

# **Gender as Genocide: An Argument for the Inclusion of Gender as a Protected Group under Article II of the Genocide Convention**

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The purpose of this paper is to add to the growing scholarship investigating the question of whether the Genocide Convention should be expanded to include gender as a protected group. My argument will be laid out in four sections. In section one, I will begin by sketching a brief overview of the history of the creation of genocide as a crime covered by international law. In section two, I will look at the reasons why gender was initially excluded as a protected group.

Section three then will examine existing international law that provides for the protection of gender groups. Section four will look at arguments against expanding the genocide convention to include gender as a protected group. In addition, I will evaluate those arguments and show how they fail to present compelling reasons for the exclusion. I will conclude with areas that I feel need further study.

## **THE EVOLUTION OF THE CRIME OF GENOCIDE**

In the aftermath of WWII, the Allies faced a unique challenge. It was clear that the major figures of Nazi leadership should be held accountable for the trail of atrocities left in their wake, but how, exactly, should this be done? After a lengthy debate, it was finally decided that an international trial in the form of a military tribunal would take place.<sup>1</sup> The International Military Tribunal (IMT) was created in 1945 for the express purpose of trying those considered to be at the head of the Reich's operations.<sup>2</sup> The next step was determining exactly which charges would

be brought. Both The Hague Conventions of 1899 and 1907 and the Geneva Conventions offered a guide to potential charges, but the sheer scope and magnitude of the crimes committed by the Nazis seemed unique to existing international law. Ultimately the court decided on three crimes: Crimes Against Peace, War Crimes, and Crimes Against Humanity.

Missing from this is the crime of genocide. Although the Holocaust stands as the quintessential example of genocide in modern discourse, genocide was not a legal crime at the time of the Nuremberg trials. Raphael Lemkin, the originator of the term, first presented what he hoped would become an international war crime at a League of Nations international law conference in 1933. Lemkin also pushed for a form of international jurisdiction with respect to the crime, stating that perpetrators should be “prosecuted and punished irrespective of the place where the crime was committed and of the nationality of the offender, according to the law of the country where the offender was apprehended” (Bazyler, 34). In 1944, when Lemkin published the seminal text, *Axis Rule in Occupied Europe*, he replaced the term “barbarity,” with “genocide.” While Lemkin did not succeed in having the crime of genocide added to the list of official crimes at Nuremberg, it was used in the language of the indictment itself, stating that the Nazis “conducted deliberate and systematic genocide” (ibid).

In 1946, the crime of genocide entered into international law with the passage of Resolution 96 (I) by the UN General Assembly. The resolution defined genocide as “a denial of the right of existence of entire human groups” which “shocks the conscience of mankind, results in great losses to humanity ... and is contrary to moral law and to the spirit and aims of the United Nations” (36). This was further codified in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) of 1948. The language of the convention differed slightly from Lemkin’s original. The official definition of genocide is set out in Article II of the Genocide Convention. It defines genocide as follows:

In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or on 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. (40)

The Genocide Convention remained untested for over forty years. Almost from the moment of codification, the Genocide Convention has been criticized as being both too general and too narrow. The main focus of criticism lies in the

determination of the protected groups. Most notably absent are political groups<sup>3</sup> and groups defined by gender, however even the groups identified suffer from a perceived lack of clarity. For example, in the aftermath of the slaughter of over 500,000 members of the Tutsi ethnic group in Rwanda, the United Nations convened a special tribunal to investigate potential war crimes. Jean-Paul Akayesu became the first person to be convicted of genocide. Akayesu was bourgmestre in Rwanda at the time of the killings and as such, the indictment stated that he “knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission” (Prosecutor v. Akayesu, para. 12B). The defense held that Akayesu could not be held responsible for the crime of genocide since the Tutsis did not fall into the category of one of the protected groups. The ICTR Trial Chamber rejected this argument stating:

...customary rules existed in Rwanda governing the determination of ethnic group, which followed patrilineal lines of heredity. The identification of persons as belonging to the group of Hutu or Tutsi (or Twa) had thus become embedded in Rwandan culture. The Rwandan witnesses who testified before the Chamber identified themselves by ethnic group, and generally knew the ethnic group to which their friends and neighbours belonged. Moreover, the Tutsi were conceived of as an ethnic group by those who targeted them for killing. (para. 171)

Crucial to the identification of a group in the ICTR judgement against Akayesu was the cultural recognition of a separate Tutsi identity. Regardless of whether or not there is a distinct ethnic difference between Hutu and Tutsi, the genocidaires targeted specific individuals based on this perceived difference. In other words, there was a *dolus specialis* to commit (a) through (d) in the convention.

