and putting it down.'[1073]

What has been worrisome for a genocide scholar is how the conflict has transformed in three years from being a politically driven war of elites to a fully-fledged ethnic war. The UN Human Rights Commission noted that 'inter-communal violence reached unprecedented levels between January and May 2017. There was a two-thirds increase in violence against civilians and nearly one and a half times more communal ethnic conflict events compared to the corresponding period in 2016.'[1074] Researchers who have visited South Sudan have also documented the emergence of trends such as using ethnicity as insults or mottos and songs specifically expressing hatred against an ethnic group.[1075] Indeed, it is reported that at the UN site in Malakal, officers had to divide the

[1072] According to the UN report: 'In addition to the SPLA-IO loyal to Riek Machar (RM) and the SPLA-IO loyal to Taban Deng (TD), the following armed groups are now participating in the revitalization process: the Group of Former Detainees, the Federal Democratic Party/South Sudan Democratic Forces (FDP/SSDF) represented by Gabriel Changson Chan; the National Democratic Movement (NDM), represented by Dr. Lam Akol; the National Salvation Front (NAS), represented by Lieutenant General Thomas Cirillo Swaka; the People's Democratic Movement (PDM), represented by Taban Julu Ladimbe Lomuja; the South Sudan National Movement for Change (SSNMC), represented by Joseph Bakosoro; the South Sudan Patriotic Movement,/Army (SSPM/A) represented by Hussein Abdelbagi Akol; the South Sudan United Movement, represented by Denay Chagor; and the South Sudan Liberation Movement, represented by Bapiny Montuil' Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 6 March 2018), 9.

[1073] Sooka in her private correspondence with Aljazeera. 'UN: 'Ethnic cleansing under way' in South Sudan' *Aljazeera* (1 December 2016) available at <https://www.aljazeera.com/news/2016/12/ethnic-cleansing-south-sudan-161201042114805.html> accessed on 30 March 2018.

[1074] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 6 March 2018), 9.

[1075] Alan Boswell notes, in this respect, 'This year I witnessed a Shilluk ethnic defense militia march new graduates to war with songs against the Dinka, after the government annexed traditional land to a neighboring Dinka state. I landed in Wau, a historically diverse provincial town, to emptied streets patrolled by Dinka soldiers after a Dinka militia avenged a Fertit rebel attack by torching a Ferit neighbourhood. At an abandoned medical research facility deep in the forest of Western Equatoria, a Zande rebel leader derided the Zande governor, simply, as "Dinka" — the height, for the rebel, of all insults.' A. Boswell, 'The genocidal logic of South Sudan's "gun class"', IRIN (2016) available at

Dinka, Nuer and Shilluk peoples on an ethnic basis due to conflicts among members. That is to say, ethnic hatred has even reached those who run away from conflict.[1076] Another disturbing fact is that, after July 2016, government forces became more hostile towards the UN and the international community, refusing access to new UN troops to the country and directing attacks against US properties and personnel.[1077]

However, perhaps the most troublesome dimension of the renewed conflict has been its evolution into a total war in that the various parties, particularly the SPLM/A, now effectively target the very presence of ethnic groups (or sections of them) almost as a policy, rather than merely winning the civil war against rebel factions. As Alan Boswell aptly summarised after his field research, 'South Sudan is not Sudan or Syria; no rump state exists. The war is increasingly existential. If the history of mass atrocities should tell us anything: beware the desperate, not just the strong. Thus far, in the brutal logic of South Sudan's war, all sides become weaker and weaker, more and more vulnerable.'[1078]

In the midst of all these developments, six opposition groups[1079] published a joint declaration in April 2017 and called on the international community to investigate,

---

<https://www.irinnews.org/opinion/2016/11/25/genocidal-logic-south-sudan%E2%80%99s-%E2%80%9Cgun-class%E2%80%9D> accessed on 11 May 2018.

[1076] 'When Dinka, Nuer, and Shilluk first sought shelter with the UN in Malakal, violence raged between the ethnic groups inside the camp. The UN head called a meeting and John Chuol, a community police volunteer, stood to speak. "I told her to divide us up, so we'd stop fighting. She did. And it worked," he told me. Tensions calmed, allowing Chuol to start a youth league bringing the groups back together as South Sudanese' Ibid.

[1077] Meservey, 'South Sudan: Time for the U.S. to Hold the Combatants Accountable', 7,9,11. 'Approximately 47 per cent of the total incidents reported in 2017 involved violence against humanitarian personnel and assets. These incidents included killing of 28 aid workers, robbery, looting and threats or harassment.' The OCHA South Sudan, *Humanitarian Access Overview* (January – December 2017), 6 February 2018.

[1078] Boswell, 'The genocidal logic of South Sudan's "gun class"'.

[1079] 'Republic of South Sudan: The Sudan Peoples' Liberation Movement – In Opposition (SPLM –IO); The Sudan Peoples' Liberation Movement – SPLM Leaders (FDs); The National Democratic Movement (NDM); The People's Democratic Movement (PDM); The South Sudan National Movement for Change (SSNMC); The National Salvation Front (NAS)'. Opposition Press Release, 'As Genocide unfolds in South Sudan, much of the world looks away' (17 April 2017) available at <http://www.southsudannation.com/as-genocide-unfolds-in-south-sudan-much-of-the-world-looks-away/> accessed on 30 March 2018.

document and act against the 'ongoing genocide' perpetrated by the SPLA and the government supported Mathyiang Anyor militia.[1080] The declaration claimed that Kiir's regime sought to 'violently expel women, children and the elderly from their homes and villages or exterminate them completely'[1081] and these acts reached the level of genocide in Wonduruba, Yei, Lainya, Pajok and Kajo-Keji in Equatoria, Wau in Bahr el-Ghazal and in the whole of the Upper Nile. A more recent declaration made by the South Sudan Equatorial Community in the Diaspora in May 2018 who called for the ICC to prosecute Kiir and Machar for war crimes, crimes against humanity and genocide.[1082]

As a result of this shift in nature of the situation and the aforementioned resemblances of the tribal relations, the similarities between the Rwandan Genocide and the South Sudan situation began to be more frequently highlighted. Most notably, Sooka, in her address to the UN Human Rights Council, stated that '[t]he stage is being set for a repeat of what happened in Rwanda' by emphasising the patterns of acts of ethnic cleansing, gang rapes, burning villages and so on.[1083] Sooka made this statement in December 2016 and, as she expected, these acts of destruction have intensified in the following two years, accompanied by mass killings and mass forced deportations, which are all vividly documented in the UN Fact-Finding Mission report in 2018. In light of

---

[1080] 'Dinka Mathiang Anyoor: A Dinka militia originally raised in 2012 in Northern Bahr el Ghazal by the former SPLA Chief of Staff Lt. Gen. Paul Malong. Its members were recruited from Dinka cattle guards of the Greater Bahr el Ghazal area, the Titweng and Gelweng, who have historical links with the SPLA and were used as proxy forces during the second civil war and since the CPA against southern militia. At the time, a border war with Sudan was feared, and with tension arising from disputes along the northern boundary of Bahr el Ghazal, local youth were easily recruited to the cause.' Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2 (6 March 2018), 53.

[1081] Opposition Press Release, 'As Genocide unfolds in South Sudan, much of the world looks away'.

[1082] J. Oduha, 'South Sudan group asks ICC to indict President Kiir, Riek Machar', *Daily Monitor* (13 May 2018) available at <http://www.monitor.co.ug/News/National/South-Sudan-group-asks-ICC-indict-President-Kiir-Riek-Machar/688334-4559776-yxvbsd/index.html> accessed on 31 May 2018.

[1083] UNMISS, 'UN human rights experts says international community has an obligation to prevent ethnic cleansing in South Sudan' 30 November 2016 available at https://unmiss.unmissions.org/un-human-rights-experts-says-international-community-has-obligation-prevent-ethnic-cleansing-south accessed on 30 January 2020.

these facts, then, can we conclude that there was developed a normative destructive ethos?

As mentioned earlier, the practice that came fairly close to the notion of 'normative destructive ethos' in case law is that of establishing the general existence of genocide or patterns of destructive acts and overall context and, then, inferring individual genocidal intent and assessing individual responsibility in reference to these findings. This practice has become particularly important in ICTR case law. In one of its most controversial decisions, the ICTR Appeals Chamber in Karemera ruled in favour of taking judicial notice pursuant to Rule 94(A) of the fact that '[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group'.[1084] The Chamber conceptually substantiated this decision by arguing that there was no reasonable basis to dispute that 'there was a campaign of mass killings to destroy, in whole or at least in very large part, Rwanda's Tutsi population'.[1085]

While the doctrinal admissibility of taking genocide as a 'fact of common knowledge' caused opposing views[1086] and, indeed, the decision was a novelty in legal terms; this step is not in fact entirely unprecedented from a conceptual standpoint. For example, in *Semanza*, the Trial Chamber took judicial notice that:

> The following state of affairs existed in Rwanda between 6 April 1994 and 17 July 1994. There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there was a large number of deaths of persons of Tutsi ethnic identity.[1087]

[1084] Prosecutor v Karemera et al. (Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice) ICTR-98-44-AR73(C) (2006) paras 33-7.

[1085] Ibid. para 35

[1086] See in general Jørgensen, 'Genocide as a Fact of Common Knowledge'; Heller, 'International Criminal Tribunal for Rwanda'.

[1087] Prosecutor v Laurent Semanza (Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54) ICTR-97-20-T (3 Nov 2000), Annex A, Para 2.

The difference was, however, the Trial Chamber in *Semanza* took notice of the common occurrence of the 'acts of genocide' on the discriminatory grounds, but avoided to make an assessment regarding the legal status of the situation, since, according to the prevailing legal conceptualisation, such an assessment could have ultimately been made depending on the intentionality of perpetrators.[1088]

The ICTY Trial Chamber in *Karemera*, has produced a similar reasoning in nothing that

> '[i]t does not matter whether genocide occurred in Rwanda or not, the Prosecutor must still prove the criminal responsibility of the Accused for the counts he has charged in the Indictment. Taking judicial notice of such a fact as common knowledge does not have any impact on the Prosecution's case against the Accused, because that is not a fact to be proved.'[1089]

In overturning this decision and considering genocide as 'a fact of common knowledge', the Appeals Chamber disagreed by noting that 'the fact of the nationwide campaign is relevant; it provides, the context for understanding the individual's actions'.[1090] The plausibility and possible impact of the *Karemera* decision have been discussed in the literature from different perspectives. Critics like Kevin Jon Heller argued that the decision went too far in the sense that it makes inferring genocidal intent too easy and undermines the emphasis on the specific *intentionality* by presuming that an overall context indicates the likeliness of an individual acting with genocidal intent.[1091] Others, like Rebecca Faulkner, valued the decision by stating that '[w]hile it is true that in proving genocide the Prosecution has the burden of proving specific intent, or dolus specialis, it is also true that in the case of genocide in Rwanda there is ample evidence to support such a burden.'[1092]

[1088] Ibid para 36.

[1089] Prosecutor v Karemera et al.(Decision on Prosecution Motion for Judicial Notice) ICTR-98-44-R94, 9 November 2005 para 7.

[1090] Prosecutor v Karemera et al. (Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice) ICTR-98-44-AR73(C) (16 June 2006) Para 36.

[1091] Heller, 'International Criminal Tribunal for Rwanda', 159.

[1092] R. Faulkner, 'Taking Judicial Notice of the Genocide in Rwanda: The Right Choice', 27 Penn State International Law Review. 910.

Nina Jorgensen, on the other hand, remarks that 'the actual impact of Karemera is unlikely to be so great since evidence related to the genocidal context would most likely in any case be admissible as relevant evidence from which inferences could be drawn even if judicial notice were denied'.[1093] Indeed, as pointed out in the previous section, not only ICTR case law but also all successful prosecutions of genocide thus far have relied on collective factors, not limited to acts of genocide, in inferring genocidal intent and thus establishing genocide. In *Kayishema and Ruzindana*, the ICTR Trial Chamber highlighted the importance of establishing the general existence of genocide in Rwanda in 1994 for its proceedings and,[1094] after examining acts against the Tutsis, including identification cards, roadblocks, derogatory language in the mass media, it established that genocide took place in Rwanda between April and June 1994.[1095]

The issue to be highlighted here is the conceptual ambiguity in positioning the 'general existence of genocide' in the legal framework and analysing it systematically by clarifying its elements. The thesis has suggested some 'improvements' in this regard. First, it should be recognised that what is referred as 'contextual factors' are not exclusive to genocide. They indicate the existence of a group destruction process and a collective action in this direction. Thus, they in their totality enable individuals to form an 'intent to destroy', but this does not necessarily mean that there exists a situation of genocide, as an 'intent to destroy' is not exclusive to genocide. Second, it is suggested that a collective action of group destruction has a distinct ontological reality, which means a normative destructive ethos does not merely refer to the sum of its participants' individual intentionalities and contributions, rather it is a relationally developed process that extends beyond the sum of individual impacts and may exist independently of individuals' intentions regarding it. This means that, however unlikely it may seem, a normative destructive ethos can exist without any participant individually sharing the ultimate goal of destruction and thus there may not be any principal perpetrator of the crime. This is a natural result of group destruction requiring collective intentionality, which may occur by virtue of compromises between the participating parties and thus no one may individually share the collective goal at the end while acting towards it with

[1093] Jørgensen, 'Genocide as a Fact of Common Knowledge', 893.

[1094] . Kayishema & Ruzindana, [1999], ICTR–95–1–T, Judgment, para 273.

[1095] Ibid. para 291.

knowledge of it. Third, if a normative destructive ethos (collective context) involves establishing or established patterns of acts of genocide, then, it become possible to establish the general existence of genocide.

All these connote that there is (i) an ontological distinction between genocide in an individual and a general sense, (ii) the former requires the existence of the latter, and yet (iii) the 'general existence of genocide' does not mean that participants share the ultimate goal. Therefore, while the ICTR Appeals Chamber in *Karemera* and the Trial Chamber in *Kayishema and Ruzindana*, as well as the UN fact-finding commission in Myanmar, were on point about the essentiality of establishing the general existence of genocide, their efforts to explain this through referring to the 'genocidal intent' of unnamed individuals were inaccurate and created the impression that they were avoiding a detailed examination of the individuals' mental state in establishing their intentionality. To restate the suggestion of the thesis, then, locating a normative destructive ethos and the general existence of genocide is a necessity to be able to move on to assessing individual responsibility, but their existence merely means that there is sufficient context for individuals to commit the crime.

This brings us to the lack of a systematic analysis by clarifying the elements. As the previous section emphasised, the ICTR (and ICTY) case law as well as the UN fact-finding commission established several factors allowing the inference of overall 'intent to destroy',[1096] which the thesis has re-framed as a 'normative destructive ethos'. In relation to South Sudan, all the factors listed in the case law are present. That is, they are being committed in mass fashion, particularly by government forces against ethnic groups who supposedly support the rebellion. The SLPA makes a rebellion and non-rebellion distinction in ethnic terms and largely attacks indiscriminately. In the course of these attacks, there have emerged patterns of targeting group members, artefacts and property; the use of derogatory language; a clear policy to change the demographic and ethnic composition of some areas;[1097] and the scale and brutality of atrocities have been

[1096] UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', para 1441.

[1097] See Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2

more ‘severe’ compared to, for example, Myanmar. If this is the case, however, why is the question of genocide in terms of Myanmar now before the ICJ and characterised in UN reports as ‘genocide’, while the South Sudan situation has not been considered in the same manner? Moreover, UN officers and commentators who worked in the field have been much more reluctant to utter the term genocide, which indicates that they at least intuitively think that the situation has not reached the stage of genocide.

If the factors listed in the case law are the main elements to establish the general existence of genocide – that is, putting it in the terms offered by the study, if the existence of normative destructive dispositions, interaction and practices against the victim group is sufficient to speak of a normative destructive ethos – then the conclusion as regards South Sudan should be in the same direction as Myanmar. However, the study suggests that there is a second element, which is the evolution of the relation between the perpetrators and the victim group into a one-sided dominance in a particular timeframe and space. As the previous section elaborated, this is an inherent aspect of genocide and when the relatedness of Tatmadaw and Roghinya in the Rakhine State since 2016 and Tutsis and Hutus in Rwanda in 1994 is considered, the one-sided destructive dominance of the former groups in these particular timeframes and spatial areas is evident. In South Sudan, however, the conflict has evolved as a civil war between armed forces and one group has not established such dominance in the entire country so far. Thus, even if there emerged normative destructive dispositions, interactions and practices in the relatedness of the belligerent groups, it is not possible to conclude the general existence of genocide in South Sudan. This aspect is an element missing from the analysis and it is what separates cases like South Sudan from Rwanda and Myanmar in respect of the existence of a normative destructive ethos.

Localised Normative Destructive Ethos in South Sudan?

On the other hand, the evidence provided so far indicates the possibility of the existence of such dominance in some particular areas of South Sudan. Therefore, while the study established that genocide has not occurred in South Sudan in overall, it may be possible to argue for the occurrence of a temporally and spatially more limited, Srebrenica-like, genocide. The rest of the analysis in the chapter thus will focus on four emblematic and localised attacks. These attacks selected for two reasons. First, they are all invoked, at

least to some extent, the question of genocide in public and media. Second, these cases largely differ in terms of their nature and extent and thus allow highlighting the different aspects of the proposed framework. In the following paragraphs, the proposed framework of analysis to establish normative destructive ethos will be applied in assessing these situations.

Bentiu (14–16 April 2014):

While it is stated that the nature of conflict in South Sudan later transformed, this does not mean that the discourse of genocide was totally absent between December 2013 and August 2015. Indeed, the term genocide was brought up in the very early stages of the conflict by high-level statesmen such as US Secretary of State John Kerry.[1098] Although there were a number of ethnically driven mass atrocities in the pre-August 2015 period, two particular incidents invoked the word genocide. One of these incidents was the Massacre of Bentiu on 14–16 April 2014.

Bentiu was the capital town of the oil-rich, Nuer-dominant Unity State (see Map Nos. 1 and 2). The current population of the town is at estimated around 7,000 people[1099] (excluding the protection of civilians site established by the UNMISS near Bentiu that harbours over 100,000 people from all across Unity State),[1100] which makes it the 17th largest city in South Sudan. On the other hand, it is thought that the population was around 9,000 at the time of the massacre.

[1098] For example in May 2014 the US State Secretary John Kerry voiced his concern that the conflict raises the question of genocide. 'John Kerry warns of South Sudan genocide', *BBC* (1 May 2014) available at <http://www.bbc.co.uk/news/world-africa-27245641> accessed on 17 May 2018. Similarly US Congressman Frank Wolf noted that 'every indication points to the fact that the crisis currently unfolding in South Sudan is headed the way of Rwanda.' See also L. Iaccino, 'South Sudan Genocide an Abomination and Betrayal, Says Washington', IBT (12 February 2016) available at <https://www.ibtimes.co.uk/south-sudan-genocide-abomination-betrayal-says-us-government-1445793> accessed on 17 May 2018.

[1099] 'South Sudan Population 2018', World Population Review available at <http://worldpopulationreview.com/countries/south-sudan-population/> accessed on 19 May 2018.

[1100] International Organization for Migration, 'Camp Coordination and Camp Management' (Jul-Sep 2017) available at <https://reliefweb.int/sites/reliefweb.int/files/resources/Annex%20Bentiu%20Quarterly%20Update%20-%20Q3%20Sep%202017.pdf> accessed on 19 May 2018.

The Bentiu Massacre took place following the SPLM/A-IO defeating government forces and taking control of the town.[1101] After establishing control, rebel forces initiated a 'manhunt' to identify those opposing them. However, the UNMISS reports revealed that this classification was largely based on ethnicity rather than any particular examination of individual resistance, and without drawing any justifiable distinction between combatants and civilians.[1102] The Nuer-dominant rebellion forces particularly targeted the members of two groups in the town on this basis: Dinka and Sudanese. [1103] Although there has not been an entirely reliable 'body count' and the UN personnel in the field only described 'piles and piles' bodies,[1104] the number of causalities was later reported as between 350[1105] and 1,000.[1106] In addition, there have been a number of rape and abduction incidents against Dinka and Sudanese people in the town.[1107]

[1101] The town was captured and re-captured between the government and SPLA/M-IO forces many time. Indeed, the rebels lost the town three weeks later of the Massacre on May, 4. See Commission on Human Rights in South Sudan, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan' (Human Rights Council Thirty-seventh session, A/HRC/27/74, 2014), 5.

[1102] 'the targeted killing of civilians based on their ethnic origins and nationality in Bentiu'. Report from UN Mission in South Sudan, 'UNMISS condemns targeted killings of hundreds of foreign and South Sudanese civilians in Bentiu' (21 April 2014) available at <https://reliefweb.int/report/south-sudan/unmiss-condemns-targeted-killings-hundreds-foreign-and-south-sudanese-civilians> accessed on 19 May 2018.

[1103] Ibid.

[1104] F. Barbash, 'An 'abomination': Slaughter in the mosques and churches of Bentiu, South Sudan' *Washington Post* (23 April 2014) available at <https://www.washingtonpost.com/news/morning-mix/wp/2014/04/23/an-abomination-slaughter-in-the-mosques-and-churches-of-bentiu-south-sudan/?utm_term=.95dc9f41b804> accessed on 22 April 2018.

[1105] 'South Sudan conflict: Bentiu 'ethnic slaughter' condemned', *BBC* (21 April 2014) available at <https://www.bbc.co.uk/news/world-africa-27102643> accessed on 22 April 2018. See also Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan' (Human Rights Council Thirty-seventh session, A/HRC/27/74, 2014).

[1106] A. Adam, 'Bentiu Massacre reminiscent of Darfur' (*World Policy*, 2 May 2014) available at <https://worldpolicy.org/2014/05/02/bentiu-massacre-reminiscent-of-darfur-genocide/> accessed on 22 April 2018.

[1107] The African Union Commission of Inquiry on South Sudan, 'Final Report of the African Union Commission of Inquiry on South Sudan' (15 October 2014), 169 ff. The most of these atrocities took place at Kalibalek Mosque, Bentiu Civil Hospital, a Catholic church and an empty World Food Program, where civilians sheltered during the clashes. Barbash, 'An 'abomination': Slaughter in the mosques and churches of Bentiu, South Sudan'.

The Bentiu massacre[1108] significantly escalated international concerns over the overall conflict at the time.[1109] The reason for that appears to be some disturbing similarities with the Rwandan Genocide.[1110] For example, it is reported that, just as the *Kangura* newspaper did in Rwanda, the *Al Entibaha* newspaper 'disseminated hate speech against Darfuris in South Sudan' before and during the Bentiu Massacre.[1111] More strikingly, it is claimed by witnesses[1112] that, on 15 April, an SPLM/A-IO officer came on the air, on Radio Bentiu FM, and stated that 'Dinka SPLA and JEM had raped Nuer women and now their wives were pregnant with Dinka and JEM babies' and thus 'called upon young men to meet at the SPLA 4th Division Headquarters the next day in order to go to Dinka areas and do what the Dinka did to their wives and girls'.[1113] The selectivity of the perpetrators was perhaps best demonstrated during the atrocities in the mosques, in which Ethiopians and Eritreans were separated by the rebels, who escorted them towards the UNMISS site or another safe space, while the Sudanese were

---

[1108] D. Smith, 'Bentiu massacre is game-changer in South Sudan conflict, says UN official' *The Guardian* (22 April 2014) available at <https://www.theguardian.com/world/2014/apr/22/bentiu-massacre-south-sudan-united-nations> accessed on 22 April 2018.

[1109] 'A New Depth of Horror' *The Economist* (26 April 2014) available at <https://www.economist.com/middle-east-and-africa/2014/04/26/a-new-depth-of-horror> accessed on 22 April 2018.

[1110] S. Oakford, 'Disturbing Echoes of Rwandan Genocide Emerge in South Sudan' *Vice News* (21 April 2014) available at <https://news.vice.com/article/disturbing-echoes-of-rwandan-genocide-emerge-in-south-sudan> accessed on 22 April 2018; J. Prendergast and J. Fleischner, 'Before There's a Genocide: The Slaughter in South Sudan Must Stop', Daily Beast (23 April 2014) available at <https://www.thedailybeast.com/before-theres-a-genocide-the-slaughter-in-south-sudan-must-stop> accessed on 22 April 2018. That said, Al Jazeera rightfully opined that the incident does not come close to what happened in Rwanda. J. Copnall, 'South Sudan's massacre among many', Aljazeera (23 April 2014) available at <https://www.aljazeera.com/indepth/opinion/2014/04/south-sudan-massacre-among-man-2014423103845492493.html> accessed on 22 April 2018.

[1111] M. Kielsgard, *Responding to Modern Genocide: At the Confluence of Law and Politics* (Oxon: Routledge ,2015) 157 at footnote 41.

