

The Global Transgender Genocide: An analysis of the elements of genocide and gender nonconforming people

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List of Abbreviations

Abbreviations	Definition
AIDS	acquired immune deficiency syndrome
FL H0747	Florida: Protections of Medical Conscience
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
LGBTQIA+	lesbian, gay, bisexual, transgender, queer, intersex, asexual
NGOs	non-governmental organization
US HB3328	Protecting Children From Experimentation Act

Chapter I: Introduction

Analytical Problem

In 2023, several states within the United States introduced legislation that would strip away transgender rights¹. The bills were met with backlash from both LGBTQIA+ activists², legal scholars³, and lawmakers who claimed the bills were “genocidal”⁴. Those in favour of the bills reaffirmed their stance on the issue with what many claimed was “genocidal rhetoric” meant to systematically dehumanize and incite genocide against transgender people within the country⁵. As of the writing of this thesis, the United States still has bills introduced weekly⁶ with the purpose of removing the rights of transgender people.

This is not solely an American issue. Several other countries have introduced legislation that would strip away the rights of transgender people or allow for their imprisonment and execution in order to maintain family values, protect children, and prevent public disorderly conduct⁷. Other countries have refused to overturn decades old anti-transgender legislation, including several countries in the European Union who still force transgender people to undergo sterilization⁸. Groups that identify as gender nonconforming for cultural reasons have also been affected by anti-transgender legislation including the *meti* in Nepal who are forcefully undergoing a “sexual cleansing”⁹.

Despite some scholars claiming the global transgender population is undergoing a slow genocide, other scholars claim it’s not possible to commit genocide against transgender people. This is generally because they cannot be considered a protected group under the Genocide Convention¹⁰, and the bills have been called insufficient to fulfill the *actus rei* described in the Convention¹¹.

Literature Review

¹ Trans Legislation Tracker, “2023 National Bills” [2023] Web.

² American Civil Liberties Union, “Legislative Attacks on LGBTQ Rights” [2023] Web.

³ M. Killian Kinney, Taylor E. Pearson, and Julie Ralston Aoki, “Improving “Life Chances”: Surveying the Anti-Transgender Backlash, and Offering a Transgender Equity Impact Assessment Tool for Policy Analysis” J Law Med Ethics [2022] 489, 489.

⁴ Eugene Scott, “House Democrats organize against anti-trans bills across U.S.” Axios [2023] Web.

⁵ Delphine Luneau, “Human Rights Campaign: Extremists at CPAC Laid Bare Hatred at Root of Vile Legislation Targeting Trans People”, Human Rights Campaign [2023] Web.

⁶ Trans Legislation Tracker, “2023 National Bills” [2023] Web.

⁷ Brian Kritz, “The global transgender population and the International Criminal Court” [2014] Yale Hum. Rts. & Dev. LJ 1, 16.

⁸ Anna Carastathis, “Compulsory Sterilisation of Transgender People as Gendered Violence,” *(In)Fertile Citizens: Anthropological and Legal Challenges of Assisted Reproduction Technologies* [2015] 79, 79.

⁹ Human Rights Watch, “Nepal: ‘Sexual Cleansing’ Drive Continues” Web [2006].

¹⁰ Brian Kritz, “The global transgender population and the International Criminal Court” [2014] Yale Hum. Rts. & Dev. LJ 1, 19.

¹¹ Ibid. 20.

The debate on whether any category of the LGBTQIA+ community could be considered a protected group, or whether they are facing genocide has been researched and documented since the 1980s¹². Most of the research examines gay men and their treatment during the AIDS pandemic¹³. Other members of this community are rarely mentioned or have not been mentioned for several decades. Further, the literature lacks information on current problems that have arisen after 2015. An examination of this gap could benefit in understanding whether transgender people are undergoing genocide.

Waites, a scholar specializing in human rights and sexual identities, has done extensive research into genocide and sexual identities¹⁴. His article focuses on the “discourse of genocide”, and the exclusion of queer identities in international legislation¹⁵. While a case is made for a genocide affecting gay men that has been present in several countries since the Holocaust, the paper does not discuss other queer identities that might have also been included in these mass exterminations. As an example, he considers the systematic killings of queer people in The Gambia genocide because of the mass graves of queer people¹⁶. This is examined as an issue primarily affecting homosexual men with little detail as to how gender nonconforming people may also be included in these graves as a result of identity erasure¹⁷.

Kidd’s research discusses the genocide faced by transgender people globally, with attention given to countries like the United States and Brazil where large numbers of people are murdered for their identity¹⁸. While the literature includes statistics showing an increase of hate crimes¹⁹, the acts described in the literature can arguably not be considered genocide since they are perpetrated by individuals in individual cases of hate crimes. They are not systematic killings perpetrated with the intention of eliminating a group, rather, they are instances of an individual acting in their own aggressions. While the focus is on transgender people here, the potential application of these murders to the crime of genocide is not discussed. Further, the *mens rea* and inclusion of transgender people in protected groups is not discussed.

Kritz’s research gives an in-depth analysis of transgender people and the potential protections afforded to them by the Rome Statute. While emphasis is placed on the “protected groups” section of article 6²⁰, limited discussion is made on the *actus rei* that would lead one to believe that a genocide against transgender people is occurring. The nominal discussion is in the form of the statement: “It does not require considerable imagination to conclude that a number

¹² Jeremy D. Kidd and Tarynn M. Witten, "Transgender and Transsexual Identities: The Next Strange Fruit—Hate Crimes, Violence and Genocide Against the Global Trans-Communities" [2008] J. Hate Studies 31, 50.

¹³ Ibid. 51.

¹⁴ Matthew Waites, “Genocide and Global Queer Politics”, Journal of Genocide Research (2017) 44, 46.

¹⁵ Ibid. 58.

¹⁶ Ibid. 60.

¹⁷ Haley Marie Brown, ‘The Forgotten Murders: Gendercide in the Twenty-First Century and the Destruction of the Transgender Body’ in John Cox, Amal Khoury, and Sarah Minslow, *Denial: the Final Stage of Genocide?*, (Routledge, 2023) 180, 186.

¹⁸ Jeremy D. Kidd and Tarynn M. Witten, "Transgender and Transsexual Identities: The Next Strange Fruit—Hate Crimes, Violence and Genocide Against the Global Trans-Communities" [2008] J. Hate Studies 31, 31.

¹⁹ Ibid. 41

²⁰ Brian Kritz, "The global transgender population and the International Criminal Court" [2014] Yale Hum. Rts. & Dev. LJ 1, 17.

of the *actus rei* enumerated in article 6 could be committed against transgender persons, with the intent to destroy, in whole or in part, the group.²¹”

Other literature leaves similar gaps on transgender genocide by examining hate crimes as genocide, a lack of focus on the *actus rei* of genocide, an exclusive focus on gay men as an umbrella term of “queer identities”, and nominal discussion on the present legislation that strips transgender people of their human rights. This paper will seek to mend these gaps through a focus on gender nonconforming groups and a full analysis of article 2 of the Genocide Convention as it relates to transgender people.

Research Question

This paper will examine transgender and other gender nonconforming people of different nationalities and different cultures to see if their experience can be considered genocide, or the “slow genocide”²² as described by some scholars. The focus of the paper will be on several countries that are often listed by scholars as having committed systematic killings against those in the LGBTQIA+ community, those who have stripped away human rights of LGBTQIA+ people, and countries that may undergo a slow genocide based on the information scholars gave decades ago. These countries include Russia²³, the United States²⁴, Nepal²⁵, and Iraq²⁶. Countries from the European Union will also be examined because of forced sterilization²⁷. Cases from these countries will be examined to offer a more thorough analysis of the elements of the crime of genocide as related to transgender people globally. If a single country were exclusively analyzed, some *actus rei* would have nominal discussion. This paper seeks to analyze all elements of the crime rather than one which is why multiple countries were selected. Unfortunately, analyzing multiple countries holds some limitations. The thesis is limited in the number of pages that can be used to describe the elements of the crime. As such, some information may be omitted. The debate on hate crimes as they relate to inciting genocide in the United States²⁸ could be an entire section on its own but is instead only briefly mentioned. Further, this global perspective does not allow for a comprehensive analysis on a single country’s actions. The crime of genocide would have to be proven in a single state, and this thesis does not focus on proving that genocide is actively occurring in a single country. Rather, it focuses on

²¹ Ibid. 16.

²² Caroline Fournet, ‘the Actus Reus of Genocide’ in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Taylor & Francis Group 2012) 49, 54.

²³ Human Rights Watch, “New Anti-Gay Crackdown in Chechnya” [2019].

²⁴ Jeremy D. Kidd and Tarynn M. Witten, “Transgender and Transsexual Identities: The Next Strange Fruit—Hate Crimes, Violence and Genocide Against the Global Trans-Communities” [2008] *J. Hate Studies* 31, 32.

²⁵ Human Rights Watch, “Nepal: ‘Sexual Cleansing’ Drive Continues” Web [2006].

²⁶ Jack Healy, “Killings Strike Fear in Iraqi Gay and Emo Youth” [2012] *The New York Times*.

²⁷ Anna Carastathis, “Compulsory Sterilisation of Transgender People as Gendered Violence,” *(In)Fertile Citizens: Anthropological and Legal Challenges of Assisted Reproduction Technologies* [2015] 79, 79.

²⁸ Shannon Fyfe, “Tracking Hate Speech Acts as Incitement to Genocide in International Criminal Law” [2017] *Leiden Journal of International Law* 523, 548.

whether genocide can be committed against transgender people based on the interpretations of the elements of the crime from legal scholars.

The paper will be divided into chapters to cover all aspects of Article II of the Genocide Convention and how they relate to gender nonconforming people: *protected groups*, *actus rea*, and *mens rea*. The paper will examine these elements of the crime individually. If transgender people cannot be considered a protected group in the first section, acts committed against transgender people will still be examined for whether those actions fit the *actus rei* described in article 2. The conclusion of this paper will then analyze all of the elements together to conclude whether genocide can be committed against transgender people.

Methodology

This paper will primarily examine article 2 of the Genocide Convention and whether acts of systematic violence and proposed or implemented laws against or related to transgender people can be considered genocide under the Convention. An overall analysis will be done using articles from legal scholars who have previously conducted research into genocide against LGBTQIA+ people, scholars who have examined genocide against nonprotected groups, and some instances of scholars outside of the legal field. Scholars outside of the legal field were chosen as a result of their association with NGOs specializing in violent crimes against transgender people, and previous work submitted to international organizations for the prevention of genocide against LGBTQIA+ people. Further, there is an added value of examining all scholars who have previously researched genocide against transgender people. As an example, the research of Jeremy Kidd will be examined despite his work as a psychologist. This is because the bulk of his work examines violence and the mental harm that comes from such violence against the global transgender community. His ideas will be analyzed in relevant sections as they relate to case studies.

