

**REDEFINING THE CRIME OF GENOCIDE: A PATHWAY TO INTERNATIONAL PEACE,
SECURITY AND ACCOUNTABILITY***

Abstract

This paper examines how a redefinition of the constitutive elements of the crime of genocide could promote international peace, security and accountability. Genocide has been described as the gravest crime against humanity and one of the three 'radical evils' in the world. The Rome Statute of the International Criminal Court defines it as the destruction in whole or in part, of a national, ethnical, racial or religious group. However, this restrictive definition has posed significant challenges to holding perpetrators accountable and thus not serving as a strong deterrence to those who may want to unsettle international peace and security through acts of genocide. This paper advances three arguments for a possible redefinition of genocide to resolve the exceptionalism of horror entrenched by its current understanding and definition. First, we argue that there is a need to expand the definition of the protected group beyond national, racial, ethnical and religious groups to include political and social groups. In addition, we argue the need to expand the actus reus to include acts such as ethnic cleansing, and lastly to relax the stringent mental element requiring an 'intention to destroy a group in whole or in part'. We conclude that a proper conceptualisation of genocide has a role to play in ensuring accountability as well as promoting international peace and security and that the primary responsibility for initiating this conceptual shift lies with the United Nations Security Council.

Keywords: Redefining, Genocide, International Peace, Security, United Nations.

1. Introduction

Genocide is one of the four crimes captured in the Rome Statute of the International Criminal Court (ICC) and subject to the jurisdiction of the court; the others are: crimes against humanity, war crimes, and aggression.¹ While the Rome Statute does not delineate a hierarchy of crimes, in practice and popular understanding, the crime of genocide has primal place as the 'crime of crimes'.² Only few people would argue that any other international crime evokes more emotion, political manoeuvres, and media attention as genocide. The word 'genocide' has become so powerful that victims of mass atrocities rejoice when the crime committed against them is labelled genocide and are disappointed when labelled otherwise.³ When a United Nations Commission of Inquiry decided in 2004 that they found no genocidal intention in Darfur, the media went into frenzy with headlines indicating that Omar al Bashir had been cleared of genocide as if this meant the atrocities in Darfur at the time was acceptable as long as it was not genocide.⁴ What more, the denial of genocide is a crime in countries like Switzerland.⁵ The most recent is the criticisms on one side (Turkey) and praise on the other side (Armenians) that have trailed the naming by President Joe Biden of the 1915 killing of about 1.5 million Armenians by the Ottoman Empire as genocide.⁶ While genocide is indeed a very grievous crime, it is useful to ask the question: Is genocide indeed over and above all crimes? If yes, why? Is it because the protection of groups is more important than the protection of individuals or because genocide is understood as the most suitable word to capture cases of mass atrocities that require the attention of the international community? It is in response to this conundrum of genocide that Philippe Sands calls for the redefinition of the crime so that more mass atrocities can be captured under the word.⁷ This article critically evaluates these posed questions in relation to the proposition by Sands.

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¹ See Article 5, Rome Statute of the International Criminal Court (17 July 1998), United Nations Treaty series, vol 2187.

² W. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 654.

³ P. Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge University Press 2012) ix.

⁴ *ibid* 4.

⁵ W. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press 2012) 103.

⁶ Aljazeera, 'US President Joe Biden Officially Recognises Armenian Genocide' *Aljazeera* (24 April 2021) <<https://www.aljazeera.com/news/2021/4/24/joe-biden-officially-recognises-armenian-genocide>> accessed 24 December 2021; See also Aljazeera, 'Shameful': Turkey rejects US resolution on 'Armenian genocide' *Aljazeera* (30 December 2021) <<https://www.aljazeera.com/news/2019/10/30/shameful-turkey-rejects-us-resolution-on-armenian-genocide>> accessed 25 December 2021. A claim of genocide may also be weaponised against a political or ideological opponent. A basic principle of international criminal law is non-retroactivity. While the ascription of genocide to the 1915 killings of Armenians may have good moral value, it begs the question whether the assessment was done with recent international criminal statutes in mind.