[1112] The African Union Commission of Inquiry on South Sudan, 'Final Report of the African Union Commission of Inquiry on South Sudan' (15 October 2014), 135.

[1113] United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report' (8 May 2014), para. 247,248. See also Keith Somerville, 'South Sudan: how hate radio was used to incite Bentiu massacres' *African Arguments* (24 April 2014) <http://africanarguments.org/2014/04/24/south-sudan-how-hate-radio-was-used-to-incite-bentiu-massacres-by-keith-somerville/> accessed 22 April 2018.

attacked.[1114] It is also reported that rebel forces blocked roads leading to the UNMISS site before the clashes began and thus controlled the civilian population's movement towards safe areas.[1115]

The detailed UNMISS report published in 2015 opined that the atrocities in Bentiu constituted war crimes and those who responsible must be identified and prosecuted.[1116] Although the way the atrocities unfolded resembled Rwanda and Darfur in certain aspects and were considered 'genocidal atrocities' by some,[1117] there has been no particular official or academic source that argues for qualification of the campaign as 'genocide'. While the study agrees with this consideration, it appears important to briefly examine the reason 'why' for demonstrative purposes. The reason for this has been the lack of a normative destructive ethos and – even if a normative destructive ethos and patterns of acts of genocide are assumed for a moment - the lack of 'substantiality' of the part affected.

The issue of substantiality will be examined in the relevant section below. In respect of the normative destructive ethos, on the other hand, applying the proposed framework does not conclusively indicate to the presence of such an ethos. It is rather evident that the relation of Nuer offenders and Sudanese and Dinka of Bentiu turned into a one-sided dominance in that particular timeframe and area. However, it appears unlikely to establish that the perpetrator group was in fact developed normative destructive dispositions, interactions and practices that directed towards the existence of a protected group as such.

To concretise, by considering the four most common factors singled out in the previous section, (i) the timeframe of the attack, its reactive nature and the overall situation of the conflict in the pre-2015 era do not allow decisively speaking of 'patterns' of targeting group members, artefacts and property. Instead, the attack was mostly reactionary and

---

[1114] United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report' (8 May 2014), para. 245,246.

[1115] United Nations Mission in the Republic of South Sudan, 'Attacks on Civilians in Bentiu & Bor April 2014', (9 January 2015), para 28.

[1116] Ibid. para 120.

[1117] 'John Kerry warns of South Sudan genocide', *BBC* (1 May 2014); See also Iaccino, 'South Sudan Genocide an Abomination and Betrayal, Says Washington'.

sought revenge by humiliating and harming Dinkas and Sudanese, rather than targeting their existence as such. For example, the UNMISS reports indicate that sexual assault was ultimately used more as a means of punishment or revenge, rather than as a method to destroy the Dinka presence in the town.[1118] Similarly, neither killings nor the destruction of artefacts and houses were systematically undertaken. On the other hand, while (ii) the use of derogatory language and hate speech against the victim groups has been well-documented, the evidence does not indicate (iii) a particular plan or policy that aims to changing the demographic and ethnic composition of an area in a concise way. Finally, (iv) the scale of the atrocities is relatively small, which cannot on its own t indicate he existence of a normative destructive ethos.

Juba (2013-2014):

The second pre-2015 case that raises the questions of genocide is the atrocities that took place at the very beginning of the conflict in Juba. Compared to the Bentiu Massacre, the scale of these atrocities was larger and there are ongoing genocide claims regarding them,[1119] which the Nuer community commemorate annually as the 'Juba Genocide'.[1120] Admittedly, there are some unsettling similarities between incidents that occurred in Juba and in Kibuye, and according to the ICTR Trial Chamber in *Kayishema and Ruzindana*, a 'plan of genocide was implemented'.[1121]

The examination of the Trial Chamber in respect of Kibuye was preceded by a broader examination of the genocide in Rwanda and took place under the title of 'Did genocide

---

[1118] United Nations Mission in the Republic of South Sudan, 'Attacks on Civilians in Bentiu & Bor April 2014', (9 January 2015), para 120.

[1119] K. Wechtuor et al, *The Nuer Nation* (Create Space Independent Publishing Platform, 2016), ch1.

[1120] 'Nuer America Christian Mission Network to Commemorate the "December 2013 Juba Genocide" in Nebraska Next Week' South Sudan News Agency (11 December 2014) available at <http://southsudannewsagency.org/index.php/2014/12/11/nuer-america-christian-mission-network/> accessed on 11 April 2018; 'A calls to joins South Sudanese to commemorate the December 15, 2013 at Trump Tower in New York on December 15, 2016' *African Press* (2 December 2016) available at <https://africanspress.org/2016/12/02/a-calls-to-joins-south-sudanese-to-commemorate-the-december-15-2013-at-trump-tower-in-new-york-on-december-15-2016/> accessed on 11 April 2018; 'The Forgotten Juba Nuer Genocide (JNG)' *African Press* (19 December 2017) available at <https://africanspress.org/2017/12/19/the-forgotten-juba-nuer-genocide-jng/> accessed on 11 April 2018.

[1121] Prosecutor v. Kayishema and Ruzindana, [1999] ICTR-95-1, Judgement, Para 312.

occur in Rwanda and Kibuye in 1994?'[1122] In Kibuye, the crash of the president's plane was the triggering event. According to the Trial Chamber, after the president's death a campaign of persecution began 'against the Tutsis based on the victims' education and social prominence. Simultaneously, the Tutsi population, as a whole, suffered indiscriminate attacks in their homes. Perpetrators set on fire their houses and looted and killed their herds of cattle.'[1123] Tutsi women were systematically raped, and Tutsis were 'massacred by Hutu assailants who sang songs whose lyrics exhorted extermination during the attacks'.[1124] The ICTR documented the planned nature of the attacks by referring to short meetings involving local officials after the plane crash to address the 'Tutsi problem'; the systematic distribution of machetes by officials; roadblocks and deliberate separation of Tutsis from Hutus.[1125] The Trial Chamber also observed that attacks forced the Tutsi population's mass movement. By considering this evidence, it was concluded that 'persons in position of authority used hate speech and mobilised their subordinates [...] who in turn assisted in the mobilisation of the Hutu population to the massacre sites. [...] [where] Tutsis [were] killed, based on their ethnicity'.[1126] Against this background, the Trial Chamber concluded that genocide occurred in Kibuye in 1994.

The situation in Juba exhibited some noticeable similarities with Kibuye. To summarise, after the adoption of some party documents in the absence of the opposition (who boycotted the meeting) on 15 December and the attempt to disarm predominantly non-Dinka soldiers, fighting broke out in the SPLA Headquarters barracks along ethnic lines.[1127] According to the UNMISS report, what was witnessed in the following days was the 'most egregious violations occurring on a large scale'.[1128]

[1122] Ibid. para 273

[1123] Ibid. para 293.

[1124] Ibid para 294.

[1125] Ibid. paras. 296-307

[1126] Ibid. para 312.

[1127] Human Rights Watch, 'Ending the Era of Injustice Advancing Prosecutions for Serious Crimes Committed in South Sudan's New War' (2014), 39, 40 available at <https://www.hrw.org/sites/default/files/reports/southsudan1214_ForUpload_0.pdf> accessed on 21 May

In the early morning of 16 December, troops who supported Machar were defeated and chased down towards civilian neighbourhoods. 'There, SPLA of Dinka origin reportedly began targeting civilians of Nuer origin, who were beaten, arrested and killed.'[1129] Strikingly, most of the civilian killings came after house-to-house and hotel-to-hotel searches that were undertaken in those areas where the Nuer population live.[1130] It is reported that soldiers of Dinka origins and 'opportunistic criminal elements' targeted pre-identified Nuer homes or tried to identify Nuers 'with a language test or by [traditional] facial scarring'.[1131] Human Rights Watch ('HRW') remarks in this context that 'the fact that the abuses took place at the same time in different places [...] suggests organisation and planning'.[1132] According to some witness statements, civilians of Nuer

---

2018. L. Blanchard, 'The Crisis in South Sudan', Congressional Research Service, (27 December 2013), 4 available at <http://www.refworld.org/pdfid/52cff1494.pdf> accessed 02 April 2018.

[1128] United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report' (8 May 2014), 10, 11: 'The allegations of widespread and ethnically motivated 'mass killings, enforced disappearances, sexual violence, arbitrary arrest and detentions, abductions, threats and harassments, looting, and the destruction of public and private property' are documented in the following days by the UNMISS officers and Human Rights Watch through their interviews and site visits'.

[1129] Ibid. 10.

[1130] Ibid. 11. According to the report, '[n]umerous witnesses who spoke to the HRD told consistent stories of house-to-house searches in multiple neighbourhoods across Juba, notably Jebel, Newsite, Mia Saba, Lologo, Khor William, Gudele, Eden, and Mangaten. These neighbourhoods are spread across Juba and cover large areas of the city: Jebel in the southwest; Mia Saba in the northern, central city; Lologo and Khor William near the southeast; and Newsite in the north. Many, such as Mia Saba and Newsite, are known as predominantly Nuer residential areas. Many also border on military barracks, including Jebel which is near the Giada barracks; Lologo near Khor William; and Newsite which is adjacent to the SPLA Headquarters at Bilpam and an SPLA armoury'. Ibid. 18. See also Amnesty International, 'Nowhere Safe: Civilians Under Attack in South Sudan,' (AFR65/003/2014/en/ 8 May 2014) <https://www.amnesty.org/en/documents/> accessed 21 May 2018.

[1131] Ibid. 11-12. It is noted in the report, '[a]ccording to sources, security forces targeted men of Nuer ethnicity. Several sources relayed how Nuers were identified by facial markings; if an individual was not identifiable by facial markings, security forces reportedly questioned them in the Dinka language or asked about their ethnicity. If a person questioned in this way admitted to being Nuer, could not speak Dinka, or was able to speak Nuer, that person would be shot. Several Nuer survivors reported that they believe their lives were spared because they could speak other languages such as Anyuak or Dinka or because they claimed to be members of non-Nuer ethnic groups.' Ibid. 18,19.

[1132] Human Rights Watch, 'Ending the Era of Injustice Advancing Prosecutions for Serious Crimes Committed in South Sudan's New War' (2014), 10. Indeed it is also noted in the UNMISS report that: 'In many reported instances, members of the security forces seemed to know which houses were occupied by Nuer families following discussion with Dinka neighbours; in some instances, the Dinka members of the security forces were neighbours of the Nuers they targeted. The perpetrators were reportedly primarily

origin 'were being killed like chickens'[1133] at, inter alia, police stations, while trying to flee, and occasionally tied together and taken to 'killing fields' as well as being targeted in their houses.[1134]

The male population appeared to be the main target of the killings, yet women and children were also subjected to violence – particularly sexual assaults.[1135] It is specified in this respect that incidents of sexual violence, 'including rape, including penetration with objects, forced abortion and sexual harassment',[1136] were committed by Dinka members of the SPLA and the police force.[1137] Witnesses and victims also shared that Nuer properties were systematically looted, set on fire and demolished by SPLA soldiers and tanks.[1138] 'Credible allegations have been received that, after people fled their homes in search of safety, SPLA or other security forces have occupied them. This is particularly acute in areas targeted in the initial searches.'[1139] It is also noted in a

---

from the SPLA and the SSNPS, although some victim testimonies also implicate the NSS, the Wildlife Service, and the Fire Brigade. Many of the perpetrators were recognizable to witnesses as members of the Dinka ethnicity.' United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report' (8 May 2014), 21.

[1133] Ibid. 21.

[1134] United Nations Mission in the Republic of South Sudan, 'Interim Report on Human Rights Crisis in South Sudan', (21 February 2014), 11.

[1135] United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report', (8 May 2014), 49,50.

[1136] United Nations Mission in the Republic of South Sudan, 'Interim Report on Human Rights Crisis in South Sudan', (21 February 2014),11.

[1137] United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report', (8 May 2014),18. It is also added in this report that, 'in the days following 15 December, Nuer women were [...] assigned to soldiers who repeatedly raped them. In some instances, survivors were subsequently taken as "wives" by the soldiers.' Ibid. 49,50.

[1138] Ibid. 19. 'From various accounts, security forces entered neighbourhoods on foot, in official vehicles, and/or in tanks. Several sources reported that security forces ran over homes with the tanks. Reportedly, in some cases the security forces or even neighbours announced in Arabic that people should come out of their homes. At least one witness with some knowledge of the Dinka language indicated that in his area, an individual called out in the Dinka language that Dinkas should not be concerned as Nuers were the ones being sought'.

[1139] Ibid. 19.

United States Department of State report that, from 'December 16 through the end of the year, an unknown number of Nuer civilians in Juba disappeared'.[1140]

Attacks against Nuer civilians in Juba reportedly continued for a considerable period and SPLA soldiers resumed 'conducting house-to-house searches for Nuers, who were also targeted on their way to and from safe havens'.[1141] While there has been a consensus that the Nuer population were targeted on an ethnic basis, the number of causalities is not clear since the government only provided limited access[1142] and different counts are given, from around 1,000[1143] to 20,000.[1144] Similarly, it is not clear how many of Nuer people in Juba have been victims of non-fatal assaults. One certain fact, however, is that thousands of people, predominantly the Nuer population, fled from Juba as a result of these systematic attacks and, by 22 April 2014, 'over 32,000 civilians were seeking protection in UNMISS sites in Juba'.[1145] Even though the number of Nuer who had been living in Juba cannot be verified, Juba has been historically a Bari-dominated town and only after independence did the representation of other

---

[1140] United States Department of State, 'South Sudan 2013 Human Rights Report', Country Reports on Human Rights Practices for 2013, Bureau of Democracy, Human Rights and Labor, 19 available at <https://www.state.gov/documents/organization/220374.pdf> accessed on 21 March 2018.

[1141] United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report' (8 May 2014), 2.

[1142] J. Henry, 'Dispatches: Is the Truth Off-Limits in Juba, South Sudan?', Human Rights Watch (18 February 2014) available at <https://www.hrw.org/news/2014/02/18/dispatches-truth-limits-juba-south-sudan> accessed on 22 May 2018.

[1143] United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report', (8 May 2014). According to the US State Department report: 'During the weeks that followed, Dinka members of the PG and other security forces reportedly conducted targeted killings of Nuer civilians across the city. The events led to armed conflict between government forces and newly formed antigovernment forces in several states across the country and ethnic violence by civilians. By the end of the year, at least 1,000 individuals were killed and approximately 180,000 displaced as a result. The violence continued at year's end.' United States Department of State, 'South Sudan 2013 Human Rights Report', 1.

[1144] N. Kelly, 'Why the World Ignores South Sudan's Killing Fields: Part II—Nameless, numberless and dead in South Sudan', War is Boring (2 June 2015) available at <http://warisboring.com/why-the-world-ignores-south-sudan-s-killing-fields/> accessed on 22 May 2018; 'Nuer America Christian Mission Network to Commemorate the "December 2013 Juba Genocide" in Nebraska Next Week' *South Sudan News Agency* (11 December 2014).

[1145] United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report' (8 May 2014), 18.

ethnicities increase. It is certain in this respect that the Nuer were largely a minority in Juba, which was projected to have had a total population of around 450,000 at the time of the attacks.[1146] In light of these facts, it would be safe to estimate, then, that most, if not all, the Nuer population in the town actually disappeared as a result of the attacks.

The HRW and UNMISS reports concluded that the nature of the documented attacks and information suggesting coordination and planning afford a reasonable ground to conclude that crimes against humanity were committed during the conflict.[1147] Arguably, the difficulty in proving 'intent to destroy a substantial part as such' has stopped these reports bringing up the question of genocide, despite the Nuer presence having been largely eradicated from Juba because of the campaign. Indeed, from an individualistic viewpoint, it is unlikely to be decisively established that the intent was the 'physical or biological' destruction of all Nuer individuals in Juba. Not only was any explicit expression of such 'will' absent, but there have also been reoccurring witness and victim statements that SPLA soldiers transported some Nuer, on whatever criteria, to the UN protection site after releasing them from detention or forced them to leave Juba, instead of killing them or committing any other genocidal acts.[1148] The selective

---

[1146] In the 2008 census the population of Juba was 368,436. The Editors of Encyclopaedia Britannica, 'Juba', *Encyclopaedia Britannica*, available at <https://www.britannica.com/place/Juba> accessed on 22 May 2018) When the population trends is considered, it can be estimated that around 450.000 people were living in Juba.

[1147] United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report' (8 May 2014), 3. Also see U.N. Office of the High Commissioner for Human Rights (OHCHR), 'Pillay Urges South Sudan Leadership to Curb Alarming Violence Against Civilians' (24 December 2013) available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14140&LangID=E> accessed on 11 April 2018.

[1148] United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report' (8 May 2014), 20: '[...] On 17 December, a Nuer witness reported that after being arrested on the street by SPLA soldiers in Khor Romla, near the Khor William area, he was detained along with 200 Nuer males, both soldiers and civilians and including some children, in containers in a factory in Jebel Kujur area. Many of the men were released and transported to the UNMISS PoC area on 18 December after being interrogated by two senior SPLA officers. [....] Also in Mia Saba, several witnesses report that, on 16 December, they were taken from their houses by Dinka SPLA in a group of around 40 Nuer men, tied together with bed sheets and forced to walk to the Newsite cemetery. Along the way, a witness saw the soldiers bringing different men being taken from their homes. Smaller groups of between four and eight men were shot dead as they walked. One witness reported that, every time the group came across a dead SPLA soldier, they killed four or five men from the group. This reportedly took place between two

killing has been arguably the main difference between Kibuye and Juba situations. This, however, does not pose any problem in light of the framework offered in the thesis as it is established that the scope of the term 'to destroy' cannot be read as 'to physically or biologically destroy'.

The proposed framework may offer a conceptually more coherent and sensible way to examine the Juba case by reducing the heavy and unnecessary emphasis on the subjective side of the judicial conceptualisation and establishing a normative destructive ethos would be the first step. Once again, it appears rather evident that relatedness between the groups evolved into a one-sided, destructive dominance in a particular timeframe and area. Thus the main examination should be on whether the perpetrator group developed normative dispositions, interactions and practices that directed towards the destruction of the relevant part of the Nuer group. In this regard, the relations and practices developed by the SPLA (and other offenders) in Juba from 15 December onwards should be examined.

Unlike the Bentiu situation – where the atrocities occurred in a reactionary fashion and without an ulterior goal – the attacks in Juba had a coordinated and planned. SPLA soldiers operated in distinct neighbourhoods in a similar manner and took particular courses of destructive action against a pre-defined ethnic community. Unlike Kibuye, however, mobilisation of the civilians was not necessary due to the manpower of the SLPA. The attacks were evidently not limited to the 'bodies of the Nuer people' but also targeted 'the Nuer presence in Juba', through – in addition to killings, sexual and physical violence – the systematic demolishment of Nuer buildings, forced deportations, abductions and so on.

In other words, the attacks in Juba exhibited (i) patterns of targeting group members, artefacts and property that had taken place for some weeks. (ii) The use of derogatory language and hate speech against the victim group has been documented in UNMISS reports. As is already pointed out, (iii) the evidence also indicates a particular plan or policy that aims to change the demographic and ethnic composition of an area in a

---

and three times during the walk. Around 20 of those who reached the cemetery were then shot. Those who were not shot were detained for three days and then released'.

concise way. The information provided by the aforementioned reports strongly indicates that SPLA soldiers acted to put an end to the Nuer presence in Juba, most likely because any such presence was perceived as a threat to the government. This action against the Nuer has been rather successful. Finally, when all these factors are considered in conjunction with (iv) the scale of atrocities, which were more or less similar to the Srebrenica situation, and the means used in the atrocities (e.g. systematically demolishing Nuer houses with tanks), it is possible, from the perspective offered in the study, that a normative destructive ethos was present during the Juba atrocities against the Nuer population in Juba. However, a determination of the occurrence of genocide also depends on the second (pattern of genocidal acts) and third (substantiality) steps of the proposed test, which will be examined in the next sections in relation to Juba.

Pajok (2017):

As is mentioned, the nature of the overall atrocities significantly changed after 2016. In February 2018, the UN Human Rights Commission published the most detailed examination to date and concluded that war crimes and crimes against humanity had been committed in the previous two years by various parties, but mostly by government forces.[1149] In its reports, the UN Commission particularly focused on emblematic cases in Central and Eastern Equatoria, Western Bahr el Ghazal and Upper Nile State. In all these cases the civilian population has been targeted (usually after a significant loss for the SPLA in that region) with a blanket assumption that inhabitants from ethnic groups support the rebels.[1150] That said, two particular situations explored in the report requires

[1149] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2 (6 March 2018).

[1150] In Wau town of Western Bahr el Ghazal, for example, the way Luo and Fertit communities are targeted since February 2016 resembles what happened to Nuer in Juba in 2013. After two army generals of SPLA were killed in a rebel ambush, 'the attackers went from house to house targeting Luo and Fertit communities and asking people's ethnicity or checking whether they could speak Dinka prior to shooting them'. Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2 (6 March 2018). 81, para 426. In the following months these attacks continued and thousands of people were displaced, subjected of rape and lost their properties due to the presumption attached to their ethnicity. The UN commission of Human Rights remarked that, in addition to other crimes against humanity, the targeted and systematic nature of the attacks against the Fertit community 'on the basis of their perceived support for the opposition may amount to the crime of persecution'. (ibid

for attention, at least from the perspective developed in the thesis, in terms of the question of genocide and substantiality.

The first of these cases is the SPLA campaign that took place in April 2017 against the Acholi clan in Pajok, Eastern Equatoria.[1151] Pajok was a relatively quiet *Payam* (a political subdivision of counties) for a long time, yet there existed an underlying political division between the Acholi clans. While the Acholi-Pajok clan purportedly supported the SPLA-IO, the rest took the SPLA side. On 3 April 2017, within the scope of an operation that allegedly targeted the SPLA-IO base near Pajok, government forces directly attacked the town and specifically targeted civilians in order to punish the local population for their alleged support for the rebels.[1152] The HRW reported that soldiers often killed civilians at close range.[1153] It is also reported that government forces told 'civilians that they were there to fight the rebels only and to return to their homes. Several of those who obeyed this instruction were subsequently shot and killed.'[1154] In addition to the number of killings,[1155] incidents of rape, looting and destruction of property were reported. Even though mass graveyards have been found and there are some witness statements, the number of individuals suffering atrocities is not certain,

---

para 428.) 'The International Organization for Migration (IOM) estimated that between 22,000 and 25,000 people were displaced from their homes in Wau town as a result of the violence on 10 April 2017. This included more than 16,400 new arrivals at the UNMISS PoC site, bringing the site's total population to 41,700 which was already the most crowded PoC site'. (Ibid. para 385 (also see para. 452). The study's assessment regarding the situation would not be that different compared to the one already offered as to the Juba case. That is, even though the genocidal acts has been constantly resorted to as a result of the destructive normative relations and practices developed among the perpetrators against the Fertit and Luo populations in the area, the target of these relations and practices was not, according to the revealed evidence at least, a substantial part, but individuals who are labelled as threat or traitor because of their ethnic identity.

[1151] Ibid. 67.

[1152] Ceasefire and Transitional Security Arrangements Monitoring Mechanism ('CTSAMM'), *Report 38 – Killing and Displacement of Civilians in Pajok* (15 May 2017), paragraph 3.2.

[1153] 'Soldiers Assume We Are Rebels', Human Rights Watch (01 August 2017) available at <https://www.hrw.org/report/2017/08/01/soldiers-assume-we-are-rebels/escalating-violence-and-abuses-south-sudans> accessed on 31 May 2018.

[1154] CTSAMM, *Report 38 – Killing and Displacement of Civilians in Pajok.*

[1155] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 6 March 2018), 67.

mostly because access to the area has been largely rejected or very limited.[1156] It is certain, however, that those who suffered 'acts of genocide' amounted to at least hundreds.[1157] According to the UN Commission, the evidence indicates that 'the civilian population fled as a direct result of the attack'[1158] and the town population reduced from around 50,000 to 1,200 in just a few months due to killings and displacements.[1159]

The Commission concluded that the attack against the Acholi-Pajok clan may constitute a crime against humanity of persecution[1160] and did not get into the question of genocide. Admittedly, the limited access to the evidence diminishes the opportunity of making a healthy assessment. That being said, the situation is worth to consider from the study's perspective, particularly because it poses an intriguing challenge in terms of the assessment of 'substantiality', which will be discussed in the following sections. Here, however, it will be first asked whether the attack against Acholi-Pajok indicates to the existence of a normative destructive ethos from the SLPA side.