The Genocide Convention will be the primary treaty of focus, but reference will also be made to the Rome Statute. Cases involving the Rome Statute are not discussed extensively in this paper. This is because the definitions of the elements of the crime are broad in their definitions, with varying interpretations of those definitions made by legal scholars as they might apply to cases. This paper seeks to analyze the elements of the crime as narrowly as possible, and therefore will examine case studies from the Statute of the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the Former Yugoslavia. These cases will be used because they are often the primary focus in many legal analyses involving groups of people who may not be considered a “protected group”. These definitions are more narrow in their scope and have been previously examined for their applicability in the elements of the crime against other groups, allowing a more streamlined analysis of the potential genocide against transgender people. Regardless, some elements are not covered extensively by these analyses or are not applicable to transgender people, and therefore require additional analysis from other sources. My intention when writing this paper is not to create my own interpretation of the primary

literature on genocide as that has already been done before. My research is on whether genocide could occur against transgender people using a combination of the primary literature and interpretations made by legal scholars.

Gender Nonconforming, Transgender, and the Difficulty of Recognition

This paper will primarily focus on gender nonconforming people. Gender nonconforming will mean any identity that does not fit the gender binary of male or female, and/or has a gender different from their sex²⁹. Due to the number of various identities across cultures, many identities within this umbrella term will not be mentioned, or may only be mentioned briefly. This paper will primarily use the term “transgender people”- that is, those who have a gender different from their sex, and “intersex people”- those who were born with ambiguous genitals. This is due to the legislation discussed in the paper that specifically affects “transgender people” as opposed to all gender nonconforming people. This is an issue with the generalization of the lawmakers, as it targets more than transgender people and instead targets any gender nonconforming identity such as those listed above.

When examining mass killings of queer people, it remains difficult to understand how many of the affected individuals were gender nonconforming. Forensic data relies heavily on the bones of an individual which will show a different gender identity to the one they held, or an identity card might be found that mislabels their gender and name³⁰. Many countries do not allow name or gender changes on identity cards which leads to information on an individual that is inaccurate³¹. Testimony on one’s true identity can usually only be acquired by those who knew the person. However, transgender people will go unidentified entirely because their identity will be labeled as their birth gender and name, leading families with an inability to recognize the deceased or claim their body³². As such, an accurate number of gender nonconforming people who have been killed in systematic executions globally can likely never be achieved.

A final consideration must be made regarding the debate on whether or not transgender people, as well as individuals from the LGBTQIA+ community as a whole, are born transgender, queer, or of a specific sexual orientation. To minimize the debate regarding this, an assumption will be made based on current literature in the field of neuropsychology that queer people are born queer³³. This distinction will prove important for this paper when discussing the elements of the crime of genocide.

²⁹ Patience Crozier, “Forcing Boys to be Boys: The Persecution of Gender Non-Conforming Youth”, *Boston College Third World Law Journal* (2001) 123, 123.

³⁰ Jeremy D. Kidd and Tarynn M. Witten, "Transgender and Transsexual Identities: The Next Strange Fruit—Hate Crimes, Violence and Genocide Against the Global Trans-Communities" [2008] *J. Hate Studies* 31, 36.

³¹ *Ibid.* 37.

³² Haley Marie Brown, ‘The Forgotten Murders: Gendercide in the Twenty-First Century and the Destruction of the Transgender Body’ in John Cox, Amal Khoury, and Sarah Minslow, *Denial: the Final Stage of Genocide?*, (Routledge, 2023) 180, 184.

³³ Georg S. Kranz and Andreas Hahn, “White Matter Microstructure in Transsexuals and Controls Investigated by Diffusion Tensor Imaging [2014] *Journal of Neuroscience* 15466, 15474; Ivanka Savic and Alicia Garcia-Falgueras, “Sexual differentiation of the human brain in relation to gender identity and sexual orientation” [2010] *Progress in Brain Research* 41, 60.

Chapter II: Protected Groups

Introduction

According to international law, the recognition of genocide against transgender people requires them to be one of the four protected groups as defined in the Genocide Convention. The four protected groups are “national, ethnical, racial or religious group[s]”³⁴. Research has been conducted extensively³⁵ regarding whether people of certain genders exposed to targeted and systematic gendered violence can be considered a protected group, but the answer is often no³⁶. In this section, an examination will be made on this previous research and its applicability to gendered groups. Further examination will be made of the claims of several scholars who believe they have found methods to circumvent the rigid definitions of the protected groups to include gendered groups. The second section of this chapter will specifically examine cultural third genders and whether these can be considered a protect group under the Genocide Convention. The purpose of this section is to examine whether gender nonconforming groups can be classified as a protected group or fit within any of the preexisting groups.

Global Transgender Population

Prior to a discussion on the results of previous research, an overview of the definitions of each protected group is necessary as well as their potential applications to transgender people at a global level. The Genocide Convention itself does not provide definitions for the protected groups, leaving the concepts ambiguous in interpretation. This has been heavily criticized by legal scholars who consider it a “blind spot”³⁷. The notion of “groups” in the Genocide Convention has been identified as consisting of individuals³⁸, and combined with the four groups, entails that a crime must be committed against a number of individuals on the basis of their national, ethnic, racial, or religious group membership. While transgender people can be considered a group consisting of a number of individuals, their identity within the four protected groups remains unclear. Transgender people can come from a multitude of backgrounds: different nationalities, religions, ethnicities, and races. As such, the concept of “group identity” within the four groups should be examined to better understand what “identity” members of a group must hold to be considered part of that group.

³⁴ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 12 January 1951) UNGA art 2.

³⁵ Eichert, David. "Expanding the Gender of Genocidal Sexual Violence: Towards the Inclusion of Men, Transgender Women, and People Outside the Binary." *UCLA J. Int'l L. Foreign Aff.* 25 (2020) 154, 159.

³⁶ Kritz, Brian, "The global transgender population and the International Criminal Court" [2014] *Yale Hum. Rts. & Dev. LJ* 1, 4.

³⁷ Beth Van Schaak, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot". [1997] *Yale L J.* 145, 152.

³⁸ Nehemiah, Robinson, *The Genocide Convention, A Commentary*. 1960. New York: Institute of Jewish Affairs, World Jewish Congress 1, 23.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) describes the concept of “group identity” in relation to the four protected groups:

“Article 4 (...) defines genocide as one of several acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group as such’. The term ‘as such’ has great significance, for it shows that the offense requires intent to destroy a collection of people who have a particular group identity”³⁹

Combined with the previous definition of a group, it can be gathered that a group of individuals holding a particular group identity can be considered a protected group. At this basic level, transgender people would fit the definition as they are a group of individuals who hold a similar group identity of being transgender. The categorization is based upon the same shared gender identity. However, this group identity would further have to fit within one of the four protected groups.

An important issue to consider with the four protected groups is that each involves that a person must be born into that group. While political groups, for example, were considered for inclusion as a protected group, it was found to be a matter of free will and therefore was not included in the Convention⁴⁰. As discussed previously, transgender people are born transgender. There is not a decision to be transgender, and no free will associated with it. A transgender person is born a member of the group. This fact could prove important when considering them as a protected group because their group membership is not a choice, a fact that appears necessary based on the delegates' hesitancy to add groups where membership is not granted at birth.

The definitions of the four groups themselves have been defined in varying ways across cases, tribunals, literature, and speeches. The protected groups are mentioned verbatim to the Genocide Convention in Art. 2 Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁴¹, Art. 4 Statute of the International Criminal Tribunal for Rwanda (ICTR)⁴², and Art. 6 Rome Statute of the International Criminal Court (ICC),⁴³ but usually lack a definitive conclusion on inclusion. The definitions will therefore be taken instead from varying cases like the *Akayesu* case. The *Akayesu* case has provided basic definitions for each of the protected groups.

A national group is identified as “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”⁴⁴ The

³⁹ *Prosecutor v. Milomir Stakic* (Trial Judgement), IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 July 2003 para. 20

⁴⁰ Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Leiden, Boston: Martinus Nijhoff Publishers 2008) 1271, 1312.

⁴¹ International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993)

⁴² International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994)

⁴³ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998)

⁴⁴ *Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 512

application of this definition to the Genocide Convention has been considered controversial⁴⁵ due to its reliance on a decision from the International Court of Justice (ICJ)⁴⁶ which defined the concept of “nationality” as opposed to “national identity”. A second definition was offered by Schabas who described a national group as: “national minorities [...] sharing cultural and other bonds with a given State, [who] may actually hold the nationality of another State, or who may even be stateless”⁴⁷. According to the definition given by the *Akayesu* case, transgender people would not fulfill the requirements of sharing a national group identity. Transgender people can be found globally in numerous countries without sharing a common legal bond based on common citizenship. They do not need to be born within a specific State to receive their group identity, they cannot be considered to have a common national identity. The definition provided by Schabas potentially allows for the inclusion of some third-gender groups specific to a nation or culture which is discussed in the second section of this chapter. As a whole, however, it is unlikely that transgender people can be categorized as a national protected group.

The *Akayesu* case defined an ethnic group as “a group whose members share a common language or culture”⁴⁸. Reference to ethnic groups have been included in several pieces of international legislation, including the International Covenant on Civil And Political Rights⁴⁹ and the Universal Declaration of Human Rights⁵⁰. Both provide a reference to the term “ethnic group” without providing a definitive definition. The Ethnicity Reader provides an in-depth evaluation of what an ethnic group could be defined as: “similarities of physical type or of customs or both”⁵¹, further, the sharing of a common culture, language, religion, and customs can all be attributed to creating an “ethnic group”⁵². Another definition of ethnic group defines it as “being alike by virtue of their common ancestry, real or fictitious, and who are so regarded by others”⁵³. Based on the definitions used in international law, transgender people are not part of a common ethnic group. Similar to a national group identity, this is because transgender people at the global level do not hold a common culture or language- they can be of different cultures and speak different languages. When using the definitions provided by legal scholars, transgender people likely still cannot be considered a protected ethnic group.

A religious group was defined as “one whose members share the same religion, denomination or mode of worship”⁵⁴. The religions or modes of belief included under this

⁴⁵ Schabas, William, “Groups Protected by the Genocide Convention: Conflicting Interpretation From the International Criminal Tribunal for Rwanda” 6 ILSA J. Int’l & Comp. L. 375, 375.

⁴⁶ Nottebohm Case, Judgement of 6 April [1955] ICJ Reports 24

⁴⁷ Schabas, William, “Groups Protected by the Genocide Convention: Conflicting Interpretation From the International Criminal Tribunal for Rwanda” 6 ILSA J. Int’l & Comp. L. 375, 382.

⁴⁸ *Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 513.

⁴⁹ International Covenant on Civil and Political Rights. (1976) 999 UNTS 176 Art. 27.

⁵⁰ UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948, Art. 2.

⁵¹ Guibernau, Montserrat & Rex, John. *The Ethnicity Reader*. 1997 Oxford: Polity. 13, 18.

⁵² *Ibid.* 19.