⁷ I. Vock, 'Philippe Sands on the Uighurs: 'Why does it matter if we call it a genocide?' *NewStatesman* (15 December 2021) <<https://www.newstatesman.com/world/asia/2020/07/philippe-sands-uighurs-why-does-it-matter-if-we-call-it-genocide>> accessed 1 April 2021.

This article is divided into two broad sections. Section 1 focuses on the rise of genocide. This section is a brief history of how genocide came to be part of international criminal law. Section 2 discusses the need for a redefinition of genocide and a proposal of what a new definition should capture. The second section is further divided into three subsections. First sub-section focuses on Phillippe Sands' statement and analyses the truism in the call for a redefinition of genocide considering the general practice around the crime. The second sub-section identifies the challenges with the current definition of genocide as encapsulated in the Genocide Convention and Rome Statute of the ICC and suggests possible ways forward. Sub-section 3 connects the redefinition of genocide with 'crimes against humanity'. The article argues that genocide should be subsumed under the broad umbrella of 'crimes against humanity' with an expansion of its *actus reus* to include acts like ethnic cleansing, a less stringent *mens rea*, and a wider delineation of groups protected to capture political and social groups. Furthermore, the article argues that while there is indeed a need to redefine genocide, it is not because every atrocity needs to be named genocide. It is rather because the crime needs to capture more atrocities committed against groups. Finally, bringing genocide under crimes against humanity will establish that the group is in fact not more important than the individual in international criminal law.

2. The Emergence of Genocide in International Criminal Law

The history of genocide is traceable to the work of Raphael Lemkin.⁸ However, the work of Lemkin would be incomplete without a reference to the work of Hersch Lauterpacht on crimes against humanity. Both men studied law in the same university in the city of Lemberg.⁹ Their connection to genocide is tied to the distinct roles they played in the Nuremberg trials after the WWII. Lauterpacht is an advocate of the respect for individual rights in international law.¹⁰ He was employed by the British to be part of the prosecution team at Nuremberg.¹¹ It was him who suggested to Robert Jackson, the US prosecutor, that 'crimes against humanity' best fits the description of the atrocities committed against individuals during the war.¹² While Lauterpacht did not form the phrase 'crimes against humanity', it had not been used in a strict legal sense before then.¹³ 'Crimes against humanity' was defined to encompass atrocities committed against individuals on a large scale such as torture, murder, enslavement and enforced disappearance.¹⁴ Lemkin on his part was an advocate for group protection. In 1943, he authored a book '*Axis Rule in Occupied Europe*'.¹⁵ In the chapter on 'genocide', Lemkin advocated that the crime of destroying national, racial, or religious groups should be called genocide. He coined the word genocide from Greek word, '*genos*' which translates tribe or race and Latin word, '*cide*' which translates 'kill'.¹⁶ Lemkin's idea of genocide was broad as it captures even cases of cultural destruction.¹⁷

Moreover, while the idea of Lauterpacht was easily accepted and crime against humanity became one of the crimes in the London Charter, it took the unrelenting efforts of Lemkin to ensure that genocide found its way to the Nuremberg trial. However, at the trial, the term was rarely used and when used, it was used interchangeably with crimes against humanity. Thus, no one was charged with genocide at Nuremberg. Also, according to the Nuremberg precedent, 'crimes against humanity' could not be committed in time of 'peace'.¹⁸ Unsatisfied with the backside seat taken by genocide at Nuremberg, Lemkin continued to lobby for the recognition of genocide as an international crime.¹⁹ His advocacy paid off in 1948 when the United Nations Convention on the Prevention and Punishment of the Crime of Genocide was adopted. Although the definition in the Convention is limited compared to his original idea, he considered the Convention a win. Lemkin spent the rest of his life lobbying states to sign the Convention.²⁰ Lemkin's passion for group protection was not welcomed in all quarters. For example, Lauterpacht disagreed with Lemkin's theorisation of genocide. In 1950, Lauterpacht wrote that a crime of genocide 'would constitute a recession of individual rights'.²¹ Lauterpacht opined that 'the individual is the

⁸ P. Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) ch IV.