Admittedly, while the motive of the SPLA was clearly to punish the Acholi-Pajok people and the one-sided dominance in a particular timeframe and space is evident for this situation as well, the nature of the normative relations, dispositions and practices cannot be fully commented on due to limited information. On the one hand, it may be argued that the reports demonstrate – particularly considering that acts of looting and excessive destruction of homes accompanied killings, rape and forced deportations – that government forces might have developed destructive dispositions and practices that directed towards the group in question. Furthermore, the group's spatial position has been one of the key elements that defines and sustains its unity and therefore forcing the group to go somewhere else while significantly reducing their chances of coming back

---

[1156] 'the Commission finds that there are reasonable grounds to believe that the SPLA deliberately attempted to prevent information about the events from Pajok from becoming public and used road check-points to prevent international observers from accessing Pajok immediately after the killings. International observers reached Pajok on 12 April 2017, but were denied full access to the town and not permitted to visit the more-remote Pugee boma' Ibid. 71,72.

[1157] Ibid. 69.

[1158] Ibid. 73,

[1159] Ibid. 71.

[1160] Ibid. 73.

may indicate targeting the reproduction of those 'crystallised' and 'objectivicated' interactions and practices that underpin the group.

On the other hand, the evidence is not sufficient to conclude whether the destructive disposition and practices were aiming to change the demographics of the region and were deliberately designed to force the Acholi-Pajok people out or punish them for their alleged support for the rebellion. In other words, while patterns of targeting group members, artefacts and property were evident in Pajok, it was not similarly evident whether these acts were directed against the existence of the group or in order to punish individuals, which triggered mass deportations.

That said, if evidence is found in the future supporting atrocities selectively committed to put an end to the existence of the entity in the region as such, rather than 'punishing' them for their alleged support for the rebellion, that may support a case of genocide. On the other hand, as the next sections will examine, even if a destructive ethos is established, the second and third steps of the proposed test may rule out a conclusion of genocide in respect of the attacks against the Acholi-Pajok people.

Yei River (2016-2017):

The other possible case of genocide covered in the report is the situation in Central Equatoria, home of several Bari-speaking tribes situated in different counties.[1161] The rise in tension in this region started in 2015, with the exacerbation of the strife between Equatorians and the SPLA-backed Dinka pastoralists after the number of states increased and an SPLA officer was assigned as governor. This led to an acceleration in SPLA-IO activities in Central Equatoria, an area actually that had managed to largely stay out of the ongoing conflict until that point (except Juba). On top of the already brewing tension, when Machar had to flee in July 2016[1162] he and his forces travelled

[1161] e.g. Kakwa, Bari, Pajulu, Baka, Mundu, Avukaya, Kelico and Lugware. See Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 6 March 2018), 54, para 280. The other tribes, including Dinka and Nuer, have been also historically present, albeit as minorities and predominantly in Juba.

[1162] In fact his initial plan was to establish a base in Lainya Country, Central Equatoria (See Map no.3), but the SPLA forces did not allow to this to happen. Small Arms Survey: Human Security Baseline

towards Central Equatoria. This triggered a surge in violence between SPLA and SPLA-IO forces in the area.[1163] Although Machar could not eventually establish his base in Equatoria as he initially planned and ended up in the Democratic Republic of Congo, the SPLA-IO presence and ambushes continued in Central Equatoria. That prompted retaliatory attacks by the SPLA and Mathiang Anyoor in Yei, Lainya and Kajo-Keji counties (see Map No. 4). The rationale for these attacks was, once again, alleged support for rebels in the tribes situated in those counties.[1164]

The terror against civilians in Yei, Lainya and Kajo-Keji has been amongst the most severe in the South Sudan conflict so far.[1165] The UN Commission has reported substantial numbers of civilian killings in these three counties in the last two years.[1166] Additionally, people have been forced to leave their homes due to threats and mass violence. For example, in the very early stages of the conflict, the governor explicitly threatened the people of Yei by stating that they would pay the price for what is

---

Assessment for South Sudan and Sudan, Number 28, 'Spreading Fallout: The Collapse of ARCSS and the new conflict along the Equatorias-DRC border' (2017), 3,4.

[1163] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 6 March 2018), 55.

[1164] Expectedly, the youth of Bari ethnic group, who suffered most of these attacks, act to resist, which first led to them joining to the SPLA-IO and eventually to the establishment of NAS as is previously mentioned. The UN Report notes, in this respect: 'The situation was further complicated when SPLA Deputy Chief of General Staff for Logistics Lt. Gen. Thomas Cirillo, from Central Equatoria, resigned from the SPLA on 11 February 2017, accusing the SPLA and Mathiang Anyoor of atrocities against civilians, including in the Equatorias. Lt. Gen. Cirillo founded the opposition group the "National Salvation Front" (NAS) on 6 March 2017. A number of SPLA-IO Generals in Central Equatoria defected to join the NAS. Among those defections was the SPLA-IO commander for Central Equatoria who defected on 28 July 2017'. Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 6 March 2018), 63.

[1165] R. Maclean, 'People 'burned to death in homes' by South Sudan's government militias' The *Guardian* (4 July 2017) available at <https://www.theguardian.com/global-development/2017/jul/04/people-burned-to-death-in-homes-by-south-sudan-government-militias-amnesty-report> accessed on 22 May 2018.

[1166] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 6 March 2018), 57.

happening, which led to a mass exodus of civilians (60–70% in total)[1167] to Uganda in a few days.[1168] It has also been documented that the livelihoods of the civilian population have been deliberately destroyed in order to 'clean' the targeted area of these ethnic groups. Houses have been burnt on an industrial scale with the same purpose. According to satellite images, 18,318 structures were destroyed on just the route from Yei town in Central Equatoria to the Uganda border in a few months in 2017.[1169] Moreover, sexual violence has been an issue as severe as the killings.[1170] It is noted in this context that:

[1167] 'OCHA visited Yei in September 2016 and found that most of the civilian population had fled. The team reported that "continued insecurity in Yei has resulted in the displacement of around 60-70 percent of the population. The team noticed the emptying of most neighbourhoods, with locked homes visible in all communities. Only those without the resources for transport or other means to leave town remain." According to the most recent census, conducted in 2008, Yei town then had a population of 201,443. By September 2016, OCHA estimated that only 46,000 to 61,300 people remained in the town. Indeed, over 163,000 people had crossed to Uganda between 8 July and the first week in September 2016, with over 4,000 people arriving every day. Additionally, 15,700 refugees arrived in DRC in August and September 2016.' Ibid. 59.

[1168] 'A witness told the Commission that following the incident, the Governor declared, in a public speech, that "all the youths of Yei were rebels, especially the "Boda-Boda" drivers", and that the "intelligence and military forces should look for the youths of Yei and 'they should be taken care of'.' Ibid. 56.

[1169] 'UNITAR - UNOSAT identified a total of around 7,800 destroyed structures within the analysis extent of the current map (approximately 600 square kilometers). The whole analysis over the Nahr Yei district covers an area of approximately 3,640 square kilometers, and the results show over 18,300 destroyed structures.' NOSAT, *Satellite Density of Damaged Structures in Yei District*, March 2017, ERN D101201-D101201. 308. available at <http://www.unitar.org/unosat/map/2569> accessed on 31 May 2018; CTSAMM also visited Lainya, Morobo, Lutaya, Sanzasiri, and Glumbi in January and February 2017 and noted in each case large numbers of abandoned, destroyed, and burned homes. CTSAMM, *Report 033, Burning of Homes in the Yei Area* (28 March 2017) available at <http://ctsamm.org/wp-content/uploads/2017/08/CTSAMM-REPORT-033-BURNING-OF-HOMES-IN-THE-YEI-AREA.pdf> accessed on 31 May 2018.

[1170] For example 'Multiple women and girls from the Lainya and Yei areas interviewed by the Commission also described how they were gang raped by government Dinka soldiers, often while they were fleeing insecurity in the Lainya and Yei areas. A 23 year-old woman from Yei described being stopped by Mathiang Anyoor soldiers in July 2017, as she and her family were fleeing on foot to Uganda.' Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 6 March 2018), 57, para.298; Another example: 'A local source in Lainya town acknowledged that local officials were hearing of women being raped in Lainya and the surrounding villages and that these incidents of rape coincided with the deployment of Mathiang Anyoor forces in Central Equatoria. According to the source: "between August and September 2016, twenty-seven women

> ...[r]ape and sexual violence is used by perpetrators as a tool to punish, humiliate and destroy the family and social fabric. Witnesses told the [UN] Commission that victims were forced into performing acts of sexual violence in the presence of others, usually family members, neighbours or community members and other survivors and victims.[1171]

The UN Commission pointed out that the massive displacement of the civilian population of Lainya, Yei and Kajo Keji counties was a direct result of the widespread violations committed by SPLA forces, which resulted in physical and food insecurity[1172] that 'left the civilians with no option but to flee elsewhere'.[1173] Overall, the UN Commission once again concluded that these violations may constitute several crimes against humanity, including persecution.

The question, then, comes to whether the dispositions, interactions and practices of a set of people were directed towards the destruction of a protected group or one of its parts as such. First, (i) the patterns of the SPLA and Mathiang Anyoor atrocities appear to be directed against the entire Bari-speaking tribes in these three counties.[1174] The

---

were raped that I am aware of. They were raped while coming from or going to the farm. SPLA would ambush them and rape them.' Ibid. 58.

[1171] Ibid. 38. 'Conflict-related sexual violence is endemic. Rape, mutilations of sexual organs and other forms of sexual violence, targeting girls, boys, women and men, are often committed in front of children, humiliate the victims, their families and their communities and destroy the social fabric, leaving behind a traumatised people and the seeds of yet more violence '. Ibid. 127.

[1172] In addition, Kiir's regime's policy of 'actively blocking and preventing aid access and using food as a weapon of war, has engineered widespread regime-made famine in the country'. See UN Security Council, 'Interim report of the Panel of Experts on South Sudan' (S/2017/979, 20 November 2017), 13.

[1173] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 6 March 2018), 65.

[1174] It is unlikely to infer from the patterns of destructive practices that the offence has been directed against any particular sub-tribe 'as such', as it was the case in the Pajok offence. That is, even though Yei has been the home of various Bari-speaking tribes including Kakwa, Avokaya, Mundu, Bari, Baka; Lainya largely consist of Pajulu tribe; while Kajo-Keji is home of the Kuku tribe. Kajo Keji County lies in the south eastern corner of Central Equatoria, near the Ugandan border, and had an estimated population of 200,000, predominantly from the Kuku sub-tribe of the Bari-speaking community. Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2 (6 March 2018), 60.

systematic use of widespread rape in order to damage the social fabric,[1175] the mass destruction of houses (mainly through burning them), the vast number of killings and forced deportations reported so far indicate[1176] a finding of a normative destructive ethos. (ii) The attacks were widespread and emerged in a systematic manner. Moreover, (iii) the hate speech and threats against the population of the area and (iv) the scale of atrocities and means, particularly the common practice of house-burning, also support a finding in this direction.

The question is, however, whether these practices and dispositions are directed to a protected group 'as such'. On this point, the evidence is not sufficient to make a decisive statement. On the one hand, these three counties and their inhabitant tribes are socio-politically, historically and spatially differentiated from other Bari-tribes situated in Juba and Terekeka Counties, so much so that when the government increased the number of states from 10 to 28 on ethnic lines, he divided Central Equatoria into three counties and grouped together Yei, Lainya and Kajo-Keji, which together constituted Yei River State (see Map Nos. 1, 3 and 4). Apart from the impact of this fact to the assessment of 'substantiality', it may also be considered as an indication of the targeting this particular section of the Bari tribe as such. On the other hand, the purpose of the attacks can also be considered as the retaliation and gaining political control in this particular case given the explained history of the conflict. In other words, while the existence of destructive dispositions, interactions and practices of the perpetrators can hardly be contested; the evidence obtained to date is still far from being sufficient to make the decisive inference that they are 'directed against a protected group as such'.[1177] Indeed, the UN Commission has constantly noted that although it has heard of

---

[1175] 'Traditional and cultural norms place enormous value and importance on virginity and purity of women. Women and girls who are raped face stigmatisation once it becomes known. The ongoing conflict has added to the burden of womanhood, especially for survivors of sexual violence.' Ibid. 35.

[1176] 'the atrocities described now in South Sudan's Equatoria region — charred bodies in torched villages, gang rape, depopulation as a tool of war, and political violence waged against perceived ethnopolitical blocs — has characterised the war since its inception.' Boswell, 'The genocidal logic of South Sudan's "gun class"'.

[1177] Adama Dieng, 'Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on the situation in South Sudan' (United Nations Secretary-General, 7 February 2017) available at <https://www.un.org/sg/en/content/sg/note-correspondents/2017-02-07/statement-adama-dieng-united-nations-special-adviser> accessed on 31 May 2018.

'similar violations taking place across most of southern Central Equatoria, [...] international observers were repeatedly denied access to Lainya, Yei and Kajo Keji and their surrounding areas by the SPLA [...] This has inevitably hampered access to information about the events in the area as well as investigations.'[1178]

All in all, this section has extensively applied the first step of the proposed test (i.e. whether there exists a normative destructive ethos against a protected group, as such), first to the overall South Sudan situation and then to the four emblematic, spatially limited attacks, by drawing some comparisons and analogies with the Rwanda and Myanmar situations. Each situation has highlighted a different aspect of the notion of a 'normative destructive ethos'. In respect of the overall situation in South Sudan, it is established that the lack of one-sided dominance in a particular timeframe was the reason why we cannot establish the existence of a normative destructive ethos and, thus, genocide, despite the clear patterns of destructive acts, relations and dispositions from different parties.

6.3.2. Did Similar Conducts of Genocide Become an Established or Establishing Pattern?

In the proposed framework, what turns a destructive normative ethos against a protected group into 'genocide', rather than any other form of crime underpinned by the purpose of group destruction, is that acts of genocide became or were becoming one of the main means of destruction. As Chapter Five pointed out, the idea underlying this requirement is to reflect the social reality of genocide and avoid the absurd suggestion that an ordinary individual can commit the crime outside of a proper context – unless the act itself is capable of causing it. It is pointed out that the same sentiment was underpinning the inclusion of a contextual element in this direction as regards the ICC's Elements of Crimes.

It should be noted that this idea was also previously articulated in the case law of international courts and tribunals. For example, the ICTY Trial Chamber in *Krstić*

[1178] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2 (6 March 2018), 64.

suggested, by highlighting the kinship between crimes against humanity and genocide, that

> a widespread or systematic attack against a civilian population is comprised within the genocide requirement that there be an intent to destroy a specified type of group. [...] [A]cts of genocide must be committed in the context of a manifest pattern of similar conduct, or themselves constitute a conduct that could in itself effect the destruction of the group, in whole or part, as such.[1179]

On the other hand, the ICC in *Al-Bashir* understood this contextual element as a denotation that a genocidal campaign constitutes a point of reference for a realistic genocidal intent.[1180] While the actual impact of the contextual element is still a point of controversy, the present thesis welcomed this advancement towards reflecting the true nature of the crime.

That said, a novel contribution of the study has been to reverse the process of assessment, which was hanging upside down, and to offer brief guidance about how to assess whether 'context' is present. As to the former, the quoted decisions, however plausible they may be, still take the 'intentionality' of the individual as the focal point of assessment and do not in essence examine the general existence of genocide, but rather the relatedness of the perpetrator in question to the assumed 'collective genocide', and assess whether his mental state was realistic or not. While this assessment is necessary for attributing criminal responsibility and part of the offered framework, to be able to make such an assessment one needs to first establish the existence of genocide at the 'context level'. Arguing otherwise may lead to some strange situations. For example, if only one person formed a genocidal intent in the context of a crime against humanity of extermination, would it turn the entire process into genocide? Or would those who commit extermination while being aware of the

---

[1179] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgment, para 682. It should be noted that the Appeals Chamber disagreed with this understanding. See Judgment, *Krstić*, IT-98-33-A, AC, ICTY, 19 April 2004, para. 223 et seq.

[1180] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, paras 147–51

perpetrator's genocidal intent without sharing it become 'accomplices' to genocide due to their awareness and intentional contribution to the overall process?

In this context, it is suggested that, before examining individual responsibility, the legal character of the process should be determined and the first three steps of the proposed test should focus on this aspect. This brings us to the second contribution, which is clarifying the thinking process about 'patterns' of conduct. An emerging pattern of conduct is hard to prove unless there is a revealed plan, which is in the early stages of execution. On the other hand, the assessment of an 'emerged pattern' requires a holistic examination. Such an examination should consider the (i) frequency and density of genocidal acts; (ii) their percentage in relation to overall acts of destruction that constitute a normative destructive ethos; (iii) the absolute number of genocidal acts; (iv) whether the acts occurred as part of a plan and in a systematic manner; or (v) whether they were selectively committed and functionally became an important part of the process.

Thinking of Rwanda in this context, for example, poses no significant challenge since the density, frequency, magnitude and systematic nature of the acts clearly indicated a pattern. In respect of Srebrenica, on the other hand, the assessment is trickier, as the absolute and relative magnitude of the acts were relatively less. However, the acts occurred as part of a plan and were most importantly strategically undertaken. In this sense, while acts of genocide were secondary to forced deportations in the process of destruction, they can still be considered an 'established' pattern. The ICTY, however, inaccurately emphasised the strategic importance of the killings in order to substantiate the argument that the Bosnian Muslims of Srebrenica were the targeted part. Instead of relying on this strained argument that stems from a misconceptualization of the term 'to destroy', the proposed framework offers to determine the targeted part through referring to a broader process of destruction, while considering 'strategic' or other forms of importance and the density of acts in determining the legal character of group destruction.

Moreover, as hinted at before, from the perspective of the study, a key analysis that would determine the question of genocide against the Rohingya would be whether patterns of acts of genocide occurred. To briefly explain, the well-recognised acts of

genocide, e.g. killing or rape, that occurred constituted around 5 per cent of overall acts of destruction, but they did not target a strategically particular section or display a systematic nature. Against this background, the UN fact-finding report tried to interpret the acts of genocide as broadly as possible. The report considered a wide range of acts, such as the separation of families, poor conditions of the camps, birth-rate control of the Rohingya, under the guise of Article II (b), (c) and (d). While these arguments in the report are by no means unprecedented, as far as is observed the consideration of whether these acts fall into the ambit of *actus reus* will determine whether there existed patterns of acts of genocide in Myanmar. A detailed analysis of this, however, must be the subject of a future work. In light of this established understanding, then, this second step can be applied to the four situations under examination as follows.

Bentiu:

Even if we assume that there was a normative destructive ethos against Dinka and Sudanese in Bentiu, it would be challenging to establish the patterns of acts of genocide. To begin with, the one-sided dominance of the perpetrators occurred in a really short timeframe, which made establishing any 'pattern' of acts physically unlikely. Second, while the numbers of acts of genocide were small – particularly in absolute terms, they did not occur in any systematic or planned manner or targeted a strategically significant section. The only possible supportive element would be the density of the acts; however, a holistic examination indicates that the patterns of genocide did not emerge in Bentiu.

Juba:

In Juba, the campaign clearly involved widespread genocidal acts (Article II (a) and (b) and to an extent (d)), used in order to achieve the disappearance of the Nuer presence in Juba. Admittedly, the absolute magnitude of the acts of genocide (e.g. killing, rape) may be considered insufficient to single out an established pattern on its own– particularly considering that the numbers vary in different accounts. However, in light of the facts that the Nuer population in Juba being fairly small, the attacks occurring on highly systematic manner and aiming to facilitate the broader destruction, and frequency and density of the attacks, a more holistic examination may lead to conclude that the normative destructive ethos has involved established patterns of acts of genocide. This

means that it can be argued that the situation qualifies as genocide – if the substantiality of the targeted part is established.

Pajok:

Despite the UN Commission mentioning significant numbers of killings and incidents of rape,[1181] it is contestable in light of the available evidence, particularly given that the numbers considered 'significant' are in the 'hundreds', whether these acts of genocide became a pattern of conduct as the main course of action in the destruction of the Acholi-Pajok or they were committed in order to enhance the rapidness and effectiveness of ethnic cleansing as a secondary means. If further evidence supports the former argument that might provide further support for a case of genocide.

Yei River State:

In Yei River State, it seems evident from the extensive reports that 'acts of genocide' were systematically used in the course of the offence. According to one of the latest quantitative studies conducted on the South Sudan situation,[1182] during the conflict, in addition to the commission of the others acts of genocide committed *en masse* by government forces, around 85,000 civilians have been killed in Central Equatoria. Most of these killings took place during the offensive in question against Bari people of Yei River. The planned nature of the acts and their role in the overall process also supports a finding in the direction that the acts of genocide have become a pattern of conduct during the attack.

In short, in the proposed framework, a process of group destruction reaches to the stage of genocide when the acts of genocide become an established or emerging pattern of conduct. It is argued that this examination should be made at the context level and before getting into the assessment of a particular individual's intentionality since the latter can only be duly assessed after the existence and extent of the genocide at the context level are determined. Having sketched the thinking process about the 'patterns

[1181] Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan', Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2 (6 March 2018), para. 73.

[1182] Checchi, 'Estimates of crisis-attributable mortality in South Sudan, December 2013-April 2018 A statistical analysis', 23.

of acts' and singled out the main factors for the assessment in the previous section, this section demonstrated how this process may work in actual situations by applying it to the four atrocities in South Sudan. It is found that while there appears sufficient evidence to support a claim for 'established' patterns of acts of genocide in respect of the Yei River State and Juba atrocities; the nature and extent of the Pajok and Bentiu atrocities do not provide enough evidence to support the same conclusion. Having thus demonstrated the second step of the proposed 'test', the next section shall examine the 'substantiality' concerning the case study, which is the last step of the assessment in establishing genocide at the collective level.

6.3.3. Assessing 'Substantiality': Vukovar, Srebrenica and the Localised Atrocities in South Sudan

As to the assessment of 'substantiality', which has been the central question of the thesis, it is submitted that posing a straightforward test is ontologically not possible. Rather, the assessment ultimately needs to be understood as a process of balancing between genealogical and analytical imperatives, rather than a test with some definitive questions and answers. This balancing process, on the other hand, can only be initiated after determining whether the group constitutes a 'part' or a 'whole'. While determining the 'whole' poses no complications where the unity in question has no overarching kinship, when the unity has kinships it needs to be considered whether it has socially, politically, historically and/or spatially developed and in addition a distinct solidarity and identity emerge on a national, ethnic, religious or racial basis (or any combination of these). If this is the case, then the unity constitutes a 'whole'. As already pointed out, the 'Rwandan Tutsis' are an example of this, since they distinguished themselves through kinships as such on a historical continuum on national/ ethnic grounds and constitute a distinct 'whole' in the context of genocide law.

Throughout the study two particular situations have frequently been referred to in order to highlight the inconsistencies and conceptual problems with the prevailing legal framework and assessments of substantiality. It is underlined that the Vukovar and Srebrenica situations present very similar factual evidence, yet while the ICTY and ICJ inferred a genocidal intent and established 'substantiality' in respect of the latter, the conclusion was the exact opposite in the former. As is argued, the difference in these

conclusions is rather hard to justify from the prevailing legal construction of genocide, and indeed this was the argument of Croatia before the ICJ.[1183] Here, a brief final analysis can be outlined regarding these two situations in order to underscore the contribution of the study, which can also lay the ground to understand how to apply the framework of analysis of 'substantiality' to the localised atrocities in South Sudan.

To begin with, both the Croats of Vukovar and the Bosnian Muslims of Srebrenica were 'parts' of their broader national unity in the sense that they did not develop a distinct identity and additional solidarity on one of the listed grounds vis-à-vis their overarching kinship. From the perspective of the study, in both situations, a normative destructive ethos against these groups was evident. Both offensives were undertaken in order to achieve the 'Greater Serbia' ideal and thus aimed to remove the groups in question from their respective areas. The nature of the acts, e.g. mass shootings and deportations or attacks on the hospital in Vukovar, were all indicators of systematic attacks that were undertaken as a part of a plan to change the demographics of the respective areas. In Vukovar, around 3,000 victims were killed, while the number was around 8,000 in Srebrenica. In both situations the rest of the population were deported (respectively around 21,000 and 32,000 people) in conjunction with these killings.

Despite these similarities, however, the ICJ and ICTY decided differently about the existence of an overall genocide intent. While both judicial bodies saw these facts as an indication of 'genocide intent' in respect of Srebrenica; the ICJ, quoting the ICTY Trial Chamber in *Mrkšić*,[1184] concluded that the 'intent to destroy' was not the only reasonable inference in respect of Vukovar. Accordingly, the attack on that city constituted a response to the declaration of independence by Croatia and aimed to punish Serbia's enemies and assert its grip on the SFRY.[1185] It is also pointed out that Serb forces 'did not kill those Croats who had fallen into their hands', many Croat combatants were transferred to the camps, which according to the Court proved the lack

[1183] See in general Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement paras 463-475.

