



ERASMUS MUNDUS JOINT MASTER

**International Law
of Global Security,
Peace and Development**

Harry David Kiwanta Sembiring

**Decolonizing the Genocide Convention: A Third World Approach on
International Law (TWAIL) Analysis on the Convention and Its Applicability
in East Timor (1975-1999) and the Baltic States (1946-1991)**

Master's Thesis
Word Count: 24,754

Supervisor
Prof. Lauri Mälksoo

Tallinn
2023

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CHAPTER I

INTRODUCTION

“Some must have believed, in 1948, that the unthinkable crime of genocide would never recur” – William Schabas¹

I. Background and Context

a. Overview of the Genocide Convention History

The development of international law after World War II foresaw a significant leap in norms codification, proven by the increase in international legal instruments adopted within the period. While this situation demonstrates an optimistic tool to prevent another human tragedy, its rapid development has lately been questioned. Bernstorff and Dann (2019) perceive that this legal development came with a fundamental challenge to legalize Western hegemony through emerging global institutions.² Pahuja (2011) even goes as far as to argue that international law is used by powerful states for exploitation and maintaining their global hegemony.³ Similar criticisms of the great powers’ dominance can also be found in the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as “the Genocide Convention”).

Schabas (1999) assessed the implementation of the Genocide Convention in its fiftieth year of adoption⁴ and came up with the starting quote of this chapter for his conclusion. The pessimistic tone of his argument perhaps best demonstrates how the Genocide Convention still faced challenges in its implementation after 50 years of its adoption. Although in the year of its adoption, the Convention was applauded as the first of its kind to ‘address human rights issues,’⁵ its content was still perceived to be ambiguous and ‘loop-hole ridden diplomatic compromise’ as Maddox (2015) described.⁶ In addition, its unique position in international law, as noted by Ratner (1998) to be at the intersection of international human rights law, international criminal law, and perhaps

¹ William Schabas, *The Genocide Convention at Fifty*, (US Institute of Peace 1999) 8.

² Jochen von Bernstorff and Philipp Dann, ‘Introduction’ in Jochen von Bernstorff and Philipp Dann (eds), *The Battle of International Law: South-North Perspectives on the Decolonization Era*, (Oxford Academic 2019) 1.

³ Sundhya Pahuja, *Decolonizing International Law: Development, Economics and the Politics of Universality*, (Cambridge University Press 2011) 3.

⁴ Schabas (1999) 10.

⁵ Kelly Maddox, ‘“Liberat[ing] Mankind from such an Odious Scourge”: The Genocide Convention and the Continued Failure or Halt Genocide in the Twenty-First Century’ [2015] 9(1) *Genocide Studies and Prevention: An International Journal* 48.

⁶ *Ibid* 50.

international humanitarian law, creates a more complicated approach to implementing or making a crime of specific actions under the Convention.⁷ This could be credited to the historical process of the Convention itself.

To put it briefly, the Genocide Convention was adopted in 1948 out of the horrors of World War II and the Holocaust in Europe. However, the Convention as we know it today is slightly different from how Raphael Lemkin, the architect behind the term genocide, envisioned it. Lemkin strived for an international codification to outlaw genocide as he argued that genocidal policies are ‘committed by the state or powerful groups which have the backing from the state.’⁸ Hence, he established that a universal jurisdiction to outlaw genocide was essential to prevent such actions from happening in both war and peace time.⁹ However, at first, Lemkin offered a more comprehensive understanding of genocide as he reflected on how the Nazis operated to destroy Jewish and other minority groups’ identities through cultural destruction, such as enforcing German as the *lingua franca*, destroying religious sites, and confiscating works of literature in Nazi-occupied territories.¹⁰ Hence, before the codification of the Genocide Convention, Lemkin pioneered the term to be more inclusive towards actions that target groups’ identity and not just physical destruction. Nevertheless, why, in the end, does the Convention that we know today only cover limited grounds?

One of the biggest criticisms of the codification of the Convention is related to the influence of great powers. The removal of cultural technique from the Convention was heavily influenced by the USA delegations who expressed that the Convention should only deal with physical destruction of the designated groups, and that acts to destroy their institutions should be dealt with in ‘a subsequent treaty for the protection of minorities’ which never materialized.¹¹ France and Great Britain supported the US stance on the draft, meanwhile the USSR, Venezuela, and Pakistan were recorded to support for the inclusion of cultural genocide to the Convention.¹² We can see

⁷ Steven R. Ratner, et al., ‘The Genocide Convention after Fifty Years’ [1998] 92 *The Challenge of Non-State Actors* 2.

⁸ Ana Filipa Vrdoljak, ‘Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law’ [2009] 20(4) *European Journal of International Law* 1185.

⁹ Raphael Lemkin, ‘Genocide’ [1946] 15(2) *American Scholar* 229.

¹⁰ Leora Bilsky and Rachel Klagsbrun, ‘Cultural Genocide: Between Law and History’ in Markus D. Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History*, (OUP 2018a) 1083.

¹¹ The Yale Journal, ‘Genocide: A Commentary on the Convention’ [1949] 58(7) *The Yale Law Journal* 1145.

¹² Economic and Social Council, Doc. No. E/623, 11-13 (Jan. 30, 1948); Russia, Venezuela, and Pakistan strongly favored inclusion of cultural genocide, No. A/PV 178, 15-16.

from the brief explanation on the negotiation process of the Convention, it was still heavily influenced by great powers, mainly the US, the USSR, and their allies. On top of this, it is worth recalling that the Genocide Convention was adopted in response to the detrimental effects of World War II experienced by great powers. As Lewis (2014) argues that for European States, the US, and the USSR, the Convention was a response to Nazi genocide in Europe, while for China, as a response to the Japanese occupation.¹³ This is also why the Convention is considered to fail in incorporating power relations in post-colonial situation and lacks historical context,¹⁴ especially in the term of colonial settlement. Therefore, it is important to critically analyze the current Convention and its history to better understand ways to improve its applicability in the future.

The motivation of this thesis stems from the current situation of global power dynamics pertaining to genocide crimes and the failure of its prevention under the framework of the Convention. I shall argue that there is an imminent need for the amendment of the Convention to better enhance its applicability and to fulfil its objectives. The two cases covered in this thesis will explain the dynamics of the Convention applicability and the legal and/or political loopholes surrounding the Convention. Using a TWAIL and Postcolonial lens, this thesis will approach the Convention and the cases from the narratives of the oppressed under the existing regime. The conclusion will then draw on the necessities to expand the scope of the Convention and its impacts for future development in international law.

b. Justification of the Cases: Brief Explanation of the Situations in East Timor (1975-1999) and the Baltic States (1944-1991)

The cases selected to analyze the applicability of the Convention in light of the Third World Approach to International Law (TWAIL) school are the occupation of East Timor by Indonesia during 1975-1999 and the occupation of the Baltic States by the Soviet Union during 1944-1991.¹⁵ Interestingly, the occupation of both territories through genocidal policies was carried out even after the conclusion of the Genocide Convention, which raised a question on challenges in

¹³ Mark Lewis, 'The Genocide Convention: The Gutting of Preventive Measures, 1946-58' in Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (OUP 2014) 184.

¹⁴ Martin Shaw, 'The 1948 Convention and the Transition in Genocide' in Martin Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* (Cambridge University Press 2013a) 8.

¹⁵ The first mass deportation conducted by the USSR happened in 1940-1941. This thesis will look into the *Operation Priboi* which was carried out in 1944

implementing the Convention to address genocide crimes conducted by great powers with neo-imperialist policies as reflected by both the Indonesian and the Soviet governments.

For the East Timor case, Jose Ramos-Horta, a leader of the independence movement, compared the Indonesian occupation to the Holocaust arguing that it was a genocide.¹⁶ With the estimated casualties caused by the invasion to be 150,000-200,000 deaths of East Timorese or more than 25% of the total population at the time,¹⁷ it is worth reconsidering if this invasion constitutes genocide legally. Furthermore, some human rights reports recorded the brutal methods used by the Indonesian military that *inter alia* included stockpiling food for enforced starvation, systematic gender-based violence for ‘society purification’, and even forced removal of East Timorese children.¹⁸ With such high casualties and genocidal policies, the importance of testing the Convention applicability emerged for justice restoration. In addition, while so far, the Convention has not established any legal proceedings on the East Timor occupation, it is of utmost important to understand the reasons behind it.

Meanwhile, while it is noted that the Genocide Convention does not apply in a retroactive manner, the Soviet genocidal policies in the Baltic States still continued even after the adoption of the Genocide Convention in 1948. For instance, the Soviet military carried out Operation Priboi in 1949 which resulted in the mass expulsion of more than 90,000 Baltic people.¹⁹ In addition, during the 1950s period, the Soviet government enacted a targeted deportation policy towards minority religious groups in the Baltics, such as Jehovah Witnesses.²⁰ Taagepera (1993) called the period of 1945-1953 as the years of genocide in the Baltics due to the Soviet mass violence in the annexed territory.²¹ As the politics of the Convention largely dominates its implementation, especially considering how the Soviet Union remains a great power until its dissolution, it is

¹⁶ Ben Saul, ‘Was the Conflict in East Timor ‘Genocide’ and Why Does It Matter?’ [2001] 2(2) *Melbourne Journal of International Law* 478.

¹⁷ Ben Kiernan, ‘The Demography of Genocide in Southeast Asia: The Death Toll in Cambodia, 1975-79, and East Timor 1975-80’ [2003] 35(4) *Critical Asian Studies* 593..

¹⁸ Ben Kiernan, ‘War, Genocide, and Resistance in East Timor, 1975-79: Comparative Reflections on Cambodia’ in Mark Selden and Alvin Y. So, *War and State Terrorism: The United States, Japan, and the Asia-Pacific in the Long Twentieth Century* (Rowman & Littlefield Publishing Group Inc. 2004) 220.

¹⁹ Heinrihs Strods and Matthew Kott, ‘The File on Operation ‘Priboi’: A Re-assessment of the Mass Deportations of 1949’ [2002] 33 *Journal of Baltic Studies* 1.

²⁰ Olaf Mertelsmann and Aigi Rahi-Tamm, ‘Soviet Mass in Estonia Revisited’ [2009] 11(2-3) *Journal of Genocide Research* 316.

²¹ Rein Taagepera, *Estonia: Return to Independence* (Westview 1993), 77.

interesting to look at the applicability of the Convention on the Baltic States after its adoption while reflect on its hypothetical retroactive applicability.

The two cases are also selected due to its perpetrators status on the international arena. The Soviet Union embodies the great power who influenced the Convention negotiation process with its political interests were weighed for its adoption. Meanwhile, as a post-colonial state, arguably Indonesia did not possess such power compared to the Soviet Union, yet it managed to mimic great powers' pattern on colonial expansionist policies in the past. Interestingly, but not surprisingly, the Convention historical background overlooks the idea of genocidal policies during colonial era and it is relevant for these two cases to be analyzed on the basis of their power relations to the peripheral states involved. In addition, while the Convention is largely deemed as Eurocentric, I argue that European experience is not the sole reason of the inadequacy of the Convention, rather great powers' dominance in the process. This thesis will seek to test the legal applicability of the Convention to these two cases and look beyond the Eurocentrism of the Convention in its arguments.

II. Conceptualization of TWAIL on The Genocide Convention

TWAIL emerged to international legal scholarship as a critical school that perceive the existing international legal system as the continuation of the Western dominance and exploitation over the global south. It is also a political movement among legal scholarship to deconstruct the existing international legal system and recalibrate it to be more inclusive and emancipatory for global south countries. The previous argument is further strengthened by Chimni's (2006) statement elaborating that international law coalesces to erode the independence of third world countries in favor of transnational global dominance asserted by major powers.²² Hence, even after the entanglement of colonialism in global order, the independence of third world countries was just illusive and international law was installed to perpetuate the power relations and act as a tool of oppression.²³ Such imbalanced power relations can also be found in the Genocide Convention.

As mentioned before, the historical process of the Genocide Convention is largely dominated by European states and great powers' experience, which were mostly former colonial

²² B.S. Chimni, 'TWAIL: A Manifesto' [2006] 8 *International Community Law Review* 26.

²³ J.T. Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network and A Tentative Bibliography' [2011] 3(1) *Trade, Law and Development* 38-39.

powers. Using TWAIL trajectory, I intend to retrace the process of the Genocide Convention conclusion and look into the political dynamics around it. Furthermore, as noted briefly in the previous part, smaller states' views during the negotiation process of the Convention were overruled. Hence, this resulted in a convention that only embraced the definition of genocide subscribed by these former colonial powers. In addition, as the Eurocentrism of the Convention remains central in its implementation, the practice of comparing Holocaust to other lived experience under genocidal policies results in an unattainable threshold to be fulfilled in order to constitute a genocide case under the Convention.²⁴ Hence, aligned with the spirit of TWAIL in reaffirming global plurality,²⁵ this thesis will give a critical TWAIL commentary to the Genocide Convention in its process, contents, and implementation by contextualizing it through the cases in East Timor and the Baltic States.

III. Research Questions and Methodology

The main research question of this thesis is: *to what extent does the legacy of Eurocentrism pertain in the historical process of the Genocide Convention reflected on its applicability to the cases of East Timor and the Baltic States, and how does it overlook neo-colonialist genocidal policies after its adoption?* The research question aims to analyze the Convention's history of Eurocentrism and the challenge to its applicability to certain cases that mimic the pattern of great powers' genocidal policies. In answering the main research questions, five sub-research questions were formulated to structure the thesis as follow:

1. Chapter I: *What is the context of historical process of the Genocide Convention in light of TWAIL?*
2. Chapter II: *How does TWAIL understand the process of concluding the Genocide Convention in the context of its history, negotiation process, and the content of the legal instrument itself?*
3. Chapter III: *How is the legal applicability of the Genocide Convention in East Timor and the Baltic States in related to their genocidal policies carried out?*

²⁴ Ernesto Verdeja, 'Genocide: Clarifying Concepts and Causes of Cruelty' [2010] 72(3) *The Review of Politics* 514.

²⁵ John D. Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' [2014] 27(2) *Canadian Journal of Law and Jurisprudence* 400.

4. Chapter IV: *How does postcolonial international relations theory understand the politics around the Genocide Convention and its future amendment prospects?*
5. Chapter V: *How do the key findings of the thesis help expanding the scope of the Genocide Convention in terms of a critical postcolonial and TWAIL assessment?*

In order to critically analyze the Genocide Convention, this thesis is using TWAIL as the principal theoretical framework. TWAIL as a theory does not only cover the critics of the existing international legal instrument, but also provides an approach in its historical emergence. Hence, the expected result from this research is to see the possibility of deconstructing the Genocide Convention to include other genocidal acts, hence, expanding its scope. Further, this thesis also expects theoretical explanation on why the Genocide Convention is still dormant of colonial values, and narrates the prospects of improvement through amendment, revision, or concluding a more fitting legal instrument in the future based on the assessment of the East Timor and the Baltic States Cases. Meanwhile from the international relations perspectives, this thesis will use qualitative method to elaborate more on the political process of the Genocide Convention and analyze the power dynamics within the period. Data for international relations analysis will be gathered through desk research of secondary resources, such as historical documents or governmental records. Historical and narrative analysis will be employed on the data obtained and will be further contextualized through the case study method.

IV. Academic Relevance

This thesis aims to contribute to the diversification of approach in the Genocide Convention. Driven by the ongoing notorious genocidal acts in almost every part of the world, for example, Rohingya in Myanmar, Arab Palestinians in the Occupied Territory, Uyghurs in China, or the recent Russia's invasion of Ukraine, I realized that these actions capitalized on the legal loopholes presented by the current Genocide Convention. What intrigues me more is that the actions carried out by the States can also be found in historical genocidal actions, and in this thesis are East Timor and the Baltic States. Hence, it is relevant to critically approach these two historical cases using the current Genocide Convention, while at the same time aim to deconstruct what is covered under the Convention using TWAIL. In addition, as an interdisciplinary piece of writing, it is expected that the thesis will provide a common ground in applying legal and political analytical tools to approach a case which is expected to result in a more holistic understanding of the

problems. In addition, arguably the most prominent point of the thesis is to seek the prospects of amending the Genocide Convention and the impacts of it based on the analysis. All in all, combining legal and political analyses on the Genocide Convention in postcolonial and TWAIL framework will demonstrate how the current Convention still contributes to the ongoing global oppression against marginalized groups.

CHAPTER II

TWAIL AND THE CODIFICATION OF THE GENOCIDE CONVENTION

“The Convention’s formalism and precision of definition is not an unmixed blessing.” – Ephraim Mirvis²⁶

I. A European Experience? A Critical Analysis on the Genocide Convention Historical Background

In his renowned book, “Axis Rule in Occupied Europe,” Lemkin defined genocide as ‘destruction of a nation or ethnic group, ... not only through mass killings, but also through a coordinated plan of different actions aiming at the destruction of essential foundations of the life of a national group, with the aim of annihilating the groups themselves.’²⁷ However, this definition of genocide came into being based on Lemkin’s experience of the wars in Europe – the main criticism of TWAIL on the historical ground of the Convention. Lemkin’s work on genocide has been influenced by the Holocaust as his personal experience coming from the group targeted by the Nazi. Hence, as mentioned by Kunz (1949), Lemkin treated genocide primarily as a technique of the German occupying practice during the World War II.²⁸ In addition, Lemkin’s advocacy for the Convention also came from his dissatisfaction of the legal process of the Nuremberg Trial, in which Lemkin described the avenues of the existing international law at that time as ‘insufficient.’²⁹ Thus, he advocated for the charge of genocide in the Nuremberg indictment,³⁰ and marked the first time the word ‘genocide’ used in any courtroom litigation proceeding.³¹

At first, Lemkin understood that genocide could also use cultural technique, as he perceived that culture is an essential foundation of groups.³² During the Nuremberg trial, Lemkin’s notion of

²⁶ James Snell, ‘How the Genocide Convention Hinders Rather Than Helps Victims’ (The Critic, 1 February 2021) <<https://thecritic.co.uk/how-the-genocide-convention-hinders-rather-than-helps-victims/>> accessed 24 March 2023

²⁷ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (Carnegie Endowment for International Peace, 1944) 75-90.

²⁸ Josef L. Kunz, ‘The United Nations Convention on Genocide’ [1949] 43(4) *The American Journal of International Law* 738.

²⁹ Hilary Earl, ‘Prosecuting Genocide before the Genocide Convention: Raphael Lemkin and the Nuremberg Trials, 1945-1949’ [2013] 15(3) *Journal of Genocide Research* 318.

³⁰ John Q. Barrett, ‘Raphael Lemkin and ‘Genocide’ at Nuremberg, 1945-1946’ in C. Safferlings and E. Conze (eds.), *The Genocide Convention after its Adoption* (T.M.C. Asser Press 2010) 46

³¹ *Ibid* 47.

³² Lemkin (1944) 75-90.

cultural genocide was once quoted by the prosecutors while describing the subject matter of the trial was not ‘genocide as mass murders but, instead, the other techniques of group destructions’³³, referring to the Germanization policies carried out by the Nazi. Similar forced assimilation policies can also be found during the colonization period; thus, the narrative of colonial genocide is usually constructed around cultural genocide. For example, Ko (2021) identifies that Australian integration policies towards Aboriginal people constitute cultural policies.³⁴ In addition, Woolford and Benvenuto (2015) also categorize Canada’s forced removal of indigenous children as a practice of cultural genocide intersecting with colonialism.³⁵

But surprisingly, Moses (2010) argued that Lemkin excluded the experience of indigenous people during colonial period from the term culture as mentioned in his genocide terminology.³⁶ Responding to the practice of imperialism in the past, Lemkin, as noted by Moses (2010), also did not oppose colonization or empire as such and empire could serve the interests of civilization.³⁷ So the question emerges as to which culture Lemkin was referring to when constructing the idea of cultural genocide – as he is seen to overlook the pattern of cultural genocide during colonial period committed by colonial powers. Lemkin’s complicity to imperialism and its effects to indigenous people did not end at the formulation process of the idea of genocide itself. Records also showed that Lemkin excluded the experience of indigenous people or former colonies in his advocacy for the Genocide Convention. In his letter to the Italian government, Lemkin (1950) urged that the Convention was pivotal to protect Italian minorities from the natives after the departure of the British troops in Eritrea,³⁸ neglecting the expansionist policy of Italy at that time.