⁹ D. Scheffer, 'East West Street: On the Origins of Genocide and Crimes Against Humanity by Philippe Sands' (2017) 111(2) *The American Journal of International Law* 559, 560.

¹⁰ Sands (n 8) ch II.

¹¹ *ibid* 113.

¹² *ibid* 109-110.

¹³ *ibid* 111.

¹⁴ See Article 6(c), Charter of the International Military Tribunal (Nuremberg Charter); Principle VI (c) Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.

¹⁵ Cited in Akhavan (n 3) 7.

¹⁶ *ibid*.

¹⁷ R. Lemkin, 'Genocide' (1946) 15(2) *The American Scholar* 227 <<https://www.jstor.org/stable/41204789>> accessed 6 December 2021.

¹⁸ *ibid* 19.

¹⁹ Sands (n 8) 377.

²⁰ *ibid*.

²¹ Oppenheim's *International Law* (7th edn) cited in Sands (n 8) 108.

ultimate unit of all law’ and that the group cannot be more important than the individual.²² Also, Leopold Kohr, an Austrian academic refugee in his criticism of Lemkin’s work, argued that Lemkin’s position was deeply flawed because in ‘his prioritising of group protection over individuals right, he has gone down into the biological thinking that led to anti-Semitism and anti-Germanism’.²³ He also feared, like Lauterpacht, that codifying genocide will foster animosity between groups.²⁴ The aftermath of the Polish Minority Treaties of 1919 is an example of how the protection of a group may in fact be the foundation for conflict, giving credence to the reservation expressed by Lauterpacht and Kohr.²⁵ Notwithstanding this history, both genocide and crimes against humanity are now contained in Articles 6 & 7 of the Rome Statute of the International Criminal Court respectively and can be committed during and outside conflict.²⁶ However, given the present concerns about redefining genocide, the criticism of Lauterpacht and Kohr have turned out to be prophecies.

3. Genocide and the Search for a New Definition

Now to the proposition of Phillipe Sands which is the subject of this article.²⁷ When asked whether the persecution of Uyghurs in China’s Xinjiang qualifies as a genocide, Sands asked why the situation must be called genocide, noting that if he says it was not genocide, it would be interpreted to mean that the situation was not grievous enough. This he states will be incorrect as grievous atrocities are being committed against the Uyghurs. It is in further response that he made the following statement:

Genocide needs to be redefined, so that acts which are horrendous on a mass scale can more easily be characterised as genocide, to limit the exceptionalism of the nature of the horror... Either that, or we get away from the concept altogether and have crimes against humanity’ aggravated where it is combined with group destruction.²⁸

Following the primal status that genocide has come to attain in international law, the call by Sands for a redefinition cannot be disregarded. At Nuremberg, ‘waging a war of aggression’ was considered the most grievous crime.²⁹ The tides have changed, genocide is now regarded as the crime that captures the worst form of horrors that can be committed.³⁰ The origin of this status is however not clear in law. The *travaux préparatoires* of both the Genocide Convention and the Rome Statute of the ICC show that the drafters considered genocide as the gravest of the crimes.³¹ However, in practice before international criminal tribunals, there is no consistency on the status of genocide. In *Bosnia v. Serbia*, the ICJ acknowledged an international responsibility to prevent genocide. During the *Eichmann* trial, the Israeli court noted that genocide represents ‘the gravest type of crime against humanity’.³² Also, the International Criminal Tribunal for Rwanda (ICTR) in the *Kambanda* trial described genocide as the ‘crime of crimes’.³³ Later in *Kayishema*, the ICTR stated that there is no hierarchy of crimes.³⁴ While, in *Kupreškić* trial, the ICTY stated otherwise that, ‘from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution’.³⁵ The exceptional nature of genocide is more rooted in its strict definition.³⁶ So, what is genocide? In Article II of the Genocide 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 a group;

²² H. Lauterpacht, ‘The Grotian Tradition in International Law’ in *British Year Book of International Law* 23 (1946) 1, 27 cited in P. Sands, ‘Genocide at 70: A Reflection on its Origins’ (2018) 36(3) *Netherlands Quarterly of Human Rights* 167, 168.

