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Genocide and International Criminal Justice: Consistencies and Inconsistencies

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By

William Holmes
s2270692
w.a.holmes@umail.leidenuniv.nl

Thesis Supervisor: Dr. Maja Vodopivec
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Abstract

This thesis posits that the term "genocide" and the 'Genocide Convention' have been inconsistently used by the international community since the term entered the international law vocabulary and the convention entered into force. Within this, some mass killings appear to fulfil the convention's criteria, but they are not defined as genocide by the international criminal justice system i.e. the actor that best placed in this community to authoritatively do so, due to its supposed impartiality. This research aims to answer why this is the case. To do so, it first outlines the history of the term genocide and its (historical) role in international criminal justice. Next, it analyses the Genocide Convention and answers why some mass killings are defined as genocide. It does so via an analysis of the avenues through which international criminal justice has been – and can be – pursued, and their cases. This thesis then engages in most-similar case study analyses of various mass killings in Rwanda (1994) and the former Yugoslavia (1995). Accordingly, it argues that some mass killings are not defined as genocide partly because of: the requirement of domestic and international) political will for trying mass killings as genocide(s) and; political interests. In other words, the international criminal justice system is inconsistent when defining mass killings as genocide because it is susceptible to the political will and interests of myriad stakeholders in the international community.

Keywords: International Criminal Justice; Genocide; Inconsistency

List of Abbreviations

ECCC	Extraordinary Chambers in the Courts of Cambodia
RPF	Rwandan Patriotic Front
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMTFE	International Military Tribunal for the Far East
IMTN	International Military Tribunal at Nuremberg
JIA	Japanese Imperial Army
RSK	Republic of Serbian Krajina
UNSC	United Nations Security Council
WW2	World War Two

Table of Contents

1. Introduction

The term "genocide" and the 'Genocide Convention'[1] have been inconsistently used by the international community. This has occurred since the term entered the international law vocabulary (in 1944) and the convention entered into force (in 1951), and especially since the early 1990s, the period of renaissance for the international criminal justice system. This has arguably undermined the term's efficacy because some mass killings, which fulfil the Genocide Convention's criteria, have not been defined as genocide by the international community. Due to its supposed impartiality, the international criminal justice system has been, and is, uniquely placed within this community to authoritatively define mass killings as genocide. This thesis takes genocide to mean "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" (UNGA, 1948c, p.280). Not all mass killings that satisfy the convention's criteria are judged to be genocides. This research seeks to answer why this is the case. It argues that this is partly reducible to: the requirement of political will for trying mass killings as genocide(s) and; considerations of political interests. In other words, this thesis argues that the international criminal justice system is inconsistent when defining mass killings as genocide because it is susceptible to the political will and political interests of myriad stakeholders in the international community.

Since the early 1990s, there has been a proliferation of the use of the term "genocide" (Herman & Peterson, 2010, p.103). Numerous political actors have used the term to define past and contemporary situations of violence and/or injustice (e.g. oppression/repression). The term has proved to be particularly effective at attracting the attention of the international community, due to its stigma and evocative appeal (Destexhe, 1995, p.6; UN, 2015, p.1). Such use, alongside its being applied freely and somewhat indiscriminately to diverse ranges of situations[2] have caused the term to suffer "verbal inflation" i.e. it has progressively lost its initial meaning (Destexhe, 1995: 6; Herman & Peterson, 2010, p.103). In relation to this, some posit that the term genocide has been banalized into a "validation of every kind of victimhood" (Ignatieff, 2000). Ignatieff cites aboriginal victims of European diseases (dubbed "microbial genocide") as an example of the banalization of the term (ibid). He posits that "microbial genocide" misunderstands genocide as microbes "don't have intentions" and genocide "turns on" genocidal intent (2000). He argues

1 The United Nations' Convention on the Prevention and Punishment of the Crime of Genocide.
2 E.g. in reference to animals, abortions, and the environment (Brook, 1998).

that the term is now "so banalized" and "misused" that it has "lost all definition" (ibid). Although the term retains its definition and much rhetorical and political power, these concerns remain important.

In the above arguments, Destexhe and Ignatieff draw on the notion of 'conceptual currency' and allude to the issues of 'conceptual inflation' and 'conceptual stretch.' This thesis takes conceptual currency to denote a concept's use value for a certain international order and/or its values. Various political actors have claimed that an increasingly large number of cases (and types of cases) should be defined as genocide. This thesis hypothesizes that if they are defined as such, these cases might entail conceptual inflation i.e. the expansion of a concept's definition and/or its constituent examples. Arguably, this may devalue the term's conceptual currency by undermining its credibility and/or coherence. Consequently, assertions of 'ingenuine' cases of genocide might be used to discredit 'genuine' cases, and the term itself (Wellman, 1998, p.3). Conceptual stretch i.e. distorting a concept to apply it to different situations and/or contexts, may also devalue the term's conceptual currency. At best, conceptual stretch may capture and facilitate alternative understandings (at the expense of coherence). At worst, it can make a concept completely incoherent and/or ineffective. These potential outcomes appear particularly problematic for the concept of genocide, due to its importance in international politics and international criminal law (Alonzo-Maizlish, 2002, pp.1399, 1401-1402; Barnett, 2002, p.19; Evans in Herman & Peterson, 2010, pp.26-27; Gellately & Kiernan, 2003, p.14; Herman & Peterson, 2010, p.103; Kates, 2015; Schabas, 2009; Suny, 2009, pp.938-939, 944-946). These concerns motivated this research and justify it as worthwhile.

The concept of "genocide" holds a uniquely important position in political and legal discourse and practice (ibid). Thus, determining why some mass killings (that fulfil the criteria of the genocide convention) are not defined as genocide by the international criminal justice system, represented by international criminal courts, has wide implications for the study of politics and law. These implications will likely further impact political and legal discourse and practice. Within the current academic literature, some scholars argue in favour of the expansion of jurisdiction vis-à-vis the Genocide Convention and/or the international criminal justice system e.g. via the creation of more international (criminal) ad hoc tribunals (Lippmann, 1998, 2001; Knowles, 1998). However, any 'progress' made regarding jurisdiction may be seriously undermined by the (international) courts if their proceedings do not consistently uphold international criminal justice. Despite the importance attributed to genocide and this apparent

risk, the current literature does not address the question of why some mass killings are, and are not, defined as genocide by the international criminal justice system. This research gap entails a lack of clarity regarding the prosecution of mass killings (as genocide) in current international (criminal) legal practice, which could disserve efforts to prevent future genocides; one of the expressed intentions of the Genocide Convention (Alonzo-Maizlish, 2002, p.1401; Schabas, 2000, p.170; UN, 2014b, 2015; UNGA, 1948c, p.280; Vyver, 1999, p.290). This thesis aims to fill this gap via analysis of the legal and political mechanisms involved in defining mass killings as genocide (and 'not genocide'). The importance of doing so is derived from the importance of punishing and preventing genocide, for which the international criminal justice system is the primary means.

The political dimensions of genocide are evidenced by divergent perspectives on how genocide should be defined and (thus,) how many genocides occurred in the 20th-century (BBC, 2016). Some say that there was only one genocide: The Holocaust. Others say that there have been at least three: The mass killing of Armenians by Ottoman Turks between 1915 and 1920; The Holocaust, and; the mass killing of *batutsi*[3] by *bahutu* in Rwanda in 1994 (ibid). Within these cases, only that of Rwanda has been (officially) defined as genocide by an ad-hoc international criminal court (the International Criminal Tribunal for Rwanda-ICTR). Some other mass killings have also been defined as genocide by international criminal courts. For instance, the Srebrenica mass killing in the former Yugoslavia in 1995 was defined as genocide by another ad-hoc international criminal court, the International Criminal Tribunal for the former Yugoslavia (ICTY), as were (some of) the mass killings enacted by/under the Khmer Rouge in Cambodia between 1975-1979 (by the Extraordinary Chambers in the Courts of Cambodia-ECCC). Still others claim that the Soviet man-made famine of Ukraine (1932-1933) and the 1975 Indonesian invasion of Timor-Leste were genocides (ibid).

Such divergence may be explained by the evocative nature of the term 'genocide' and its political and legal importance; use of the term tends to attract controversy (Destexhe, 1995, p.6; UN, 2015, p.1). That said, according to international criminal courts' rulings, genocides have occurred in Cambodia, Rwanda, and the former Yugoslavia (ECCC, 2015, 2016, 2018; ICTR, 2000, 2001, 2015; ICTY 2004, 2015a, 2015b, 2016, 2017; Thompson, 2015). The Holocaust

3 The prefix ba- denotes a group of people (Hintjens, 1999, p.241).

Memorial Day Trust (HMDT)[4] goes along with these rulings and considers the Holocaust to be the genocide which caused the international community to establish genocide as a crime against international law (HMDT, 2018).[5] The Holocaust is also considered to be genocide by much of the international community. Notably absent from HMDT's list is the widely cited 'Armenian genocide' (Hintjens, 1999, p.282; Kates, 2015; Suny, 2009; Thompson, 2015). This appears striking upon consideration of its role in Raphael Lemkin's work (the lawyer/legal scholar who coined the term "genocide"): he explicitly referred to this mass killing as genocide in his autobiography and in the classes he taught at Yale (Balakian, 2013; Lemkin, 2013, pp.51, 183-184, 200).

Numerous political actors within the international community also omit the Armenian genocide from their lists of 20th-century genocides.[6] The political interests apparently responsible for this beg questions over the likelihood of a mass killing's being defined as genocide via an international (criminal) court if it was committed by a state whose legitimacy is aligned with (and/or supports) the USA's political interests, due to that state's power (Barnett, 2002, p.11). This warrants consideration of mass killings that appear to fit the criteria of the Genocide Convention but are not defined as genocide and thus, the following research question:

Why are some mass killings not defined as genocide?

This thesis first establishes the relevance of its research topic. It does so by highlighting the importance of the topic of genocide and a research gap in the current academic literature. Next, it elaborates on its research question. Following this, it conducts a literature review that draws on the fields of International (Criminal) Law, International Relations, and History. This situates the research within the current academic literature on genocide, evidences the above-mentioned research gap, and (further) contextualises the debate by outlining the history of the term genocide. This thesis then analyses the different roles that this term played in the Nuremberg Trials and the International Military Tribunal for the Far East (IMTFE). It focuses on these cases because of their importance for modern international criminal law and justice (Bazyler, 2016, p.90; Dower, 2000, p.449; Hafetz, 2018, p.6, p.16; UNGA, 1946b).[7] Within this, it examines their proceedings, outcomes, and the political interests involved in them. Next, it

4 This trust is supported by the United Kingdom (UK) Government's Ministry of Housing, Communities and Local Government.
5 Rosen does likewise (2004).
6 E.g. the USA (at the national level), Israel, Azerbaijan, and Turkey (Melman, 2019; USC, 2018).
7 E.g. they introduced the practice of international criminal trials and provided a just process for holding high-level officials criminally accountable (Graubart, 2010, pp.411-412).

critically analyses the Genocide Convention, as the international legal codification of the crime of genocide. Then, it elucidates its research design. The chapters following the research design analyse why certain mass killings are, and are not, defined as genocide. These chapters especially focus on the roles that political will and political interests can play in the acquisition of international criminal justice regarding genocide. The chapter on why certain mass killings are defined as genocide begins with a critical analysis of the avenues through which international criminal justice has been, and may be, pursued. It then examines several legal cases in which mass killings have been defined as genocide. It draws on legal proceedings concerning prominent cases at the international criminal ad-hoc tribunals established in the early 1990s: the ICTY and the ICTR. It does so because these tribunals have concluded their proceedings, defined (some) mass killings as genocide[8] and made substantial contributions to international criminal law regarding genocide (ICTR, 2000, 2001, 2015; ICTY 2004, 2015a, 2015b, 2016, 2017).[9] It focuses primarily on mass killings in Rwanda as they were defined as genocide despite their apparent incompatibility with the Genocide Convention's criteria regarding victim groups (ICTR, 1998, ¶81; Straus, 2013, pp.19-20; Valentino, 2004, p.178; Vyver, 1999, pp.303-304). In the next chapter, this thesis engages in most-similar case study analyses. It compares the legal proceedings concerning the mass killing of batutsis by bahutus with those concerning the mass killing of bahutus by batutsis in Rwanda. Then, it compares the legal proceedings concerning the Srebrenica mass killing with those concerning 'Operation Storm.' It does so because the cases that it compares are similar on many independent variables[10] but have different dependent variables: the mass killing of batutsis by bahutus came to be defined as genocide by the ICTR, the mass killing of bahutus by batutsis did not; the Srebrenica mass killing in Bosnia was defined as genocide by the ICTY, 'Operation Storm' in Croatia was not. This chapter is devoted to understanding the reasons for these inconsistencies. Within this, this thesis' hypotheses are primarily focused on the political will and political interests involved in these mass killings and their associated cases. Its analysis tries to provide sufficient evidence for those hypotheses and argues that mass killings are unlikely to be defined as genocide if there is no (domestic or international) political will to try them as such and/or they do not fulfil the criteria of the genocide

8 I.e. by convicting individuals of genocide and/or genocide-related crimes in relation to them.
9 These tribunals revived and deepened international criminal law by prosecuting high-level officials and disseminating generalizable legal norms (Graubart, 2010, p.411, 415; Maogoto, 2004, p.238; Robertson, 2013, 485-486; Thakur, 2006, p.121).
10 E.g. their context (political, cultural, and social features) and temporality.

convention[11] (at least loosely). The conclusion summarises its research findings and hints at possible implications of the inconsistencies.