⁵³ Tamotsu Shibutani and Kian Kwan, *Ethnic Stratification: A Comparative Approach* (New York: Macmillan Company, 1965), 27, 42.

⁵⁴ *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 515.

protected group have been thoroughly argued, with conflicts from the United Kingdom during the 6th committee⁵⁵, the UN Human Rights Committee⁵⁶, and the Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief⁵⁷. The primary source of arguments come from whether non-theists, those belonging to a religious group who can easily leave, and those belonging to a religious group with worship relating to drugs can still be considered a protected group. Considering the definitions provided, transgender people are unlikely to belong to a protected religious group as a whole. Transgender people do not all follow the same religion that identifies them as being part of the group. The inclusion of religious groups in the Genocide Convention was heavily debated by the United Kingdom who argued the group should not be included on the basis that people can freely leave or join the religion as they desired⁵⁸. A similar sentiment has been made for transgender people, or those who are part of the LGBTQIA+ community as to why they should not be included in the Genocide Convention as a protected group⁵⁹. This has been argued against due to the idea that being gay or transgender is a choice. Rather, it has been cited in numerous reports that it is not a choice, and one cannot choose to be gay or to not be gay⁶⁰ in the same way a transgender person cannot choose to be transgender or to not be transgender. The LGBTQIA+ group identity is linked with the person in the same way religion has been linked to the person and thus included in the Convention. Further, the *Akayesu* case emphasized that the text was meant to only protect “permanent and stable” groups⁶¹ which would be a problem for transgender people who may not be considered permanent or stable for the reasons above.

Lastly, in the *Akayesu* case, the Tribunal decided, with regards to race:

*“The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”*⁶².

Similar to ethnic groups, racial groups lack a definition from international instruments despite being frequently referenced. The International Convention for the Elimination of All Forms of Racial Discrimination provides a brief distinction of “race, colour, descent, or national

⁵⁵ Schabas, William, “Groups Protected by the Genocide Convention: Conflicting Interpretation From the International Criminal Tribunal for Rwanda” 6 ILSA J. Int’l & Comp. L. 375, 381.

⁵⁶ General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights (1993) UN Doc. CCPR/C/21/Rev.1/Add.4, para. 2.

⁵⁷ Elimination of All Forms of Religious Intolerance, UNGA A/8330, 6 July 1971 para. 16-20.

⁵⁸ Schabas, William, “Groups Protected by the Genocide Convention: Conflicting Interpretation From the International Criminal Tribunal for Rwanda” 6 ILSA J. Int’l & Comp. L. 375, 381.

⁵⁹ Jeremy D. Kidd and Tarynn M. Witten, "Transgender and Transsexual Identities: The Next Strange Fruit—Hate Crimes, Violence and Genocide Against the Global Trans-Communities" [2008] J. Hate Studies 31, 37.

⁶⁰ Ibid. 38.

⁶¹ *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 701.

⁶² *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 512

or ethnic origin”⁶³. Scholars have further debated definitions of racial groups due to their reliance on physical characteristics⁶⁴. Regardless, however, it is unlikely that transgender people can be considered a racial group. The identification of “transgender” is linked to a group identity based on mental and physical characteristics, but not passed on via hereditary or based on geographic region.

With these rigid definitions, it appears clear that transgender people cannot be considered within the four protected groups of the Genocide Convention. Many legal scholars, however, have tried to find methods that would allow for the inclusion of groups that would not normally fall within the categories to be included within the four protected groups. Further, other scholars have argued against the inclusion of transgender people or other members of the LGBTQIA+ community for reasons other than not fitting within the four protected groups.

The concept of “group identity” was discussed previously as potentially including transgender people due to their identification in a shared group: they all hold the identity of being transgender. Brickelle Bro has explored the concept of group identity for disability, and how those who are disabled can be considered within the scope of the protected groups in the Genocide Convention. Bro argues that the definition of group identity paves the way for the inclusion of others into the protected groups category⁶⁵. Bro concludes that:

“The strongest argument that the international community needs to recognize disability as an identity group and provide protection under the Genocide Convention is the fact that those violating basic human rights already recognize it as a group. And those that recognize it as a group perpetrate violence against disabled people with the intent of destroying the group necessary to establish that a group exists”⁶⁶

A similar sentiment can be said regarding transgender people globally. The human rights abuses detailed in the *actus rea* section of this paper show the human rights abuses faced by transgender people, including bodily⁶⁷ and mental harm⁶⁸, systematic killings⁶⁹, and sterilization⁷⁰ which fulfill the requirements of the *actus rei* in the Genocide Convention. The anti-transgender laws passed in the United States categorize transgender people into a single group based on the shared characteristics of the group. While the language, race, culture, nationality, and mode of

⁶³ International Convention for the Elimination of All Forms of Racial Discrimination. (1969) 660 UNTS 195, art. 2(2) and 7

⁶⁴ William Schabas, The Genocide Convention at Fifty, United States Institute of Peace Report 41 (Web)

⁶⁵ Brickelle Bro, “Destroying Disability: Expanding the Application of the Genocide Convention.” [2021] ICLR, 124, 126.

⁶⁶ Ibid. 130.

⁶⁷ Dominic Scicchitano, “The “Real” Chechen Man: Conceptions of Religion, Nature, and Gender and the Persecution of Sexual Minorities in Postwar Chechnya”. Journal of Homosexuality, 1, 3.

⁶⁸ Establishes the "Missouri Save Adolescents from Experimentation (SAFE) Act" and modifies provisions relating to public funding of certain gender transition procedures, MOSB49 [2023] .

⁶⁹ Dominic Scicchitano, “The “Real” Chechen Man: Conceptions of Religion, Nature, and Gender and the Persecution of Sexual Minorities in Postwar Chechnya”. Journal of Homosexuality, 1, 3.

⁷⁰ Jon Ostrowsky, “Birth Certificate Gender Corrections: The Recurring Animus of Compulsory Sterilization Targeting Transgender Individuals.” UCLA Women’s Law Journal, 273, 273.

worship of transgender people in the United States may be different, other characteristics remain shared, recognizing them from other groups.

US HB3328 groups transgender people based on “the development of feminizing or masculinizing features (in the opposite gender)”⁷¹. Most of the anti-transgender legislation also attempts to establish a definition between “biological sex” and “gender”⁷²⁷³⁷⁴. An unmatched biological sex and gender is the shared characteristic used in this situation. Several of the laws do not offer a definition of “transgender”, instead grouping transgender people by no shared characteristics other than self-identity⁷⁵.

In general, a biological sex that does not match one’s gender is the shared characteristic between transgender people. Psychological sciences further this through the concept of *gender dysphoria*: a person has a mental conflict regarding their biological sex and gender. The conflict must be so great as to cause mental discomfort in the individual⁷⁶.

Transgender people do have a group identity that is shared amongst other transgender people. There are shared characteristics that can be traced between transgender individuals, although these collective characteristics do not fall within the scope of the protected groups within the Genocide Convention, nor while using the definitions found in the judgement of the *Akayesu case*⁷⁷. The identity could potentially fall within the scope of a “group identity” as described in the *Stakić case*⁷⁸. This concept was used by Bro to showcase how disabled people can fit within a group identity⁷⁹. Since there is a shared identity for transgender people all under the umbrella term of “gender nonconforming”, they could fit here. However, an argument can further be made that the concept of a “group identity” by the ICTY is solely related to the importance of an identity for already protected categories of people. That is, those belonging to a group based on nationality, ethnicity, religion, or race.

In conclusion, when examining transgender people at a global level and categorizing them based on gender identity, they do not fit into the four protected groups of the Genocide Convention. The definitions provided by international cases and instruments have been criticized by scholars for poor wording and the exclusion of certain people, in particular national groups

⁷¹ Protecting Children From Experimentation Act of 2023, US HB 3328 [2023].

⁷² A bill for an act prohibiting persons from entering single and multiple occupancy restrooms or changing areas and other facilities in elementary and secondary schools that do not correspond with the person's biological sex and including effective date provisions, IA SF482 [2023].

⁷³ To Create The Given Name Act; And To Prohibit Requiring Employees Of Public Schools And State-supported Institutions Of Higher Education To Use A Person's Preferred Pronoun, Name, Or Title Without Parental Consent, AR HB1468 [2023].

⁷⁴ Pronouns; biological sex; school policies, AZ SB1001 [2023].

⁷⁵ Preferred pronouns and providing accommodations to a transgender student; to provide a penalty; and to declare an emergency, ND HB 1522 [2023].

⁷⁶ Jack Turban, “Gender Dysphoria”. American Psychiatric Association [2022] Web.

⁷⁷ *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998 para. 512, 513, 515.

⁷⁸ *Prosecutor v. Milomir Stakić (Appeal Judgement)*, IT-97-24-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 March 2006, para. 20

⁷⁹ Brickelle Bro, “Destroying Disability: Expanding the Application of the Genocide Convention.” [2021] ICLR, 124, 125.

that do not hold the citizenship of the State in which they reside⁸⁰, those who can assimilate into an ethnic group⁸¹, and agnostic groups⁸², but do provide broad definitions that are used in examining the protected groups. When applying scholar definitions, there is more flexibility in potentially including people holding a third-gender identity linked to a specific culture.

Two-Gender, Meti, and Other Cultural Groups

Transgender people globally cannot be considered a protected group under the strict definitions found within the *Akayesu* case. It may be possible for other specific gender nonconforming groups to be protected under the genocide convention including those who identify as a third gender based on cultural norms and nonconforming groups may be capable of consideration as a whole under queer culture.

“Third gender” is a term coined for people who do not fall within the gender binary structured within some cultures of “male” and “female”⁸³. Usually, third gender is an umbrella term to describe other genders (even those beyond three) in a culture. Third genders include two-spirit, *meti*, *māhū*, *fa'afafine*, Balkan sworn virgins, and hijras⁸⁴. While some have been legally recognized in the states they reside, others still lack legal definitions despite being important parts of a culture.

Since they are important parts to a culture, systematic attacks against them may be capable of being included in one of the four protected groups. Indigenous two-spirit Americans, for example, are part of an ethnic group that share a common language and culture. Two-spirit people are considered important members of the society in which they belong. The Ethnic Reader defines an ethnicity as having “similarities of physical type or of customs or both⁸⁵”, which would potentially classify two-spirit people as an ethnic group. The primary issue with this, as well as other cultural groups, is that it’s unlikely the ethnic group would be related to their classification as a third or fourth gender. Rather, their identification as an indigenous American would relate to their ethnic group, or their identification as a Nepalese citizen, or other classification. The gender identity itself would not qualify as a protected group. If a mass killing occurred against indigenous Americans, it is likely their classification as indigenous would be considered instead of their gender. As stated previously, gender is not a protected group and therefore transgender people cannot be considered in the protected groups, even if another variable exists.

⁸⁰ Claus Kress, “The Crime of Genocide Under International Law”, *International Criminal Law Review* [2006], 461, 476.