²³ Sands (n 8) 183.

²⁴ *ibid.*

²⁵ *ibid* 291.

²⁶ The International Law Commission in 2019 adopted a draft convention on crimes against humanity, see United Nations, Draft Articles on Prevention and Punishment of Crimes Against Humanity (2019) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf> accessed 24 December 2021.

²⁷ Vock (n 7).

²⁸ *ibid.*

²⁹ C. Kreß. ‘The Crime of Genocide under International Law’ (2006) 6 *International Criminal Law Review* 461, 464 <https://brill.com/view/journals/icla/6/4/article-p461_1.xml> accessed 9 December 2021.

³⁰ Schabas (n 2) 654.

³¹ Akhavan (n 3) 81.

³² *Attorney General of Israel v. Eichmann*, 36 I.L.R. 18, 41 (District Court of Jerusalem, 1961).

³³ *Kambanda* Trial Judgment (ICTR, 4 September 1998) para 14.

³⁴ *Kayishema*, Appeals Judgement (ICTR, 1 June 2001), para 367.

³⁵ *Kupreškić*, Trial Judgement (ICTY, 14 January 2000) para 699.

³⁶ See Schabas, *Unimaginable Atrocities* (n 5) 109, who suggests that the strict limitation of groups is tied to the fear among the then world powers that their own atrocities could be classified as genocide if the definition were as expansive as suggested by Raphael Lemkin.

- (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’.

The above definition is reproduced *pari materia* in the Rome Statute of the ICC.³⁷ There are three crucial elements in the definition that has influenced the exalted position of genocide and the challenge it poses for prosecutors and victims. The first is the *mens rea*. That is, the ‘intention to destroy in whole or in part’. The second is the delineation of groups, and the third being the closed list of acts criminalised. These three factors differentiate genocide from crimes against humanity as the acts criminalized are also criminalized as crimes against humanity.³⁸ Thus, theoretically, every case of genocide is a crime against humanity but not all cases of crimes against humanity qualify as genocide. Due to this ‘magical’ status, the word ‘genocide’ has been abused in use. In 2008, when Russia invaded Georgia, it accused Georgia of committing genocide against the people of Ossetia to legitimize its invasion.³⁹ Russia’s assertion was later realised to be false. Following the political violence in Abidjan in 2010, the Permanent Representative of Côte d’Ivoire to the United Nations said genocide was taking place. By the next day, his statement was top page of newspapers.⁴⁰ In 2011, the office of the UN High Commissioner on Human Rights used genocide to describe the situation in Congo.⁴¹ This is regardless of the fact that the situation in Congo at the time was generally understood to be a case of crimes against humanity. William Schabas suggests, and we agree that the UN expert who authored the said report for the Office of the High Commissioner in this instance brandished the word ‘genocide’ just to draw attention to his work and not because he found facts to support his assertion.⁴²

Redefining Genocide

In agreeing with Sands in his call for a redefinition of genocide, this article argues that genocide needs to be redefined in three areas: first is the stringent ‘intention to destroy a group in whole or in part’, second is the exclusion of other groups such as political social groups from the definition, and third is the limited number of acts which qualify as *actus reus* of the crime. A redefinition that addresses these issues will demystify genocide as the ‘crime of crimes’, not because the protection of the groups is not important, but because the group is not more important than the individual.

Intention to destroy in whole or in part

First, establishing ‘the intention to destroy a group in whole or in part’ has turned out to be the most challenging task for prosecutors and for the international community in deciding when to name a situation genocide.⁴³ The standard of the ‘intention to destroy’ can be traced back to the *Holocaust*. Since the Nazi kept records of their intention to destroy the Jews and other minorities, establishing this intention was relatively easy.⁴⁴ This standard is no longer practicable, as subsequent events in Rwanda and elsewhere, has shown.⁴⁵ It has become burdensome for prosecutors and politicians alike to pin down ‘the intention to destroy’.⁴⁶ In *Akayesu*, the ICTR noted that finding out ‘the intention to destroy’ is an uphill task and all the court could do is to look at the actions of the perpetrators to determine their intention in the absence of a confession.⁴⁷ More so, the process of proving this ‘intent to destroy in whole or in part’ puts pressure on prosecutors and victims.⁴⁸ For prosecutors, the pressure lies in the fact that in their attempt to establish the ‘intention to destroy a group’, they help to perpetuate a feeling of ‘otherness’ resulting in a ‘them versus us’ situation.⁴⁹ This does not help the course of resolving conflicts and ensuring peaceful co-existence. For victims of mass atrocities, the pressure they feel is due to their desire for