Perhaps what is interesting about Lemkin’s view on colonial genocide is how the field remains underexplored. Lemkin, in building his argument, recognizes the Spanish conquest in South America as a colonial genocide albeit still rationalizing the human rights violations against

³³ Leora Bilsky and Rachel Klagsbrun, ‘The Return of Cultural Genocide?’ [2018b] 29(2) *The European Journal of International Law* 381.

³⁴ Ñusta Carraza Ko, ‘Complicating Genocide: Missing Indigenous Women’s Stories’ (2021) *Oxford Research Encyclopaedia of Politics* <<https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-2008>> accessed 28 March 2023.

³⁵ A. Woolford and J. Benvenuto, ‘Canada and Colonial Genocide’ [2015] 17(4) *Journal of Genocide Research* 380.

³⁶ A. Dirk Moses, ‘Raphael Lemkin, Culture, and the Concept of Genocide’ in Donald Bloxham and A. Dirk Moses, *The Oxford Handbook of Genocide Studies* (OUP 2010) 39-40.

³⁷ *Ibid* 27.

³⁸ Raphael Lemkin, *Letter to Salvatore Parisi, the Order of Sons of Italy*, 1950.

indigenous people.³⁹ McDonnell and Moses (2006) also affirm that the term genocide, which is mainly attributed to the Holocaust, was regarded by Lemkin as the consequences of the Nazi imperialism and colonialism in Europe.⁴⁰ What makes a difference in how Lemkin see both colonial genocide is that Lemkin tend to be more accepting the practice of colonial conquest in the past, and in contrast, was very vocal on such similar practice that happened in Europe at that moment. Regardless of how Lemkin sees colonial genocide, the term genocide itself is widely criticized as Eurocentric, hence, my analysis from TWAIL lens will begin from how the idea of genocide came into being.

The conclusion of the Convention in 1948 came long before the emergence of TWAIL in the 1990s. Although the methodology of TWAIL as a novel perspective keeps being re-invented, one value remains constant, which is its criticisms of the Eurocentric vision of international law.⁴¹ Eurocentrism, as per TWAIL scholarship, is described as the persistent patterns of dominance that place ‘substantial constraints’ on former colonies, to benefit former colonial powers.⁴² This pattern of dominance, according to Chimni (2006) is being legitimized by international law.⁴³ Hence, an important objective of TWAIL is to deconstruct the existing international legal system and locate how Eurocentrism influences the system to some extent. I will now attempt to contribute to TWAIL development pertaining to the Genocide Convention historical background.

Reflecting on the historical background elaborated above, the Convention’s Eurocentric historical background serves as a starting point of TWAIL discussion on the Convention. Relying on Lemkin’s understanding of genocide, which was based on the World War II and his experience as a European perpetuates the patterns of dominance that TWAIL consistently aims to deconstruct. Moses (2010) notes that Lemkin regarded international law as the ‘central civilizational instrument to combat genocide.’⁴⁴ This argument explains why Lemkin strongly advocated the codification of genocide in international law and actively resorted to former empires, such as the USA,⁴⁵ to rally behind his idea of genocide. Although, this step resulted in the deviation of meaning of

³⁹ Ko 9.

⁴⁰ Michael A. McDonnell and A. Dirk Moses, ‘Raphael Lemkin as Historian of Genocide in the Americas’ [2005] 7(4) *Journal of Genocide Research* 502.

⁴¹ Gathii (2011) 35.

⁴² Ibid 38.

⁴³ Chimni 3.

⁴⁴ Moses (2010) 27.

⁴⁵ Lemkin sent a short letter to Justice Jackson of the US Supreme Court to advocate for genocide as a war crime based on evidence written in his book and articles; Barrett 36.

genocide in the Convention itself, his idea gained substantial support from the giants of the UN at that time. And despite having to compensate his broader idea of genocide, for Lemkin, this treaty would ‘take the life of nations out of the hands of politicians and give it objective basis.’⁴⁶ Thus, he achieved his goal to codify genocide. However, the action of Lemkin submitting his genocide idea to international law, which at that time was strongly dominated by these former colonial powers, overlooked the position of former colonies and resulted in the lack of protection against mass killings in colonialism acts.

Moreover, TWAIL is also very critical in regard to the hierarchy within international law. Hierarchy, as per Koskenniemi, implies a structure of social power,⁴⁷ ought to be deconstructed and decentralized.⁴⁸ The existence of hierarchy in the Genocide Convention precludes its effective implementation as per TWAIL. One hierarchy criticized by TWAIL scholars is that the codification of genocide involved the degradation of other international instruments, such as the draft Covenant on Social and Political Rights and the Convention Concerning the Abolition of Forced Labour.⁴⁹ Weiss-Wendt (2015) records that Lemkin regarded these international instruments as contradictory to the draft of the Genocide Convention, hence, precluded the adoption of international instruments that could address episodes or impacts of genocide itself.⁵⁰ As Moses (2021) also argues that the position of genocide as ‘crime of crimes’ blinds the international community to other causes of civilian death.⁵¹

TWAIL also finds the hierarchy in the double standards in understanding mass killings of a national or racial group between during the World War II and colonization period. As per Shaw (2013), the Convention’s process overlooked the existing genocidal conflicts at that time, namely in Eastern Europe, China, Palestine, and India.⁵² The reason why this happened might be because

⁴⁶ Mark A. Drumbl, ‘Genocide: The Choppy Journey to Codification’ in *Morten Bergsmo and Emiliano J. Buis* (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (TOAEP 2018) 610.

⁴⁷ Martti Koskenniemi, ‘History in International Law: A Sketch’ [1997] 8 *EJIL* 572

⁴⁸ James T. Gathii, ‘The Agenda of TWAIL’ in Jeffrey Dunoff and Mark Pollack (eds.), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press 2019) 7-8.

⁴⁹ Drumbl 625.

⁵⁰ Anton Weiss-Wendt, *A Rhetorical Crime: Genocide in the Geopolitical Discourse of the Cold War* (Rutgers University Press 2018) 3-4.

⁵¹ A. Dirk Moses, *The Problems of Genocide: Permanent Security and the Language of Transgression* (Cambridge University Press 2021) 1.

⁵² Martin Shaw, ‘The 1948 Convention and the Transition in Genocide’ in Martin Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* (Cambridge University Press 2013c) 90.

of the historical background of the Genocide Convention as a response to the Holocaust. Hence, the international community has a tendency to compare genocidal events to the Holocaust and wait for such events to achieve the threshold similar to the Holocaust, before establishing it as a genocide under the Convention.⁵³ This hierarchy in defining genocide hinders the justice retribution for smaller genocidal events or imperialist victims due to the nature of Eurocentrism in the Convention itself. Further, even in a more fatal condition, due to the nature of preventive measure enacted in the Convention, international community has the obligation to prevent a genocide from happening. Many argue that the Holocaust threshold might cause the delay in international intervention that caused the Rwandan genocide.⁵⁴

All in all, the historical background of the term genocide and the Genocide Convention is highly influenced by the European experience. Lemkin himself tended to have a softer approach towards colonial genocide, although he recognized the pattern of colonialism and imperialism can lead to genocide. TWAIL lens sees this phenomenon can result in a more damaging international law with its hierarchies that disadvantage former colonies. Diversifying narratives in genocide studies might improve how we interpret the Genocide Convention in the future and finally deconstruct the Eurocentric nature of genocide. However, Eurocentrism is not my only critical commentary on the Convention. The next part will seek to explore the aggregation of this historical background to the negotiation table for the Convention itself.

II. Unraveling the *Travaux Préparatoires* of the Genocide Convention: The Great Power's Influence in the Codification Process of the Convention

Former Judge of the International Court of Justice (ICJ), Judge Higgins, made remark about how politicians and lawyers contributed to the degradation of the concept of genocide.⁵⁵ Having mentioned briefly that the genocide's core concept has deviated from Lemkin's first initial idea, it is worth understanding the process of the codification of the Genocide Convention. Reflected on what Judge Higgins stated before, this part of the second chapter will delve deep into the negotiation process of the Genocide Convention and will base the research on the *travaux*

⁵³ Philip Spencer, 'Imperialism, Anti-Imperialism and the Problem of Genocide, Past and Present' [2013] 98(4) *History* 607-608.

⁵⁴ *Ibid* 618.

⁵⁵ Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff Publishers 2008) xvii.

préparatoires of the Convention. Although *travaux préparatoires* does not pose any legal obligations, its existence can be used as ‘supplementary means of interpretation’ of any treaties.⁵⁶

Lemkin formulated the word ‘genocide’ from the Greek word *genos*, referring to groups of shared heritage, and the Latin word *caedo*, meaning the act of killing, and came up with:

*“Destruction of a nation or of an ethnic group and (signifies) a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”*⁵⁷

Lemkin also defined techniques used in genocide to be political, social, cultural, economic, biological, physical, religious, and moral aspect.⁵⁸ However, Lemkin’s definition of genocide, after periods of negotiation in international arena, experienced a deviation in its meaning and scope. Hence, the current international recognized definition of genocide from the Genocide Convention is:

“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 groups;

(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.”*⁵⁹

From the Convention’s definition, the international community narrowed Lemkin’s concept of genocide, especially in the techniques to only physical shown in Art. 2 (a), (b), (c), and biological shown in Art. 2 (d) and (e). To see how this concept ended up as defined in the Convention, I will outline the process of the Genocide Convention, which includes negotiation process, UN member states delegations’ suggestions, and various other discussions during the process.

a. The United Nations General Assembly Resolution 96(I): The Crime of Genocide (1946)

In early 1946, Lemkin initiated a strategy to gather support in establishing genocide an international crime by approaching several European states, but his proposal was turned down.⁶⁰

⁵⁶ Vienna Convention on the Law of Treaties 1969, Art.32.

⁵⁷ Lemkin (1944) 79.

⁵⁸ Ibid 82-90.

⁵⁹ Convention on the Prevention and Punishment of the Crime of Genocide 1948, Art.2.

⁶⁰ John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (Palgrave Macmillan 2008)

Lemkin then first approached South American states, such as Panama and Cuba to gain support.⁶¹ His next plan was to win over Indian delegations, hence, exposing his cause to support from Asian countries.⁶² Lemkin managed to execute his plans, and therefore the first proposal relating to the development of the Genocide Convention was brought up by Cuba, India and Panama through Draft Resolution A/BUR/50 in 1946⁶³ calling for the Social and Economic Council (ECOSOC) to study and prepare a report on the possibilities of ‘declaring genocide an international crime.’ The document also recommended that ‘genocide should be dealt with by national legislations in the same way as other international crimes.’⁶⁴

This document was passed to the Sixth Committee who conducted a number of meetings to discuss the draft resolution. On 29 November 1946, the delegates of France and the United Kingdom submitted a new draft to distinguish clearly between the responsibility of individuals and that of States.⁶⁵ Meanwhile, a stark support came from the Chinese delegation as they view the proposal carried the similar principle by Confucius.⁶⁶ With final minor inputs from the UK, India, France, and the USSR delegations,⁶⁷ the rapporteur of the Sixth Committee recommended that the General Assembly adopt the draft into a resolution.⁶⁸ Hence, the General Assembly finally unanimously adopted the Resolution 96(I) which declares genocide as a crime under international law⁶⁹ on 11 December 1946.

While this implies a strong progress towards the criminalization of genocide, some colonial legacies are shown in the process of reaching the common legal understanding of genocide, which was influenced by great powers. Abtahi and Webb (2018) note that the USSR only framed genocide based on ‘racial discrimination’, avoiding other legal persecutions of related crimes.⁷⁰

⁶¹ Cooper 79.

⁶² Ibid 80.

⁶³ Annex 15 Draft resolution relating to the crime of genocide, proposed by the delegations of Cuba, India, and Panama, *A/BUR/50*. See also Abtahi and Webb (2008) 3.

⁶⁴ Ibid.

⁶⁵ Sixth Committee, Discussions pertaining to issues other than the Genocide Convention, *A/C.6/96*, 1946. See also Abtahi and Webb (2008) 18.

⁶⁶ Sixth Committee 1946, See also Abtahi and Webb (2008) 22.

⁶⁷ Annex 15a, Amendments to the draft resolution relating to the crime of genocide, proposed by the delegations of the UK, India, France, and the USSR, *A/C.6/83*. See also Abtahi and Webb (2008) 5.

⁶⁸ Sixth Committee, Annex 63 The Crime of Genocide, *A/231*. See also Abtahi and Webb (2008) 33.

⁶⁹ Cooper 86.

⁷⁰ Hiram Abtahi and Philippa Webb, ‘Secrets and Surprises in the *Travaux Préparatoires* of the Genocide Convention’ in Margaret deGuzman and Diane Marie Amman, *Arcs of Global Justice: Essays in Honour of William A. Schabas* (OUP 2018) 304.

Cooper (2008) finds that the exclusion of national and ethnical groups in the resolution was due to the insistence of the UK delegation.⁷¹ In addition, it was also noted that the UK and the USA had issued orders for their delegates to push for a ‘vaguely worded resolution’ or even to the extent of burying the proposal in the subcommittees.⁷² Therefore, as per TWAIL lens, the Resolution can be seen as a persistent measure taken by the former colonial powers to persist their legacies and influence in international system. Lemkin further assumed that the objection from some delegations was due to the fact that there would be a legal basis for persecuting states and individuals for the destruction of populations within ‘their sphere of influence.’⁷³ Lemkin’s use of the wording sphere of influence might refer to the situation at that time when these powerful states ruled over their colonies, and avoided accountability to genocidal policies within their realm of power. Despite of this great powers’ influence, Resolution 96(I) served as a foundation towards the codification of genocide under international law whose process will be elaborated in the next parts of this chapter.

b. The Secretariat Draft Convention for the Prevention and Punishment of Genocide (1947)

The struggle to codify genocide did not end in Resolution 96(I). The process of following up the resolution started with the instruction of the Secretary-General to the ECOSOC to draft a convention on the crime of genocide.⁷⁴ The US and the UK proposed that the draft would be tasked to the Commission on Human Rights, instead of an ad hoc committee, which Lemkin viewed as an effort to sideline the Convention by ‘burying it in an overburdened commission.’⁷⁵ With this being delegated to the Commission on Human Rights, the codification of genocide could have not ended in a convention, but a human rights declaration or other less enforceable international legal instruments. This could also be seen as how great powers influence the codification of genocide as the great powers can utilize the tools to hinder an internationally needed law at that time.

⁷¹ Cooper 86.

⁷² Douglas Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide* (University of Pennsylvania Press 2016) 158.

⁷³ Raphael Lemkin in a letter to Gertrude Samuels, 1948; collected by the American Jewish Historical Society.

⁷⁴ Irvin-Erickson (2016) 158.

⁷⁵ Ibid.

Despite of the dynamics around the formulation process, the committee produced a draft convention in June 1947. The definition of genocide according to the draft is:

*“criminal acts against any one of the groups of human beings aforesaid, with the purpose of destroying them in whole or in part, or of preventing their preservation or development.”*⁷⁶

The protected groups of the draft are defined as ‘*racial, national, linguistic, religious or political groups of human beings*’,⁷⁷ which showed that political genocide made it to the draft. In addition, cultural genocide as advocated by Lemkin was also recorded in the Article 1(ii) point 3, where it recognized the destroying the characteristics of the group by, *inter alia* forced transportation of children, exile of all individual representatives of the culture of a group, prohibition of the use of the national language in private realms, systematic destruction or prohibition of books, and systematic destruction of monuments.⁷⁸

In the *travaux*, we can see the dynamics of states after the draft was tabled and circulated among the UN member states. In their argument, Yugoslavia raised a concern that no governments of countries which had suffered most from genocide had been consulted and that the draft had been prepared by three non-governmental experts.⁷⁹ Colombia also concerned about the timing of the draft circulated among the states which was deemed to be ‘so late,’ hence their government was prevented from broaching the substance of this draft.⁸⁰ The UK, on the other hand, viewed genocide has already been established as international crime due to the consequence of the judgment of the Nuremberg Trial.⁸¹ In response to the UK, the Philippines felt that ‘the principles established at the Nuremberg Trial did not sufficiently cover the matter of genocide,’⁸² therefore, urging for the codification of genocide in international law. In addition, Irvin-Erickson (2016) also records the efforts made by the UK and the USA to encircle the draft in pointless committee reviews to slow down the process.⁸³ Substantially, the Convention also received comments from the UN member states. In their observations, the USA accepted the idea of physical and biological

⁷⁶ Draft Convention for the Prevention and Punishment of Genocide 1947, Art.1(II)

⁷⁷ Ibid Art.1(I).

⁷⁸ Draft Convention for the Prevention and Punishment of Genocide Art.1(II).

⁷⁹ General Assembly, Summary Record on the 28th Meeting of the Committee on the Progressive Development of International Law and Its Codification, A/AC/10/SR.28, 1947. See also Abtahi and Webb (2008) 166.

⁸⁰ Ibid 169.

⁸¹ Schabas (2009) 66.

⁸² Discussions pertaining to issues other than the Genocide Convention, A/C.6/SR.41, 1947. See also Abtahi and Webb (2008) 396

⁸³ Irvin-Erickson (2016) 160.

genocide, but generally rejected the idea of cultural genocide, and would only retain the ‘forced transfer of children to another human group’ act out all of the acts mentioned under cultural genocide.⁸⁴ France also took the same side as the USA in opposing cultural genocide arguing that it ‘invites the risk of political interference in the domestic affairs of States.’⁸⁵ Despite all debates and criticism by states, this draft was then forwarded to the Sixth Committee and sent to the General Assembly for vote. On 21 November 1947, the General Assembly passed Resolution 180(II), ordering the ECOSOC to work on the draft convention for the 1948 General Assembly in Paris.

Many critical points of this stage of the conclusion of the Genocide Convention can be analyzed using TWAIL. International law has been perceived by TWAIL as the arena of domination of powerful, former colonial states. The process in adopting the 1947 Draft Convention encapsulated that argument. First, the exclusion of genocide affected states, as flagged by Yugoslavia, resulted in an understanding of genocide that put colonial genocide on the sideline. As the UK, the USA, and France were constantly critical on cultural genocide, which is closely related to colonial policies, the experience of colonial peoples is not reflected by the draft. Therefore, it could create a legal loophole in preventing or punishing such actions at that time or for the future. Second, as noted by Yugoslavia, the experts chosen for the panel only consisted of three European men who might disregard the contextualization of countries’ situation and system. This was also demonstrated by Venezuela’s concern on the overwhelming reliance on the international system and raised the importance of balancing international and domestic legal system.⁸⁶ Lastly, the procedural circulation of the Genocide Convention also raised some concerns. Many delegates complained about the timing of its circulation, resulting in the incapability of smaller states with limited resources to thoroughly review the Convention. Regardless of the controversial points above, the process continued to form an ad hoc committee to ensure the codification of genocide.

c. The Ad Hoc Committee Draft on the Genocide Convention (1948)

⁸⁴ General Assembly, Historical Summary Prevention and Punishment of Genocide, *E/621*, 1946. See also Abtahi and Webb (2008) 526.

⁸⁵ *Ibid* 527.

⁸⁶ Annex 3a Draft Convention on Genocide, *A/401*, 1947. See also Abtahi and Webb (2008) 371.

