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SPECIAL ISSUE ARTICLE

Conceptualizing the National Group for the Crime of Genocide: Is Law Able to Account for Identity Fault Lines?

Carola Lingaas*

VID Specialized University, Oslo, Norway
*Corresponding author. Email: carola.lingaas@vid.no

Abstract
"National group" is one of four victim groups that is explicitly protected by international criminal law from genocide. At the core of any genocide lies an element of identity. Yet, the fixed group categories that the law provides for seemingly do not conform to the fluidity of group identities. Is the law at all able to account for identity fault lines? By recourse to research on identity construction and otherness, this article argues that the interpretation of the law of genocide can benefit, structurally and legally, from insight into the forces at work before a genocide erupts. In recognizing the perpetrator's definitional power over the victim group, the courts should increasingly focus their investigation into the mind of the *génocidaires* and their perception of the national victim group. In addition to discussing the dynamics of intergroup conflicts leading up to a genocide, this article also looks at the jurisprudence of criminal courts on the issues of nationality, national groups, and national identity for the crime of genocide.

Keywords: genocide; national group; identity; perpetrator; international criminal law

The National Group: Setting the Parameters

> *Nation, nationality, nationalism – all have proved notoriously difficult to define, let alone to analyse* (Anderson 2006, 3).

International criminal law narrowly protects four enumerated groups from the crime of genocide: national, racial, ethnic, and religious.[1] In order to grant protection to the victims, and conversely, to prosecute perpetrators of the crime of genocide, the contours of these four groups have to be defined. This article focuses on the national group as one of four exclusively protected victim groups. This article examines whether the seemingly static legal framework can account for fluid identity fault lines. It will also discuss if and how courts have taken into consideration group dynamics in their analysis of genocide.

The goal of this article is, foremost, to reveal the challenges of defining "national group" for the law of genocide. The analysis therefore revolves to a great extent around the manner in which nationality and national identity is dealt with in criminal law within historical, normative, and comparative perspectives. The article draws in part on social science research on group identity and the construction of otherness, as well as the stigmatization of "other" groups.[2] Well aware of the principle of legality, whereby law must indicate the prohibited conduct unambiguously and an individual cannot be sentenced if the law does not prescribe punishment (Werle 2009, 55),[3] the article does not trespass the boundaries of criminal law. In its conclusion, it calls for an increased recourse to the understanding of group dynamics, which it holds indispensable for the construction of the legal elements of the crime of genocide, especially the perpetrator's intent to destroy a

national, ethnic, racial, or religious group as such (Art. 2 Genocide Convention). It urges, in particular, (international) criminal courts to recognize the significance of the setting apart of groups perceived as inferior and threatening "others" for the legal construction of the national group. Moreover, if othering is included in the interpretation of the law, the same might be able to account for identity fault lines that characterize (violent) group conflicts. At the same time, however, the fluidity of identity fault lines creates a challenge for the interpretation of the (static) law.

What are fault lines and how do they relate to group violence? Largely building on social identity theory, the fault line hypothesis asserts that most groups are divisible into two or more homogeneous subgroups that differ from one another based on certain sets of attributes. These characteristics can create imaginary dividing lines within a group. More particularly, group fault lines often remain concealed until pressure is exerted upon them. Commonly, the fault lines become visible only if activated through force (Hart and van Vugt 2006, 394). Such dynamics became discernible in the case of the former Yugoslavia or Rwanda, where, prior to the eruption of the respective conflicts, the different groups led a largely peaceful coexistence (Hardin 1995, 57–58, 148, 156–159).

The National Group: Its Legal Definition

International law does not define the "national group" (Pap 2017, 970). In the case against the Rwandan *génocidaire* Jean-Paul Akayesu, the first ever genocide trial before an international criminal court, the judges of the International Criminal Tribunal for Rwanda (ICTR) had the difficult task not only of proving the guilt of the accused, but also of defining the national group, among others.[4] Had the judges concluded that the Tutsi victim group was neither a national, nor racial, nor ethnic, nor religious group, the atrocities in Rwanda in 1994 would not be genocide in the legal sense of the word (Akhavan 2005, 1005–1006; Lisson 2008, 1461). For understandable reasons, the judges were under significant pressure to conclude that the acts were of a genocidal nature (Akhavan 2005, 1003). The Trial Chamber of the ICTR went into detail in defining the four statutory groups. It reasoned that since the special intent to commit genocide lay in the intent to destroy a national, ethnic, racial, or religious group, it was necessary to determine the meaning of these social categories.[5] The Trial Chamber defined a national group as follows: "Based on the *Nottebohm* decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."[6] The Chamber's definition contains two, at first sight seemingly irreconcilable, strands: first, the *Nottebohm* judgment of the International Court of Justice (ICJ), to be discussed below, and, second, the perception of shared legal bonds. The judges' choice of sources is rather remarkable for the following reasons: First, the ICJ is a body that deals with interstate conflicts. The court finds its legal foundation in the Charter of the United Nations (UN) and in its Statute. It deals with breaches of international law by UN member states, but not with individual perpetrators of international crimes. While international law governs the rights and obligations of States, criminal law imposes individual prohibitions, the violation of which entails penal sanctions by a State. At times, these two aspects are in tension (Cryer, Robinson, and Vasiliev 2019, 3). The focus of international criminal law is by and large on individuals and their protection from wide-scale atrocities. The International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case pointedly remarked that "[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach …. [I]nternational law, while … duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings."[7] International law and international criminal law have very different approaches and protect different interests. It could, therefore, be questioned whether the ICJ's jurisprudence is an appropriate point of reference for the definition of a crime (Nersessian 2010, 25).

Moreover, in the *Nottebohm* case of 1955, nationality was determined on effective factual relationships between individuals and a sovereign state. The issue at hand was that Mr. Friedrich Nottebohm, a citizen of Germany, had lived in and conducted a business in Guatemala for 34 years.

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He never became a citizen of Guatemala, but instead applied to acquire citizenship of Liechtenstein one month after the outbreak of World War II in 1939. As a result of his naturalization, Nottebohm lost his German nationality and was thereafter refused re-entry into Guatemala. In the interstate case before the ICJ, Guatemala argued that for purposes of international law, Nottebohm did not gain citizenship of Liechtenstein for purposes of international law.[8] Based on the principle of effective nationality (the so-called "effective link" principle), according to which the national must demonstrate a genuine link and a meaningful connection to the State in question, the ICJ in its ruling agreed with Guatemala.[9] Legal scholars generally interpret the ICTR's reference to *Nottebohm* as emphasizing the objective legal bonds in the politico-legal sense rather than defining membership of a national group in an ethnographical or sociological sense (Lisson 2008, 1468; Mugwanya 2007, 80; Nersessian 2010, 25; Schabas 2009b, 134–135; Triandafyllidou 1998, 595). In doing so, the "legal bond based on common citizenship" is highlighted, thus the membership of a political community (Henrard 2018, 271). However, another reading is the emphasis of the links between an individual and the population of a (nation) state based on a "social fact of attachment, a genuine connection of existence, interests and sentiments."[10] Such an interpretation focuses on an attachment rather than a formal legal bond, as in citizenship. Other legal scholars also recognize the close interrelationship between a state and natural persons that combines a legal relationship with social bonds. James Crawford (2012, 513), for example, considers nationality a legal bond that has its basis in a social fact of attachment, genuine connections of existence, interests, and sentiments, combined with the existence of reciprocal rights and duties.

Although the distinguishing mark of nationalism per definition is a relationship to a state, neither nationalism nor the national group is defined by citizenship (Hylland Eriksen 2010, 10; Kress 2006, 476; Luban 2006, 318; Triandafyllidou 1998, 600). During the drafting process of the Genocide Convention, the UN Secretary-General explicitly stressed that the law of nationality and the general rights and obligations of states should not coincide with the question of genocide, even though genocide may have points of contact with them.[11] The statement of the UN Secretary-General raises doubt as to whether the ICTR's reference to *Nottebohm* was based on a sound legal interpretation of the law of genocide. Indeed, the law of genocide and the law of nationality are understood as two distinct chapters of international law with decidedly distinct rules. In *Akayesu*, however, the judges linked the interpretation of the crime of genocide with the law of nationality and interstate obligations and thereby amalgamated these fields of international law.

