

NOTES

LEGAL IDENTITY AS A TOOL OF STATE-SPONSORED GENOCIDE: ENFORCING THE RESPONSIBILITY TO PREVENT THROUGH A NORM OF ACTIVE ENGAGEMENT

ELIZABETH G. HALODIK*

ABSTRACT

The world is not ignorant of the plight facing the most vulnerable communities, yet there are no enforceable binding mechanisms to identify, prevent, or intervene in the development of state genocidal regimes. As the global community advanced international legal customs for prosecuting state actors of genocide, limited development has been made towards identifying cognizable factors for legitimizing early intervention. The international community has repeatedly stated “never again” following atrocities, but will States ever enforce their “Responsibility to Prevent” to hinder sovereign domestic policies from escalating to the crime of genocide? Can there be a preventative approach to genocide, or has the codification of the crimes of persecution and genocide confined the international community to retrospectively punish genocidal actors?

I. INTRODUCTION

It is widely accepted that genocide is not an incidental occurrence; rather genocides are built and effectuated through societies. As argued here, and elsewhere in the context of discrimination and persecution, the law is often the tool with which the seed for violence is planted. Genocide, and tragedies such as mass killings, “are preceded and prepared by identity conflicts.”¹ Therefore, it is essential to determine a process of identifying the characteristics of group identity in the framework of genocide. The identification of victims, similar to the characterization of genocide, must consider the “political, social and cultural

* J.D. and Graduate Certificate in Civil and Human Rights Law, 2021, Indiana University Robert H. McKinney School of Law; B.A., International Relations, 2018, Roanoke College. The author would like to thank the Volume XXXI Executive and Faculty Board for the honor of the Best Student Note Award. The author would also like to dedicate this Note to her grandfather, Gary Gray, whose family stories inspired the author to write this Note and pursue her career.

1. I. WILLIAM ZARTMAN, PREVENTING IDENTITY CONFLICTS LEADING TO GENOCIDE AND MASS KILLINGS 1 (Adam Lupel ed., 2010).

context.”² Following the proposition of Frank Chalk and Kurt Jonassohn that “in order to perform a genocide the perpetrator has always had to first organize a campaign that redefined the victim group,”³ legal identity not only has the ability to characterize groups or subgroups in a society, but also carries the appearance of legitimacy within domestic law. The characterization of an identity under the law often corresponds with legal rights and protections,⁴ whereas the characterization of an individualized identity may correspond with determinative social power.⁵ By comparing the establishment and evolution of the legal identity of victims in state-sponsored genocides, there is clear evidence of the law as a tool being used to target, weaken, and weaponize the affected population group. Future policy must recognize the significance of an overlapping legal characterization and oppression of identity as precursors and effectuating mechanisms of genocide and persecution.

In Part IA, this Note lays the foundation of analysis by defining relevant concepts in international law, specifically “genocide,” “victim,” and “legal identity.” In Parts II and III, this Note addresses the transformation of the legal identity through the analysis of the *Porajmos*⁶ in Germany and the Rwandan

2. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 56 (Dec. 6, 1999) (“The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are not generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context . . .”).

3. FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 28 (1990) (“[T]he performance of a genocide required, first, the dehumanization of victims, and second, a strong, centralized authority and bureaucratic organization.”).

4. See Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747-49 (2015). Clarke included the following examples: characterizing identity for affirmative action, the importance of the identity of a “father” for custody rights, and the previous importance of identity of sex for purposes of marriage (citations omitted); see also Debra Ladner et al., *A Critical Assessment of Legal Identity: What It Promises and What It Delivers*, 6 HAGUE J. ON RULE L. 47, 48 (2014) (discussing that legal identity, specifically birth certificates, has implications across development issues such as eligibility to access benefits and opportunities, protection of human rights, and demographic statistics to inform and direct development planning resources).

5. Immanuel Wallerstein, *The Construction of Peoplehood: Racism, Nationalism, Ethnicity*, 2 SOCIO. F., 373, 385 (1987) (“For there to be minorities, there needs to be a majority. It has long been noticed by analysts that minority hood is not necessarily an arithmetically-based concept; it refers to the degree of social power.”).

6. Renata Berkyová, *Concept of the Porajmos as a Reflection of the Marginalization of Roma in Historiography*, ROMEA.CZ (July 6, 2018, 1:25 PM), <http://www.romea.cz/en/news/world/renata-berkyova-concept-of-the-porajmos-as-a-reflection-of-the-marginalization-of-roma-in-historiography> [<https://perma.cc/3KNT-DSZJ>] (explaining how the term ‘Holocaust’ is understood as an umbrella term for the genocide of the 1933-1945 National Socialist regime, ‘Shoah’ is the term used to identify the Jewish suffering during the Holocaust, and ‘Porajmos’ is a term derived from Romani that refers to the Roma “devouring” during the Holocaust). While recognizing the

genocide.⁷

The Roma are Europe's largest ethnic minority group⁸ and one of the most persecuted minorities on the continent.⁹ The constant persecution against the group is documented throughout European history¹⁰ and remains prevalent today.¹¹ The considerable amount of scholarly literature surrounding the Holocaust demonstrates a notable gap in research and narratives related to the Roma victims,¹² and the prominence of the rejectionist position among historians which forsook Roma and Sinti as legitimate victims has only recently dissipated.¹³ This Note analyzes the persecution of Roma in Germany while acknowledging the significance of discriminatory and persecutory policies against the group across Europe. Notably, scholarly discourse has recognized the continuous persecution against subgroups as one explanation as to why certain societies devolve into genocide while others do not.¹⁴

existence of a debate within the Roma community over the use and spelling of *Porajmos* due to the translative meanings in different dialects, the term will be used for the purposes of this Note as there appears to be consensus over its usage. The term "Holocaust" is also referenced interchangeably throughout the Note in the discussion of the 1933–1945 genocidal period.

7. For an in-depth investigation into the history of the Rwandan genocide, see ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999).

8. Roma Equality, Inclusion, and Participation in the EU, EUR. COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/roma-eu/roma-equality-inclusion-and-participation-eu_en [<https://perma.cc/X3PL-ATRS>].

9. Jonathan Fox, *Patterns of Discrimination, Grievances, and Political Activity Among Europe's Roma: A Cross-Sectional Analysis*, J. ON ETHNOPOLITICS AND MINORITY ISSUES IN EUROPE, WINTER 2001/2, at 2 ("The Roma have historically been and continue to be one of the most discriminated against minorities in Eastern and Western Europe.").

10. Arno Tanner, *The Roma of Eastern Europe: Still Searching for Inclusion*, MIGRATION POL'Y INST. (May 1, 2005), <https://www.migrationpolicy.org/article/roma-eastern-europe-still-searching-inclusion> [<https://perma.cc/5HPL-QYY7>].

11. See, e.g., Orla Barry, *Roma Persecution Intensifies During the Coronavirus Pandemic in Europe*, THE WORLD (Aug. 24, 2020, 1:15 PM), <https://www.pri.org/stories/2020-08-24/roma-persecution-intensifies-during-coronavirus-pandemic-europe> [<https://perma.cc/4DR3-Q5LG>].

12. See, e.g., C. R. Sridhar, *Historical Amnesia: The Romani Holocaust*, 41 ECON. AND POL. WKLY. 3569 (2006).

13. Sybil Milton, *Sinti and Roma in Twentieth-Century Austria and Germany*, 23 GERMAN STUD. REV. 317, 324 (2000) ("Some historians focusing on the fate of Sinti and Roma during the Nazi period have accepted the arguments advanced by the Nazi regime that "Gypsies" were an antisocial and criminal group to question their status as legitimate victims of Nazi genocide. Historians of the Holocaust, both in Germany and elsewhere, have also tended to reject the claims of Sinti and Roma. These historians, most prominently Yehuda Bauer, have echoed the German rejectionist position, adding that, in any event the regime never intended to kill all members of this persecuted minority.") (footnote omitted).

14. ERVIN STAUB, *THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE* 4-5 (1989) ("Certain characteristics of a culture and the structure of a society, combined

The Rwandan genocide demonstrates the importance of a state-influenced identity and the impact of a legal identity on the regulation and flow of society. Rwanda is also reflective of the influence of colonialism and foreign-involvement on a state-constructed identity and the difficulties caused in genocide classification when identity was not constructed from a unique language or culture but rather societally-imposed.¹⁵ This analysis will be constitutive only of a small portion of selected identity characterization and persecution and does not have the capacity to conduct a full historical, sociological, and legal analysis of the laws and society of these two genocidal periods.

In Part IV, this Note compares the evolution of legal identity between the two conflicts through separation of the timelines into (A) pre-genocide, (B) genocide, and (C) post-genocide. In Part V, this Note recommends the reevaluation of existing international mechanisms as the basis for future intervention-based policy. Lastly, in Part VI, the conclusion calls for filling the gap in existing literature and the importance of viewing group identity and legal identity through an interdisciplinary lens which incorporates the legal paradigm.

A. Defining Concepts Within International Law

Genocide

The term “genocide” was first introduced towards the end of World War II.¹⁶ Originally described by Sir Winston Churchill as the “crime without a name,”¹⁷ the legal nature has shifted in the international sphere so exponentially that the prohibition of genocide is now regarded by the International Court of Justice as a *jus cogens* norm,¹⁸ and by *ad hoc* international tribunals as the “crime of

with great difficulties or hardships of life and social disorganization, are the starting point for genocide or mass killing . . . What motives arise and how they are fulfilled depend on the characteristics of the culture and society. For example, a society that has long devalued a group and discriminated against its members, has strong respect for authority, and has an overly superior and/or vulnerable self-concept is more likely to turn against a subgroup. Genocide does not result directly. There is usually a progression of actions. Earlier, less harmful acts cause changes in individual perpetrators, bystanders, and the whole group that make more harmful acts possible . . .”).

15. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶¶ 170-73 (Sept. 2, 1998).

16. Staub, *supra* note 14, at 7 (discussing that the term was introduced by jurist Raphael Lemkin, as the etymology of the word “denotes the destruction of a nation or ethnic group, from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing).”).

17. Sir Winston Churchill, Prime Minister Winston Churchill’s Broadcast to the World About the Meeting with President Roosevelt (Aug. 24, 1941), in BRITISH LIBR. INFO. <http://www.ibiblio.org/pha/policy/1941/410824a.html> [<https://perma.cc/5TNA-Z3SB>].

18. Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Rwanda), Judgement, 2006 I.C.J. 6, ¶ 64 (Feb. 3); see also Claus Kres, *The Crime of Genocide under International Law*, 6 INT’L CRIM. L. REV. 461, 468 (2006) (discussing genocide as a subject of an international legal prohibition imposed on States: “Already in 1951 the ICJ considered the prohibition of genocide as customary in nature. In 1996, the ICJ supplemented this early determination by attributing to the

crimes.”¹⁹ The codification of the crime of genocide occurred in the latter part of the 20th century,²⁰ and mass atrocities throughout history have since been acknowledged and discussed by States and scholars under the umbrella of genocide.²¹

In light of the gravity of the crimes committed by the National Socialist Party during World War II, the international community began the process of constructing acts of genocide into an attributable and prosecutable crime. The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis designated jurisdiction to the Charter of the International Military Tribunal to prosecute all actions regarded as “crimes against humanity,”²² the crimes which are now defined as genocide. Concurrent with the codification of acts constituting “crimes against humanity” was the acknowledgement of *persecution* in execution of or connection to these crimes.²³ While subsequent charters granting authority to *ad-hoc* tribunals have altered the

prohibition an effect *erga omnes*. Finally, the ICJ recognized in 2006 that the prohibition of genocide amounts to *jus cogens*.”) (footnotes omitted). *See* Rep. of the Int’l Law Comm’n, ¶ 56, U.N. Doc. A/74/10 (Aug. 20, 2019) (defining *jus cogens* norms in international law).

19. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgement and Sentence, ¶ 16 (Sept. 4, 1998).

20. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 278 U.N.T.S. 1021 [hereinafter *Genocide Convention*].