11 This thesis focuses on the Genocide Convention because it is the principal source of law on the subject. Although the Rome Statute of the International Criminal Court and the statutes of the ICTY and ICTR also contemplate prosecution for genocide, they all draw on this convention (Schabas, 2000, p.155).

2. Literature Review

Much of the current academic literature on genocide focuses on the concept of genocide and/or specific instances of it (Andreopoulos, 1997; Chorbajian & Shirinian, 1999;[12] Gellately & Kiernan, 2003; Rosenbaum, 2009; Weitz, 2015). Works that focus on instances of genocide typically do so from historical and/or comparative perspectives (Andreopoulos, 1997; Chorbajian & Shirinian, 1999; Gellately & Kiernan, 2003;[13] Rosenbaum, 2009; Weitz, 2015). Other works analyse the Genocide Convention and its limitations from a philosophical and/or legalistic perspective (Alonzo-Maizlish, 2002, p.1400; Fowler in Rosenbaum, 2009; Gellately & Kiernan, 2003; Lippmann, 2001; Schabas, 1999; Simon, 1996). Some scholars also analyse the role that realpolitik can, and/or does, play in enforcing the convention i.e. by prosecuting genocide (Alonzo-Maizlish, 2002, p.1400; Graubart, 2010; Lippmann, 1998, 2001; Maogoto, 2004). Yet, there appears to be a gap in the literature regarding why some mass killings are, and are not, defined as genocide by the international criminal justice system. This research aims to help fill this gap. To do so, it first analyses the history of the term and its use in international military tribunals. Then, it analyses the Genocide Convention.

The term genocide was coined by Raphael Lemkin.[14] It entered the international law vocabulary in 1944 following the publication of *Axis Rule in Occupied Europe,* in which he defined it as:

> "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of individuals belonging to such groups" (Lemkin, 2008, p.79).

Within this, he strongly emphasizes the destruction of a group and/or their 'foundations' and emphasizes the intent to do so, though to a lesser extent. He posited that:

12 Fein and Staub's essays in this book address prevention. However, they do so solely through analysis of prior genocides, not their prosecution.
13 Within this, Grandin's essay employs "legal methods," but it offers little insight into the legal and political mechanisms involved in international criminal justice regarding genocide.
14 Lemkin was a Polish-Jewish lawyer whose family was killed during the Holocaust. He "tirelessly championed" this legal concept as a means of protecting various groups under international law (USHMM, 2015).

> "Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group" (ibid).

Lemkin aimed to establish genocide as a crime against international law, distinct from crimes against humanity, war crimes, and crimes against peace. Through doing so, he intended to: provide an effective instrument for the punishment of genocidaires; legally prohibit (and thus, help prevent) future genocide, and; provide greater legal protection for minority groups (Lemkin, 2008, pp.92-3). Genocide became a crime against international law on 12 January 1951, when the Genocide Convention entered into force (UNGA, 1948c, p.278). This was apparently due, at least in part, to the role that the term played in many of the international military tribunals that followed World War Two (WW2) (UNGA, 1948c, p.278).

2.1. International Military Tribunals

The trial of Nazi war criminals in the *Nuremberg Trials* i.e. the International Military Tribunal at Nuremberg (IMTN) and 12 subsequent trials, is regarded by many as the foundation of modern international criminal law and justice (Bazyler, 2016, p.90; Hafetz, 2018, p.6). These trials should be considered in connection with the trial of Japanese war criminals in the IMTFE AKA "Japan's Nuremberg," as doing so provides insight into international criminal law and the (legal) concept of genocide (Dower, 2000, p.449; Hafetz, 2018, p.16; Rosen, 2004).

The Nuremberg Trials began on 20 November 1945 and ended on 13 April 1949 (Roland, 2010, para. 1). The IMTN began on 20 November 1945 and ended on 1 October 1946, its 12 subsequent trials went on from 9 December 1946 to 13 April 1949 (Heller, 2010, pp.1, 19, 23, 103). The IMTFE convened on 29 April 1946, it was adjourned on 12 November 1948 (Hosch, 2019).

The Nuremberg Trials (20 November 1945 – 13 April 1949) were apparently inspired by the failings of the Leipzig trials (23 May 1921 – 16 July 1921) that followed World War I; German judges meted out "very" lenient sentences to German war criminals (Bazyler, 2016, p.70). Consideration of this apparently produced a "clear consensus" on the part of the 'allies' to not allow the Germans to try their own again (ibid). However, the leaders of the 'major' allied

powers did not initially support war crimes trials for senior Nazi officials: at the Tehran conference in 1943, Stalin advocated mass executions and Churchill argued that the circumstances demanded a political, rather than judicial, approach i.e. Nazi leaders should be executed (Bazyler, 2016, p.70; Hafetz, 2018, p.6).[15] Prima facie, the decision to opt for a 'judicial' approach i.e. criminal trials, appears positive regarding the (potential) impartiality of international criminal law and justice in this case, and subsequent cases.[16] However, the trials' architects apparently believed that this judicial process should: "allow" Germans to accept their leaders' criminality; discredit the Nazi regime; demonstrate the allies' moral superiority, and; facilitate Germany's post-war transition (Bazyler, 2016, p.72; Hafetz, 2018, p.8). Therefore, political considerations also underlay this decision, which undermines any claims of impartiality. Such considerations also pertained to the IMTFE, as the USA apparently initiated this tribunal to: punish the Japanese for their attack on Pearl Harbor; focus attention on Japanese atrocities and; divert attention from its use of atomic bombs (Graubart, 2010, p.413). According to Telford Taylor – the USA's assistant prosecutor at Nuremberg – its main goal was "to give meaning to the war ... [t]o validate the casualties we have suffered and the destruction and casualties we have caused" (1992, p.50).

Defendants at the Nuremberg Trials accused its central charges of constituting impermissible *ex post facto* ('after the fact') punishment (ibid, p.8). This accusation was apparently premised on the notion that these indictments violated the legal principle against retroactivity, as the law (and punishment) were not defined clearly in advance of the crime's commission (Bazyler, 2016, p.84; Hafetz, 2018, p.8). Defendants at the IMTFE did likewise (Hafetz, 2018, p.17). The IMTN and IMTFE both rejected these accusations (ibid). Additionally, Justice Rölling (Netherlands) argued that the principle against retroactivity "is not a principle of justice but a rule of policy ... [It] may, if circumstances necessitate it, be disregarded" (ibid). He argued that strict legal principles can – and sometimes should – be disregarded for the higher aims of (criminal) justice, particularly that of holding perpetrators of "mass crimes" (e.g. genocide) responsible, to prevent their recurrence (ibid). Thus, considerations of punishment and prevention appear integral to these trials. That said, both were convened by occupying 'victor states,' who drafted their indictments and supplied their prosecutors and judges, apparently with

15 Churchill argued that a trial would give Nazis a public platform to propagate their ideology (Hafetz, 2018, p.6).
16 Due to its 'foundational' role.

the above-mentioned political goals in mind (Graubart, 2010, p.411).[17] This begs questions over: "victor's justice;" impartiality (an integral part of 'justice') and; the extent to which those involved were separated from politics.

The IMTFE is more problematic than the Nuremberg Trials (at least) insofar as it appears more akin to "a political trial," "victor's justice," and/or "formalized vengeance" (IMTFE, 1948, p.37; Johnson, 2006, p.82; Maogoto, 2004, p.100). This appears evidenced by Justice Pal (India)'s dissenting opinion, in which he critiqued the premise and conduct of the IMTFE (Hafetz, 2018, p.17). He objected to its rules of evidence – which were biased in favour of the prosecution – and posited that the trial "did not correspond to any idea of justice ... [it was] an essentially political objective ... cloaked by a juridical appearance" (IMTFE, 1948, pp.37, 289-290).[18] He argued that consistency demands that the colonial (allied) powers also be tried. He did not object to the Chief Prosecutor's choice of who (and who not) to indict. Yet, the choice to not indict Emperor Hirohito – the commander of the Japanese Imperial Army (JIA) – apparently on the grounds that retaining the emperor, as a symbol of the unity of the Japanese people, would: facilitate a successful post-war transition; help prevent the spread of communism, and; assist the reconstruction of Japan in a US-friendly direction, appears to best evidence his characterization of the proceedings (Graubart, 2010, p.413; Hafetz, 2018, p.17; Johnson, 2006, p.82; Maogoto, 2004, pp.104, 106).

Furthermore, while the Nuremberg Trials highlight the possibility of imposing criminal responsibility and upholding the principles of legality and due process, the IMTFE elucidates the risk of these principles being sacrificed in the name of 'accountability' (Hafetz, 2018, p.16). For instance, the IMTFE's charter did not bind it to any technical rules of evidence. The trial subsequently "relied heavily" on second or third-hand hearsay, including news reports (Hafetz, 2018, p.6; Johnson, 2006, pp.83-84). Resources were also heavily skewed in favour of the prosecution and Japanese defendants faced an unfamiliar (Anglo-American) legal system and a criminal proceeding conducted in English, a language the defendants were not completely proficient in (Dower, 2000, p.462; Hafetz, 2018, pp.16-17). Thus, while the Nuremberg Trials

17 The USA apparently used its leverage as the occupying power to further its public image and advance its post-war political interests e.g. via a selective approach to gathering evidence and arresting suspects (Graubert, 2010, p.413).

18 Many Japanese people still use Pal's dissenting opinion to argue that the IMTFE merely constituted victor's justice (Hafetz, 2018, p.17; Onishi, 2007).

have inspired much optimism regarding international criminal justice in Western states, the IMTFE has done the contrary in many non-western states (Hafetz, 2018, p.16).