Following up to Resolution 180(II), ECOSOC established an ad hoc committee that consisted of delegates from China, France, Lebanon, Poland, the US, the USSR, and Venezuela.⁸⁷ In their fifth meeting, the delegates engaged on a debate regarding the draft. Based on the *travaux*, the USSR stressed the importance of qualifying genocide under the term ‘national-cultural,’ and was supported by Venezuela with an argument that ‘genocide deprived humanity of the cultural contributions of certain human groups.’⁸⁸ Poland shared the same sentiment by emphasizing great importance to the notion of cultural genocide coming from an experience suffering under such particular crime in the past.⁸⁹ Although Venezuela and Poland brought up views from periphery countries, their views faced objection from other members of the Committee. In the contrasting side, France urged the suppression of cultural genocide arguing that it was already connected with ‘the protection of culture in general.’⁹⁰ Responding to it, China raised a concern that the proposal from France would result in ‘the limitation of the convention’s scope.’⁹¹ Meanwhile, the USA argued that the General Assembly only viewed genocide in its physical aspect, and by including cultural genocide, the USA concerned that the Committee would jeopardize its object to pass the Genocide Convention.⁹² In addition, the USSR and Poland pushed for the exclusion of political groups because they were deemed to be lacking of stability.⁹³ Despite some opposition, the wording of cultural genocide made it to the Ad Hoc Committee Draft by six to one votes, and so did political groups by four to three votes.⁹⁴

Hence the draft was agreed by five votes, with the USSR rejected the whole draft and Poland abstained. The USSR, in their explanatory document, elaborated that political groups inclusion would ‘neglect the destruction of national, racial, and religious groups’ and condemned that public propaganda for genocide was not banned in the draft.⁹⁵ With strong push from France, eventually cultural genocide was simplified and defined as prohibition of the use of language and

⁸⁷ ECOSOC, Ad Hoc Committee on Genocide – Terms of Reference, *E/AC.25/2*, 1948. See also Abtahi and Webb (2008) 643

⁸⁸ ECOSOC, Ad Hoc Committee on Genocide – Summary Record of the 5th Meeting, *E/AC.25/SR.5*, 1948. See also Abtahi and Webb (2008) 726.

⁸⁹ *Ibid.* See also Abtahi and Webb (2008) 728.

⁹⁰ ECOSOC, Ad Hoc Committee on Genocide – Summary Record of the 5th Meeting, *E/AC.25/SR.*

⁹¹ ECOSOC, Ad Hoc Committee on Genocide – Corrigendum to the Summary Record of the 3rd Meeting, *E/AC.25/SR.3/Corr.1*, 1948. See also Abtahi and Webb (2008) 720.

⁹² *Ibid* 730.

⁹³ Cooper 123.

⁹⁴ *Ibid.*

⁹⁵ *Ibid* 125.

destroying cultural institutions or objects.⁹⁶ Hence, the point of forced removal or transfer of children was removed in the draft.

Unsurprisingly, the UK launched a campaign against the Convention with support from Canada and France.⁹⁷ Cooper (2008) notes that the Polish delegates pointed out that these efforts to prevent the early adoption of the draft came from ‘narrow nationalist and imperialist motives.’⁹⁸ TWAIL sentiment resonates with the Polish delegates’ view on great powers influence as imperialism was still common among these opposing states. Countries engaged in colonial practice, such as the UK and France, at that time still ruled over some colonies, avoiding legal obligations to stop or to get blamed for their colonial assimilation practices. Eventually, the ECOSOC submitted the ad hoc draft to the General Assembly for the final drafting stage of the eventual Convention.

d. The Final Draft of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and Its Adoption

The draft submitted to the General Assembly contained two articles on the prohibited acts defined as genocide. Article 2 stipulated that physical and biological genocide could be committed against nation, racial, religious, and political groups. Meanwhile, Article 3 defined cultural genocide as an act committed with intent to destroy the language, religion, or culture of the protected groups. Hence, the dichotomy between the two forms genocide became apparent in the draft as tabled by the USA previously. According to Cooper (2008), this dichotomy made it easier for the USA and likeminded countries to omit cultural genocide clause completely.⁹⁹ The USA began the debate on this matter by pushing for the exclusion of Article 3, which according to Irvin-Erickson (2016), haunted by domestic situation where racial segregation and forced assimilation of Native Americans were still lawful.¹⁰⁰ France and Belgium proposed that the matter on Article 3 should totally be excluded from the draft and forwarded to another committee working on human rights.¹⁰¹ The Canadian government also instructed their delegate to vote against the Convention

⁹⁶ The Ad Hoc Committee Draft: Second Draft Genocide Convention 1948, Art.3.

⁹⁷ Irvin-Erickson (2016) 169-172.

⁹⁸ Cooper 139.

⁹⁹ Ibid 151.

¹⁰⁰ Irvin-Erickson (2016) 175.

¹⁰¹ Ibid 184.

if Article 3 remained in the Convention.¹⁰² Meanwhile, it was also recorded that Sweden admitted that Article 3 could bring legal persecution on the Swedish government policies against the Sami and their mass conversion to Christianity.¹⁰³ Denmark also opposed the article by making an analogy that comparing mass murders in gas chambers and the closing of libraries as per the Convention showed a lack of logic.¹⁰⁴ Even New Zealand argued as far that the protection of tribal system in Africa and the South Seas was an obstacle to the advancement of the indigenous inhabitants.¹⁰⁵

States in favor of Article 3 were led by China in this debate. China argued that the '[cultural] aspect of genocide might even be harmful than physical or biological genocide, ..., attempting to deprive of its ancestral culture and to destroy its very language.'¹⁰⁶ Pakistan also supported this article by arguing that for Pakistan, the ties of religion, culture and feeling faced 'cultural extinction' at the hands of hostile forces, appearing to refer to the British colonial legacy in Pakistan.¹⁰⁷ Adding to the favorable arguments, Ecuador argued that although the destruction of culture normally inflicted with less violence than the extermination of groups, but they recognized that 'the result was the same – the disappearance of the group.'¹⁰⁸ Meanwhile, Czechoslovakia drew the Committee's attention on the fact that 'a group might disappear ... as a result of the forcible destruction of its distinctive and permanent characteristics' by reflecting on the past Nazi policies of the Germanification of the Czech and Slovak peoples.¹⁰⁹

We can see that blatant rejections mostly came from states engaged in colonial practice, such as Canada, New Zealand, and the UK. These states, through their arguments in the debate, exemplified how international law is shaped by their influence to protect and retain their position. For example, New Zealand's critics on tribal system could be seen as an imposition of Western idea of governance to be superior to other systems. Meanwhile, the rebuttal of argument that support cultural genocide showed how the existing colonial powers during the period of the debate

¹⁰² Commentary for the Use of the Canadian Delegation, *NAC/RG/25*.

¹⁰³ ECOSOC, Continuation of the consideration of the draft convention on genocide, *A/C.6/SR.83*, 1948. See also Abtahi and Webb (2008) 1506.

¹⁰⁴ *Ibid* 1508.

¹⁰⁵ *Ibid* 1511.

¹⁰⁶ ECOSOC, Continuation of the consideration of the draft convention on genocide, *A/C.6/SR.83*, 1948. See also Abtahi and Webb (2008) 1506.

¹⁰⁷ *Ibid* 1501-1502.

¹⁰⁸ *Ibid* 1515.

¹⁰⁹ *Ibid* 1517.

overlooked the detrimental effects of their expansionist policies and considered them as lawful. Hence, this domination retains its position in this debate and sideline the experience of colonial peoples, such as those from Pakistan and Ecuador. Despite all this support from mostly newly independent third world countries, the exclusion of the cultural genocide from the Convention was passed by twenty-five votes.¹¹⁰ Regardless, an amendment from Greece recalled on the inclusion of the ‘forced transfer of children to another human group’ should be retained on the draft.¹¹¹ With the support from member states, the clause made it to the final draft and became the only cultural genocide act that is recognized on the Convention as we know today.

During the second round of debate, the delegates of Iran, Egypt and Uruguay proposed the re-examination on the exclusion of political groups. Although the USA had been a staunch supporter of the inclusion of political groups, in this debate, the USA supported the proposal to delete it from the draft ‘in a conciliatory spirit.’¹¹² Resonating with the USA’s argument, Egypt also voted to exclude political groups because it would be ‘a serious obstacle’ to gain support for the ratification of the Convention. China voted to retain political groups saying that ‘at a time of ideological strife, political groups stood in greater need of protection than national or religious groups.’¹¹³ Hence, the exclusion of political groups from the Convention was adopted by twenty-six votes.

The legacy of Western dominance also appeared in the territorial jurisdiction of the Convention. The USSR criticized the Convention’s applicability limited to the signatory States and supported its application in Non-Self-Governing Territories (NSGTs).¹¹⁴ In response, the UK objected the proposal pleading that it would ‘represent interference on the part of the metropolitan Powers in local government activities.’¹¹⁵ The UK also argued that any international convention to which it had become a party could not be ‘automatically extended to colonial territories.’¹¹⁶ A significant backlash to the UK’s stance came from Poland who reaffirmed that weak and small

¹¹⁰ ECOSOC, Continuation of the consideration of the draft convention on genocide, *A/C.6/SR.83*, 1948. See also Abtahi and Webb (2008) 1518.

¹¹¹ ECOSOC, Continuation of the consideration of the draft convention on genocide 82nd meeting, *A/C.6/SR.82*, 1948. See also Abtahi and Webb (2008)1492.

¹¹² Discussions pertaining to issues other than the Genocide Convention, *A/C.6/SR.128*, 1948. See also Abtahi and Webb (2008) 1868.

¹¹³ *Ibid* 1870.

¹¹⁴ ECOSOC, 178th Plenary Meeting, *A/PV.178*, 1948. See also Abtahi and Webb (2008) 2045.

¹¹⁵ *Ibid* 2046.

¹¹⁶ ECOSOC, 170th Meeting, *A/C.6/SR.107*, 1948. See also Abtahi and Webb (2008) 1821.

nations were most seriously threatened by genocide and recognized that ‘Trust and other NSGTs needed most protection from the Convention.’¹¹⁷ Poland also acknowledged that genocide had often been committed in the colonies by the metropolitan States, be it in physical or cultural form of genocide.¹¹⁸ This remarkable debate ended in the Convention not including any provisions that make the Convention automatically enforceable in NSGTs. Hence, I would argue that from the *travaux*, the dominance of colonial States in maintaining their administering powers over NSGTs or weaker states appeared as a pattern in the negotiation process of the Convention. Regardless, the General Assembly had a session on the Genocide Convention with the contents as we know it today. In a unanimous vote, the General Assembly ruled in favor of its codification as the Genocide Convention.¹¹⁹

III. TWAIL-ing the Elements of Genocide under the Genocide Convention: Intent, Prohibited Acts, and Protected Groups

a. The Motive behind Genocide: The Question on Intent

Intent is an important aspect of the Convention, especially under criminal law, because the legal responsibility is built upon establishing the punishable acts to be committed intentionally.¹²⁰ In the Convention, genocide is a crime under international law if the acts committed ‘*with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.*’¹²¹ Hence, this provision established the *dolus specialis*, separating the crime of genocide from other international crimes,¹²² e.g., crimes against humanity or non-genocidal mass killings. This was further strengthened by the International Court of Justice (ICJ) reaffirming that Article 2 of the Convention

*‘requires a further mental element. [...] it is not enough that the members of the groups are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent.’*¹²³

¹¹⁷ ECOSOC, 179th Plenary Meeting, A/PV.179, 1948. See also Abtahi and Webb (2008) 2076.

¹¹⁸ Ibid.

¹¹⁹ Schabas (2009) 90.

¹²⁰ William A. Schabas, ‘The Law and Genocide’ in Donald Bloxham and A. Dirk Moses, *The Oxford Handbook of Genocide Studies* (OUP 2012) 137.

¹²¹ Convention on the Prevention and Punishment of the Crime of Genocide 1948, Art.II.

¹²² Katherine Goldsmith, ‘The Issue of Intent in the Genocide Convention and Its Effects on the Prevention and Punishment of the Crime of Genocide: Toward A Knowledge-Based Approach’ [2010] 5(3) *Genocide Studies and Prevention* 241.

¹²³ *Bosnia and Herzegovina v. Serbia and Montenegro* [2007] ICJ: Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide para.187.

For state-sponsored genocide, Schabas (2012) notes that as the crime of genocide under international law is the crime caused by the act of state, state policies became important as the context shift from individual liability to a broader political determination.¹²⁴ Hence, in proceeding on the crime of genocide, the specific intent of wiping out the protected groups should be implied in the state policies in order to establish the crime.

Reflecting on the Rwandan Genocide, Magnarella (2002) problematizes intent as difficult to be determined without a sincere confession or public admission by the accused.¹²⁵ Adding to this, it is worth noting that the Appeal Chamber of the International Criminal Tribunal for Rwanda (ICTR) has implied that with the absence of direct proof, 'intent thus must usually be inferred.'¹²⁶ The Appeals Chamber of ICTR also stated that factors that might be considered to establish intent are, *inter alia* the general context, other systematic acts targeting the same group, the scale of the atrocities, the systematic targeting of victim on account of their membership in a group, or the repetition or discriminatory acts.¹²⁷ Interestingly, Schabas (2009) also considers that proof of attacks on cultural institutions as important in establishing the existence of genocide rather than merely homicidal acts,¹²⁸ despite the Convention not recognizing cultural genocide.

The challenge of applying this in the context of TWAIL also involves the difficulty in establishing the intent of violent actions. As the Convention sets a very specific intent, that is to wholly or in part exterminate the groups, it is challenging to apply this in the context of colonialism practice. As noted by Wolfe (2006), pertaining to colonialism, sometimes the mass killings occurred not on the basis of exterminating any particular groups, but rather because of territorial conquest.¹²⁹ In addition, with the common practice to compare alleged genocidal acts to the Holocaust, where intent was clearly manifested in their repeated actions during a specific period of time, it further disadvantages indigenous or colonial peoples, where such violent actions

¹²⁴ Schabas (2012) 138.

¹²⁵ Paul J. Magnarella, 'Recent Development in the International Law of Genocide: An Anthropological Perspective on the ICTR' in Alexander Hinton, *Annihilating Difference: The Anthropology of Genocide* (California Scholarship 2002) 319.

¹²⁶ *Prosecutor v. Gacumbitsi* [2006] Judgment (Case No. ICTR-2001-64-A) para.40.

¹²⁷ *Prosecutor v. Simba* [2005] Judgment and Sentence (Case No. ICTR-2001-76-T) para.411. *Prosecutor v. Semanza* [2003] Judgment and Sentence (Case No. ICTR-97-20-T) para.313. *Semanza v. Prosecutor* [2005] Judgment (Case No. ICTR-97-20-A) paras.261–262.

¹²⁸ William A. Schabas, 'The Mental Element or *mens rea* of genocide' in *Genocide in International Law: The Crime of Crimes* (Cambridge University Press 2009b) 267.

¹²⁹ Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' [2006] 8(4) *Journal of Genocide Research* 388.

occurred in an extensive induration with varied motives.¹³⁰ In a hypothetical application of the Convention to past colonial actions, Dwyer and Ryan (2016) argue that the intent should not be the focus point on constituting genocide if the outcome of the actions is genocidal,¹³¹ for example, the Great Famine in Ireland¹³² and Australia's complicity in allowing 'hunting parties' of indigenous people.¹³³ They argued that both cases in the past could not constitute genocide based on the current Convention, yet the state's policies outcome were genocidal, resulting in annihilations of members from a particular group. In addition, Goldsmith (2010), in interpreting the case of Darfur, also notes that the territorial conquest intent had been established, demonstrated by the perpetrators' action to move victims from the land, yet this was not enough to constitute genocidal intent.¹³⁴ Another scenario is the failure to fulfil threshold of genocidal intent could reduce the violent acts to be non-genocide. For example, in the Bosnia and Herzegovina case, the ICJ dismissed attempts to broaden the definition of genocide, stating that deportation or displacement of the members of a group was not necessarily equivalent to destruction of the group, and that destruction was not an automatic result of the displacement.¹³⁵

I argue that the question on intent could act as a barrier to establish colonial practice as the crime of genocide under international law. The neglect in including colonial experience accounts manifests in this legal loophole that can be utilized by States in the practice to avoid genocide charges that will be further elaborated in the next chapter through the cases. Hence, one question remains relevant, is genocidal intent necessary to be proven when the casualties of the acts already show genocidal characters?

b. Executing Genocide: *Prohibited Acts*

As mentioned in the previous part of this chapter, during its drafting, the punishable acts under the Convention were categorized in three attacks, physical, biological, and cultural. However, the General Assembly voted to exclude the cultural attacks from the Convention, leaving

¹³⁰ Wolfe 401.

¹³¹ Philip Dwyer and Lyndall Ryan, 'Reflections on Genocide and Settler-Colonial Violence' [2016] 13(3) *History Australia* 338.

¹³² Mark G. McGowan, 'The Famine Plot Revisited' [2017] 11(1) *Starvation and Genocide* 90-93.

¹³³ Lorena Allam and Nick Evershed, 'The killing times: the massacres of Aboriginal people Australia must confront' (The Guardian 3 March 2019) <<https://www.theguardian.com/australia-news/2019/mar/04/the-killing-times-the-massacres-of-aboriginal-people-australia-must-confront>> accessed 30 March 2023.

¹³⁴ Goldsmith 243-244.

¹³⁵ *Bosnia and Herzegovina v. Serbia and Montenegro* para.190.

the current five punishable acts under the physical and biological attacks. The five punishable acts set out as the *actus reus* are

- “(a) Killing members of the groups;
- (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.”¹³⁶

However, Schabas (2012) observes that the inclusion of forcible transfer of children was presented as an ‘exception to the agreed upon exclusion of cultural genocide.’¹³⁷ Hence, one might argue that cultural genocide is mentioned by the Convention through this one particular punishable act. Many critics, however, do not consider this prohibition of this act as enough pertaining to the importance of cultural characteristic of social groups.

Even with the inclusion of forcible transfer of children, it is still difficult to establish the crime of genocide under this provision. Whitt and Clarke (2019) argue that in order to establish genocide, ‘physical and biological destruction must be intended when forcible transfer occurs; cultural destruction alone will not suffice.’¹³⁸ Relating to colonial actions, Herschkopf and Hunter (2011) note that such actions to remove children and put them in residential schools, such as the ones in Canada or the USA, could be observed to constitute genocide under this provision.¹³⁹ Their observation was met with skepticism that reckoned while such removals may have resulted in physical destruction of indigenous groups, yet ‘specific intent as such can be exceedingly difficult to prove.’¹⁴⁰ From this debate, I observe that although the physical destruction comes out as a result from the forcible transfer, proofing the intent outweighs the importance of this result, demonstrating the argument in the previous section that genocidal intent in colonial acts is difficult to locate.

Another issue regarding the prohibited acts is the exclusion of colonial practice from the Convention. The ICJ Judge Fitzmaurice of the UK implied that the Convention might plausibly

¹³⁶ Convention on the Prevention and Punishment of the Crime of Genocide 1948, Art.II.

¹³⁷ Schabas (2012) 135.

¹³⁸ Laurelyn Whitt and Alan W. Clarke, *North American Genocide: Indigenous Nations, Settler Colonialism, and International Law* (Cambridge University Press 2019) 174.

¹³⁹ Jayme Herschkopf, Julie Hunter and Laurel E. Fletcher, *Genocide ReInterpreted: An Analysis of the Genocide Convention’s Potential Application to Canada’s Indian Residential School System* (Yale Law School 2011) 26-28.

¹⁴⁰ Whitt and Clarke 175.

establish a legal liability of the UK government against colonial peoples.¹⁴¹ With influence from great powers, the Convention does not recognize colonial actions under the scope of the prohibited acts of the Convention, making these actions invisible to be charged as the ‘crime of crimes.’ Responding to this, Palmer (1998) made a comment that understanding historical non-European cases of genocide¹⁴² is important to understand modern genocides, especially in mapping out the recurring patterns of genocidal actions that can be found in colonial and modern genocides.¹⁴³ For example, Brazil’s argument in the *travaux*, pointed out that minorities can use ‘normal assimilation’¹⁴⁴ policies from a newly formed state to create a narrative of genocide.¹⁴⁵ However, in my argument, such assimilationist policies are not new to newly formed states as many colonial practices in the past executed the same policies on colonial peoples. This, according to TWAIL, is a proof that the genocide overlooks one significant characteristic of ‘groups,’ which is culture – a stark contrast in how Western and non-Western countries understand the component constituting a destruction of groups.

Another new development made by Schabas (2009) uncovers the relations between environment as integral to the survival of certain groups,¹⁴⁶ referring to the colonial extractive industries. Adding to this argument, Crook and Short (2014) coin the term ‘ecologically induced genocide’ to describe the annexation of land and the associated externalities can be genocidal when the *genos* in question is indigenous peoples.¹⁴⁷ Dunlap (2018) exemplifies that the killing of animals or other environmentally destructive interventions can be a part of ‘a larger extermination strategy,’¹⁴⁸ that can result in the destruction of the group itself. In addition to genocidal

¹⁴¹ Interview G.G. Fitzmaurice to Hartley Shawcross (Public Record Office, 1947).