In merging the notion of citizenship with an element of perception ("perceived to share a legal bond"), the *Akayesu* Trial Chamber combined objective with subjective elements for the definition of a national group. Being the first conviction for genocide by an international tribunal, this definition set the foundation for all case law on genocide to follow. As such, it was of major importance for the development of the definition of the protected national group (Alvarez 1999). Before examining the jurisprudence on the crime of genocide, a historical review will discuss how the notion of the national group for the law of genocide evolved.

The National Group: Its Historical Understanding in International Law

Definitions of a national group range from national minorities to citizenship and even to a homeland as a broader concept (Bisaz 2012, 92; Lisson 2008, 1495; Luban 2006, 318; Nersessian 2002, 262). By way of example, Vierdag (1973, 88) defines a nation as a group of people who feel they are different and regarded as such through the combination of subjective factors, which create a national consciousness, and objective factors, such as a common culture.

When the Genocide Convention was drafted, the national group contained an idea of kinship between present and past, embracing century-long traditions (Confino 2014, 23). European views and ideas of national identity shaped the understanding of the nation as an organic entity based on a common, rich legacy of memories and "endowed with soul, psyche or racial attributes" (Confino 2014, 23; Vierdag 1973, 88). According to Raphael Lemkin, the creator of the term "genocide,"

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nationality comprehends a concept broader than citizenship. The destruction of the national pattern of an oppressed group was therefore essential for the commission of genocide (Lemkin 1944, 79–80, 91). In his seminal work, *Axis Rule in Occupied Europe*, Lemkin defines genocide as "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 1944, 79). In Lemkin's mind, the idea of a nation signifies constructive cooperation and original contributions based upon genuine traditions, genuine culture, and a well-developed national psychology (Lemkin 1944, 91). He recognized that genocides follow a twofold pattern: the first step is denationalization and the second dehumanization, including the removal of the group identity and the legal rights of the targeted group (Sands 2016, 166). This insight into pre-genocidal processes is important for the legal definition of the crime too, as later sections discuss. At this point, it suffices to emphasize the connection between group identities and dehumanization.

In an essay on the destruction of the Ukrainian nation by the Kremlin that Lemkin understood to be a Soviet genocide, he further reflects on the understanding of nation (Lemkin 1953/2009, 126). Lemkin notes distinctions in culture, temperament, language, and religion. He also mentions the different national spirits of Ukrainians and Russians, which manifested themselves in tradition, folklore, and music (Lemkin 1944, 79; Lemkin 1953/2009, 126, 128). It becomes apparent that nationality covered a much broader notion than citizenship. Lemkin rounds off his argument stating: "for the family of minds, the unity of ideas, of language and of customs that form what we call a nation" (Lemkin 1953/2009, 130).

By merging nationality with tradition and culture, Lemkin approaches the notion of ethnicity, which the subsequent section discusses. While the definition of the national group may be guided by Lemkin's understanding, a contemporary (evolutive) interpretation of the Convention presumably will lead to a different result (Lingaas 2018, 135ff.; Lingaas 2019, 98–103;). Moreover, an "obsession with Lemkin's original vision of the crime of genocide, as if he was the author of holy gospel, is not a particularly useful approach to understanding the current or, for that matter, the historical debate," William Schabas (2009a, 540) pointedly remarks. If a contemporary interpretation takes into account current debates and research, whereby in genocide an ostensive group is targeted for its (perceived) national otherness, it might be able to account for identity fault lines.

The meaning of nation, national group, national origin, and nationality was not only an issue in drafting the Genocide Convention. It was also a topic of extensive discussion when the International Convention on the Elimination of Racial Discrimination (ICERD) was drafted. Although the ICERD is a human rights treaty that aims at protecting individuals from excessive state interference without prescribing individual criminal responsibility, its drafting history may nevertheless shed some light on the definition of the national group for the law of genocide. Art. 1(1) ICERD contains a legal definition of racial discrimination that includes "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin." Hence, ICERD defines racial discrimination very broadly to include discriminatory acts based, among others, on national origin. In drafting ICERD, the discussions revolved around the need to draw a distinction between ethnic and national origin, indicating the relatedness of the two concepts.[12] However, it was made clear that in many languages and cultures, "national origin" means something different from "ethnic origin." The notion of a national group was not necessarily connected to a nation-state:

> A nation was created when persons organized themselves politically on the basis of a common culture, common traditions or other factors.… [T]here were also situations in which a politically organized nation was included within a different State and continued to exist as a nation in the social and cultural senses even though it had no government of its own. The members of such a nation within a State might be discriminated against, not as members of a particular race or as individuals, but as members of a nation which existed in its former political form.[13]

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State delegates noted that the term nationality had two meanings: a sociological one that referred to citizens of different ethnic and cultural origins, and a legal one relating to citizenship.[14] In the context of ICERD, the notion of national origin was not limited to citizenship: it incorporated concepts of culture, traditions, and language, hence what nowadays would be described as "ethnicity." In sum, the drafting history of the Genocide Convention and ICERD both suggest that the term national group was meant to include a broader concept than one limited to statehood.

Distinguishing Nationality from Ethnicity

Only after the Genocide Convention was drafted did nationality become synonymous with nation-state. Today, a nation is commonly defined as a political community, a source of sovereignty (Cornell and Hartmann 1998, 36; Garner 2014, 1183). It has therefore been proposed to define the national group as a group whose primary identity is based on an affiliation with a nation-state (Lippman 2008, 412). It is undoubtedly easier to define a state than a nation or a national group,[15] yet it would be incorrect to juxtapose the political unit of a state with that of a nation because, while a state can comprise different national groups, a nation can comprise citizens of different states (Banton 1996, 81; Castells 2010, 32). Examples of national groups are the Welsh, Catalans, Kurds, or the Sami, all of which could arguably also be considered ethnic groups (Castells 2010, 32). The uncertain boundaries between the protected victim groups result in definitional inconsistencies in the application of the law of genocide, which later sections on the jurisprudence of national and international courts discuss.

What, then, are the differences between a national and an ethnic group? According to *Akayesu*, "an ethnic group is generally defined as a group whose members share a common language or culture."[16] In the words of David Luban, this definition created "an intellectual embarrassment for the ICTR because it made difficult to see why the Hutu and Tutsi count as different ethnic groups," given that they spoke the same language, cooked the same food, and largely shared the same culture and religion (Luban 2015, 27). Nersessian believes that the ICTR's use of the *Nottebohm* methodology in defining national groups could possibly explain its search for objective indicia of ethnic collectives as well (Nersessian 2010, 28). This assumption is questionable. *Akayesu* defined each of the four groups individually and placed each in a separate paragraph. It only referred to *Nottebohm* for the definition of the national group.

In drafting the Genocide Convention, the UN General Assembly Sixth Committee narrowly accepted the term "ethnical group" with 18 to 17 votes and 11 abstentions. It was considered an attempt to neutralize shortcomings of the term "racial."[17] In the view of the drafters, a national group referred to those whose primary identity rested on their affiliation with a nation-state, while ethnic groups referred to cultural, linguistic, or other distinct groupings or minorities within or outside a state.[18] As early as 1922, Max Weber, one of the founders of modern sociology, defined ethnic groups as follows:

> Those human groups that entertain a subjective belief in their common descent—because of similarities of outer appearance or of customs or both or because of memories of colonialization and migration—in such a way that this belief is important for the continuation of non-kinship communal relationships, we shall call "ethnic" groups, regardless of whether an objective blood relationship exists or not. (Weber 1922, 219)

Weber correctly identifies that ethnicity—like nationality—is not an objective fact, but rather an issue of presumed identity, which he makes clear by referring to a "subjective belief." It is not only identity markers, such as descent or memories, that are important. He also mentions differences in clothing, housing, diet, and division of labor that could affect the belief of an ethnic belonging (Weber 1922, 211). Importantly, Weber recognized that ethnicity is largely built on the belief of the superiority of one's own group as opposed to an inferior group that does not share the same "ethnic

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honor" (Weber 1922, 211). An ethnic group is defined—and defines itself—in relation to another group. Identification with similar individuals necessarily entails an identification of others as strangers (Barth 1969/1998, 15). Essential for the definition of a group as a separate ethnicity is not the sum of all "objective" differences, but only those that the persons involved regard as significant (Barth 1969/1998, 14). In other words, it is irrelevant whether there exist objective differences as long as the perpetrator considers them as real. If the *génocidaire* perceives and treats members of a national, ethnic, racial, or religious group as "others," they acquire protection under the Genocide Convention. The definition set by *Akayesu* of the national and ethnic group, however, appears to be based on the group's objectively determinative characteristics rather than its presumed—and often subjectively imposed—identity.