21. *See, e.g.*, H.R. Res. 296, 116th Cong. (2019) (stating that the U.S. policy was to: “(1) commemorate the Armenian Genocide through official recognition and remembrance; (2) reject efforts to enlist, engage, or otherwise associate the United States Government with denial of the Armenian Genocide or any other genocide; and (3) encourage education and public understanding of the facts of the Armenian Genocide, including the United States role in the humanitarian relief effort, and the relevance of the Armenian Genocide to modern-day crimes against humanity.”); *see also* Resolution on a Political Solution to the Armenian Question, EUR. PARL. DOC. A2-33/87 (1987) (stating the belief that the events of 1915–1917 involving the Armenians living in the Ottoman Empire constituted genocide within the meaning of the Genocide Convention); Ass’n of Genocide Scholars of N. Am., Armenian Genocide Resolution (June 13, 1997) (reaffirming that the mass murder of Armenians in Turkey in 1915 constituted genocide); Int’l Ass’n of Genocide Scholars, *Resolution* (Dec. 26, 2007) (recognizing that the Ottoman campaign against Christian minorities between 1914 and 1923 constituted a genocide against Armenians, Assyrians, and Pontian and Anatolian Greek).

22. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6(c), Aug. 8, 1945, 280 U.N.T.S. 251 (“Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”) [hereinafter *Charter of the IMT*].

23. *Id.*

representation of persecution as a crime against humanity,²⁴ rather than attributing the acts to the crime of genocide, it appears to remain stagnant as a factor in international crimes.²⁵ The tribunals appear to balance persecution as a crime of nature in-between crimes against humanity and genocide²⁶ but also simultaneously emphasize the important relationship and *genus* that genocide and persecution share. Thus, persecution may amount to genocide when “escalate[d] to the extreme form of willful and deliberate acts designed to destroy a group or part of a group.”²⁷

As persecution is not defined in international treaties,²⁸ scholars have analyzed international tribunal jurisprudence for guidance on the scope of the crime.²⁹ As originally rationalized in the jurisdiction for the Charter of the IMT, the temporal scope for persecution included acts which predated the outbreak of the war.³⁰ International tribunals have sought to narrow the *actus reus*³¹ and *mens rea*³² of persecution, and scholars have attributed the following as acts that International Criminal Tribunals may constitute as persecutions:

the unlawful detention of civilians, the deportation and forcible transfer

24. For a comparison on persecution in the ICTY, ICTR, and Rome Statutes, see Caroline Fournet & Clotilde Pegorier, *Only One Step Away from Genocide: The Crime of Persecution in International Criminal Law*, 10 INT'L CRIM. L. REV. 713, 715-16 (2010).

25. See David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT'L 111, 128-31 (2007) (discussing the crime of persecution as a sub-category of crimes against humanity and discussing the definition within the Rome Statute of the International Criminal Court and the ICTY Appeals Chamber) [hereinafter *Atrocity Crimes*].

26. Fournet & Pegorier, *supra* note 24, at 718.

27. *Id.* (quoting, Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 636 (Jan. 14, 2000) (“[. . .] persecution as a crime against humanity is an offence belonging to the same *genus* as genocide [. . .] Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhumane form of persecution. To put it differently, when persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of group, it can be held that such persecution amounts to genocide.”).

28. See Fournet & Pegorier, *supra* note 24, at 725 (discussing that by separating persecution and genocide in the Genocide Convention this has ignored the real legacy of Nuremberg, restricted the understanding of genocide, and led to the coexistence of two international crimes).

29. See, e.g., Fournet & Pegorier, *supra* note 24, at 726-38.

30. Charter of the IMT, *supra* note 22, at art. 6(c) (“Crimes against humanity . . . against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds . . .”).

31. Fournet & Pegorier, *supra* note 24, at 726 (quoting Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶ 732 (1) (July 31, 2003) (“an act or omission that: discriminates in fact and which denies or infringes upon a fundamental right laid down in customary international or treaty law.”)).

32. Fournet & Pegorier, *supra* note 24, at 726 (quoting, Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶ 732 (2) (July 31, 2003) “the intent to discriminate on political, racial, and religious grounds.”).

of civilians, murder, extermination, torture, humiliating treatment, constant humiliation and/or degradation, harassment, humiliation and psychological abuse, hate speech- as potentially causing an irreversible harm, destruction, wilful damage and looting of residential and commercial properties, destruction of, or wilful damage to, residential and cultural buildings. . . More generally, political, social, economic rights violations have been recognized as constitutive of persecution, as have violations of elementary and inalienable rights of man.³³

Persecution, whether acknowledged through the argument of being substantively integral to genocide³⁴ or as an individual factor on the timeline of genocide, is intrinsic in the foundational argument of identifying genocidal intent prior to the intensification of acts to destroy. This argument can be found correspondingly in the *post-hoc* jurisprudence rationale of the Nuremberg Trials, which recognized the systematic legal persecution of Jews as having “paved the way for the ‘final solution.’”³⁵

Genocide was codified as an international crime in the Convention on the Prevention and Punishment of the Crime of Genocide.³⁶ Genocide, as proposed in the Convention, is defined as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; [and] (e) Forcibly transferring children of the group to another group.³⁷

Similar codification has subsequently occurred in the statutes granting jurisdiction to international tribunals to identify and prosecute allegations of

33. Fournet & Pegorier, *supra* note 24, at 728-29 (citations omitted).

34. *Id.* at 721 (arguing that “by encapsulating the notion of ‘persecutions’ within a precise timeline, the IMT Charter acknowledged the fact that persecutions were not mere discriminatory acts endorsing a ‘preparatory’ character in anticipation of the genocide, but rather they *were* the genocide.”).

35. Prosecutor v. Tadić, Case No. IT-94-I-T, Opinion and Judgement, ¶ 706 (May 7, 1997) (discussing the Nürnberg Tribunals findings that “[t]he persecution of the Jews was immediately begun in the General Government. . . They were forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated. . . . The Nürnberg Tribunal focused on anti-Semitic laws drafted, signed and administered . . . designed to exclude Jews from the German life and economy. These led up to a final decree placing Jews “outside the law” and handing them over to the Gestapo, all of which “paved the way for the ‘final solution.’”) (citations omitted).

36. Genocide Convention, *supra* note 20, at art 2.

37. *Id.*

genocide. The international tribunals include the International Criminal Tribunal for the Former Yugoslavia (ICTY),³⁸ the International Criminal Tribunal for Rwanda (ICTR),³⁹ and the International Criminal Court (ICC).⁴⁰

The tribunals that were established following the conflicts in the former Yugoslavian nation-states and Rwanda have been instrumental in the interpretation and application of the Genocide Convention, including in the categorization of protected groups.⁴¹ However, scholars heavily critique the *ad-hoc* tribunals' characterization of genocide and advocate that successful prosecution is more likely if acts are brought under the lens of crimes against humanity.⁴² Scholarly discourse has continuously recognized the overlap in persecution, discrimination, and genocide.⁴³ Discrimination may in fact be an essential element in associating persecution with the crime of genocide; the special intent of the perpetrator creating the distinction from acts otherwise attributable to crimes against humanity.⁴⁴ However, legal frameworks for the

38. G.A. Res. 1877, art. 4, Statute of the International Criminal Tribunal for the Former Yugoslavia (July 7, 2009).

39. G.A. Res. 143, art. 2, Statute of the International Criminal Tribunal for Rwanda (Jan. 30, 2007).

40. G.A. Res. 38544, art. 5, Rome Statute of the Int'l. Crim. Court (Jan. 16, 2002). For a scholarly analysis on the Rome Statute in the influence of genocide as an international crime, see Thomas E. Davies, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide*, 22 HARV. HUM. RTS. J. 245 (2009).

41. David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention*, 36 CORNELL INT'L. L.J. 293, 307-14 (2003) (discussing the different objective and subjective approaches and the international tribunal cases that defined racial groups, ethnic groups, religious groups, and national groups).

42. See Leila Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. OF INT'L L. 334, 340-56 (2013) (discussing the ICTY's declination to find ethnic cleansing in Bosnia and Herzegovina as genocide despite characterizations of such a nature by the United Nations General Assembly and the European Court of Human Rights and listing genocide as only 2.4 percent of the total charges and less than 1 percent of convictions at the ICTY).

43. Monika Ambrus, *Genocide and Discrimination: Lessons to be Learnt from Discrimination Law*, 25 LEIDEN J. OF INT'L. L. 934, 936 n.5 (2012) (discussing an essential link between genocide and direct discrimination: "the concept of genocide has a discriminatory component and the crime of genocide is the result of serious and far-reaching discrimination against certain groups.") (quoting Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 636 (Jan. 14, 2000) ("[b]oth persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the *intent to discriminate*: to attack persons on account of their ethnic, racial, or religious characteristics.") (emphasis added)).

44. Ambrus *supra* note 43, at 938. See Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 636 (Jan. 14, 2000) ("In both categories what matters is the *intent to discriminate*: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution, the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of

identification and prevention of discrimination exists primarily in tandem with State obligations under international human rights law.⁴⁵ Notably permeated throughout treaty and soft law are State obligations related to protecting specific minority groups and affirmatively disavowing discrimination in domestic mechanisms.⁴⁶

Victims

Genocide as an international crime contains an objective⁴⁷ and subjective element.⁴⁸ The subjective element or unique concept of *dolus specialis* is the “aggravated criminal intention,” which “implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the *group* as such, and knew that his acts would destroy in whole or in part, the *group* as such.”⁴⁹ International jurisprudence has explicitly distinguished the group dynamic for the crime of genocide, specifically “the victim is chosen not because of his individual identity, but rather on account of his membership . . . the victim of the crime of genocide is the group itself and not only the individual.”⁵⁰

The protected groups under the Genocide Convention include those belonging to a national, ethnic, racial, or religious group.⁵¹ The proper identification of victims is essential for genocide and may lead to the exclusion

actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong.”); *see also Atrocity Crimes*, *supra* note 25, at 129 (discussing the crime of persecution as defined in art. 7 § 1 (h) in the Rome Statute of the ICC, “[i]n effect, the crime of persecution adds discriminatory intent to the underlying crime or, in the case of genocide, supplements the more narrowly defined genocidal intent to destroy [. . .].”).

45. *See e.g.*, G.A. Res. 36/55, art. 3, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981). G.A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Dec. 18, 1992). International Convention on the Elimination of All Forms of Racial Discrimination art. 1(1), Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter *ICERD*].

46. *See ICERD*, *supra* note 45, at art. 2(a)-(d); *see also* G.A. Res. 36/55, *supra* note 45, at art. 4(2); G.A. Res. 47/135, *supra* note 45, at art. 1, art. 2(3).

47. International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, ¶ 490 (Jan. 25, 2005) [hereinafter *Darfur Report*] (stating that the twofold objective element includes the *prohibited conduct* and the *targeted group*).

48. *Id.* ¶¶ 490-91.

49. *Id.* ¶ 491.

50. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 521 (Sept. 2, 1998) (internal citations omitted).

51. Genocide Convention, *supra* note 20, at art. 2.

of victimology of those otherwise targeted during a genocidal period,⁵² such as moderate Hutus in Rwanda.⁵³ The Genocide Convention does not further define the broad category of group or victim identity. Following the Darfur Report which characterized victims through both subjective and objective lenses,⁵⁴ commentators have noted the controversy over the proper approach for determining protected groups.⁵⁵ For purposes of this Note, the strict Genocide Convention definition of victim is appropriate.⁵⁶ However, it is important to note the ICTR's initial difficulty in characterizing victim identity in Rwanda, which is relevant to the previously utilized colonial legal identities.⁵⁷ Nevertheless, an approach under the Genocide Convention is appropriate as future victim identification will likely follow *ad hoc* tribunal guidance and uphold the *travaux preparatoires* of the Genocide Convention in identifying group identity.⁵⁸

52. Nersessian, *supra* note 41, at 299 ("If the victim in question lacks membership in a protected group, genocide has not occurred with respect to that victim, even if the actor's ultimate intention is to facilitate the destruction of a protected group.").