¹⁴² Palmer used the term ‘historical non-European cases of genocide’ to refer to colonial genocide that happened outside of Europe. Two examples from Palmer’s writing are the Aborigines in Queensland (1840-1897) and the Herero in South West Africa (1884-1906). See also Alison Palmer, ‘Colonial and Modern Genocide: Explanations and Categories’ [1998] 21(1) *Ethnic and Racial Studies* 104.

¹⁴³ *Ibid* 105.

¹⁴⁴ The Brazilian delegate referred to their assimilationist policy as ‘normal assimilation.’ However, Brazil arguably has the history of forced assimilation policies that can be considered as culturally genocidal. See also Salo de Carvalho, David Goyes, and Valeria Vegh Weis, ‘Politics and Indigenous Victimization: The Case of Brazil’ [2021] 61(1) *The British Journal of Criminology* 260-263. See also Omaira Bolaños, ‘Reconstructing Indigenous Ethnicities: The Arapium and Jaraqui Peoples of the Lower Amazon, Brazil. [2010] 45(3) *Latin American Research Review* 72-75.

¹⁴⁵ ECOSOC, A/C.6/SR.83, 1948. See also Abtahi and Webb (2008) 1507.

¹⁴⁶ Schabas (2009b) 235.

¹⁴⁷ Martin Crook and Damien Short, ‘Marx, Lemkin, and the genocide-ecocide nexus’ [2014] 18(3) *The International Journal of Human Rights* 298-299.

¹⁴⁸ Alexander Dunlap, ‘The ‘solution’ is now the ‘problem’: wind energy, colonisation and the ‘genocide-ecocide nexus’ in the Isthmus of Tehuantepec, Oaxaca’ [2018] 22(4) *The International Journal of Human Rights* 557.

characteristics of colonial exploitation of the environment, it is also worth noting that this can relate to cultural genocide as the relationship to nature is pivotal to the indigenous peoples and their culture.¹⁴⁹

Criticisms to the prohibited acts of the Convention are mainly revolved around the exclusion of cultural genocide. As mentioned in this part, the experience of colonial peoples is not represented in the drafting of the Convention, which result to the exclusion of colonial acts that are not necessarily cultural genocide, yet are still genocidal according to the Convention. Actions, such as forced assimilation and ecologically induced genocide, are found to have caused physical or biological destruction to a particular group, but they are still invisible to the Convention. Therefore, it is established that understanding colonial actions is vital to ensure that the Convention achieves its aim to prevent and punish the crime of genocide. However, in the current application, these colonial acts have reemerged in State's policies with the same destructive results, but their exclusion poses a challenge to bring justice for the affected groups.

c. What Is Destroyed by Genocide: Protected Groups

The last element that I will outline in this part is the protected groups under the Convention. According to the Convention, the protected group is defined as '*a national, ethnical, racial or religious group*'.¹⁵⁰ In the previous part, I have mentioned the discourse on political genocide that involves the targeting of political groups, which finally did not make it to the final draft of the Convention due to opposition of some states, namely the USSR and Poland. In addition to the exclusion of certain groups, Lingaas (2016) argues that the understanding of these groups has changed parallel with technological, scientific and sociological developments, and the interpretation of them was purposefully left to the state parties to the Convention.¹⁵¹

In *Akayesu case*, the Trial Chamber of ICTR gave an analysis to the definition of the protected groups.¹⁵² They clarified that a national group is identified with share legal bonds based

¹⁴⁹ Martin Crook, Damien Short, and Nigel South, 'Ecocide, genocide, capitalism colonialism: Consequences for indigenous people and glocal ecosystems environments' [2018] 22(3) *Theoretical Criminology* 301-303.

¹⁵⁰ Convention on the Prevention and Punishment of the Crime of Genocide 1948, Art.2.

¹⁵¹ Carola Lingaas, 'Defining the Protected Groups of Genocide through the Case Law of International Courts' (University of Oslo 10 February 2016) <<https://www.jus.uio.no/pluricourts/english/blog/carola-lingaas/2016-02-10-protected-groups-genocide.html>> accessed 31 March 2023.

¹⁵² *Prosecutor v. Jean-Paul Akayesu* [1998] Judgement (Case No. ICTR-96-4-T).

on common citizenship with reciprocity of rights and duties.¹⁵³ Meanwhile, an ethnic group is defined to share common language or culture.¹⁵⁴ A racial group is considered to be based on the hereditary physical traits often affiliated with a geographical region regardless of linguistic, religious, cultural, or national factors.¹⁵⁵ And lastly, a religious group refers to a group of people who share the same religion, denomination, and modes of worship.¹⁵⁶ Szpak (2012) reaffirms that this definition is also backed by the nature of this social grouping to be cohesive, homogenous, inevitable, stable, and traditional.¹⁵⁷ This also explains the reasoning behind the exclusion of political groups, as the affiliation to the group is arguably a matter of individual choice.

With the challenges arising from the narrow nature of this provision, it presents yet another legal loophole in achieving justice for the victims of genocide if one fails to categorize the victims into one of these protected groups. One development worth noting is from the work of the Darfur Commission. The Commission concluded that a tribal group is not automatically afforded protection under the Convention unless they are perceived as a racial or ethnic group by themselves or the perpetrators.¹⁵⁸ Another effort in interpreting if the victims fall within the protected group is through identifying it by what it is not, rather than what it is. The applicant in the *Bosnia v. Serbia case* defined the victims as the ‘non-Serb’ group. However, the Court argued that the matter of genocide is to define ‘whom those people are, not whom they are not.’¹⁵⁹

The legacy of colonialism also shapes how the dominating Western countries define these protected groups. One example encapsulates this is when the Special Rapporteur of the International Law Commission, Doudou Thiam, notes that the impacts of territorial division by colonial powers can be seen in how national groups mainly in Africa can comprise different ethnic groups.¹⁶⁰ Another example of how colonialism accentuates groups dichotomy is the application of the Convention on the Rwandan Genocide. The ICTR trial process embodies this narrative of

¹⁵³ *Prosecutor v. Jean-Paul Akayesu* para.512.

¹⁵⁴ *Ibid* para.513.

¹⁵⁵ *Ibid* para.516.

¹⁵⁶ *Ibid* para.513.

¹⁵⁷ Agnieszka Szpak, ‘National, Ethnic, Racial, and Religious Groups Protected Against Genocide in Jurisprudence of the ad hoc International Criminal Tribunals’ [2012] 23(1) *European Journal of International Law* 159.

¹⁵⁸ International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, *UN Doc. S/2005/60*, 2005, para. 496.

¹⁵⁹ *Bosnia and Herzegovina v. Serbia and Montenegro* para. 193.

¹⁶⁰ Doudou Thiam, ‘Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind’, *UN Doc. A/CN.4/398* para.57.

colonialism and its manifestly genocide where Schabas (2009) finds that Belgian system of ethnic identity cards dichotomized the Hutus and Tutsis, despite of the practice of common language, religion, and culture.¹⁶¹ The same challenge can be seen in Israeli annexation of the Palestinian territories, where the Israeli government persistently rejects the idea of Palestinian group-hood, arguing ‘it did not exist’.¹⁶² In addition, as Khalidi (2010) also notes that Palestinian identity is developed as a response to Zionism,¹⁶³ it could be argued that Palestinians can be interpreted as a political or ideological groups.

I argue on this section that the protected groups as one element of constituting genocide is saturated with colonial dominance. Persistent objections to the inclusion of other groups embodies this dominance, in addition to the perception gap in understanding these protected groups between Western and non-Western countries. However, most importantly, I argue that colonialism creates a legacy that stratifies groups that might trigger the policy of assimilationist or othering the perceived lower groups. Many of the modern alleged genocides,¹⁶⁴ stemmed from the practice of colonialism and neo-colonialism, face similar difficulties in categorizing them as genocide under international law because of the challenge in affiliating the victims to any of the protected groups. I also would like to highlight that the understanding of groups under the Convention overlooks the fact that social groups are not a static entity – they evolve and build various identities due to social interactions or other factors. Hence, the narrow and strict definition of these protected groups could be politicized when the defining characteristic of the victims is no longer dominated by how any protected groups under the Convention should have.

¹⁶¹ William A. Schabas, ‘Groups protected by the Convention’ in *Genocide in International Law: The Crime of Crimes* (Cambridge University Press 2009c) 125.

¹⁶² The New York Times, ‘What Golda Meir Said About Palestinians’ (The New York Times 12 October 1993) <<https://www.nytimes.com/1993/10/12/opinion/l-what-golda-meir-said-about-palestinians-766493.html>> accessed 2 April 2023..

¹⁶³ Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (Columbia University Press 2010) 133.

¹⁶⁴ I used the term modern genocide to refer to non-colonial genocide. For example, the Indonesian occupation in East Timor, the Annexation of the Baltic States, the Uyghurs in China, to name a few, encapsulate the pattern of settler-colonialism and face challenges in bringing justice under international law due to multi-identity of the oppressed groups.

CHAPTER III
THE APPLICABILITY OF THE GENOCIDE CONVENTION IN EAST TIMOR AND
THE BALTIC STATES

“Occupation, curfew, settlements, closed military zone, administrative detention, siege, preventive strike terrorist infrastructure, transfer. Their war destroys language. Speaks genocide with the words of a quiet technician.” – Suheir Hammad¹⁶⁵

I. Comparative Outlook on the Situations in East Timor (1975-1999) and the Baltic States (1944-1991)

The third chapter of this thesis will touch upon the applicability of the Genocide Convention in East Timor under Indonesia’s occupation (1975-1999) and the Baltic States under USSR occupation (1944-1991). Both cases present a similar pattern of occupation, ones which involved alleged genocidal policies. However, to this day, there is no legal precedent of genocide crimes for these two cases. Hence, I will try to test the legal applicability of the Convention for both cases, and argue that due to the narrow and limited terms under the Convention, its enforcement is arguably weak. In addition, this chapter will also explore the international community’s responsibility to prevent the alleged genocidal crimes as stated under the Genocide Convention.

To begin, this section will give a brief comparative outlook on what happened in both cases. In 1974, the Portuguese Empire withdrew from East Timor and created a power vacuum which was capitalized by the Indonesian government. Hence, the struggle for independence of East Timorese began in December 1975, when Indonesian troops under *Operation Lotus* invaded the territory and took control of around 750,000 East Timorese.¹⁶⁶ The invasion caused 150,000-200,000 casualties, or almost 25% of the total population of East Timor at that time.¹⁶⁷ The military operation used violent methods, such as machine-gunning resisting population, setting civilians’ houses on fire, and stockpiling food to induce mass starvation.¹⁶⁸ In addition, it was also found that the military members employed systematic use of gender-based violence, such as rape, forced

¹⁶⁵ The quote was from Suheir Hammad’s Poem, <<http://libertytree.ca/quotes/Suheir.Hammad.Quote.391A>> accessed 12 April 2023.

¹⁶⁶ Sonya Fatah, ‘East Timor Struggle for Self-Determination’ [1998] 51(3) *Pakistan Horizon* 57.

¹⁶⁷ Kiernan (2003) 593.

¹⁶⁸ Kiernan (2004) 220-222.

sterilization, and forced contraception, particularly against women in resistance groups.¹⁶⁹ An independent report also showed proofs that Indonesia abducted children from East Timorese communities and forcefully resettled them among Indonesian communities in other regions.¹⁷⁰

However, the violent acts did not end in 1975 when Indonesia successfully occupied the territory. Throughout the occupation, many violent policies are recorded by many international human rights reports. Many of these actions managed to be censored from international community under Indonesian President Soeharto's dictatorship, while East Timor's border was totally shut off from international world.¹⁷¹ By 1980, more than 120,000 East Timorese were reported missing as the military force still instigated massacre on the territory.¹⁷² In addition, the government also engaged in forced assimilation practice through its mass resettlement policies of settling the territory of East Timor with non-native people.¹⁷³ Saura (2002) notes that the mass forced sterilization on East Timorese women constituted genocide under the biological methods mentioned in the Convention.¹⁷⁴ In addition, the UN Truth Commission for East Timor (2006) also established that the Indonesian security forces deliberately used starvation as "a weapon of war," causing more than 80,000 deaths of East Timorese.¹⁷⁵ By the end of its occupation, it was recorded that more than four thousands East Timorese children were abducted, some were sent to re-education camps, and some were permanently settled among Indonesian families.¹⁷⁶ To retain the 'Indonesian identity' among East Timorese, speaking East Timor language was strictly prohibited¹⁷⁷ and the practice of indigenous beliefs was almost impossible due to the conversion of tribal lands into agricultural areas.¹⁷⁸

¹⁶⁹ Christine Mason, 'Women, Violence and Nonviolent Resistance in East Timor' [2005] 42(6) *Journal of Peace Research* 744.

¹⁷⁰ Anne Barker, 'The Stolen Children' (ABC 6 July 2020) <<https://www.abc.net.au/news/2020-07-07/timor-leste-stolen-children-are-coming-home/12374180?nw=0&r=HtmlFragment>> accessed 13 April 2023.

¹⁷¹ Fatah 57.

¹⁷² Kiernan (2004) 221.

¹⁷³ James Saura, 'Free Determination and Genocide in East Timor' [2002] 3 *Human Rights Review* 38.

¹⁷⁴ Ibid 41.

¹⁷⁵ Sian Powell, 'UN Verdict on East Timor' (The Australian 19 January 2006) <<https://gsp.yale.edu/sites/default/files/files/UN%20verdict%20on%20East%20Timor.pdf>> accessed 13 April 2023.

¹⁷⁶ Helene van Klinken, *Making Them Indonesians: Child Transfers out of East Timor* (Monash University 2020) xxi.

¹⁷⁷ Paul Hainsworth and Stephen McCloskey, *The Struggle for Independence from Indonesia* (St. Martin Press 2020) 5.

¹⁷⁸ Ai Chaobang, 'How well has the causality of the conflict in East Timor been reflected in its UN Peacebuilding Experience' [2013] 1(1) *United Nations Peace and Progress* 35.

East Timor finally gained their independence in 1999 after a UN-supervised referendum was held. Two months later, on October 1999, the UN through the UN Transitional Administration in East Timor (UNTAET) took over the control and administration over East Timor demonstrating the start of state-building.¹⁷⁹ UNTAET also established the Truth Commission for East Timor (hereafter referred to as CAVR) that aimed to facilitate reconciliation with justice for East Timorese. The Commission released a report on human rights violations experienced by East Timorese, many of which had been carried out by the Indonesian army, including forced disappearance, forced displacement, forced famine, and unlawful killings.¹⁸⁰ In addition, an Ad Hoc Human Rights Court was established by the Indonesian government to signify a good gesture after East Timorese independence. However, as assessed by Cammack (2005), the court failed to fulfil its duty as most of the perpetrators of the crimes were eventually acquitted of their crimes.¹⁸¹

A similar pattern of occupation can also be found in the Baltic states. The three independent Baltic states - Estonia, Latvia, and Lithuania, were forcefully annexed into the USSR and operated as constituent republics under the Stalin regime.¹⁸² With the rising power of Germany during World War II, the Nazi regime invaded the USSR, occupying the Baltic states in 1941. With similar extermination policies in other parts of German occupied territory, the Jewish people in the Baltics became target and exterminated by the Nazis.¹⁸³ At the end of World War II, the USSR launched the Baltic Offensive military operation to pushback German forces, hence regaining control over the three occupied Baltic states. Regardless of many literatures debating on the legality of the USSR occupation and annexation of the Baltic States,¹⁸⁴ it showcased the violent policies carried out by the USSR in the takeover process and during the occupation.

¹⁷⁹ Markus Benzing, 'Midwifing a New State: The United Nations in East Timor' [2005] 9 *Max Planck Yearbook of United Nations Law* 297.

¹⁸⁰ CAVR, 'Conflict Related Death in Timor Leste 1974-1999' (CAVR 2010) <<http://www.cavr-timorleste.org/updateFiles/english/CONFLICT-RELATED%20DEATHS.pdf>> accessed 15 April 2023.

¹⁸¹ Mark Cammack, 'Crimes against humanity in East Timor: The Indonesian ad hoc Human Rights Court hearings' in Kirsten Sellars (ed.), *Trials for International Crimes in Asia* (Cambridge University Press 2015) 194-196. Similar assessment also made by the Human Rights Watch, 'Justice Denied for East Timor' (HRW 2012) <<https://www.hrw.org/legacy/backgrounder/asia/timor/etimor1202bg.htm>> accessed 15 April 2023.

¹⁸² Walter R. Iwaskiw, *Estonia, Latvia and Lithuania Country Studies*, (Library of Congress 1996) xiv.

¹⁸³ John Hiden, *The Baltic Nations and Europe* (Longman 1994) 117.

¹⁸⁴ Arno Liivak, 'Soviet Responses to Western Nonrecognition of Baltic Annexation' [1987] 18(4) 330. See also Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of Incorporation of the Baltic States by the USSR* (Brill 2022).

Mälksoo (2001) argues that the USSR confrontation with the Baltics resistance ended up in mass deportations and liquidations, which can be qualified as “crimes against humanity, and possibly even genocide.”¹⁸⁵ It was also recorded that in 1949, more than 100,000 Balts were arrested and then deported in cattle wagons to Siberia¹⁸⁶ during *Operation Priboi*. In addition, Pettai (2016) notes that under the Stalin regime, the Baltic states experienced the denial of freedom, mass-scale killing, and guerilla warfare.¹⁸⁷ According to the Lithuanian authority, out of 132,000 deported Lithuanians, twenty percent of them died due to enforced starvation and hard labors.¹⁸⁸ Meanwhile, Estonia recorded that the country lost eighteen percent of its population or nearly 121,000 during the Soviet occupation.¹⁸⁹ In Latvia, the USSR forces are also thought to have killed 122,000 Latvians.¹⁹⁰ The numbers of casualties mark a significant departure from the traditional deportation case, to one that is genocidal under the USSR occupation. Targeted deportations against ethnic Balts, or other minority groups, such as the Jehovah Witness¹⁹¹ raised a more prominent question on establishing if there was a genocide during the occupation period.

After the three Baltic states regained their independence in 1991, several domestic court proceedings on genocide and other serious crimes were held to try the perpetrators, mostly ex-military force members of the USSR. Satkauskas (2004) notes that there have been 91 proceedings against the USSR oppressions after 1991, and similar figures can also be observed in both Estonia and Latvia.¹⁹² Some of the perpetrators are charged with conspiring and committing genocide, while some are charged guilty of crimes against humanity.¹⁹³ However, in international law, there is a lack of progress towards establishing the crime of genocide under the Genocide Convention. This might be driven by the dilemma of applying the Convention in the Baltic States, between ‘the

¹⁸⁵ Mälksoo (2022) 136.

¹⁸⁶ Lauri Mälksoo, ‘Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law’ [2001] 14 *Leiden Journal of International Law* 765.

¹⁸⁷ Eva Clarita-Pettai, ‘Prosecuting Soviet genocide: comparing the politics of criminal justice in the Baltic States’ [2017] 18(1) *European Politics and Society* 52.

¹⁸⁸ A. Anušauskas on the arrests and other forms of coercion carried out by Soviets in 1940-1941.

¹⁸⁹ Museum of Occupations of Estonia Information, <<https://www.vabamu.ee/en>> accessed 16 April 2023.

¹⁹⁰ Indictment of Anti-Communist Congress, Anti-Communist Congress and the Proceedings of the International Public Tribunal in Vilnius: ‘Evaluation of the Crimes of Communism’ (Ramona 2002) 927.

¹⁹¹ The 70th Anniversary of Operation North, ‘Estonia’ (1951 Deport 2021) <https://1951deport.org/en/archive/estonia/?post_type=documents> accessed 16 April 2023.

¹⁹² Rytis Satkauskas, ‘Soviet Genocide Trials in the Baltic States: The Relevance of International Law’ [2004] 7 *Yearbook of International Humanitarian Law* 388-389.