Group Identities

Dynamic Fault Lines v. Static Law?

In 1946, the UN General Assembly in Resolution 96 (I) stated: "Genocide is the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings." The perpetrator targets individuals for being members of a particular group, and accordingly, the law of genocide protects individuals in their capacity as group members. Hence, the group notion is inextricably connected to the notion of genocide.[19] The International Criminal Tribunal for the Former Yugoslavia (ICTY) explained the importance of the issue of group identity: "genocide [is] … one of several acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, *as such*.' The term 'as such' has great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity."[20] Although the law protects individuals as members of a group, the trial itself deals with individuals: the prosecution has to prove that the victim, an individual, was exposed to a crime committed by the perpetrator, also an individual. An element that is contained in the proof of the crime is the victim's membership of an ostensive national group. The question arises how the group notion relates to the individual victim's identity and whether the law of genocide can account for the identity fault lines between the groups.

The fault line between groups, especially in conflicts, is often symbolic and based on a construction of opposing irreconcilable identities. Thus, the fault lines are hypothetical divides that force a wedge between different groups. They are based on individual attributes that are interpreted as being significant to the group as a whole. Since they are constructed, these fault lines are dynamic and can change over the course of time. Research indicates that fault lines, in their development, exacerbate the differences between the groups (Barth 1969/1998, 11–15; Blumer 1958, 5–6; Castells 2010, 6–12; Cornell and Hartmann 1998, 72; Glaser and Possony 1979, 56; Hart and van Vugt 2006, 392–395; Tajfel 1981, 132–133). The challenge that fault lines pose is that they are variable and change according to the individual context. At the same time, the law has to be interpreted objectively and consistently while also taking into account these dynamics. For reasons of evidence and the principle of legality, the law demands that the contours of the protected groups are clearly delineated in order to hold accountable the perpetrators of genocide. In a world of fluid group identities, is law the static pole?

Identifying the National Group

The law of genocide protects individuals as members of a group and thereby connects the group notion intrinsically to the legal protection of the crime. But what defines a group? And, probably more importantly, who defines a group? The matter of group definition is commonly approached from both the concerned group's perspective (internal self-categorization) as well as the outsider's view on this group (external categorization), hence by means of perception rather than objective factors. The respective group can perceive itself as distinct from another group, distinguishable in

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terms of language, tradition, citizenship, or religion, to name a few. The group can equally be perceived as different by outsiders (Deng 2012, xi).

Intergroup conflicts are triggered by the fundamental human necessity for identity (O'Neil Bell 2016, 79–80). Identity is largely chosen and can therefore also be manipulated (Triandafyllidou 1998, 597; Zartman and Anstey 2012, 14). Research from genocide studies, social psychology, and criminology has demonstrated that all genocides have a singling-out of a group of others in common. The perpetrator targets his/her victims not as individuals, but as members of an ostensibly distinct group. Such collective targeting of a group that is understood as "the enemy" is symptomatic for any genocide (Chalk and Jonassohn 1990, 28; Hiebert 2017, 142). In this process, the internal self-categorization of the victim group becomes insignificant, since the perpetrator has the definitional power over his victims (Deng 2012, x; Dutton 2007, 96–113; Moshman 2007, 115–135; Paul 2008, 161; Smith 2011, 84–95, 142–154).

Although the "others" have several levels of identity and probably share a fair amount of these levels with the perpetrator, the latter picks out one in particular—in our case, nationality. Rather than highlighting the common identity traits, the perpetrator focuses on the group's (real or perceived) differences (Zartman and Anstey 2012, 8). Notably, the group may have an objective existence and, as such, be recognizable to others than the perpetrator. An example of an objectively identifiable group is the orthodox Jews of Germany prior to the Holocaust. Such groups, in all likelihood, also perceive themselves as a distinct part of the population. However, the group's identity as an aggregate of dangerous, inferior, subhuman, or inhumane individuals is the creation of the perpetrators' minds. The members of the victim group might not even be cognizant of their belonging to an "other" group (Hiebert 2017, 141-142; Huttenbach 1988, 299; Straus 2006, 241). Samuel Huntington, author of *Clash of Civilizations*, aptly remarks that "we know who we are only when we know who we are not and often only when we know whom we are against" (Huntington 1996, 21).[21] Hence, it is in juxtaposition that the contours of the other group(s) become apparent.

For national groups, it has been asserted that the notion of the other is inherent: the individuals' recognition as members of a national community or group always presupposes the existence of other nations (Castells 2010, 30; Henrard 2018, 271; Triandafyllidou 1998, 596). While the process of othering can take place peacefully, history has shown that the formation of national identity often goes hand-in-hand with (violent) conflicts (Triandafyllidou 1998, 594). In his analysis of four genocides in Armenia, Rwanda, Cambodia, and during the Holocaust, Douglas Greenberg established that all were part of a program to build (utopian) national communities that established rules for the acquisition of citizenship. These rules were often linked to racial or ethnic criteria and resulted in the exclusion of minorities (Greenberg 2011, 90). Following Greenberg's argument, the definition of national group always connects to aspects of racial or ethnic ideologies of the majority. One might consequently ask whether there is any point in legally defining the national, racial, ethnic, and religious victim group if all elements are composite of a genocidal attack. Do the legal categories of protected groups ever fully correspond to the groups targeted by genocidal perpetrators, or are courts pedantically trying to make these victims fit into one of the four exclusive groups? Interconnected to this, one might wonder whether the national element is so intertwined with the other elements that a legal interpretation of each group becomes futile. Legal scholarship on this matter is not conclusive but acknowledges the genuine difficulties in deciding if a person is a member of one of the protected groups (Cryer et al. 2019, 212). Recent jurisprudence on genocide could indicate a departure from a clear categorization of victims—a development with regard to the requirement of legal specificity that is not without problems.[22]

Greenberg recognizes that all genocides share a common method by which the minority is targeted, demonized, accused of bringing impurity to the dominant group, and, finally, attempted to be physically removed (Greenberg 2011, 93). Crucially, this setting apart of the others is connected to a threat discourse. In other words, the "other" group is portrayed as different, inferior, and of a lesser worth—and therefore a threat to the continued existence of "our" group. At first sight, it might seem paradoxical that a group's existence is deemed a threat, while it at the same time

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is considered of a lesser value and inferior. Yet, it is precisely this inferiority that presents the threat to the alleged superiority of 'our' group (Donohue 2012, 63; Dutton 2007, 27, 113; Staub 2012, 37–39; Zartman and Anstey 2012, 3). The final step involves what Ervin Staub calls a "reversal of morality," where the killing of the designated enemy group becomes the right thing to do (Staub 2012, 39). These steps create an unbridgeable abyss between the different groups, delimiting who belongs to "our" national group and who is part of the "other" group (Staub 2012, 40).

Given that the perpetrator defines who the members of the other national group are, this article advocates a perpetrator perspective only in genocide trials, notwithstanding that Carsten Stahn (2018, 131) considers this approach "unorthodox."[23] To date, however, international criminal courts have generally applied a mixed approach whereby they define the (national) victim group based on subjective and objective criteria. This article is critical to the current approach because it disregards intergroup dynamics and the manner by which the *génocidaire* identifies the victims (Lingaas 2019, 40–52). The courts could more appropriately take into account the identity formation to which the members of the national group have to succumb.