53. *See* Akayesu, Case No. ICTR 96-4-T, ¶ 173 (discussing the massacre of Hutus that were sympathetic to or supportive of Tutsi in the context of chargeable crimes against humanity).

54. Darfur Report, *supra* note 47, ¶ 501 (suggesting that the interpretation of the element of a protected group to include connotations and subjective perceptions of members of groups has become "part and parcel of international customary law."). *But see* Prosecutor v. Rutaganda, Case No. ICTR 96-3-T, Judgment and Sentence, ¶ 56 (Dec. 6, 1999) ("Moreover, the Chamber notes that for the purpose of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.").

55. For a full contextual consideration of whether international law identifies the victim group of genocide based on objective indicators or subjective perceptions, including an analysis of *ad hoc* international tribunals determinations, see Rebecca Young, *How Do We Know Them When We See Them: The Subjective Evolution in the Identification of Victim Groups for the Purpose of Genocide*, 10 INT'L CRIM. L. REV. 1 (2010). For an analysis of defining a protected group and manifesting genocidal intent, see Nersessian, *supra* note 41.

56. As this Note analyzes mass killings that have previously been regarded as genocide, the debates over which groups fall under the definition of victim have already been largely resolved.

57. *See* Akayesu, Case No. ICTR 96-4-T, ¶ 170-73 (noting that the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population, however there were a number of objective indicators of a distinct identity, such as an official governmental classification system which included identity cards, customary rules of determination following patrilineal lines of hereditary, and a registration/categorization system imposed through colonial rule).

58. *Id.* ¶ 516 ("... it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux preparatoires*, was patently to ensure the protection of any stable and permanent group."). For an analysis of the case holding, see Nersessian, *supra* note 41, at 304-07.

Legal Identity

The term “legal identity” may be defined as “referring to an official, state-issued document that includes basic information attesting to the holder’s identity, status, and legal relationship.”⁵⁹ Legal identity may be both reflective and constitutive of determinations such as race, sex, family, and citizenship⁶⁰ and may be configured through documentation such as birth, marriage, and death certifications, citizenship cards, identity cards, and passports.⁶¹

The models of attributing identity include ascriptive, elective, and formal.⁶² Generally, the different models do not change the nature of the identity, rather only how the legal identity was created or designated.⁶³ Jessica A. Clarke, Associate Professor at University Minnesota Law School, defines formal identity as self-construed, “the execution of formalities by individuals claiming identities *for themselves*.”⁶⁴ The “formalities” that Clarke describes within formal identity are practices intended to confer a legal status in “the eyes of the law.”⁶⁵ Whereas ascriptive models “determine identities based on certain biological or social standards considered to be objective” and elective models “view identities as self-determined labels that each individual may freely adopt and change.”⁶⁶

Similar to Clarke’s conclusory argument of the appropriateness of a context-dependent identity model,⁶⁷ this Note will incorporate different models to reach

59. Ladner et al., *supra* at note 4, at 47-48.

60. *See* Jessica Clarke, *supra* note 4, at 749-50 (“These practices do not simply reflect an underlying identity status; they create and constitute that status for legal purposes.”).

61. Ladner et al., *supra* note 4, at 53.

62. Jessica Clarke, *supra* note 4, at 750-51.

63. *Id.* at 756 (demonstrating in the table that the legal identity created by citizenship could be achieved differently through each of the three models: the ascriptive model would formalize citizenship through factors such as birthplace, physical presence, parentage or marriage, language, or civics; the elective model would formalize citizenship through consent of individual and state; and, the formal model would formalize citizenship through naturalization papers and ceremony, passport); *see id.* at 756 n.33 (answering the “entangled question” of “who decides” an identity claim, “[u]nder the ascriptive model, the law defers to experts or community standards. Under the elective model, the law defers to the individual claiming the identity. Under the formal model, the law defers to the evidence that the formality was executed – generally a document demonstrating that the individual complied with the official rules to claim the identity.”).

64. *Id.* at 750 (emphasis added); *see also id.* at 750 n. 12 (the definition does not include “those identities conferred by formalities executed by someone other than the individual laying claim to an identity, such as birth certificate race designations assigned by hospital staff.”).

65. *Id.* at 750.

66. *Id.* at 751.

67. *Id.* at 828 (concluding that a context-dependent, rather than all-purpose identity definition may be appropriate depending on the substantive aims; “Elective definitions may be appropriate where the law’s concern is protecting privacy and autonomy. Ascriptive definitions may be appropriate where the law regulates identity as a proxy for another substantive interest apart from

the legal “identity” of victims in addition to utilizing the subjective and objective lens of determining the “group” of victims. Through combining the understanding of the subjective and objective lens of victim identity with the different models of characterizing identity, the different methods resolve gaps otherwise present. For example, if one only utilizes the elective model of identity or the subjective lens of victim in which the identity was established only if personally identified as such, these self-identifications would be irrelevant in the genocidal context as historical inference has proven that victims could not choose to change their identity once proscribed by the State. Therefore, the importance of state-conferred identity cannot be devalued.

In today’s society, an individual may self-identify as a certain racial, ethnic, or religious group in order to register for a government form of identification such as a passport, but their formal identity of citizenship is not conferred until the State grants the passport, and the denial of a passport on the grounds of the racial, ethnic, or religious identity, would restrict—or oppress through the simultaneous denial of citizenship based benefits and protections—the individual’s legal identity through discrimination of their group identity. While “ethnicity is socially constructed,”⁶⁸ legal identity is a political, State construction. Similarly, Mahmood Mamdani refers to this proposal in his characterization of “political identities.”

If the law recognizes you as a member of an ethnicity, and state institutions treat you as a member of that ethnicity, then you become an ethnic being legally and institutionally. In contrast, if the law recognizes you as a member of a racial group, then your relationship to the state, and to other legally defined groups, is mediated through the law and the state. It is a consequence of your legally inscribed identity. If your inclusion or exclusion from a regime of rights or entitlements is based on your race or ethnicity, as defined by law, then this becomes a central defining fact for you, the individual and the group. From this point of view, both race and ethnicity need to be understood as political—and not cultural, or even biological—identities.⁶⁹

Significant research has been produced on the multidisciplinary aspect of societal and cultural influences in classifying race or ethnicity for purposes of legal

protecting the right to self-definition. Formal definitions may be appropriate when the law seeks to facilitate identity choices, but it is necessary to mark a clear division between those who do and do not hold particular rights or duties, to caution individuals before they choose those rights or duties, and to provide stability and security in those identities.”).

68. James D. Fearon & David D. Laitin, *Violence and the Social Construction of Ethnic Identity*, 54 INT’L ORG. 845, 847-48 (2000) (describing identity as a social category that labels individuals and distinguishes categories based on rules of membership and sets of characteristics, beliefs, or behaviors expected or required or members).

69. MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA*, 22 (2001).

identity.⁷⁰ A considerable mechanism for classifying individuals based on ethnic, racial, or religious identity is national identity cards. This classification results in the forceful affiliation with a “governmentally-defined group,” potentially exposing individuals to profiling and discrimination based on their identity.⁷¹ The utilization of national identity cards in times of conflict contributes to easier targeting and identification of individuals based on identity—resulting in more organized detention, deportation, and the ultimate State goal of destruction of a group.⁷²

Legal identity is also based on the right to be recognized as a person before the law, which is embodied throughout international law.⁷³ This recognition ranges in practical implementation from rights in nationality,⁷⁴ birth registration,⁷⁵ and civil registration systems.⁷⁶ The process and purpose of individual and legal identity formalities often overlap,⁷⁷ but civil registration does not necessarily

70. See, e.g., Kathryn Clarke, *The Blood Quantum and Indian Identification*, 2 DARTMOUTH C. UNDERGRADUATE J. L. 40 (2004) (discussing the various approaches and use of the “blood quantum” which measures how much “Indian blood” a person has to determine Indian identity for purposes of eligibility criteria such as tribal membership (arguably national identity), health care, and federal benefits). See, e.g., Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of Foreignness in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 75-90 (1997) (discussing the legal discrimination against Asian immigrants – including the “racialized identification of Japanese Americans as foreign” – and justification of this discrimination being founded on racial, cultural, or religious difference).

71. Jim Fussell, *Group Classification on National ID Cards a Factor in Genocide and Ethnic Cleansing*, Prevent Genocide International (presented on Nov. 15, 2001 to the Seminar Series of the Yale University Genocide Studies Program), <http://www.preventgenocide.org/prevent/removing-facilitating-factors/IDcards/> [<https://perma.cc/84W2-VZHT>].

72. *Id.*

73. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 6 (Dec. 10, 1948) (“Everyone has the right to recognition everywhere as a person before the law.”) [hereinafter *UDHR*]; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, at art. 16 (Dec. 16, 1966) [hereinafter *ICCPR*]; ICERD, *supra* note 45, at art. 5.

74. UDHR, *supra* note 73, at art. 15 (“(1) Everyone has the right to a nationality; (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”); ICCPR, *supra* note 73, at art. 24(3); G.A. Res. 44/25, Convention on the Rights of the Child, at art. 7 and art. 8 (Nov. 20, 1989) [hereinafter *CRC*].

75. See ICCPR, *supra* note 73, at art. 24 (“(1) Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State; (2) Every child shall be registered immediately after birth and shall have a name”); CRC, *supra* note 74, at art. 7(1).

76. *United Nations Handbook on Civil Registration and Vital Statistics Systems: Management, Operation and Maintenance Revision 1*, U.N. ¶ 2 (2018) [hereinafter *U.N. Handbook on Civil Registration*].

77. See, e.g., Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 362 (2014)

in itself confer the protections associated with a legal identity.⁷⁸ The United Nations has characterized civil registration as establishing “the existence of a person under the law,” and has therefore been the “fundamental means of granting legal identity.”⁷⁹ Despite its significance, there is not a universal understanding of “identity management,”⁸⁰ and domestic civil registration systems significantly vary and are affected by discriminatory regimes.⁸¹ The international community has largely advocated for civil registration systems to promote development,⁸² while also acknowledging that ineffective or discriminatory systems may contribute to greater risks of statelessness among certain population groups, such as minorities.⁸³ However, international scholarship often fails to discuss the significant relationship between restricting registration of legal identity and consequential statelessness existing as longstanding discriminatory regimes for persecuted minorities in Europe, specifically the Roma.⁸⁴

(discussing the importance of birth as to questions of identity, race, gender, kinship, belonging, rights, inheritance, property, citizenship, and political power, and how these questions are subsequently certified through birth and identity in government-prescribed categories).

78. U.N. High Comm’r for Refugees (UNHCR), *Action 7: Ensuring Birth Registration for the Prevention of Statelessness*, Good Practices Paper: Global Action to End Statelessness 2014–2024 at 3 (Nov. 2, 2017), <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2017/11/Good-Practices-Paper-on-Ensuring-Birth-Registration-for-the-Prevention-of-Statelessness.pdf> [<https://perma.cc/TRQ4-2CSM>] (explaining that birth registration and nationality are two distinct laws, and states often vary as to whether a birth certification is proof in itself of nationality or merely a prerequisite to obtaining a national identity document).

79. *U.N. Handbook on Civil Registration*, *supra* note 76, at ¶ 2. *See also Training Course on: Civil Registration and Vital Statistics Systems, Participant’s Notes - September 2015, CDC Global Program for Civil Registration and Vital Statistics Improvement*, https://www.cdc.gov/nchs/data/isp/Participants_Manual.pdf [<https://perma.cc/ZT8Q-R44N>] (“The primary purpose of civil registration is to establish the legal documents required by law.”).

80. *U.N. Handbook on Civil Registration*, *supra* note 76, ¶ 21.

81. Ladner et al., *supra* note 4, at 61 (“Discriminatory laws, practices, and attitudes present a barrier to registrations, particularly for women and minority groups. Laws related to citizenship, birth registration, marriage, property, and inheritance may all contain discriminatory provisions which undermine the goal of universal registrations.”).