The crime of genocide was further strengthened after the adoption of the Rome Statute in 1998 which called for the creation of a permanent International Criminal Court intended to prosecute perpetrators of the most serious crimes, included that of genocide (“Understanding the ICC”).

### **THE EXCLUSION OF GENDER AS A PROTECTED GROUP UNDER THE GENOCIDE CONVENTION**

At the time of the drafting of the Genocide Convention, gender *per se* was not considered a separate group with specific concerns. While much evidence supports the existence of multiple gender identities as far back as the Iron Age, (“Exploring the History of Gender Expression”) post-war society held fairly strict views recognizing gender as limited to male and female. Since national, racial, ethnical and religious groups contain both male and female bodies, the addition of gender as a protected group was seen as irrelevant. For example, despite claims that Jewish

women were not targets of sexual violence that occurred in the concentration camps due to racial purity laws (*Rassenschande*), there is sufficient evidence to suggest that widespread sexual abuse did occur (Flaschka). However, the primary crimes perpetrated by the Nazis were against Jews as a *people*, despite the gendered nature of the attacks.

Similarly, during the violence in Rwanda many women experienced sexual abuse. The ICTR found that not only did Jean Paul Akayesu know about acts of sexual violence but held that he was at times directly responsible for them. The ICTR judgement against Jean Paul Akayesu states, “Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul Akayesu facilitated the commission of the sexual violence ... by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises” (Prosecutor v. Akayesu, ICTR Trial Chamber, Judgement, para 12B). The Trial Chamber determined that this did meet the parameters of Article II of the Genocide Convention, yet it was the participation in the ethnic group Tutsi that allowed for this rather than their gender (*ibid*, Sect. 8).

Filip Strandberg Hassellind has noted that international criminal law has traditionally reflected a gendered view in which men’s experiences stand as the norm and women’s experiences as belonging to a separate sphere of “women’s issues.” Hassellind writes, “The groups worthy of protection in the Genocide Convention are gendered to suit atrocities that have befallen men” (Hassellid 72).

## GENDERCIDE AND CURRENT PROTECTIONS

Coined by Mary Anne Warren in her 1985 book, *Gendercide: The Implications of Sex Selection*, the term “gendercide” refers to the deliberate killing of members of a specific gender. Warren writes, “gender roles have often had lethal consequences, and that these are in important respects analogous to the lethal consequences of racial, religious, and class prejudice” (“Gendercide and Genocide”). Currently the terms, “Gendercide,” “Femicide” and “Gynocide,” are used to describe gender based violence. In many cases this violence is sexual in nature, but it is also used to describe sex based selection, such as the “one child policy” enacted in China. The policy was created to combat rising population, however a cultural preference for male children coupled with inheritance laws led to mass murder of unwanted female babies (Whyte et al.)

International Human Rights law protects against gender based discrimination and violence through a number of treaties, such as the Universal Declaration of Human Rights, the UN Declaration on the Elimination of Violence Against Women, and the arguably most significant, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This convention, adopted by the UN General Assembly in 1979 calls upon states to:

- to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
- to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises. (“Convention on the Elimination...”)

Countries that have ratified the Convention are required to put the provisions into practice. The Convention is meant to reflect the International Bill of Human Rights which ensures “the entitlement of everyone to equality before the law and to the enjoyment of human rights and fundamental freedoms without distinction of kind and proceeds to include sex among the grounds of such impermissible distinction” (“Short History of CEDAW Convention”).

However, the Convention has been accused of lacking teeth, relying on ratifying states to enact enforcement measures. This is done to varying effect. As well, not all countries have ratified the CEDAW. Iran, Somalia, Sudan, Tonga, Palau and the United States have all refused to ratify the Convention. Until widespread implementation of CEDAW’s provisions is enacted, with significant and meaningful enforcement, it, as is the case with many of the treaties, remains little more than a symbolic nod.