Rhetoric and Hate Speech

In a pre-genocidal setting, inflammatory rhetoric is used to identify the threatening "others" (Staub 2012, 47; Zartman and Anstey 2012, 9). Rhetoric can polarize a society along identity lines and amplifies othering to the point that it becomes instigation or incitement to genocide (Zartman and Anstey 2012, 13). These crimes are, according to Art. 25(3)(e) of the Rome Statute of the International Criminal Court (ICC), inchoate crimes, meaning incomplete offenses. They are punishable even though the offense, whose commission the perpetrator aimed at, is not completed and, hence, the intended harm not realized (Timmermann 2006, 825). Although international criminal tribunals and courts have been hesitant to revert to hateful rhetoric for the proof of intent to destroy a national group, this article argues that hate speech preceding a genocide could—and should—be used as evidence in a trial against the *génocidaire*. The reason for this lies in the fact that perpetrators of genocide commonly stigmatize, discriminate, and dehumanize the group members that they then intend to destroy. These pre-genocidal dynamics are often revealed in acts and, most importantly in our context, in speech. Thus, the engagement of the perpetrator in dehumanizing discourses in which an intent to destroy a national group becomes discernible could be used as evidence of this special intent.

Rather than focusing on the interpretation of the national group by the international criminal tribunals, which have been dealt with elsewhere in great detail (Lingaas 2019, 84–139), the next section attempts to provide insight into how selected domestic courts have tackled its definition. In sociological, practical, political, and legitimacy terms, national prosecutions are generally considered a preferable option to prosecutions by international or hybrid courts (Cryer et al. 2019, 69). There are numerous reasons why national prosecutions are preferable, except for cases where the domestic judiciary has collapsed. Here, it suffices to point out two main reasons: first, international criminal courts were established as a supplement to domestic courts and are not, especially in the case of the ICC, intended to replace domestic jurisdiction. International criminal law is also primarily enforced by domestic authorities. International courts lack, for instance, enforcement mechanisms and rely on domestic authorities to implement decisions such as arrest warrants. National courts are therefore "an integral and essential part of the enforcement of international criminal law" (Cryer et al. 2019, 5 and 483–484). Second, domestic courts are, from a sociological perspective, generally considered the more legitimate tool to prosecute individuals, given that these courts are embedded in the national environment in which the crimes were committed and where the perpetrator and victim commonly reside(d).

National and international courts relate to different legal statutes, and domestic criminal law does not necessarily have to correspond to international criminal law.[24] Therefore, domestic jurisprudence is not directly relevant for the interpretation of the law by international courts.

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Nevertheless, with regard to the crime of genocide, the majority of states have incorporated Art. 2 of the Genocide Convention verbatim into their national laws. Moreover, although set on different legal levels, the judicial decisions of national courts can function as subsidiary means for the determination of the rules of law [Art. 38(1)(d) ICJ Statute]. Although Art. 38(1)(d) of the Statute of the ICJ was intended to delimit the source of law for the ICJ only, it is now widely recognized as binding for other courts too. The value of national jurisprudence to sources of international criminal law is, for example, demonstrated in the *Erdemović* case before the ICTY. In a joint separate opinion to the appeals judgment, two judges analyzed the laws and jurisprudence of 27 nations in an attempt to determine whether there existed a rule regarding duress as a defense to the killing of innocent persons.[25] Thus, although set on different levels and often containing distinct rules, national legislation and jurisprudence can become relevant for international law, especially if it demonstrates a uniform and constant practice.

Selected National, Regional, and International Jurisprudence: An Analysis and Critique

Different Legal Levels, Different Legal Definitions

In order to demonstrate the different approaches and definitions, this section discusses the different legal levels on which the law of genocide is applied, namely prosecutions on the national level of selected states as well as the jurisprudence of international courts. Moreover, this section discusses how the European Court of Human Rights (ECtHR) analyzes the law of genocide in cases of alleged human rights breaches. The statutes of regional human rights courts do not proscribe prohibitions of genocide, and the courts do not have the competence to sentence individuals. The commission of the crime and the execution of judgments for genocide, however, raise a number of human rights issues, for instance the right to a fair trial or the prohibition of retrospective criminal laws (the so-called *ex post facto* principle). Inasmuch as these human rights judgments emerge into the analysis of substantive criminal law, they are relevant for the current discussion. Note that the direct application of human rights law by (international) criminal courts remains a contentious issue (Lingaas 2019, 160–161). Nonetheless, the decisions of human rights courts can function as interpretative guidelines.

International crimes are primarily intended to be prosecuted at the national level (Cryer et al. 2019, 69). Art. 6 of the Genocide Convention notes that persons charged with the act of genocide shall be tried by a competent tribunal of the state in the territory in which the act was committed, or "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Art. 12(2)(a) of the Rome Statute contains a similar provision with regard to territorial jurisdiction. While the intention of the drafters regarding the Genocide Convention points to an exclusion of universal jurisdiction for the crime of genocide, domestic courts have in the aftermath of the occurrences in Rwanda and the Former Yugoslavia increasingly chosen to base their jurisdiction for alleged cases of genocide on universal jurisdiction (Schabas 2003, 39, 57, 60; Schabas 2010, 65; Wouters and Verhoeven 2007, 197–209). Under the principle of universal jurisdiction, every state is authorized to prosecute perpetrators of certain grave international crimes such as genocide, regardless of where they were committed and whether the accused or the victims are nationals of the respective state (Cryer et al. 2019, 56-57). Universal jurisdiction is controversial for a number of reasons, including the lack of connection to the forum State, the risk of disturbing a balance between prosecution and amnesty, or the ability of powerful States to assert jurisdiction beyond their borders (Cryer et al. 2019, 65–68).

To date, there have been only a limited number of genocide trials worldwide based either on universal or regular statutory domestic jurisdiction. The numerous indictments in the Baltic countries (Estonia, Latvia, and Lithuania) of Soviet crimes, prosecuted after the collapse of communism, present a remarkable exception (Pettai 2017, 53). International law served as a guideline for these countries' domestic legal provisions, which were created in the early 1990s. However, the criminal codes of all three states diverge significantly from international jurisdiction,

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particularly with regard to the definition of the crime of genocide (Pettai 2017, 53). According to the analysis of some legal scholars, the national legislators adapted the legal norms to specific historical experiences under the Soviet occupation, thus underpinning the law with historical or political motives (Satkauskas 2004, 397). These discrepancies illustrate that the cross-fertilization of domestic and international law of genocide does not come without challenges.[26] The ECtHR, for example, had to deal with a number of genocide convictions originating from the Baltic States. The case *Vasiliauskas v. Lithuania* has its origin in World War II and the power struggle between Stalin and Hitler over control of the Baltic States.[27] Stalin won the battle, annexed Lithuania, and incorporated it into the Soviet Union. In the following years, the KGB sought to repress Lithuanian partisan resistance movements. In 2004, after the collapse of the Soviet Union, the applicant, Mr. Vytaytas Vasiliauskas, was convicted of genocide for killing two Lithuanian partisans in 1953. The applicant argued that the killing of the partisans did not fall under the definition of the crime of genocide as articulated in the Genocide Convention since they were members of a political group (Le Gallez 2015). The judges were split in a 9:8 division, a rarity for the ECtHR that reveals the legal ambiguities and complexity of the case. The majority decided that the State is entitled to codify a broader interpretation of the crime of genocide than that stipulated in international law at the time of its commission. Such a crime, however, may not be punished retroactively.[28]

In its most recent case dealing with a conviction for genocide in the Baltics, *Drėlingas v. Lithuania*, the ECtHR acknowledged that domestic courts could define partisans as constituting a "significant part of the Lithuanian nation as a national and ethnic group" (para. 103 in conjunction with para. 62). The domestic courts held that "genocide could target a group of people belonging to several protected groups, and that in some instances protected groups might be interchangeable" (para. 90), an understanding of genocide's protected groups that deviates from international jurisprudence, and one that the ECtHR tacitly endorses. Moreover, the ECtHR held the members of the *résistance* to represent a significant part of the Lithuanian population, "as a national and ethnic group, because the partisans had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation" (para. 103). In not expressly rejecting the domestic courts' blending of political groups with national and ethnic groups, the ECtHR accepts a broader group definition than that commonly accepted by the international criminal judiciary.