82. *See, e.g., Civil Registration, UNICEF: South Asia*, <https://www.unicef.org/rosa/what-we-do/child-protection/civil-registration> [<https://perma.cc/2U46-CJBW>] (discussing that the demographics provided by civil registration helps governments create and monitor population statistics and support planning and decision-making).

83. *See Action 7: Ensuring Birth Registration for the Prevention of Statelessness*, *supra* note 78, at 3 (“Some population groups are at particular risk of statelessness because their situation makes it difficult for them to register births or obtain related documents. They include nomadic and border populations, minorities, refugees, IDPs, and migrants . . . Minorities are often denied equal access to rights and services, including access to documentation.”).

84. *But see* Jessica Parra, *Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty concerning Nationality Laws with International Agreements to Reduce and Avoid*

II. RECOGNIZING THE SYSTEMIC AND ENDURING DISCRIMINATION AGAINST ROMA IN GERMANY

A. The Roma Identity in Unified Germany

The term “Roma” as understood in European politics encapsulates numerous sub-groups into the minority identity.⁸⁵ Discrimination of Roma in Eastern Europe and Western Europe has historically differed;⁸⁶ discrimination in Western Europe is set apart by some as “societal,” perhaps rooted in the lack of recognition of Roma citizenship status by many Western governments.⁸⁷ The Roma identity is multifaceted, but for purposes of this Note, Roma identity will encapsulate the German Roma⁸⁸ and Sinti⁸⁹ group identities. Roma were first documented in Europe in the Middle Ages⁹⁰ and, similar to the Jewish population, were one of the only indigenous minorities historically native to Germany.⁹¹

In Germany, Roma and Sinti were previously identified through the German term *Zigeuner*, which is a term primarily used by outsiders to the group and carries negative implications.⁹² The English equivalent of *Zigeuner*, “gypsy,”

Statelessness, 34 *FORDHAM INT’L L.J.* 1666 (2011).

85. *Roma Equality, Inclusion and Participation in the EU: Roma People in the EU*, EUR. COMM’N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/roma-eu/roma-equality-inclusion-and-participation-eu_en [<https://perma.cc/X3PL-ATRS>] (“The umbrella-term ‘Roma’ encompasses diverse groups, including Roma, Sinti, Kale, Romanichels, Boyash/Rudari, Ashkali, Egyptians, Yenish, Dom, Lom, Rom and Abdal, as well as Traveller populations (gens du voyage, Gypsies, Camminanti, etc.)”).

86. Fox, *supra* note 9, at 3 (“Discrimination against the Roma tends to be worse in Eastern Europe than in Western Europe and includes both governmental and societal discrimination. At its worst, official discrimination in Eastern Europe since World War II has included assimilation campaigns, forced settlement, segregation, police abuse, denial of citizenship and/or the right to vote, denial of the right to use their own language, and discrimination in employment and education. The Roma have been victims of ethnic cleansing campaigns in some of the former states of Yugoslavia . . .”).

87. *Id.* at 4.

88. Milton, *supra* note 13, at 318 (“The term Roma connotes ethnic self-description and refers to the language Romani, spoken by the group.”).

89. *Id.* (“In Germany, the largest population group is called Sinti . . . a term based on their linguistic origins in the Sind region of India. In Austria, Roma are the larger group, whereas in Germany, Sinti are more numerous. There are also linguistic subgroups, such as the Lalleri, generally considered Sinti. Moreover, some Sinti and Roma have designated themselves by their profession although they belong to one of the two main language groups. For example, Roma in Austria involved in itinerant horse trading were known as Lowara.”)

90. Fox, *supra* note 9, at 2.

91. Milton, *supra* note 13, at 325.

92. *Id.*

carries similar negative connotations, as the word refers to the Middle Ages' incorrect connotation of the group as "Egyptian."⁹³ In any discussion of the group, this Note will refer to the group as "Roma" or "Sinti." However, the term "Gypsy" appears throughout historical documents and will be discussed in the context of the broad use of the term in Germany in contributing to a larger legal identity.

The transformation of the legal identity of the term *Zigeuner* in German history is important in defining the subjective and objective lens of group identity. As argued by Leo Lucassen, the evolution of the identity has cautioned some against the assumption of a homogeneous ethnic group.⁹⁴ However, this transformation is also important in understanding the progression of persecution into genocide. Lucassen based his argument on the tendency of the police to label individuals identified by their itinerant lifestyle as gypsies; an itinerant lifestyle was sufficient to be labeled as dangerous and considered a potential criminal.⁹⁵ However, as time progressed, stereotypes (rooted in either racial or social classification) were replaced with racial science, and this racial science eventually led to a universal racially based identification system. There is considerable documentation of historical proposals for both the adoption and rejection of racial-anthropological theories, and relevant ideologies such as a "West Aryan" or "Germanic race" and the basis for "eugenics" programs were widespread as early as the 1880s.⁹⁶

While tracing the discrimination of Roma in Germany poses numerous difficulties, primarily due to the various independent German states prior to unification⁹⁷ and the various terms of identification each state applied to the

93. MICHAEL BURLEIGH & WOLFGANG WIPPERMANN, *THE RACIAL STATE: GERMANY 1933-1945*, at 113 (1991) (citations omitted).

94. Leo Lucassen, *Harmful Tramps, Police Professionalization and Gypsies in Germany, 1700-1945*, 1 *CRIME, HIST. & SOCIETIES* 29 (1997) (explaining the history of gypsy-labelling and the persecution of and stigmatization of gypsies and travellers). *See also* SINTI AND ROMA: GYPSIES IN GERMAN-SPEAKING SOCIETY AND LITERATURE x (Susan Tebbutt ed.) (1998) (discussing that despite the term "traveller" being accepted by the Roma community in Great Britain, the term refers to a life-style rather than ethnic origins and would be rejected by the German Sinti and Roma).

95. Lucassen, *supra* note 94, at 30-31 (explaining that the increase in the identification of gypsies was introduced in 1700-1830 through a simultaneous evolution of police investigative methods; the use of the composition and distribution of warrants that contained names, professions, and descriptions of persons suspected of crime was an important method). *But see* Ludwig Eiber, *The Persecution of the Sinti and Roma in Munich 1933-1945*, in SINTI AND ROMA: GYPSIES IN GERMAN-SPEAKING SOCIETY AND LITERATURE 17, 19 (Susan Tebbutt ed.) (1998) (arguing that the reform in the Bavarian police administration was explicitly based on race and ethnic affiliation, evident in the shift from identifying itinerant people in terms of social and occupational criteria, with the racist "Gypsy.").

96. BURLEIGH & WIPPERMANN, *supra* note 93, at 22-32 (citations omitted).

97. German unification occurred in 1871. There were several noted difficulties in pursuing unification, one of which was the numerous ethnicities in the region of Central and Southeastern

Roma, there is no ambiguity that the discrimination and persecution of Roma existed as a systematic and widespread practice before the National Socialist government gained power in Germany. Specifically, special legislation, or *Sonderrech*, were passed in the German Empire and Weimar Republic and were directed at “gypsies.”⁹⁸ Despite the group’s early appearance in German society, *Antiziganismus* (anti-Gypsy ideology) has been prevalent throughout German history, and stereotypes of Roma as nomadic, socially marginalized, economically unproductive, sexually licentious, criminally “inclined,” and racially inferior predated the twentieth century.⁹⁹ The *Zigeunerfrage*, or the “Gypsy question,” also appears to have emerged in the nineteenth century.¹⁰⁰

The foundation for an ethnic-based registration system was created in 1899 in the German state of Bavaria through the Information Agency about Gypsies, which collected genealogical data, photographs, and fingerprints of “Gypsies” above the age of six.¹⁰¹ Subsequently, in 1926, the Bavarian Law for Combatting Gypsies, Vagabonds, and the Work Shy “mandated registration of domiciled and migratory Gypsies with the police, local registry offices, and labor exchanges.”¹⁰² Further, the law prohibited “roam[ing] about or camp[ing] in bands,” and risked forced labor up to 2 years for “[Gypsies] unable to prove regular employment.”¹⁰³ The introduction of identity cards followed registration in a 1927 Prussian decree.¹⁰⁴

The influence and role of the police in forging stereotypes cannot be understated.¹⁰⁵ In April 1929, a national police commission adopted the Combatting Gypsies, Vagabonds, and Work Shy Decree of 1926 as the federal norm and simultaneously created a Center for the Fight against Gypsies in Germany.¹⁰⁶ As the Weimar Republic declined, police established the practice of arbitrary arrests and detention of itinerant gypsies in support of the theory of

Europe. See U.S. State Department, Office of the Historian, *Issues Relevant to U.S. Foreign Diplomacy: Unification of German States*, <https://history.state.gov/countries/issues/german-unification> [<https://perma.cc/K5FM-LSAB>].

98. Special Legislation Directed Against ‘Gypsies’, RACIAL DIAGNOSIS: GYPSY: THE NAZI GENOCIDE OF THE SINTI AND ROMA AND THE LONG STRUGGLE FOR RECOGNITION, <https://www.sintiundroma.org/en/introduction/special-legislation/> [<https://perma.cc/3CWU-ACWD>].

99. Milton, *supra* note 13, at 318.

100. KAROLA FINGS ET AL., FROM “RACE SCIENCE” TO THE CAMPS: THE GYPSIES DURING THE SECOND WORLD WAR 1, 1 (1997).

101. Milton, *supra* note 13, at 319.

102. *Id.*

103. See BURLEIGH & WIPPERMANN, *supra* note 93.

104. *Id.* (the identity cards required fingerprints and photographs for 8,000 Sinti and Roma above the age of six).

105. Lucassen, *supra* note 94, at 30 (discussing the responsibility of the police in labelling “travelling people gypsies.”)

106. Milton, *supra* note 13, at 319.

crime prevention.¹⁰⁷

B. Germany Under National Socialist Rule: 1933–1945

The National Socialist Party, commonly known as the Nazi Party, came to power in Germany on January 30, 1933.¹⁰⁸ The National Socialist Party staged a compressive and intensive persecution through legislation. As previously discussed, the Roma population in Germany faced systematic discrimination and oppression prior to 1933. However, the argument has been presented that the Nazi persecution—specifically the oppression and persecution that existed through the law—would not have been as effective, nor as quick, had there not been existing legal discrimination against Roma.¹⁰⁹ Specifically, scholars argue that in 1935, there was a transition from “pseudo-legal to the totally illegal persecution of both ‘alien’ races and those of ‘lesser racial value.’”¹¹⁰ Significantly, post-1935 Roma and Sinti were “carriers of non-German or related blood,” which created a legal recognition similar to the Jewish population.¹¹¹

To demonstrate the expansive scope of persecutory laws on Roma legal identity, examples of relevant legislation and legal orders are separated into the following categories: (1) limitation, restriction, and elimination of all state-conferred relationships and benefits; (2) criminalization of identity; (3) creation, implementation, and enforcement of a new state identity; and (4) discriminatory laws implementing physical genocidal policy.

Limitation, Restriction, and Elimination of All State-Conferred Relationships and Benefits

To create a uniform national approach and reconcile the varying statutes of individual states, the National Socialist Party enacted the Cooperative Interstate Agreement to Combat the Gypsy Plague in March 1933, and the earlier 1926 Bavarian Law and 1927 Prussian Act were combined and expanded.¹¹² The Cooperative Interstate Agreement restricted issuance of Roma and Sinti itinerant trade licenses, mandated the supervision of Roma children by municipal welfare authorities, limited travel to routes monitored by police, remanded Roma without proof of employment to forced labor camps, and provided that states could issue additional regulations.¹¹³ Through the Law for the Restoration of the Professional Civil Service, all non-Aryans lost their employment as civil servants, officials of local government and local government associations, and as officials of public

107. *Id.*

108. BURLEIGH & WIPPERMANN, *supra* note 93, at xiii.

109. *See e.g.*, FINGS ET AL., *supra* note 100, at 18.

110. BURLEIGH & WIPPERMANN, *supra* note 93, at 49.

111. *Id.* at 54.