### **ARGUMENTS AGAINST INCLUDING GENDER AS A PROTECTED GROUP IN THE GENOCIDE CONVENTION**

There are three main criticisms directed towards the question of including gender as a protected group in the Genocide Convention.

First, critics claim that expanding the group categories would open a “Pandora’s Box” through which the claims of so many groups would flow that the definition under Article II would lose all meaning (Hassellind 66). William Schabas notes the problem with determining which groups should be included, “if one group is to be included, why not the disabled, or other groups based on arbitrary criteria” (ibid.). There may well be compelling arguments for the inclusion of differently abled people as a protected group, however that is beyond the scope of this paper. It is sufficient to point out that the crime of gendercide, as previously mentioned, fits the parameters of (a) through (d) of the Genocide Convention. As well, the majority of international human rights treaties currently conceive of gender as a group to be protected against discrimination and violence. Furthermore, gender based attacks formed part of the genocidal picture in *Akayesu*. Hassellind argues that discourses regarding what is worth protecting has changed since the original drafting of the Convention and that, “it is necessary to calibrate

the crime of genocide in relation to the changing discourses so they corroborate, inasmuch as it is possible, to ensure that the believability in the judicial construct is preserved.” (71).

Next, critics claim that gender groups are currently given adequate protection due to the inclusion of the crime of gendercide as a Crime against Humanity. This argument neglects a key difference between Genocide and CAH. As Hassellind notes, National, Ethnical, Racial and Religious groups are protected from both Crimes against Humanity and Genocide. If it were the case that CAH offered adequate protection, the crime of Genocide would be unnecessary. The difference lies in the *dolus specialis* of the crime. Genocidaires seek the destruction of a certain group through killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and/or forcibly transferring children of the group to another group. This is what leads to the crime of Genocide standing “at the apex of international criminality” (69). Crimes against Humanity, on the other hand, targets on an individual basis. While Crimes against Humanity can be included in the crime of Genocide, Genocide cannot be subsumed under CAH.

The third criticism points to the risk of member states withdrawing their membership to the Convention if gender is included as a protected group. It is important to remember that many of the states that are suggested as likely to withdraw their membership, such as Saudi Arabia and Iraq, have ratified the Convention on the Elimination of All Forms of Discrimination against Women, I am not convinced this is a significant worry. However, it was Soviet reluctance that led to the elimination of political groups as a protected category, so this objection cannot be dismissed out of hand. It is my contention that adding gender as a protected group would give CEDAW and other treaties the weight they need to become meaningful. In addition, as previously mentioned, Crimes against Humanity currently covers crimes against gender groups, so simply withdrawing membership from the Convention would not result in a complete absence of accountability.

### AREAS FOR FURTHER STUDY

Thus far this project has predominantly focused on gender as it relates to women’s issues. However, it is essential that any serious investigation of the possibility of adding gender groups as protected groups include issues that surround transgender individuals. Definitions of gender are often problematic, but broadly, *transgender* is the term used to refer to individuals whose gender identity does not conform to the stereotypical roles related to the biological sex assigned at birth. Violence against transgender individuals has increased sharply in recent years, with the

monitoring website, *transrespect.org*, reporting 2021 as the deadliest year on record since their monitoring began in 2009. However, this is not to indicate that violence against transgender people is a new phenomenon. A few examples will serve to illustrate this.

Some of the early prisoners sent to concentration camps by the Nazis were the “asocials” which included those who did not conform to stereotypical gender norms. Homosexuals and transgender people were made to wear a pink triangle signifying their camp designation. Many were sent to the concentration camp brothels for “re-education.” (Hughes 309).

In 2006, the New York based organization Human Rights Watch reported the sexual cleansing of transgender people in Nepal. In Nepal, transgender people are referred to as “metis.” This term is specifically in reference to those assigned to the male sex at birth but who identify as female. The Blue Diamond Society, a Nepalese non-governmental organization that specializes in defending sexual rights, reported beatings accompanied by cries of “Metis! Kill them!” and “These hijras<sup>4</sup> pollute the society and must be cleaned out” (Nepal: Police on ‘Sexual Cleansing’ Drive”). It was further reported that in March of 2006, approximately 26 metis were rounded up and detained, and denied legal counsel (Kidd and Witten 45).