¹⁹³ Ibid 392. See also Ineta Ziemele, ‘The application of international law in the Baltic States’ [1997] 40(243) *German Y.B. International Law* 261. See also Mälksoo (2001) 774-775.

politics of compromise’ and ‘the radical notion of justice.’¹⁹⁴ This then leads to similar practice recurring in the future that do not have the legal precedent under the Genocide Convention from happening all over again.¹⁹⁵

Overall, the occupation in East Timor and the Baltic states demonstrated a similar pattern in genocidal policies that raise a question on analyzing the applicability of the Genocide Convention in both instances. Both East Timor and the Baltic states experienced genocide horror under the occupying regimes, which includes targeted killings, deportations, and enforced starvation. Furthermore, as the violent atrocities continued even after the signing of the Genocide Convention, this signals an importance in evaluating the applicability of the Convention. Reckoning that millions of casualties happened under the occupations, this chapter seeks to find a way to reiterate justice to the victims, while also discuss on the challenges towards legal proceedings against the perpetrators under the Convention’s framework.

II. The Applicability of the Genocide Convention in Light of the TWAAIL Critics

After elaborating the situation in the previous part, I will then test the applicability of the Genocide Convention in East Timor during the Indonesian occupation and the Baltic States during the USSR occupation to see if the acts during the occupation can constitute to genocide under the Convention. Further, I also will highlight the challenges of applicability using TWAAIL lens based on the three elements of the Convention, which are the protected groups, prohibited acts, and the intent. The focus of the analysis will be during Operation Lotus in East Timor and Operation Priboi in the Baltic states. However, this does not mean that the analysis will overlook the occupation activities after the operations in case there are genocidal policies occurred following any development in both countries.

a. East Timor

The first element that I want to test in the case is the prohibited acts under the Convention. As the actions highlighted in the previous chapter, I attest that they can serve as evidence violating the Genocide Convention. Curtin (2000) finds that the Operation Lotus “falls within the

¹⁹⁴ Satkauskas 408.

¹⁹⁵ The expansionist practice of the USSR can also be seen in a similar manner carried out by Russia in post-soviet countries, such as in Abkhazia and South Ossetia in Georgia (2008), in Crimea (2014), and eventually in Ukraine nationwide (2022).

enumerated culpable acts of the Genocide Convention, as enunciated in Akayesu.”¹⁹⁶ The International Commission of Inquiry on East Timor (hereinafter referred as the Commission on East Timor) recorded witnesses’ claims that the Indonesian forces used systematic intimidation and terror which resulted in mass killings and injuries.¹⁹⁷ Mass killings, injuries and terrors can be accounted as a physical destruction against East Timorese which fulfill the “killing members of the groups” and “causing serious bodily or mental harm to members of the group” based on the Convention. Although there is no threshold of number of casualties required to constitute a genocide under the Convention, the fact that Operation Lotus resulted in more than 100,000 deaths of East Timorese¹⁹⁸ should be taken into consideration in the urgency of establishing the crime.

In addition, *Rutaganda case* also provides explanation in the subsection (c) of Article 2, which includes “methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group, but which are, ultimately aimed at their physical destruction.”¹⁹⁹ In the Commission on East Timor’s report, it was recorded that there were more than 80,000 deaths due to forced mass expulsions and induced starvation,²⁰⁰ which did not necessarily inflict direct physical harms to East Timorese in the beginning, but eventually found to result in their physical destructions. Mason (2005) also recorded forced sterilization policies²⁰¹ on East Timorese women that qualifies to the subsection (d) of Article 2 to “prevent births within the group.” In recent evidence, CAVR found that thousand East Timorese children were forcibly removed to Indonesia during 1975-1999.²⁰² This was one key policy during the Indonesiaization of East Timorese, which also fulfils the subsection (e) of Article 2, which prohibits “forcibly transferring children of the group to another group.”²⁰³ Hence, I argue that the actions and policies

¹⁹⁶ Philip J. Curtin, ‘Genocide in East Timor? Calling for an International Criminal Tribunal for East Timor in Light of Akayesu’ [2000] 19(1) *Penn State International Law Review* 208-209.

¹⁹⁷ Report of the International Commission of Inquiry on East Timor to the Secretary-General, United Nations General Assembly, 54th Sess., Letter of Transmittal, Agenda Item 96, at 1, A/541726, S/2000/59.

¹⁹⁸ *Ibid* 6.

¹⁹⁹ *Prosecutor v. Georges Anderson Nderubumwe Rutaganda* [1999] Judgement and Sentence (Case No. ICTR 96-3-T) para.52.

²⁰⁰ Report of the International Commission of Inquiry on East Timor to the Secretary-General 6.

²⁰¹ Mason 737. Robert A. Rubinstein and Sandra D. Lane, ‘Population, Identity and Political Violence’ [2003] 2(4) *Peace and Human Rights* 145.

²⁰² CAVR (2010). See also Aljazeera, ‘The Return of East Timor’s Children’ (Aljazeera, 2020) <<https://www.aljazeera.com/program/101-east/2020/8/28/the-return-of-east-timors-children>> accessed 16 April 2023.

²⁰³ Convention on the Prevention and Punishment of the Crime of Genocide 1948, Art.2.

carried out by the Indonesian government in Operation Lotus and during the occupation satisfy the *actus reus* of genocide under the Convention.

The second element of genocide under the Convention is the question on intent. Under the genocide, this element is defined as “intent to destroy, in whole or in part”²⁰⁴ which is a *dolus specialis* separating genocide from other crimes. Curtin (2000) argues that the historical relationship between Indonesia and East Timor sheds a light on the specific intent of genocide because of the recurring brutal repression with support from Indonesian officials.²⁰⁵ With the recurring violent attacks to specific groups which result in a large scale of atrocities, this condition can qualify as indirect proofs of intent as per ICTR.²⁰⁶ In addition, Indonesian officials’ rhetoric by using dehumanizing language, such as *snakes*,²⁰⁷ and calling for multi-generational killings, such as “obliteration to the fourth generation” or “not a single member of their families to be left alive”.²⁰⁸ Prevalent use of dehumanizing language and multi-generational aspect of killings can demonstrate special intent of genocide, as argued in Rwandan genocide.²⁰⁹ In addition, Saura (2002) argues that mass expulsions of East Timorese and mass settlement of Indonesians to East Timor’s territory aimed to “alter the original composition of the population,” which is qualified as the intent of genocide.²¹⁰

However, on the other hand, there are some pessimistic views on this element. Clark (1981) insists that the intent of genocide was not there as Indonesia’s actions could be considered as war crimes because of the multidimensional aspect of the conflict that also involved independence movement.²¹¹ In addition, the actions fall short of genocide under the Convention as the intent was to destroy cultural characteristics of East Timorese through the Indonesiazation policies. Most of the violent attacks, according to Saul (2001), were aimed to integrate East Timorese to Indonesia’s

²⁰⁴ Convention on the Prevention and Punishment of the Crime of Genocide 1948, Art.2.

²⁰⁵ Curtin 203.

²⁰⁶ *Prosecutor v. Simba* para.411.

²⁰⁷ David Lisson, ‘Defining “National Group” in the Genocide Convention: A Case Study of Timor-Leste’ [2008] 60(5) *Stanford Law Review* 1489.

²⁰⁸ Noam Chomsky, *A New Generation Draws the Line: Kosovo, East Timor, and the Standards of the West*, (Pluto Press 2001) 72.

²⁰⁹ David Yanagizawa-Drott, ‘Propaganda and Conflict: Evidence from the Rwandan Genocide’ [2014] 129(4) *Quarterly Journal of Economics* 1950.

²¹⁰ Saura 41.

²¹¹ Roger S. Clark, ‘Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia’s Invasion of East Timor’ [1981] 8(2) *Ohio Northern University Law Review* 327.

national identity.²¹² Moreover, the nature of Indonesia's activity, which is an occupation, can also be seen with the intention of conquest.²¹³ This argument is similar to the critics of colonial genocide, which only view victims as collateral damages of the colonial powers' intent to conquer a territory. This problem also stems from the neglect in including colonial experience in drafting the Genocide Convention which eventually can act as a legal loophole for occupying states. Furthermore, considering that Indonesia was under a military dictatorship at that time, many of state's documents are not accessible until nowadays, which according to Schabas (2012), genocide intent should be implied in state policies in order to establish the crime.²¹⁴

Difficulties in determining the intent of genocide in East Timor is not substantial to establish the crime. I argue that although multi-generational dimension, recurring policies and dehumanizing words can show intent, but they did not specifically aim to destroy East Timorese as a group. Many of the policies, as demonstrated above, were aimed to create a common identity, which constitute cultural genocide, but is not outlawed under the Convention. The importance of territoriality also showed how the Indonesian forces' objective was to secure East Timor territory rather than to exterminate the whole population. Although the outcome of these policies was genocidal, but there is a lack of special genocidal intent found.

In order to determine if the people of East Timor can be considered as such under the Convention, East Timorese has to fall under the identity of either a national, ethnical, racial or religious group. Curtin (2000) controversially stated that East Timorese are a national and ethnical group distinct from Indonesians.²¹⁵ Hence, he argued that the East Timorese people fall under a denomination protected by the Convention. However, I found that such argument oversimplified the problem of group categorization of East Timorese people, which hinder the applicability of the Convention. I then first begin by singling out the religious group category as East Timorese as a social group is religiously diverse. This argument is also strengthened by an East Timorese independence leader, José Ramos-Horta, stating that the violence is unrelated to religious identity.²¹⁶ Although there has been a systematic attack on the Catholic church and priests in East Timor, but it was not the exclusive religious identity that was under attack. For example,

²¹² Saul 37.

²¹³ Kiernan (2004) 203.

²¹⁴ Schabas (2012) 138.

²¹⁵ Curtin 209.

²¹⁶ Jose Ramos-Horta, 'East Timor and the Region: The Opportunities and Perils Ahead' (Speech delivered at Scientia, University of New South Wales, Sydney, 30 May 2001) at 20 September 2001.

indigenous belief was also strictly prohibited and its religious sites were destroyed.²¹⁷ Saul (2001) argues that attacks against religious institutions in East Timor because of the roles they played in opposing Indonesian occupation.²¹⁸

Meanwhile, for the ethnical or racial group, Lisson (2008) claims that East Timorese people constitute a racial or ethnical group were not supported by the Convention's definition or interpretation. Considering how diverse the demography of East Timorese, it is challenging to claim that they share the similar cultural bonds or physical traits.²¹⁹ However, *Kayishema* Case gave an expanded definition for an ethnic group "which distinguished itself as such (self-identification); or, a group identified as such by others, including the perpetrators of the crimes."²²⁰ Yet, there was no evidence that these groups in East Timor practiced or declared any self-identification. Pertaining to how Indonesia identified East Timorese, officials perceived the people as *brothers and sisters* under the experience of colonialism that need to be saved from the political opposition in East Timor.²²¹ Therefore, this also does not satisfy the identification aspect based on the *Kayishema* Case. In addition, some racial groups were even specifically targeted during the mass killings, such as Chinese Timorese.²²² Hence, I consider that East Timorese also does not constitute a racial or an ethnical group under the Convention.

I would argue that the best prospect in determining the East Timorese under the protected group is as a national group. In the *Akayesu* Case, a national group has been established as 'a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.'²²³ Perhaps, the defining factor of a national group is closely affiliated with statehood and citizenship. This relates to how the legacy of colonialism presents a challenge in applying the Convention, as in East Timor case, there was not a clear status of the territory as either a sovereign state, a continuing colonial territory of Portugal, or a legal annexed subnational of Indonesia.²²⁴ The lack of transitional governance between the Portuguese Empire

²¹⁷ Saul 480-482.

²¹⁸ Ibid 470.

²¹⁹ *Prosecutor v. Akayesu* para.513-514.

²²⁰ *Prosecutor v. Clément Kayishema and Obed Ruzindana* [1999] Judgement (Case No. ICTR 95-1-T) para.98.

²²¹ Clark 327.

²²² Kai Thaler, 'Foreshadowing Future Slaughter: From the Indonesian Killings of 1965-1966 to the 1974-1999 Genocide in East Timor' [2012] 7(2) *Genocide Studies and Prevention* 215.

²²³ *Prosecutor v. Jean-Paul Akayesu* [1998] Trial Chamber (Case No. ICTR-96-4-A) para.512.

²²⁴ Saul 470.

and the colonial territory of East Timor clearly accounts for this problem. In addition, Lisson (2008) argues that Indonesia unilaterally removed East Timorese from the protected group under the Convention, “by preventing the East Timorese from forming a state.”²²⁵ I would argue that this is also what TWAIL criticizes from international law, where in the case of East Timor, its status was heavily dependent on the Portuguese Empire or Indonesia’s recognition. This calls for the need to expand the definition of a national group, as stated by Lisson (2008) should also include groups with self-determination rights.²²⁶ If past legal interpretation of this group includes self-determination groups, hence, East Timorese might be categorized as such because their right has been established and recognized by the General Assembly²²⁷ and other state’s recognition.

Overall, I conclude that it will be challenging to establish the Indonesian occupation in East Timor as a crime of genocide. Although the prohibited acts element is found to be quite satisfactory, but the intent and protected groups elements face challenges. For the intent, due to the nature of multi-dimensional objectives of Indonesian occupation, it is hard to bluntly identify that the intention of violent attacks was to destroy East Timorese as a group. This, combined with the difficulty of categorizing East Timorese as a protected group under the Convention, further complicate the prospects. If hypothetically, the Portuguese Empire provided a smooth transitional governance to East Timor, giving them sovereignty and independence, it would have been likely to categorize East Timorese as a national group. The challenge is then to contemplate if there is a need to expand the definition of intent and protected groups under the Convention to prevent similar things from happening in the future.

b. The Baltic States

Similar to the analysis of the East Timor case, I will analyze if the USSR occupation in the Baltic States can constitute genocide under the Convention and what are the challenges in implementing the Convention to this case. Having elaborated that the USSR was one of the dominating powers in the codification process of the Convention, it should not be overlooked that by that time, the USSR had started the violent annexation process of the Baltic states, and further continued to claim its legitimacy through violent genocidal policies even after the Convention was

²²⁵ Lisson 1461.

²²⁶ Ibid 1471.

²²⁷ GA Res 3485, UN Doc A/Res/3485 (1975). The vote was 72 to 10, with 43 abstentions.

agreed. Taagepera (1993) labels the period 1945-1963 under the USSR occupation as ‘years of genocide’²²⁸ considering the massive casualties due to the USSR violent policies. Although the Convention does not apply retroactively, it is still important to see if the USSR occupation can constitute genocide in light of the recent expansionist policies of great powers in the 21st century.

The first element that I will test is the prohibited acts under the Convention. As mentioned in the previous part, the main element of Operation Priboi in the Baltic states was mass deportations and expulsions of the Balts by the USSR forces. Nollendorfs and Oberländer (2005) consider that the deportations ‘and their consequences contain elements of genocide enumerated in Article 2’ of the Convention.²²⁹ Records show that more than 90,000 people were deported from the Baltic states territory during the Operation Priboi in March 1949.²³⁰ The numbers might even be higher because some deportation operations were not recorded as part of the official operation. Although not intended to exterminate the population, but the result of this deportation policy was the staggering deaths of ten percent of the deportees in Siberia.²³¹ This, in addition to the intentional neglect in providing rights and facilities for the ‘special settlers’ led up to the outcome being ‘astronomical death rate’ among the deportees in Siberia, which according to Strods and Kott (2002) is genocide.²³² Hence, I argue that the deportation policy carried out by the USSR satisfy the *actus reus* (b) and (c) of Article 2 of the Convention. Although deportation was not an act of direct killings of the Balts *per se*, however, it was deliberately inflicting the conditions of livelihood of the group which eventually resulted in their physical destruction. In addition, as it was recorded that more than 25,000 children were deported and transferred to Siberia,²³³ this can satisfy the subsection (e) of Article 2. Although one might argue that the deportation policies did not specifically target children, but the USSR Council of Ministers passed a resolution that ‘liberated’ children under ten,²³⁴ which implied that the occupying force was implicit in systematically target children in their operations. Hence, I would argue that on the basis of the

²²⁸ Taagepera 77.

²²⁹ Valters Nollendorfs and Erwin Oberländer, *The Hidden and Forbidden History of Latvia under Soviet and Nazi Occupation 1940-1991* (Institute of the History of Latvia 2005) 282.

²³⁰ Aigi Rahi-Tamm and Andres Kahar, ‘The Deportation Operation “Priboi” 1949’ 380.

²³¹ Mälksoo (2001) 765.

²³² Strods and Kott 29.

²³³ Rahi-Tamm and Kahar 380.

²³⁴ Campana Aurélie, ‘The Soviet Massive Deportations – A Chronology’ (Sciences Po 5 November 2007) <<https://www.sciencespo.fr/mass-violence-war-massacre-resistance/fr/document/soviet-massive-deportations-chronology.html>> accessed 19 April 2023.

prohibited acts under the Convention, the USSR occupation can constitute genocide as a crime under international law.

Pertaining to the second element, which is the intent, the USSR occupation of the Baltic States presents tricky challenges. ICTY clarifies that special intent for genocide can be manifested in two forms, ‘desiring of extermination of the large number of the members of the group,’ or ‘consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.’²³⁵ Mälksoo (2001) argues that the USSR occupation satisfied the latter because of repressive actions were directed towards liquidating people who would carry the political will of independence of the occupied Baltic states.²³⁶ Liivoja (2013) strengthens the argument by showcasing that the repressions were carried upon the political, economic, and intellectual elites of the Balts, to ‘subjugate national groups.’²³⁷ In addition, subjugating national groups is more affiliated as a territorial conquest goal, which again, not covered under the Convention, similar to the East Timor case. The shortcomings in satisfying the intent of genocide can be seen through TWAIL as a manifestation of how great powers use international to maintain their dominance. The inability to consider genocidal territorial conquest, as well as, repression of opposition political groups as an intent under the Convention reflects TWAIL critics. In addition, what is interesting in this particular situation is that the USSR itself consistently objected to include political groups as a protected group under the Convention and in this case, such repression policies cannot be considered as genocide because of this legacy.

In another discourse on the intent for genocide, The Institute of the History of Latvia (2005) perceives that the operation as genocidal as it was ‘intended to destroy, in whole or in part, the nation that it occupied and kept captive until 1991.’²³⁸ However, the Institute failed to emphasize on the clause of the intention of destroying the group which is attributed by the physical existence of its members, instead of destroying ‘the nation’, which in my opinion, is closely related to social identity of that group. My argument stems from the assessment by Karlsson (2009) that a national group to be socially constructed and invented in a state. The USSR aimed for the *Russification* of

²³⁵ *Prosecutor v Goran Jelisić* [1999] Judgement (Case No. IT-95-10) para.82.

²³⁶ Mälksoo (2001) 748.

²³⁷ Liivoja Rain, ‘Competing Histories: Soviet War Crimes in the Baltic States’ in Kevin Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials* (Oxford Academic 2014) 259.

²³⁸ Nollendorfs and Oberländer 283.

the Baltic States²³⁹ by presenting the argument that their policies aimed at a nation, instead of a national group, albeit it ended in physical casualties. In addition, Tulun (2015) argues that the mass deportation, torture, or killing of the Balts were a response to the opposition of the Balts against the restriction of the Baltic culture.²⁴⁰ Hence, there was no clear evidence in the intent, be it from acclamation or record of activities by the Soviet government, that the occupation was intended to exterminate the Balts population. I will close the discussion on the intent of the USSR to be not constitutive of genocide as it was mainly for the goal of conquering territory and forced assimilation of the Balts to the Soviet society, which can account for cultural genocide, but unfortunately is not protected under the current Genocide Convention.

Pertaining to the protected groups under the Convention, the discourse in legal applicability is highly dichotomized. It is more likely to identify that the Baltic victims can be categorized under the national group²⁴¹ as a protected group under the Convention, because Estonians, Latvians, and Lithuanians represent ‘a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties’ as per ICTR.²⁴² The occupation of the three Baltic states that already established themselves as a state conveys citizenship status to the people with clear national rights and duties. Strods and Kott (2002) also further elaborate that Operation Priboi can constitute genocide because of the end results of the casualties among the members of these national groups.²⁴³ Although opposing argument presents a rebuttal that documents found related to Operation Priboi did not specifically target the Baltic nationals, or what was called as *dekulakization*, however, the definition of ‘kulak’ was kept vague in the Operation documents to give the forces maximum latitude for actions. The actions could also be in interpreting who would eventually get deported, which not necessarily the member of ‘kulaks.’