[1184] *Prosecutor v. Mrkšić et al*. [2007] IT-95-13/1-T Judgment, para. 471.

[1185] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement para 429.

of a genocidal intent.[1186] Aside from the fact that the first observation was about the motive rather than the intent, similar arguments can also be put forward in relation to Srebrenica – e.g. Serbian forces reacted to the UN intervention and wanted to demonstrate their grip on the area; they also did not kill most of the Bosnians, despite the opportunity to do so. This demonstrates how problematic is a purely 'intentionalist' construction of the crime. Putting all the emphasis on 'intentionality' forces judicial bodies to make such strained arguments to justify their decisions.

Indeed, the thesis also agrees with the ultimate conclusion that genocide did not occur in Vukovar. However, the proposed framework allows a more coherent and better justification of this decision. While a destructive normative ethos was present in both situations from the thesis' perspective due to the explained reasons' as the ICJ and ICTY observed, the way the acts occurred and their nature were different in both cases. The inaccuracy, however, was in trying to highlight this fact in relation to the 'intent'. Rather, in the proposed framework, this difference affects the assessment regarding *actus reus* at the context level and 'substantiality'.

As to the former, in both cases, the killings were secondary to mass deportations (in Vukovar around 14 per cent of the total, while in Srebrenica it was 20 per cent). Thus the frequency, density and absolute magnitude of the acts of genocide did not indicate an emerged pattern of conduct on their own. However, in Vukovar, these acts occurred in a reactionary fashion, as the ICJ and ICTY observed, and the main plan was deporting the group rather than committing an act of genocide, while in Srebrenica the killings were systematically and strategically implemented as part of a broader destruction plan. In this sense, it can be concluded that the process of group destruction reached the stage of genocide in Srebrenica, while this was not the case in Vukovar due to the lack of an established conduct of genocide.

A similar observation can be made about the assessment of 'substantiality'. In both situations, the absolute magnitude of the targeted parts (40,000 in Srebrenica and 21,000 in Vukovar) was hardly sufficient to create a weighty genealogical imperative in the assessment process, which means that the analytical factors should be severe enough to balance the process. It was clear that while both 'parts' were spatially distinct, they did

[1186] Ibid. 436

not develop a sub-group identity (like Black Sea Turks or Yorkshire people in England).[1187] However, there was an important different in respect of their sociopolitical significance. While both areas were important for the overall expansion plan of Serbia, the Vukovar attack was 'regular business' in the sense that it was a part of a broader conflict between Croat and Serbia forces and the city and its population were no different from any others *per se*. Srebrenica, however, as the ICTY noted,[1188] was a UN safe-zone where the Muslim population in the region sought refuge and so 'the enclave's elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their defencelessness and be "emblematic" of the fate of all Bosnian Muslims'.[1189]

This relatively unique situation of Srebrenica attributed particular sociopolitical importance to the Bosnian Muslims in it, which constitutes an important analytical factor in the balancing process. Whether this factor alone is enough to 'balance' the process is ultimately a subjective consideration (as it has to be) and must be left to the judges who are in a better position than anyone to make a holistic assessment. It seems that this was the emphasis of the ICTY, which separated Srebrenica from Vukovar. All in all, however, this brief analysis highlights that the proposed framework allows a conceptually more coherent and clear process of examination. In light of this demonstration, the same kind of balancing process to assess 'substantiality' can also be applied to the localised atrocities in South Sudan as follows.

Bentiu:

It is founded that, from the perspective of the study, genocide did not take place in Bentiu since the available evidence does not indicate the existence of a normative destructive ethos, or pattern of acts of genocide. However, if we assume the otherwise for a moment, would it then be possible to consider the situation as 'genocide'? In other words, whether the targeted parts may have qualified as 'substantial'. There is no doubt that Sudanese or Dinka people in Bentiu constituted 'parts' of their respective groups and not distinct 'wholes' since they did not develop additional and distinct solidarity

[1187] See p. 225.

[1188] *Prosecutor v. Krstić* [2001] IT-98-33-T, Judgement, para. 774.

[1189] Ibid.

and identity emerge on a national, ethnic, religious or racial basis (or combination of any).

On the other hand, there are not sufficient reasons that may support the characterisation of these parts as 'substantial' in the proposed analysis of framework. As seems clear, the 'absolute magnitude' of the number of victims is far from invoking the genealogical imperative to consider the part as 'substantial'. The Dinka and Sudanese populations of the town were fairly small, which means 'substantiality' may be established by virtue of considerably strong analytical factors. Yet such factors also appear to be missing.

Indeed, there is no evidence that Sudanese or Dinka in Bentiu considered themselves as distinct sub-groups compared to the whole for any contextual or material reason, nor did perpetrators or outsiders. Rather, these individuals were targeted in their individual capacity and identity. Similarly, there exist no sociopolitical reasons that may support a judgement of 'substantially' since the targeted parts did not hold any emblematic or strategic significance at the time of the attack. In the absence of any other unique reason that might emerge due to the particular nature of the conflict and the 'part', spatial distinctiveness surfaces as the only meaningful analytical factor, which would not be sufficient on its own to justify a pronouncement of 'substantiality', at least in that particular context.

Juba:

The Nuer minority in Juba was of approximately the same size as the Bosnian Muslims in Srebrenica at most. In other words, the absolute size of the group was not large enough to invoke the genealogical imperative to characterise the part *de facto* as substantial. However, unlike the Srebrenica situation, the strength of the analytical factors to balance this imperative was not sufficiently persuasive. First of all, and similarly to Srebrenica, the Nuer population in Juba at the time of attack did not define a novel social boundary vis-à-vis the whole. The historical evidence supports this conclusion, since most of the Nuer in Juba had relatively recently immigrated from the other parts of the country and had not developed a sub-group identity as such (e.g. Nuer Juba). In other words, the Nuer population in the town was indeed a part of the Nuer group, but that does not demonstrate a further unity with a distinct identity and way of

life, which might have constituted a moral imperative that might balance the genealogical imperative.

At this juncture, one might argue that the part did in fact have emblematic significance just as in the Srebrenica situation. A key point in considering such an argument should be 'temporality'. It may be argued with information held today, given how the conflict has unfolded, that the atrocity in question had a significant sociopolitical impact on the overall conflict. While this would be already a vast overstatement, even if one buys this argument for a moment, it would nevertheless constitute a misplaced revisionism. This is because, in considering the sociopolitical or any other form of significance, the situation at the time of the attack should be focused on. To put it in perspective, the Nuer population currently resides under UN protection at a civilian site in Juba holds a considerable emblematic significance (like Srebrenica) due to the very status of the area and the residents. A hypothetical destructive attack against this part of Nuer, even if it involves the exact same number of individuals as those targeted in 2013, would probably shock the collective moral consciousness that underpins the law against genocide.

On the other hand, the same cannot be said about the Nuer in Juba in 2013. At the time of the attack, there was no particular sociopolitical or emblematic significance attached to the part as such that might have temporally and contextually separated it from the rest of Nuer. This, once again, leaves spatial distinctiveness as the only factor, which is likely to be insufficient. Of course, this assessment may always be challenged and even blamed for being morally pervasive. However, if indeed one of the purposes of the substantiality requirement is to ensure that the crime of genocide is built on a group-centric understanding and has a unique magnitude that separates it from other crimes, such purpose needs to be achieved through some form of moral and genealogical reasoning in the absence of ontological justifications. For this reason, it should concluded that despite the evident destructive ethos that accompanied with the patterns of acts of genocide, due to the lack of substantiality, the Juba case should not be legally characterised as 'genocide' from the proposed viewpoint.

Pajok:

While the thesis has argued that, just like the Bentiu situation, the evidence is not sufficient to conclude the existence of a normative destructive ethos and patterns of acts of genocide in respect of atrocities against the Acholi-Pajok clan; as opposed to the Bentiu situation, if we assume otherwise for a moment it would be possible to argue for the existence of genocide because, in the proposed framework of analysis, it appears likely to consider the Acholi-Pajok a 'substantial part'.

To elaborate, despite being small in a numerical sense (i.e. the total population of Acholi-Pajok was around 50,000), the clan holds a unique sub-group identity. It is differentiated from the whole of the Acholi through corresponding in-group and out-group perceptions built on different sociation processes, as well as spatially. That said, this differentiation and sub-identify did not emerge on a national, ethnic, religious or racial basis (or any combination of these). Instead, spatial distinctness and minor cultural differences led to corresponding perceptions about a distinct sub-group identity. Thus, the clan in question does not constitute a distinct 'whole', but rather a part of the broader Acholi.

While the Acholi-Pajok clan consist of relatively fewer numbers of people, it likely to be considered 'substantial' as a result of socio-historical processes and perceptions which created a distinct sub-group identity which might have been targeted as such, as opposed to a set of individuals with a similar overarching identity and spatial proximity as it was the case in Juba. Moreover, the Acholi-Pajok gained a particular socio-political significance at the time of the attack, as it was the only part of the Acholi clan that supports the rebellion movement. Despite the weak genealogical imperative then, these analytical factors may appear to be strong enough to qualify the Acholi-Pajok as 'substantial' in the context of the proposed framework.

Yei River State:

In Yei River State, the absolute magnitude of the targeted population was much larger compared to other cases discussed so far, which should be taken account in the process of assessment. Nevertheless, the absolute numerical magnitude of the targeted part may not be sufficient to conclude 'substantiality' on its own, particularly when it is compared to the archetypical event, namely the Holocaust, that the genealogical

imperative stems from. Thus, in order to establish 'substantiality', the genealogical factor should be supported by some analytical imperatives.

To begin with, the Bari people of Yei River State constitute a 'part' as they are differentiated from their overarching 'Bari' identity in spatial and sociopolitical terms, as opposed to any ethnic, national, religious or racial 'form' of relatedness. It appears that when spatial distinctiveness is considered in conjunction with the sociopolitical significance which the group gained in the course of the conflict, it appears that there exist enough analytical reasons that strike the required balance and support an argument in favour of the 'substantiality' of the part. The sociopolitical significance of the 'part' particularly stems from its relatedness to the perpetrator group. As mentioned, the Baris of Yei River State historically differ from the Baris of Juba or Terekeka Counties, which led President Kiir to give it a county status when increasing the number of counties on ethnic lines. This historical differentiation also evolved into a political one when the Bari groups in Yei River, different from the others, began to effectively resist the pressure coming from the SLPA. Thus, it gained emblematic significance, because 'punishing' or 'destroying' the sub-group would have sent a message to other Bari tribes.

Therefore, through applying the proposed framework of analysis, the thesis suggests that the Bari of Yei River State should be considered a substantial part and if future evidence confirms that the target of the collective attack was the Baris of the Yei River State 'as such', then it should be concluded that genocide occurred.[1190] As is already

[1190] A very similar consideration can also be offered about the campaign against the Shilluk in the Upper Nile – or according to the new delimitation and more particularly in the Western Nile State (see Map no. 3), which has been referred to by the UN report (and the opposition declaration). The Shilluk Tribe is culturally, linguistically, historically and spatially distinct from its neighbouring Dinka and Nuer tribes and historically had border conflicts with Dinka tribes. Since 2015, the Dinka and Shilluk communities have targeted each other on the basis of their purported political allegiances. Fighting broke out after Kiir's government made a border change and transferred the Shilluk-populated county of Panyinkang (see Map no. 4) to the Dinka dominated Central Upper Nile. Upon the rising violence, the SPLA initiated an operation later on 27 January 2017 to capture Wau Shilluk village and surrounding areas that are ten kilometres away from Malakal and constitute the cradle of the Shilluk ethnic group. These operations later spread out to the entire state and showed patterns of deliberate targeting Shilluk civilians for their purported allegiance. A striking demonstration of the ethnic motive of the SPLA is that after the Shilluk tribe were forcefully displaced from Wau Shilluk, approximately 2,000 Dinka people were transported to the town, 'Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide,

mentioned, the fourth step of the proposed test falls out of the ambit of this demonstration, which exclusively focuses on establishing genocide at the context level. Having examined and demonstrated all three steps to this end, the chapter can conclude by summarising its findings.

6.4. Conclusion: Genocide in South Sudan?

This chapter aims to systematise the theoretical findings of the thesis, which not only lead to a novel conception of 'substantiality' but also a novel understanding regarding how to think about genocide in general and assess its occurrence. This goal is accomplished by condensing the thesis findings into a four-step test to assess genocide, positioning the proposed framework of analysis for 'substantiality' in the context of this test, and applying the test to actual situations – in particular, South Sudan.

In and after devolving this four-step test, the chapter applied the first three steps to determine the general existence of genocide in the case study to hand by drawing comparisons with the Rwanda, Srebrenica, Vukovar and Myanmar situations. Having established that the differentiation in South Sudan is 'ethnic', the chapter examined whether an 'overall' normative destructive ethos was directed against a protected group in South Sudan. Here it is argued that while destructive practices and dispositions against protected groups were present in South Sudan – as was the case in Rwanda and Myanmar – the South Sudan situation differs from these two examples due to the lack of a one-sided dominance of any group in a particular timeframe, and thus it is not possible to conclude that there existed an 'overall' normative destructive ethos in South

---

on the situation in South Sudan' (United Nations Secretary-General, 7 February 2017). While the Shilluk tribe evidently constitute a protected group and the population under attack constituted a 'whole', it must be determined in order to make a decisive assessment as to the question of genocide whether the normative relations and practices of the SPLA merely aimed at some social engineering to enlarge Dinka lands towards the disputed zones or if it was an operation to eliminate the Shilluk tribe as an entity. The evidence so far is sufficient to infer such a 'genocidal context' against the tribe. The situation is concerning and must be monitored carefully, according to an Amnesty International UK Press Release, 'South Sudan: ''Shocking' killing and mass displacement of Shilluk people by government forces – new evidence' (2017), available at: <https://www.amnesty.org.uk/press-releases/south-sudan-shocking-killing-and-mass-displacement-shilluk-people-government-forces> accessed on 21 May 2018. Also see Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February – 23 March 2018, A/HRC/37/CRP.2, 6 March 2018), 87 ff.

Sudan that allows the emergence of an 'intent to destroy'. Rather, the situation in general was a tribal 'total war', particularly after 2016.

That said, there have been spatially limited situations that resemble the Srebrenica genocide where a perpetrator group developed such a one-sided dominance and the chapter particularly focused on arguably the four most emblematic of these cases, namely the attacks on Bentiu (2014), Juba (2013), Pajok (2017) and Yei River (2016-2017). In respect of a normative destructive ethos, the thesis first focused on the Bentiu massacre. It is argued that the timeframe and reactive nature of the attack; the lack of a systematic destruction of artefacts, houses and ultimately individuals; the lack of a plan or policy to change the demographic and ethnic composition; and the relatively small scale of the atrocities indicated the lack of a normative destructive ethos and thus genocide. In relation to the Juba attack, the thesis has drawn some analogies with the Kibuye in Rwanda and established that there was a normative destructive ethos directed against the Nuer in Juba in that particular timeframe by the SPLA and supporting forces. Third, the thesis examined the attack against the Acholi-Pajok people. It is found that while there existed destructive dispositions and practices against group members, artefacts and property, it was not clear whether these acts were 'directed against' the existence of the group or in order to punish individuals, which triggered mass deportations. Thus, in light of the limited evidence presented from the field so far, it was not possible to conclusively establish the existence of a normative destructive ethos. Finally, the thesis turned its attention to the atrocities in Yei River State. While it is found that the perpetrators developed destructive dispositions, interactions and practices, more evidence is needed to prove that these were directed against the Bari people of Yei River State 'as such', rather than being excessive acts of retaliation and punishment.

The thesis then moved on to the second step. Here it is argued that, even if we assume the existence of a destructive ethos in respect of these cases, the scale and nature of the atrocities in Bentiu and Pajok did not support a finding that acts of genocide became an established pattern of conduct. As to the Juba and Yei River State atrocities, it is argued that when the systematic and planned nature of the acts, as well as their density and frequency, are considered it is possible to conclude that acts of genocide became an established pattern of conduct in both cases.

Finally, moving to the third step, namely the assessment of 'substantiality', the chapter first conducted a comparative analysis of the Vukavor and Srebrenica situations in order to further concretise the contribution of the proposed conceptualisation of genocide and lay the ground for applying the proposed analysis of the framework for 'substantiality' to the situation in South Sudan. Here, it is first argued that Croatia was on point in its argument before the ICJ[1191] that those elements utilised to infer 'genocidal intent' were also present in Vukovar and relying on the lack of 'genocidal intent' in dismissing the claims of genocide for Vukovar created a conceptual inconsistency. Instead, the chapter, by briefly applying its test to the situation, established that while a normative destructive ethos was present in each case. in Vukovar the acts of genocide did not become an established pattern since they occurred in a reactionary fashion and not as a part of a broader destruction plan, as opposed to Srebrenica where killings were strategically and systematically executed in order to achieve the broader goal of destruction. Similarly, although the genealogical imperative was not persuasive in each situation in terms of establishing 'substantiality', the analytical imperatives were more prominent in Srebrenica, particularly due to the sociopolitical and emblematic significance of the population and area at the time of the attack. Thus, balancing the two competing imperatives was relatively easier in Srebrenica in establishing 'substantiality'.

Having thus comparatively demonstrated the novel perspective that this framework of analysis brings, the thesis finally considered the question of 'substantiality' regarding the four localised cases in South Sudan. In respect of the Juba, it is argued that while the genealogical imperative was once again weak, there were not sufficient analytical factors to 'balance'. The in Juba were not a distinct sub-group; they were not holding any sociopolitical or emblematic 'significance' at the time of the attack; and the mere spatial distinctiveness appears insufficient to establish 'substantiality'. Thus, the thesis concluded that despite an 'intent to destroy' and 'patterns of genocidal acts' being present in Juba, the lack of 'substantiality' of the targeted part prevents us from considering the attack as a case of genocide.

[1191] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) [2015] ICJ Judgement para 429.

The thesis also considered the other three situations for demonstrative purposes by assuming the presence of an 'intent to destroy' and 'patterns of acts' for each situation. It is argued that in Bentiu, both genealogical and analytical factors were largely absent to support a finding of 'substantiality'. On the other hand, despite being small in a numerical sense, the Acholi-Pajok clan holds a distinct sub-group identity, as well as a unique sociopolitical significance as the only clan of their tribes that supports the rebellion movement. These factors make it likely to see the clan as a 'substantial part' by balancing weak genealogical imperatives. Similarly, the Bari of Yei River State also held a particular political and spatial significance at the time of the attack. In addition to, the part in question was relatively larger than any others so far mentioned, which makes the genealogical factor more prominent in the process of balancing. It is thus concluded that these two facts together may support establishing 'substantiality' concerning this particular case.

All in all, the establishment of a Hybrid Court for South Sudan is still pending,[1192] as is the hope of holding accountable those most responsible for these atrocities. The present chapter has demonstrated how moving beyond traditional substantialist and intentionalist conceptions of protected groups, genocidal intent and consequently 'substantiality' by endorsing a processual viewpoint may conceptually improve the coherence of judicial examination of genocide and better equip judicial bodies to engage with the dynamic social reality of group destruction in a possible future where the perpetrators of these atrocities are brought before judges.

Admittedly, one may criticise the proposed understanding of 'substantiality' and the four-step test for assessing the occurrence of genocide for being arbitrary in light of the analysis conducted throughout the chapter. Yet, as constantly emphasised, the central argument of the thesis has been that the assessment of substantiality cannot be decisively systematised in any form due to ontological facts and epistemological limitations. Nor does the study aim to bring such certainty. Any assessment made entails a certain level of judicial discretion. In this context, the concern of the study has

[1192] Antonio Guterres, 'Remarks to Security Council open debate: "Upholding International Law Within the Context of the Maintenance of International Peace and Security"', UN Secretary General (17 May 2018) available at: <https://www.un.org/sg/en/content/sg/speeches/2018-05-17/upholding-international-law-within-context-maintenance-international> accessed 31 May 2018.

been to crystallise, as much as possible, thinking processes and points of references in determining and justifying ‘substantiality’ as well as in determining the occurrence of genocide, and this chapter has demonstrated how such thinking processes may work through systematising the theoretical arguments made throughout the study as a four-step test.

CHAPTER SEVEN

CONCLUSION

The foregoing thesis has dealt with the identification problem of 'substantiality' in genocide law by investigating to what extent, and how, the substantiality of a targeted part can be assessed in 'objective' terms. The methodological approach utilised in this scrutiny, i.e. going beyond the doctrinal debates and examining the issue from philosophical, sociological and legal theory perspectives, has not only led to developing a novel approach for the assessment of 'substantiality', but also has allowed delineating a novel understanding for evaluating the occurrence of genocide. To conclude, the following paragraphs will recap the arguments of the study, highlight its three main novel contributions to knowledge, and specify its limitations and implications for future research. Given that each chapter has produced lengthy summaries and conclusions, the thesis will include very concise summaries of the arguments in here and mainly reiterate the three main contributions of the study.

7.1. A Novel Understanding of the Problem and its Relation with the Overall Judicial Conceptualisation of Genocide

The first novel contribution of the study to knowledge has been engaging with the problem of justifying and assessing the 'substantiality' of a targeted part from a novel perspective, which ultimately led to revealing broader issues as to the legal conceptualisation of genocide and the assessment of its occurrence. The thesis began by establishing that the considerable difficulty that determining a part's substantiality causes in the courtroom is essentially an episode of the larger legal theory problem of 'particularity void'. It is established that the substantiality requirement, which has become a *de facto* part of the legal representation of genocide, is an extension of the rule determination process, and in that sense it is an abstract normative universal that needs to be 'bridged' through legal reasoning with the particulars of each situation. However, while the requirement ultimately emerged as a reflection of the large social, moral and legal consensus that genocide is a crime of a certain magnitude, the impreciseness inherent to the notion of 'substantiality' and the uncertainties involved in

locating the relevant 'part' have rendered the process of 'bridging', i.e. reflecting this consensus in the assessment of particular situations, quite uncertain and unpredictable.

Having thus defined the problem in terms of a search for equilibrium between the legalistic expectation of certainty and coherence and the social expectation of law reflecting the reality and collective moral consciousness, the thesis undertook an analysis of existing judicial and scholarly approaches to the problem. The review presented in chapters two and three showed that the concerns over the lack of 'objectivity' have largely led to attempts to ensure predictability and certainty through settling the meaning of 'substantiality' by proposing further normative universals with the help of doctrinal argumentation and deductive logical induction.

It is argued, however, that these attempts have not only ended up with largely competing, albeit doctrinally equally persuasive, approaches to 'substantiality', but also have not dissipated the perceived lack of 'objectivity'. On the contrary, while each individual approach lacks a form of preciseness that 'strict normativity' requires (e.g. a definitive numerical threshold), the existence of logically and conceptually competing approaches in the same framework without a particular hierarchy has led to another form of arbitrariness, since a subjectively favoured approach by judges may easily change the ultimate verdict on a crime. This prompted the thesis to commence two further enquiries by moving beyond inconclusive doctrinal examinations: how is it that these competing approaches can exist in the same judicial framework and why do they fail to provide the aspired certainty and predictability in the first place? These enquires led to two important findings.

As to the former matter, it is found that the textual definition and the drafting history do not define the term 'groups', which allows not only understanding the nature of protected groups and group destruction from various ontological perspectives depending on the interpreter's philosophical presupposition but also, and connectedly, conceiving the immorality of genocide differently. These different conceptual presumptions unavoidably produce different answers to the abstract question: 'What makes a part substantial?' This being the case, the prevailing judicial construction does not interpret the definition from a particular viewpoint but rather blends the conceptualisations of the crime in construing different definitional terms. Most importantly, while 'protected

groups' in the prevailing construction are described as 'distinct and separate' entities and primary protected values 'as such' – which reflects a structural-functionalist understanding, the term 'to destroy' is confined to the intentional physical and biological destruction of group members – not to the intended destruction of a distinct and separate social entity – which echoes the nominalist conception of protected groups as the 'sum of individual members'.

It is argued, in this respect, that this ambivalent position between an individualistic conception of genocide as a mass atrocity against individuals due to their identity and a collectivistic conception of genocide as an offence against a collective entity have not only paved the way for the co-existence of conflicting approaches to 'substantiality' in the same framework, but also led to the utilisation of one over another as a backdoor to enforce a particular conception of genocide. By way of example, by putting the emphasis on the qualitative approach a decision may ultimately highlight a structural-functionalist conception of genocide – as was the case in Srebrenica, while putting the emphasis on the quantitative approach promotes a nominalist conception of genocide and leads to a different judgment.