However, the 'achievements' of the Nuremberg Trials regarding due process appear significantly undermined by the 'leniency' that followed. 208 individuals were indicted during the Nuremberg Trials. 199 of these were successfully tried: 38 defendants were acquitted and 163 were found guilty. Of these 163 individuals, 22 were executed as planned and 18 served their full sentences. 123 did not. John J. McCloy – the High Commissioner for Germany – and his "Advisory Board on Clemency for War Criminals," are primarily responsible for this (Heller, 2010, pp.349-351). 49 of these 123 inmates were released in 1951 (ibid, pp.403-462).[19] 12 of these had previously had their sentences commuted (ibid, pp.403-457). The sentences of 33 of the 51 who remained in prison after 1951 were also commuted by McCloy's Revisions (ibid, pp.403-464). Within this, four death sentences became life sentences and four death sentences were commuted to jail terms of 25, 20, or 15 years (ibid, pp.442-445). Additionally, 14 inmates had their life sentences commuted to jail terms of 20, 18, or 15 years and one inmate had his 25-year sentence commuted to 15 years (ibid, pp.405-464). Eight had their 20-year sentences reduced to 15, 12, or 10-year sentences and two inmates with 15-year sentences saw their sentences reduced by 5 years (ibid, pp.403-462, 433-435). All 33 of these inmates were out of prison by 1958 (ibid, pp.403-464). 9 of the 18 that did not get their sentences commuted by McCloy were also out of prison by this time (Roland, 2010, ch.5; Heller, 2010, pp.426-463). McCloy's actions were apparently (largely) reducible to the desire to improve German-US relations in response to the "growing Soviet threat in Europe" and the outbreak of the Korean War[20] (Graubart, 2010, p.414; Heller, 2010, pp.341, 349-350). Such 'leniency' appears problematic in itself and as the product of politicization; US leaders did not choose legal principles over political self-interest (Graubart, 2010, p.414). It appears further problematised by consideration of the Advisory Board's operating procedures i.e. the processes behind these decisions (Heller, 2010, pp.346-7). This Board solely considered the views of defendants' lawyers and German consultants; it never heard from the judges or the prosecution (ibid, p.346). Moreover, in "nearly every case" it did not review the trial transcripts and evidence considered by the judges; it typically read only the judgments, which contained (only) part of the evidence

19 The Advisory Board submitted its report to McCloy on 28 August 1950. This report recommended commuting the sentences of 7 of the 15 defendants sentenced to death and reducing the sentences of 77 of the 90 defendants sentenced to prison terms (Heller, 2010, p.347). McCloy made his decisions on clemency at the end of January 1951. Five, five and 13 individuals had already been released in 1948, 1949, and 1950, respectively (ibid, pp.349, 412-464).

20 This allegedly convinced McCloy to drop his long-standing opposition to German rearmament (ibid, p.350).

that supported the convictions (ibid). That said, within these trials, the prosecutors apparently had "significant" logistical (and material) advantages over the defence and they relied heavily on defendants' incriminating statements, which were made in the absence of counsel (Bazyler, 2016, p.92). Thus, one may contend that McCloy's actions served to restore balance. However, due to the scope of this research, I shall omit further discussion of this point.

The 'achievements' of the IMTFE appear similarly undermined by the 'leniency' that followed. 5,700 individuals were indicted for "Class B" and "Class C" war crimes i.e. "Conventional War Crimes" and "Crimes against Humanity" at the IMTFE (Dower, 2000, p.447, p.456). Of these, 984 were condemned to death; 920 were executed (Johnson, 2006, p.81). Additionally, 475 received life sentences, 2,944 received prison terms, 1,018 were acquitted, and 279 were either not sentenced or never brought to trial (Dower, 2000, p.447). A "hundred or so" individuals were also arrested for "Class A" war crimes i.e. "Crimes against Peace" (ibid, p.325, p.456). Many of these were never indicted and when the trial was adjourned on 12 November 1948, only 19 remained in custody (ibid, p.454).[21] These 19 were released on grounds of insufficient evidence on 24 December 1948 (ibid). This was effectuated by General MacArthur, the Supreme Commander for the Allied Powers (Maogoto, 2004, p.105). Like at Nuremberg, such 'leniency' was apparently employed to help improve relations and secure a "reliable" Cold War ally; US leaders did not choose legal principles over political self-interest (Graubart, 2010, p.414; Maogoto, 2004, p.106). The USA's government then quickly "embraced" many of these war criminals in its fight against communism e.g. Kishi Nobusukue and Shigemitsu Mamoru (Dower, 2000, p.474).[22] That said, as the prosecution at the IMTFE also retained significant logistical advantages over the defence, a similar argument vis-à-vis using 'leniency' to restore balance could be made (Dower, 2000, p.462; Hafetz, 2018, p.16; IMTFE, 1948, pp.289-290). I shall omit further discussion of this due to scope considerations.

As argued earlier, the IMTFE is more problematic than the Nuremberg Trials (at least) insofar as it appears more akin to "a political trial," "victor's justice," and/or "formalized vengeance" (IMTFE, 1948, p.37; Johnson, 2006, p.82; Maogoto, 2004, p.100). This appearance accords to its general disregard of the principles of legality and due process in its apparent search for 'accountability' (Hafetz, 2018, p.11; IMTFE, 1948, pp.289-290, 321-322). These concerns

21 Five of the convicted "Class A" war criminals died in prison (Dower, 2000, p.450).
22 Kishi served as Japan's Prime Minister (1957-1960) and Shigemitsu served as Japan's Minister of Foreign Affairs (1954-1956) and Japan's Deputy Prime Minister (1954-1956) (ibid, p.474).

appear particularly acute regarding the IMTFE's "main tribunal," as all 25 defendants were convicted (Hafetz, 2018, p.16; Johnson, 2006, p.81). Contrarily, three individuals were acquitted at the IMTN, the corresponding Nuremberg Trial (Johnson, 2006, p.81). These issues problematise understanding, and thus, prevention of the crimes that it tried (UN, 2014a).

The IMTFE was further problematised by its use of secrecy and censorship. Whereas the Nuremberg proceedings were made available in a 42-volume bilingual publication, no official publication ever came from the IMTFE (Dower, 2000, p.453). Moreover, the majority judgment and materials produced by the trial were not made readily accessible to even the Japanese public (ibid, p.454). Furthermore, General MacArthur allegedly did not permit Justice Pal's dissenting opinion to be translated (Dower, 2000, p.633). Such secrecy and (effective) censorship served various states' interests by: facilitating Japan's post-war transition and (thus,) helping prevent the spread of communism and; suppressing contestation of the allies' moral superiority (Dower, 2000, p.473; Johnson, 2006, p.82; Hafetz, 2018, pp.7, 17). Yet, it also undermined the IMTFE's preventative function by (at least) appearing to validate accusations of "victors' justice" and/or facilitating distrust of international criminal law and justice.

2.1.1. International Military Tribunals and genocide

The Nuremberg Trials and the IMTFE also differ regarding their use of the term genocide. On 18 October 1945, the word "genocide" entered numerous languages when it appeared in the IMTN's indictment (Bazyler, 2016, p.35). Although not expressly identified as a crime, it appeared numerous times as a descriptive term before, and throughout, the subsequent trials (Bazyler, 2016, p.35; Earl, 2013, p.319; UN, 2015, p.1). Before they were tried, it was used 3, 9, 13, 59, 5, 3, and 9 times in relation to the "Medical," "Justice," "Einsatzgruppen," "RuSHA," "Pohl," "High Command," and "Ministries" cases (MGG, 1949a, 1949b, 1949c, 1949d, 1949e, 1949f, 1949g). It was also used 1, 2, 2, and 3 times in the indictments of the "Einsatzgruppen," "RuSHA," "High Command" and "Ministries" cases (MGG, 1948). These trials are considered to represent an attempt at full judicial scrutiny of Nazi genocide (Bush, 1998, pp.681-682; Heller, 2010, p.249). Within this, the Chief Prosecutor's office apparently made a "deliberate decision" – supported by the Departments of State and War – to attempt to establish genocide as a crime against humanity (Heller, 2010, p.4). However, the effectiveness of these trials regarding punishment and prevention appears significantly undermined by the 'leniency' that followed

them: only 22 of the 96 individuals convicted at those trials served their full sentences (or were executed as planned).[23]

The IMTFE was unable to attain even these modest achievements regarding genocide, as the term was never mentioned there. This appears striking as genocide was referenced numerous times in the context of "crimes against humanity" throughout the Nuremberg Trials (UN, 2015, p.1; Vyver, 1999, p.286) and 4,403 individuals were found guilty of this war crime at the IMTFE (Dower, 2000, p.447).[24] This absence appears increasingly troubling upon consideration of the similarity between the crimes committed by the Nazis and the JIA. For instance, during the Nuremberg Trials, the concept of genocide was first mentioned in the Chief Prosecutor's opening argument in the "Medical" case (Heller, 2010, p.294). The conduct examined within this trial appears akin to that of 'Unit 731' of the JIA, which conducted experiments with "bacteriological" weapons in China (Hafetz, 2018, p.16; Nie, 2004, p.33; Yamada, 1950, p.11). This unit was shielded from prosecution by the US authorities, which aimed to: hide information regarding their conduct from the Soviet Union and; make use of their 'medical' data (Dower, 2000, p.465; Hafetz, 2018, p.16; Nie, 2004, p.33).[25] In 1949, the Soviet Union tried 12 members of 'Unit 731.' The USA's belligerent response to this trial and its findings seem to evidence these aims (Nie, 2004, pp.37-38; Williams & Wallace, 1989, p.228).[26] These trials deduced that: Unit 731 produced masses of "lethal bacteria" which were intended for the mass killing of troops and civilians and; the chief method for testing their bacteriological weapons was systematic, mass-scale human experimentation (Yamada, 1950, pp.14-19, 29-31). Their actions were apparently responsible for outbreaks of plague in the Nimpo and Chang Teh areas (in 1940 and 1941, respectively) and the casualty count of their "open tests" reportedly fell in the six-figure range (Harris, 2002, p.80; Nie, 2004, p.36; Yamada, 1950, pp.22-24). Critically, they allegedly attempted to manufacture ethnically discriminatory pathogens to wipe out particular peoples (McCormack, 2003, p.282). Prima facie, these findings appear difficult to

23 7, 1, 5, 6, 1, 1, and 1 of these were tried as part of the "Medical," "Justice," "Einsatzgruppen," "RuSHA," "Pohl," "High Command," and "Ministries" cases (Heller, 2010, pp.404-463). 12 of these 22 individuals were executed as planned (Dower, 2000, pp.404-443).

24 Approximately 75% of the defendants at the "B/C" tribunals were (solely) accused of crimes against the allied powers' prisoners, who were typically white; crimes committed outside of the JIA's prisons received scant attention (ibid, p.447). Additionally, it was "fundamentally a white man's tribunal;" although Japan invaded and occupied Asian states, only three of the eleven judges were Asian (ibid, p.469). Thus, racism may be an explanatory factor in discrepancy regarding use of the term (ibid).

25 This helped the USA advance various post-war political interests (Graubart, 2010, p.413). The USA and UK governments also persuaded the prosecution at the Nuremberg Trials to exempt various German industrialists and bankers, apparently to do likewise (ibid).

26 Numerous other Western powers also ignored, or dismissed, these findings on the basis that they were "communist propaganda" (Nie, 2004, pp.40-41).

believe (Nie, 2004, pp.38-39). Yet, the evidence presented at this trial and its "main conclusions" have since proven to be "accurate in most details" (Nie, 2004, p.37; Williams & Wallace, 1989, p.230). Ergo, international criminal justice was not served, and punishment and prevention appear hindered accordingly (Williams & Wallace, 1989, pp.230-231).

Furthermore, the JIA is responsible for the deaths of between 974,000 and 4,547,000 Chinese civilians (Rummel, 2011, p.159).[27] The Nanking mass killing reportedly accounts for 40,000 to 300,000 of these deaths (Rummel, 2011, p.157; UNWCC, 1948, p.1015) and forced labour camps account for 107,000 to 210,000 (Rummel, 2011, p.157). The JIA's use of mass killings and forced labour camps evokes strong parallels to the (genocidal) crimes that various individuals were accused of committing in the "Einsatzgruppen" and "RuSHA" cases. Despite these apparent similarities, the IMTFE never mentioned genocide in relation to Japan's wartime conduct.