112. SYBIL H. MILTON, “Gypsies” as Social Outsiders in Nazi Germany, in SOCIAL OUTSIDERS IN NAZI GERMANY 214 (Robert Gellately & Nathan Stoltzfus eds., 2001).

113. *Id.*

corporations, institutions, and enterprises.¹¹⁴

Despite not being explicitly listed in two laws of 1935, the Law For Protection of German Blood of Honor¹¹⁵ and the Reich Citizenship Law, subsequent commentaries interpreting these laws resulted in their application to “Gypsies.”¹¹⁶ Thus, German Sinti and Roma were effectively second-class citizens,¹¹⁷ and interracial marriages with “Aryans” were prohibited.¹¹⁸ The Reich Citizenship Law of 1943 subsequently deprived “full Gypsies and part-Gypsies with predominant or equal parts of Gypsy blood” of their already “limited rights, and equated [Roma] with Jews with regard to labour legislation.”¹¹⁹ In 1935, the State Office for Domestic Affairs (*Bundesamt für das Heimatwesen*) removed entitlement to social benefits through regional welfare funds for itinerant and permanent Gypsy residents.¹²⁰ To receive welfare payments, Roma were required to be located in the Gypsy camps and perform compulsory labor.¹²¹

Criminalization of Identity

The German Sinti and Roma population were often implicitly targeted in the earlier, broad legislation of the Nazi Socialist period by designation of either “asocial” or “habitual criminals.” For example, the November 1933 Law against Dangerous Habitual Criminals permitted broad discretion for the detention and sterilization of “habitual criminals” as determined by a “racial-biological” investigation.¹²² The German Sinti and Roma were also classified under the “asocial” category, which resulted in an unknown number of the groups being targeted by the Law against Dangerous Habitual Criminals and other laws purposefully broad on a racial scientific basis.¹²³

The December 1937 Decree on the Fight to Prevent Crime Through the Police, and the Special Operation which implemented it, were largely designed to purify the “body of the nation from criminal and anti-social (*asozial*)

114. Gesetz zur Wiederherstellung des Berufsbeamtentums [Law for the Restoration of the Professional Civil Service], April 7, 1933, § 3 translation at http://ghdi.ghi-dc.org/sub_document.cfm?document_id=1520 (Ger.) [<https://perma.cc/Y5J3-NYQZ>].

115. DONALD KENRICK & GRATTAN PUXON, *THE DESTINY OF EUROPE’S GYPSIES* 71 (1972) (“The Law for the Protection of German Blood (1935) stated that: ‘A marriage cannot take place if offspring dangerous to the preservation of the purity of German blood can be expected from it.’”).

116. *See generally id.* at 69-72.

117. BURLEIGH & WIPPERMANN, *supra* note 93, at 45-49.

118. *Id.* at 49.

119. *Id.* at 126-27.

120. FINGS ET AL., *supra* note 100, at 45.

121. *Id.* (explaining that this practice was a continuation of earlier Weimar Republic policy which exchanged welfare payments for labor).

122. BURLEIGH & WIPPERMANN, *supra* note 93, at 48.

123. *Id.* at 116.

elements,” and were aimed at targeting men able to work in concentration camps.¹²⁴ German Roma were targeted through the second Special Operation of the Decree and were deported to concentration camps for compulsory labor alongside male Jews.¹²⁵ According to scholars, the Decree and latter instructions demonstrated the clear purpose of the law under the National Socialist Party; “for Gypsies and Jews[,] the rule of the Third Reich meant the complete loss of both collective and individual rights.”¹²⁶ The effect of the law for these groups “entailed a complete loss of civil rights together with the possibility of annihilation—not on behavioral grounds but simply because of a ‘foreign race.’ These ‘non-citizens’ were taken away to concentration camps ‘in order to protect society.’”¹²⁷

Creation, Implementation, and Enforcement of New State Identity

The racial science behind the genocidal policy was regulated and implemented through the Racial Hygiene and Population Biology Research Centre, which was created in 1936.¹²⁸ The aim of the staff, led by Dr. Ritter, was to “track down every pure and part Gypsy in the country.”¹²⁹ The Centre was responsible for completing genealogical tables of individuals, often through the threat of forced sterilization or deportation to a concentration camp, and to determine and classify individuals as pure or part-Gypsy.¹³⁰ The definition of a part-Gypsy included “a person who has one or two Gypsies among his grandparents. Further, a person is classed as a part-Gypsy if two or more of his grandparents are part-Gypsies as defined above.”¹³¹ The classification systems were utilized in legislation and were influential in determining the affected groups under each law. For example under a 1943 law “pure Gypsies” were explicitly dismissed from labor and military service, whereas “part-Gypsies” were to serve in the Second Reserve.¹³² The classification system was later revised in August 1941.¹³³

124. FINGS ET AL., *supra* note 100, at 29-30.

125. *Id.* at 30.

126. *Id.*

127. *Id.*

128. KENRICK & PUXON, *supra* note 115, at 61.

129. *Id.* (discussing that Ritter was largely responsible for the number of German Roma and Sinti killed during this period due to his classification system; Ritter was never prosecuted for his role nor did he face any judgement for his crimes).

130. *Id.*

131. *Id.* at 67 (discussing that, “if two of a person’s sixteen great-great-grandparents were Gypsies he was classed as part-Gypsy and later, in 1943, could be sent to Auschwitz . . . a person with one Jewish grandparent (four great-great-grandparents) was not generally affected by Nazi anti-Jewish legislation.”) (citations omitted).

132. *Id.* at 92.

133. FINGS ET AL., *supra* note 100, at 32 (“(Z): Full blooded Gypsy, or part Gypsy; (ZM): Gypsy half-breed with equal parts of Gypsy and German blood; (ZM+, ZM(+)): Gypsy half-breed

In May 1938, the Research Centre merged with the Central Office for Fighting the Gypsy Nuisance and the Central Police Headquarters in order to produce legislation that utilized the experience of the police and the racial scientists in classifying Roma.¹³⁴ Thus, the 1938 Fight against the Gypsy Menace Law provided for different treatment for part and pure-Gypsies as a “matter of race”; the establishment of “racial affinity” of every Gypsy living in Germany through ordered registration with the Central Office for the Fight against the Gypsy Nuisance; mandatory police reporting by any person who “by their looks and appearance, by their customs or habits are to be regarded as Gypsies or part-Gypsies”; an official census of all Gypsies, part-Gypsies, and “vagrants living a Gypsy-like existence” over six years old; the classification of nationality (or a consideration of statelessness in the lack of proof of nationality) on an index card; and, that the final decision on classification rested on the expert advice of the Criminal Police.¹³⁵

In March 1939, to carry out the Fight against the Gypsy Menace Law, instructions were given for passes based on classification (pure Gypsies received brown passes, part-Gypsies received light-blue passes, and non-Gypsy travelers were given gray passes).¹³⁶ Further, each police headquarters was to establish a unit for Gypsy problems with specially assigned officers, and the aim of measures “must be racial separation once and for all of the Gypsy race (*Zigeunertum*) from the German nation (*Volkstum*), then the prevention of racial mixing and finally the regulation of the conditions of life of the racially pure Gypsies and the part-Gypsy.”¹³⁷

Discriminatory Laws Implementing Physical Genocidal Policy

Similar to the enforcement of other legislation in 1933, the Law for the Prevention of Offspring with Hereditary Defects did not explicitly refer to the German Roma and Sinti population, but an unknown number of these groups were sterilized under this law.¹³⁸ Sterilization would also occur later in concentration camps such as Ravensbrück, where all Gypsy women, as well as Gypsy children, were sterilized.¹³⁹

Between 1935 and 1939, individual municipalities limited the activities of the

with a greater proportion of Gypsy blood; (ZM 1st Class): One parent is pure Gypsy, the other of German blood; (ZM 2nd Class): One parent is ZM 1, the other of German blood; (ZM-, ZM(-)): Gypsy half-breed with a greater proportion of German blood; (NZ): Non-Gypsy (i.e. nomads with no Romany or Sinti blood).”).

134. KENRICK & PUXON, *supra* note 115, at 73.

135. *Id.* at 73-74.

136. *Id.* at 74.

137. *Id.*

138. BURLEIGH & WIPPERMANN, *supra* note 93, at 116.

139. FINGS ET AL., *supra* note 100, at 91 (discussing that the sterilizations were often experimental and torturous, and killed many women and children).

Sinti and Roma by placing them in guarded internment camps, while simultaneous local rules “imposed greater police surveillance and arbitrary intimidation of German Roma and Sinti, intensified restrictions on their freedom of movement, and limited their employment.”¹⁴⁰ The internment camps were used for forced labor, genealogical registration, and compulsory sterilization until 1939, when the camps became essential in the organization of deportations to concentration camps, ghettos, and killing centers.¹⁴¹ An appendix to the 1939 Settlement Decree, which restricted German Sinti and Roma from leaving their place of residence and required counting of the population by police officials, announced plans for deportations to begin in May 1940.

The deportation of May 1940 expelled German Sinti and Roma into occupied Poland. The following instructions were issued to officials who organized the deportation:

[a]ll identity documents . . . were to be confiscated . . . Gypsies over the age of six who had not previously been registered were to have their fingerprints taken and all those over fourteen were to be photographed. Registered numbers were to be inscribed with coloured ink on the left forearm . . . a racial classification report was to be prepared for each deportee.¹⁴²

In the final years of the genocidal period, the National Socialist government shifted the persecutorial regime against the Roma from an oppression of legal identity to a total elimination of individual identity through the use of mass group identification and registration systems in concentration camps. Upon arrival at concentration camps, German Sinti and Roma were tattooed with a camp number.¹⁴³ After 1939, the categories of camp prisoners were usually identified by a marking system of differently colored inverted triangles on camp uniforms.¹⁴⁴ It is possible that the classification of German Roma and Sinti varied by each camp and included black triangles, brown triangles, and the sign “Z.”¹⁴⁵

The Auschwitz Order of December 16, 1942 ordered all “Sinti Gypsy half-breeds, Rom[a] Gypsies and members of Gypsy tribes of Balkan origin with non-

140. SUSAN TEBBUTT, *Piercing Together the Jigsaw: The History of the Sinti and Roma in Germany*, in *SINTI AND ROMA: GYPSIES IN GERMAN-SPEAKING SOCIETY AND LITERATURE* 7 (Susan Tebbutt ed.) (1998).

141. *Id.*

142. FINGS ET AL., *supra* note 100, at 35.

143. KENRICK & PUXON, *supra* note 115, at 155.

144. United States Holocaust Memorial Museum, *Classification System in Nazi Concentration Camps*, *Holocaust Encyclopedia*, <https://encyclopedia.ushmm.org/content/en/article/classification-system-in-nazi-concentration-camps> [<https://perma.cc/GDL9-5G5C>].

145. KENRICK & PUXON, *supra* note 115, at 60 (discussing that the authors did not accept the suggestion of some that Nazis classified the Gypsies as “asocials” in camps, rather the authors’ note that Gypsies were considered as “non-Aryan” from the beginning of the Nazi period and formed a separate group from targeted “asocials.”).

German blood” to be deported to Auschwitz.¹⁴⁶ On January 29, 1943, the majority of the remaining German Roma and Sinti, “without consideration of the proportion of Gypsy blood [were to be deported] to the concentration camp (Gypsy Section) at Auschwitz, in families.”¹⁴⁷ Following a series of transportations, mainly of men capable of hard labor, the Gypsy Family Section at Auschwitz was liquidated on August 2, 1944, and 2,897 men, women, and children were murdered in the gas chambers.¹⁴⁸ The total number of Sinti and Roma victims is still unknown, but the estimates of the total number of victims for all sub-groups of Roma range from 250,000¹⁴⁹ to 500,000.¹⁵⁰

C. Post- WWII Germany and Reconstruction

The identity of German Roma and Sinti as victims of the Holocaust was continuously ignored or suppressed throughout the period of reparations, restitution, and justice. Roma and Sinti victims were purposefully excluded from acts which allowed for compensation claims, and the judicial system upheld the continued use of former Nazi classifications and stereotypes.¹⁵¹ The newly established Western German government made compensation available for victims of persecution in September 1953.¹⁵² However, the Federal Court of Justice utilized the racist stereotypes of the National Socialist Party and held on January 7, 1956, that there was no racial persecution of “gypsies” prior to Himmler’s Auschwitz Decree on December 16, 1942.¹⁵³ The court determined

146. FINGS ET AL., *supra* note 100, at 95.

147. *Id.*, at 36.