However, in her dissenting opinion, Judge Motoc makes clear that this merger is problematic. She calls the consequences of the judgment "unprecedented in international practice" since this was the "first time that ethnopolitical genocide has been recognised by an international Court." The judge is highly critical of such an expansion of the scope of genocide, which she considers going "far beyond the approach taken so far in international criminal law" (para. 2). This dissenting opinion clearly reveals the legal issues at stake: first, the diverging codification of the law of genocide on the national and international level; second, the diverging interpretation of the law of genocide on the national and international level; and, finally, the diverging interpretation of the law of genocide in human rights and international criminal court. Moreover, the ECtHR's declaration that the victim may belong to several protected groups and that in some instances, protected groups might be interchangeable, is noteworthy. It stands in contrast to research on genocide and on the *génocidaire*'s power to define the victim group, which focuses on one level of identity. It also stands in contrast to the principle of legality and legal specificity according to which the law has to unambiguously define the protected groups of genocide. There is, furthermore, a contrast to the clear delimitation of the law of genocide to four exhaustive groups. Last, there is a contradiction to the jurisprudence of the international criminal courts, as rightfully recognized by Judge Motoc. The interpretation of the notion of "national group" to include any group that in some manner contributes to the national identity of a State, irrespective of the group's primary character as a political unit, may lead to a dilution of the law of genocide. However, the judgment's discussion on the interchangeability of different identity groups points to a more sociological recognition of the victims' group membership. As such, the ECtHR judgment could be said to more fully incorporate

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the fluidity of identity levels. The *Drėlingas v. Lithuania* judgment clearly exemplifies that there is no easy answer to the multiple challenges that arise from the definition of the national group.

The remainder of this section will discuss selected domestic cases based on their interpretation of the material elements of the crime, foremost national group membership. Where considered appropriate for the current analysis, it will contrast the domestic approach with the interpretation of international criminal tribunals.

German Jurisprudence

Germany is one of the leading countries in prosecuting international crimes based on universal jurisdiction, at present particularly for atrocities committed in Syria (Kaleck and Kroker 2018, 165–191; Kroker and Kather 2017). Section 1 of the *Völkerstrafgesetzbuch* grants (universal) jurisdiction of domestic courts over the crime of genocide even if the crime has been committed abroad and there is no connection to Germany.[29] In the criminal case against *Jorgić*, the court of the second instance defined the protected groups of genocide as a "social unit in its particularity and distinctiveness and its sense of a common bond,"[30] terminology that the ECtHR reverted to in its judgment on case.[31] In the appeals case, the German Constitutional Court confirmed that the law of genocide protected an "over-individual" (*überindividuell*) legal interest, namely the social existence of a group, thereby accentuating the social over the objectively determinable nature of the group.[32] In accentuating the social togetherness of a group, the German courts take account of the fact that most group conflicts entail some element of identity construction. Rather than trying to squarely define the protected groups, the courts are given leeway to acknowledge the fluidity of social groups.

In a recent case on the Rwandan genocide, the German Federal Court of Justice upheld settled domestic jurisprudence according to which the perpetrator's intent covered the destruction of one of the protected groups, "at least in its social existence."[33] A commentator rightfully concluded that the German Federal Court apparently did not construe the legal requirements of the intent to destroy as narrowly as the ICTR or ICTY.[34] In an earlier case, the same Court confirmed that the provisions on genocide did not protect an individual legal interest, but rather the social existence of the persecuted national, racial, religious, or national group. According to the Court, the perpetrator had to aim at the destruction of the group as a social unit in its specialty and peculiarity and its feeling of togetherness.[35] The German Courts, on all levels, consistently distance themselves from an objective determination of the protected group, while focusing on the victim group's feeling of unity and togetherness. This approach appears to contradict the findings from genocide research, according to which the perpetrator holds the definitional power over the victim group, which conversely cannot influence its composition, unity, or togetherness.

Dutch Jurisprudence

A genocide judgment that exemplifies the vague boundaries between ethnic and national groups is the Dutch *Van Anraat* case. The District Court of Den Haag decided that while it had not legally and convincingly been proven that the Kurds in Iraq were a national group, they were, however, an ethnic group. The judgment refers to a great deal of evidence, including the group members' common language and culture, the individuals' understanding that their group was of a distinct ethnicity, and, furthermore, the perpetrator's perception of the victim group as a distinct ethnic group.[36] The judgment thus reverts to certain objectively measurable parameters, such as language. But it also uses subjective components, like the perpetrator's perception and the victims' own understanding of their group membership. It thereby combines objective with subjective elements in the form of the internal self-categorization of the victims and the external categorization by the perpetrator. This approach does not cohere to the common practice of the international criminal courts, which generally refer to the perpetrator's perception of his victims only in addition to

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objective factors (Lingaas 2015). In giving priority to the perpetrator's understanding of his victims, the international judiciary better reflects the process of othering. Although it might cohere with objectively determinable elements, the construction of the victim group is in the hands of the perpetrator alone, a fact that the judgment in *Van Anraat* does not recognize.[37] This discrepancy between domestic and international jurisprudence, in particular the different weighting of the subjective and objective elements, confirms that caution is appropriate for the legal analysis of the crime. It becomes apparent that the interpretation of the crime of genocide on the domestic level differs from the international jurisprudence. Nonetheless, the latter is regularly used as a guideline for the interpretation of national laws of genocide.

Case Law on the Yugoslav Wars—and Beyond

The national courts of the countries directly affected by the armed conflicts in the Balkans also dealt (and are still dealing) with cases of genocide.[38] For this article, the domestic case of *Mitrović* in Bosnia and Herzegovina is of interest. According to the Court, the Bosnian Muslims were objectively a protected national group and recognized as such by the Constitution of Bosnia and Herzegovina.[39] As to the subjective definition, the Court held:

> Subjectively, the evidence is overwhelming that the Bosniak people were identified and stigmatized as a distinct national group by members of other national groups who perpetrated crimes against the Bosniak people. That the Bosniak people were additionally stigmatized on religious grounds serves only to emphasize that they are a protected group.[40]

As in the *Van Anraat* case, the Appellate Chamber in *Mitrović* reversed the genocide conviction due to the lack of the special intent to destroy the victims.[41] In what could be understood as criticism of an objective definition of the victim group, scholars have pointed out that "the recognition or not in internal legislation is not necessarily related to the intrinsic qualities of the group" (Wouters, Verhoeven 2013, 182). Legislation can assert a group a quality that the group itself does not share or by which the group is randomly characterized, as several historical cases show. The Nazi Nuremberg Racial Laws are one example of an objective—though possibly constructed and incorrect—classification of a group by means of law; the Myanmar citizenship laws that exclude certain national groups such as the Rohingya are another (Cheesman 2017, 461–483; Dutton 2007, 45–47; Greenberg 2011, 82–83; Haque 2017, 454–469).

The *Mitrović* judgment stands in contrast to an earlier judgment of the ICTY in the *Čelebići* case. There, the Trial Chamber determined that detainees belonging to the Bosnian Serb victim group should be regarded as protected persons, albeit formally having Bosnian nationality. In other words, although they had the same nationality as their aggressors, they were still considered protected.[42] Rather than relating on the concept of citizenship, the ICTY judges discussed the principle of a right to option, namely to have a free choice of nationality, as well as the "effective link" theory of the ICJ *Nottebohm* judgment.[43] They concluded that a broader concept than domestically accorded citizenship had to apply for the protection of victims in armed conflicts. Moreover, the judgment recognizes the importance of identity and the manner in which the enemy is perceived as a threat.[44] In dealing with breaches of international humanitarian law rather than acts of genocide, the conclusions of the *Čelebići* judgment cannot be applied to the law of genocide *ipso facto*. The prohibition of analogy, as a corollary of the principle of legality, bars the direct application of one legal provision for the interpretation of another legal provision (Werle and Jessberger 2014, 39–40). In international criminal law, the procedural rights of the accused include the right to be made aware of the charges, including each count based on a legal provision. If the prosecution could suddenly revert to other, previously uncharged, provisions, the accused would not be given a fair chance to properly prepare his defense (Cryer et al. 2019, 419; Hoffmann 2014, 517). Notwithstanding the prohibition of analogy, the logic of the *Čelebići* judgment on nationality can be used for

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the determination of the national group in the crime of genocide. Accordingly, the victim group is protected by the law of genocide if the perpetrator targets it for a perceived distinct (national) group membership.