The importance of the concept of 'genocide,' and the frequency of the term's use, in the Nuremberg Trials appears partly due to Lemkin's involvement in the proceedings. For instance, he "lobbied" members of the prosecution team to have them use the term in the IMTN (Bazyler, 2016, p.35). These efforts appear to have entailed an increase in its use there. However, it is difficult to imagine an alternative IMTN in which the term is not mentioned. This is due to the indirect influence of Lemkin's work on many of the jurists involved; US officials made a conscious decision to try to establish genocide as a crime against humanity before Lemkin contacted them (Heller, 2010, p.249). Consideration of this makes the term's absence in the IMTFE more striking.

The establishment of international military tribunals after WW2 allegedly manifested a 'moment of hope' for international criminal justice (Sikkink, 2011, p.5). However, these trials were hugely problematic due to: the politicization of the judicial process and; the 'leniency' that followed (Graubart, 2010, p.413). That said, the Nuremberg Trials came closer to achieving an essential goal of any credible and legitimate criminal proceeding: holding a defendant accountable while ensuring their fair treatment (Hafetz, 2018, p.18). They also established that individuals could be held responsible under international criminal law (Graubart, 2010, p.415; Hafetz, 2018, p.18; OUSCCPAC, 1946, p.53; Rosen, 2004; Vyver, 1999, pp.291-295). Moreover,

27 Their "annihilation" bombing campaigns and "three-all" (kill all, burn all, loot all) campaign were an integral part of this (Bix, 2001, pp.364-366; Fairbank & Goldman, 2006, p.320; Grasso et al., 1991, p.130).

they attained significant rhetorical success vis-à-vis "genocide" in international criminal law. No such progress could be ascertained from the IMTFE, due to the term's absence in its proceedings.

The main goal of punishment and prevention of genocide, via the Nuremberg Trials, was obstructed by subsequent 'leniency.' This begs questions regarding the extent to which the Nuremberg Trials should be characterised as 'justice' as opposed to political opportunism and/or hypocrisy. Such 'leniency' also pertains to the IMTFE. This similarly undermines punishment and prevention regarding the acts that it tried and begs the same questions. The IMTFE cannot help prevent genocide as it lacked any consideration of the phenomenon. Therefore, the IMTFE and the 'leniency' that followed it appear to critically undermine the notion that these international military tribunals manifested a (genuine) 'moment of hope.'

Hence, the foundation of modern international criminal law and justice i.e. the Nuremberg Trials, seems more problematic than is typically presumed. The prospects for international criminal justice appear increasingly problematic upon consideration of "Japan's Nuremberg" (Bazyler, 2016, p.90; Dower, 2000, p.449; Hafetz, 2018, p.6). This seems reducible to the politicization of the judicial process within (both of) these tribunals, and the 'leniency' that followed them (Graubart, 2010, p.413). Within this, the partisan nature of these trials apparently provoked broad resentment in Germany and Japan and thus, discouraged remorse and reflection there (ibid, p.414).[28] Historically, this is evidenced by the early release of numerous convicted war criminals there, which swiftly followed the departure of the (occupying) 'victor states' (Graubart, 2010, p.414; Maogoto, 2004, p.105). Contemporarily, the lack of criticism (within Japan) regarding the JIA's wartime conduct does likewise (ibid).[29] Ergo, consideration of these trials begs much scepticism regarding international criminal justice.

28 In Japan, many convicted war criminals were/are viewed as victims of "victors' justice" (Maogoto, 2004, p.106).
29 The level of self-criticism within Germany appears largely reducible to generational shifts and Germany's desire to regain a leading role in Europe (ibid, p.414).

3. The Genocide Convention

The Genocide Convention was negotiated from 9 November 1946 to 9 December 1948, when it was adopted by the United Nations General Assembly (UNGA, 1946a, 1948c, p.278). These negotiations drew heavily upon the IMTN. For instance, genocide was characterised as an international crime, in accordance with the principles "recognized by" its charter and its judgments, from the outset of these negotiations (UNGA, 1946a, 1946b). Lemkin was involved in these negotiations. However, despite his efforts,[30] the resulting convention seems akin to an impoverished version of his conceptualization, as it omits any reference to 'political' and 'cultural' groups:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group."
> (UNGA, 1948c, p.280)

Thus, the Genocide Convention precludes legal proceedings regarding political and cultural genocide, at least insofar as such proceedings (have to) draw on it. These omissions show that legal definitions may be reducible to the compromising nature of politics and the political context in which they are negotiated (Crick, 1971). Within this, Cooper deems opposition from 'Eastern bloc' countries[31] chiefly responsible for the deletion of any reference to 'the political' from the definition (2008, p.154).[32] 'Western' democracies were largely responsible for the deletion of any

30 E.g. Lemkin persuaded the delegations to convert the Legal Committee into one working group and skip the subcommittee, which apparently reduced the risk of delay (Lemkin, 2013, pp.151-2).
31 This was at least partly motivated by Western states' characterising the use of gulags as genocide.
32 However, these states abstained from the vote, apparently to indicate displeasure with the International Criminal Court compromise forged by the USA's delegation (LeBlanc, 1988, p.278). The following states voted in favour of deletion: South Africa, the UK, the USA, Uruguay, Venezuela, Afghanistan, Argentina, Australia, Belgium, Brazil, Canada, Colombia, Denmark, Dominican Republic, Egypt, Greece, India, Iran, Mexico, Pakistan, Peru, and Syria. (UNGA, 1948b, p.663). Although various legal rulings have subsequently expanded protection to numerous other victim groups, 'political' groups remain unprotected (Vyver, 1999, p.355).

reference to culture.[33] In spite of such compromises, the convention has still provoked considerable debate. Most prominently, over the number of victims necessary for a mass killing to be defined as genocide (Alonzo-Maizlish, 2002; ICTY, 1999, ¶¶79-83, 2001c, ¶¶63-66; Triffterer, 2001; Quigley, 2016, pp.97-99).

In practice, the Genocide Convention is problematised by its requiring proof of 'special intent' (Schabas, 2000, p.144; UN, 2015, p.2). Accordingly, prosecutors must prove that a genocidal actor (or actors) intended to destroy the specific group in question, which is typically very difficult (Vyver, 1999, p.309; O'Brien in Dyett, 2015; Suny, 2009, pp.939-940). This requirement has apparently enabled states to evade prosecution by arguing that: there was no genocidal intent e.g. the killing was confined solely to armed conflict, or; the reason for the killing was political (O'Brien in Dyett, 2015). Therefore, prosecutors must prove that the case in question went beyond the confines of armed conflict e.g. counter-guerrilla violence, and/or the targeting of political groups, to define it as genocide (Valentino, 2004; Valentino et al., 2004).

The convention appears further problematised by international legal institutions' prohibition of its retroactive application. For instance, the UN has stated that: "states are only bound by the Genocide Convention from the date on which it entered into force for the States in question" (UN, 2015, p.2). Thus, a mass killing may only be defined as genocide via an international (criminal) court if it fulfils the convention's criteria and it occurred in a state at least 90 days after that state ratified the convention[34] (UNGA, 1948c, p.284). This enables inconsistency regarding defining mass killings as genocide and impedes the fulfilment of the intentions behind Lemkin's conceptualisation of genocide (Lemkin, 2008, pp.92-3) and the Genocide Convention's expressed intentions: to prevent genocides and punish their perpetrators (Schabas, 2000, p.170; UN, 2014b, 2015; UNGA, 1948c, p.280; Vyver, 1999, p.290). It problematises punishment as it shields actors who committed genocide before their state ratified the convention from prosecution. The prospect of genocide not being optimally prevented and/or genocidal actors not being punished (at least not fully) is highly problematic due to the term's legal and political value (Alonzo-Maizlish, 2002, pp.1401-1402; Barnett, 2002, p.19;

33 The following states voted in favour of deletion: South Africa, the UK, the USA, Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Dominican Republic, France, Greece, India, Iran, Liberia, Luxembourg, Netherlands, New Zealand, Norway, Panama, Peru, Siam, Sweden, and Turkey" (UNGA, 1948a, p.206).
34 The article states: "The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession" (UN, 1948c, p.284).

Gellately & Kiernan, 2003, p.14; Herman & Peterson, 2010, p.103; Kates, 2015; Schabas, 2009; Suny, 2009, pp.938-939, 944-946).

4. Research Design

This research design first outlines the ontological and epistemological considerations that provide the basis for its methodological choices. Then, it engages in conceptual clarification. Next, it discusses theory. Following that, it explicates its hypotheses and methodology. Lastly, it details its variables, data, and limitations.

4.1. Ontology and Epistemology

Ontology is the study of being i.e. what constitutes reality (Scotland, 2012, p.9). It concerns itself with assumptions about the nature of the social and political worlds, and the causal relationships within them (Hall, 2003, p.374). This thesis adopts a (partly) positivistic ontological position. It assumes that: a discoverable reality exists independently of the researcher, and; causal mechanisms can be observed (Pring, 2010, p.91).

Epistemology concerns itself with the nature and forms of knowledge i.e. how knowledge can be created, acquired, and communicated (Scotland, 2012, p.9). It examines the relationship(s) between the would-be knower and what can be known (Guba & Lincoln, 1994, p.105). This thesis adopts a (partly) positivistic epistemological position: it assumes that it is possible to obtain objective knowledge and it focuses on generalization (Carson et al., 2001, p.6).

4.2. Conceptual Clarification

Within this thesis, the international community is taken to mean a group of state actors and civil society groups (UN, 1999). Mass killings are taken to mean killings enacted by a government or an organized group against certain members of a community or an entire population (TMV, 2017). Killing denotes "homicide committed with intent to cause death" (ICTR, 1998a, ¶500).

4.3. Theory and Argument

The theoretical framework of this thesis draws on Herman and Peterson's critical analysis of the politics underlying the defining of (some) mass killings as genocide, by various political actors (2010). It applies an attenuated version of their approach to the more legalistic issue of why some mass killings are not defined as genocide by international (criminal) courts.

To answer why some mass killings are not defined as genocide, this thesis must first answer:

Why are some mass killings defined as genocide?

Chapter 5 does so. It argues that for a mass killing to be defined as genocide there must be political will to try it as such and the mass killing must have occurred after the state concerned ratified the Genocide Convention.[35] Within this, it interrogates the following legalistic hypothesis: a mass killing will likely be defined as genocide if it fulfils the criteria of the Genocide Convention (exactly). This hypothesis is tested on the case of the Rwandan genocide. It argues that a mass killing need not fulfil the convention's criteria (exactly) to be defined as genocide. Lastly, this chapter visually represents its theory by diagramming links in probabilistic causal chains (Gerring, 2006, p.181).

Chapter 6 considers why some mass killings have not been defined as genocide. It posits that a mass killing is unlikely to be defined as genocide (by an international (criminal) court) if it occurred before the states concerned ratified the Genocide Convention[36] and/or it does not fulfil the convention's criteria (at least loosely). It argues that a mass killing is unlikely to be defined as genocide (by an international (criminal) court) if there is a lack of political will to try it as such.

35 Or accepted the jurisdiction of the ICC. More on this in chapter 5.
36 Ibid.

4.4. Hypotheses

The following hypothesis stems from chapter 5:
H1: *A mass killing will likely be defined as genocide if there is political will to try it as genocide, if it occurred after the state concerned ratified the Genocide Convention*[37] *and if it fulfils the convention's criteria (at least loosely).*

Four hypotheses follow from Chapter 6:
H2: *A mass killing is unlikely to be defined as genocide (by an international (criminal) court) if it occurred before the state concerned ratified the Genocide Convention.*[38]
H3: *A mass killing is unlikely to be defined as genocide (by an international (criminal) court) if it does not fulfil the convention's criteria (at least loosely).*
H4: *A mass killing is unlikely to be defined as genocide (by an international (criminal) court) if there is no domestic political will to try it as genocide.*
H5: *A mass killing is unlikely to be defined as genocide (by an international (criminal) court) if there is no international political will to try it as genocide.*

4.5. Methodology

Chapter 5 engages in within-case analyses of legal proceedings at the ICTY and the ICTR and compares their findings. It supplements analysis of these proceedings with a systematic examination of diagnostic evidence that has been selected in light of this thesis's research question and the (legalistic) hypothesis that it interrogates (Collier, 2011, p.823; Gerring, 2006, pp.172-173).