⁸¹ Eric Weitz, *Genocide: Utopias of Race and Nation* (Princeton and Oxford: Princeton University Press 2003), 1, 21.

⁸² Gerhard Werle, Florian Jessberger, *International Criminal Law* (Oxford: Oxford University Press, 3. ed. 2014) para. 802.

⁸³ Niko Besnier and Kalissa Alexeyeff, “Gender on the Edge: Transgender, Gay, and Other Pacific Islanders”, *University of Hawaii Press* (2014) 241, 241.

⁸⁴ Morgan Holmes, “Locating Third Sexes”, *Regions of Sexuality* 8 (2004) 1, 4.

⁸⁵ Guibernau, Montserrat & Rex, John. *The Ethnicity Reader*. 1997 Oxford: Polity. 1, 18.

Queer culture, however, is a unique concept that some legal scholars believe could circumvent the current protected groups classifications to allow anyone part of the LGBTQIA+ community to be considered within the ethnic group category. Queer culture is the culture surrounding the LGBTQIA+ community. It is a shared sense of understanding and knowledge related to what it means to be a member of the group, and it has transformed across decades of violence and oppression⁸⁶. What does queer culture look like? It is different from person to person, and from scholar to scholar. Bauer argues that queer culture, contrary to many other cultures, is not a celebration. Instead, it is a mourning of the numerous deaths, of sexual violence and oppression that occurred across centuries⁸⁷. Further argued is that queer culture from the past was a shared understanding of violence, but now is a celebration from those in the past, and those today⁸⁸.

Queer culture appears to have varied definitions, as well as varied thoughts on its representation. Those part of the LGBTQIA+ community may also reject queer culture in its entirety. Can queer culture then be a protected group? This is also unlikely. For queer culture to be a protected ethnic group, its members must share a common language or culture. Queer culture does appear to vary greatly across countries, with different ideas of what it represents meaning that it is not a shared experience between people. Further, some members may not identify with queer culture at all. With split ideas of what queer culture is, and with members of the LGBTQIA+ community divided in its meaning, its unlikely to be considered a protected group. There has also been a striking lack of legal analysis regarding queer culture, which makes its understanding limited from a law perspective. It is primarily a social group as opposed to a legally recognized group.

⁸⁶ Heike Baurer, "Violence, Death, and Modern Queer Culture", [2017] Temple University Press, 1, 3.

⁸⁷ Ibid. 39.

⁸⁸ David Alderson, "Sex, Needs and Queer Culture: From Liberation to the Postgay", [2016] Bloomsbury Publishing 1, 7.

Chapter III: Actus Rea

Introduction

In order to prove the crime of genocide was committed, article 2 of the Genocide Convention must be taken into consideration. It reads as follows:

“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.⁸⁹*

For the crime of genocide to be recognized as having been committed, it is necessary that one of the acts listed under article 2 of the Genocide Convention, or article 6 of the Rome Statute, be committed. As such, the atrocities committed against transgender people would need to be categorized within one of the acts recognized in article 2 of the Convention. In this chapter, an in-depth analysis will be made on whether various atrocities, rights restrictions, and legislation can fall within these acts. This analysis will be accomplished by examining individual cases within different countries and comparing the acts with the *actus rei* described in the Genocide Convention.

Article 2(a): Killing Members of the Group

Article 2(a) of the Genocide Convention has been criticized for its usage of the word ‘killing’ as opposed to a word found more commonly in criminal texts such as murder⁹⁰. ‘Killing members’ implies any number of people above one can be constituted as genocide under article 2(a), and it does not give reference to how the people are killed. Killing someone from a group can be accidental⁹¹. The definition of ‘killing’ would later be defined in the *Musema* Trial Chamber to mean “homicide committed with intent to cause death.”⁹² In the judgment of *Semanza*, the definition of killing was defined even further to mean:

⁸⁹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 12 January 1951) UNGA art 2

⁹⁰ John Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate 2007) 1, 94.

⁹¹ Caroline Fournet, ‘the Actus Reus of Genocide’ in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Taylor & Francis Group 2012) 49, 52.

⁹² *The Prosecutor v. Alfred Musema* (Judgement and Sentence), ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, para 155.

“In order to be held criminally liable for genocide by killing members of a group, in addition to showing that an accused possessed an intent to destroy the group as such, in whole or in part, the Prosecutor must show the following elements: (1) the perpetrator intentionally killed one or more members of the group, without the necessity of premeditation; and (2) such victim or victims belonged to the targeted ethnical, racial, national, or religious group.”⁹³

As the four protected groups will be discussed later in a separate chapter, the focus will solely be on element one described in the *Semanza* judgment. This section will determine if article 2(a) can be applied to the intentional killings of transgender people.

In February 2012 in Iraq, the Baghdad Morality Police targeted teenage males described as “emo”: those who had long hair, wore tight clothing, and were otherwise considered “strange”. Flyers appeared in Baghdad that threatened death to the “crossdressing gays” of Baghdad. A warning was given to the teens to conform to a gender normative style or face arrest. In March 2012, security officers kidnapped an undisclosed number of teenage men from their homes and in the streets. Many were detained without a trial, tortured, and eventually killed, while others were reportedly killed outright.⁹⁴ Officially, the Interior Ministry places the death toll at 6, and the United Nations officially placed the number at 12, but believes the exact count is in the hundreds accounting for missing persons after the raid.⁹⁵

The Iraqi Emo Killings of 2012 are considered by legal scholars to be a strong case for genocide that targeted gay men.⁹⁶ However, it has also been debated whether this is instead systematic killings of transgender people based on the non-normative gender expression the teens held⁹⁷. Based on the usage of the term “crossdresser” used by the Morality Police and the targeted attack specifically due to their gender expression, this will be analyzed as a transgender issue as opposed to an attack against gay teenagers. The Iraqi Emo Killings were a systematic attack perpetrated by the state with the intention of causing numerous deaths to members of a specific group. The Morality Police were given specific orders from the Interior Ministry to target the teenagers, kidnap them, and kill them⁹⁸. Since the police were given explicit orders to kill the teenagers, it can be stated that they possessed an intention to destroy the group of crossdressing men in the city. Element one is satisfied since numerous teenagers from the group were killed by the perpetrator (the Morality Police) intentionally. This case fulfills the *actus rea* of article 2(a) of the Genocide Convention.

In 2017, numerous men identified as gay by the government in Chechnya were abducted from their homes, tortured, and killed as a result of a newly introduced amendment, “for the

⁹³ *The Prosecutor v. Laurent Semanza (Judgement and Sentence)*, ICTR-97-20-T, International Criminal Tribunal for Rwanda (ICTR), 15 May 2003, para 319.

⁹⁴ Jack Healy, “Killings Strike Fear in Iraqi Gay and Emo Youth” [2012] *The New York Times*, Web.

⁹⁵ Natalia Antelava, “BBC investigation reveals police persecution of gays in Iraq” [2012] *BBC*, Web.

⁹⁶ Brian Kritz, “The global transgender population and the International Criminal Court” [2014] *Yale Hum. Rts. & Dev. LJ* 1, 2.

⁹⁷ *Ibid.* 3.

⁹⁸ Jack Healy, “Killings Strike Fear in Iraqi Gay and Emo Youth” [2012] *The New York Times*, Web.

Purpose of Protecting Children from Information Advocating a Denial of Traditional Family Values”⁹⁹. The implementation of this amendment to the law, “On Protecting Children from Information Harmful to Their Health and Development” caused what activists consider a “gay purge”¹⁰⁰. Every group deemed to go against traditional family values was arrested and killed in a mass detention center in Argen¹⁰¹. This overwhelmingly affected those belonging to the LGBTQIA+ community, including gay and transgender men. The number of those dead are unknown, but there are reports of mass graves around Argen containing those who were killed during the arrests.

Similar to the Iraqi Emo Killings, the mass execution of LGBTQIA+ people in Russia would fulfill the *actus rea* described in article 2(a). According to advocates, transgender Russians were one of the groups targeted for arrest and detention in Argen¹⁰². The individuals were abducted and purposefully killed in large groups due to their identification with the LGBTQIA+ community¹⁰³. This fulfills element one as described in the *Semanza* case, thus fulfilling the requirements of article 2(a). This mass killing can be considered a genocide against transgender people in Russia.

In most literature concerning the genocide of transgender people, hate crimes are listed as a form of genocide¹⁰⁴. Individuals who commit murder against either a confirmed or perceived transperson are considered to have fulfilled article 2(a) of killing members of a group¹⁰⁵. While the number of hate crimes and murders against transgender people are staggering, the potential for these crimes to be considered “genocide” is less certain. While a person may intentionally target someone who is transgender because of their gender identity, whether they intended to destroy the group in whole or in part would be unclear. Kidd includes a description of a hate crime against a transwoman in California, in which she was assaulted and mugged after the assailant learned her gender identity¹⁰⁶. However, this instance appears to be less of an intent to “destroy a group” but rather a crime committed out of aggression. It would be difficult to examine single cases of hate crimes against transgender people as potentially having genocidal motivations. Kidd admits that for many of the crimes listed in his article, a motivation was never released¹⁰⁷. This further makes an analysis complicated. With limited information on motivations, the analysis by Kidd that transgender murders are a result of hate crimes and fulfill

⁹⁹ For the Purpose of Protecting Children from Information Advocating a Denial of Traditional Family Values [Russia].

¹⁰⁰ Human Rights Watch, “New Anti-Gay Crackdown in Chechnya” [2019] Web.

¹⁰¹ Graeme Reid, “Russia, Homophobia and the Battle for ‘Traditional Values’” [2023] Social Europe, Web.

¹⁰² European Center for Constitutional and Human Rights, “The Brutal Persecution of LGBTQ in Chechnya” [2020], Web.

¹⁰³ Human Rights Watch, “New Anti-Gay Crackdown in Chechnya” [2019].

¹⁰⁴ Shannon Fyfe, “Tracking Hate Speech Acts as Incitement to Genocide in International Criminal Law” [2017] *Leiden Journal of International Law* 523, 548.

¹⁰⁵ Jeremy D. Kidd and Tarynn M. Witten, “Transgender and Transsexual Identities: The Next Strange Fruit—Hate Crimes, Violence and Genocide Against the Global Trans-Communities” [2008] *J. Hate Studies* 31, 50.

¹⁰⁶ *Ibid.* 51.

¹⁰⁷ *Ibid.* 50.

article 2(a) of the Genocide Convention can only be argued for the lack of information provided. It is unlikely these murders can fulfill article 2(a) of the Convention.

In conclusion, variance exists in perceived genocide between different legal scholars. Further, not all the events listed by scholars can fulfill the *actus rea* of article 2(a). Issues such as the Iraqi Emo Killings and the Chechnya gay purge would fulfill the requirements of article 2(a) based on the definition given in the *Semanza* case. However, this is only true if the second element regarding the protected groups is eliminated: only element one has been analyzed with regard to these issues. The more broad examination of genocide given by Kidd would more accurately be labelled as a homicide or hate crime. As such, the current problems in the United States likely cannot be considered under article 2(a) of the Genocide Convention.