Ethnic cleansing was the topic of the Review of the Indictments of Radovan Karadžić, political leader of the Bosnia Serbs, and against Ratko Mladić, commander of the Serb armed forces and known as "The Butcher of Bosnia." The ICTY judges held that an intent to destroy was given with respect to the non-Serbian groups, particularly the Bosnian Muslims.[45] Furthermore, the Chamber concluded that the criminal acts aimed at undermining the foundation of the groups, more specifically the national Bosnian, Bosnian Croat, and especially the Bosnian Muslim national groups (para. 95). The judges avoided any further legal interpretation of a national group or why the Bosnian Muslims should be considered as such.

The *Mladić* trial judgment confirmed the designation of the Bosnian Croats and Bosnian Muslims as victim groups of the genocide, a fact undisputed by the defense (Nilsson 2018). Rather than classifying the victims as members of one of the four protected groups, the ICTY Trial Chamber simply concluded that the victims were members of a "national, ethnical, and/or religious" group.[46] In their historical analysis, the judges discuss how Maršal Tito discouraged ethnic division and nationalism; nonetheless, the various groups remained conscious of their separate identities. The judges thereby refer to ethnicities, nationalism, and identities, yet without discussing their contours or boundaries. The judgment mentions Bosnia-Herzegovina with Serbs, Muslims, and Croats as "the predominant nationalities" but then simply concludes that the victims "are protected groups within the meaning … of the Statute" (para. 3442). Albeit laying clear the facts that the involved groups (victims and perpetrators) had distinct nationalities, the judges avoided a conclusion that they belonged to "national groups" according to the law of genocide. This judgment points to a remarkable development: in dealing with the four protected groups as one, a clear definition of each group is circumvented. The most recent genocide conviction by an international(ized) court, in the case 002/02 against the Khmer Rouge leaders Nuon Chea and Khieu Samphân, the Extraordinary Chambers of the Courts in Cambodia (ECCC) confirms this tendency. There, the Court concluded that the Vietnamese were an "ethnic, national and racial group."[47] As in *Mladić*, the defendants' defense did not contest that the victims were an ethnic or national group, thereby enabling a multiple classification (para. 3418). If this development is confirmed in future genocide judgments, we might have to conclude that the interpretation of the law has evolved. Then, we could also establish that the legal practice takes into account the multifaceted levels of group identities. At the same time, however, such interpretation does not cohere with the perpetrator's definitional power over his/her victim group. Such a change in interpretation would further align the jurisprudence of the (international) criminal courts with the human rights approach, as discussed above in the section "Different Legal Levels, Different Legal Definitions," which would increase legal certainty.

Returning to the Balkan wars, the ICTY Appeals Chamber in the *Tadić* case was also tasked with the determination of the status of Bosnian Serb victims. Duško Tadić was a high-ranking member of the Serbian Democratic Party and, in this role, was involved in attacks against Prijedor and Kozarac, both predominantly Muslim towns. The attacks on Kozarac caused the death of more than 800 civilians (of approximately 4,000 inhabitants). In executing their plan to create a Greater Serbia, the Bosnia Serbs expelled the entire non-Serbian population and led them to the infamous concentration camps of Omarska, Keraterm, and Trnopolje on foot, where their suffering continued. Tadić was accused of participating in all the stages of the attacks against the town of Kozarac, the killing of two Muslim police officers, and taking part in the ill treatment of the detainees of Omarska camp.[48]

The *Tadić* appeals judgment constructed a distinction between formal nationality (including diplomatic protection of a state) and more substantial relations to a state, one in which ethnicity (and probably also religion and "race") become determinative of national allegiance.[49] Similar to the ECCC judgment, ethnicity, race, and religion became decisive elements for the definition of

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nationality. Here also, the four groups protected by the law of genocide were legally interpreted as an amalgam with overlapping boundaries. This interpretation raises doubts as to its compatibility with the principle of effectiveness, "one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence," whereby the interpretation of a legal text or treaty should attribute a reason and meaning to every word.[50] Moreover, such broad interpretation begs the question of whether the intentionally excluded political, gender, cultural, ideological, linguistic, or economic groups will (have to) be granted protection under the law of genocide if their group characteristics can be connected, in any conceivable manner, to the larger concept of nationality. This is the same issue that the dissenting Judge Motoc in *Drėlingas v. Lithuania* raised.[51]

Case Law on Crimes Committed by South American Military Juntas

The case law on crimes committed by military commanders in Latin American countries is arguably the most progressive with regard to defining nationality. In 1998, the Spanish National High Court (Audencia Nacional) decided that Spain had gained universal jurisdiction over the crime of genocide and could therefore prosecute the former dictator of Chile, Augusto Pinochet (Lippman 2001, 518). In its judgment, the Court ruled that a national group consisted of a larger community of people who shared some common views or traits, and hence was not limited to a collectivity that belonged to the same nation-state (Marquez Carrasco and Fernandez 1999, 693; Paul 2008, 107). It concluded that in Chile, the military *junta* considered individuals who were not compatible with the new social order as "others" (Lippman 2001, 519). The Court's conclusion chimes with scholarship that understands a nation as an embodiment of the people, an aggregation of similarity, of "people like us" (Deutsch and Yanay 2016, 34; Triandafyllidou 1998, 593–595). The members perceive their own national group as a unity, differentiated from and implicitly better than other unities. Thus, national identity becomes meaningful only if contrasted with the feelings toward another group (Glaser and Possony 1979, 131; Triandafyllidou 1998, 598–599). Such dichotomous worldviews separating the inward perception of "we" from the outward understanding of "them" originate in beliefs and myths, as Max Weber already recognized for the ethnic group (Triandafyllidou 1998, 596–597, 599; Weber 1922). The national other is not a biological or objective, but a social construct, one that further reinforces the subjectivity of national group membership (Zartman and Anstey 2012, 7). This broad approach to nationality resonates in the writings on another conflict in Latin America, namely Argentina's "Dirty War." There, the generals perceived their enemies as not being *nacional*, thus as outsiders to the collective national essence, the soul, or even the consciousness of Argentina (Feitlowitz 2011, 23). In the judgment against Miguel Etchecolatz, the domestic court determined that the national group protected by the law of genocide did not mean a "group formed by persons belonging to the same nation," but rather a differentiated human group, characterized by something, and integrated into a greater collective.[52] It thereby went beyond the objective politico-legal connection to a nation-state and reverted to the subjective feeling of belonging and togetherness of a national group. In doing so, the domestic court chose a more progressive path than its international counterparts did.

Moving on to another conflict, the 36-year-long Guatemalan civil war came to an end with the Oslo peace accords of 1994. These accords led to the creation of a Truth Commission, chaired by Christian Tomuschat, a renowned international lawyer (Bosdriesz and Wirken 2014, 1069–1070; Tomuschat 2001, 233–258). The Truth Commission is, by its very nature, not a judicial body, but rather an organ of transitional justice. As such, it can neither render legally binding judgments, nor can its conclusions be enforced. Nonetheless, in being headed by an international lawyer and relating to valid international criminal law, the Commission applied legal methodology and legally analyzed the crimes of the Guatemalan *junta*. Its findings are therefore legally significant. In its analysis, the Commission established that all victims belonged to a specific ethnic group and that the perpetrators identified them as such. In applying the standards of the Genocide Convention, the Commission concluded that agents of the Guatemalan State had committed acts of genocide against

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groups of Mayan people with the intention to destroy them.[53] This conclusion is supported by the national trial against the former President Ríos Montt, who was convicted for the crime of genocide, despite the later annulment of the judgment for procedural reasons (FIDH 2013). The *Ríos Montt* case was constructed on the fact that the ruling *junta* considered the indigenous people an inferior race and public enemy, leading to the intent of the commanders of the armed forces to eliminate the group.[54] The court concluded that "through the declaration of women and men from Ixil, it was established that they effectively belonged to the Ixil ethnic group" (Bosdriesz and Wirken 2014, 1077), or, in another English translation, "the testimony of the Ixil women and men [allowed us to] establish that indeed they belong to the Ixil ethnic group."[55] By referring to self-identification, the victims' statements led the court to establish that the Ixil effectively belonged to an ethnic group (Bosdriesz and Wirken 2014, 1077). Note how the court relates to elements of race, ethnicity, threat, and self-identification to construct the victims' group membership. The judgment reveals the multiple levels of the victims' identity, as well as their inferiorization and dehumanization by the perpetrators. The judgment's interpretation of the protected groups of genocide thereby takes account of the identity fault lines between the Guatemalan *junta* and the indigenous people who were framed as an enemy and a threat. The Court goes beyond the established international practice to apply a combination of objective and subjective elements, whereby the latter focus on the victims' perception of their group membership. The reference to effectiveness could imply that the victims do not have to objectively belong to a certain group, but that their perception alone suffices for the legal construction of group membership.