³⁷ Article 6.

³⁸ See Article 7 of the Rome Statute for a definition of the *actus reus* and *mens rea* of crimes against humanity.

³⁹ Akhavan (n 3) 5-6.

⁴⁰ Schabas, *Unimaginable Atrocities* (n 5) 99.

⁴¹ *ibid*.

⁴² *ibid* 99-100; See also M. Manaktala, ‘Defining Genocide’ (2012) 24(2) *Peace Review* 179

<<https://doi.org/10.1080/10402659.2012.677333>> accessed 19 December 2021 for a discussion on the complication that arises from the difference in the common use and strict definition of genocide; Aljazeera, ‘US President Joe Biden Officially Recognises Armenian Genocide’ *Aljazeera* (24 April 2021) <<https://www.aljazeera.com/news/2021/4/24/joe-biden-officially-recognises-armenian-genocide>> accessed 24 December 2021.

⁴³ D. Scheffer, ‘Genocide and Atrocity Crimes’ (2006) 1(3) *Genocide Studies and Prevention* 229

<<https://doi.org/10.1353/gsp.2011.0044>> accessed 6 December 2021.

⁴⁴ See generally Sands (n 8) ch viii & x.

⁴⁵ See generally Akhavan (n 3) 124-140.

⁴⁶ Scheffer ‘Genocide and Atrocity Crimes’ (n 43).

⁴⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, in part reported at (1998) 37 I.L.M. 1399 para.523.

⁴⁸ Sands (n 8) 380.

⁴⁹ *ibid*.

perpetrators to be charged with genocide. They are disappointed when it cannot be done whether because they do not fall within the definition of groups or the acts committed are not captured in the *actus reus* of the crime. Sands describes it as feeling ‘less a victim’.⁵⁰ In fact, the international community spends more time deciding whether the intention to destroy in whole or in part exists than actually taking steps to save millions from mass atrocities. This is evident in the delay of the international community to respond in the *Rwanda* case and the abysmal response to the Darfur situation.⁵¹

The more recent Darfur situation is an example of how the quest to establish this stringent ‘intention to destroy’ can be costly for victims. In 2004, the US Congress passed a resolution accusing the government of Sudan of a campaign of genocide.⁵² On the other hand, the UN set up its own committee of inquiry headed by Antonio Cassese. This committee found that there was no genocidal intention by Omar al Bashir’s government. However, the committee warned that the fact that it did not find a genocidal intention does not mean that atrocities were not being committed in Darfur. In fact, it reported that atrocities were being conducted on a large scale including the burning of villages, widespread rape and enforced displacement. The committee therefore advised that the international community could not fold its arms.⁵³ This second and crucial part of the report was ignored.⁵⁴ All the media reported was that ‘UN Clears Sudan of Genocide in Darfur’.⁵⁵ Also, the subsequent response of the UN to the situation became limited to inconsistent humanitarian assistance.⁵⁶ This situation begs two questions; is the death of thousands of a group permissible because we cannot lay hold on a specific intention to destroy them? Second, is the death of 100,000 individuals less an atrocity than the death of 100,000 members of a group? Just like Philippe Sands, we do not think that the last question can seriously be answered in the affirmative.⁵⁷ Thus, we argue the *mens rea* of genocide is the place to start in redefining genocide. We propose that the *mens rea* of genocide be redefined to the *mens rea* under crimes against humanity, with the exception that genocide focuses on groups. Therefore, in place of ‘any civilian population’ as contained in crimes against humanity, we now have ‘any identified group’ while maintaining the rest of the *mens rea* of crimes against humanity.⁵⁸