This took the thesis to the latter matter, and to ask: Why are these conceptualisations insufficient on their own and thus why has such a framework emerged? Having already established that formal methods of interpretations do not support any particular position, the thesis has searched for conceptual reasons to assess the competing functionalist and nominalist conceptualisations of genocide and thus 'substantiality'. This conceptual enquiry, however, has strikingly revealed that neither nominalist nor functionalist conceptualisations of genocide aptly reflect the reality of the protected groups and thus the immorality of genocide, while they both also falsely suggest at the conceptual level that 'substantiality' can be identified in a strictly 'objective' sense through posing further universals.

The reason for this, as far has been observed, is that both of these perspectives are built on 'substantialist' presumptions, albeit from diametrically opposed perspectives, and thus try to account for the existence of protected groups in static and reductionist terms, either by perceiving them as the sum of individuals or as stable 'things' that exist independently – while in reality the protected groups are contingent, socially

constructed and distinct emergent processes. This inconformity leads either to deficiently equating the harm of genocide with the physical and biological harm caused to individuals or to mystifying the evil of the crime by referring to a metaphysical entity. Consequently, accounts built on these 'substantialist' presumptions fail to reflect the social reality, which also prevents proposing a sufficiently definitive normative universal, reference to which will largely justify the decision of 'substantiality'. Instead, as the thesis has demonstrated through its conceptual examination and survey of relevant case law, established approaches, even in their loosely articulated forms, cause significant moral, logical and applicative complications in the courtroom.

All in all, there are two significant conclusions have emerged from this analysis. First of all, the thesis revealed that the general conception in the literature that the international courts and tribunals have fallen short in ensuring the legal certainty due to the lack of 'objective' criteria is inaccurate. This is because, on the one hand, the contingent nature of the social reality, particularly in relation to genocide, largely refrains legal norms to establish a universal rule that reference to which would give a clear-cut answer and justification to the qualification of a part as 'substantial'. On the other hand, as is elaborated in chapter one, it is conceptually moot to what extent a legal norm can be 'certain'. Instead, the thesis revealed that the case law rather falls short in crystallising how to think about 'substantiality', that is, the assessment process is far from being clear. To put it differently, while striving for a settled meaning of substantiality is beyond possibility due to the ontological reasons and thus it is a vain endeavour, the 'objectivity' of the assessment process constitutes an essential element to ensure legal predictability and coherence. However, the existing judicial framework to assess substantiality includes conceptually contradicting methods and these methods are rather arbitrarily gaining or losing prominence on a case-by-case basis.

Second, and connectedly, the conceptual analysis has revealed that these contradicting methods exist in the same framework due to necessity, rather than a misconstruction. The contingent reality of the protected groups and the criminal phenomenon itself cannot be fully captured by a nominalist or functionalist conceptualisation of genocide alone due to their substantialist presupposition about the society. As a result, neither perspective can duly explain the 'immorality' of genocide, which leads to morally undesirable and/or conceptually problematic legal reasonings when they are applied to

the certain cases on their own. The case law aimed to overcome this complication by keeping both conceptualisations in its framework and utilising them, depending on the particulars of the case, through the backdoor of substantiality. However, such an approach has not solved the legal representation problem of genocide, but instead, the legal scope of the crime became unstable since it obscured the protected good by the law against genocide, according to which the moral correctness and desirability of the decisions can be measured.

Therefore, it is concluded that the assessment and justification problem of substantiality is a symptom of a larger complication, namely the deficient judicial conceptualisation of genocide. The current legal representation of genocide in the case law appears to be 'stuck' in between two archaic conceptualisations of the crime, namely nominalist (individualistic) and functionalist (collectivistic) and yet both of these conceptualisations proved to be deficient, as is successfully argued in the broader social sciences. Both viewpoints postulate a static and substantial being or essence as the source of the 'good', i.e. the protected groups, to be protected by law. This leads to an unmanageable gap between the contingent social reality and the legal representation, which causes moral defects for each way of conceptualising the crime, and connectedly for methods offered from these viewpoints to assess and justify 'substantiality'. Instead, the thesis suggested that a novel judicial construction that reflects (i) the contingent reality of the protected groups, (ii) the processuality of the criminal phenomenon, and (iii) the contextual nature of genocidal intent is needed.

7.2. Rethinking 'Substantiality': A Call for Embracing Contingency and Processuality

The second contribution of the study has been going beyond the prevailing substantialist thinking by exploring a relational realist conception of the protected groups and 'processual' conceptualisation of the criminal phenomenon. Rethinking the crime and its elements from this perspective led to a novel understanding regarding our ability to legally represent genocide and, connectedly, the assessment and justification of 'substantiality'. The thesis began to construct its framework by focusing on the nature of the protected groups and its implications for the assessment of 'substantiality' in chapter four.

First, it is founded that the concepts of ethnicity, race, nation and religion are not natural phenomena, but they are also not completely fictitious and subjective. Rather these are relatively stable 'forms' of relatedness, the content of which is in constant, albeit very slow, change depending on the relations that are defined in these terms and the collectively ascribed and constantly re-confirmed significance and meaning to them. The 'forms' loosely determine what kind of differentiation between collectives can or cannot qualify as one of the listed kind of relatedness. Thus, determining the 'form' of these concepts at that point of time is an essential starting point to assess whether a particular differentiation on the historical continuum can be characterised as one the listed 'forms' of relatedness.

Second, it is established that the nature of reality is constant becoming, rather than sheer existence, which means 'thingness' is simply 'continuity over time'. It is observed from this perspective that individuals grow into listed 'forms' of unities in order to satisfy their various needs and through this commitment they develop relatively constant and persistent relations, perceptions and practices that are collectively affiliated with the notions of race, ethnicity, nation or religion. Once such a process of unity is *externalised* through reciprocal in-group and out-group perceptions a distinct 'social whole' arises. It is thus argued that the listed types of groups are always ongoing processes that emerge, evolve and disappear through constantly re-confirmed meanings and significance that are collectively ascribed to certain physical or social traits, recurring interactions, beliefs, practices or institutions and combinations of these. They are thus necessarily historically individuated.

In other words, what has been perceived as 'wholes', their existence and consequently the significance of their parts, are in constant flux depending on, inter alia, the spatial, temporal and sociopolitical context and conceptions. That being said, what makes the protected groups ontologically distinct and valuable 'as such' is that the process of unity constantly produces and re-produces causal powers and properties that its parts do not possess individually or in sum – most prominently culture and language. These ultimately belong to the unity as such, since they cannot be explained away by reduction to the individual level and exists as long as the unity continues.

While the ontological distinctiveness and value of the protected groups are thus substantiated by the thesis, exploring the mechanisms that endow these groupings the ability to be causally efficacious on their members – and thus largely reproduce their properties and causal powers – was essential to fully conceptualise the moral harm caused by genocide. In relational thinking, only the present exists and all causal effects of the past influence the present shape by affecting the decisions taken. The past, then, enhances or restrains possibilities for the future from certain facets through presenting physical, biological and psychological forces. Once the protected groups are collectively externalised they have the same impact on their members. Their 'historicality', which may present itself trough buildings, conventions, norms, biological heritages and so on, offer unique normative interpretative schemas to the individual members that enhance or limit their moment by moment decisions and conceptions of the world.

In short, it is established that the protected groups are processes that produce emergent properties, which endows them ontological independence and distinctive value. Two reciprocal phenomena reinforce the actuality of these entities. First, the mutual in-group and out-group perceptions regarding that a collection of individuals have something in common in ethnic, racial, religious or national terms, and this commonality is significant. Second, as a result of externalisation, there surface normative attitudes among members and also outsiders that certain practices, rules or ways of acting must be followed as a result of the social role assigned to them as group members.

Understanding this complex nature of the protected groups and avoiding the reductive substantialist explanations have led to two important novel conclusions about the nature of genocide. First, it is founded that the notion of group destruction, i.e. 'intent to destroy a protected group', ultimately refers to the goal of ending the perpetuation of one of the listed 'types' of processes. Therefore, 'intent to destroy' cannot be reduced to 'mass murder' or destruction of a postulated 'structure'. Rather it targets the process as such and may manifest itself in many different ways depending on the unique being of the targeted process.

Second, it is found that the distinctive immorality of the crime derives from its threefold harm. Accordingly, genocide simultaneously (i) physically and mentally damage individuals; (ii) causes identity and status loss of survivors because being robbed from

the normative influence which had played an essential role in self-definition generates major harm; (iii) extinguishes or significantly lessens the possibilities for the realisation of a selection of creative potentials that could have otherwise occurred since the unique interpretative schemas that are presented by these collectives and the interaction between these different schemas create an irreplaceable richness for humanity. The thesis suggested that the protection against this threefold harm should be a moral anchor in developing the legal understanding of genocide.

The impact of recognising this very contingency of the protected groups for our research purpose has been that any form of abstract ontological justification for 'substantiality' is beyond possibility, as there exist an infinite number of possible ontological factors that may inform such decisions, some of which may only be located after the process of 'groupness' dissolves. Therefore, the processual nature of the protected groups, as well as our epistemological limitations, prevents us 'bridging the particularity void' at the level of normative universals, unless one is willing to set an entirely arbitrary and morally questionable threshold.

Instead, the thesis has suggested that we should not think of 'objectivity', at least in this particular context, as having an abstract justifying norm that will turn judges 'into a machine that is the agent of the universal law', but rather as ensuring the predictability and consistency of the identification and justification process of 'substantiality', i.e. crystallising how to think about 'substantiality'. Following this line of thought, it has been suggested that, in the absence of ontological constraints, the assessment of 'substantiality' should be thought of as a balancing process between the genealogical imperative and analytical imperatives.

The former refers to the required numerical magnitude in absolute (not relative) terms, which reflects the genealogy of genocide that largely stems from the imagery of Holocaust and the collective moral consciousness that underpins its criminalisation. Indeed, it would be ostensibly counterintuitive in light of the history of the concept and its moral underpinnings to consider a part that consists of millions of people as 'non-substantial'. In the proposed balancing process, the absolute numerical magnitude thus constitutes a starting point, but rarely an endpoint. It can justify the 'substantiality' of a part on its own only in extreme cases where such large masses are targeted that judges

feel morally obliged to characterise the part as ‘substantial’ without any further consideration. Thus, the absolute magnitude requirement mentioned here does not stem from any ontological reasons, but rather is a reflection of the collective moral consciousness, which means it cannot be standardised in any particular normative and abstract sense. Instead, it is a point of moral evaluation that needs to be made by judges in each case.

The analytical imperatives encapsulate the complete array of possible reasons that stem from the purpose and object of genocide law and may establish a contrasting force in the reasoning process against the explained genealogical imperative in the sense of compelling judges to consider a smaller section of a group as ‘substantial’. The scope and application of these imperatives must be informed by the immorality of genocide which, from the perspective presented in the thesis, stems from the threefold harm the crime causes: physical harm, identity and status loss of victims and diminishing the opportunities for the realisation of a range of creative potential of humanity. While postulating a definitive list of analytical factors is impossible due to the explained ontological reasons, the thesis has broadly listed the three most common, albeit non-exhaustive, types of analytical factors, namely: (i) the particular characteristics of the whole or the targeted part, (ii) spatial circumstances and (iii) sociopolitical embeddings and context.

It is advanced, in this respect, that the assessment and justification of ‘substantiality’ is a balancing process between these two imperatives and it can be denoted, as a generalisation, that the smaller the part becomes in absolute numerical terms, the more the moral strength and persuasiveness of the analytical factors should become compelling and forcible to justify a judgment of ‘substantiality’. This is, however, ultimately a moral, not an ontological, assessment that needs to be made by judges in light of the particulars of each situation.

All in all, then, the thesis has established that ‘substantiality’ can be assessed in ‘objective’ terms, as long as ‘objectivity’ is understood as predictability and consistency in the judicial thinking process – not creating a definitive normative universal that proposes an exact threshold. Considering ‘objectivity’ from this standpoint, the thesis elaborated ‘how’ substantiality can be assessed and suggested that the identification and

justification of ‘substantiality’ should be understood as a balancing process between the genealogical imperative and analytical imperatives, as explained in the thesis.

Having developed and presented its understanding regarding the assessment of substantiality, the thesis next focused on the uncertainties involved in locating the relevant ‘part’ for the assessment of substantiality in chapter five. Here, the thesis argued against the ‘intentionalist’ and individualistic views that respectively maintain that the relevant part, at least to a certain extent, should be determined according to the reach and control of the individual perpetrator and only those who were intended to be subjected to the listed acts of genocide constitute the relevant part.

The thesis argued against these prevailing views by outlining a novel conceptual framework to rethink the perpetration of the crime by building on the ontological findings established in chapter four. This framework has rested on two suggestions. First of all, it is sustained that group destruction and genocide should not be equated because the former contains any kind of destructive process directed at the destruction of a group; the latter refers to a particular stage in the destruction process in which certain acts are being resorted. Drawing this distinction was a result of recognising the distinct reality of the protected groups and the processual nature of group destruction.

This conception allowed reducing the heavy emphasis on the specific *mens rea* element by recognising that other crimes as well may be underpinned by ‘intent to destroy’, e.g. ethnic cleansing or forced assimilation. This is a consequence of establishing that the term ‘to destroy’ cannot be reduced to mere physical and biological destruction since it is directed at the entity as such. The thesis argued that group destruction is a process that legally qualifies as genocide when acts of genocide become patterns of conduct and thus one of the main means of destruction. However, this does not change the fact that an ‘intent to destroy’ is directed at collective processes, i.e. at groups, and in that capacity, all other acts of destruction inform the determination of the relevant ‘part’ intended to be destroyed.

Secondly, it is argued that even though the legal definition is formulated the crime as if it were mere individual misconduct, individual genocidal intent is inherently a ‘we-mode’ of intentionality. This is because what turns a vain wish to a meaningful act oriented will is developing the reasonable belief that the goal can be achieved. Barring

the exceptional *lone genocidaire* cases, an individual can develop such intentionality only as a part of a collective act and common understanding. Therefore, 'genocidal intent' is necessarily contextual, because developing a reasonable belief concerning the destruction of a substantial part becomes possible only in particular 'contexts'. For this reason, the scope of the crime's elements should necessarily be assessed through an examination of the nature of the collective genocidal ethos to which the individual adheres. Therefore, the relevant part in terms of an individual's genocidal intent is not usually determined by her reach and control, but by the extent of the collective action that she adheres to.

All in all, the second novel contribution of the study has been two-fold. First, it is established that posing an objective universal to straightforwardly determine 'substantiality' is beyond possibility. Rather, the assessment of substantiality should be understood as a balancing process between genealogical and analytical imperatives. The thesis has elaborated on how this balancing process may work in chapters four and six. Second, it is established that because 'intent to destroy' necessarily refers to the entire destruction process and the genocidal intent is a 'we-mode' of intentionality, the targeted part is determined by the extent and nature of the collective action and understanding.

7.3. Reflecting the Reality of Group Destruction in Genocide Law: A Four-Step Test to Examine the Occurrence of Genocide

The thesis began by referring to the exchange between Christine Shelly and the Reuters reporter, which highlighted the well-known difficulty of representing genocide. Even though the present thesis had a narrow starting point, its methodological approach has allowed not only offering a fresh perspective as to the assessment of 'substantiality', but also presenting a novel understanding regarding the legal representation of genocide and the assessment of its occurrence. The third and final contribution of the study has been that offering a four-step test to assess the occurrence of genocide through systematising its findings in chapters four and five. This test then comparatively applied to the South Sudan situation.

The four-step test, however, does not imply the possibility of determining that genocide has occurred simply through theoretical analysis. Such a claim would go against one of

the central findings of the thesis in that the contingent nature of protected groups and the criminological phenomenon preclude the prospect of reducing the assessment process to a set of questions with 'yes/no' answers. Instead, the proposed test aims to clarify the thinking process and locate the main points of consideration, which are nevertheless abstract conceptualisations that need to be moulded and applied by judges depending on the particulars of the situation to hand and in light of the moral and historical purpose of the law against genocide explained in Chapter Four. Therefore, the purpose of the case study has been to demonstrate how this thinking process may work, rather than suggesting an ultimate conclusion or solution.

The proposed test is primarily built on the finding that a purely 'intentionalist' legal conceptualisation of genocide contradicts the social reality of the crime and thus generates an incoherent assessment process as well as some strained arguments that lead to inconsistent justifications of legal decisions. It is demonstrated, for example, that the strong emphasis on 'intentionality' has resulted in weak justifications in ICJ and ICTY jurisprudence regarding why the Srebrenica attack qualified as genocide while the Vukovar did not. Similarly, another highlighted inconsistency is that while the factors that the UN fact-finding mission in Myanmar relied on in inferring overall genocidal intent were also largely present in South Sudan, it is not clear why the question of genocide has been largely overlooked in relation to the latter.

As the analysis in the previous chapters has revealed, there is a symbiotic relationship between individual genocidal intent and the 'general existence of genocide', and the former can only exist by virtue of the latter – barring unlikely *lone genocidaire* cases. In this sense, it is pointed out that establishing individual responsibility for genocide requires an examination of the perpetrator's relatedness to 'collective genocide', which means determining the occurrence of genocide at the collective level should be the starting point for an assessment. The first three steps of the proposed test are thus devoted to developing a way of thinking about how to establish the general existence of genocide in light of the overall findings of the study.

Accordingly, the first step should be to determine whether the perpetrator group developed a 'normative destructive ethos' that targeted a protected group as such in a particular space and timeframe. The relevant section in chapter six first focused on the

determination of the protected status of a group. By comparatively examining Tutsis and Hutus in Rwanda and Nuer and Dinka in South Sudan, the study demonstrated that the objective and subjective perspectives offered in the case law either unduly essentialize these identities by presuming an ever-present essence or undermine the social reality of the definitional listing by entirely subjectifying the assessment. Instead, by applying its findings in Chapter Four, the study argued that each listed type is a particular and always changing 'form' of relatedness. Judges first need to examine what kind of relatedness these 'forms' are referring to at that point of history, and then examine whether the victim group developed one of these 'forms' of relatedness vis-à-vis the perpetrators on a socio-historical continuum through the externalisation of their process of unity and corresponding in- and out-group perceptions. By rethinking protected groups from this processual perspective, the thesis demonstrated how the relatedness between Nuer and Dinka and Hutus and Tutsis preserved their 'ethnic' character despite the original reasons for that differentiation having faded out or been transformed.

Subsequently, it is elaborated that locating a normative destructive ethos requires engaging with two connected questions, namely whether the perpetrator group developed normative destructive dispositions, interactions and practices against the victim group as such, and whether these relations evolved or were evolving into one-sided dominance in a particular timeframe and space. In elaborating the former, the thesis has drawn some parallels with the practice of inferring genocidal intent in the case law and established that the contextual factors referred to in the case law to infer an 'intent to destroy' are all elements of a normative destructive ethos. Thus, the chapter suggested a similar form of inquiry to establish a normative destructive ethos, though this dissented from the practice of international courts and tribunals on three grounds.

First, by building on the arguments in Chapter Five, it was found that the collective process of group destruction is ontologically distinct from the intentionality and acts of particular individuals and thus should be established on its own, before getting into any discussion regarding the intentionality and responsibility of an individual perpetrator. This is particularly because the existence and nature of the latter depend on the existence and nature of the former. In other words, individual genocidal intent is a 'we-mode of reasoning' that emerges and gains its characteristics through its relation and

commitment to collective action and reasoning. Second, it is advanced that a normative destructive ethos, which refers to the common understanding that underpins as collective action and thus denotes a collective 'intent to destroy', is related to the entire process of destruction against an entity as such, not merely to acts of genocide against members of the group. Thus, its extent determines the relevant part that will be subject to an assessment of 'substantiality'. Third, a normative destructive ethos and thus an 'intent to destroy' is not specific to genocide. What qualifies a destruction process as 'genocide' is the listed acts of the crime becoming one of the main means of destruction. The latter question, on the other hand, reflects the insight that genocide differs from unequal power relations or total existential wars in the sense that it requires a one-sided dominance in a particular timeframe and area.

The second step of the test is to determine whether the destruction processed reached the stage of genocide. It is argued that a process of destruction should legally qualify as genocide if there is an established or emerging pattern of acts of genocide as part of a normative destructive ethos. Accepting otherwise would preposterously imply that even a single killing or rape may constitute a crime of genocide. The study thus welcomed the contextual element included in the ICC's Elements of Crimes. However, the chapter objected to the idea that this element merely denotes a requirement for genocidal intent to be 'realistic'. Rather, in the proposed framework, it is the main element that determines whether a collective action has reached the stage of genocide. The chapter offered several, non-exhaustive, elements that can inform a holistic assessment, including the frequency, nature and density of acts; their numerical magnitude in an absolute and relative sense; the systematic or planned nature of the acts; or their strategic importance.

The third step is to determine 'substantiality'. By building on the arguments developed in Chapter Four, it is reiterated that the assessment of substantiality should be a twofold examination. First, it should be determined whether the unity under attack constitutes a 'whole' or 'part' by investigating whether it has developed an additional and distinct solidarity and identity vis-à-vis its overarching kinships emerging on a national, ethnic, religious or racial basis (or any combination of these). If this assessment reveals that the group in question is a part, then its substantiality can be assessed. The thesis suggests there is no definitive element that decides 'substantiality', rather it is a balancing

process between genealogical imperatives, i.e. the absolute numerical magnitude of the part, and the analytical factors which encapsulate any possible reasons that stem from the protective purpose of the law. The chapter singled out three main factors in this respect, namely (i) the particular characteristics of the whole or the targeted part; (ii) the spatial circumstances; and (iii) the sociopolitical embeddings and context. Finally, the suggested fourth step is the individualisation of genocide. While the study has offered a brief framework for how to think about the relatedness of individuals to the general process of genocide, and connectedly to determine their individual responsibility, due to the limitation and focus of the study and the vastness of the subject, a detailed examination of this particular step is left for future work.

The thesis extensively applied this four-step test to the South Sudan situation by drawing some comparisons with the Rwanda, Myanmar, Srebrenica and Vukovar situations. To highlight the main conclusions, unlike Rwanda or Rakhine State, it was not possible to establish the existence of a normative destructive ethos against any particular group in the entire South Sudan, because, even though the acts of destruction commonly occurred, none of the parties was able to established one-sided dominance in the country in a particular timeframe.

That said, there have been some 'localised', Srebrenica-like atrocities took place in South Sudan, which allowed the thesis to apply its four-step test by focussing the assessment of 'substantiality'. As to the first of these situations, namely Bentiu massacre of 2014, it is found that the situation was lacking both the presence of a normative destructive ethos (mainly due to the reactive nature of the attack; the lack of systematic destruction and a plan or policy to change the demographic and ethnic composition) and patterns of acts of genocide. Also, the targeted Dinka and Sudanese population were significantly small in numbers and there were almost no analytical imperatives to balance the process of assessment.

The second situation was the Juba atrocity in 2014. Here, the study found, by highlighting the disturbing similarities between this atrocity and Kibuye in Rwanda, that the first two steps were met in light of systematic and planned targeting of Nuer people as well as systematic and widespread application of the acts of genocide. However, the thesis found that the Nuer of Juba cannot be qualified as a substantial part because while

the genealogical imperative was weak, there were not sufficient analytical factors to balance the process. Here the study has drawn some distinction with the Srebrenica situation and highlighted that despite the similarities in numbers, the socio-political significance of the Srebrenica Muslims at the time of the attack constituted a very strong element, at least according to the ICTY and ICJ, to balance the lack of genealogical imperative.

As to the other two 'localised' situations, the study found that while there was not sufficient evidence in terms of Acholi-Pajok to locating a normative destructive ethos since it was not clear whether the acts were directed against the existence of the group, in Yei River State the lack of evidence on whether the group was targeted 'as such' led to a similar conclusion. In terms of the second step, while the acts of genocide were not dense and large in numbers to speak of a pattern in Acholi-Pajok, the attack against Bari of Yei River State was one of the most severe in South Sudan and pattern of acts of genocide was evident. As to the third step, the study highlighted that the distinct sub-group identity of Acholi-Pajok clan is a strong analytical factor to balance the lack of genealogical imperative, while the relatively higher number of targeted group considered in conjunction with the socio-political significance of the part at the time of the Bari of Yei Rivers State can be considered as a substantial part.

This four-step test admittedly requires further improvements and elaboration. However, it offers a novel way of thinking about genocide by reducing the heavy and unduly emphasis on 'intentionality', recognising the ontological distinctiveness of 'collective genocide' and suggesting to consider the individual responsibility according to one's relatedness with the 'collective genocide'. In short, then, the present thesis has produced a fresh understanding of the problem, which led to a novel understanding to assess 'substantiality' and the occurrence of genocide in general.

To restate, the ultimate answer to the research question has been that if the idea of objectivity is understood as generating a certain institutional arrangement or universal rule, reference to which would provide a straightforward answer and justification in considering the 'substantiality' of a part, then, the study submits that the reality of the protected groups significantly limits, if not completely dismisses, the moral and logical desirability and use of such 'objective universals' in applying the substantiality

requirement to particular situations. On the other hand, if 'objectivity' is understood as predictability and consistency in the judicial thinking process, then it is possible to reach a certain level of 'objectivity' by crystallising the thinking process, and the study offered a particular way of thinking in this direction.