In December 2019, the Public Prosecutor of Guatemala presented the charges against four senior military officials of genocide of the Maya Ixil population, making this a historic first case of holding senior military officials accountable for genocide against the indigenous community.[56] In a subsequent trial, it will be interesting to see how the court subsumes the Ixil within the group categories of the law of genocide and whether it follows the *Ríos Montt* case's approach.

Canadian Jurisprudence

In the case *Minister of Citizenship and Immigration, v. Léon Mugesera*, the Supreme Court of Canada noted that its national legislation on genocide defined the crime as "the act of killing members of an identifiable group or of deliberately inflicting conditions of life on an identifiable group calculated to bring about the physical destruction of that group, in whole or in part."[57] Of interest here is the term "identifiable," which may point to an objective definition. Unlike the subjective approach by which, in its most extreme form, the perpetrator can define the group arbitrarily, the objective approach relies on recognizable or identifiable criteria. However, who identifies the victim group: the general public, the victim group, or others? At the time, the Canadian law defined an identifiable group as "any section of the public distinguished by colour, race, religion or ethnic origin."[58] The Canadian provision thereby omits the national group, while it includes the category of color in addition to race and ethnicity. The omission of national group is remarkable, particularly for a country like Canada with numerous indigenous groups that could be termed national groups, above all if "nationality" is defined more broadly than "citizenship." In contrast to the *Akayesu* definition discussed previously in the section "The National Group: Its Legal Definition," legal scholars hold that national groups are not required to hold the nationality of the state they live in, but could be inhabitants of a nation's territory (Kress 2006, 476; Luban 2006, 318).

In another Canadian genocide case, the *Munyaneza* judgment, the Supreme Court Judge Denis refers to the victim group as "an identifiable group of people as a national, ethnic or religious group," thereby including the national group, but omitting the racial group.[59] The judge notes that each case of genocide is *sui generis*, yet that international criminal jurisprudence defines an ethnic group from an objective standpoint according to political, cultural, social, or historical characteristics, and from a subjective standpoint according to perceptions of these characteristics by the perpetrators of the offenses.[60] Albeit related to ethnicity only, the statement holds true for the national group too: the

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case law of the international criminal tribunals builds on an adherence to a mixed approach, consisting of objective elements and the subjective perception of the perpetrator. Importantly, the judge emphasizes the perpetrator's perception of the victims' group characteristics, confirming his/her definitional power over the group identity. National group membership is thus a means of classification in order to create a particular consciousness of group difference. Thereby nationality, by the same token as ethnicity, religion, or "race," becomes a by-product "of the human predisposition to construct categories based on identifiable difference" (Banton 1996, 77). Such consciousness of group differences is, in the words of Michael Banton, "a consciousness of social constructs" (Banton 1996, 79).

Conclusion

Considering that its definition ranges from a connection to a state, to citizenship, to cultural ties rather than territorial links, the "national group" challenges international as well as domestic criminal courts that deal with cases of genocide and other international crimes. Unsurprisingly, their jurisprudence is incoherent and presents, as such, a threat to the rule of law.

Cases dealing with genocide are particularly challenging. In addition to proving beyond reasonable doubt the guilt of the accused *génocidaire*, other issues are at stake: the defendant's freedom, the victims' need for retribution, the communities' urge for transition, the cessation of impunity, and the proper administration of justice, among others. The judicial interpretation of the national group must not only consider all of these concerns, but also reflect established research on genocidal dynamics. In every genocide, the perpetrator characterizes the victims as members of an "other," threatening out-group that s/he intends to destroy on the basis of their ostensible national, ethnic, racial, or religious identity. In turning the attention to the perpetrator's special intent leading to the construction of the national group, the international judiciary will be able to render legally sound judgments, while simultaneously acknowledging the collective identities of the groups involved.

Playing the admittedly dangerous role of devil's advocate,[61] this article asks whether the law is holding on to outdated objective conceptions of nations, nationalism, and national group membership. If the recent *Mladić* judgment by the ICTY and the judgment by the ECCC in case 002/02 (against the defendants Nuon Chea and Khieu Samphân) provide a yardstick for international criminal courts, a clear-cut distinction between the four protected victim groups of genocide is no longer necessary. Following the judgment's logic, national identity would always be connected with ethnicity, an argument with roots in the social sciences. This article is critical of such a merger because it disregards the principles of effectiveness and legal specificity. As discussed, it could also breach the perpetrator's rights to a fair trial. At the same time, one might wonder whether these definitional challenges can be resolved—or at least avoided—if the emphasis is placed on how the group is perceived rather than on objectifiable facts. Such an approach would cohere with the pre-genocidal stages of othering and the perpetrator's definitional power over the victim group's identity.

The question of whether the law of genocide is able to account for identity fault lines cannot be answered conclusively. This article has demonstrated that there exists no uniform practice in conceptualizing the national group. Domestic judgments on genocide seem to rely on the social togetherness of a group, as perceived by the victims, while the international courts focus on objectively determinable characteristics (such as citizenship, language, and traditions) in addition to the perpetrator's understanding of the group. The most recent judgments of international(ized) courts indicate a change of interpretation in that they are becoming more receptive to fluid and multilayered identities, given that they merge the categories of protected groups. This is also the approach that the ECtHR has accepted, despite (forceful and convincing) criticism. In the case Drėlingas v. Lithuania, the dissenting Judge Motoc declared that "[t]he issue of the definition of genocide has remained one of the most difficult in public international law,"[62] an opinion with which this article agrees. In any case, the recent development in the interpretation of the "national group" concerning genocide promises to be a stimulating debate for years to come.

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Notes

1 Art. 2 Convention on the Prevention and Protection of the Crime of Genocide, adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, 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." All later statutes of international criminal courts and tribunals contain identical elements.

2 This article agrees with Brubaker (2009, 22), who pledges for an integrated field of study that is "comparative, global, cross-disciplinary, and multi-paradigmatic, and that construes ethnicity, race, and nationhood as a single integrated family of forms of cultural understanding, social organization, and political contestation."

3 See also *The Prosecutor v. Kunarac*, Case No. IT-96-23A, Appeals Judgment (June 12, 2002), para. 372.

4 *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (September 2, 1998).

5 Ibid., para. 510.

6 Ibid., para. 512.

7 *The Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (October 2, 1995), para. 97.

8 The case deals with damages in respect of the acts of the Government of Guatemala in arresting, detaining, expelling, and refusing to re-admit Nottebohm and seizing and retaining his property without compensation (for a detailed discussion of the case, see Brownlie 2003, 396–406).

9 *Nottebohm* case (*Liechtenstein v. Guatemala*), Second Phase, Judgment (ICJ Reports 1955), especially p. 22: "They have given their preference to the real and effective nationality, that which accorded with the facts that based on stronger factual ties between the person concerned and one of the States whose nationality is involved."

10 Ibid., p. 23.

11 UN Secretary-General, Draft Convention on the Crime of Genocide and Comments (June 26, 1947), UN Doc. E/447, p. 17.

12 UN General Assembly, Third Committee (October 14, 1965), UN Doc. A/C.3/SR.1304, para. 3.

13 Ibid., para. 5.

14 Ibid., paras. 9, 14, 15.

15 The modern state consists of precise boundaries and the related identification of bounded territories, a sufficient centralization, reflected in institutions, and a sense of community of the people living in that territory (see Henrard 2018, 273).