Chapter 6 engages in 'most-similar' case study analyses. It first compares the legal proceedings concerning the mass killing of batutsis by bahutus with those concerning the mass killing of bahutus by batutsis (both in Rwanda). Then, it compares the legal proceedings concerning the Srebrenica mass killing with those concerning 'Operation Storm.' Within these analyses, it takes the political, cultural, and social features of these cases to be "control" variables (Gerrin, 2006, pp.133, 204). Its use of 'small-N' comparative case studies and the most similar systems design allows for: the excavation of significant trends and; in-depth analysis of this

37 Supra note 35.
38 Ibid.

chapter's hypotheses (Mahoney & Rueschemeyer, 2003, pp.104-105). This chapter also supplements its analysis with a systematic examination of diagnostic evidence selected in light of this thesis's research question and the hypotheses that it concerns itself with (Collier, 2011, p.823; Gerring, 2006, pp.172-173).

4.6. Variables

In accordance with H3-H5, the (main) independent variables are: the extent to which the mass killing fulfils the criteria of the Genocide Convention; domestic political will, and; international political will.[39] The dependent variable is: whether or not the mass killing was defined as genocide by an international (criminal) court.

4.7. Data

This thesis's data is based on primary sources (legal transcripts and other legal documents) and relevant secondary literature from the fields of international (criminal) law, international relations, and history.

4.8. Limitations

This thesis appears limited by its inducing its findings from a small number of cases. This limited selection of cases is due primarily to scope limitations. However, as very few mass killings have been tried as genocide in international (criminal) courts, one can seemingly induce (accurate) findings regarding the current international criminal justice system from a small number of cases.[40] That said, this thesis appears limited insofar as the small number of cases available may prevent it from conclusively inducing a trend.

39 It omits extensive consideration of when a mass killing occurred because its chosen case studies cannot provide much insight into this issue.
40 It omits analysis of cases at the ECCC because their proceedings are ongoing; its findings are inconclusive.

5. Why are some mass killings defined as genocide?

This chapter begins with a critical analysis of the avenues through which international criminal justice has been, and can be, pursued. It then looks at legal cases in which mass killings have been defined as genocide, to determine links in a probabilistic causal chain. It diagrams these chains via flowcharts. It takes the aforementioned legalistic hypothesis i.e. a mass killing is likely to be defined as genocide if it fulfils the convention's criteria (exactly), as its conceptual starting point.

Historically, the Nuremberg Trials and the IMTFE both apparently sought international criminal justice (Vyver, 1999, p.322). Yet, they also highlighted a problem for it, at least at that time: only in cases of complete military defeat was it possible to hold perpetrators accountable (Sikkink, 2011, p.5). Moreover, they highlighted the fragility of international (criminal) justice in the face of political interests (Dower, 2000, p.474; Hafetz, 2018, p.8, p.17; Heller, 2010, p.341, pp.349-350). That said, it should be noted that these trials laid the foundation for much international criminal law and hastened the negotiation, and adoption, of the Genocide Convention (Hafetz, 2018, p.18; Sikkink, 2011, p.14).

Within the Genocide Convention, genocide is recognised as "a crime under international law" (UNGA, 1948c, p.280). Therefore, all states have an 'obligation' to prevent and punish it, even if they have not ratified the convention (UN, 2015, p.2). This 'obligation' may be used by one state to justify the trial of an individual, or individuals, from another state for (genocidal) mass killing(s) that were committed before the latter state ratified the convention. This appears supported by the UN's asserting that the prohibition of its retroactive application in international (criminal) courts "does not prevent the application of customary international law or general principles of international law to a situation that predates the Convention" (UN, 2015, p.3). This obligation and its corresponding assertion create conditions that are more favourable to the fulfilment of both Lemkin's intentions and those expressed by the Genocide Convention. However, as international (criminal) courts must abide by the principle of non-retroactivity, this seems to place the burden of legal responsibility for international criminal justice on domestic courts (ibid). Therefore, this thesis shall first analyse domestic courts as one avenue through which international criminal justice has been, and may be, pursued.

Domestic courts typically depend primarily (if not solely) upon their respective governments for funding, staffing and/or judicial independence. Thus, all genocide trials in domestic courts appear (at least somewhat) dependent upon domestic political will. This appears to be the case for many of the states' domestic courts that have tried, and prosecuted, individuals for genocide regarding an act, or acts, that were committed before genocide was criminalised in their respective states and/or the state(s) in which the act(s) were carried out. Such prosecutions have taken place in Belgium, Bolivia, Ethiopia, France, Germany, Guatemala, Iraq, Israel, Latvia, Lithuania, Norway, Poland, Romania, Sweden, and Switzerland (Bazyler, 2016, pp.271-273; PGI, 2003).[41] Many of these trials seem to reflect a (political) will to demonstrate opprobrium towards the acts committed by former regimes (Bazyler, 2016, p.272). This apparent politicization of genocide trials appears problematic for consistency. Concerns regarding politicization also pertain to considerations of the potential political and economic costs of conducting genocide trials in domestic courts. For instance, in 2000, a Latvian domestic court tried Yevgeny Savenko (a former KGB agent) for acts committed during the Soviet era.[42] The Russian Foreign Ministry denounced this trial and sharply criticized its proceedings (Latvian Mailer, 2000). This trial also inspired an attack on Latvia's embassy in Moscow (ibid). These outcomes appear to highlight some of the potential political (and economic) costs of conducting genocide trials in domestic courts. The potential for politicization within domestic courts appears highly problematic for consistency, as international (criminal) justice should, in theory, transcend (or at least not depend on) domestic political will or political interests e.g. the desire to avoid political and/or economic costs (HRW, 2014). Additionally, the convictions of such trials rarely explain how the defendant was shown to possess genocidal intent or how the acts of genocide, as specified under the Genocide Convention, were committed, which seems to further problematise consistency (Bazyler, 2016, p.272).

Besides the above-mentioned risks of politicisation, the pursuit of international criminal justice (regarding genocide) via domestic courts seems to systematically disadvantage 'less economically developed' and/or politically isolated states, particularly when a genocide trials concerns another state. Within this, any state that is accused of genocide by another state appears likely to respond by imposing political and/or economic costs (e.g. sanctions and/or reduced aid)

41 Bolivia, Latvia, Lithuania, and Poland have tried cases for genocidal acts committed before genocide was a crime there.

42 Although Savenko is a Latvian citizen, he was tried for his part in crimes committed by the Soviet Union (when he was not a Latvian citizen). Domestic courts in the other above-mentioned states have prosecuted their own states' citizens and/or citizens from states which openly acknowledge that genocide occurred there e.g. Germany, Rwanda, and Bosnia-Herzegovina.

on the accusatory state. These costs may be particularly severe for 'less economically developed' and/or politically isolated states. This appears particularly troubling in a 'postcolonial world'[43] regarding numerous ex-colonies and their former colonisers because colonised states appear uniquely vulnerable to genocidal mass killings and colonisers typically played a critical role in their becoming and/or remaining 'less economically developed.' Currently, if an ex-colony were to accuse its former coloniser of genocide, this could seemingly entail political and/or economic costs from its former coloniser and other ex-coloniser states. Other ex-coloniser states might impose such costs in attempts to force the withdrawal of the case and thus, reduce the risk of their also being accused of genocide by their ex-colonies. Ergo, domestic courts appear to be unsuitable for seeking international criminal justice regarding genocide because of their potential for, and history of, inconsistency.

International ad hoc criminal tribunals may be a more suitable avenue through which to pursue international criminal justice. Established in 1993, the ICTY was the first tribunal of this kind; it was responsible for the prosecution of those responsible for genocide, war crimes, and crimes against humanity in the former Yugoslavia (ICTY, 2019b; Sikkink & Kim, 2013, p.271; UN, 2014b, p.3).[44] This was the first tribunal in which states used individual criminal accountability at the international level since the Nuremberg Trials and the IMTFE (ibid). The ICTY was also the first international (criminal) tribunal since then, and its creators apparently drew their inspirations primarily from the precedents of these international military tribunals (Sikkink, 2011, p.98). The value of this tribunal appears partly derived from its ability to successfully prosecute those at the "highest level" and thus, punish and prevent genocide (Barria & Roper, 2005, p.360). The establishment of the ICTY was followed by that of the ICTR and the ECCC, which began operating in 1995 and 2006, respectively (ICTR, 2019; ECCC, 2019b). The creation of these tribunals may have a deterrent effect, due to their expressing international condemnation of acts such as genocide (Barria & Roper, 2005, p.357). These "competent judicial bodies" have subsequently determined that several mass killings have constituted genocide (UN, 2015, p.2). The ICTR determined that various bahutu mass killings (of batutsis) in Rwanda in 1994 were genocide and the ICTY determined that the Bosnian-Serb mass killing (of Bosnian Muslims) at Srebrenica in 1995 was genocide (ibid). These two tribunals are responsible for "significant advancements" in international criminal law and its interpretation/implementation (Barria & Roper, 2005, p.349; Graubart, 2010, p.419). Furthermore, as they were not controlled

43 I take this to mean a world in which states are no longer (physically) colonised.
44 It began functioning in 1994 (Rosen, 2004).

by 'victor states,' they seem less vulnerable to critique regarding "victor's justice" (Graubart, 2010, p.415). However, both trials were highly flawed, largely due to political pressures e.g. from the USA and/or well-connected local parties (ibid, pp.415-416).

The ICTY and ICTR concluded in 2017 and 2015, the ECCC is currently ongoing (ECCC, 2019a; ICTR, 2019; ICTY, 2019a). The ICTY and ICTR indicted 161 and 93 individuals, respectively. Of the 161 individuals indicted by the ICTY, 90 were sentenced, 19 were acquitted, 13 were referred to countries in the former Yugoslavia for trial and 37 had their proceedings terminated or their indictments withdrawn (ICTY, 2019c). Six defendants were convicted of genocide and/or genocide-related crimes (ICTY, 2001, 2010, 2012, 2016, 2017). The ICTR sentenced 62 individuals, acquitted 14, referred 10 to various national jurisdictions for trial, referred 3 to the Mechanism for International Criminal Tribunals, and withdrew 2 indictments before trial (ICTR, 2019).[45] 53 of the 62 individuals it sentenced were convicted of genocide and/or genocide-related crimes (Bazyler, 2016, p.265). The establishment of these international ad hoc criminal tribunals appears to be a positive step for international criminal justice and the punishment and prevention of genocide as they appear to be a suitable avenue for pursuing international criminal justice regarding genocide in states that are willing to do so.[46]

However, the ICTY and the ICTR were both UN International Criminal Tribunals and the ECCC was established as a result of an agreement between the UN and the government of Cambodia (ICTY, 2019a; ICTR, 2019; UN, 2014, p.3). Such tribunals could not be established in the absence of political goodwill regarding the UN. Hence, international criminal justice regarding genocide cannot be pursued through this avenue if the government/ruler(s) of the state concerned lack such goodwill and/or the domestic political will to seek the prosecution of genocide through this avenue. Furthermore, even if there is sufficient domestic political will to establish such tribunals, the likelihood of their establishment depends upon the political will of the UN, which depends on the political interests of myriad states. Moreover, even if they are established, their likelihood of success depends on the political, financial, military, and logistical support of internationally powerful states and influential local actors (Graubart, 2010, pp.419-420). Thus, although international ad hoc criminal tribunals appear to be a suitable avenue for

45 Two defendants died before they received their judgments (ICTR, 2019).
46 However, the ICTY and ICTR are merely vested with "concurrent jurisdiction" (Solera, 2002, p.147). Hence, numerous (international and domestic) courts possess jurisdiction over their cases. As the parties concerned with these cases typically try to have their case heard in the court that they perceived to be most favourable to them, many cases appear likely to be tried in domestic courts, not international ad hoc criminal tribunals.

pursuing international criminal justice regarding genocide in states that are willing to do so (in conjunction with the UN), they are problematic for consistency as they depend upon political will and political interests at the domestic and international levels. For instance, such tribunals may prove 'willing' only concerning crimes committed by one side of a conflict. This proved to be the case in Rwanda: the ICTR's second chief prosecutor reported fearing severe reprisals if her office investigated crimes committed by the Rwandan Patriotic Front (RPF) and the third chief prosecutor's attempts to do so failed to get very far, apparently due to the government's leveraging its logistical power, victim status, and strategic alliance with the USA (and other Western states) against her (Graubart, 2010, p.418). More on this in Chapter 6. Ergo, such tribunals appear to be unsuitable for seeking international criminal justice regarding genocide in states that are unwilling to do so in a consistent manner.