Article 2(b): Causing serious bodily or mental harm to members of the group

Similar to article 2(a), article 2(b) is heavily criticized by legal scholars for its potentially broad interpretation¹⁰⁸. Some definitions offered include that of the ICTR:

“to a large extent, ‘causing serious bodily harm’ is self-explanatory. This phrase could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses¹⁰⁹”

This definition still received numerous criticisms due to its lack of clarification regarding which acts constitute as causing serious bodily harm. As such, the definitions that will be used for this section are two provided by the *Krstić* Trial Chamber: “an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury¹¹⁰” and:

“Serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.¹¹¹”

Aside from those given by the *Krstić* Trial Chamber, examples of serious bodily and mental harm include “non-fatal physical violence that causes disfigurement or serious injury to

¹⁰⁸ Nema Milaninia, “Understanding Serious Bodily or Mental Harm as an Act of Genocide” [2018] 51 Vanderbilt Journal of Transnational Law 1381, 1383.

¹⁰⁹ *The Prosecutor v. Clément Kayishema and Obed Ruzindana (Appeal Judgement)*, ICTR-95-1-A, International Criminal Tribunal for Rwanda (ICTR), 1 June 2001, para 109.

¹¹⁰ *Prosecutor v. Radislav Krstic (Appeal Judgement)*, IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004, para 484.

¹¹¹ *Ibid.* para 486.

the internal or external organs¹¹², degrading treatment¹¹³, enslavement¹¹⁴, persecutions¹¹⁵, starvation¹¹⁶, and interrogations that include violent beatings for information¹¹⁷. The definition for mental harm is even more heavily debated¹¹⁸, with the original meaning including only harm caused through the forcible injection of pharmacological substances¹¹⁹. For the purpose of this paper, the definition used will be that of the *Gacumbtsi* case: “serious mental harm can be construed as some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim.¹²⁰” Some acts that fulfill this criteria include infliction of fear or terror and intimidation¹²¹. This paper will briefly examine the inclusion of discrimination and slurs as mental harm¹²², as suggested by legal scholar Bryant.

This section will seek to apply article 2(b) of the Genocide Convention to various harms gender nonconforming people have faced globally at a systematic level. It will also examine claims made by other legal scholars and advocates regarding whether other harms can be constituted as a serious bodily or mental harm under this article.

In Nepal, a “sexual cleansing” is occurring against a cultural third gender of people, the *meti* and *hijra*. Over the past two decades, third genders in Nepal have experienced severe discrimination and rights violations that have been documented by human rights advocates¹²³. Unfortunately, most of the abuse faced by the two remains undetected due to the detention and expulsion of advocates attempting to gather information on them¹²⁴. The Nepalese police have detained dozens of people identifying as a third gender for the arbitrary reason of “disturbing the peace”, and refused access to a lawyer. Human rights reports also claim the groups are subject to routine beatings, sexual assault, and torture¹²⁵.

¹¹² *Prosecutor v. Athanase Seromba (Trial Judgement)*, ICTR-2001-66-I, International Criminal Tribunal for Rwanda (ICTR), 13 December 2006, para 46.

¹¹³ *Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para 504.

¹¹⁴ *Attorney General v. Adolf Eichmann (Judgment)*, No. 40/61 11, District Court of Jerusalem, 11 December 1961 para. 340.

¹¹⁵ *Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998 para 504.

¹¹⁶ *Attorney General v. Adolf Eichmann (Judgment)*, No. 40/61 11, District Court of Jerusalem, 11 December 1961 para. 340.

¹¹⁷ *Prosecutor v. Blagojevic and Jokic (Trial Judgment)*, IT-02-60-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 January 2005 para 646.

¹¹⁸ Stephen Gorove, “The Problem of ‘Mental Harm’ in the Genocide Convention”, (1951) *Washington University Law Quarterly*, 174, 187.

¹¹⁹ *Prosecutor v. Radislav Krstic (Appeal Judgement)*, IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004, para 510.

¹²⁰ *Prosecutor v. Milutinovic et al. (Judgment) - Volume 4*, IT-05-87-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2009, para 291.

¹²¹ *The Queen v Munyaneza (Désiré) (Trial decision)*, QCCS 2201, [2009] QJ No 4913, ILDC 1339 (CA 2009), 22 May 2009, para. 89.

¹²² Bunyan Bryant, ‘Substantive Scope of the Convention’, (1975) 16 *Harvard International Law Journal*, 686, 686.

¹²³ Human Rights Watch, “Nepal: ‘Sexual Cleansing’ Drive Continues” Web [2006].

¹²⁴ Human Rights Watch, “Nepal: ‘Sexual Cleansing’ Drive Continues” Web [2006]

¹²⁵ *Ibid.*

The “sexual cleaning” occurring in Nepal could be considered under article 2(b) of the Genocide Convention. The harm inflicted against the cultural third genders includes humiliation, but goes beyond embarrassment. It includes torture, rape, and sexual abuse which are all acts that have all been recognized as grave harms by the *Krstić* Trial Chamber and can be considered under article 2(b)¹²⁶.

The harms committed by the *meti* and *hijra* are similar to the harms discussed in the previous section regarding Iraq and Chechnya. In Iraq, the teenage boys that were detained were also tortured prior to their deaths¹²⁷. In Chechnya, men in the detention camps were tortured to give the names of other gay men, raped, sexually abused, and disfigured prior to their death¹²⁸. These acts were meant to cause serious bodily and mental harm to members belonging to a specific group of people: those with a gender expression different from their gender assigned at birth¹²⁹. All of these acts can be categorized under article 2(b).

Legal scholars have also considered whether the bodily harm intersex people face in many countries shortly after birth can be categorized in this article. According to Eichert, intersex people experience genocide because of the sexual violence they are subjected to, including genital mutilation to conform to a more “aesthetic” appearance fitting the gender binary. This forced transition has led to severe mental anguish later in life and results in many intersex people committing suicide¹³⁰. This destruction of the intersex body is an attempt to destroy their identity within the group to fit a cultural norm. Those born with both a penis and a vagina, for example, will usually have the penis removed. This is also in cases where the individual is born with primarily male anatomy but the penis is deemed aesthetically displeasing. While showing characteristics primarily associated with men, the child will be forcefully raised as a girl. This further causes mental harm later in life¹³¹.

Could the actions performed by doctors in Western countries to “correct” intersex people at birth be considered genocide under article 2(b)? To analyze, the definition given by the ICTR will be examined. The actions must “mean to harm” or “seriously injure the health” of the individual, “cause disfigurement” or injuries to the external or internal organs¹³². The major issue with considering this surgery under article 2(b) is the phrase “mean to harm”. It would be very difficult to argue that the doctors intentionally perform the surgery with the intention of harming the infant. Further, while there are injuries that can happen that seriously injure the health of the infant, these are rare and are also not done purposefully to harm the infant¹³³. These injuries

¹²⁶ *Prosecutor v. Radislav Krstić (Appeal Judgement)*, IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004, para 510

¹²⁷ Mohammed Tawfeeq, “Iraqi murders put gay and emo youth on edge” CNN World [2012] Web.

¹²⁸ Human Rights Watch, “New Anti-Gay Crackdown in Chechnya” [2019].

¹²⁹ Human Rights Watch, “Nepal: ‘Sexual Cleansing’ Drive Continues” [2006] Web.

¹³⁰ David Eichert, “Expanding the Gender of Genocidal Sexual Violence: Towards the Inclusion of Men, Transgender Women, and People Outside the Binary” [2020] *UCLA J. Int’l L. Foreign Aff.* 154, 159.

¹³¹ *Ibid.* 157.

¹³² *Prosecutor v. Radislav Krstić (Appeal Judgement)*, IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004, para 510

¹³³ David Eichert, “Expanding the Gender of Genocidal Sexual Violence: Towards the Inclusion of Men, Transgender Women, and People Outside the Binary” [2020] *UCLA J. Int’l L. Foreign Aff.* 154, 157.

usually do result in the permanent disfigurement of the genitals¹³⁴, but again only occur as an accident. The removal of the external organs are intentional, but not to intentionally bring suffering either physically or mentally to the child. The mental harm caused later in life as a result of the surgery is currently an unexplored topic, with only a few reports made¹³⁵. Further examination would be needed and reported. If a doctor knowingly performs the surgery knowing it causes mental anguish later in life, then the surgery could potentially be considered under article 2(b). However, based on current research, it is difficult to determine whether the surgery fulfills the requirements found in article 2(b) to be considered genocide.

Aside from intersex people, Eichert also discusses the usage of sexual violence against gender nonconforming people in times of war. While this violence would likely fall under crimes against humanity, it is examined from the broad lens of international criminal law. Eichert argues that gender nonconforming people are subjected to rape that is purposefully meant to eliminate members of the group: transwomen are subjected to rape that causes severe internal injuries in the intestines and bladder, and transmen are subjected to rape that permanently disfigures their reproductive system. Further, those who survive these attacks can also suffer from a sexually transmitted disease that might cause disfigurement or death¹³⁶. These acts do fulfill the requirements of article 2(b), since these acts are grave acts of harm intended to physically and mentally harm an individual.

Article 2(c): Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

Article 2(c) is generally understood to relate to the systematic deprivation of essential resources to a group of people imposed to bring about the destruction of the group in whole or in part¹³⁷. The actions that could potentially be included under the article include the deprivation of food and water, reduction of medical services¹³⁸, denial of housing and work, and the confiscation of property¹³⁹. The deprivation of these basic necessities by the government to eliminate the group in whole or part would be a systematic deprivation of rights¹⁴⁰.

For the purpose of this paper, the above definition and scope of the article will be used. While other references have been made to the inclusion of sexual violence and previous actions found in article 2(b)¹⁴¹, selected cases can be found within the associated section. As stated by Fournet,

¹³⁴ Ibid. 156.

¹³⁵ Ibid. 158.

¹³⁶ Ibid. 160.

¹³⁷ Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960) 64.

¹³⁸ Ibid. 65.

¹³⁹ Caroline Fournet, 'the Actus Reus of Genocide' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Taylor & Francis Group 2012) 49, 64.

¹⁴⁰ Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960) 64.

¹⁴¹ *Prosecutor v. Clément Kayishema and Obed Ruzindana (Appeal Judgement)*, ICTR-95-1-A, International Criminal Tribunal for Rwanda (ICTR), 1 June 2001, para 116.

“The infliction of conditions of life calculated to bring about the physical destruction of the group must be intentional and it is this intent to destroy which will then, and only then, characterize the act as genocidal¹⁴²”

This section will seek to define whether the conditions of life imposed on gender nonconforming people in selected countries constitute as a form of genocide according to article 2(c) of the Genocide Convention.