7.4. Developing This Research

Finally, the thesis does admittedly have some limitations that stem from the way the research developed and these limitations leave open many opportunities for future work. First of all, the relationship between ontological presumptions and the application of the legal definition in jurisprudence requires further examination, but the true breadth of that topic extends beyond the limits of this study. Similarly, a relational realist reading of the legal definition should be more extensively examined in future work. Further, the implications of the processuality of group destruction for the assessment of genocidal intent as well as the 'we-mode' nature of genocidal intentionality admittedly require some lengthy examinations, but unfortunately the thesis could only focus on their relation to the research topic. Despite all its limitations and possible weaknesses, the present study nevertheless makes an important contribution to knowledge by scrutinising a practical, crucial and yet somehow under-examined topic from a unique methodological perspective.

BIBLIOGRAPHY

Books:

- Abbott, Andrew *Processual Sociology* (Chicago: The University of Chicago Press, 2016)

- Akhavan, Payam *Reducing Genocide to Law*: *Definition, Meaning, and the Ultimate Crime* (Cambridge: Cambridge University Press, 2012)

- Ambos, Kai *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Oxford: Oxford University Press, 2013)

- Ambos, Kai *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford: Oxford University Press, 2014)

- Anderson, Benedict *Imagined communities: reflections on the origin and spread of nationalism (revised edition)* (London: Verso, 2006)

- Anderson, Kjell *Perpetrating Genocide: A Criminological Account*, (Oxon: Routledge, 2018)

- Arendt, Hannah *The Origins of Totalitarianism* (New York: Meridian Books, 1962)

- Arendt, Hannah *The Promise of Politics* edited by Jerome Kohn (New York: Schocken Books, 2005)

- Badar, Mohamed Elewa, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Oxford: Hart Publishing, 2013)

- Barkan, Elezar *The retreat of scientific racism: Changing concepts of race in Britain and the United States between the world wars* (Cambridge: Cambridge University Press, 1992)

- Barth, Frederick *Ethnic Groups and Boundaries: The Social Organization of Culture Difference*, (Illinois: Waveland Press Inc., 1969)

- Bauer, Otto *The Question of Nationalities and Social Democracy* translated by Joseph O'Donnell and edited Ephraim Nimni (Minneapolis: University of Minnesota Press, 2000)

- Bazyler, Michael *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (Oxford: Oxford University Press, 2016)

- Berger, Peter and Thomas Luckmann *The Social Construction of Reality* (London: Penguin, 1967)

- Bhaskar, Roy *A Realist Theory of Science* (Oxon: Routledge, 2008 [1975])

- Bhaskar, Roy *The Possibility of Naturalism: A Philosophical Critique of the Contemporary Human Sciences 3rd ed.* (London: Routledge, 1998 [1979])

- Boas, Gideon, James L. Bichoff and Natalie Reid *International Criminal Law Practitioner Library - Volume II: Elements of Crimes under International Law* (Cambridge: Cambridge University Press, 2008)

- Bratman, Michael *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge: Cambridge University Press, 1999)

- Breidlid, Anders, Aveliono Androga Said, Yosa Wawa and Anne Ferren (eds.) *A Concise History of South Sudan: New and Revised Edition* (Kampala: Fountain Publishers, 2014)

- Bridget, Coggins *Power Politics and State Formation in the Twentieth Century: The Dynamics of Recognition* (Cambridge: Cambridge University Press, 2004)

- Brodbeck, May *Readings in the Philosophy of the Social Sciences* (New York: Macmillan, 1968)

- Brubaker, Roger *Ethnicity Without Groups* (Massachusetts: Harvard University Press, 2006)

- Bryan, M.A. *The Bantu Languages of Africa: Handbook of African Languages* (Oxon: Routledge, 2017)

- Bratman, Michael, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge & New York: Cambridge University Press, 1999)

- Walter, Buckely *Society: A Complex Adaptive System* (Durham: Gordon and Breach Publishers, 1998)

- Carter, Bob *Realism and Racism: Concepts of Race in Sociological Research* (London: Routledge, 2000)

- Chalk, Frank and Kurt Johassohn *The History and Sociology of Genocide* (New Heaven: Yale University Press, 1990)

- Coggins, Bridget *Power Politics and State Formation in the Twentieth Century: The Dynamics of Recognition* (Cambridge: Cambridge University Press, 2004)

- Collier, Andrew *Critical Realism: An Introduction to Roy Bhaskar's Philosophy* (London and New York: Verso, 1994)

- Cooper, John *Raphael Lemkin and the Struggle for the Genocide Convention* (New York: Palgrave Macmillan, 2008)

- Coser, Lewis *Masters of Sociological Thought: Ideas in historical and social context* (Houghton Mifflin Harcourt, 1971)

- DeLanda, Manuel *Deleuze: History and Science* (Atropos, 2010)

- DeLanda, Manuel *Assemblage Theory* (Edinburg: Edinburgh University Press, 2016)

- Donati, Pierpaolo *Relational Sociology: A New Paradigm for the Social Sciences* (Oxon: Routledge, 2011)

- Dörr, Oliver and Kirsten Schmalenbach *Vienna Convention on Law of Treaties: A Commentary* (Berlin: Springer, 2011)

- Drost, Pieter *The Crime of State: Genocide* (Leiden A.W Sythoff-Leyden Publishers, 1959)

- Durkheim, Emille, *The Rules of Sociological Method and Selected Texts on Sociology and its Method* translated by W. Halls (New York The Free Press, 1982 [1895])

- Durkheim, Emile *Suicide* translated by John A. Spaulding and George Simpson (London: Routledge & Kegan Paul, 1952 [1897])

- Durkheim, Emile *The Division of Labour in Society* Translated by W. D. Halls (New York: The Free Press, 1997 [1893]),

- Elder-Vass, Dave *The Causal Power of Social Structures: Emergence, Structure and Agency* (New York: Cambridge University Press, 2010)

- Elder-Vass, Dave *The Social Construction of Reality* (New York: Cambridge University Press, 2013)

- Elias, Norbert *The Germans* translated by Eric Dunning and Stephen Mennell (New York: Columbia University Press, 1996)

- Evans-Pritchard, Evan *Nuer Religion* (Oxford: Clarendon Press, 1956)

- Evans-Pritchard, Evan *The Nuer* (Oxford: Clarendon Press, I940)

- Fadlalla, Mohamed *Customary Laws in Southern Sudan: Customary Laws of Dinka and Nuer* (New York: iUniverse, 2009)

- Feierstein, Daniel *Genocide as a Social Practice: Reorganizing Society under the Nazis and Argentina's Military Juntas* (New Brunswick: Rutgers University Press, 2014)

- Feteris, Eveline *Fundamentals of Legal Argumentation*, (Utrecht: Springer, 2017)

- Forster, Michael *After Herder: Philosophy of Language in German Tradition* (Oxford: Oxford University Press, 2010)

- Fournet, Caroline *The crime of destruction and the law of genocide: their impact on collective memory* (Hampshire: Ashgate, 2007)

- Frieze, Donna-lee *Totally Unofficial: The Autobiography of Raphael Lemkin* (New Heaven&London: Yale University Press, 2013)

- Fulbrook, Mary *German National Identity after the Holocaust* (Cambridge: Polity Press, 1999)

- Fuller, Lon *Legal Fictions* (Stanford: Stanford University Press, 1957)

- Gellately, Robert and Ben Kiernan, *The Specter of Genocide: Mass Murder in Historical Perspective,* (Cambridge: Cambridge University Press, 2003)

- Gerth, Hans Heinrich and Mills, C. Wright *From Max Weber: Essays in sociology,* (Oxford: Oxford University Press, 1946)

- Gilbert, Margaret *On Social Facts* (New York: Routledge, 1999)

- Gould, Carol *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004)

- Grotius, Hugo *On the Law of War and Peace* (1926) F. Kelsey (trs) (Oxford: Clerandon Press, 1925)

- Hackling, Ian *Social Construction of What?* (Massachusetts: Harvard University Press, 2000)

- Hartshorne, Charles *Creative Synthesis and Philosophic Method,* (La Salle, ILL: Open Court, 1970)

- Herder, Johann Gottfried *On Social and Political Culture* (London: Cambridge University Press, 1969)

- Herder, Johann *On the change of taste (1766),* in Michael Forster (trans.) *Herder: philosophical reader* (Cambridge: Cambridge University Press, 2002)

- Hoecke, Mark Van. *Methodologies of Legal Research – Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing, 2011)

- Irvin-Erickson, Douglas *Raphael Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2016)

- Isaacs, Tracy *Moral Responsibility in Collective Context* (Oxford; Oxford University Press, 2011)

- Jacobs, Steven *Lemkin on Genocide* (New York & Plymouth: Lexington Books, 2012)

- Jones, Adam *Genocide: A Comprehensive Introduction* 2nd ed (Oxon: Routledge, 2010)

- Jovanovic, Miodrag *Collective Rights: A Legal Theory* (Cambridge: Cambridge University Press, 2012)

- Judd, Donald *Critical Realism and Composition Theory* (London: Routledge, 2003)

- Katsiaficas, George and Robert George *Introduction to Critical Sociology* (New York: Irvington Publishers, 1987)

- Khalidi, Rashid *Palestinian Identity: The Construction of Modern National Consciousness* (New York Columbia University Press, 1997)

- Kielsgard, Mark D. *Responding to Modern Genocide: At the Confluence of Law and Politics* (Oxon: Routledge, 2015)

- Kim, Sangkul *A Collective Theory of Genocidal Intent* (Hague: Springer T.M.C. Asser Press, 2016)

- Klabbers, Jan *International Law* (Cambridge: Cambridge University Press, 2013)

- Korey, Willam *An Epitaph for Lemkin* (US: Jacob Blaustein Institute for the Advancement Human Rights of the American Jewish Committee 2001)

- Koursami, Nasour *The 'Contextual Elements' of the Crime of Genocide* (Hague, Springer T.M.C Asser Press, 2018)

- Kuper, Leo *Genocide: Its Political Use in the Twentieth Century (*New Haven: Yale University Press, 1981)

- Lang, Berel *Genocide: The Act as Idea*, (Philadelphia: University of Pennsylvania Press, 2017)

- Lawson, Tom *The Last Man: A British Genocide in Tasmania*, (London: I.B. Tauris, 2014)

- LeBlanc, Lawrence *The United States and the genocide convention* (North Carolina: Duke University Press, 1991)

- Lemkin, Raphael *Axis Rule in Occupied Europe*: *Laws of Occupation - Analysis of Government - Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace, 1944)

- Levene, Mark *Genocide in the Age of the Nation State: The Rise of the West and the Coming of Genocide* (London: I. B. Taurus, 2005).

- Luhmann, Niklas *Social Systems*, translated by John Bednarz (California: Stanford University Press, 1984).

- Mann, Micheal, *The Dark Side of Democracy*, (Cambridge: Cambridge University Press, 2004)

- Maccormick, Neil *Legal Reasoning and Legal Theory* 2d ed. (Oxford: Oxford University Press, 1994)

- MacCormick, Neil *Rhetoric And The Rule Of Law: A Theory Of Legal Reasoning* (Oxford: Oxford University Press, 2005)

- MacLean, James *Rethinking Law as Process: Creativity, Novelty, Change* (Oxon: Routledge 2012)

- Marchuk, Iryna, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Analysis* (Berlin: Springer, 2014)

- Malinowski, Bronislaw *The Scientific Theory of Culture and Other Essays (*Chapel Hill: University of North Carolina Press, 1944)

- Martin, Rex and Sprenger Gerhard (eds.) *Challenges to Law at the End of the 20th Century: Rights* (Germany: Franz Steiner Verlag, 1997)

- May, Larry *Morality of Groups* (Lawrence: University of Notre Dame Press, 1989)

- May, Larry *Genocide A Normative Account* (Cambridge: Cambridge University Press, 2010)

- Mettraux, Guénaël *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005)

- Miles, Robert *Racism after "Race Relations"* (London: Routledge, 1993)

- Montagu, Ashley *Statement on Race: An Annotated Elaboration and Exposition of the Four Statements on Race Issued by the United Nations Educational, Scientific, and Cultural Organization* (Oxford: Oxford University Press, 1972)

- Moses, Dirk *Empire, Colony, Genocide*: Conquest, Occupation, and Subaltern Resistance in World History: War and Genocide (New York: Berghahn Books, 2013)

- Mounk, Yascha *Stranger in My Own Country: A Jewish Family in Modern Germany* (New York: Farrar Straus and Giroux, 2014)

- Mugwanya, Georg, *The Crime of genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda* (London: Cameron May, 2007)

- Mukhopadhyay, Carol et. al, *How real is race?: a sourcebook on race, culture, and biology* (Rowman & Littlefield, 2013)

- Murray, Christopher *Encyclopedia of the Romantic Era, 1760-1850, Volume 2* (New York: Fitzroy Dearborn, 2004)

- Nersessian, David *Genocide and Political Groups* (Oxford: Oxford University Press, 2010)

- Novic, Elisa, *The Concept of Cultural Genocide: An International Perspective* (Cambridge: Cambridge University Press, 2016).

- Quirico, Ottavio, *International Criminal Responsibility: Antinomies* (New York: Routledge, 2019)

- Paul, Angela *Kritische Analyse und Reformvorschlag zu Art II Genozidkonvention* (Springer 2008) (cited in Behrens, `The *Mens Rea* in Genocide')

- Paunio, Elina *Legal Certainty in Multilingual EU Law* (Oxon: Routledge, 2013)

- Popper, Karl *The Open Society and its Enemies* (London: Routledge, 2002 [1945])

- Powell, Cristopher *Barbaric Civilization: A Critical Sociology of Genocide* (McGill-Queen's University Press, 2011)

- Power, Samantha *A Problem from Hell: America and the Age of Genocide* (London: Flamingo, 2003)

- Quigley, John *The Genocide Convention: An International Law Analysis* (Ashgate Publishing, 2006)

- Richmond, Walter *The Circassian Genocide* (New Brunswick: Rutgers University Press, 2013)

- Robinson, Nehemiah *The Genocide Convention a Commentary (*Institute of Jewish Affairs-New York, 1960)

- Rosenbaum, Alan (ed.), *Is the Holocaust Unique?: Perspectives on Comparative Genocide* 3rd Ed. (New York: Routledge, 1970)

- Roth, John *Genocide and Human Rights: A Philosophical Guide* (New York Palgrave Macmillan, 2005)

- Sands, Philate *East West Street*: *On the Origins of "Genocide" and "Crimes Against Humanity*" (London: W&N, 2016)

- Schabas, William *Genocide in International Law 2nd* (Cambridge: Cambridge University Press, 2009)

- Searle, John *Making the Social World: The Structure of Human Civilization* (New York: Oxford University Press, 2010)

- Searle, John *The Construction of Social Reality* (New York: The Free Press, 2010)

- Seibel, Wolfgang and Gerald Feldman, *Networks of Nazi Persecution: Bureaucracy, Business and the Organization of the Holocaust* (New York: Berghahn, 2005)

- Shaw, Martin *What is Genocide?* (Cambridge: Polity Press, 2007)

- Sheehy, Paul *Reality of Social Groups* (UK: Ashgate Publishing Group, 2006)

- Simmel, Georg *The Sociology of Georg Simmel* translated and edited by Kurt Wolff (New York: The Free Press, 1950)

- Simmel, George *George Simmel on Individuality and Social Forms*, Selected Writings edited by Donald Levine (Chicago: University of Chicago Press, 1971)

- Simmel, George *Simmel on Culture: Selected Writings* edited by David Frisby and Mike Featherstone (London: Sage Publication, 1997).

- Smith, Christian *What is a Person?': Rethinking Humanity, Social Life, and the Moral Good from the Person Up* (Chicago: University of Chicago Press, 2010)

- Staub, Ervin, *The Roots of Evil: The Origins of Genocide and Other Group Violence*, (Cambridge: Cambridge University Press, 1989)

- Stone, Dan (ed.) *The Historiography of Genocide* (New York: Palgrave Macmillan, 2008)

- Tajfel, Henri and John Turner, *An integrative theory of intergroup conflict. The social psychology of intergroup relations?* (Oxford: Academic Press, 1979)

- Tessema, Marshet, *Prosecution of Politicide in Ethiopia: The Red Terror Trials*, (Hague: Asser Press – Springer, 2018)

- Tuomela, Raimo *Social Ontology: Collective Intentionality and Group Agents*, (Oxford; Oxford University Press, 2013)

- Van Den Herik, Larissa *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff Publishers, 2005)

- Waller, James *Confronting Evil: Engaging Our Responsibility to Prevent Genocide* (Oxford: Oxford University Press, 2016)

- William, Lucy *Law's Judgement* (Oxford, Hart Publishing, 2017)

- Weber, Max *Basic Concepts in Sociology* (New York: Citadel Press, 1964)

- Weber, Max *Economy and Society* (Berkeley University of California Press, 1978)

- Weber, Max *The Theory of Social and Economic Organizations* translated by A.M. Henderson and Talcott Parsons (New York: Oxford University Press, 1947)

- Wechtuor, Kuajien Lual, Yual Doctor Chieck and Peter Gai Manyoun *The Nuer Nation*, Create Space (Independent Publishing Platform 2016)

- Werle, Gerhard and Florian Jessberger *Principles of International Criminal Law* (2rd ed.) (Oxford: Oxford University Press 2014)

Book Chapters:

- Akande, Dapo 'Sources of International Criminal Law' in Antonio Cassese (ed.) *The Oxford Companion to International Criminal Justice* (Oxford, OUP, 2009).

- Bankowski, Zenon 'Legal Reasoning from the inside out,' in Tadeusz Biernat Christopher Wong (ed.) *Stressing Legal Decisions: IRV 21st World Congress, Lund, Sweden, 2003: Law and Politics in Search of Balance* (Krakow: Polpress, 2004)

- Bankowski, Zenon 'In the judgement space: the judge and the anxiety of the encounter' in James MacLean and Zenon Bankowski (eds.) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2007)

- Behrens, Paul, `The mens rea of genocide` in Paul Behrens and Ralph Henham (eds.), *Elements of Genocide* (Oxon: Routledge, 2012)

- Behrens, Paul, 'The need for a genocide law' in Paul Behrens and Ralph Henham (eds.), *Elements of Genocide* (Oxon: Routledge, 2012)

- Berster, Lars, 'Article II' in Christian Tams, Lars Berster and Björn Schiffbauer (eds.) *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, (Oxford: Hart Publishing, 2014)

- Charny, Israel, 'Toward a Generic Definition of Genocide' in George Andreopoulos (ed.) *Genocide: Conceptual and Historical Dimensions*, (Philadelphia, University of Pennsylvania Press, 1997)

- Christodoulidis, Emilious 'Eliding the particular: a comment on Neil MacCormick's "particulars and universals"' in James MacLean and Zenon Bankowski (eds.) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006).

- Costerbosa, Marina 'Some Reflections on the Relationship Between Law and Morality-Neil MacCormick's Point of View' in *Law and Democracy in Neil MacCormick's Legal and Political Theory* Agustin Menéndez and Jose Fossum (eds.) (Dordrecht: Springer, 2011)

-- Fenwick, Mark and Stefan Wrbka, 'The Shifting Meaning of Legal Certainty' in Fenwick, Mark and Wrbka, Stefan *Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives* (E-Book: Springer, 2016), at. 179

- DeLanda, Manuel, 'Deluzian Social Ontology and Assemblage Theory' in *Deluze and the Social* Martin Fuglsang and Bent Meier Sorensen (eds.) (Edinburgh: Edinburgh University Press (2006)

- Giles, Howard and Jane Giles, 'In-Groups and Out-Groups' in *Inter/Cultural Communication: Representation and Construction of Culture* Anastacia Kurylo (ed.) (California; Sage Publication, 2013)

- Gilbert, Margaret 'Remarks on collective belief' in Frederick Schmitt (ed.) *Socializing Epistemology* (Maryland: Rowman & Littlefield, 1994)

- Gilbert, Margaret ‘Searle and Collective Intentions’ in. Savas L. Tsohatzidis (ed.) *Intentional Acts and Institutional Facts: Essays on John Searle's Social Ontology* (Dordrecht; Springer, 2007)

- Gould, Carol ‘Group Rights and Social Ontology’ in Christine Sistare, Larry May and Leslie Francis (eds.) *Groups and Group Rights,* (Lawrence: University Press of Kansas, 2001)

- Haque, Adil Ahmad ‘International Crime: in Context and in Contrast’ in R. A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros (eds.) *The Structures of The Criminal Law*, (Oxford, Oxford University Press, 2011)

- Jessberger, Florian, ‘The Definition and the Elements of the Crime of Genocide’ in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary,* (Oxford, Oxford University Press, 2009)

- McCallion, Micheal J. ‘In-Groups and Out-Groups’ in The Blackwell Encyclopedia of Sociology, George Ritzer (Ed.) (Malden: Blackwell Publisher, 2007)

- MacCormick, Neil, ‘Particulars and Universals’ in James MacLean and Zenon Bankowski (eds.) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006).

- Misztal, Blaise, ‘Protect, but from What? Genocide as a Concept of Moral and Legal Universalism’. in Agnieszka Bieńczyk-Missala and Dębski Sławomir (eds.) *Rafal Lemkin: A Hero of Mankind*, Poland: Polski Instytut Spraw Miedzynarodowych, 2010.

- Moses, Dirk, ‘Raphael Lemkin, Culture, and the Concept of Genocide’ in Dirk Moses and Donald Bloxham *Raphael Lemkin, Culture, and the Concept of Genocide, Oxford Handbook of Genocide Studies* (Oxford, Oxford University Press, 2010)

- Ohlin, Jens David ‘Organizational Criminality’ in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014).

- Oosterveld, Valerie ‘The Context of Genocide’ in Roy S Lee and Hakan Friman (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York: Transnational Publishers, 2001)

- Powell, Christopher ‘Introduction’ in Conceptualizing Relational Sociology: Ontological and Theoretical Issues edited by Christopher Powell and François Dépelteau (New York: Palvgrave MacMillian, 2013)

- Robinson Darryl and Herman von Hebel, ‘Crimes Within the Jurisdiction of the Court’, in Roy S Lee and Hakan Friman (eds), *The International Criminal Court, the*

Making of the Rome Statute, Issues, Negotiations, Results (New York: Transnational, 1999)

- Schabas, William, 'Rafal Lemkin, Genocide and Crimes Against Humanity', in Agnieszka Bieńczyk-Missala and Dębski Sławomir (eds.) *Rafal Lemkin: A Hero of Mankind,* (Poland: Polski Instytut Spraw Miedzynarodowych, 2010)

- Searle, John 'Collective Intentions and Actions' in Phillip R. Cohen, Jerry Morgan, and Martha E. Pollack (ed) Intentions in Communication, (Cambridge, Mass.: MIT Press, 1990)

- Shaw, Martin 'Genocide and International Law', in Yoram Dinstein (ed.) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne,* (Leiden: Springer, 1989)

- Sluiter, Goran and Koran Vriend, 'Defending the 'Undefendable'? Taking Judicial Notice of Genocide' in Harmen van der Wilt, Jeroen Vervliet, Goran Sluiter and Johannes ten Cate. *Genocide Convention: The Legacy of 60 Years,* (Leiden, Martinus Nijhoff Publishers, 2012)

- Tajfel, Henri 'The achievement of group differentiation' in Henri Tajfel (ed), *Differentiation between groups: Studies in the social psychology of intergroup relations* (London: Academic Press, 1978)

- Tams, Christian, 'Introduction' in Christian Tams, Lars Berster, Björn Schiffbauer *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary,* (Oxford: Hart Publishing, 2014)

- Taylor, Charles 'The Importance of Herder,' in Edna Ulmann-Margalit and Margalit, Avishai *Isaiah Berlin: A Celebration,* (Chicago, University of Chicago Press, 1992)

- Tiba, Firew, 'The Trial of Mengistu and other Derg Members for Genocide, Torture and Summary Execution in Ethiopia' in Murungu,C and Biegon,J (ed), *Prosecuting International Crimes in Africa, PULP* (Pretoria University Law Press), at. 163

- van den Herik, Larissa, 'The schism between the legal and the social concept of genocide in light of the responsibility to protect' in Paul Behrens and Ralph Henham (eds.) *The Criminal Law of Genocide International, Comparative and Contextual Aspects,* (UK, Ashgate, 2007)

- van der Herik, Larissa and Carsten Stahn, ''Fragmentation', 'Diversification', and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?' in Larissa van der Herik and Carsten Stahn, (eds.) *The Diversification and Fragmantation of International Criminal Law,* (Leiden: Martinus Nijhoff Publishing, 2012)

- van der Herik, Larissa, 'The Meaning of the Word "Destroy" and its implications for the Wider Understanding of the Concept of Genocide' in van der Wilt, Harmen, Jeroen Vervliet, Goran Sluiter and Johannes ten Cate. *Genocide Convention: The Legacy of 60 Years, (*Leiden, Martinus Nijhoff Publishers, 2012)

- Veitch, Scott, '"A Very Unique Case": Reflections on Neil MacCormick's Theory of Universalization in Practical Reasoning' in James MacLean and Bankowski, Zenon (eds.) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006).