The exclusion of political and social groups

The second concern with the definition of genocide is the exclusion of political and social groups. In situations where an attack is directed towards members of a group, but the group is political or social, the atrocities do not qualify as genocide. Rather, they would be crimes against humanity even where the intention to destroy the group is evident.⁵⁹ One may think this a trivial issue, but it has turned out to be a tool for political manipulations and disaffection among victims. The idea of permanence and stability used as criteria by the ICTR to define what constitutes a group leaves too much gap.⁶⁰ For example, the millions who died during Stalinist Soviet Union and the Argentina Dirty War of 1976 to 1982 do not qualify as victims of genocide because they were ‘mere’ political dissidents.⁶¹ If a people can be identified as belonging to a group and are killed, maimed, forced to disappear for this sole reason, then it should qualify as genocide. It should not make any difference that it is a political or social group. Thus, we argue that a redefinition of genocide should include an expanded view of what constitutes a group.

The Closed List of Actus Reus

The third definitional problem is the closed list of *actus reus* in defining genocide. For example, ethnic cleansing does not qualify as genocide.⁶² The International Court of Justice (ICJ) in *Bosnia v. Serbia* held that ethnic cleansing is not genocide as destruction is not a necessary result of displacement.⁶³ The only act that is like ethnic cleansing in the genocide definition is the ‘forcible transfer of the children of one group to another’.⁶⁴ Thus, in cases where members of a group are being forced to move *en masse* from their original location to another, for example, Armenians from Turkey, Serbs from Yugoslavia, and Rohingya Muslims from Myanmar, it is not

⁵⁰ *ibid.*

⁵¹ Akhavan (n 3) 135,138.

⁵² Scheffer, ‘Genocide and Atrocity Crimes’ (n 44) 235- 236; Akhavan (n 3) 3-4.

⁵³ Akhavan (n 3) 4.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ Scheffer, ‘Genocide and Atrocity Crimes’ (n 44) 236.

⁵⁷ Vock (n 7).

⁵⁸ For context, see Art 7 Rome Statute of the ICC.

⁵⁹ Schabas, *Unimaginable Atrocities* (n 5) 122.

⁶⁰ *ibid* 115.

⁶¹ *Ibid* 122.

⁶² Kreß (n 30) 473-479; Schabas, *Unimaginable Atrocities* (n 5) 121

⁶³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 43, para. 190.

⁶⁴ Art 6(e) Rome Statute of the ICC.

genocide. It is noteworthy that there is no gap in law as these acts are criminalised under crimes against humanity.⁶⁵ However, we ask, why not genocide? If genocide is a crime designed to protect groups, why are acts excluded that directly target groups? We argue that atrocities that constitute an attack against a group should be named genocide. We also disagree with authors such as Claus Kreß who argue that the atrocities committed against the group need to be exceptional and tend towards biological destruction for it to be regarded as genocide.⁶⁶ Indeed, there is a need to limit the ‘exceptionalism of horror’. This is more in line with Lemkin’s original idea of genocide which includes cultural destruction.⁶⁷