In the United States, transgender people have been targeted for discrimination in access to housing, employment, and healthcare¹⁴³. Further, Kidd claims the inability of transgender people to work with some employment agencies, such as the United States military, qualifies the discrimination as genocide under article 2(c)¹⁴⁴. The United States lacks a federal anti-discrimination law that would ensure the protection of transgender people to purchase housing and find employment. Only thirteen states recognize transgender people as a protected group under anti-discrimination laws. Kidd argues that as a result of the lack of national laws to protect transgender people, most are denied shelter and work, thus resulting in a high population of homeless and unemployed individuals¹⁴⁵.

Kidd’s assessment of the discrimination faced is unlikely to fall within the scope of article 2(c) of the Genocide Convention. The prohibitions must be systematically done by a state¹⁴⁶ with the intention to destroy a group in whole or in part¹⁴⁷. While the United States does not provide anti-discrimination laws at the federal level, it has also not created laws that would withhold all housing or all employment opportunities to transgender people at the federal level. The transgender military ban of 2019 did attempt to restrict transgender people from enrolling in the military, but was overturned in 2021¹⁴⁸. Despite the overturn of the ban, several states have attempted to enact their own bans and urge Congress to reinstate a ban with stronger regulations. Reasons for the ban include that transgender people cannot have a “warrior ethos¹⁴⁹” and they are too unstable as a result of gender dysmorphia¹⁵⁰.

The military ban cannot constitute a violation of article 2(c), as a restriction of a single place of employment does not deprive transgender people of employment opportunities elsewhere. As such, there is not a deprivation of rights occurring to bring about the destruction of the group. Further, while companies alone can discriminate against the hiring of transgender people, it is not a systematic deprivation.

¹⁴² Caroline Fournet, ‘the Actus Reus of Genocide’ in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Taylor & Francis Group 2012) 49, 66.

¹⁴³ Jeremy D. Kidd and Tarynn M. Witten, "Transgender and Transsexual Identities: The Next Strange Fruit—Hate Crimes, Violence and Genocide Against the Global Trans-Communities" [2008] *J. Hate Studies* 31, 51.

¹⁴⁴ *Ibid.* 52.

¹⁴⁵ *Ibid.* 53.

¹⁴⁶ Draft Convention on the Crime of Genocide, UN Doc. E/447, 26 June 1947, 25.

¹⁴⁷ Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960) 64

¹⁴⁸ Expressing opposition to banning service in the Armed Forces by openly transgender individuals, H.Res.124 [2019]

¹⁴⁹ United States Department of Defense, FL S1382 [2023]

¹⁵⁰ Ensuring Military Readiness Act of 2023, US HB1064 [2023]

Regardless of the inability to classify the discrimination found in housing and employment as genocide under article 2(c), a case can be made based on national laws that prohibit access to healthcare for transgender people. Numerous states across the country have enacted or proposed laws that would eradicate treatment for children with gender dysmorphia,¹⁵¹ or allow for the refusal of any healthcare including in cases of emergency for transgender individuals¹⁵². Further, these bills have also been proposed at the federal level¹⁵³¹⁵⁴ to restrict healthcare for transgender children and adults. According to FL H0747:

“Provides that health care providers & health care payers have right to not participate in or pay for any health care services that violate their consciences; prohibits person from taking or threatening to take adverse action against such providers & payers for specified actions; provides for civil remedies & damages; provides immunity from civil, criminal, & administrative liability for such providers & payers under certain circumstances.”¹⁵⁵”

A person who is transgender, intersex, or gender nonconforming can be refused service for any reason under this legislation, allowing for discrimination and restriction of all medical procedures. However, this is not a ban on all medical treatment for transgender people. Transgender people may be denied healthcare from some providers, but not all. The legislation does not state a full withholding of medical treatment for gender nonconforming individuals. Even if the deprivation of healthcare services can be made in times of emergency, this wording is not enough alone to show a systematic deprivation that would bring about the group’s destruction.

Other than laws in the United States, limited information is available regarding potential issues that could fulfill the requirements of article 2(c). Focus is primarily placed on torture, detention, and killings that have occurred in other countries. It is unknown whether food and water deprivation occurred, or if discrimination in healthcare and housing is so rampant that it could be considered a deprivation of basic necessities. Without information available, it is difficult to determine the extent to which article 2(c) is violated.

¹⁵¹ Enact Ohio Saving Adolescents from Experimentation (SAFE) Act, OH HB68 [2023]; Public health, medical procedures for minors intended to alter appearance of gender prohibited, exceptions provided, criminal penalties provided, AL HB150 [2022]; House Substitute for SB 233 by Committee on Health and Human Services - Enacting the forbidding abuse child transitions act, restricting use of state funds to promote gender transitioning, prohibiting healthcare providers from treating children whose gender identity is inconsistent with the child's sex, authorizing a civil cause of action against healthcare providers for providing such treatments, requiring professional discipline against a healthcare provider who performs such treatment, prohibiting professional liability insurance from covering damages for healthcare providers that provide gender transition treatment to children and adding violation of the act to the definition of unprofessional conduct for physicians and nurses, AL HB150 [2022]

¹⁵² Protections of Medical Conscience, FL H0747 [2022] para 1

¹⁵³ End Taxpayer Funding of Gender Experimentation Act of 2023, US HB3329 [2023]

¹⁵⁴ Protecting Conscience in Our Health Care Act, US HB6258 [2023]

¹⁵⁵ Protections of Medical Conscience, FL H0747 [2022] para 1

Based on this information, it is difficult to say whether article 2(c) is violated anywhere in the world. The proposed law in the United States would deprive transgender people access to healthcare, but some healthcare access may still be available to them. Further, other legal scholars' claims that discrimination in the United States violates article 2(c) are insufficient in proving the violation. Based on the information provided, it remains unclear whether these cases could violate the article. Further, limited information exists for other countries facing transgender killings, which makes it difficult to determine the extent the article is violated.

Article 2(d): Imposing measures intended to prevent births within the group

Article 2(d) was defined extensively in several judgements, with the most extensive definition given in the *Akayesu* case. While this definition has also faced criticism for its overlap with the definition of crimes against humanity, it provides the most thorough understanding of the article and was used in a Tribunal judgment. The definition given in the judgment was:

“For purposes of interpreting Article 2(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.”¹⁵⁶

Based on the definition given above, this section will seek to examine whether the actions committed against gender nonconforming people can be considered an act meant to prevent births within a group, and thus be considered a genocidal act.

The practice of sterilization is still practiced against transgender people in several countries. Compulsory sterilization is often a preliminary step to gender reassignment surgery, in which for an individual to legally transition to their desired gender, they must be sterilized¹⁵⁷. This is the case in both several countries in the European Union including Belgium, Finland, Greece, Latvia, Luxembourg, and Slovenia¹⁵⁸ and multiple states in the United States, such as California¹⁵⁹. While the countries in Europe require it prior to gender reassignment surgery, states in the United States often require it prior to the issuance of an identity document containing information that would show a preferred gender¹⁶⁰.

¹⁵⁶ *Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para 507

¹⁵⁷ Anna Carastathis, "Compulsory sterilisation of transgender people as gendered violence" [2015] In) *Fertile Citizens: Anthropological and Legal Challenges of Assisted Reproduction Technologies* 79, 79.

¹⁵⁸ European Parliament, *Forced Sterilization of Transgender People*, Parliamentary question - E-007687/2017

¹⁵⁹ Jon Ostrowsky, "Birth Certificate Gender Corrections: The Recurring Animus of Compulsory Sterilization Targeting Transgender Individuals." *UCLA Women's Law Journal* [2020] 273, 273.

¹⁶⁰ *Ibid.* 275.

In the United States, *Buck v Bell* is the Supreme Court decision that allows for federal mandated compulsory sterilization for those deemed unfit for reproduction. The law has been criticized for eugenicist language, including: “[i]t is better for all the world . . . [if] society can prevent those who are manifestly unfit from continuing their kind.¹⁶¹” While the law also allows for the sterilization of criminals, indigenous people, and those with disabilities, the LGBTQIA+ community has suffered from the decision as well due to the belief that many are “unfit” for reproduction. Transgender people must undergo sterilization in order to have their gender corrected on identity documents such as their license, passport, or birth certificate. Regardless of whether the individual wishes to undergo sex reassignment surgery, the state requires its completion prior to recognition of that person’s gender¹⁶².

Buck v Bell has been called genocidal in its intentions, eliminating groups of people deemed unfit for reproduction¹⁶³. This decision by the court shows an intention to eliminate a group of people deemed undesirable, as such an elimination would be “better for all the world”¹⁶⁴. Based on the language used and the elaborated definition of genocide, it is possible that the sterilization procedure could fulfill the requirements of article 2(d) for the action to be considered genocide.

The reasoning for compulsory sterilization in Europe is similar to that of the United States. The decision is similarly enshrouded in eugenics, and based on a decision in the 1970’s by Sweden. While transgender people were allowed to change their gender legally, they had to be sterilized prior to this recognition. This was based on the belief that transgender people had a severe mental illness and could not care for a child appropriately as a result of it. It is likely that this belief crossed borders over time, resulting in its adoption by other European countries¹⁶⁵.

Similar to the reasoning that *Buck v Bell* could be considered as fulfilling the requirements of article 2(d), the laws imposed by European countries could also fulfill the requirements. The reasoning for the procedure is a little different, however. Whereas in Sweden the reasoning was based on the belief that the mentally ill could not raise a child, the United States specifically sought to eliminate undesirable groups. This difference shows a difference in the intention of the crime. Sweden likely did not seek to eliminate the transgender population by restricting births, while the United States did. It is unlikely, then, that the requirements of article 2(d) could be met with the laws imposed in European countries.

However, in each of these cases another consideration must be made. While sterilization against transgender people is occurring, and it does prevent births, is it preventing births within the group? The measure appears to primarily relate to the prevention of a child being born as a member of the group with which its parents would belong. While transgender people are born

¹⁶¹ Ibid. 273.

¹⁶² Ibid. 275.

¹⁶³ Ibid. 274.

¹⁶⁴ Ibid. 273.

¹⁶⁵ M.H., “Why Transgender People are Being Sterilised in Some European Countries”, [2017] the Economist, Web

transgender, a parent who is transgender may give birth to a child that is not transgender¹⁶⁶. The child then does not hold the group membership of their parent. Therefore, is it possible for sterilization to actually prevent a child from being born into the group of “transgender”? Based on the wording of article 2(d) alone, the measures only have to prevent births “within” a group¹⁶⁷ as opposed to preventing a child’s group membership. Sterilization would prevent births within the transgender group, as transgender people would be unable to have children. If this definition alone is used, then the forced sterilization used by the European Union could be considered as a measure preventing births within the group. However, the definition provided by the *Akayesu* case describes further what could be considered a measure and highlights that some measures are done to prevent the child’s membership to the group, such as forceful impregnation¹⁶⁸. Based on this definition, it does appear that the child also must be born within the group with that group membership. If this definition is used, compulsory sterilization may be considered under article 2(d) since transgender people are born transgender. There can also be held beliefs that a transgender parent might force their child to become transgender, similar to the belief that gay parents might force their child to become gay¹⁶⁹. If this is the held belief, then the measure may potentially be included under article 2(d). There is limited information that would prove this is the case.