The International Criminal Court (ICC) may be the most suitable avenue through which to pursue international criminal justice regarding genocide in 'unwilling' states. This court was established in 2002, apparently in response to the successes (and failures) of the ICTY and the ICTR (Barria & Roper, 2005, p.349; ICC, 2019a).[47] According to the preamble of the Rome Statute of the International Criminal Court (Rome Statute) that created it, it has been empowered to "put an end to impunity for the perpetrators" of "crimes of concern to the international community as a whole" i.e. genocide; crimes against humanity; war crimes and; the crime of aggression (UN, 1998, p.4, p.6). If a state is unwilling and/or unable to exercise jurisdiction over alleged perpetrators of genocide, this court has the power to investigate and prosecute those responsible[48] (UN, 2014, p.3; UN, 1999, pp.16-17; Vyver, 1999, pp.339-340).

However, this court can only exercise jurisdiction over situations where (an alleged) genocide was committed "on or after 1 July 2002" (ICC, 2019b). It also requires that this (alleged) genocide was committed: by a "State Party national," i.e. a citizen of a state that has ratified the Rome Statute; in the territory of a "State Party" i.e. a state that has ratified the Rome Statute, or; in a State that has accepted the jurisdiction of the ICC (ICC, 2019b; UN, 1998, p.14). Thus, if a "non-State Party" wishes to evade the scrutiny of the ICC, it may do so by refusing to accept its jurisdiction or by withdrawing prior acceptance of its jurisdiction. "States Parties" may do likewise

47 Kofi Annan has since posited that international ad hoc criminal courts will no longer be set up because of this (Herman & Peterson, 2010, p.106). If true, this would make the ICC the only suitable avenue through which to pursue international criminal justice regarding genocide.

48 Although the ICC Prosecutor is empowered to trigger such action, their ability to do so appears hampered by the difficulty of determining when a state is sufficiently 'unwilling' or 'unable' to justify doing so.

by withdrawing from the Rome Statute.[49] In such instances, the ICC can then only exercise its jurisdiction if a case is referred to the ICC Prosecutor by the United Nations Security Council (UNSC) (ICC, 2019b; UN 1998, pp.14-15).[50] The UNSC is comprised of 15 member states. Ten of these are "non-permanent members" that are elected for two-year terms by the General Assembly and five are "permanent members," these are: China, France, the Russian Federation, the United Kingdom (UK), and the USA (Barnett, 2002, p.11; UNSC, 2019a). Each "permanent member" retains the "right to veto" (UNSC, 2019b). If a permanent member casts their veto, the resolution or decision will not be approved (ibid). Thus, it appears highly unlikely that the UNSC will refer a case to the ICC Prosecutor if doing so may be (perceived as) contrary to the political interests and/or responsibilities of any of its five permanent member states.[51] For instance, they might perceive certain cases to be potential threats to their sovereignty, reputation and/or public support, domestically and/or internationally (Barnett, 2002, pp.24-25).[52] This is further problematised by consideration of the often conflicting political interests of these states. Ergo, political will, at both the domestic and international levels, is required for a case to reach the ICC.

The ability to effectively prosecute a case at the ICC also depends upon domestic political will. This is due to the court's dependence on the cooperation of the state under investigation e.g. to make arrests, transfer suspects, freeze assets, and provide materials (ICC, 2019b; UN 1998, pp.65-81). Hence, it is dependent on the political, financial, military, and logistical support of internationally powerful states and influential local actors (Graubart, 2010, pp.419-420). Even with full cooperation assured, the decision to prosecute a case at the ICC entails significant costs and logistical challenges.[53] Thus, in the absence of such cooperation, the ICC is unlikely to take on the case, on the grounds of pragmatism. The above-mentioned issues with the ICC problematise its apparent aims i.e. ending impunity and bringing about accountability without any distinction relating to race and power (Herman & Peterson, 2010, p.105).

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49 This is more problematic, as a withdrawal only becomes effective one year after the deposit of notice of withdrawal and the ICC retains its jurisdiction over crimes committed during the time in which the State was a party to the Statute (ICC, 2018; UN, 1998, p.87).

50 The UNSC has done so for the cases of Darfur and Libya (ICC, 2019b).

51 This appears evidenced by the UNSC's failure to refer mass killings committed against Tamil civilians in Sri Lanka in 2009 to the ICC Prosecutor; the USA has maintained "steadily friendly relations" with Sri Lanka's (Sinhalese) government (Herman & Peterson, 2010, pp.xiii-xvi). Its non-action vis-à-vis mass killings that occurred: throughout Guatemala from 1981 to 1983; in Palestinian refugee camps at Sabra and Shatila in 1982 and; during Israel's invasion of Gaza (December 2008-January 2009) does likewise (ibid, pp.73, 77-80, 91-93).

52 Within this, states may be especially reluctant to refer cases to the ICC Prosecutor if they are uncertain of the outcome, as any (perceived) failure regarding prosecution could undermine faith in their decision-making capacities and those of the UNSC (Herman & Peterson, 2010, p.48).

53 It can also entail significant risks to staff e.g. like those faced by the ICTR's second and third chief prosecutors regarding the investigation of RPF crimes (Graubart, 2010, p.418).

In sum, the avenues through which international criminal justice have been, and can be, pursued are highly dependent upon political will and political interests. In the absence of political will, it seems unlikely that a mass killing will be tried in an international (criminal) court. Hence, it constitutes the first link in a probabilistic causal chain that leads to a mass killing's being defined as genocide by an international criminal court.

According to the current literature, a mass killing must fulfil the convention's criteria (exactly), and it must have occurred in a state that ratified the Genocide Convention prior to its occurrence,[54] to be defined as genocide by an international criminal court. This research interrogates these requirements via a comparison of within-case analyses of cases at the ICTY and ICTR. Within these analyses, it assumes that an individual's being convicted for genocide and/or genocide-related crimes in relation to a mass killing in an international criminal court means that that mass killing is defined as genocide by the international community (Vyver, 1999, p.313).

5.1. Srebrenica

On 6 July 1995, the Bosnian Serb Army attacked the United Nations-designated 'Safe Area' of Srebrenica (UNGA, 1999a, p.57). Around 7,475 Bosnian Muslims were killed in the two weeks that followed (Brunborg et al., 2003, p.236; ICTY, 2001, p.27). The ICTY has since convicted Radislav Krstić, Vujadin Popović, Ljubiša Beara, Drago Nikolić, Zdravko Tolimir, Radovan Karadžić, and Ratko Mladić of genocide and/or genocide-related crimes in relation to this mass killing (Brunborg et al., 2003, p.233; ICTY, 2001, 2010, 2012, 2016, 2017).[55] Hence, it has been defined as genocide by the international community. According to records of these proceedings, this was because it was carried out with genocidal intent regarding Bosnian Muslims as a national,[56] ethnical,[57] and/or religious group[58] (ICTY, 2004, 2015b, 2016, 2017). Therefore, the Srebrenica mass killing was defined as genocide because it fulfilled the convention's criteria

54 Alternatively, this mass killing could be defined as genocide via the ICC. This requires that it occurred "on or after 1 July 2002" in a "State Party" or a state that has accepted the ICC's jurisdiction (or it was committed by a "State Party national") (UN, 2019b).
55 Despite appeals, Popović, Beara, Nikolić, Krstić and Tolimir remain convicted of genocide (ICTY, 2004, 2015a, 2015b).
56 I.e. "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties" (ICTR, 1998, ¶512).
57 I.e. "a group whose members share a common language or culture" (ibid, ¶513).
58 I.e. a group "whose members share the same religion, denomination or mode of worship" (ibid, ¶515).

(exactly) and it occurred after the state(s) concerned ratified the Genocide Convention.[59] Thus, it supports an 'attenuated' version of the above-mentioned legalistic hypothesis: a mass killing will likely be defined as genocide if it occurred after the state(s) concerned ratified the Genocide Convention[60] and it fulfils the criteria of the Genocide Convention (exactly).

5.2. Rwanda

The mass killings that occurred in Rwanda in 1994 do otherwise, as they do not (exactly) fulfil the convention's criteria regarding victim groups. From 6 April to 19 July 1994, bahutu "hardliners" (Straus, 2012, 2013) killed between 470,000 and 970,000 batutsi Rwandans (Barnett, 2002, p.1; Hintjens, 1999, p. 276; Straus, 2013, p.1; Valentino, 2004, p.187; UNGA, 1999b, p.3).[61] The ICTR has since convicted Jean-Paul Akayesu, Jean Kambanda, Théoneste Bagosora, Aloys Ntabakuze, Anatole Nsengiyumva, Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Joseph Kanyabashi, Élie Ndayambaje, Justin Mugenzi, Prosper Mugiraneza, and others[62] of genocide and/or genocide-related crimes in relation to various mass killings that took place during this period (ICTR 1998a, 1998b, 2008, 2011a, 2011b).[63] Thus, these mass killings have been defined as genocide by the international community (UNGA, 1999b, p.5). According to records of these proceedings, this is because they were carried out with genocidal intent vis-à-vis batutsi Rwandans as an ethnical or racial[64] group (ibid). However, batutsis do not appear ethnically or racially distinct from bahutus.

Historically, the bahutu and batutsi were not fixed groups (Straus, 2013, p.22). Prior to European colonisation, they considered themselves more akin to castes/classes than ethnical or racial groups (Valentino, 2004, p.178).[65] They spoke the same language, belonged to the same clans, had the same cultural practices and myths, and adhered to the same religions (Straus, 2013, pp.19-20; Valentino, 2004, p.178). This would place them in the same ethnical group (Herman

59 Bosnia and Herzegovina ratified the Genocide Convention on 29 December 1992 (UN, 2019).
60 Supra note 54.
61 This figure accounts for the 10,000 to 30,000 'moderate' bahutu killed (Valentino, 2004, p.187). It subtracts 30,000 to give the most conservative estimate.
62 The ICTR has convicted 41 other individuals of these crimes (Bazyler, 2016, p.265). However, it appears unnecessary to provide an exhaustive list of these individuals.
63 Akayesu, Kambanda, Bagosora, Ntabakuze, Nsengiyumva, Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, Ndayambaje were convicted of genocide (ICTR 1998a, 1998b, 2008, 2011a). Despite appeals, all bar Kanyabashi remain convicted of this (ICTR 2000, 2001, 2015).
64 I.e. a group "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors (ICTR, 1998, ¶514).
65 Bahutus were generally farmers of lower social status and Batutsis were pastoralists of higher social status, but these categories were not rigid (Straus, 2013, p.20).

& Peterson, 2010, p.41). Individuals also occasionally moved between the groups via intermarriage, clientage and/or wealth acquisition (ICTR, 1998, ¶81; Straus, 2013, p.20; Valentino, 2004, p.178). This contravenes the notion of their belonging to distinct racial groups.