Despite of establishing that Operation Priboi targeted national groups, Strods (2002) also iterates that Operation Priboi did not specifically target the Baltic nationals but rather to ‘rid the Baltic countries of all politically untrustworthy elements.’²⁴⁴ Mertelsmann and Rahi-Tamm (2009) also labelled Operation Priboi as ‘different waves of cleansing and repression’ since the

²³⁹ Mehmet Oguzhan Tulun, ‘Russification Policies Imposed on the Baltic People by the Russian Empire and the Soviet Union’ [2013] *Uluslararası Suçlar ve Tarih* 145-146.

²⁴⁰ *Ibid* 149.

²⁴¹ Mälksoo 783.

²⁴² *Prosecutor v. Jean-Paul Akayesu. Akayesu* [1998] Trial Chamber (Case No. ICTR-96-4-A) para.512.

²⁴³ Strods and Kott 29.

²⁴⁴ *Ibid* 29-30.

repressions target political elites, kulaks, or opposition figures.²⁴⁵ In addition, although it is worth applauding that the Estonian and Lithuanian domestic genocide criminal code already expanded the protected groups to include social or political group,²⁴⁶ but it also presents a challenge in applying the Convention to Operation Priboi. In *Vasiliauskas v. Lithuania*, the applicant complained to the ECHR after he was convicted for committing genocide against members of a political group, the Lithuanian partisans, which is prohibited under the Lithuanian Criminal Code Article 71.²⁴⁷ The Lithuanian Court recognized the policy is genocide under *political group* as the protected group, however, such group is not protected under the Convention. Hence, it can be argued that even Lithuania, the state party to the Convention, also reckons that Operation Priboi targets a group not protected under the Convention, making establishing the Operation as a crime of genocide under the Convention even more challenging.

I conclude that it is unlikely that the Operation Priboi can constitute genocide under the Convention. Although the Operation could satisfy the prohibited acts element of the Convention, establishing it as a crime of genocide needs prove of the intent and the protected groups elements. However as elaborated in this part, the intent would unlikely reach the *dolus specialis* requirement under the Convention because there was no clear instructions or patterns of actions that signifies the intention to exterminate a particular group as such. In addition, the complexity in categorizing the victims of the Operation under any of the protected groups add up to the challenge of the Convention's applicability even in a rhetoric analysis. With TWAIL lens, I argue that this is due to the USSR's influence during the process of the Convention to exclude political or social groups altogether. Although there is promising progress in developing the crime of genocide under domestic jurisdiction of the Baltic states, but without international codification, we might see similar cases happening in the future due to this legal flaw.

²⁴⁵ Mertelsmann and Rahi-Tamm 309.

²⁴⁶ Liivoja 256.

²⁴⁷ *Vasiliauskas v. Lithuania* [2015] Grand Chamber (Application No.35343/05) para 30.

CHAPTER IV
ALTERNATIVES TO THE GENOCIDE CONVENTION IN APPROACHING EAST
TIMOR AND THE BALTIC STATES CASE

“Genocide, after all, is an exercise in community building”
-Philip Gourevitch²⁴⁸

I. Quasi-Imperial States and International Law: A Postcolonial Examination of the Genocide Convention and the Position of Indonesia and the USSR

The challenges in applying the Convention to East Timor and the Baltic States case are restricted by the narrow understanding of genocide under the Convention. Hence, this chapter will seek to complement the narrative around the alleged genocide in both cases using international relations analytical lenses. The legal analysis part of this thesis delves into the process and applicability of the Convention through the lens of TWAIL. TWAIL, although centers itself around colonial legacies in international law, does not specifically focus on the postcolonial structure, rather on dominance of Western and/or great power states. Meanwhile, this chapter being the political part aims to elaborate more on the alternatives to approach the genocide case in East Timor and the Baltic states through postcolonial approach.

I will then begin my analysis by establishing postcolonialism lens in international relations and apply it to the Convention. Widely reckoned as the pioneer in postcolonial scholarship, Said (1979) brings into attention the complex relationship between the complicity of European production of knowledge with the imperial projects.²⁴⁹ Reflecting on postcolonial criticisms to international system, Granh-Farley (2019) perceives that ‘the deep structure of international law is still colonial’ despite the ties between colonial and postcolonial laws become increasingly invisible.²⁵⁰ The Genocide Convention is an example of this argument. I argue that the Genocide Convention reflects the dominance of European production of knowledge in the existing structure. One major criticism of the Convention is that it is too static in comparing one genocide against the

²⁴⁸ Philip Gourevitch, ‘Genocide in Rwanda’ (American Federation of Teachers 2003)
<<https://www.aft.org/periodical/american-educator/fall-2003/genocide-rwanda>> accessed 20 April 2023.

²⁴⁹ Edward Said, *Orientalism* (Vintage 1979) 2-5. New York: Vintage, 1979.

²⁵⁰ Maria Granh-Farley, ‘Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the UN Convention on the Rights of the Child’ [2009] 34(1) *Brooklyn Journal of International Law* 2.

Holocaust, which leads to competition over victimhood.²⁵¹ This exemplifies how the Western overlooks colonial mass killings and resorts to the Western experience of genocide, which is the Holocaust, as the plausible comparison. TWAIL sees the Convention as a response to the Holocaust, but postcolonialism sees it as a dominating Western experience among the narratives of colonized people's experience of genocide.

Further, the legacy of colonialism can also be seen by how the Convention demotes the non-Western values of culture in the society, hence, perpetuating the Western dominance in knowledge production. Chowdry (2011) sees that culture is used by colonial states to forge the identities of 'us' and 'them' which values certain culture higher than the others.²⁵² In relation to the Convention, during the process, I found many remarks from Western countries that relegated the cultural essence of a society. This led to the dichotomy of which culture was acceptable to the Western standards and the legitimatization of certain violent actions towards colonized people to adopt the acceptable cultures, resonating Chowdry's 'us' v. 'them' argument above. For example, Sweden sought to spread Christianity among the Sami people,²⁵³ while New Zealand aimed to deconstruct the tribal governing system of the Maori²⁵⁴ during their colonialism practice. This explains why Western states were willing to advocate for the exclusion of cultural genocide from the Convention. Criticisms also came from Pakistan and Ecuador to include cultural genocide²⁵⁵ because most postcolonial states believe that cultures have their own essential features constitutive to a society or a social group.²⁵⁶ Diminishing this idea through the codification of the Genocide Convention demonstrates the perpetuating European knowledge of affiliating the importance of a group to its physical features *per se*, but not its cultural essence.

Progressive postcolonial scholars now begin to locate the effects of imperialism and the existing global structure. Seth (2021) signifies that conquest and empire are constitutive of

²⁵¹ Spencer 607.

²⁵² Geeta Chowdry, 'Edward Said and Contrapuntal Reading: Implications for Critical Interventions in International Relations' [2007] 36(1) *Millennium* 110.

²⁵³ ECOSOC, Continuation of the consideration of the draft convention on genocide, *A/C.6/SR.83*, 1948. See also Abtahi and Webb (2008) 1506.

²⁵⁴ *Ibid* 1511.

²⁵⁵ Economic and Social Council, Doc. No. E/623, 11-13 (Jan. 30, 1948); Russia, Venezuela, and Pakistan strongly favored inclusion of cultural genocide, No. A/PV 178, 15-16.

²⁵⁶ Mohamed Osman Guudle, 'Postcolonialism in International Relations Theory: Ethics, Knowledge, and Orientalism' [2021] 3(2) *AHBV Akdeniz Havzası ve Afrika Medeniyetleri Dergisi* 50.

international society whose impacts can no longer be overlooked.²⁵⁷ The practice of imperialism had long been dominating the global politics and its legacies are apparent to this day. In his criticism to the Genocide Convention, Spencer (2013) uses the analysis on the impact of imperialism to generate more reflections on genocidal processes and patterns.²⁵⁸ Imperialist powers seek to expand their space for their race to develop and prosper on the space that is widely perceived used by the inferior race.²⁵⁹ In addition, Lemkin also recognizes that genocide has two phases: first, the destruction of the national patterns of the oppressed group, and second, the imposition of the national patterns of the oppressor.²⁶⁰ Lemkin refers to the imperialist policies in Belgian Congo, Latin America, American Indians, to name a few, as genocide. Further, one might also argue that the imperialism practice poses recurring acts in carrying out genocide in modern world. For example, Zimmerer (2004) argues that Germany's role in annihilating the Herero in Namibia during its imperialism eventually leveled the road to the Holocaust.²⁶¹ Hence, genocidal expansionist policies might have always been inherent in imperialist practice and can be seen as a driving factor in modern day genocide.

With the Convention overlooking colonized people's experience and imperialism actions, it is important to see if such patterns exist in the case study of this thesis. I will then continue to assess the aspect of imperialism in Indonesia and the USSR to fit the narrative of this chapter. Shaw (2002) states that there is a transformation of historic empire after 1945, which reconstitutes historical empire as the outcome for the international system after world wars.²⁶² He further elaborates his argument by taking the USSR expansion into Eastern Europe and the replacement of colonial power in Asia and Africa,²⁶³ such as Indonesia, as the examples of post-1945 empires. The USSR could be seen as the reconstitution of the Russian Empire, and Indonesia of the Dutch Empire in the East Indies after 1945. Despite of how the USSR positioned themselves as the leader of anti-imperialist camp, the USSR adopted centralization and uniformity policies that are similar

²⁵⁷ Sanjay Seth, 'Postcolonial Theory and the Critique of International Relations' [2011] 40(1) *Millennium* 173-174.

²⁵⁸ Spencer 607.

²⁵⁹ Spencer 610.

²⁶⁰ Lemkin (1944) 79.

²⁶¹ Jürgen Zimmerer, 'Colonialism and the Holocaust: Towards An Achaology of Genocide' in Dirk A. Moses, *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books 2004) 50. See also Thomas Kühne, 'Colonialism and the Holocaust: Continuities, Causations and Complexities' [2013] 15(3) *Journal of Genocide Research* 341.

²⁶² Shaw (2002) 330-331.

²⁶³ *Ibid* 331.

to those of the past empires.²⁶⁴ In addition, its expansionist policies are similarly brutal to the Russian Empire, one that includes mass starvation, military annexation, and forced assimilation.²⁶⁵ In governing their domestic affairs, Noga (2011) notes that both the Russian Empire and the USSR used an authoritarian model of government that created fear, inertia, and low public awareness in politics to maintain stability.²⁶⁶

Meanwhile in the case of Indonesia, it gained momentum as the leader of the colonized nations as the initiator of the Asia-Africa Conference which eventually led to the Non-Aligned Movement. Indonesia navigated itself as the leader of the non-bloc countries, most of them were former colonies, yet still managed to invade and occupy East Timor in a similar colonial manner. I shall note that although Indonesia did not possess power as much as the USSR, but its position was enough to garner support and influence other peripheral states. Further, the occupation of East Timor reminisced the Dutch 'Ethical Imperialism' doctrine, that used the goal of purifying or civilizing indigenous people as the foundation of their conquest.²⁶⁷ Hence, forced assimilation policies, such as religious conversion, and the killings of indigenous leaders were inherent in their occupation. In addition, the Dutch doctrine of colonial imagination based on geographical proximity manifested in the conquest of small islands under the Empire, such as Flores and Nusa Tenggara.²⁶⁸ This geographical imagination also led Indonesia to invade East Timor during the power vacuum shortly after the Portuguese Empire left.

These quasi-imperials, according to Shaw (2013), mobilize power to suppress marginalized ethnic and national groups, and further subordinated masses of poor peasants and labourers.²⁶⁹ With the Convention does not extend its scope to imperial and colonial policies, the quasi-imperials adopt the past policies to their likings to achieve their expansionist goals. The subjugation of marginalized groups, in this case, the Baltic people and East Timorese, were seen legitimate to actualize their 'national identity' formation, albeit intrinsically genocidal. In the end, without the recognition of colonial genocide as the center of postcolonial critics, the system is set

²⁶⁴ Dominic Lieven, 'The Russian Empire and the Soviet Union as Imperial Polities' [1995] 30(4) *Journal of Contemporary History* 611.

²⁶⁵ Ibid 619.

²⁶⁶ Madgalena Noga, 'Comparing the Tsarist Russians and Soviet Empires' [2011] 3(12) *Inquiries Journal* 1.

²⁶⁷ Elsbeth Locher-Scholten 'Dutch Expansion in the Indonesian Archipelago around 1900 and the Imperialism Debate' [1994] 25(1) *Journal of Southeast Asian Studies* 106-108. See also Justus M. van Der Kroef, 'Indonesia and the Origins of Dutch Colonial Sovereignty' [1951] 10(2) *The Far Eastern Quarterly* 169.

²⁶⁸ Locher-Scholten 109.

²⁶⁹ Shaw (2013) 101.

in a way that leaves colonial power or quasi-imperials unpunished in their violent paths to their conquest.

II. Was There A Genocide? Multi-approach Discourses in East Timor and the Baltic States Beyond the Genocide Convention

a. Cultural Genocide: the Indonesiazation of East Timor and the Russification of the Baltic States

The first alternative that I will present in this paper is to see the cases from cultural genocide frameworks. Although the Convention was heavily influenced by Lemkin's concept of genocide, yet as noted in the previous chapters, it leaves out Lemkin's cultural aspect of genocide. Lemkin (1994) perceives genocide to involve both the destruction of national pattern of the oppressed and the imposition of the national patterns of the oppressors.²⁷⁰ Irvin-Erikson (2019) defines that the use of national pattern in Lemkin's statement refers a community's character or common culture, which is usually under siege by the oppressor.²⁷¹ This was also reflected in Lemkin's initial explanation on the Holocaust which he highlighted the mandatory use of the German language and the destruction of cultural and religious sites as an effort of cultural destruction of the minority group's identity.²⁷² Therefore, with the development of Lemkin's cultural genocide, it can be understood that systematic attacks that threaten the existence of a culture can constitute genocide.

In East Timor occupation, arguably the most controversial policy is the resettlement policy. The Indonesian government at that time implemented a mass resettlements program for Indonesians, mainly ethnic Java, to move to East Timor, hence, changed the demographic composition on the occupied territory. Hanisworth and McCloskey (2000) perceive this policy to be assimilationist meaning aiming to 'eradicate indigenous culture, language and religion.'²⁷³ This policy caused many problems in East Timorese society as the spread of the use of Indonesian language as the main language of instruction²⁷⁴ and the broad practice of Javanese social and

²⁷⁰ Lemkin (1944) 79.

²⁷¹ Douglas Irvin-Erikson, 'Raphael Lemkin: Culture and Cultural Genocide' in Jeffrey S. Bachman *Cultural Genocide: Law, Politics, and Global Manifestations* (Routledge 2019) 31.

²⁷² Bilsky and Klagsburg (2018a) 1083.

²⁷³ Paul Hainsworth and Stephen McCloskey, *The East Timor Question: The Struggle for Independence from Indonesia* (I.B. Tauris 2000) 5.

²⁷⁴ Geoffrey Hull, 'East Timor and Indonesia: The Cultural Factors of Incompatibility' [1999] 2 *Studies in Languages and Cultures in East Timor* 9

cultural system on the island threatened the existence and practice of East Timorese culture. For example, Chaobang (2013) notes that the mass resettlement of Javanese transformed the tribal use of lands and other ancestral sites to be for agricultural purposes,²⁷⁵ which further decayed East Timorese indigenous identity. Reflecting on Lemkin's argument on cultural genocide, this resettlement policy can be seen as culturally genocidal because its core purpose was to destroy the group's essence.²⁷⁶

Beyond resettlement issues, it was also recorded that many East Timorese intellectuals were murdered and kidnapped by the Indonesian forces.²⁷⁷ I shall argue that East Timorese intellectuals had a vital role in disseminating the group's cultural values, customs, and practice in East Timorese society which leads to my argument that this can also be seen as a cultural genocide. Historical example from the case of the executions of the Baha'i intellectuals in Iran showed a clear instance of cultural genocide because it eliminated the Baha'i's cultures from Iranian history.²⁷⁸ Irvin-Erikson (2019) resonated with this argument stating that the systematic killings of a group's intellectuals can amount to genocide because such policy prevents the replication of a group's social identity.²⁷⁹ Therefore, in this case, the extermination of East Timorese intellectuals could lead to the extinction of the culture which I argue to be genocidal.

One defining policy during the East Timor occupation was the removal and reeducation of children. The first part of the policy, which was the forced removal of children, amounts to genocide as argued in the third chapter of this thesis. However, the Indonesian government also set up reeducation camps across the occupied territory for children. Although it was not a physical removal nor an attack on children, Sautmann (2006) asserts that reeducation camps can be genocidal because they encourage children to shift their identities coercively.²⁸⁰ For example, cases from Australia and Canada's residential schooling for indigenous children are commonly understood as a cultural genocide because of their aim to subdue multigeneration indigenous community into the ways of majority rulers.²⁸¹ The similar pattern of residential school can also

²⁷⁵ Chaobang (2013) 35.

²⁷⁶ Bilsky and Klagsburg (2018b) 379.

²⁷⁷ Curtin (2000) 191.

²⁷⁸ Moojan Momen, 'The Baha'i Community of Iran: Cultural Genocide and Resilience' in Jeffrey S. Bachman *Cultural Genocide: Law, Politics, and Global Manifestations* (Routledge 2019) 259.

²⁷⁹ Irvin-Erikson (2019) 31.

²⁸⁰ Barry Sautmann, *Cultural Genocide and Asian State Peripheries* (Springer 2006) 4-8.

²⁸¹ David Nersessian, 'A Modern Perspective: The Current Status of Cultural Genocide under International Law' in Jeffrey S. Bachman *Cultural Genocide: Law, Politics, and Global Manifestations* (Routledge 2019) 62.

be identified in East Timor case where children were forced to abandon their East Timorese identities and forbidden to talk about East Timor and its cultures in any context.²⁸² I contend that the policy's intention is clearly to erase the East Timorese identities within children population through 'reeducation measures.'

Pertaining to the Baltic states case, the USSR implemented several forced assimilation policies throughout the Baltic region to eliminate the language and culture of the oppressed people during its expansionist period.²⁸³ In the Baltics, one controversial policy was the banning of many books throughout the region destroying works of literature and limiting cultural center activities in the Baltics, while at the same banning thousands of books that were perceived to be contradictory to the Soviet doctrine.²⁸⁴ In addition, children were also pushed to use Russian beside their national language with framing that the Russian language was the higher one compared to their own national language and to learn propagandist literature that glorify 'the new Soviet life.'²⁸⁵ The culmination of these policies led to a nation-wide adoption of Russian as the official language of the three Baltic states which caused the Baltic people to conduct official affairs in Russian, instead of their local languages.²⁸⁶ As such, these policies were detrimental to the Baltic languages and cultures. According to O'Connor (2003), during the Soviet occupation, the works of literatures and arts from the Baltic countries plummeted partly also because of the Russification policy.²⁸⁷

In addition to the suppression of Baltic cultures and languages, the Soviet also tried to change the ethnic and cultural composition in the occupied and annexed territory. With the massive numbers of the Balts already deported, the Soviet exacerbated the demography issues by settling the territory with Russians and Russian-speaking people.²⁸⁸ There was also a preferential treatment and incentive for Russian migrants at the expense of the Baltic people,²⁸⁹ which further accelerated the mass migration to the Baltic region. This caused a drastic change in ethnic composition, where it was noted that the number of ethnic Estonians in Estonia dropped by twenty-eight percent and

²⁸² Barker accessed 18 April 2023.

²⁸³ J. Otto Pohl, 'Stalin's Genocide against the Repressed "Peoples"' [2000] 2(2) *Journal of Genocide Research* 288.

²⁸⁴ Isabelle T. Kreindler, 'Baltic Area Languages in the Soviet Union: A Sociolinguistic Perspective' [1988] 19(1) *Journal of Baltic Studies* 9.

²⁸⁵ Ibid.

²⁸⁶ Steven Otfinoski, *The Baltic Republics (Nations in Transitions)* (Facts on File 2004) 15-16, 64-65.

²⁸⁷ Kevin O'Connor, *The History of the Baltic States* (Greenwood Publishing Group 2003) 132.

²⁸⁸ Otfinoski 112.