It is likely that the elaboration in the *Akayesu* case is more accurate to what might be considered a crime under article 2(d). Since a child can be born transgender, but is not automatically granted membership into the group, it is difficult to know if this *actus rea* to ever be considered under the article. Inevitably, compulsory sterilization does cause other issues to members of the group. As stated by human rights activists, the inability to have a child because of forced sterilization is a human rights violation, but it is unlikely that forced sterilization against transgender people can be considered genocide.

Article 2(e): Forcibly transferring children of the group to another group

Similar to article 2(d), article 2(e) received a succinct definition from the *Akayesu* case.

“With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to

¹⁶⁶ Haley Marie Brown, ‘The Forgotten Murders: Gendercide in the Twenty-First Century and the Destruction of the Transgender Body’ in John Cox, Amal Khoury, and Sarah Minslow, *Denial: the Final Stage of Genocide?*, (Routledge, 2023) 181, 184.

¹⁶⁷ *Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para 507

¹⁶⁸ *Ibid.*

¹⁶⁹ Sue E. Spivey and Christine M. Robinson, "Genocidal intentions: Social death and the ex-gay movement" [2010] *Genocide Studies and Prevention* 68, 70.

*sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.*¹⁷⁰”

Further, the forcible transfer in itself does not cause the destruction of a group in whole or in part, but rather causes a cultural genocide that impedes the ability of the group to continue its survival into the next generation¹⁷¹.

This section seeks to identify whether the forcible transfer of children from gender nonconforming parents can fulfill the requirements of article 2(e) to be considered genocide. It will also examine national laws that directly discuss the forcible transfer of children by reasoning of having a transgender parent.

While fewer examples exist in research literature compared to the other *actus rei*, the most apparent one comes from the United States with the case of transferring children from a transgender parent to another group. This bill, titled “Treatments for Sex Reassignment”, allows for Child Protective Services to take a child away from their transgender parent, or from a parent who seeks to bring them gender reaffirming care including therapy, and assign them to a different family that would otherwise not support that care¹⁷². Advocates have called the bill “forcible kidnapping” and the “Florida abduction bill”¹⁷³.

The bill, however, is unlikely capable of violating article 2(e). While the bill has been criticized for allowing for the forcible transfer of a child, the bill contains some differences in its language compared to that reported by advocates. The bill does not specifically rescind custody of a transgender parent to a non-transgender child. Instead, it provides that:

*“[it] grant[s] courts of this state temporary emergency jurisdiction over a child present in this state if the child has been subjected to or is threatened with being subjected to sex-reassignment prescriptions or procedures; amending s. 61.534, F.S.; providing that, for purposes of warrants to take physical custody of a child in certain child custody enforcement proceedings, serious physical harm to the child includes, but is not limited to, being subjected to sex-reassignment prescriptions or procedures...”*¹⁷⁴”

“Subjected” in this bill means having any procedure or prescription related to sex reassignment, consensual or non consensual. The bill does not convey wording that would indicate the abduction or transfer of a child from one group to another. The language present relates exclusively to a transgender child as opposed to a transgender parent. The child will belong to the group of “gender nonconforming” and be transferred to a group that would be

¹⁷⁰ *Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para 509

¹⁷¹ Paayam Akhavan, ‘The Crime of Genocide in the ICTR Jurisprudence’, (2005) 3 *Journal of International Criminal Justice*, 989, 1005.

¹⁷² *Treatments for Sex Reassignment*, FL CS/SB 254

¹⁷³ Brandon Girod, “Florida's transgender affirming care ban is now law. Here's what SB 254 does”, *Pensacola News Journal* [2023] Web

¹⁷⁴ *Treatments for Sex Reassignment*, FL CS/SB 254

“gender conforming”. However, if the parent does not hold the same membership of the child, could the transfer be considered genocide? Akhaven notes that the transfer of a child was primarily a biological destruction rather than a cultural genocide¹⁷⁵. If this is the case, it is unlikely the transfers could be considered genocide because transgender people are not born transgender. The transfer would not hold a biological basis. It could potentially have a cultural basis, which Akhaven argues is indicated more heavily than simply a biological destruction¹⁷⁶. If a child is raised in a household and allowed to be transgender, they will likely become exposed to a different cultural identity, such as queer culture. By transferring the child into a household where their transition would be restricted, they would also likely not be exposed to queer culture. Regardless, the capacity to consider this “genocide” or a “cultural destruction” remains limited. It would likely be more considered a rights violation as opposed to a cultural destruction.

However, a Missouri bill does violate the *actus rea* of article 2(e) of the Genocide Convention. This bill forces any individual aiding in a child’s transition including giving information or allowing exposure to other LGBTQIA+ people to register as a sex offender. If a parent is implicated in aiding their child with information, then they would be forced to register as a sex offender which would also lead to the placement of their child into state custody¹⁷⁷. This bill does appear to fulfill the requirements more because of the clear restriction of culture in the language of the bill. By disallowing even the presence of other transgender people, or any information or promotion related to transgender people, the capacity for the child to be exposed to it is very limited. If a child were to be seen with such information and it were to be reported, the one who gave access could face severe repercussions.

While limited information exists regarding the transfer of children from the “transgender” group to a gender conforming group, there are several bills¹⁷⁸ that come close to violating article 2(e). As a result of the inability to commit a biological destruction through the transfer, the bills are difficult to recognize as genocide. If cultural genocide is taken into consideration when examining the subparagraph, then there is a potential for the Missouri bill to be considered a violation of article 2(e).

In conclusion, some of the *actus rei* listed in article 2 of the Genocide Convention have been violated in cases of killings and serious harms against transgender people. While some countries, like Iraq, also show clear intention to eliminate a group, other countries show less of an intention which makes it difficult to examine as a potential case of genocide. In the next chapter, a more in-depth analysis of intention, or the *mens rea* of the crime, will be analyzed with relation to the above *actus rea*.

¹⁷⁵ Payam Akhaven, “Cultural Genocide: Legal Label or Mourning Metaphor?”, [2016] McGill Law Journal 243, 244

¹⁷⁶ Ibid. 243.

¹⁷⁷ Establishes the offense of contributing to social transition and requires a person to be placed on the sexual offender registry if guilty of the offense of contributing to social transition, MO HB2885 [2024]

¹⁷⁸ Treatments for Sex Reassignment, FL CS/SB 254

Chapter IV: Mens Rea

Introduction

In order for an act to be recognized as the crime of genocide, the perpetrator must have *mens rea*, or the knowledge and awareness to commit the crime¹⁷⁹. The Rome Statute of the International Criminal Court contains information on the *mens rea* of genocide in article 30:

1 “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2 For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3 For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.^{180”}

While the description of *mens rea* in article 30 provides a broad interpretation of the *mens rea* of genocide, it does also provide for further interpretation by the courts in its usage of “unless otherwise provided” by the Rome Statute or Elements of Crimes. The *mens rea* of a crime would need to be analyzed by the courts individually to determine the extent that a perpetrator had the knowledge and awareness of the conduct committed. Further, article 25 of the Rome Statute establishes individual criminal responsibility and the incitement of genocide¹⁸¹. Article 25(e) can be analyzed with regards to genocidal rhetoric and the incitement of genocide. While it provides that “... a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person... directly and publicly incites others to commit genocide...”¹⁸², the wording of the treaty has similarly been regarded as ambiguous, with different interpretations held for the word “direct” and “publically”¹⁸³.

Mens rea must be accompanied with an *actus rea* to fulfill article 2 of the Genocide Convention. However, this concept has been debated by legal scholars, as some believe *mens rea* alone is enough to fulfill the requirements of genocide. That is, one who has an intention to

¹⁷⁹ Paul Behrens, ‘the Mens Rea of Genocide’ in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Taylor & Francis Group 2012) 66, 71.

¹⁸⁰ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998), article 30

¹⁸¹ Ibid. article 25

¹⁸² Ibid.

¹⁸³ Shannon Fyre, “Tracking Hate Speech Acts as Incitement to Genocide in International Criminal Law” 30 *Leiden Journal of International Law* [2017] 523, 525.

commit the *actus rei* described in article 2 can still be punished for the crime of genocide so long as sufficient proof is present that the individual intended to destroy one of the protected groups in whole or in part¹⁸⁴. *Mens rea* must fulfill three elements of genocide according to article 30: conduct, consequences, and circumstance¹⁸⁵. It is the intent to destroy a group, which can also be called “genocidal intent”.

What can be considered “genocidal intent” varies amongst legal scholars, and even more so in the discussions of cases that might show genocidal intent. According to Triffterer, this is a subjective expression and difficult to apply in analysis and practice¹⁸⁶. An action that is not completed with a fully intended consequence but has genocidal intent is sufficient to show *mens rea*. It must further be emphasized that genocidal intent is different from genocidal rhetoric. That is to mean, the intention to commit genocide is different from speech that dehumanizes a group of people and may incite genocide¹⁸⁷. While genocidal rhetoric is common in cases of genocide, genocidal rhetoric may appear in countries where no genocide is actively occurring¹⁸⁸. This distinction will be important when discussing the rhetoric used by some countries against transgender people.

The ILC has also argued that all of the *actus rei* in article 2 are, by their very nature, capable of proving intention¹⁸⁹. A perpetrator of any of the acts in subparagraphs (a) to (e) cannot commit those acts without understanding the consequence to their action: that they are attempting to destroy a group in whole or in part¹⁹⁰. Legal scholars, such as Behrens, contest this statement on similar grounds as Triffterer: a person may have the intent to destroy a group, but may not have an intention to commit a specific *actus rea* described through subparagraphs (a) to (e). Instead, the deaths or destruction of the group may be part of a separate action. Behrens uses the case of children being transferred to another group. While the intention is still to destroy a group in some way, if the children are then killed in the care of the new household, the perpetrator who forced the transfer could not be tried for subparagraph (a)¹⁹¹. The deaths were an unintentional consequence that could not be foreseen, which directly contradict the three elements described within article 30 of the Rome Statute. It cannot be assumed, then, that a perpetrator committing an action described in article 2 fully understands the consequences of their action.

This chapter will examine whether the actions described in the previous *actus rea* chapter also have *mens rea* to destroy a group in whole or in part. The cases discussed in the previous chapter will be evaluated for genocidal intent, genocidal rhetoric, and analysis from legal

¹⁸⁴ Otto Triffterer, “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such” 14 Leiden Journal of International Law [2001] 399, 402.

¹⁸⁵ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998).

¹⁸⁶ Otto Triffterer, “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such” 14 Leiden Journal of International Law [2001] 399, 400.