A 2006 report on violence against transgender people in Argentina listed 420 transgender deaths “in recent years.” The deaths were a combination of murders, suicides, medical neglect, and substance abuse. Furthermore, “70% of these deaths occurred between the ages of 22 and 41, much younger than the country’s overall healthy life expectancy of 66.7 years” (ibid.)

Finally, in 2021, Governor of Texas, Greg Abbott declared that gender affirming procedures for minors constituted child abuse under chapter 261 of the Texas Family Code. Advised by the Office of the Attorney General, Abbott directed the Texas Department of Family and Protective Services to “investigate the parents of a child who is subjected to these abusive gender-transitioning procedures.” Removal of the child was recommended if it was determined that such procedures had, or were likely to take place; “if parental control falters, the State must play its part as *parens patriae*. In this respect, the [child]’s liberty interest may, in appropriate circumstances, be subordinated to the State’s *parens patriae* interest in preserving and promoting the welfare of the child” (“Governor Abbott Directs DFPS To Investigate...”).

The inclusion of gender as a protected group under the Genocide Convention would have a significant effect on the understanding of anti-transgender violence. As Jeremy Kidd and Tarynn Witten point out in their article, *Transgender and Transsexual Identities: The Next Strange Fruit– Hate Crimes, Violence and Genocide Against the Global Trans Communities*, “the material existences of transgender people ... bear tremendous resemblance to the acts outlined in the Genocide Convention” (Kidd and Witten 51). For example, the sexual cleansing

in Nepal fits the criteria laid out in (a) through (c) of the Convention; killing members of the group; causing serious bodily or mental harm to members of the group; and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Section C of the Convention covers several forms of violence against transgender people. Denying or providing substandard medical care, creating and fostering a culture of fear that results in substance abuse and routine verbal, sexual and physical harassment that leads to suicide all fall under the category of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”

Furthermore, Governor Abbott’s threat to remove minors receiving gender affirming care from their parents appears to meet the conditions of (e), forcibly transferring children of the group to another group. In addition, denying gender affirming care to transgender minors seems to meet the aforementioned “conditions of life” criteria.

Although the same treaties that are meant to extend protection to women purport to extend protection to transgender people, the reality is that many anti-transgender attacks are ignored by authorities or even tacitly encouraged. Kidd and Witten argue that since transgender violence maps easily onto Article II, it warrants “increased global attention to this issue through the world court, WHO, the United Nations, and other international agencies dealing with ‘gender violence’” (54).

## CONCLUSION

To conclude, I am aware of several things that I have not done in this project. To begin, I have not addressed the issue of how, exactly, the Genocide Convention should be expanded from a legal perspective. This is due to my interest in probing the question of whether it *should* be expanded to include gender as a protected group rather than the question of *how* it should be expanded.

Also, with respect to the question of whether additional groups such as political groups or differently abled groups should likewise be included as protected groups, I think that there are likely good arguments in favor of inclusion. The intention of the Genocide Convention was to hold criminally responsible those who seek to destroy a group based on their participation, or the genocidaire’s perception of their participation in that group. Taking this into consideration, it would seem that any group that constitutes a unique identity may have grounds for inclusion. However, I am sensitive to the need to protect the integrity of the Convention, and the argument that the inclusion of too many groups threatens that.

This is to say that I feel there is room for further study in regards to possible other group inclusions. This project was intended simply to present a case for the inclusion of gender as a protected group. While gender can participate in Religious, Ethical, Racial and National groups, there is sufficient evidence to support the

view that genocidal intentions can be directed to gender *per se*. Due to this, gender deserves to be added as a protected group.

## NOTES

1. Both Stalin and Churchill were in favor of court martials and executions, but disagreed on the number of officers that should be tried, Stalin wanted 50,000 while Churchill felt that number was far too high. Yet even some American officials were in favor of executions. Cordell Hull, Roosevelt's Secretary of State said, "If I had my way, I would take Hitler and Mussolini and Tojo and their accomplices and bring them before a drumhead court martial, and at sunrise the following morning there would occur a historic incident" Michael Bazylar, *Holocaust, Genocide and the Law: A Quest for Justice in a Post-Holocaust World* (New York: Oxford University Press, 2016).

2. See Bazylar.

3. For a discussion of including political groups as a protected group in the convention see Beth van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot." *The Yale Law Journal* 106, no. 7 (1997): 2259–91. <https://doi.org/10.2307/797169>.

4. Slang for transgender.

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