²⁸⁹ Aija Prabene and Juris Prikulis, *Damage Caused by the Soviet Union in the Baltic States* (E-Forma 2017)

the number of ethnic Latvians in Latvia dropped by twenty-five percent.²⁹⁰ The problem was even more visible in Riga, the capital of Latvia, where ethnic Latvians became minority and received discriminatory policies in their country.²⁹¹ In addition to demography change, the Soviet also caused severe religious change in the territory. Non-Orthodox church properties were confiscated by the Soviet, and public masses were strictly restricted.²⁹² Many clergymen and cultural intellectuals were arrested and deported by the Soviet forces.²⁹³

I argue that both cases can satisfy the cultural aspect of genocide as per Lemkin. The destructions of national pattern can be seen in the restriction and ban of cultural, lingual, and religious practice in both East Timor and the Baltic states by their oppressors. In addition, the targeting of intellectuals in both cases further signifies that there was an intent by the oppressors to obliterate local cultures as the basis of their local identities. The pattern then followed by the impositions of the oppressor's identity through forcible methods, such as mass resettlement of non-indigenous groups to the area, reeducation policies, imposition of the oppressor's language and religion, with aim for the groups to adopt the oppressor's identities and to assimilate to their demography. The cultural aspect of genocide is not codified under the Convention, but it presents a prominent element in valuing the oppressed experience in understanding genocide beyond its physical aspect.

b. Political Genocide: Suppressing the Independence Movement

The second alternative to approach the cases is through the political genocide discourse, or often called 'politicide.' Lemkin (1944) considers a political technique as one of the eight techniques of genocide in his book *Axis Rule in Occupied Europe*.²⁹⁴ He exemplified the political technique of genocide through the limitation of political parties and restrictions of national characters under the Nazi regime in Europe.²⁹⁵ He also advocated the inclusion of political groups as one of the protected groups under the Convention which made it to the Secretariat Draft of the

²⁹⁰ Tulun 150.

²⁹¹ Otfinoski 58.

²⁹² Alfred Erich Senn, 'The Sovietization of the Baltic States' [1958] 317 *The Annals of the American Academy of Political and Social Science* 125.

²⁹³ Ibid.

²⁹⁴ Lemkin (1944) 79.

²⁹⁵ Ibid 79.

Convention in 1947. However, political groups were eventually scrapped off from the Convention due to the Soviet's strong opposition as elaborated in Chapter II of this thesis.

Despite the failure of the codification of political genocide, it still gained academic momentum in exploring the terminology. Harff and Gurr (1988) describe a political group with their hierarchical position or political opposition to a regime or dominant groups.²⁹⁶ Nersessian (2010) criticizes the decision to remove political groups from genocide was not based on any legal necessities and argues that political groups have been predicted to be the targets of most genocidal attacks after the adoption of the Convention.²⁹⁷ For example, the mass killings in Cambodia, according to Schaack (1997), illustrates the shortfall of the Convention as it does not cover a significant portion of deaths under the Khmer Rouge regime.²⁹⁸ Hence, exploring political genocide lens is of utmost importance to shed a light on the ongoing attacks and their notoriety towards political groups, which is neglected under the Convention.

In regards to political genocide development, Lithuania and Estonia recognize political groups, including anti-occupation resistance, as one of the victim groups of genocide under their criminal law.²⁹⁹ Many argue that the challenge in constituting the Soviet occupation in the Baltic as a genocide under international law is because of the difficulty in categorizing the victim group. But perhaps, it is explainable in the political genocide sense. Although on the surface, the Baltic people are grouped based on the nationality, hence, falls under the national group in the Convention, but in reality, the Soviet did not exterminate most of the victims based on this notion. Lemkin's example on the restriction of political parties under the Nazi regime clearly resonates with how the Soviet governed the Baltic region. Alexiev (1983) finds that the Baltic nations were extremely underrepresented in comparison to ethnic Russians in the local and national political party, in addition to restriction of political activities among the Baltic states.³⁰⁰

In the Baltics, *Operation Priboi* was implemented to fit the nationwide Soviet campaign for dekulakization. Kulaks were defined to be prosperous private farmers, and the Soviet aimed to

²⁹⁶ Barbara Harff and Ted Robert Gurr, 'Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases Since 1945' [1988] 32(3) *International Studies Quarterly* 360.

²⁹⁷ David Nersessian, *Genocide and Political Groups* (OUP 2010) 63.

²⁹⁸ Beth van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' [1997] 106(7) *The Yale Law Journal* 2261.

²⁹⁹ Pettai 57-58.

³⁰⁰ Alexander R. Alexiev, *Dissent and Nationalism in the Soviet Baltic* (Rand Publishing 1983) 8.

collectivize and redistribute their lands.³⁰¹ This operation also involved deportation of resisting kulaks which led to more than 100,000 deportees by the end of 1949.³⁰² In addition, during the dekulakization, the Soviet forces also proportionately targeted anti-occupation movements, such as the Forest Brother, which was almost completely eliminated by the 1950s.³⁰³ In addition, Mälksoo (2001) also finds that the repressive policies were also targeted towards groups with political will for the independence of the Baltic states.³⁰⁴ For example, some religious leaders were kidnapped and tortured if they refused to glorify the Soviet doctrines in their preaching.³⁰⁵

Meanwhile, in the case of East Timor, not that much literature is found in identifying the occupation as a political genocide. I will then try to contribute to the development of the approaches to understand the East Timor occupation. The political group in East Timor is arguably the independence or resistance movement, such as the Revolutionary Front for an Independent East Timor (FRETILIN). As the Indonesian dictator Soeharto perceived FRETILIN as a threat to the regional stability as it was promoting communism and Marxist in the region, he proposed that the decolonization in East Timor must lead to their integration to Indonesia to combat communism spread.³⁰⁶ This showed how the suppression of FRETILIN and other ideology-based groups as a political genocide according to Lemkin, with FRETILIN can be identified as the ‘opposing group’ based on Harff and Gurf’s political groups definition.

In addition, many East Timorese were forced to declare their loyalty to Indonesia and failure to do so would mean instant execution.³⁰⁷ The result was 300,000 East Timorese were displaced and relocated in ‘guarded camps’ and thousands of them were gunned down³⁰⁸ because of their support for an independent East Timor. In the 1980s, the Indonesian forces even poisoned

³⁰¹ Robert Conquest, *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine* (OUP 1987) 13.

³⁰² Strods and Kott 29-30. See also Allan Purr, Martin Klesment and Luule Sakkeus, ‘A Turbulent Political History and the Legacy of State Socialism in the Baltic Countries’ in Daniel Baldwin Hess and Tiit Tammaru, *Housing Estates in the Baltic Countries* (Springer 2019).

³⁰³ Joseph M. Ellis, ‘Russian Disinformation: The Forest Brothers, Baltic Resistance and NATO’ in J. Chakars and I. Ekmanis, *Information Wars in the Baltic States* (Springer 2022) 45.

³⁰⁴ Mälksoo (2001) 748.

³⁰⁵ Senn 125.

³⁰⁶ Laura Southgate, ‘The Indonesian Invasion of East Timor’ in *ASEAN Resistance in Sovereignty Violation: Interests, Balancing, and the Role of the Vanguard State* (Policy Press Scholarship 2020) 29-30.

³⁰⁷ John G. Taylor, ‘Encirclement and Annihilation: The Indonesian Occupation of East Timor’ in Robert Gellately and Ben Kiernan, *The Specter of Genocide: Mass Murder in Historical Perspective* (Cambridge University Press 2012) 164.

³⁰⁸ Derrick Silove, ‘Conflict in East Timor: Genocide or Expansionist Occupation?’ [2000] 1 *Human Rights Review* 68.

the lands and water which caused the death of livestock.³⁰⁹ This policy was intended to immobilize FRETILIN's grassroots support through forced starvation. In addition, similar to the attacks towards religious leaders in the Baltic, the Catholic churches and their leaders in East Timor were systematically destroyed and murdered if they opposed the Indonesian occupation.³¹⁰ Even by the end of Indonesian occupation in East Timor, there were still targeted attacks against the independent movement. Two days after the independence referendum, the military forces kidnapped and exterminated indigenous East Timorese as a response to the overwhelming ballots voting for the independence from Indonesia.³¹¹

Reflecting on the discourse on political genocide, both the Baltic states and East Timor could fall under this definition. The Baltic states case, I argue, has a stronger association with political genocide seeing how Stalin's policies against political opponents were extensive throughout the Soviet Union territories. It must also be noted that the Soviet Union was already implementing such policies during the negotiation period of the Convention, which explains why they persistently objected to the inclusion of political groups to the Convention. Meanwhile, in East Timor case, a strong justification of the mass killings was based on the fear of the spread of communism in the region. Perhaps this is why the occupation was neglected by the international community during its early years,³¹² which led to more casualties in the future. Therefore, I attest that the inclusion of political groups under the Convention as it was in its Secretariat Draft might have prevented these cases from happening, or at the minimum might have brought justice to the victims.

c. Structural Genocide: The Question of Settler Colonialism in the Occupation

The third alternative I will elaborate is structural genocide, a term developed by Patrick Wolfe. In response to the overlooking of colonial genocide in genocide discourse, Wolfe (2006) coins the term to avoid the questions of degree and of hierarchy among victims, while retaining settler colonialism's structural induration.³¹³ Settler colonialism itself is demonstrated when colonizers 'come to stay' through the establishment of the new political order in the conquered

³⁰⁹ Silove 69.

³¹⁰ Saul 470.

³¹¹ Silove 75.

³¹² Southgate 71.

³¹³ Wolfe 403.

land, rather than to exploit native labors.³¹⁴ Whitt and Clarke (2019) view settler colonialism as a different form of colonialism as it employs logic of elimination towards the native population for territorial gains.³¹⁵ This practice is different than the common colonial practice that views indigenous population as the source of labor to support their exploitative industries. Hence, settler colonialist perceives indigenous population pressingly dispensable³¹⁶ for their territorial project.

Linking settler colonialism practice and elimination of the native policies, Wolfe (2006) also emphasizes that invasion is a structure, and not a one-time event, that entails an eventual permanent settlement.³¹⁷ Structural genocide is deemed important because the framework enables us to make sense of the relationships between spatial removal, mass killings, and biocultural assimilation.³¹⁸ For example, the absence of space for removal during settler colonial practice will eventually lead to the elimination of the natives as demonstrated in the US and Australia.³¹⁹ The development of structural genocide is considered important to discuss on genocidal events that initially did not fit into any categories in genocide discourse. For example, the US' control over Hawaii and the ongoing occupation of Palestine by Israel,³²⁰ illustrate how structural genocide does not occur instantly, yet it involves a structured way of eliminating the native population for territorial conquest. I will then analyze the cases in East Timor and the Baltics from this lens to see if the occupations can amount to structural genocide.

In terms of induration and political context, settler colonialism showcases systematic violent measures during a period of time which is relatively impervious to regime change.³²¹ Contextualizing this to East Timor's situation, the attacks on East Timorese can be seen as a structured event, spanning more than three decades with international support in the beginning. The intention of Indonesia's invasion was apparent which was to stay in East Timor. This intention was manifested in Indonesia's efforts to fully integrate East Timor into their territory,³²²

³¹⁴ Lorenzo Veracini, 'Settler Colonialism: Career of a Concept' [2013] 41(2) *The Journal of Imperial and Commonwealth History* 313.

³¹⁵ Whitt and Clarke 47.

³¹⁶ Ibid.

³¹⁷ Wolfe 387.

³¹⁸ Ibid 403.

³¹⁹ Ibid.

³²⁰ Dean Itsuji Saranillio, 'Why Asian Settler Colonialism Matters: A Thought Piece on Critiques, Debates, and Indigenous Difference' [2013] 3(3) *Settler Colonial Studies* 282.

³²¹ Wolfe 402.

³²² Lee Jones, 'East Timor: ASEAN and Third-World Colonialism' in *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan 2012) 59-61..

establishing it as their twenty-seventh province with an aim to avoid international repercussions because it could constitute an illegitimate interference of its internal affairs. The massacres against the natives also occurred periodically,³²³ often influenced by internal stability, unlike the Rwandan genocide which happened in one week. Comparing this structural induration aspect of structural genocide, the same thing can be found in the Baltic case. The Soviet first launched an invasion in 1940, and the second one in 1944, in conjunction with its territorial expansion project. Already in 1940, the Baltic states were annexed by the Soviet Union as its constituent republics. The deportations also occurred in several instances, recorded in 1940, 1942, 1949, and 1952.³²⁴ Despite international criticism of the occupation, the Soviet managed to eventually suppress the Forest Brothers guerilla movement and to immobilize grassroots political movement,³²⁵ hence, retaining the sole governing authority in the occupied territories, which was impervious to regime change due to its dominance. I argue that the induration aspect of structural genocide is visible both cases as the occupation can be seen as a structural event spanning over a period of time with military means which showcased the ‘systematic violence measures’ from both cases.

The second aspect of the structural genocide that I will elaborate is the spatial removal. Wolfe (2006) notes spatial removal as inherent in settler colonialism as the goal is to conquer a land.³²⁶ He takes the Palestine case as an example as the continuing tendency to Palestinian expulsion has taken on a settler-colonial character³²⁷ demonstrated by massive settlement projects by the Israeli government. Similar characteristics I argue can be found in both cases of East Timor and the Baltic. In East Timor, the Indonesian government deliberately expelled East Timorese from their indigenous lands and relocated Indonesian transmigrants to settle on the land. In addition, the government also exploited their resources and put Indonesian migrants as the labors, for example in agricultural and petroleum industries that were dominated by Indonesians.³²⁸ This policy entails settler-colonial practice as the Indonesian government no longer relied on the native East Timorese as their labors, but rather used Indonesians to serve the purpose. In addition to this,

³²³ Ehud Eiran, ‘The Indonesian Settlement Project in East Timor’ in Oded Haklai and Neophytos Loizides, *Settlers in Contested Lands: Territorial Disputes and Ethnic Conflicts* (Stanford University Press 2015) 98-99.

³²⁴ Hiden 129.

³²⁵ Inete Ziemele, ‘State Continuity, Succession and Responsibility: Reparations to the Baltic States and Their People?’ [2003] 3(1) *Baltic Yearbook of International Law Online* 170.

³²⁶ Wolfe 399.

³²⁷ *Ibid* 401.

³²⁸ Jones 65-66.

East Timorese were also removed from their houses and relocated to camps for undetermined period.³²⁹ Those who were living in camps were prevented from engaging in any economic activity and were subjected to enforced starvation.³³⁰ I argue that this policy illustrates structural genocide as the main objective of Indonesia at that time was to gain territorial control.

In the Baltic states case, spatial removal was a central aspect of the Soviet occupation. This thesis has recorded repeatedly that there were several mass expulsions of the Balts during the occupation, but I will further argue that the goal was to acquire the Balts' lands, in addition to suppressing opposition movement as argued in the previous part. The dekulakization campaign during *Operation Priboi* resulted in the Soviet's collectivization of more than eighty percent of lands that were previously owned by the Balts.³³¹ In addition to the land control and mass expulsions of the Baltic people, the Soviet also relocated ethnic Russians to the occupied territory. Hiden and Salmon (1994) record that ethnic Russians relocated by the Soviet changed the demographic dramatically in Estonia and Latvia, and in a smaller scale in Lithuania.³³² The Soviet also relied to these ethnic Russians to serve their industrialization purpose and were favored in governmental housing that was built on the Baltic lands.³³³ This also showed a departure from previous colonial practice that the Soviet also did not need the exploitation of the natives for their economic gains and relied on ethnic Russians to do so. Hence, I would contend that both policies in East Timor and the Baltic states show that the oppressors considered the indigenous land as *terra nullius*, aiming at both pacification of the indigenous people and the economic exploitation of their land.³³⁴ In the end, both aims are inherent in settler colonial practice.³³⁵

Regarding the third aspect of structural genocide, biocultural assimilation aims to display that the oppressor has successfully created an egalitarian society in the territory.³³⁶ I would claim that this policy is usually achieved through violent and forced methods. In East Timor, cultural assimilation was executed by kidnapping East Timorese children and placing them in reeducation

³²⁹ Eiran 101.

³³⁰ John G. Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor* (Zed Books 1991) 92-94.

³³¹ Strods and Kott 30.

³³² Hiden 130.

³³³ Aksel Kirch, Marika Kirch and Tarmo Tuisk, 'Russians in the Baltic States: To Be or Not To Be?' [1993] 24(2) *Journal of Baltic Studies* 174.

³³⁴ Kjell Anderson, 'Colonialism and Cold Genocdie: The Case of West Papua' Jeffrey S. Bachman *Cultural Genocide: Law, Politics, and Global Manifestations* (Routledge 2019) 180.

³³⁵ Evelyn Nakano Glenn, 'Settler Colonialism as Structure: A Framework for Comparative Studies of US Race and Gender Formation' [2015] 1(1) *Sociology of Race and Ethnicity* 52.

³³⁶ Wolfe 407.

camps.³³⁷ Meanwhile, biological assimilation was implemented through a more violent method. It was recorded that the Indonesian forces prevented the births of East Timorese by forcing women to undergo contraception procedures.³³⁸ In addition, many East Timorese women were also raped for the goal of the Indonesianization of ethnic East Timorese.³³⁹ The biocultural assimilation aspect in the Baltic states was also visible during the occupation, although more sporadic compared to East Timor. The Soviet enacted the ‘Soviet Nationality’ program with aim to nationally mix the Soviet population.³⁴⁰ However, Kirch et.al. (1993) records that this program did not achieve its purpose in the Baltic states as the resistance to Russification led to the refusal of mixed marriages in the region.³⁴¹ Despite all this, there are also reports on how the Soviets sent deportees to reeducation camps in order to assimilate with Soviet values and principles.³⁴² I would argue that the biocultural assimilation policies were more visible in East Timor showed by the violent measures to change social, cultural, and biological compositions in East Timor. However, my argument does not mean to disregard the cultural assimilation policies in the Baltic states. I contend that biocultural assimilation does not end in either biological or cultural aspect of the assimilation, rather that both are executed correspondingly. Hence, East Timor case embodies this aspect more than the Baltic states.

To close this part, I would argue that it is not a secret that the Convention was deliberately shaped to overlook colonial genocide. When the mass killings did not occur as a one-time event, Wolfe’s structural genocide can be an alternative to approach some cases. The calculated occupation in East Timor and the Baltic states spanning over decades with the intention to gain territory can constitute structural genocide. Both cases are important to analyze from the perspective because Wolfe (2006) argues that it can alert us of the indicator of genocide, thus shaping our response to prevent that from happening.³⁴³ Therefore, more discourse on this matter

³³⁷ Hannah Loney, ‘Displacement and Detention in Ataúro Island during the Indonesian Occupation of East Timor’ in Robert Cribb, Christina Twomey and Sandra Wilson, *Detention Camps in Asia: The Conditions of Confinement in Modern Asian History* (Brill 2022) 103-104.

³³⁸ Rubinstein and Lane 145.

³³⁹ Curt Gabrielson, ‘East Timorese Women’s Fight Against Violence’ (ICWA 1 January 2002) <<http://www.icwa.org/wp-content/uploads/2015/09/CG-13.pdf> > accessed on 27 April 2023.

³⁴⁰ Kirch, Kirch and Tuisk 174.

³⁴¹ Ibid 175.

³⁴² Tulun 146.

³⁴³ Wolfe 403.

is needed to prevent future genocides, ones that have settler colonial characteristics, from happening in the future.

CHAPTER V

CONCLUSION

This thesis seeks to decolonize the Convention using TWAIL in its analysis. This thesis recognizes that the codification of the Genocide Convention was a significant development in international community, however, the process of its codification should not be overlooked to understand how the Convention faces challenges in its applicability. I had sought to unravel the *travaux* of the Convention to see the traces of great powers influence in the process of the Convention. Applying TWAIL means that we must contextualize the power dynamics and situation during the process and look beyond the Convention itself. First, the exclusion of cultural genocide is a major loss for Lemkin's concept, but even a greater one for non-Western states. Persistent objections from the UK, France, and likeminded countries not only showed their involvement in cultural genocide, but also reinstated their position as superiors to non-Western states or colonies. Second, the erasure of political groups showed how great powers, such as the USSR, perceived this international legal instrument as a threat to their legitimacy. Without the protection against political genocide, the States will not have international legal liability on the matter of genocidal policies towards political groups. Lastly, pertaining to the existing system at that time, the *travaux* showed a contrasting position, between Western or former colonial states, and former colonies or NSGTs, on which the international legal system was built upon. The subordinate position of the latter was perpetually legitimized by international law, and this time yet again in the Genocide Convention. This resulted in the deserted narratives from smaller states, taking away their emancipation and protection chance under international law. This all recorded in the *travaux* also demonstrates the power disparities during the codification.