However, Belgian colonial administrations in Rwanda changed what these categories meant and how they mattered; they racialized bahutu and batutsi identities, rendering them exclusive and immutable (Hintjens, 1999, p.250; Straus, 2013, p.20; Valentino, 2004, p.178). Colonial-era documents consistently described bahutus as "short, stocky, dark-skinned, and wide-nosed" and described batutsis as "tall, elegant, light-skinned, and thin-nosed" (ICTR, 1998, ¶82; Straus, 2013, p.21). These supposed differences are not as clear-cut as most historical and anthropological accounts suggest,[66] as evidenced by the frequent 'mistakes' made during the mass killings (Hintjens, 1999, p.247).[67] Belgian colonial officers forced racialized identities onto Rwandan society by introducing identity cards that labelled Rwandans according to their 'race' in 1926 (Beigbeder, 1998, p.170).[68] Race-based thinking then became the basis for allocating power; colonial administrators "heavily favoured" the batutsi minority[69] for positions of authority (Graubart, 2010, p.416; Hintjens, 1999, p.253; Straus, 2013, p.21; Valentino, 2004, p.178). These (more rigid) conceptions of identity were apparently adopted by the Rwandans, as evidenced by changing attitudes towards mixed marriages and concubinage (Hintjens, 1999, p.250).

However, many Rwandans still seem to have conceptualised bahutu and batutsi primarily in terms of power, not race, in the run-up to the 1994 genocide (Valentino, 2004, p.178). Critically, bahutu hardliners typically did not argue that the batutsi posed a biological threat to the bahutu, rather they argued that virtually all batutsi supported the RPF, which invaded Rwanda in 1990[70] (Hintjens, 1999, p.257; Straus, 2013, pp.24-25; Valentino, 2004, pp.183-185). This lack of genocidal intent regarding a distinct racial group appears to problematise the 'attenuated'

66 E.g. exaggerations in physical disparity in size appear due to the comparison of the batutsi aristocratic minority with the majority of bahutu farmers and servants (Hintjens, 1999, p.252).
67 Many bahutu who fit the batutsi stereotype were killed and some batutsi who fit the bahutu stereotype forged identity cards and managed to escape (Mackintosh, 1996, pp.38-39, p.41).
68 The difficulties inherent in the social construction of these racial categories appears evidenced by their reliance on the old Rwandan caste/class-based conception of bahutu and batutsi: they allegedly classified men with more than ten cattle as batutsi and men with fewer than ten cattle as bahutu or *batwa*, depending on their profession (Hintjens, 1999, p.253). Bahutus apparently used Belgian-issued identity cards at roadblocks to distinguish batutsis from bahutus due to the lack of any other obvious basis for doing so (Barria & Roper, 2005, p.353).
69 They comprised 9-15% of the population (ICTR, 1998, ¶83; Straus, 2013, p. 19; Valentino, 2004, p.178).
70 This army was primarily comprised of descendants of batutsi who fled Rwanda after the "Hutu Revolution" in 1959 (Barnett, 2002, p.183; Straus, 2013, p.24).

legalistic hypothesis, as does the lack of a distinction between ethnical and political/warring groups (Valentino, 2004, p.185).

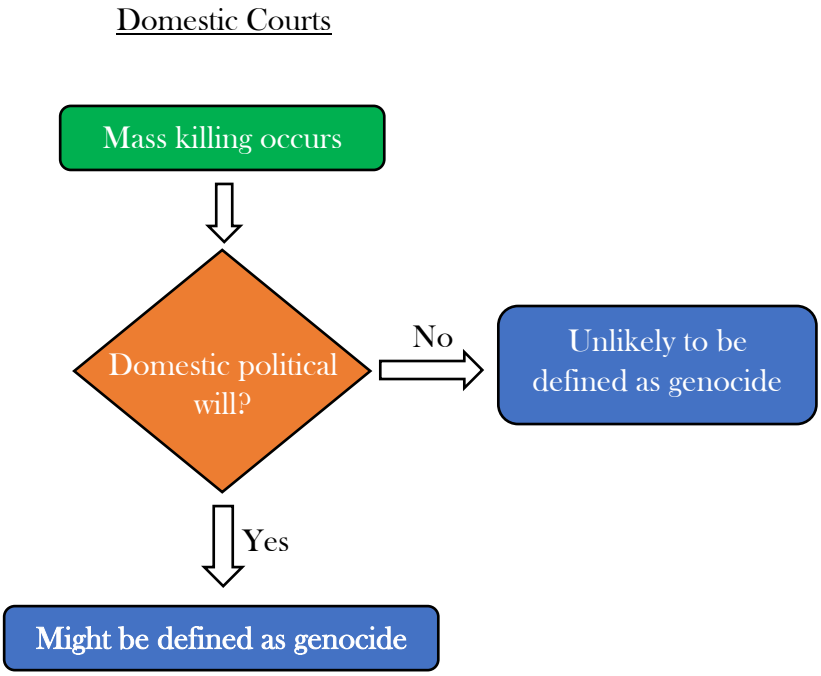
The mechanism that allowed genocidal mass killings to occur in Rwanda was collective racial categorization i.e. the perpetrator determined the victim group and its membership (Hintjens, 1999, p.246; Straus, 2013, p.225). This engineering of 'racial' conflict is evidenced by increasing attacks on batutsi in the run-up to the genocide; there was little intercommunal violence between bahutu and batutsi following the RPF invasion in 1990 and the onset of a severe economic crisis (Hintjens, 1999, p.248).[71] Although this depended upon a pre-existing, widespread, resonant notion of racial categories, this was provided by the Belgian colonial authorities (ibid). It did not exist prior to colonialism.

In accordance with the Genocide Convention, a victim of genocide is "chosen not because of his individual identity, but rather on account of his membership of a national, ethnic, racial or religious group" (ICTR, 1998, p.521). As shown above, the distinction between bahutu and batutsi "falls between the cracks" of these group classifications; they cannot be classified as distinct ethnical or racial groups in accordance with the proceedings' own definitions (Vyver, 1999, pp.303-304). Thus, the ICTR chose to concern itself with "stable" victim groups whose membership is determined by birth, in "a continuous and often irremediable manner" (ICTR, 1999, p.511). This exceeded the bounds of the language used in the Genocide Convention and thus, it expanded the scope of the groups protected by it (Vyver, 1999, p.318, p.355). The precedent set by the cases that it oversaw, for international criminal law, thus prohibits "strictly" positivistic approaches whereby only groups falling precisely in any of the categories explicitly mentioned in the Genocide Convention can be victims of genocide (ibid, p.304).[72] Crucially, it also appears at odds with the 'attenuated' legalistic hypothesis, as a mass killing may be defined as genocide if it does not fulfil the convention's criteria exactly, as was the case with Rwanda. Various mass killings there were apparently defined as genocide because they occurred after the state ratified the Genocide Convention[73] and they fulfilled the convention's criteria (loosely). This appears to warrant the following revision of the 'attenuated' legalistic hypothesis: a mass killing is likely to be defined as genocide (by an international (criminal) court) if there is sufficient (domestic and international) political will to try it as genocide, if it occurred after the state

71 Northern bahutu elites apparently revitalised the myth of an ongoing 'racial' struggle for supremacy to paper over inter-bahutu divisions and thus, preserve their dominance (Hintjens, 1999, pp.261-262).
72 The ICC appears likely to follow this broad interpretation of the crime of genocide (Vyver, 1999, p.318).
73 Rwanda ratified the Genocide Convention on 16 April 1975 (UN, 2019).

concerned ratified the Genocide Convention,[74] and if it fulfils the convention's criteria (at least loosely).

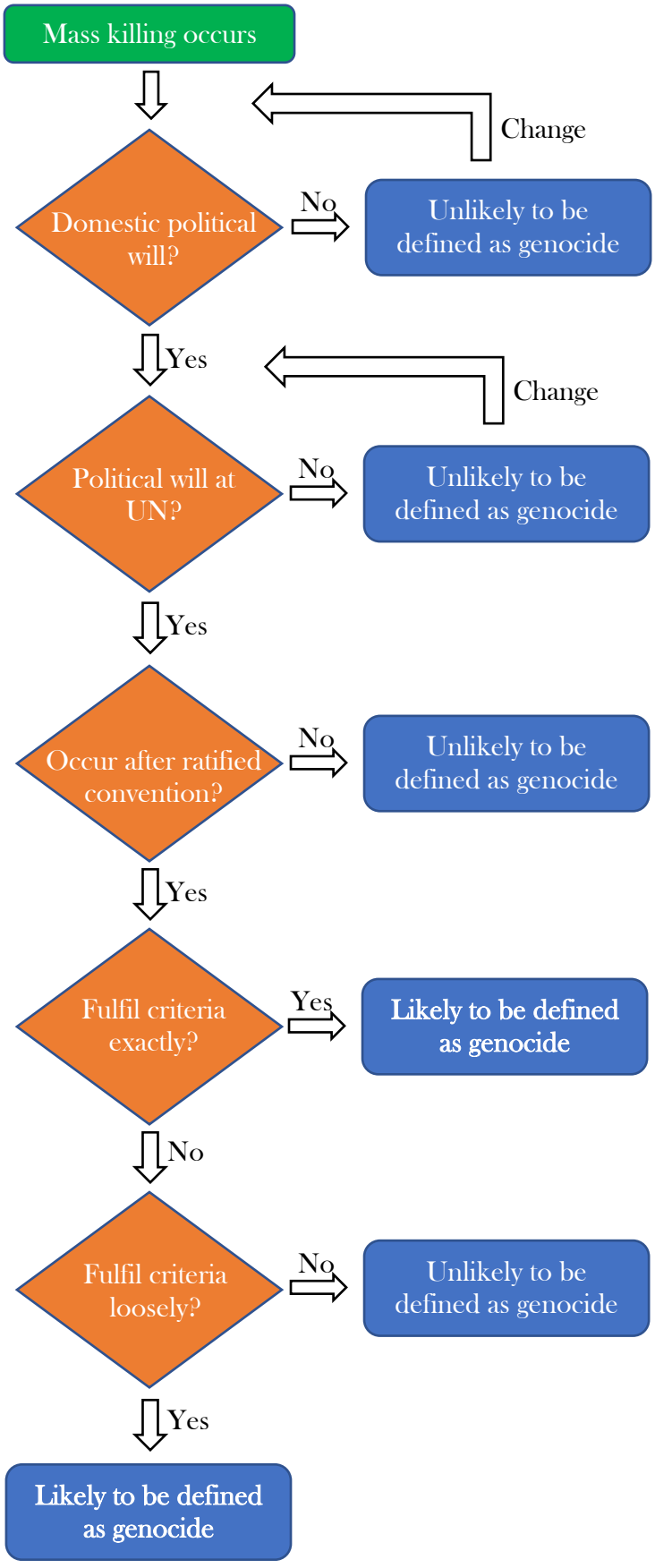
The following flowcharts visually represent this chapter's analysis:



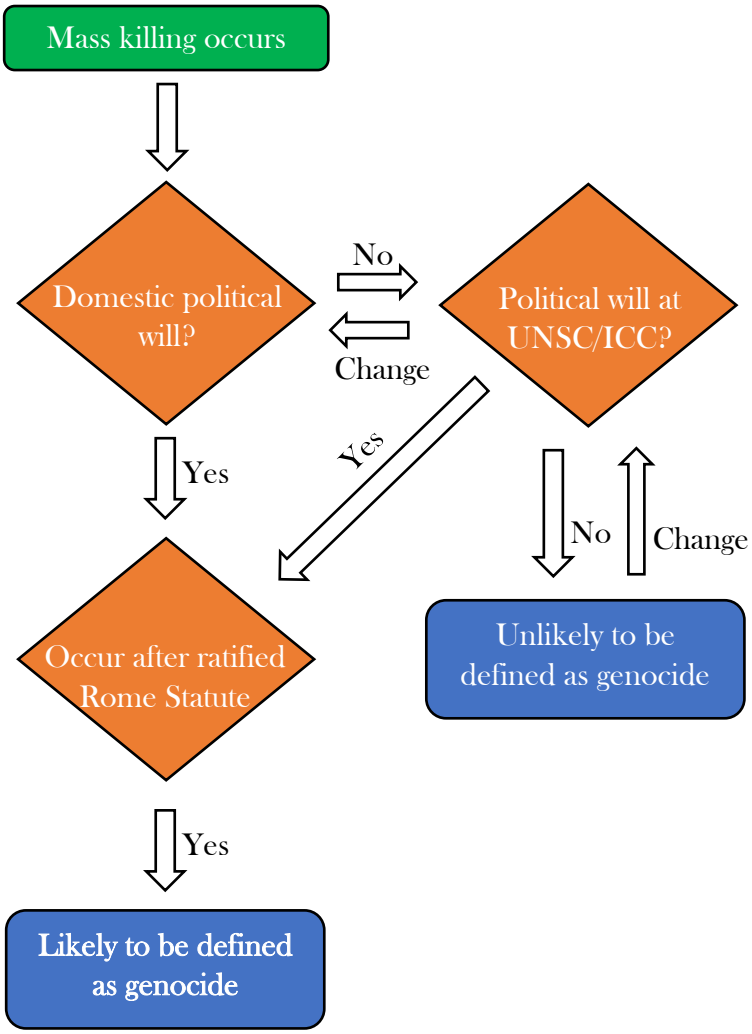
Domestic political will might be the only criterion necessary for defining a mass killing as genocide in a domestic court because they are not prohibited from retroactively applying the law against genocide (UN, 2015, p.3) Thus, a mass killing may be defined as genocide there regardless of when it occurred. Furthermore, a mass killing might not need to fulfil the criteria of the Genocide Convention (exactly or loosely) to be defined as genocide in a domestic court, as they can draw solely on domestic legislation.