148. *Id.*, at 108.

149. U.S. Holocaust Memorial Museum, *Genocide of European Roma (Gypsies), 1939-1945*, Holocaust Encyclopedia, <https://encyclopedia.ushmm.org/content/en/article/genocide-of-european-roma-gypsies-1939-1945> [<https://perma.cc/4NEU-BTQ9>].

150. *Racial Diagnosis: Gypsy, The European Dimension of the Genocide Perpetrated on the Sinti and Roma*, SINTI UND ROMA, <https://www.sintiundroma.org/en/genocide-in-europe/> [<https://perma.cc/F5CX-FA4J>].

151. See *Racial Diagnosis: The Nazi Genocide of the Sinti and Roma and the Long Struggle for Recognition*, <https://www.sintiundroma.org/en/exclusion-after-1945/difficult-new-beginnings/> [<https://perma.cc/9SW8-YSG2>].

152. Bundesergänzungsgesetz zur Entschädigung für Opfer der national-sozialistischen Verfolgung [BErG][Additional Federal Compensation Act for Victims of National Socialist Persecution], 1953, (BGBl. I. S. 1387) (Ger.) (“provides a right to compensation to all those who suffered acts of violent persecution because of political conviction . . . on grounds of race, faith, or beliefs (persecution grounds) in the period from 30 January 1933 to 8 May 1945 . . . hereby suffering damage to life, body, health, liberty, property, assets or to professional or economic advancement.”).

153. *The Judgment of the Federal Court of Justice of 1956, Sinti und Roma*, <https://www.sintiundroma.org/de/ausgrenzung-nach-1945/verweigerte-entschaedigung/bgh-urteil-1956/> [<https://perma.cc/E5XW-MEFH>] (“Sie [die Zigeuner] neigen, wie die Erfahrung zeigt, zur

that “[a]ll state persecution measures before 1943 were legitimate because they were caused by ‘gypsies’ by their own asociality, crime and migratory drive.”¹⁵⁴ Therefore, all forms of persecution of the German Sinti and Roma were considered by German courts to be “security measures.”¹⁵⁵ This precedent, which affected compensation for Sinti and Roma survivors and supported the alleged justification of former perpetrators,¹⁵⁶ was only recently publicly rejected in 2015.¹⁵⁷ However, the impact of this precedent was felt, even outside of Germany. As recently as September 2020, pleas for restitution from Roma victims in France were rejected by upholding the precedent that the differentiation between victim groups for restitution was legal.¹⁵⁸

Following 1945, many former National Socialist officials continued the discriminatory registration (*Sondererfassung*) of German Sinti and Roma under the new Central Offices for Travellers of the Roads (*Landfahrerzentralen*).¹⁵⁹ Many of the top officials in the National Socialist offices previously focused on the registration of and experimentation on Roma carried their research and files to the newly established federal agencies, where they attained amnesty status and continued application of racial-based science to the administration and implementation of government services.

In 1945, the Allied occupation government immediately ordered Control Council Law No.1, which repealed “laws of a political or discriminatory nature upon which the Nazi regime rested.”¹⁶⁰ Excluded from the itemized Nazi regulations were all those of an explicitly anti-Roma and Sinti in nature, and local governments passed directives upholding Nazi regulation against Roma and issued new regulations compelling survivors to return to the former internment camps.¹⁶¹ The denial of Roma victim identity was simultaneously effectuated

Kriminalität, besonders zu Diebstählen und Betrugerein, es fehlen ihnen vielfach die sittlichen Antriebe der Achtung vor fremdem Eigentum, weil ihnen wie primitive Urmenschen ein ungehemmter Okkupationstrieb eigen ist.”)

154. *Anti-Discrimination Work*, ZENTRALRAT DEUTCHER SINTI & ROMA, <https://zentralrat.sintiundroma.de/arbeitsbereiche/antidiskriminierungsarbeit/> [<https://perma.cc/D9ZJ-GAGB>].

155. KENRICK & PUXON, *supra* note 115, at 75.

156. ZENTRALRAT DEUTCHER SINTI & ROMA, *supra* note 154.

157. *Id.* (discussing that BGH President Bettina Limperg called the 1956 judgment “unjustifiable case law” for “which one can only be ashamed.”)

158. *French Court Blocks Roma Bid For Restitution under Jewish Holocaust Victim Law*, TIMES OF ISRAEL (Sept. 26, 2020, 11:53 AM), <https://www.timesofisrael.com/french-court-blocks-roma-bid-for-restitution-under-jewish-holocaust-victim-laws/> [<https://perma.cc/4GFV-Q4C7>].

159. *Exclusion After 1945, The Perpetrator’s Defining Powers*, SINTI UND ROMA, <https://www.sintiundroma.org/en/exclusion-after-1945/the-perpetrators-defining-powers/> [<https://perma.cc/YT66-AG85>].

160. Enactments and Approved Papers of the Control Council and Coordinating Comm., Allied Control Auth. Ger. (1945), Vol. I, Law No.1, Art. 1 (1), at 101 (Sept. 20, 1945); see MILTON, *supra* note 112, at 36, 35-49.

161. MILTON, *supra* note 112, at 36-37 (discussing the Cologne and Düsseldorf regulations of 1949 which validated the 1938 directive for “Fighting the Gypsy Plague,” and the continued

through the continuous oppression of Roma legal identity. The Bavarian vagrancy ordinance (*Landfahrerrordnung*) was in effect until 1970 and included the Vagrancy Office registry of West German Roma and Sinti.¹⁶² The registry included fingerprints, detailed personal information, and tattooed concentration camp numbers, and was used as a mechanism to dismiss compensation claims by German Roma and Sinti victims.¹⁶³

A new form of registration occurred between 1960 and 1982.¹⁶⁴ The Federal Criminal Investigation Department utilized Guidelines that authorized special registration of German Sinti and Roma under “ZN” (*Zigeunername*).¹⁶⁵ The German Conference of Interior Ministers intended for the special registration under “ZN” to continue, but this was fought by German Sinti and Roma advocates.¹⁶⁶ Despite the promise of the removal of special registration, police departments continued registration by renaming the “ZN” data field as “HWA0” (*Häufig Wechselnder Aufenthaltsort*).¹⁶⁷

Another practice of German authorities was the arbitrary confiscation and denial of identity papers.¹⁶⁸ German authorities frequently confiscated German Sinti and Roma identity papers that were issued by the Allied occupation authorities, alleging a lack of proof of German nationality.¹⁶⁹ Despite local German offices containing documentation of identity from receipts signed during forced transfer of property or confiscation, Roma and Sinti were continuously stripped of citizenship and all accompanying rights, and some were expelled or deported.¹⁷⁰ The combination of the previous confiscation of identity papers during the National Socialist period and the confiscation of new identity papers effectively denied large numbers of the group their citizenship, making them stateless.¹⁷¹

restrictions on licenses for itinerant trades, the registration and surveillance of all Gypsy employment, the compelling of Sinti and Roma to the city internment camps, and power of city councils to evict and prosecute whenever found residing on unapproved sites).

162. Daniela Gress, *Sinti and Roma in the Federal Republic of Germany*, RomArchive, <https://www.romarchive.eu/en/roma-civil-rights-movement/sinti-and-roma-federal-republic-germany/> [<https://perma.cc/AE54-NMCH>].

163. *Id.*

164. *Protests Against Special Registration by the Police*, EUR. HOLOCAUST MEM’L DAY FOR SINTI AND ROMA, <https://www.roma-sinti-holocaust-memorial-day.eu/recognition/protests-against-special-registration-by-the-police/> [<https://perma.cc/S54W-S7AW>].

165. *Id.*

166. *Id.*

167. *Id.* (meaning frequently changing place of residence).

168. See MILTON, *supra* note 112, at 39, 35-49.

169. *Id.*

170. *Id.*

171. *Id.*

D. 1980s to Present-Day Society

The fall of the National Socialist government, the resolution of the Nuremberg Trials, and the movement towards victim restitution did not end the continuous and systemic discrimination agenda toward Roma in Germany. The German Sinti and Roma civil rights movements in the 1980s began a grassroots movement to call for recognition, compensation, remembrance as victims, and elimination of discrimination suffered in spite of protections from West Germany's Basic Law.¹⁷²

The Federal Republic of Germany finally recognized the Roma as genocide victims in March 1982.¹⁷³ Alongside the awaited acknowledgment of victim identity, German Sinti and Roma were fighting for recognition as a national minority. In May 1995, Roma obtained legal recognition as a minority, which guaranteed protection against discrimination and promised active support to enable greater participation in society and politics.¹⁷⁴ Currently, Germany only recognizes four national minorities¹⁷⁵ and has a set criterion for the recognition of each group

- (1) they are German nationals;
- (2) they differ from the majority population in having their own language, culture and history and thus their own distinct identity;
- (3) they wish to maintain this identity;
- (4) they have traditionally been resident in Germany (usually for centuries);
- and (5) they live in Germany within traditional settlement areas.¹⁷⁶

This minority status does not apply to foreign Roma, such as those who sought asylum and refugee status in the 1980s-1990s due to persecution across Europe.¹⁷⁷

Despite slow recognition and a transformation of a new legal identity, one with the transference of enforceable rights and protections, the persecutory practices from the previous regimes continued under State authority. For example, the Federal Republic transferred the registration files created during the Third Reich, police surveillance continued, and laws passed as recently as the

172. *The Recognition of the Nazi Genocide of the Sinti and Roma* EUR. HOLOCAUST MEM'L DAY FOR SINTI AND ROMA, EUR. HOLOCAUST MEM'L DAY FOR SINTI AND ROMA, <https://www.roma-sinti-holocaust-memorial-day.eu/recognition/the-recognition-of-the-nazi-genocide-of-the-sinti-and-roma/> [<https://perma.cc/9MLX-CQDQ>].

173. *Id.*

174. *Id.*

175. *National Minorities, Federal Ministry of the Interior, Building and Community*, <https://www.bmi.bund.de/EN/topics/community-and-integration/national-minorities/national-minorities-node.html> [<https://perma.cc/T5WM-HVQL>] (discussing that the four officially recognized national minorities are the Danes, the Frisians, the German Sinti and Roma, and the Sorbs).

176. *Id.*

177. *See* Gress, *supra* note 162.

1990s registered Sinti and Roma under a public danger justification.¹⁷⁸ The 20,000 race reports (*Rassenguatchten*) that were created by the Racial Hygiene Research Centre have disappeared, and despite numerous court cases filed by Roma activists, remain undisclosed today.¹⁷⁹

For the protection of all minority groups, the German government has established an anti-discrimination legislative framework¹⁸⁰ as inscribed through the German Basic Law¹⁸¹ and the German Equal Treatment Act.¹⁸² The scope of the German Equal Treatment Act is intended to prohibit any discrimination in relation to conditions for access to employment and self-employment, employment and working conditions, access to vocational guidance and training, membership and involvement in worker or employer organizations, social protection such as social security and health care, social advantages, education, and access and supply of goods and services available to the public.¹⁸³ The acts constituting prohibited discrimination include direct¹⁸⁴ and indirect discrimination,¹⁸⁵ harassment,¹⁸⁶ and instructions to discriminate.¹⁸⁷ Current German legislation continues the regulation of citizens through civil registration

178. Milton, *supra* note 13, at 317. The Bavarian police registered Sinti and Roma on “special police forms without reason or legal basis, justifying this practice as vobeugende Verbrechensbekämpfung (crime prevention) because they believed that ‘Gypsies’ could become a public danger.”