¹⁸⁷ Alicia Campbell, “The Language of Genocide”, Harvard Political Review [2022] Web.

¹⁸⁸ Ibid.

¹⁸⁹ ILC 1996 II/2, 44, Art. 17, para 5.

¹⁹⁰ Ibid.

¹⁹¹ Paul Behrens, ‘the Mens Rea of Genocide’ in Paul Behrens and Ralph Henham (eds), Elements of Genocide (Taylor & Francis Group 2012) 66, 72.

scholars will be given for some of the cases. While some of the cases described in the previous chapter did not fulfill the requirements of the *actus rea*, the *mens rea* will still be analyzed individually.

Mens Rea

The Iraqi Emo Killings fulfilled article 2(a) of the *actus rea*, as a large group of transgender people were killed. Further, the intention of this action was discussed in the previous chapter and will be elaborated further here. The killings that occurred in 2012 were done intentionally to eliminate a group of people the Ministry determined were “Satanic”. Colonel Mushtaq Taleb al-Mahemdawi gave the Morality Police permission “to eliminate [the phenomenon] as soon as possible since it's detrimentally affecting the society and becoming a danger.¹⁹²” This is a clear intention and fulfills the *mens rea* described in the Rome Statute. The ILC would argue that since an *actus rea* of the Genocide Convention was committed, the perpetrator (Mushtaq Taleb al-Mahemdawi) had intention to eliminate the group. The phrase used by the Colonel also implies eliminating the group that is detrimental to society. The detainment and killings of the teenagers was a purposeful action intended to eliminate members of the group. Mushtaq Taleb al-Mahemdawi had the knowledge and awareness that his actions would lead to the destruction of the group in whole or in part, and therefore he had the *mens rea* described within article 30. Combined with the *actus rea*, it is clear that the killings were intended to eliminate a group of people in an act of genocide.

The case of LGBTQIA+ people in the Chechnya region of Russia is more complicated to evaluate due to the lack of clear intention made by politicians and police. Whereas a statement was made by Mushtaq Taleb al-Mahemdawi that indicates his intention to commit the crime that would lead to the consequence of extermination, fewer statements exist from those responsible for the gay purge. Head of the Chechnya Republic, Ramzan Kadyrov, had denied that the gay purge existed, or that any people were targeted for extermination. In this interview, however, he also denied that any people belonging to the LGBTQIA+ community lived in the Republic, as they would have been killed by their families¹⁹³. He has also encouraged families killing their children if they did not conform to the traditions of Islam, including those who practiced “sodomy”. Members of the LGBTQIA+ community have been included in these groups of people who did not conform to standard traditions¹⁹⁴. Further, state sponsored beatings against those deemed nonconforming occur regularly¹⁹⁵.

Due to the limited information, it's difficult to determine whether Ramzan Kadyrov intends to eliminate all LGBTQIA+ people from Chechnya. However, based on the information

¹⁹² Seth Abramovitch, “Truth Check: Is Iraq Killing Hundreds of Emo Teens?” The Atlantic [2012] Web

¹⁹³ Shaun Walker, “Chechen police 'have rounded up more than 100 suspected gay men'”, [2017] The Guardian, Web

¹⁹⁴ Ibid.

¹⁹⁵ Lydia Smith, “'People are being tortured and killed': Chechnya's deadly anti-LGBT crisis”, [2017] International Business News, Web.

that is available, it can be sufficiently concluded that he does. The first element is that Kadyrov needs to intend to engage in the conduct. Based on the state sponsored beatings against those who are members of the LGBTQIA+ community, and the usage of concentration camps to detain and torture its members, its likely that he does mean to engage in the conduct. This is difficult to actually conclude, however, since he has denied the actual purge from existing. Despite denying its existence, the support for honour killings and beatings indicates that he does intend to eliminate the group which would fulfill the second element of *mens rea*. Further, his denial that transgender people would exist in the region because they would be exterminated indicates that he believes the group either has already been eliminated, or that their elimination is intended. He intends to cause the consequence of elimination, but without sufficient evidence that he intended to create the gay purge which is the *actus rea* examined, the *mens rea* of the case cannot be accurately assessed.

In Europe, the compulsory sterilization of transgender people prior to their transition could be considered a violation of article 2(d). As discussed previously, the reasoning for the implementation of the law was a result of Sweden's belief that transgender people were mentally ill and therefore incapable of properly caring for a child. According to the description given as to Sweden's reasoning, it's unlikely that *mens rea* existed at the time of creating the law. Those who introduced it would have to mean to engage in the conduct, and have knowledge that it would lead to the consequence of eliminating the group. It's unlikely that the second element can be fulfilled. The first element can likely be fulfilled, as there was a clear intention to commit compulsory sterilization against transgender people. Enacting a law related to sterilization is a clear indication that there was intention. However, the second element is unlikely to be fulfilled. This is because Sweden likely did not intend to eliminate the group when this law was enacted. The reasoning given for the law was "mental illness" as opposed to "preventing births within the group". Sweden did not give an indication that the consequence was to reduce the number of transgender people, but rather to prevent "mentally ill" parents from having children. While this could be examined further with more information, such as whether there was a belief that the mental illness would be genetic, the current provided information limits an understanding of *mens rea* with relation to the case. As such, a sufficient "guilty mind" cannot be proven.

Chapter V: Conclusion

Overview

Through the analysis of issues faced globally by transgender people, genocide discussed by legal scholars against members of the LGBTQIA+ community, and a careful examination of article 2 of the Genocide Convention and cases that further defined it, this paper sought to determine whether the crimes committed against gender nonconforming people could be considered genocide.

An examination was made regarding the four protected groups described in article 2. The four protected groups are racial, ethnic, religious, and national. While examining the transgender group globally, it was difficult to categorize the group into any of the four protected groups. Transgender people are from different races, ethnicities, cultures, religions, and nations. They are not restricted by any of the categories. The analysis given in this paper was similar to those already discussed by previous researchers: gender nonconforming people cannot be considered a protected group. Unlike previous research scholars, however, the inclusion of queer culture and cultural third genders was also examined as potential protected groups. While queer culture may not be included in a protected group because of the potential for transgender people to not identify with queer culture, cultural third genders may be able to be considered. It is unlikely they will be considered based on previous research of other cultures, but they do potentially fulfill the requirements to fit in with the protected groups.

The *actus rei* of article 2 were examined next. Specific events that led to mass killings or serious bodily harm of transgender people could generally fulfill the requirements under article 2 of the genocide convention. These include the sexual cleansing of the *meti* and *hijra*, the Iraqi Emo Killings, forced sterilization of transgender people by several western countries, Chechnya detention camps, and the removal of transgender children to other families. Broad issues used by many legal scholars to describe transgender genocide usually could not be considered as fulfilling the requirements of the *actus rei* described in article 2. This was usually due to ambiguous data sets, instances of homicide and hate crimes listed as genocide, and acts not fulfilling the “intention” to cause serious harm.

To determine whether the discrimination, mass killings, and bodily harm inflicted on those belonging to a gender nonconforming group were included under article 2, *mens rea* was examined first to determine whether the acts committed and the national legislation passed were sufficient to fulfill the concept of “intention”. The perpetrator of these actions must have had an intention to destroy the group the acts were committed against. Through the examination

performed, it was clear that the language indicated in national laws was usually insufficient to qualify as *mens rea*. It was unclear whether the laws were purposefully aimed at the destruction of gender nonconforming people in whole or in part as a result of their ambiguity or lack of strict language that would emphasize the law was specifically meant to target and destroy transgender people.

The language used by those committing the crimes or passing the legislation, however, could be considered sufficient *mens rea*: those who committed crimes against transgender people or passed legislation on them clearly did so with the intention to destroy the group in whole or in part. Some of the language used by legislators was genocidal rhetoric meant to dehumanize transgender people, but would remain insufficient in determining whether they intend to destroy the group.

Conclusion

The elements of the crime of genocide were analyzed individually in previous sections. Here, they will be analyzed as a whole to understand whether genocide can be committed against transgender people. In order for an act to be considered genocide under article 2, the act must have intention to destroy the group (*mens rea*), an action intended to destroy the group in whole or in part which includes killing, serious bodily or mental harm, inflicting conditions meant to bring about the group's destruction, preventing births, and transferring children (*actus rea*). The act must also be committed against one of the four protected groups. While a case can be made for *mens rea* and *actus rea* against gender nonconforming people, the lack of ability to fit the global transgender population into a specific protected group means they are not protected under article 2 of the Genocide Convention.

Mens rea and *actus rea* varied on their applicability to the case studies examined, but the analysis showed there is a *mens rea* to destroy the group in whole or in part and actions have been previously committed that were meant to bring about the group's destruction. However, due to the limited ability for transgender people to be classified as a protected group, it is unlikely a case can be made that genocide is being committed against transgender people.

Despite this fact, legal scholars are intent on bringing attention to the issues faced by gender nonconforming people including mass killings, serious bodily harms, and arbitrary detentions. Legal scholars have predicted an increase in the numbers of crimes committed against transgender people in the 1990s, and their research was correct with the numbers of hate crimes committed yearly. Further, these crimes are caused in nations where the violence is emphasized through national laws that allow for discrimination in healthcare and employment, and forcefully sterilize people. Legislators also dehumanize transgender people and use genocidal rhetoric to reaffirm biases and hatred.

Legal scholars are attempting to include other groups to the protected groups found within the Genocide Convention, including women, disabled people, gay men, transgender

people, and even those belonging to cultures that are not recognized as a protected group. As stated by Drost:

“a convention on genocide cannot effectively contribute to the protection of certain described minorities when it is limited to particular defined groups . . . it serves no purpose to restrict international legal protection to some groups; firstly, because the protected members always belong at the same time to other unprotected groups¹⁹⁶”

This paper not only serves to answer the question of whether transgender people can be considered under the genocide convention, but also details how the *mens rea* and *actus rei* of the Genocide Convention are fulfilled through global detention and mass killings impacting transgender people. It is clear that there is an intention to destroy transgender people in whole or in part, but all elements of the crime must be fulfilled for a crime to be considered genocide. This paper showed all elements are not fulfilled. This paper further examined the previous claims of other researchers and sought to argue against the usage of some cases considered to be genocide. While it is again clear that mass killings are present, it is harmful for the overall case to include actions that can not fulfill the *mens rea* or *actus rea* of the Convention. The paper also expanded upon some gaps in the literature, such as that of Kritz who claimed: “It does not require considerable imagination to conclude that a number of the *actus rei* enumerated in article 6 could be committed against transgender persons, with the intent to destroy, in whole or in part, the group.¹⁹⁷” While one familiar with the topic may be able to understand the atrocities committed against gender nonconforming people, it is important to include the *actus rea* in discussions of genocide.

¹⁹⁶ Peter N. Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, Book II: Genocide (A.W. Sythoff 1959), 122–3

¹⁹⁷ *Ibid.* 16.

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