74 Supra note 54.

International ad hoc criminal tribunals



The ICC


Mass killing occurs
Domestic political will?
No
Change
Political will at UNSC/ICC?
Yes
Yes
No
Change
Occur after ratified Rome Statute
Unlikely to be defined as genocide
Yes
Likely to be defined as genocide

6. Why are some mass killings not defined as genocide?

In accordance with the preceding section, a mass killing seems unlikely to be defined as genocide via an international criminal court if it does not fulfil the criteria of the Genocide Convention (at least loosely) and/or there is no political will to try it as genocide.

If there is political will to try a mass killing as genocide but it occurred before the state concerned ratified the Genocide Convention,[75] it appears unlikely to be tried in an international (criminal) court, as they lack the mandate to try such cases.

A mass killing that does not fulfil the convention's criteria (at least loosely), also seems unlikely to be tried in an international criminal court. This is partly due to the expenses involved in taking on such cases, as these courts currently have (very) limited resources (Maogoto, 2004, p.238). Furthermore, the international community invests much political capital in (the successful prosecution of) such cases. Trying a mass killing that does not fulfil the convention's criteria (at least loosely) poses a significant risk of acquittal, which could threaten this capital and/or reflect badly on the international community e.g. it could undermine faith in their decision-making capacities (Herman & Peterson, 2010, p.48). This may, in turn, cause them to curtail the power, discretion, and/or jurisdiction of these courts. Therefore, international criminal courts appear unlikely to try such cases, due to financial and political considerations.

6.1. Rwanda

From 6 April to 19 July 1994, the RPF and batutsi civilians 'systematically' killed between 10,000 and 531,669[76] bahutu Rwandans (Barria & Roper, 2005, p.353; Herman & Peterson, 2010, pp.57-58; UNHCR, 1994, pp.4, 8). The ICTR did not convict anyone for any of the mass killings that took place during this period. Thus, they were not defined as genocide by the international community.[77] In fact, it was never tried as such. Yet, it appears to fulfil the criteria of the Genocide Convention, at least insofar as the bahutus mass killings of batutsis do. Thus, a case's fulfilling the convention's criteria (at least loosely) appears insufficient for it to be defined as genocide.

75 Supra note 54.
76 Davenport and Stam estimate that 1,063,336 people were killed, they argue that the majority of these victims were likely bahutu, not batutsi (Herman & Peterson 2010, p.58).
77 They did not entail any criminal charges at the ICTR (Herman & Peterson, 2010, p.62).

This mass killing's never being tried as genocide appears largely reducible to the lack of political will to do so, at both the domestic and international levels. Domestically, this appears well evidenced by the Rwandan government's resistance to attempts to investigate these mass killings. As previously mentioned, the ICTR's second and third chief prosecutor's attempts to do so did not get very far due to the government's leveraging its logistical power and victim status against them (Graubart, 2010, p.418). For instance, the government: did not grant travel visas; refused to make sites available, and; broke off cooperation with them (ibid, pp.416, 418). It used global guilt (at not having stopped the genocide) to shame other states and thus, reduce the risk of unwanted pressure (ibid, p.418).

Furthermore, the Rwandan government has (allegedly) leveraged its strategic alliance with the USA (and other Western states) against the ICTR (ibid, p.418). For instance, the USA has backed the Rwandan government at "pivotal moments" during the ICTR's proceedings (ibid, p.416). This support appears partly attributable to the USA's using the ICTR to promote its own image and strengthen ties with the Rwandan government (ibid, p.420).[78] It may also be partly explained by: the previous alignment of US and RPF interests i.e. the RPF did what the USA wanted done in Rwanda,[79] and; the USA's vested interest in Paul Kagame – Rwanda's current President – who attended the US Army's commander general staff college at Fort Leavenworth shortly before these mass killings began (Herman & Peterson, 2010, pp.53-56). Moreover, the UNSC restricted the mandate of the third chief prosecutor to the ICTY, apparently at the behest of the USA and the UK (Moghalu, 2005, pp.134-135). Such support appears reducible, in part, to the USA and the UK's desire to: support an ally that has political and economic influence in the mineral-rich Congo and; prevent political destabilization (Peskin, 2008, p.211). Given the power and influence of these states over the United Nations and international politics, their support of the Rwandan government seemingly entails a lack of political will to try these mass killings as genocide at the international level.

Despite its being formally autonomous, the ICTR lacks the means and political support (i.e. of a 'strong' state) necessary to force the USA-backed Rwandan government to cooperate with them regarding these mass killings (Graubart, 2010, pp.416, 420). Hence, it has been allowed to practice a highly partisan form of criminal justice in which the legal process has been

78 Other Western states have also done likewise e.g. the UK.
79 This appears evidenced by US efforts to prevent the effective deployment of a UN force there and the Clinton administration's suppression of a memorandum that highlighted the killing of at least 10,000 bahutu civilians per month (Herman & Peterson, 2010, pp.63, 110).

shaped by domestic and international politics and (thus,) it has legitimised the selective and occasional enforcement of international criminal law (Bassiouni, 1994, p.473; Graubart, 2010, p.419). Ergo, these mass killings seem to show that even if a mass killing fulfils the criteria of the Genocide Convention (at least loosely) it is unlikely to be defined as genocide (by an international (criminal) court) if there is no domestic political will to try it as genocide and little political will to do so at the international level.

6.2. Operation Storm

On 4 August 1995, the Croatian army launched 'Operation Storm' against the Republic of Serbian Krajina (ICTY, 2011a, p.47). The Croatian government announced that this operation had been successfully completed on 7 August 1995 (ICTY, 2011b, p.9, 2012, p.1). Yet, follow-up actions purportedly continued until 15 November 1995 (ibid). During these three months, the Croatian army killed between 903[80] and "several thousand" ethnic Serbs (Herman & Peterson, 2010, p.82; HRW, 1996). Many of these were executed in situations "unrelated to combat" (HRW, 1996).[81] Operation Storm fulfils the criteria of the Genocide Convention at least as well as the Srebrenica mass killing, as it was carried out with genocidal intent regarding Serbs as an ethnical group (Barria & Roper, 2005, p.350; Herman & Peterson, 2010, p.83). Furthermore, hundreds of women and children were killed during this operation (ibid). The Srebrenica mass killing differs from Operation Storm in this regard, as efforts were apparently made there to move the women and children in the area to safety; there is no evidence of their being killed (Herman, 2006, pp.432-433; Herman & Peterson, 2010, p.47). The apparent lack of such efforts during Operation Storm may (arguably) even make it a more fitting candidate for genocide than the Srebrenica mass killing.

However, no-one involved in this mass killing was ever indicted for genocide (ICTY, 2001, 2005). So, it has never been tried as genocide and thus, it cannot be defined as such (by an international (criminal) court). This apparent omission appears at least partly due to politicization (Herman, 2006, p.427). This case seems to highlight the dependence of the ICTY on the USA and USA-led NATO: the ICTY depends on the latter for gathering evidence, arresting indicted individuals, and ascertaining cooperation from Balkan leaders (Graubart, 2010, p.420). The USA and NATO have apparently used this leverage to determine the way trials go,

80 This figure was given by the Croatian Interior Ministry (HRW, 1996).
81 Local NGOs estimate that up to 700 Serbs were executed in such situations (ibid).

in accordance with their own political interests e.g. by choosing what evidence they turn over/withhold (ibid). Unsurprisingly, the ICTY has primarily served the interests of the USA, NATO, and its former Yugoslavian clients e.g. Bosnian Muslims and Croatians (Herman & Peterson, 2010, p.46). Here, it is worth noting that the USA supported Operation Storm via the provision of material aid, intelligence, and diplomatic protection (Herman, 2006, p.433; Herman & Peterson, 2010, pp.82-83). Hence, this mass killing appears highly unlikely to be tried as genocide while the ICTY remains dependent upon the political will of the USA and NATO, as this would likely reflect badly on them. Therefore, this case seems to evidence the notion that even if a mass killing fulfils the criteria of the Genocide Convention (at least loosely) it is unlikely to be defined as genocide (by an international (criminal) court) if there is a lack of political will to try it as such at the international level.

7. Conclusion

In the current international criminal justice system, a mass killing is unlikely to be defined as genocide, via an international criminal court, if it does not fulfil the criteria of the Genocide Convention (at least loosely) and/or there is no political will to try it as genocide. According to the literature, international criminal justice was first (seriously) pursued via the Nuremberg Trials and the IMTFE. This thesis has shown that these international military tribunals are uniquely vulnerable to critique regarding "victor's justice," due process, and politicization; they validated the instrumentalization of international criminal law for political aims (Graubart, 2010, p.415). That said, they are responsible for notable advancements in international criminal law, as they: established that individuals could be held criminally responsible under international (criminal) law; laid the foundation for much of it, and; hastened the negotiation and adoption of the Genocide Convention (Graubart, 2010, p.415; Hafetz, 2018, p.18; OUSCCPAC, 1946, p.53; Rosen, 2004; Sikkink, 2011, p.14; Vyver, 1999, pp.291-295).

The international ad-hoc criminal tribunals conducted in the 1990s were not conducted under military occupation and were formally autonomous. Thus, they appear less vulnerable to the above-mentioned critiques (Graubart, 2010, p.415). However, these trials still depended on political will at the domestic and international levels. Without this, they could not have occurred. Chapter 6 showed that political will also played a significant part in both case selection and subsequent legal proceedings. As they were largely dependent upon international politics, they remain vulnerable to accusations of inconsistency and politicization. This thesis has shown that such concerns also extend to the ICC (Graubart, 2010, pp.419-422; Herman & Peterson, 2010, pp.21, 27). Accordingly, it appears likely to provoke much resentment internationally (Maogoto, 2004, p.106).

The international criminal justice system still depends on a "politically compromised form of justice," and it fails to consistently punish perpetrators (Graubart, 2010, p.417). Therefore, it impedes the fulfilment of the intentions behind Lemkin's conceptualisation of genocide (Lemkin, 2008, pp.92-3) and the Genocide Convention's expressed intentions: to prevent genocides and punish their perpetrators (Schabas, 2000, p.170; UN, 2014b, 2015; UNGA, 1948c, p.280; Vyver, 1999, p.290).

The inconsistencies in the international criminal justice system regarding which mass killings it does, and does not, define as genocide have serious implications for the future of its norms and for the international criminal justice itself. Such inconsistencies effectively undermine the intent behind the concept of genocide and the genocide convention. Critically, they compromise the very idea of international criminal justice, which is essential for the peaceful functioning of this diverse world, a world that seems no less prone to mass killings today than at any other point throughout its long, violent history.

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