16 *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (September 2, 1998), para. 513.

17 UN Doc. A/C.6/SR. 75 (15 October 1948), pp. 115–116. See also Tams, Berster, and Schiffbauer (2014, 88).

18 UN Doc. A/C.6/SR. 75, pp. 115–116.

19 Confirmed by several judgments, e.g., *The Prosecutor v. Musema*, Case No. ICTR- 96-13-A, Trial Judgment (January 27, 2000), para. 165: "The victim is singled out not by reason of his individual

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identity, but rather on account of his being a member of a … group…. [T]he victim of the crime of genocide is the group itself and not the individual alone"; *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (September 2, 1998), para. 522.

20 *The Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Judgment (March 22, 2006), para. 20 (emphasis in original).

21 Huntington has been criticized for his assumption that the identification of culture and religion are the primary source of future conflicts. More recent research has shown that intolerance of non-group members arises in reaction to threat (see Penetrante 2012, 85). See also criticism in Appadurai (2006, 115).

22 See discussions below in the sections "Different Legal Levels, Different Legal Definitions" and "Case Law on the Yugoslav Wars—and Beyond." For a review of the recent judgment by the Extraordinary Chambers of the Courts of Cambodia (ECCC), see Lingaas (2019).

23 "[T]his approach … requires primarily a consideration of the subjective intent of the accused.… Technically speaking, such an understanding is not excluded by the plain wording of the convention. But it contrasts with the social understandings of genocide which tend to focus on objective events, rather than criminal intent" (Stahn 2018, 131).

24 ECtHR, *Case of Drėlingas v. Lithuania*, Application no. 28859/16, Judgment (March 12, 2019), Dissenting Opinion of Judge Motoc, p. 36, paras. 7–8.

25 *The Prosecutor v. Erdemović*, Case No. IT-96-22-A, Appeals Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah (October 7, 1997), para. 72.

26 For a similar discussion on the cross-fertilization between the European Court of Human Rights and the international criminal courts, see Vasiliev (2017, 13–39).

27 ECtHR, *Case of Vasiliauskas v. Lithuania*, Application no. 35343/05, Grand Chamber Judgment (October 20, 2015).

28 Ibid.

29 For a broader discussion, see Wouters and Verhoeven (2007, 201). Note that the prosecutor is entitled to dismiss the case if there is no linking point to Germany or if it is under investigation by a more closely related state or an international criminal court (see Cryer et al. 2019, 63).

30 Oberlandesgericht Düsseldorf, Urteil in der Strafsache gegen Nikola Jorgić (September 26, 1997), 2 StE 8/96, p. 161.

31 ECtHR, *Jorgić v. Germany*, Application No. 74613/01, Judgment (July 12, 2007), para. 18.

32 Bundesverfassungsgericht, Verfahren über die Verfassungsbeschwerde des Herrn J. (December 12, 2000), 2 BvR 1290/99, para. 22. The *Jorgić* case before the ECtHR concluded that universal jurisdiction over genocide was compatible with international law (*Jorgić v. Germany*, App. No. 74613/01 (July 12, 2007), paras. 68–70).

33 Bundesgerichtshof, 3 StR 575/14 (21 May 2015), p. 12 ("Zerstörung einer von der Vorschrift geschützten Gruppe zumindest in deren sozialer Existenz"). See discussion in https://www.str1.rw.fau.de/files/2016/02/Safferling_AkteRecht_BGH_3-StR-575-14_Tatherrschaft_V%C3%B6lkermord.pdf

34 https://www.vstr.rw.fau.de/2016/08/05/urteil-im-frankfurter-voelkermordprozess-ist-rechtskraeftig/.

35 Bundesgerichtshof 3 StR 215/98 (April 30, 1999) (OLG Düsseldorf), BGHSt 45-65, para. 38.

36 *The Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, Case No. 09/751003-04, Judgment (December 23, 2005), p. 11.

37 Due to the lack of genocidal intent, Van Anraat was acquitted on the count of genocide, which was confirmed by the Court of Appeals (*The Public Prosecutor v. van Anraat*, Court of Appeal, Case No. 2200050906-2, Judgment (May 9, 2007).

38 For an overview see http://www.internationalcrimesdatabase.org/Courts/Domestic and http://www.sudbih.gov.ba/.

39 *The Prosecutor's Office of Bosnia and Herzegovina v. Petar Mitrović*, Case No. X-KRŽ-05/24-1, First Instance Verdict (July 29, 2008), pp. 49–51.

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40 Ibid.
41 *The Prosecutor's Office of Bosnia and Herzegovina v. Petar Mitrović*, Case No. X-KRŽ-05/24-1, Second Instance Verdict (September 7, 2009), paras. 226–253.
42 *The Prosecutor v. Mucić, Delalić, Delić, Landžo,* Case No. IT-96-21-T, Trial Judgment (November 16, 1998); para. 263. Note that the case dealt with breaches of international humanitarian law. Art. 4 of the Fourth Geneva Convention requires that persons be "in the hands of a party to the conflict or occupying power of which they are not nationals" in order to be considered "protected" (Ibid., paras. 245 and 253).
43 Ibid., paras. 255-–258. On *Nottebohm*, see above in the section "The National Group: Its Legal Definition."
44 Ibid., paras. 263 and 265.
45 *The Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-R61 and IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence (July 11, 1996), para. 94.
46 *The Prosecutor v. Mladić*, Case No. IT– 09-92-T, Trial Judgment (November 22, 2017), para. 3442.
47 ECCC, *Prosecutor v. Nuon Chea and Khieu Samphân*, Trial Judgment, Case 002/02 (November 16, 2018), para. 3419.
48 https://trialinternational.org/latest-post/dusko-tadic/#section-1
49 *The Prosecutor v. Tadić,* Case No. IT-94-1-AR72, Appeals Judgment (October 2, 1995), para. 166.
50 *Case Concerning the Territorial Dispute* (*Libyan Arab Jamahiriya v. Chad*), ICJ Reports 1994, p. 25, para. 51, confirmed in *Fisheries Jurisdiction Case* (*Spain v. Canada*), ICJ Judgment (1998), paras. 52 and 66, *Anglo-Iranian Oil Co.* Case (United Kingdom v. Iran), ICJ Judgment, Preliminary Objection (1952), p. 105. For a detailed discussion, see Lingaas (2018, 126–151).
51 ECtHR, *Drėlingas v. Lithuania*, Application no. 28859/16, Judgment (March 12, 2019), see Section 6.1.
52 Judgment of September 19, 2006 against Miguel Etchecolatz for the crime of genocide (http://www.internationalcrimesdatabase.org/Case/1097/Etchecolatz/) on p. 101.
53 Comisión Para el Esclarecimiento Histórico (1999), p. 39, para. 111 and p. 41, para. 122.
54 Partial English translation, p. 80, at http://www.opensocietyfoundations.org/sites/default/files/rios-montt-judgment-full-version-11072013_2.pdf.
55 Ibid., p. 83, at http://www.opensocietyfoundations.org/sites/default/files/rios-montt-judgment-full-version-11072013_2.pdf.
56 https://www.justicerapidresponse.org/charges-presented-against-high-ranking-military-officers-in-separate-guatemala-genocide-cases/
57 *Minister of Citizenship and Immigration, v. Léon Mugesera*, Case No. 30025 (June 28, 2005), para. 83.
58 Ibid.
59 *Her Majesty the Queen v. Munyaneza*, Supreme Court, Criminal Division, Case No. 500-73-002500-052, Judgment (May 22, 2009), para. 104. The racial group is re-introduced in para. 107.
60 Ibid., para. 104.
61 The danger of playing the role of devil's advocate lies in the fact that the term "national group" may become empty if interpreted as a fluid concept without clear boundaries, especially with respect to the "ethnic group." The author, however, argues that the law of genocide demands a clear distinction between the four protected groups, based on the principle of effectiveness.
62 ECtHR, *Case of Drėlingas v. Lithuania*, Application no. 28859/16, Judgment (March 12, 2019), Dissenting Opinion of Judge Motoc, p. 35.

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