After understanding the codification process, some points could be highlighted on its applicability for East Timor and the Baltic States cases based on the three elements of the Convention. First, pertaining to the intent, it is found challenging to establish the *dolus specialis* of both cases mainly due to the lack of explicit intention records and their multidimensional nature of the conflicts. Second, with the narrow definition of protected groups under the Convention, establishing East Timorese or the Baltic people needs further justification although both are prospective to fall under the national group category. However, with East Timorese were not bound yet by any national bond, and the problem of targeting political groups of the Baltic States,

pose another question if they can satisfy the category. Third, I found perhaps both occupations could satisfy the prohibited acts. In East Timor, forced sterilization towards East Timorese women and the abduction of East Timorese children constitute genocide under the Convention. Meanwhile in the Baltic States, mass deportation can also amount to genocide as it destroys the group in whole or in part. Although this element could be fulfilled by its applicability, the shortcomings of fulfilling the other two will result in the failure of establishing the occupations as a crime under the Genocide Convention.

Hence, I would propose to see the occupations with the more progressive discourses in genocide studies. First, from cultural genocide, both cases are found under this scope, as both Indonesia and the Soviet's government enacted forced assimilation policies that aimed to destroy the cultural aspect of East Timorese and the Balts, such as through forced transmigration, language restrictions, or re-education camps. Second, from political genocide perspective, both occupations, to some extent, also constitute genocide. For East Timor, political genocide is found to be executed against the FRETILIN members as the liberation movement of East Timor. Meanwhile for the Baltic States, the dekulakization policy targeted specific groups of people, in addition to the wide targeted killings of the Forest Brother's members and their allies. Third, by using structural genocide perspective, I aimed to map out the induration and systemic violence in a colonial sense. For East Timor, the mass expulsion of East Timorese from their land and the repurposing of their tribal lands indicates the presence of systemic violence that aimed to disenfranchise East Timorese by replacing them with Indonesians. Meanwhile for the Baltic States, spatial removal was central for the Soviet's policies to decollectivize lands and remove the Baltic people with the result of a significant change in the demographic composition.

To end this thesis, I argue that the dominance of great powers and the legacy of colonialism still persist in international law, including in the context of the Genocide Convention. This causes a long-term problem to classify mass violence actions under the genocide due to its narrow and interests-saturated provisions. The study cases in this thesis demonstrate the challenge in satisfying the three elements that can constitute genocide, thus, serving as a bottleneck towards justice for the victims of the heinous crimes. In the spirit of interdisciplinary research, this thesis also provides alternatives to approach those cases in light of the shortcomings of the Convention. Arguably, there is a need for further discussion regarding amending or revising the Convention to improve its applicability considering how the Convention is a product of political interests of former

colonial powers that subjugate smaller states. I end this thesis by stating that the progress towards justice is unfinished and that international law itself needs to be decolonized. Should there be any international instruments to prevent yet another human tragedy, such as genocide, a greater involvement of mid-sized powers and small states should be facilitated to pursue justice in the international community.

BIBLIOGRAPHY

Primary Sources

Bosnia and Herzegovina v. Serbia and Montenegro [2007] ICJ: Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide

ECOSOC. Ad Hoc Committee on Genocide – Terms of Reference, *E/AC.25/2*. 1948.

ECOSOC. Ad Hoc Committee on Genocide – Summary Record of the 5th Meeting, *E/AC.25/SR.5*. 1948.

ECOSOC. Ad Hoc Committee on Genocide – Corrigendum to the Summary Record of the 3rd Meeting, *E/AC.25/SR.3/Corr.1*. 1948.

ECOSOC. Continuation of the consideration of the draft convention on genocide, *A/C.6/SR.83*. 1948.

General Assembly. Summary Record on the 28th Meeting of the Committee on the Progressive Development of International Law and Its Codification, *A/AC/10/SR.28*. 1947.

Prosecutor v. Gacumbitsi. Judgment (Case No. ICTR-2001-64-A). 2006.

Prosecutor v. Simba. Judgment and Sentence (Case No. ICTR-2001-76-T). 2005.

Prosecutor v. Semanza. Judgment and Sentence (Case No. ICTR-97-20-T). 2003.

Prosecutor v. Georges Anderson Nderubumwe Rutaganda. Judgement and Sentence (Case No. ICTR 96-3-T). 1999.

Prosecutor v. J.-P. Akayesu. Judgment (Case No. ICTR-96-4-A). 2001.

The United Nations. *The Convention on the Prevention and Punishment of the Crime of Genocide*. 1948.

The United Nations. *The Vienna Convention on the Law of Treaties*. 1969.

Vasiliauskas v. Lithuania. Grand Chamber (Application No.35343/05). 2015.

Secondary Sources

Books/Chapter

Abtahi, Hirad, and Philippa Webb. 2008. *The Genocide Convention: The Travaux Préparatoires*. Leiden: Martinus Nijhoff Publishers.

_____. 2018. "Secrets and Surprises in the Travaux Préparatoires of the Genocide Convention." In *Arcs of Global Justice: Essays in Honour of William A. Schabas*, by Margaret M. deGuzman and Diane Marie Amann, 299–320. Oxford: OUP.

Barrett, John Q. 2010. "Raphael Lemkin and 'Genocide' at Nuremberg, 1945-1946." In *The Genocide Convention Sixty Years after its Adoption*, by C. Safferling and E. Conze, 35-54. The Hague: T.M.C. Asser Press.

Bernstoff, Jochen von, and Philipp Dann. 2019. "Introduction." In *The Battle of International Law: South-North Perspectives on the Decolonization Era*, by Jochen von Bernstoff and Philipp Dann, 1-32. Oxford: Oxford Academic.

Bilsky, Leora, and Rachel Klagsbrun. 2018. "Cultural Genocide: Between Law and History." In *The Oxford Handbook of Legal History*, by Markus D. Dubber and Christopher Tomlins, 1081–1094. Oxford: OUP.

Cammackin, Mark. 2015. "Crimes against humanity in East Timor: The Indonesian ad hoc Human Rights Court hearings." In *Trials for International Crimes in Asia*, by Kirsten Sellars, 191-225. Cambridge: Cambridge University Press.

Cooper, John. 2008. *Raphael Lemkin and the Struggle for the Genocide Convention*. London: Palgrave Macmillan.

Drumbl, Mark A. 2018. "Genocide: The Choppy Journey to Codification." In *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, by Morten Bergsmo and Emiliano J. Buis, 609-636. Oslo: Torkel Opsahl Academic EPublisher.

Gathii, James T. 2019. "The Agenda of TWAAIL." In *International Legal Theory: Foundations and Frontiers*, by Jeffrey Dunoff and Mark Pollack, 1-45. Cambridge: Cambridge University Press.

Herschkopf, Jayme, Julie Hunter, and Laurel Fletcher. 2011. *Genocide ReInterpreted: An Analysis of the Genocide Convention's Potential Application to Canada's Indian Residential School System*. New Haven: Yale Law School.

- Hidden, John. 1996. *The Baltic Nations and Europe* . London: Longman.
- Irvin-Erickson, Douglas. 2016. *Raphael Lemkin and the concept of genocide* . Philadelphia: University of Pennsylvania Press.
- Kiernan, Ben. 2004. "War, Genocide, and Resistance in East Timor, 1975-79: Comparative Reflections on Cambodia." In *War and State Terrorism: The United States, Japan, and the Asia-Pacific in the Long Twentieth Century*, by Mark Selden and Alvin Y. So, 199-233. Lanham: Rowman & Littlefield Publishing Group, Inc.
- Klinken, Helene van. 2020. *Making Them Indonesians: Child Transfers out of East Timor* . Melbourne: Monash University.
- Lemkin, Raphael. 1944. *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*. Washington DC: Carnegie Endowment for International Peace .
- Lewis, Mark. 2013. "The Genocide Convention: The Gutting of Preventive Measures, 1946-58'." In *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950*, by Mark Lewis, 181–228. Oxford: OUP.
- Liivoja, Rain. 2014. "Competing Histories: Soviet War Crimes in the Baltic States." In *The Hidden Histories of War Crimes Trials*, by Kevin Heller and Gerry Simpson, 248–266. Oxford: Oxford Academic.
- Magnarella, Paul J. 2002. "Recent Development in the International Law of Genocide: An Anthropological Perspective on the ICTR." In *Annihilating Difference: The Anthropology of Genocide*, by Alexander Hinton, 310-322. Oakland: California Scholarship.
- Mälksoo, Lauri. 2022. *Illegal Annexation and State Continuity: The Case of Incorporation of the Baltic States by the USSR*. Brill.
- Mertelsmann, Olaf, and Aigi Rahi-Tamm. 2009. "Soviet Mass Violence in Estonia Revisited ." *Journal of Genocide Research*, Vol.11, No.2-3 307-322.
- McCloskey, Paul Hainsworth and Stephen. 2020. *The Struggle for Independence from Indonesia* . London: St. Martin Press.

Moses, A. Dirk. 2010. "Raphael Lemkin, Culture, and the Concept of Genocide." In *The Oxford Handbook of Genocide Studies*, by Donald Bloxham and A. Dirk Moses, 19-41. Oxford: OUP.

_____. 2021. *The Problems of Genocide: Permanent Security and the Language of Transgression*. Cambridge: Cambridge University Press.

Pahuja, Sundhya. 2011. *Decolonizing International Law: Development, Economics and the Politics of Universality*. Cambridge: Cambridge University Press.

Schabas, William A. 2009. *Genocide in International Law: The Crime of Crimes*. Cambridge: Cambridge University Press.

_____. 2012. "The Law and Genocide." In *The Oxford Handbook of Genocide Studies*, by Donald Bloxham and A. Dirk Moses, 123-141. Oxford: OUP.

_____. 1999. *The Genocide Convention at Fifty*. Washington DC: US Institute of Peace.

Shaw, Martin. 2013. *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World*. Cambridge: Cambridge University Press.

Strods, Heinrihs, and Matthew Kott. 2002. "The File on Operation 'Priboi': A Re-assessment of the Mass Deportations of 1949." *Journal of Baltic Studies* Vol.33 1-36

Taagepera, Rein. 1993. *Estonia: Return to Independence*. San Francisco: Westview.

Whitt, Laurelyn, and Alan W. Clarke. 2019. *North American Genocides: Indigenous Nations, Settler Colonialism, and International Law*. Cambridge: Cambridge University Press.

Journal Articles/Reports

Bilsky, Leora, and Rachel Klagsbrun. 2018. "The Return of Cultural Genocide?" *The European Journal of International Law*, Vol.29, No.2 373–396.

Chaobang, Ai. 2013. "How well has the causality of the conflict in East Timor been reflected in its UN peacebuilding experience?" *United Nations Peace and Progress, Volume 1 (1)* 33-46.

Chimni, B.S. 2006. "T-WAIL: A Manifesto." *International Community Law Review*, Vol.8 3–27.

- Clark, Roger S. 1981. "Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor." *Ohio Northern University Law Review*, 8(2) 321-328.
- Crook, Martin, and Damien Short. 2014. "Marx, Lemkin, and the genocide-ecocide nexus." *The International Journal of Human Rights*, Vol.18, No.3 298-314.
- Crook, M., D. Short, and N. South. 2018. "Ecocide, genocide, capitalism and colonialism: Consequences for indigenous peoples and glocal ecosystems environments." *Theoretical Criminology*, Vol.22, No.3 298-317.
- Curtin, Philip J. 2000. "Genocide in East Timor? Calling for an International Criminal Tribunal for East Timor in Light of Akayesu." *Penn State International Law Review* Vol.19, No.1 181-211.
- Dunlap, Alexander. 2018. "The 'solution' is now the 'problem': wind energy, colonisation and the 'genocide-ecocide nexus' in the Isthmus of Tehuantepec, Oaxaca." *The International Journal of Human Rights*, Vol.22, No.4 550-573.
- Dwyer, Philip, and Lyndall Ryan. 2016. "Reflections on Genocide and Settler-Colonial Violence." *History Australia*, Vol.13, No.3 335-350.
- Earl, Hilary. 2013. "Prosecuting Genocide before the Genocide Convention: Raphael Lemkin and the Nuremberg Trials, 1945-1949." *Journal of Genocide Research*, Vol.15, No.3 317-337.
- Fatah, Sonya. 1998. "East Timor Struggle for Self-Determination." *Pakistan Horizon*, Vol.51, No.3 57-81.
- Gathii, James Thuo. 2011. "TWAIL: A Brief History of Its Origins, Its Decentralized Network and A Tentative Bibliography." *Trade Law and Development*, Vol.3, No.1 26-65.
- Goldsmith, Katherine. 2010. "The Issue of Intent in the Genocide Convention and Its Effects on the Prevention and Punishment of the Crime of Genocide: Toward A Knowledge-Based Approach' ." *Genocide Studies and Prevention*, Vol.5, No.3 238-257.
- Haskell, John D. 2014. "TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law." *Canadian Journal of Law and Jurisprudence*, Vol.27, No.2 383-414.

- Kiernan, Ben. 2003. "The Demography of Genocide in Southeast Asia: The Death Toll in Cambodia, 1975-79, and East Timor 1975-80." *Critical Asian Studies*, Vol.35, No.4 585-597.
- Ko, Ñusta Carraza. 2021. "Complicating Genocide: Missing Indigenous Women's Stories." *Oxford Research Encyclopedia of Politics*.
- Koskenniemi, Martti. 1997. "History in International Law: A Sketch." *EJIL*, Vol.8 566-582.
- Kunz, Josef L. 1949. "The United Nations Convention on Genocide." *The American Journal of International Law*, Vol.43, No.4 738-746.
- LeBlanc, Lawrence. 1998. "The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendmen." *Yale Journal of International Law*, Vol.13, No.268 268-295.
- Lemkin, Raphael. 1946. "Genocide." *American Scholar*, Vol.15, No.2 227-230.
- Lippman, Mathhew. 2002. "A Roadmap to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide." *Journal of Genocide Research*, Vol.4, No.2 177-195.
- Lisson, David. 2008. "Defining "National Group" in the Genocide Convention: A Case Study of Timor-Leste." *Stanford Law Review* 60(5) 1459-1496.
- Maddox, Kelly. 2015. ""Liberat[ing] Mankind from such an Odious Scourge": The Genocide Convention and the Continued Failure or Halt Genocide in the Twenty-First Century." *Genocide Studies and Prevention: An International Journal*, Vol.9, No.1 48-65.
- Mälksoo, Lauri. 2001. "Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law." *Leiden Journal of International Law* 14 757-787.
- Mason, Christine. 2005. "Women, Violence and Nonviolent Resistance in East Timor." *Journal of Peace Research*, Vol.42, No.6 737-749.
- Mcdonnell, Michael A., and A. Dirk Moses. 2005. "Raphael Lemkin as historian of genocide in the Americas." *Journal of Genocide Research*, Vol.4, No.4 501-529.
- McGowan, Mark G. 2017. "The Famine Plot Revisited." *Starvation and Genocide*, Vol.1, No.1 87-104.

- Mertelsmann, Olaf, and Aigi Rahi-Tamm. 2009. "Soviet Mass Violence in Estonia Revisited." *Journal of Genocide Research Vol.11, No.2-3* 307-322.
- Nollendorfs, Valters, and Erwin Oberländer. 2005. *The Hidden and Forbidden History of Latvia under Soviet and Nazi Occupation 1940-1991*. Riga: Institute of the History of Latvia.
- Palmer, Alison. 1998. "Colonial and Modern Genocide: Explanations and Categories." *Ethnic and Racial Studies, Vol.21, No.1* 89-115.
- Ratner, Steven R., B.G. Ramcharan, Payam Akhavan, and Delissa Ridgway. 1998. "The Genocide Convention after Fifty Years." *The Challenge of Non-State Actors* 1-19.
- Satkauskas, Rytis. 2004. "Soviet Genocide Trials in the Baltic States: The Relevance of International Law." *Yearbook of International Humanitarian Law Volume 7* 388-490.
- Saul, Ben. 2001. "Was the Conflict in East Timor 'Genocide' and Why Does It Matter?" *Melbourne Journal of International law, Vol.2, No.2* 477-522.
- Saura, James. 2002. "Free Determination and Genocide in East Timor." *Human Rights Review No.3* 34-52.
- Schabas, William A. 2008. "Genocide Law in A Time of Transition: Recent Developments in the Law of Genocide." *Rutgers Law Review, Vol.61, No.1* 161-192.
- Shaw, Martin. 2002. "Post-Imperial and Quasi-Imperial: State and Empire in the Global Era." *Millenium: Journal of International Studies, Vol.31, No.2* 327-336.
- Spencer, Philip. 2013. "Imperialism, Anti-Imperialism and the Problem of Genocide, Past and Present." *History, Vol.98, No.4* 606-622.
- Strods, Heinrihs, and Matthew Kott. 2002. "The File on Operation "Priboi": A Re-assessment of the Mass Deportations of 1949." *Journal of Baltic Studies Vol.33, No.1* 1-36.
- Szpak, Agnieszka. 2012. "National, Ethnic, Racial, and Religious Groups Protected Against Genocide in Jurisprudence of the ad hoc International Criminal Tribunals." *European Journal of International Law* 155-173.

Thaler, Kai. 2012. "Foreshadowing Future Slaughter: From the Indonesian Killings of 1965-1966 to the 1974-1999 Genocide in East Timor." *Genocide Studies and Prevention* 7, 2/3 204-222.

The Yale Law Journal. 1949. "Genocide: A Commentary on the Convention ." *The Yale Law Journal*, Vol.58, No.7 1142-1160.

Vrdoljak, Ana Filipa. 2009. "Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law." *European Journal of International Law*, Vol.20, No.4 1163–1194.

Verdeja, Ernesto. 2010. "Genocide: Clarifying Concepts and Causes of Cruelty." *The Review of Politics*, Vol.72, No.3 513-526.

Wolfe, Patrick. 2006. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research*, Vol.8, No.4 387-409.

Wooldford, A., and J. Benvenuto. 2015. "Canada and Colonial Genocide." *Journal of Genocide Research*, Vol.17, No.4 373-390.

Online Sources

Allam, Lorena, and Nick Evershed. 2019. *The killing times: the massacres of Aboriginal people Australia must confront*. March 3. Accessed March 30, 2023.
<https://www.theguardian.com/australia-news/2019/mar/04/the-killing-times-the-massacres-of-aboriginal-people-australia-must-confront>.

Barker, Anne. 2020. *The Stolen Children*. July 6. Accessed April 14, 2023. Anne Barker, 'The Stolen Children' (ABC 6 July 2020) < <https://www.abc.net.au/news/2020-07-07/timor-leste-stolen-children-are-coming-home/12374180?nw=0&r=HtmlFragment>> accessed 13 April 2023.

Caster, Michael. 2018. *Seventy Years of the Genocide Convention*. December 9. Accessed March 18, 2023. <https://minorityrights.org/2018/12/09/genocide-convention/>.

Lingaas, Carola. 2016. *Defining the Protected Groups of Genocide Through the Case Law of International Courts*. February 10. Accessed March 31, 2023.
<https://www.jus.uio.no/pluricourts/english/blog/carola-lingaas/2016-02-10-protected-groups-genocide.html>.

- Powell, Sian. 2006. *UN Verdict on East Timor*. January 19. Accessed April 14, 2023. <https://gsp.yale.edu/sites/default/files/files/UN%20verdict%20on%20East%20Timor.pdf>
- Snell, James. 2021. *How the Genocide Convention hinders rather than helps victims*. February 1. Accessed March 24, 2023. <https://thecritic.co.uk/how-the-genocide-convention-hinders-rather-than-helps-victims/>
- The New York Times. 1993. *What Golda Meir Said About Palestinians*. October 12. Accessed April 2, 2023. <https://www.nytimes.com/1993/10/12/opinion/1-what-golda-meir-said-about-palestinians-766493.html>.