Re-connecting Genocide with Crimes Against Humanity

Our proposal is that the word genocide should be retained to describe atrocities committed against groups, but that it be recaptured under the broad umbrella of ‘crimes against humanity’. Special protection for groups remains important regardless of the challenges it poses. Therefore, we disagree with the first part of Philippe Sands’ suggestions on the way forward with genocide. Sands’ proposition that genocide needs to be redefined so that more mass atrocities can be captured under it suggests that specific group protection is no longer necessary.⁶⁸ We disagree with this part of Sands’ proposal.⁶⁹ History and present-day reality have confirmed that individuals can indeed be attacked for the sole reason of belonging to a group. Thus, any new definition of genocide must still be focused on group protection. Also, Sands’ alternative suggestion that international criminal law should do away with genocide altogether and just have aggravated crimes against humanity when groups are attacked does not solve the problem. It still returns the argument back to the point that attacking a group is worse than attacking individuals. Scheffer has suggested that genocide, crimes against humanity, ethnic cleansing, and war crimes be captured under the broad term ‘atrocities crimes’. However, we do not see how having an umbrella term of ‘atrocities crimes’ helps in demystifying genocide. The exceptionalism of genocide, beyond the name, is more about how it is defined. We are more in alignment with William Schabas’ more recent position. William Schabas, who earlier argued that in the hierarchy of crimes, ‘genocide belongs at the apex of the pyramid’ and that he finds nothing wrong with the definition,⁷⁰ has made a U-turn on his argument. In his more recent work, he proposes that genocide should be captured under an umbrella of ‘crimes against humanity’ with genocide ‘reserved exclusively for the clearest cases of intentional extermination of national, ethnic, racial, and religious groups’.⁷¹ This position, we believe helps resolve the problem of viewing genocide as being higher a crime than ‘crimes against humanity’ also committed on a large scale, although not completely. We reiterate our earlier argument that the definition of groups be expanded to include social, political, or any other form of identifiable group. An example of this is already in the genocide law of countries like Costa Rica;⁷² the acts criminalized need to be expanded to include ethnic cleansing, and other forms of attacks that may be committed against individuals. This position is more in line with Lemkin’s original idea which includes cultural destruction, deportation, dispossession, and cultural destruction’.⁷³ We also maintain that the standard of the *mens rea* should be reduced to the standard under ‘crimes against humanity’ only that genocide focuses on groups. By expanding the groups and acts and reducing the standard of *mens rea*, we argue that it is possible to demystify genocide, bring it at par with crimes against humanity in popular understanding, yet maintain special protection for groups under international criminal law.⁷⁴

4. Conclusion

This article has proposed a redefinition of genocide to resolve the exceptionalism of horror entrenched by the current understanding and definition of genocide. Our redefinition of genocide is captured in three areas: the definition of group has to be expanded beyond national, racial, ethnical and religious groups to include political and social groups; the *actus reus* need to be expanded to include acts like ethnic cleansing and; the stringent *mens rea* of an ‘intention to destroy a group in whole or in part’ need to be redefined to the general *mens rea* of ‘crimes against humanity’ but directed to groups. Furthermore, we suggest that in redefining genocide, the crime should be subsumed under the general heading of ‘crimes against humanity’. Our proposal serves two purposes. First, it brings genocide at par with ‘crimes against humanity’ in law and practice, thereby ‘limiting the exceptionalism of horror’. The second purpose is that it retains special protection for groups, which we believe cannot rightly be disregarded. While we stand by the rationality of the argument laid down in this article, we opine further

⁶⁵ Kreß (n 30) 473-479.

⁶⁶ See T.W. Simon, 'Defining Genocide' (1996) 15 *Wisconsin International Law Journal* 243 for similar argument.

⁶⁷ Lemkin (n 18).

⁶⁸ See quoted statement above.

⁶⁹ See Sands (n 8) 381 where Phillippe Sands stated that he recognises the affinity of humans to groups despite the challenges that group protection pose.

⁷⁰ Schabas, *Genocide in International Law* (n 2).

⁷¹ Schabas, *Unimaginable Atrocities* (n 5) 124.

⁷² *ibid* 112.

⁷³ M. Shaw, *What is Genocide?* (2nd edn, Polity Press 2015) ch 2.

⁷⁴ For further theorization on new definitions of genocide, see *ibid* ch 11.

theorisation is needed to better delineate how the new definition will operate. Bearing in mind the sacred nature with which the Rome Statute of the ICC is upheld in ICL,⁷⁵ a case for an amendment may be met with resistance. As a redefinition of genocide will serve the cause of promoting international peace and security by enhancing the effectiveness of prosecution, we are of the view that it is the responsibility of the United Nations Security Council to initiate the process for the necessary conceptual shift. For further research, we suggest a study of the role of definitions and legal codifications in international criminal justice, and investigate whether it is possible to go beyond strict legal definitions in international criminal law.

⁷⁵ Kreß (n 30) 499-500.