179. *The Search for the Nazi Race Files*, EUR. HOLOCAUST MEM’L DAY FOR SINTI AND ROMA, <https://www.roma-sinti-holocaust-memorial-day.eu/recognition/the-search-for-the-nazi-race-files/> [<https://perma.cc/5Z9U-SVF3>].

180. The Guide to the General Equal Treatment Act describes the following as encompassing the legal basis for protection against discrimination in Germany: (1) the protections for human rights in the German Basic Law and the Universal Declaration of Human Rights; (2) the Treaty of Amsterdam which empowered the Council of the European Union to undertake legislation against discrimination on race, sex, ethnic origin, religion or belief, disability, age, or sexual orientation, and the subsequent four pieces of legislation on Racial Equality, Framework Directive on Employment, Equal Treatment in Goods and Services Directive, and Equal Treatment Directive; and (3) the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) which incorporates the EU directives and extends the scope to include race/ethnic background. Federal Anti-Discrimination Agency, *Guide to the General Equal Treatment Act: Explanations and Examples*, http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_wegweiser_engl_guide_to_the_general_equal_treatment_act.pdf [<https://perma.cc/4K9J-2MXA>].

181. Grundgesetz, Basic Law, Art. 3 Equality of all Human Beings before the Law.

182. *See generally* Allgemeines Gleichbehandlungsgesetz [AGG] [General Equal Treatment Act], Aug. 14, 2006, Bundesgesetzblatt, Teil I [BGBL I] at 1897 (Ger.).

183. *Id.* at § 2.

184. *Id.* at § 3(1).

185. *Id.* at § 3(2).

186. *Id.* at § 3(3).

187. *Id.* at § 3(5).

(which includes denoting membership of religious community),¹⁸⁸ identity cards,¹⁸⁹ citizenship,¹⁹⁰ and passports.¹⁹¹

German Sinti and Roma are specifically protected in framework agreements with regional governments,¹⁹² and through a constitutional amendment in Schleswig-Holstein.¹⁹³ Despite protections in both regional and federal law,

188. Bundesmeldegesetz [BMG] [Federal Act on Registration], May 3, 2013, Bundesgesetzblatt, Teil I [BGBl I] at 1084, last amended by Art. 11 des Gesetzes vom 18. Juli 2017 [Article 11 of the Act of July 18, 2017], July Jul. 18, 2017, Bundesgesetzblatt, Teil I [BGBl I] at 2745, Sec. 3 (Ger.), *translation at* https://www.gesetze-im-internet.de/englisch_bmg/englisch_bmg.html#p0015 [<https://perma.cc/DZ2E-T5PB>].

189. Personalausweisgesetz [PAuswG] [Act on Identity Cards and Electronic Identification], June 18, 2009, Bundesgesetzblatt, Teil I [BGBl I] at 1346, last amended by Art. 4 des Gesetzes vom 22. Dezember 2011 [Art. 4 of the Act of Dec. 22, 2011], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl I] at 2959, Sec. 5(2) (Ger.) “identity cards shall clearly indicate only the following information about the card holder: (1) family name and name before marriage, (2) given names, (3) doctoral degree, (4) date and place of birth, (5) photograph, (6) signature, (7) height, (8) eye colour, (9) address; in case of an address outside Germany, then the statement “no main residence in Germany”, (10) nationality, (11) serial number, and (12) religious name/stage or pen name.” *translation at* https://www.gesetze-im-internet.de/englisch_pauswg/englisch_pauswg.html#p0013 [<https://perma.cc/J2G2-F4P8>].

190. Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, Reichsgesetzblatt, Teil I [RGBl I] at 583, last amended by Artikel 1 des Gesetzes vom 20 November 2019 [Article 1 of the Act of Nov. 20, 2019], Nov. 20, 2019, Bundesgesetzblatt, Teil I [BGBl I] at 1626, Sec. 1 (Ger.) (“A German within the meaning of this Act is a person who possesses German citizenship.”), Sec. 3 (1) (“Citizenship is acquired, (1) by birth (Section 4), (2) by a declaration pursuant to Section 5, (3) by adoption as a child (Section 6), (4) by issuance of the certificate pursuant to Section 15 (1) or (2) of the Federal Expellees Act (Section 7) (Bundesvertriebenengesetz), (4a) for Germans without German citizenship within the meaning of Article 116 (1) of the Basic Law (Grundgesetz) under the procedure laid down in Section 40a, (5) for a foreigner by naturalization (Sec. 8 to 16, 40b and 40c)”), Sec. 3(2) (“German citizenship is also acquired by any person who has been treated by German public authorities as a German national for 12 years due to circumstances beyond his or her control. In particular, any person who has been issued a certificate of nationality, a passport or a national identity card is treated as a German national. . . .”), *translation at* https://www.gesetze-im-internet.de/englisch_stag/englisch_stag.html#p0012 [<https://perma.cc/75N9-AZYA>].

191. Passgesetz [PassG] [Passport Act], Apr. 19, 1986, Bundesgesetzblatt, Teil I [BGBl I] at 537, last amended by Artikel 8 des Gesetzes vom 25. Juli 2013 [Article 8 of the Act of July 25, 2013], July 25, 2013, Bundesgesetzblatt, Teil I [BGBl I] at 2749, Sec. 1 (1) (Ger.), *translation at* https://www.gesetze-im-internet.de/englisch_pa_g/englisch_pa_g.html#p0013 [<https://perma.cc/GBJ8-4NEK>].

192. Legal Framework, Minderheiten Sekretariat, <https://www.minderheitensekretariat.de/en/legal-framework/specific-minority-legislation-and-measures> [<https://perma.cc/67CG-JZ6K>] (discussing framework agreements under public law between regional governments and regional associations of German Sinti and Roma in Rhineland-Palatinate, Hesse, and Bremen, and a “Joint Declaration” in Bavaria).

193. *Id.* (discussing that the amendment of the Constitution of Schleswig-Holstein in

German Sinti and Roma continue to face discrimination by government agencies, in housing, employment, and education.¹⁹⁴ An expert report submitted in 2013 to the Federal Anti-Discrimination Agency concluded that there was “need for action on the part of society and politicians as well as the sector of education and research” largely based on the country’s ignorance and indifference toward Sinti and Roma.¹⁹⁵ The results of the study found that “[d]erogatory stereotypes and the existence of prejudice can be found in all segments of the population,” and that in comparison with attitudes towards other minorities, “[t]here is no other group which continuously showed similar average values. They are met with the least degree of sympathy, they are least appreciated as neighbors, their lifestyle is considered to be extraordinarily different.”¹⁹⁶

III. THE CREATION OF IDENTITY IN RWANDAN SOCIETY AND ITS SUBSEQUENT ELIMINATION

A. Rwandan Identities and Colonialist Rwanda

The Rwandan population is composed of a Hutu majority (85%), whereas Tutsis (15%) and Twa (less than 1%) represent minorities.¹⁹⁷ The terms Tutsi, Hutu, and Twa are the singular, English forms of Batutsi, Bahutu, and Batwa.¹⁹⁸ The characterization of identity in Rwanda must be done through noting the historical context and the significance of the colonial period. As Mahmood Mamdani argues, the identities of Hutu and Tutsi have changed concurrently with

November 2012 was the first explicit protection in a German federal land for German Sinti and Roma).

194. Federal Anti-Discrimination Agency, Ethnic Origin / Racism, Antidiskriminierungsstelle, https://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Ethnische_Herkunft/fragen_antworten_Sinti_Roma/faq_Sinti_und_Roma_node.html [https://perma.cc/89YC-X3LZ] (discussing the study results from *STUDY ON THE CURRENT EDUCATIONAL SITUATION OF GERMAN SINTI AND ROMA-DOCUMENTATION AND RESEARCH REPORT* (Daniel Strauss ed., 2012)).

195. Federal Anti-Discrimination Agency, Research of the FADA at a Glance: Between Indifference and Rejection- Population’s Attitudes Towards Sinti and Roma, *ANTIDISKRIMINIERUNGSSTELLE* (2014), https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/factsheet_en_Bevoelkerungseinstellungen_gegenueber_Sinti_und_Roma.pdf;jsessionid=50FE99C4D430010D33937FEF6EEDDC12.1_cid360?__blob=publicationFile&v=1 [https://perma.cc/QE3G-RAHX].

196. *Id.*

197. Deborah Mayersen, *A Political Monopoly Held by One Race: The Politicisation of Ethnicity in Colonial Rwanda* 169 (Jan 1, 2011) (unpublished manuscript) (on file with University of Wollongong Faculty of Arts, Social Sciences & Humanities) <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=2263&context=artspapers> [https://perma.cc/EJM5-2ZWX] [hereinafter *A Political Monopoly*].

198. Trusteeship Council, Rep. of the U. N. Visiting Mission to Tr. Territories in E. Afr., 1957, on Ruanda-Urundi 4 U.N. Doc. T/1346 (1958).

the State enforcing them.¹⁹⁹ The distinction and characterization of the Rwandan sub-groups was previously characterized as a fluid identity, “one of race, tribe, caste, class, domination and subjugation, ethnicity and political identity,” but the predominant view has shifted from racial to what is now understood largely as ethnic.²⁰⁰

In pre-colonial Rwanda, “Tutsiness” and “Hutuness” existed as permeable social classifications or classes, and social promotion (“Tutsification”) or semi-demotion (“Hutufication”) was possible.²⁰¹ The colonial regime began under German rule (1884-1919) and continued through Belgian colonial rule until 1962.²⁰² Colonial Belgian rulers created and enforced perceived identities of Hutu, Tutsi, and Twa that have since permeated into an enduring misconstruction of Rwandan culture and society. The colonial period established and institutionalized ethnic identity through the Belgian theories of race and based access to government services, such as education and employment, on an ethnic-quota system.²⁰³ The model for Colonial Rwanda placed the administration of the country in the hands of the Tutsi monarchy.²⁰⁴ Scholars argue this model was largely based on either a misunderstanding of pre-colonial societal structure, or on the German and Belgium belief that the lighter-skin Tutsi were racially superior, an invocation of the European “Hamitic hypothesis.”²⁰⁵ This structure in effect led to the colonial classification of Hutu as second-class citizens and intense discrimination against the Twa.²⁰⁶

The scholarly consensus appears to agree that ethnic identity cards were introduced alongside a population census in colonial Rwanda in 1933;²⁰⁷ the

199. MAMDANI, *supra* note 69, at 34 (discussing that the origin of violence is connected to the construction of political identities by the colonial state, Hutu as indigenous and Tutsi as alien, and that the reason for continued violence is connected with the failure of nationalism to transcend these colonial constructions).

200. *A Political Monopoly*, *supra* note 197, at 169.

201. Hum. Rts. Council, Rep. of the Independent Expert on Minority Issues: Mission to Rwanda, ¶ 8, Doc. A/HRC/19/56/Add. 1 (2011) [hereinafter *Report on Minority Issues*].

202. Ryan Hurst, *Bahutu Manifesto (1957)*, BLACK PAST (May 22, 2009), <https://www.blackpast.org/global-african-history/bahutu-manifesto-1957/> [<https://perma.cc/MZJ6-28TG>].

203. Report on Minority Issues, *supra* note 201, at ¶ 10.

204. See generally MAMDANI, *supra* note 69.

205. Deborah Mayersen, “Race” Relations in Rwanda: An Historical Perspective (2010), <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=2306&context=artspapers> [<https://perma.cc/SM2F-625K>] (describing the “Hamitic hypothesis” as a theory of racial hierarchy which proposed that ruling groups of Africa, such as the Tutsi, were “not truly ‘Negro,’ but the lowest rung on the Caucasian ladder.”) (internal citations omitted).