- Wai, Dunstan 'The Southern Sudan and the People' in M. Wai Dunstan (ed.), *The Southern Sudan: The Problem of National Integration*, (London: Frank Cass, 1973)

= Werkmeister, Andreas 'International Criminal Law as a Means to Fight the 'Hostes Humani Generis'?' On the Dangers of the Concept of Enemy Criminal Law' in Fenwick, Mark and Wrbka, Stefan *Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives* (E-Book: Springer, 2016), at. 179

- Zaibert, Leo, 'Collective Intentions and Collective Intentionality,' in David Koepsell and Laurence Moss (eds.), *John Searle's Ideas about Social Reality – Extensions, Criticisms and Reconstructions*, (Oxford: Blackwell, 2003)

Articles and Research Papers:

- Abbott, Andrew, 'Historicality of Individuals', 29 *Social Science History* (2005), at. 1

- Abed, Mohammed, 'Clarifying the Concept of Genocide', 37 *Metaphilosophy* (2006), at. 308

- Addis, Adeno, 'Genocide and Belonging: Process of Imagining Communities', 38 University of Pennsylvania Journal of International Law (2017), at. 1041

- Akhavan, Payam, 'The Crime of Genocide in the ICTR Jurisprudence', 3 *Journal of International Criminal Justice* (2005), at. 989

- Allott, Philip, 'The Concept of International Law', 10 European Journal International Law (1999), at. 31

- Alonzo-Maizlish, David, 'In Whole or In Part: Group Rights, The Intent Element of Genocide, and the "Quantitative Criterion"', 77 *New York University Law Review* (2002), at. 1369

- Altman, Andrew, 'Genocide and Crimes Against Humanity: Dispelling the Conceptual Fog', 29 *Social Philosophy and Policy* (2012), at. 280.

- Ambos, Kai, 'What does 'intent to destroy' in genocide mean?', 91 *International Review of the Red Cross* (2009), at. 833

- Amann, Diane Marie, ‘Group Mentality, Expressivism, and Genocide’, 2 *International Criminal Law Review* (2002), at. 93

= Aneme, Girmachew, ‘The Anatomy of Special Prosecutor v. Colonel Mengistu Hailemariam et al. (1994-2008)’ 1 *The International Journal of Ethiopian Studies*, (2009), at. 1

- Arnold, Matthew B. and Alden, Chris ‘This gun is our food”: Disarming the White Army militias of South Sudan’, 7 *Conflict, Security & Development* (2007), at. 361

- Aruda, Caroline, ‘From Individual to Collective Intentionality’, 46 *Philosophy of Social Sciences* (2016), at. 319

- Aydin, Devrim, ‘The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts’, 78 *Journal of Criminal Law* (2014), at. 423

- Bauer, Yehuda, ‘The Place of the Holocaust in History’, 2 *Holocaust and Genocide Studies* (1987), at. 209

- Behrens, Paul, ‘Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia’, 28 *Leiden Journal of International Law* (2015), at. 923

- Behrens, Paul, ‘Genocide and Question of Motives’, 10 *Journal of International Criminal Justice* (2012), at. 501

- Behrens, Paul, ‘The Crime of Genocide and the Problem of Subjective Substantiality’ (2016) 59 *German Yearbook of International Law*, at. 321

- Benhabib, Seyla, ‘International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin’, 16 *Constellations* (2009), at. 331

- Berger, Peter and Stanley Pullberg, ‘Reification and the Sociological Critique of Consciousness’, 35 *New Left Review* (1966), at. 196

- Bilewicz, Michal, ‘Holocaust as the Prototype of Genocide. On Some Problems with the Modern State Crime Paradigm’, 16 *Analyses of Social Issues and Public Policy* (2016) at 321.

- Bitker, Bruno, ‘Genocide Revisited’, 56 *American Bar Association Journal* (1970) at.71

- Boghossian, Paul, ‘The Concept of Genocide’, 12 *Journal of Genocide Research* (2010), at. 69

- Bratman, Michael, ‘Shared Intention’, 104 *Ethics* (1993), at. 97

- Brewer, Marilynn B., ‘The Psychology of Prejudice: Ingroup Love or Outgroup Hate?’, *55 Journal of Social Issues* (1999), at. 429

- Bryant, Bunyan, ‘Substantive Scope of the Convention’, 16 *Harvard International Law Journal* (1975), at. 691

- Card, Claudia, ‘Genocide and Social Death’, 18 *Hypatia* (2003), at. 63

- Carlston, Kenneth, ‘The Genocide Convention: A Problem for an American Lawyer’, 36 *American Bar Association Journal* (1950) at. 206

- Cassese, Antonio, ‘The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice’, 25 *Leiden Journal of International Law* (2012), at. 491

- Chisholm, Roderick, ‘Parts as Essential to Their Wholes’, 26 *The Review of Metaphysics* (1973), at. 582

- Christodoulidis, Emilious, 'The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular', 18 *Law and Philosophy* (1999), at. 215

- Clark, Roger, ‘The Mental Element in International Criminal Law: the Rome Statute of the Inter-national Criminal Court and the Elements of Offences’, 12 *Criminal Law Forum* (2001), at. 326

- Conde, Francisco Conde, 'Rethinking the Universal Structure of Criminal Law' 39 *Tulsa Law Review* (2004), at. 941

- Crook, Martin, ‘The Mau Mau Genocide: A Neo-Lemkinian Analysis, 1 *Journal of Human Rights in the Commonwealth*, (2013), at. 19

- Cryer, Robert, ‘The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision’, 7 *Journal of International Criminal Justice* (2009), at. 291

- Cupido, Marjolein, ‘The Contextual Embedding of Genocide A Casuistic. Analysis of the Interplay between Law and Facts’, 15 *Melbourne International Law Journal* (2014), at. 24

- Dalal, Farhad, ‘Racism: Processes of detachment, dehumanization, and hatred’, 75 *Psychoanalytic Quarterly*, (2006), at.131

- De George, Richard, ‘Social Reality of Social Objects’, 37 *The Review of Metaphysics* (1983), at. 3

- Detmold, Michael, ‘Law as Practical Reason’, 48 *Cambridge Law Journal (*1989) at. 436

- Donati, Pierpaolo, ‘Manifesto for a critical realist relational sociology’, 25 *International Review of Sociology* (2015) at. 91

- Drumbl, Mark, ‘Collective Violence and Individual Punishment: Criminality of Mass Atrocity’, 99 *Northwest University Law Review* (2005), at. 567

- Editors of the American Association of Physical Anthropologists, ‘Statement on Biological Aspects of Race’, 101 *American Journal of Physical Anthropology* (1996), at. 569

- Elinghaus, Katherine ‘Biological Absorption and Genocide: A Comparison of Indigenous Assimilation Policies in the United States and Australia’ *4 Genocide Studies and Prevention: An International Journal,* (2009), at.59

- Emirbayer, Mustafa, ‘Manifesto for a Relational Sociology’, 103 The American Journal of Sociology (1997), at. 281

- Faulkner, Rebecca, ‘Taking Judicial Notice of the Genocide in Rwanda: The Right Choice’, 27 *Penn State International Law Review* (2009), at. 895

- Finch, George, ‘The Genocide Convention’, 43 *American Journal of International Law* (1949), at. 732

- Fisher, Siobhan, ‘Occupation of the Womb: Forced Impregnation as Genocide’, 46 *Duke Journal of International Law* (1996), at. 91

- Fletcher, George and Jens David Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’, 3 *Journal of International Criminal Justice* (2005), at. 545

= Gerlach, Christian, ‘The Wannsee Conference, the fate of German Jews, and Hitler’s decision in principle to exterminate all European Jews.’ 70 *The Journal of Modern History* (1998) at. 759

- Glickman, Maurice, ‘The Nuer and the Dinka; A Further Note’ 7 *Man New Series* (1972), at. 586

- Goldberg, Arthur and Gardner, Richard, ‘Time to Act on Genocide Convention’, 58 American Bar Association Journal (1972), at. 141

- Greenawalt, Alexander, ‘Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation’, 99 *Columbia Law Review* (1999), at. 2259

- Hartney, Michael, ‘Some Confusions Concerning Collective Rights’, 4 *The Canadian Journal of Law and Jurisprudence* (1991), at. 293

- Heller, Kevin Jon, ‘International Criminal Tribunal for Rwanda – Genocide – Conspiracy to Commit Genocide – Complicity in Genocide – Mens Rea – Judicial Notice’, 101 American Journal of International Law (2007), at. 159

- Hinton, Alexander, 'Critical Genocide Studies', 7 *Journal of Genocide Studies* (2012), at. 4

- Holmes, Stephen, 'Looking Away', 24 *London Review of Books* (2002), at. 3

- Howse, Robert and Karen Knop, 'Federalism, Secession, and the Limits of Ethnic Accommodation: A Canadian Perspective' 1&2 *New Europe Law Review* (1993), at. 269

- Irvin-Erickson, Douglas, 'Genocide, the "Family of Mind" and the Romantic Signature of Raphael Lemkin', 15 *Journal of Genocide Research* (2013), at. 273

- Johnson, Douglas H., 'Briefing: The crisis in South Sudan', 113 *African Affairs* (2014), at. 302

- Jok, Madut Jok, and Hutchinson, Sharon, 'Sudan's Prolonged Second Civil War and the Militarization of Nuer and Dinka Ethnic Identities', 42 *African Studies Review* (1999), at. 25

- Jones, Peter, 'Group Rights and Group Oppression', 7 *Journal of Political Philosophy* (1999), at. 353

- Jørgensen, Nina, 'Genocide as a Fact of Common Knowledge', 56 International and Comparative Law Quarterly (2007), at. 885.

- Jørgensen, Nina, 'The Definition of Genocide: Joining the Dots in the Light of Recent Practice', 1 International Criminal Law Review (2001), at. 285

- Jørgensen, Nina, 'The Genocide Acquittal in the Sikirica Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea', 15 *Leiden Journal of International Law* (2002), at. 389

- Kimura, Akio 'Genocide and the modern mind: intention and structure', 5 *Journal of Genocide Research* (2003), at. 405

- Kirsch, Stefan, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct', 42 *Creighton Law Review* (2009), at. 347

- Kon, Madut, 'Institutional Development, Governance, and Ethnic Politics in South Sudan', 3 *Journal of Global Economics* (2015), at. 149

- Kovach, Karen, 'Genocide and the Moral Agency of Ethnic Groups', 37 *Metaphilosophy* (2006), at. 331

- Kreß, Claus, 'The Darfur Report and Genocidal Intent', 3 *Journal of International Criminal Justice* (2005), at. 562

- Kreß, Claus, 'The Crime of Genocide Under International Law', 6 *International Criminal Law Review* (2006), at. 461

- Kreß, Claus, ‘The International Court of Justice and the Elements of the Crime of Genocide’, 18 *European Journal of International Law* (2007), at. 619

- Kreß, Claus, ‘The Crime of Genocide and Contextual Elements’, 7 *Journal of International Criminal Justice* (2009), at. 297

- Krieken, Robert, ‘Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation’, 75 *Oceania* (2004), at. 125

-Kumm, Mattias, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, 15 *European Journal of International Law* (2004), at. 907

- Lederman, Shmuel, ‘A Nation destroyed, an existential approach to the distinctive harm of genocide’, 19 Journal of Genocide Research (2017), at. 112

- Lang, Berel, ‘Between Genocide and “Genocide”’, 50 *History and Theory* (2011), at. 285

- LeBlanc, Lawrence, ‘The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding’, 78 *American Journal of International Law* (1984), at. 369

- Lee, Steven, ‘The Moral Distinctiveness of Genocide’, 18 *The Journal of Political Philosophy* (2010), at. 335

- Lemkin, Raphael, ‘Genocide as a Crime Under International Law’, 41 *American Journal of International Law* (1947), at. 145

- Lemkin, Raphael, ‘Genocide’, 15 *The American Scholar* (1947), at. 227

- Lemkin, Raphael, ‘Genocide- A Modern Crime’, 4 *Free World* (1945), at. 39.

- Leonardi, Cherry, ‘Liberation or Capture: Youth in between “Hakuma” and “Home” During Civil War and its Aftermath in Southern Sudan’, 106 *African Affairs* (2007), at. 391

- Levi, Edward, ‘ An Introduction to Legal Reasoning’, 15 *University of Chicago Law Review* (1948), at. 501

- Lingaas, Carola, ‘Imagined Identities: Defining the Racial Group in the Crime of Genocide’, 10 Genocide Studies and Prevention (2016), at. 79.

- Lippmann, Matthew, ‘The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later’, 15 *Arizona Journal of International Criminal Law* (1998), at. 415

- Lippmann, Matthew, ‘Genocide: The Crime of the Century-The Jurisprudence of Death at the Dawn of the New Millennium’, 23 *Houston International Law Review* (2001), at. 471

- List, Christian and Spiekermann, Kai, ‘Methodological Individualism and Holism in Political Science: A Reconciliation’, 107 *American Political Science Review* (2013), at. 629

- Luban, David, ‘Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur and the UN Report’, 7 *Chicago. Journal of International Law* (2006), at. 303

- Llewellyn, K.N. ‘The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method’, 49 *Yale Law Journal* (1940), at 1355.

- May, Larry, ‘How is Humanity Harmed by Genocide?’, 10 *International Legal Theory* (2004), at. 1

- Manaktala, Meghina, ‘Defining Genocide’, 24 *Peace Review: A Journal of Social Justice* (2012), at. 179

- Melson, Robert ‘Paradigms of Genocide: The Holocaust, the Armenian Genocide, and Contemporary Mass Destructions’ 548 *The Annals of the American Academy of Political and Social Science* (1996), at. 156

- McDougal, Myres and Richard Arens, ‘The Genocide Convention and the Constitution’, 3 *Vanderbilt Law Review* (1950), at. 683

- McMahon, Christopher, ‘The Ontological and Moral Status of Organizations’, 5 *Business Ethics Quarterly* (1995), at. 541

- Meeker, Michael, ‘The Black Sea Turks: Some Aspects of Their Ethnic and Cultural Background’, 2 *International Journal of Middle East Studies* (1971), at. 318

- Morsink, Johannes, ‘Cultural genocide, the Universal Declaration, and Minority Rights’, 21 *Human Rights Quarterly* (1999), at.1009

- Moses, Dirk, ‘Conceptual Blockages and Definitional Dilemmas in the “Racial Century”: Genocides of Indigenous Peoples and the Holocaust’, 36 *Patterns of Prejudice* (2002), at. 7

- Moshman, David, ‘Conceptual Constraints on Thinking about Genocide’, 3 *Journal of Genocide Research* (2001), at. 431

- Mukimbiri, Jean, ‘The Seven Stages of the Rwandan Genocide’, 3 *Journal of International Criminal Justice* (2005), at. 823

- Newcomer, Peter, ‘The Nuer Are Dinka: An Essay on Origins and Environmental Determinism’, 7 *Man New Series* (1972), at. 5

- Newman, Dwight, ‘Collective Rights and Collective Interests’, 49 *American Journal of Jurisprudence* (2004), at.127

- Ohlin, Jens David, ‘Group Think: The Law of Conspiracy and Collective Reason’, 98 *Journal of Criminal Law and Criminology* (2007), at. 170

- Patey, Luke, ‘Crude Days Ahead: Oil and the Resource Curse in Sudan’, 109 *African Affairs* (2010), at. 617

- Patten, Alan, ‘“The Most Natural State” Herder and Nationalism’, 4 *History of Political Thought* (2010), at. 657

- Paust, Jordan, ‘Congress and Genocide: They're Not Going to Get Away With It’, 11 *Michigan Journal of International Law* (1989), at. 90

- Phillips, Orie, ‘The Genocide Convention: Its Effect on Our Legal System’, 35 *American Bar Association Journal* (1949), at. 623

- Phillips, Orie and Eberhard Deutsch, ‘Pitfalls of the Genocide Convention’, 56 *American Bar Association Journal* (1970), at. 641

- Pinaud, Clemence, ‘South Sudan: Civil War, Predation and the Making of a Military Aristocracy’, 113 *African Affairs* (2014), at. 192

- Pleasants, Nigel, ‘Ordinary Men: Genocide, Determinism, Agency and Moral Culpability’, 48 *Philosophy of the Social Science* (2018), at. 4

- Powell, Christopher, ‘What do Genocides Kill? A Relational Conception of Genocide’, 9 *Journal of Genocide Research* (2007), at. 527

- Prandini, Riccardo, ‘Relational Sociology: a Well-defined Sociological Paradigm or a Challenging “Relational Turn” in Sociology’, 25 *International Review of Sociology* (2015), at.1

- Quayle, Peter, ‘Unimaginable Evil: The Legislative of the Genocide Convention’, 5 *International Criminal Law Review* (2005), at. 363

- Quinton, Anthony, ‘Social Objects’, 76 *Proceedings of the Aristotelian Society* (1976), at. 1

- Rashed, Haifa and Damien Short, ‘Genocide and Settler Colonialism: Can a Lemkin-Inspired Genocide Perspective Did Our Understanding of the Palestinian Situation?’, 16 *The International Journal of Human Rights* (2012), at. 1142

- Rosenberg, Sheri, ‘Genocide is a Process, Not an Event’, 7 *Genocide Studies and Prevention* (2012), at.16

- Ruben David, ‘The Existence of Social Entities’, 32 *The Philosophical Quarterly* (1982) at. 301

- Ruben, David, ‘Social Wholes and Parts’. 92 *Mind* (1983), at. 219

- Sahlins, Marshall, 'The Segmentary Lineage: An Organisation of Predatory Expansion, 63 *American Anthropology* (1961), at. 333

- Sariano, Leonor, 'Moral A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice',16 *Ratio Juris* (2003) at. 296

- Sawyer, R. Keith, 'Nonreductive Individualism. Part I – Supervenience and Wild Disjunction', 32 *Philosophy of the Social Sciences* (2002), at. 537

- Schaack, Beth Van, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', 106 *Yale Law Journal* (1999), at. 2262

- Schabas, William, 'Darfur and the "odious scourge': the commission of inquiry's findings on genocide', 18 *Leiden Journal of International Law* (2005), at. 871

- Schabas, William, 'Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide', 61 *Rutgers Law Review* (2008), at. 161

- Schabas, William, 'The Legal Prohibition of genocide Comes of Age', 5 *Human Rights Review* (2004), at. 46

- Schabas, William 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia', 25 *Fordham International Law Journal* (2001), at. 23

- Schabas, William, 'State Policy as an Element of International Crimes', 98 *Journal of Criminal Law & Criminology* (2008), at. 954.

- Schmid, Hans Berhard, 'Can Brains in Vats Think as a Team?', 6 *Philosophical Explorations* (2003), at. 201

- Simmel, George, 'The Persistence of Social Groups', 3 *The American Journal of Sociology* (1898), at 662

- Simmonds, Nigel 'Judgement and Mercy', 13 *Oxford Journal of Legal Studies* (1993), at. 52.

- Singleterry Douglas, '"Ethnic Cleansing" and Genocidal Intent: A Failure of Judicial Interpretation?', 5 *Genocide Studies and Prevention* (2010), at. 39

- Sirkin, Micol, 'Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations', 33 *Seattle University Law Review* (2010), at. 489

- Southall, Aidan, 'Nuer and Dinka Are People: Ecology, Ethnicity and Logical Possibility', 11 *Man New Series* (1976), at. 463

- Spjut, R.J. 'When Is an Attempt to Commit an Impossible Crime a Criminal Act' 29 *Arizona Law Review* (1987), at. 247

- Stanton, Gregory, ‘Could the Rwandan genocide have been prevented?’, 6 *Journal of Genocide Research* (2004), at. 213

- Stein, Stuart, ‘Conceptions and Terms: Templates for Analysis of Holocausts and Genocide’, 7 *Journal of Genocide Research* (2005), at. 171

- Stewart, Tracie, Jacqueline R. Laduke, Charlotte Bracht and Kristi Gamarel, ‘Do the “Eyes” Have It? A Program Evaluation of Jane Elliott's “Blue-Eyes/Brown-Eyes” Diversity Training Exercise 1.’ 33 *Journal of Applied Social Psychology* (2003), at 1898

- Storey, Matthew, ‘Kruger v The Commonwealth: Does Genocide Require Malice?’, 21 *University of New South Wales Law Journal* (1998), at. 224

- Straus, Scott, ‘Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide’, 3 *Journal of Genocide Research* (2001), at. 349

- Tallgren, Immi, ‘The Sense and Sensibility of International Criminal Law’, 13 *European Journal of International Law* (2002), at. 575

- Tajfel, Henri, ‘Social Identity and Intergroup Behaviour’, 13 *Social Science Information* (1974), at. 65

- Theriault, Henry, ‘Genocidal Mutation and the Challenge of Definition’, 41 *Metaphilosophy* 2010, at. 498

- Thijssen, Peter, ‘From mechanical to organic solidarity, and back: With Honneth beyond Durkheim’, 15 *European Journal of Social Theory* (2012), at. 454

- Travis, Hannibal, ‘On the Original Understanding of the Crime of Genocide’, 7 *Genocide Studies and Prevention* (2012), at. 30

- Triffterer, Otto, ‘Genocide, its particular intent to destroy in whole or in part the group as such’, 14 *Leiden Journal of International Law* (2001), at. 399

- Torben, Spaak, ‘Deduction, Legal Reasoning, and the Rule of Law. Book Review of: Rhetoric and the Rule of Law: a Theory of Legal Reasoning by Neil McCormick’. 23 *Constitutional Commentary* (2006), at. 121

- Turlington, Edgar, ‘The Genocide Convention Should Be Ratified’, *American Bar Association* (1949), at. 26

- Van Der Merwe, Beitel, ‘Reflections on the trivialisation of genocide: Can we afford to part with the special stigma attached to genocide?’, 29 *South African Journal of Criminal Justice* (2016), at.116

- Vandenberghe, Frederic, ‘Simmel and Weber as ideal-typical founders of sociology’, 25 *Philosophy and Social Criticism* (1999), at. 57

- Verdirame, Guglielmo, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals', 49 *International and Comparative Law Quarterly* (2000), at. 578

- Vest, Hans, 'A Structure-Based Concept of Genocidal Intent', 5 *Journal of International Criminal Justice* (2007), at. 781

- Verdeja, Ernesto, 'The Political Science of Genocide: Outlines of an Emerging Research Agenda', 10 *Perspective on Politics* (2012), at. 307.

- Vrdolijak, Ana Flipa, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law', 20 *European Journal of International Law* (2010), at. 1163

- Waal, Alex de, 'When kleptocracy becomes insolvent: The brute causes of the civil war in South Sudan', 113 *African Affairs* (2014), at. 347

- Warriner, Charles, 'Groups are Real: A Reaffirmation', 21 *American Sociological Review* (1956), at. 549

- Wilt, Harmen van der, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction. Reflections on the van Anraat Case', 4 *Journal of International Criminal Justice* (2006), at. 242

- Winter, Stephen, 'On the Possibility of Group Injury', 37 *Metaphilosophy* (2006), at. 393

- Wise, Louise, '"Social death and the loss of a 'world'": an anatomy of genocidal harm in Sudan', 21 *The International Journal of Human Rights* (2017), at. 838

- Woolford, Andrew, 'Ontological Destruction: Genocide and Canadian Aboriginal Peoples', 4 *Genocide Studies and Prevention* (2009), at. 81

- Yahraes, Herbert, 'He gave a name to the world's most horrible crime', *Collier's Weekly* (1951), at.28

- Zenonas, Norkus, 'Max Weber on Nations and Nationalsim: Political Economy before Political Sociology', 29 *The Canadian Journal of Sociology* (2004), at. 389

<u>Official Reports (Chronologically):</u>

- Untied Nations, 'Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council resolution 1564 (2004) of 18 September 2004', Annex to U.N. Doc. S/2005/60, (1 February 2005)

- United Nations Mission in the Republic of South Sudan, 'Interim Report on Human Rights Crisis in South Sudan', (21 February 2014)

- United Nations Mission in the Republic of South Sudan, 'Conflict in South Sudan: A Human Rights Report' (8 May 2014)

- Commission on Human Rights in South Sudan, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan' (Human Rights Council Thirty-seventh session, A/HRC/27/74, 19 September 2014).

- The African Union Commission of Inquiry on South Sudan, 'Final Report of the African Union Commission of Inquiry on South Sudan' (15 October 2014).

- United Nations Mission in the Republic of South Sudan, 'Report on Attacks on Civilians in Bentiu & Bor April 2014', (9 January 2015)

- Commission on Human Rights in South Sudan, 'Human rights situation in South Sudan Report of the United Nations High Commissioner for Human Rights' (Human Rights Council Twenty-eight session, A/HRC/28/49, 27 March 2015)

- United Nations Security Council, 'Interim Report of the Panel of Experts on South Sudan Established Pursuant to Security Council Resolution 2206' (21 August 2015)

- Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-fourth session, A/HRC/34/63, 6 March 2017).

- Ceasefire and Transitional Security Arrangements Monitoring Mechanism, *Report 033, Burning of Homes in the Yei Area* (28 March 2017)

- Ceasefire and Transitional Security Arrangements Monitoring Mechanism, Report 38 - Killing and Displacement of Civilians in Pajok (15 May 2017)

- Commission on Human Rights in South Sudan, 'Report of the Commission on Human Rights in South Sudan' (Human Rights Council Thirty-seventh session 26 February-23 March 2018, A/HRC/37/CRP.2, 23 February 2018).

<u>Online Articles</u>

- Behrens, Paul, 'Intent, Abstraction and Prevention: Lessons from the Law on Genocide', (2016), < https://ssrn.com/abstract=2896483>

- Checchi, Francesco et al. 'Estimates of crisis-attributable mortality in South Sudan, December 2013-April 2018 A statistical analysis', (2018) available at <https://crises.lshtm.ac.uk/wp-content/uploads/sites/10/2018/09/LSHTM_mortality_South_Sudan_report.pdf> accessed on 20 March 2019.

- Elder-Vass, Dave, 'The emergence of social structure and the question of naturalism' (2005) , available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.534.2419&rep=rep1&type=pdf> accessed on 20 March 2019

- Luban, David, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', Georgetown Public Law Research Paper No. 1154117 (2008) available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps_papers> accessed on 02 October 2015

- O'Connor, Timothy and Hong Wong, 'Emergent Properties' in Edward Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), available at <http://plato.stanford.edu/archives/sum2015/entries/properties-emergent> accessed on 01 September 2015

- Pim, Joam Evans, 'Nonkilling, Security and State', Creighton University (2013), available at <http://m.nonkilling.org/pdf/nksecurity.pdf#page=279> accessed on 21 May 2018

-Ramsey, William 'Eliminative Materialism', in Edward Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), available at <http://plato.stanford.edu/archives/sum2013/entries/materialism-eliminative/> accessed on 13 April 2016

- Richardson, Tom, 'Pastoral Violence in Jonglei', ICE Case Study NO. 274 (2011) available at <http://mandalaprojects.com/ice/ice-cases/jonglei.htm> accessed on 01 June 2018

- Rolandsen, Øystein H. - and Nicki Kindersley, 'South Sudan: A Political Economy Analysis' (2017) Norwegian Institute of International Affairs, available at < https://brage.bibsys.no/xmlui/bitstream/handle/11250/2460927/NUPI_raatort_+South+Sudan_Rolandsen_Kindersley.pdf?sequence=2> accessed on 21 May 2018

- Stanton, Gregory 'Ten Stages of Genocide', Genocide Watch (2016) available at <http://www.genocidewatch.com/ten-stages-of-genocide> accessed on 11 May 2018.

- Stanton, Gregory, 'The 8 stages of genocide', Genocide Watch (1998) available at <http://www.learning4u2.com/HAL/Independent%20study%20pages/Anne_Frank/Genocide%20Watch.pdf > accessed on 01 October 2016

- Varzi, Achille, 'Mereology' in Edward Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), available at <http://plato.stanford.edu/archives/spr2016/entries/mereology> accessed on 11 April 2016

- Waal, Alex De 'Introduction: Making Sense of South Sudan', African Affairs (2016) available at <https://academic.oup.com/DocumentLibrary/afraf/Introduction%20South%20Sudan.pdf> accessed on 21 May 2018.

- Walzer, Michael 'Nation and Universe', The Tanner Lectures on Human Values Delivered at Brasenose College, Oxford University, (1989) available at <http://tannerlectures.utah.edu/_documents/a-to-z/w/walzer90.pdf > accessed on 21 May 2018

Woodcock, Pete, 'Cornwall and Yorkshire show regional identities run deep in England, too', The Conversation (2015) available at. <https://theconversation.com/cornwall-and-yorkshire-show-regional-identities-run-deep-in-england-too-41322> accessed on 20 March 2019.

Online News and Journals

- 'A New Depth of Horror' *The Economist* (26 April 2014) available at <https://www.economist.com/middle-east-and-africa/2014/04/26/a-new-depth-of-horror> accessed on 22 April 2018

- 'African Union joins growing chorus demanding sanctions on South Sudan war' *Reuters* (29 January 2018) available at <https://www.reuters.com/article/us-african-union-summit-southsudan/african-union-joins-growing-chorus-demanding-sanctions-on-south-sudan-war-idUSKBN1FI2IO> accessed on 30 May 2018

- Bachelard, Michael and Kate Geraghty 'Starvation, exodus and genocide sees world's newest nation South Sudan suffer' *The Sydney Morning Herald* (5 July 2017) available at <https://www.smh.com.au/world/we-have-become-the-most-vulnerable-people-on-earth-starvation-exodus-and-genocide-in-worlds-newest-nation-20170627-gwzhn7.html> accessed on 9 May 2018

- Barbash, Fred, 'An 'abomination': Slaughter in the mosques and churches of Bentiu, South Sudan' *Washington Post* (23 April 2014) available at <https://www.washingtonpost.com/news/morning-mix/wp/2014/04/23/an-abomination-slaughter-in-the-mosques-and-churches-of-bentiu-south sudan/?utm_term=.95dc9f41b804> accessed on 22 April 2018

- Biryabarema, Elias 'UK says killings in South Sudan conflict amount to genocide' *Reuters* (12 April 2017) available at <https://www.reuters.com/article/us-southsudan-war/uk-says-killings-in-south-sudan-conflict-amount-to-genocide-idUSKBN17E2TF> accessed on 9 May 2018

- Boswell, Alan ‘The genocidal logic of South Sudan’s “gun class”’, IRIN, (2016) available at <https://www.irinnews.org/opinion/2016/11/25/genocidal-logic-south-sudan%E2%80%99s-%E2%80%9Cgun-class%E2%80%9D> accessed on 11 May 2018

- Chand, David de ‘A critique of the IGAD protocol for peace in S Sudan’ *Sudan Tribute* (30 August 2014) available at <http://sudantribune.com/spip.php?iframe&page=imprimable&id_article=52212> accessed on 9 May 2018

- ‘Choosing to be a Dinka: selecting ethnicity remains an elite privilege’ *African Argument* (2014) available on <http://africanarguments.org/2014/02/28/choosing-to-be-a-dinka-selecting-ethnicity-remains-an-elite-privilege/> accessed on 22 May 2018

- Copnall, John ‘South Sudan's massacre among many’ *Aljazeera* (23 April 2014) available at <https://www.aljazeera.com/indepth/opinion/2014/04/south-sudan-massacre-among-man-2014423103845492493.html> accessed on 22 April 2018

- Foltyn, Simona ‘Horrific attacks prompt South Sudan's communities to form armed groups’ *Guardian* (7 December 2015) available at <https://www.theguardian.com/global-development/2015/dec/07/south-sudan-horrific-attacks-prompt-communities-take-arms> accessed on 25 May 2018

- Hereward Holland, ‘South Sudan peace deal doomed if disputes not settled: think-tank’, Reuters (13 March 2019) available at <https://af.reuters.com/article/topNews/idAFKBN1QU1KS-OZATP> accessed on 15 March 2019.

- Iaccino, Ludovica ‘South Sudan Genocide an Abomination and Betrayal, Says Washington’, *IBT* (12 February 2016) available at <https://www.ibtimes.co.uk/south-sudan-genocide-abomination-betrayal-says-us-government-1445793> accessed on 17 May 2018

- Ignatieff, Michael *The Unsung Hero Who Coined the Term "Genocide"*, New Republic, 2013, available at <https://newrepublic.com/article/114424/raphael-lemkin-unsung-hero-who-coined-genocide> accessed on 13 March 2016

- ‘John Kerry warns of South Sudan genocide’ *BBC* (1 May 2014) available at <http://www.bbc.co.uk/news/world-africa-27245641> accessed on 17 May 2018

-Kranz, P, ‘*5 genocides that are still going on today*’, Business Insider UK Nov 22 2017 available at <http://uk.businessinsider.com/genocides-still-going-on-today-bosnia-2017-11/#the-nuer-and-other-ethnic-groups-in-south-sudan-2> accessed on 29 March 2018

- Maclean, Ruth ‘People 'burned to death in homes' by South Sudan's government militias’ *Guardian* (4 July 2017) available at <https://www.theguardian.com/global-

development/2017/jul/04/people-burned-to-death-in-homes-by-south-sudan-government-militias-amnesty-report> accessed on 22 May 2018

- Manek, Nizar 'New Rebel Group Threatens to Intensify South Sudan's War' *Bloomberg* (8 May 2017) available at <https://www.bloomberg.com/news/articles/2017-05-08/new-rebel-group-threatens-to-intensify-south-sudan-s-civil-war> accessed on 22 May 2018

- Martell, Peter 'South Sudan tribe vows to 'exterminate' rival group' *Mail&Guardian* (2 January 2012) available on <https://mg.co.za/article/2012-01-02-south-sudan-tribe-vows-to-exterminate-rival-group> accessed 22 May 2018

-Muhumuza, Rodney 'UK goes beyond UN to say South Sudan violence 'is now genocide''*Independent* (13 April 2017) available at <https://www.independent.co.uk/news/world/africa/south-sudan-africa-genocide-uk-priti-patel-un-violence-a7681361.html> accessed on 9 May 2018

- 'Nuer America Christian Mission Network to Commemorate the "December 2013 Juba Genocide" in Nebraska Next Week' *South Sudan News Agency* (11 December 2014) available at <http://southsudannewsagency.org/index.php/2014/12/11/nuer-america-christian-mission-network/> accessed on 11 April 2018

- Oakford, Samual 'Disturbing Echoes of Rwandan Genocide Emerge in South Sudan' *Vice News* (21 April 2014) available at <https://news.vice.com/article/disturbing-echoes-of-rwandan-genocide-emerge-in-south-sudan> accessed on 22 April 2018

- Oduha, Joseph 'South Sudan group asks ICC to indict President Kiir, Riek Machar' *Daily Monitor* (13 May 2018) available at <http://www.monitor.co.ug/News/National/South-Sudan-group-asks-ICC-indict-President-Kiir-Riek-Machar/688334-4559776-yxvbsd/index.html> accessed on 31 May 2018

- Oluoch, Fred 'South Sudan Oatosition Groups Say Genocide is Real, Blame it on Govt' *The East African* (18 April 2017) available on <http://www.theeastafrican.co.ke/news/juba-oatosition-groups-accuse-govt-of--genocide/2558-3894088-svxwh/index.html> accessed on 30 March 2018

- Philip, James C. 'Lessons from Hailemariam Desalegn's Remarks on peace in S. Sudan' Sudan Tribute (3 May 2018) available at <http://www.sudantribune.com/spip.php?article65321> accessed on 31 May 2018

- Pinna, Monica 'South Sudan: Fresh fighting flares, five years into civil war' *Euronews* (09 May 2018) available at <http://www.euronews.com/2018/05/09/south-sudan-fresh-fighting-flares-five-years-into-civil-war> accessed on 30 May 2018

- Prendergast, John and Fleischner, Justine ‘Before There’s a Genocide: The Slaughter in South Sudan Must Stop’, *Daily Beast* (23 April 2014) avaialbe at <https://www.thedailybeast.com/before-theres-a-genocide-the-slaughter-in-south-sudan-must-stop> accessed on 22 April 2018

- Smith, David ‘Bentiu massacre is game-changer in South Sudan conflict, says UN official’ *The Guardian* (22 April 2014) available at <https://www.theguardian.com/world/2014/apr/22/bentiu-massacre-south-sudan-united-nations> accessed on 22 April 2018

- Somerville, Keith ‘South Sudan: how hate radio was used to incite Bentiu massacres’ *African Arguments* (24 April 2014) available at <http://africanarguments.org/2014/04/24/south-sudan-how-hate-radio-was-used-to-incite-bentiu-massacres-by-keith-somerville/> accessed on 22 April 2018.

- Sudan Tribute, ‘South Sudan census results officially released’ (7 June 2009), available at <http://www.sudantribune.com/South-Sudan-census-results,31411> accessed on 21 May 2018

- ‘South Sudan army captures rebel-held town, senior rebel defects’ *Reuters* (28 July 2017) available at <https://www.reuters.com/article/us-southsudan-unrest-idUSKBN1AD1N4?il=0> accessed on 01 May 2018

- ‘South Sudan genocide risk 'considerably diminished:' UN head’’ *Fox News World* (08 March 2017) available at <http://www.foxnews.com/world/2017/03/08/south-sudan-genocide-risk-considerably-diminished-un-head.html> accessed on 01 May 2018

- ‘South Sudan peace talks end without deal – mediators’ *Reuters* (23 May 2018) <https://uk.reuters.com/article/uk-southsudan-war/south-sudan-peace-talks-end-without-deal-mediators-idUKKCN1IO35U> accessed 28 May 2018

-‘South Sudan conflict: Bentiu 'ethnic slaughter' condemned’ *BBC* (21 April 2014) available at <https://www.bbc.co.uk/news/world-africa-27102643> accessed on 22 April 2018

-‘South Sudan president replaces the army chief’ *Reuters* (9 May 2017) available at <https://www.reuters.com/article/us-southsudan-military-idUSKBN18528T> accessed on 01 May 2018

-‘Sudan: Transcending tribe’ *Al Jazeera* (2011) available at <https://www.aljazeera.com/photo_galleries/africa/201111010324526960.html> accessed on 1 May 2018

- Sperber, Amanda ‘South Sudan’s Next Civil War Is Starting’ *Foreign Policy* (22 January 2016) available at <https://foreignpolicy.com/2016/01/22/south-sudan-next-civil-war-is-starting-shilluk-army/> accessed on 25 May 2018

-The Economist, ‘Straddling Divides’ (2014) available at <https://www.economist.com/blogs/baobab/2014/02/talking-south-sudans-top-general> accessed on 22 May 2018

- ‘The Forgotten Juba Nuer Genocide (JNG)’ *African Press* (19 December 2017) available at <https://africanspress.org/2017/12/19/the-forgotten-juba-nuer-genocide-jng/> accessed on 11 April 2018.

- ‘UN: 'Ethnic cleansing under way' in South Sudan’ *Aljazeera* (1 December 2016) available at <https://www.aljazeera.com/news/2016/12/ethnic-cleansing-south-sudan-161201042114805.html> accessed on 30 March 2018

- ‘Why Didn't the U.S. or UN Stop the Genocide in Sudan?’ *Haaretz* (18 October 2017) available at <https://www.haaretz.com/us-news/why-didn-t-the-u-s-or-un-stop-the-genocide-in-sudan-1.5458692> accessed on 9 May 2018

- Waal, Alex de, ‘South Sudan's corrupt elite have driven a debt-free and oil-rich country to ruin’, International Business Times (2016) available at <https://www.ibtimes.co.uk/south-sudans-corrupt-elite-have-driven-debt-free-oil-rich-country-ruin-1570845> accessed on 09 April 2018.

<u>Other Online Source</u>

-ACAPS, ‘South Sudan Country Profile’, 2015, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/s-c-acaps_country_profile_southsudan_august2015.pdf> accessed on 31 May 2018

- Adam, Ahmed ‘Bentiu Massacre reminiscent of Darfur’ (*World Policy*, 2 May 2014) available at <https://worldpolicy.org/2014/05/02/bentiu-massacre-reminiscent-of-darfur-genocide/> accessed on 22 April 2018

- Amin, Hussein Lumumba ‘ South Sudan Genocide 2017 & Memories of Ombachi Church Massacre’ (*UAH* 09 March 2017) available at <http://ugandansatheart.blogspot.co.uk/2017/03/uah-oped-south-sudan-genocide-2017.html> accessed on 21 May 2018

- Amnesty International, “Nowhere Safe: Civilians Under Attack in South Sudan,” (AFR65/003/2014/en/ 8 May 2014) available at <https://www.amnesty.org/en/documents/> accessed on 21 May 2018

- Blanchard, Lauren Ploch ‘The Crisis in South Sudan’ (2013) Congressional Research Service, 5 available at <http://www.refworld.org/pdfid/52cff1494.pdf> accessed on 02 April 2018

-Brand, Mike ‘South Sudan: Will Calling it Genocide Make a Difference?’ (*Jewish World Watch* 09 December 2016) available at <https://www.jww.org/blog/south-sudan-will-calling-genocide-make-difference/> accessed on 21 May 2018

-Central Intelligence Agency, ‘The World Factbook: South Sudan’, available at <https://www.cia.gov/Library/publications/the-world-factbook/geos/od.html1> accessed on 18 May 2018

- Crittle, Simon ‘“I didn't know if he was alive”: Former child soldier reunited with family in South Sudan’, UNICEF (2018) available at <https://www.unicef.org/stories/i-didnt-know-if-he-was-alive-former-child-soldier-reunited-family-south-sudan> accessed on 1 June 2018

-Diego Gambetta, ‘Primo Levi’s Last Moments’, Boston Review June 1, 1999. available at <http://bostonreview.net/diego-gambetta-primo-levi-last-moments> accessed on 28 February 2016

- Dieng, Adama ‘Note to Correspondents: Media Briefing by Mr. Adama Dieng, United Nations Special Adviser on the Prevention of Genocide on his visit to South Sudan’ (2016) United Nations Secretary General available at <https://www.un.org/sg/en/content/sg/note-correspondents/2016-11-11/note-correspondents-media-briefing-mr-adama-dieng-united> accessed on 11 May 2018

- Dieng, Adama ‘Note to correspondents: Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on his meeting with leaders of the South Sudan Council of Churches’ (2018) available at <https://www.un.org/sg/en/content/sg/note-correspondents/2018-04-26/note-correspondents-statement-adama-dieng-united-nations> accessed on 1 May 2018

- ECC Platform Library, ‘Conflict between Dinka and Nuer in South Sudan’ available at <https://library.ecc-platform.org/conflicts/natural-ressource-conflict-south-sudan-dinka-vs-nuer> accessed on 31 March 2018

- Guterres, Antonio ‘Remarks to Security Council open debate: “Upholding International Law Within the Context of the Maintenance of International Peace and Security"’ (UN Secretary General, 17 May 2018) available at <https://www.un.org/sg/en/content/sg/speeches/2018-05-17/upholding-international-law-within-context-maintenance-international> accessed on 31 May 2018

- Henry, Jehanne ‘Dispatches: Is the Truth Off-Limits in Juba, South Sudan?’ (Human Rights Watch, 18 February 2014) available at <https://www.hrw.org/news/2014/02/18/dispatches-truth-limits-juba-south-sudan> accessed on 22 May 2018

- Human Rights Watch ‘South Sudan: Stop Delays on Hybrid Court’ (2017) available at <https://www.hrw.org/news/2017/12/14/south-sudan-stop-delays-hybrid-court> accessed on 11 May 2018

- Human Rights Watch, ‘Ending the Era of Injustice Advancing Prosecutions for Serious Crimes Committed in South Sudan’s New War’ (2014), 39, 40 available at <https://www.hrw.org/sites/default/files/reports/southsudan1214_ForUpload_0.pdf> accessed on 21 May 2018

- ‘Humanitarian Bulletin South Sudan’ (2018) United Nations Office for the Coordination of Humanitarian Affairs, 1, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/180430_OCHA_SouthSudan_Humanitarian_Bulletin1.pdf> accessed on 2 May 2018.

- ‘Hundreds of children released from armed groups in South Sudan’ (UNICEF Press, 2018) available at <https://www.unicef.org/press-releases/-children-released-armed-groups-south-sudan> accessed on 01 June 2018

-International Crisis Group, ‘South Sudan’s South: Conflict in the Equatorias’ (Report No. 236, 25 May 2016) available at <https://www.crisisgroup.org/africa/horn-africa/south-sudan/south-sudan-s-south-conflict-equatorias> accessed on 25 May 2018

- International Organization for Migration, ‘Camp Coordination and Camp Management’ (Jul-Sep2017) available at <https://reliefweb.int/sites/reliefweb.int/files/resources/Annex%20Bentiu%20Quarterly%20Update%20-%20Q3%20Sep%202017.pdf> accessed on 19 May 2018

- Kelly, Nathaniel Ross ‘Why the World Ignores South Sudan’s Killing Fields: Part II—Nameless, numberless and dead in South Sudan’, War is Boring (2 June 2015) available at <http://warisboring.com/why-the-world-ignores-south-sudan-s-killing-fields/> accessed on 22 May 2018

- Ki-moon, Ban ‘The world has betrayed South-Sudan’ (2016) United Nations Secretary General available at <https://www.un.org/sg/en/content/sg/articles/2016-12-16/ban-ki-moon-world-has-betrayed-south-sudan> accessed on 11 May 2018

- Loyuong, Tongun ‘Why are the Dinka and Nuer are Killing Each Other in South Sudan’, 2014 available at <https://tloloyuong.wordpress.com/2014/01/23/explaining-current-internal-armed-conflict-in-south-sudan-to-german-audience-from-an-ethnic-lens/> accessed on 20 April 2018.

- Meservey, Joshua ‘South Sudan: Time for the U.S. to Hold the Combatants Accountable’ (2017) Backgrounder 3202, 4 available at <https://www.heritage.org/sites/default/files/2017-04/BG3202.pdf> accessed on 13 May 2018

- Office of the Spokesperson for the UN Secretary-General, 'Highlights of the Noon Briefing by Farhan Haq Deputy Spokesman for Secretary-General' (11 May 2018) available at <https://www.un.org/sg/en/content/highlight/2018-05-11.html> accessed on 31 May 2018

-'Soldiers Assume We Are Rebels' (*Human Rights Watch*, 01 August 2017) available at <https://www.hrw.org/report/2017/08/01/soldiers-assume-we-are-rebels/escalating-violence-and-abuses-south-sudans> accessed on 31 May 2018

- Sooka, Yasmin 'Statement by Yasmin Sooka, Chair of the Commission on Human Rights in South Sudan at the 26th Special Session of the UN Human Rights Council', (*UN Human Rights Office of the High Commissioner*, 14 December 2016) available at <https://unmiss.unmissions.org/un-human-rights-experts-says-international-community-has-obligation-prevent-ethnic-cleansing-south> accessed on 11 May 2018

-'South Sudan: Genocide Emergency', Genocide Watch (2016), available at <http://docs.wixstatic.com/ugd/e5b74f_222ef50c81a34e02b07b195cc1fbb286.pdf> accessed on 18 May 2018

-'South Sudan Population 2018', World Population Review available at <http://worldpopulationreview.com/countries/south-sudan-population/> accessed on 19 May 2018

- Sune, Hougbolle 'The historiography and the memory of the Lebanese civil war', (2011), available at <http://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/historiography-and-memory-lebanese-civil-war> accessed on 10 July 2016

- The UN Security Council Meeting Coverage, 'Ceasefire in South Sudan 'a Distant Prospect', Peacekeeping Chief Tells Security Council, Citing Disagreements among Warring Parties' (United Nations, 8 May 2018) available at <https://www.un.org/press/en/2018/sc13327.doc.htm> accessed on 30 May 2018

-The U.N. Office of the High Commissioner for Human Rights (OHCHR), 'Pillay Urges South Sudan Leadership to Curb Alarming Violence Against Civilians' (24 December 2013) available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14140&LangID=E> accessed 11 April 2018

- United Nations Secretary-General, 'Secretary-General's Briefing to the Security Council on South Sudan' (2014) available at <https://www.un.org/sg/en/content/sg/statement/2014-05-12/secretary-generals-briefing-security-council-south-sudan> accessed on 2 May 2018

- United States Department of State, ‘South Sudan 2013 Human Rights Report’, Country Reports on Human Rights Practices for 2013, Bureau of Democracy, Human Rights and Labor, available at <https://www.state.gov/documents/organization/220374.pdf> accessed on 2 May 2018

- United States Holocaust Memorial Museum, ‘Press Release: Museum Statement on Risk of Genocide in South Sudan’ (28 November 2016) available at <https://www.ushmm.org/information/press/press-releases/museum-statement-on-risk-of-genocide-in-south-sudan> accessed on 13 May 2018