206. Catherine Newbury, *Ethnicity and the Politics of History in Rwanda*, 45 AFR. TODAY 7, 11 (1998).

207. Rosamunde van Brakel & Xavier Van Kerckhoven, *The Emergence of the Identity Card in Belgium and Its Colonies*, in HISTORIES OF STATE SURVEILLANCE IN EUROPE AND BEYOND 178 (Kees Boersma et al. eds.) (discussing that the decree which introduced the identity card also referred to a passport which was largely required in Belgian colonies. The indigenous colonial

ethnic categories including Butusi, Buhutu, Butwa.²⁰⁸ However, some scholars argue that analysis of official documents may suggest the introduction of identity cards was intended only as an extension of existing Belgium regulations, rather than as a desire to ethnically classify the population.²⁰⁹ But this argument is largely contradicted by scholars utilizing a multi-disciplinary analysis of colonial Rwanda and Belgium.²¹⁰ A similar contradiction may be found in the expert witness testimony of Alison Des Forges before the International Criminal Tribunal for Rwanda which provides that

The primary criterion for (defining) an ethnic group is the sense of belonging to that ethnic group But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time. The Rwandans currently, and for the last generation at least, have defined themselves in terms of these three ethnic groups [R]eality is an interplay between the actual conditions and peoples' subjective perception of those conditions. In Rwanda, the reality was shaped by the colonial experience which imposed a categorisation which was probably more fixed, and not completely appropriate to the scene. But, the Belgians did impose this classification in the early 1930's when they required the population to be registered according to ethnic group. The categorisation imposed at that time is what people of the current generation have grown up with. They have always thought in terms of these categories, even if they did not, in their daily lives have to take cognizance of that. This practice was continued after independence by the First Republic and the Second Republic in Rwanda to such an extent that this division into three ethnic groups became an absolute reality.²¹¹

Des Forges' testimony similarly supports an argument that identity in Rwanda was originally based on ascriptive models created through the xenophobic theories of Belgian Colonial rule until the group identities were so categorized to become a self and state-construed formal identity.

populations would need to obtain permission to receive a passport in order to leave the colony, essentially "travel passes.").

208. *Id.* at 177.

209. *Id.* at 180.

210. *See, e.g.,* DES FORGES, *supra* note 7, at 29 ("Once the Belgians had decided to limit administrative posts and higher education to the Tutsi, they were faced with the challenge of deciding exactly who was Tutsi . . . tracing genealogies was time – consuming and could also be inaccurate. . . . The Belgians decided that the most efficient procedure was simply to register everyone, noting their group affiliation in writing, once and for all. All Rwandans born subsequently would also be registered as Tutsi, Hutu, or Twa at the time of their birth."); *see generally* MAMDANI, *supra* note 69.

211. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 172 (Sept. 2, 1998).

B. Tensions During the Twentieth Century

The colonial period of Rwanda shifted in 1954 when Rwanda was administered as part of Ruanda-Urundi as a U.N. Trust Territory under Belgian trusteeship.²¹² The trusteeship created international pressure on Belgium and, as a result, the colonial administrators sought to shift their political support to include Hutu participation.²¹³ The “Hutu Revolution,” or Rwandan Revolution, was a series of violent incidents that led to the transfer of the majority of political power to Hutus.²¹⁴ Scholars have since detailed and debated the precise factors that led to the Revolution. The factors usually include whether the events were manufactured by Belgian colonial authorities and the Catholic Church or the significance of key Hutu leaders and the rural majority in attempting to end the privilege of Tutsi in employment, access to political power, economic advancements, and promotion of an end to Hutu discrimination.²¹⁵ Hutu political support was radicalized in the Bahutu Manifesto in 1957. The Manifesto promoted the need for Hutu self-preservation, political disenfranchisement of the Tutsi, banning inter-group marriage, and banning Tutsi from the military.²¹⁶ The shift in political power also implemented a shift in social and cultural status, and the new government justified violence and discriminatory measures under racialized propaganda, such as discrimination in employment and education based on identity card classification.²¹⁷

Rwanda became an independent State on July 1, 1962.²¹⁸ The Constitution drafted thereafter in November 1962 eliminated the Tutsi monarchy²¹⁹ and several provisions provided for equality among citizens.²²⁰ However, the immediate ramifications of the 1959 revolution were burgeoning racial tensions in the country’s politics and military. The later conflicts in 1964 and 1990 have been attributed to a recurrent pattern of threatened regimes targeting ethnic scapegoats

212. DES FORGES, *supra* note 7, at 30.

213. *Id.*

214. *Id.*

215. Newbury, *supra* note 206, at 9.

216. Hurst, *supra* note 202.

217. DES FORGES, *supra* note 7, at 31.

218. *Constitution de la République Rwandaise*, in CONSTITUTIONS OF NATIONS 672 (Amos J. Xydis Peaslee & Dorothy Peaslee trans. and ed. 1962).

219. *See id.* at 676, art. 2.

220. *See id.* at 676, art. 3 (“The Rwanda Republic ensures the equality of all its citizens without distinction of race, origin, sex or religion”); *see id.* at 677, art. 13 (“The fundamental liberties, as they are defined by the Universal Declaration of the Rights of Man, are guaranteed to all citizens. Their exercise may be regulated by law and by regulation.”); *see id.* at 677, art. 16 (“All citizens are legally equal before the law, without distinction of race, clan, color, sex or religion.”); *see id.* at 677, art. 17 (“The privileges of caste are abolished and may not be restored. No new privileges may be instituted of any kind whatsoever.”).

and rationalizing military actions based on ethnicity.²²¹

The Rwandan Patriotic Front, which would invade Rwanda in 1990, was an army of Tutsi refugees who had been previously expelled during anti-Tutsi campaigns that started in 1959.²²² The total number of exiled Rwandans in the late 1980s was 600,000 and the right of the refugees to return was largely contested by the Rwandan government, contributing to the RPF policies of a forceful return and the establishment of a new government.²²³ A Rwandan military meeting in December 1991 was called to propose a plan in response to RPF influence and led to the adoption of a widely circulated report which classified the Tutsi as enemies of the State.

The principle enemy is the Tutsi inside or outside the country, extremist and nostalgic for power and who have never recognised and will never recognise the realities of the social revolution of 1959 and who want to take back their power by any means, including weapons. The accomplice of the enemy is anyone who supports the enemy.²²⁴

The events of the 1959 revolution were also incorporated into the later media propaganda campaigns disseminated before and during the genocide by radio and print media meant to incite killings against Tutsi.²²⁵

The military further facilitated racial conspiracies, and trained armed militia (*Interahamwe*) and secret groups to lead organized killing sprees in Rwanda as early as November 1991 aimed to “neutralise the enemy,” which was a “euphemism in the military for killing Tutsi.”²²⁶ Moreover, explicit legal references to ethnic identity included Article 57 of the Civil Code of 1988, which identified a person's ethnic group, and Article 118 of the Civil Code, which provided for the identification of ethnic groups on birth certificates.²²⁷ Despite President Habyarimana's administration circumventing and inspiring ethnic divides,²²⁸ the 1991 constitution provided for equality before the law.²²⁹

221. Newbury, *supra* note 206, at 16.

222. Linda Melvern, *The Past is Prologue: Planning the 1994 Rwandan Genocide*, in AFTER GENOCIDE 23 (Philip Clark & Zachary D. Kaufman eds., 2009).

223. DES FORGES, *supra* note 7, at 37.

224. Melvern, *supra* note 222, at 27 (quoting VÉNUSTE NSHIMIYIMANA, PRÉLUDE DU GENOCIDE RWANDAIS: ENQUÊTE SUR LES CIRCONSTANCES POLITIQUES ET MILITAIRES DU MEURTRE DU PRÉSIDENT HABYARIMANA 35 (1995)).

225. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 123 (Sept. 2, 1998).

226. Melvern, *supra* note 222, at 29.

227. See Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 170.

228. *Id.* ¶ 93 (discussing the Habyarimana administration continuing the ethnic quota system in universities and government services and favoring Hutu from his native region).

229. Journal Officiel de la République Rwandaise [Constitution] Dec. 15, 1978, No. 24, art. 16 (Rwanda), translated in HEINONLINE WORLD CONSTITUTIONS ILLUSTRATED LIBRARY 2018 (Maria del Carmen Gress trans., Jefri Jay Ruchti ed., 2018) (“All citizens are equal before the law,

Amid international pressure, President Habyarimana signed the Arusha Accords on August 4, 1993, to end the conflict between the Rwandan government and the RPF.²³⁰ The Accords provided for the limitation of obstacles to nationality, specifically ethnicism,²³¹ the rejection of “political ideologies based on ethnicity,”²³² “deletion of reference to ethnic groups in all official documents,”²³³ and the establishment of “efficient mechanisms aimed at eliminating discrimination and exclusion” as a matter of urgency in restoring national unity.²³⁴ The acknowledgement of the “recurring delays in implementing the Accords” is among the factors scholars attribute to the escalation of the violence into a genocide.²³⁵ Also among the factors were the “increasingly vicious incitements to hatred and violence,” and the “the widespread awareness of training and arming the militia” which existed within the country.²³⁶

C. Genocide of 1994

The Rwandan Genocide took place between April and July 1994,²³⁷ the beginning violence of which was largely provoked by the April 6, 1994 assassination of President Habyarimana.²³⁸ There is a consensus among literature and jurisprudence that the Rwandan genocide against the Tutsi was a systematic plan implemented by the Hutu-led government.²³⁹ In 1994, Tutsi were labeled as

without any discrimination, notably, of race, of color, of origin, of ethnicity, of clan, of gender [sexe], of opinion, of religion or of social position.”).

230. DES FORGES, *supra* note 7, at 88.

231. Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Rule of Law, Rwanda-Rwandese Patriotic Front, art. 2, Aug. 18, 1992, Annex III (“National unity implies that the Rwandese people, as constituent elements of the Rwandese nation, are one and indivisible. It also implies the necessity to fight all obstacles to national unity, notably, ethnicism, regionalism, integristism and intolerance which subordinate the national interest to ethnic, regional, religious and personal interest.”).

232. *Id.* at art. 8.

233. Protocol of Agreement Between The Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions, Rwanda-Rwandese Patriotic Front, art. 16, Aug. 3, 1993, Annex VII.

234. Protocol of Agreement on Power-Sharing Within the Framework of a Broad-Based Transitional Government Between the Government of the Republic of Rwanda and the Rwandese Patriotic Front Rwanda-Rwandese Patriotic Front, art. 23(c)(1)(a), Jan. 9, 1993, Annex IV.

235. DES FORGES, *supra* note 7, at 126-27.

236. *Id.*

237. See Outreach Programme on the 1994 Genocide Against the Tutsi in Rwanda and the United Nations, <https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml> [<https://perma.cc/42YK-ZYSU>].

238. DES FORGES, *supra* note 7, at 127.

239. See AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND 5-6 (Phil Clark & Zachary D. Kaufman eds., 2009) (discussing high-level government meetings for training youth militia, stockpiling weapons, and

“enemies of the state,” and the call for murder was published in the press and radio broadcasts.²⁴⁰ The exact number of victims is estimated between 800,000 to 1 million, but the official government number of those killed is 1,074,017, of whom 93.7 percent were Tutsi.²⁴¹

An analysis of the Rwandan genocide would be incomplete without noting the impact of the national identity cards (*Indangamuntu*). The testimony before the ICTR Chamber documented numerous instances in which an individual’s “identity card” was in fact a life-or-death determination to the perpetrators.²⁴² Rwandan military officers and *Interahamwe* erected roadblocks around the capital city of Kigali and most localities to target identity cards of individuals trying to flee,²⁴³ and identity cards were found among mass killing sites of Tutsis.²⁴⁴ De Forges explained the vitality of the administrative system and the hope of many to avoid the death sentence associated with the identity card:

Persons who hoped to pass for Hutu often “lost” their identity cards and then requested temporary papers from the councilor or a new card from the burgomaster [head of the local administration who was the ultimate authority of contested ethnic classification], hoping the administrator would be persuaded to falsify the document.²⁴⁵

Prior to April 1994, the local administrative system recorded births, deaths, and movements in and out of the area, giving officials the number of Tutsi (male or female, adult or child), in each administrative unit.²⁴⁶ The local officers utilized the administrative system during the genocide period by instructing displaced Tutsi to register in the communes where they sought refuge, by requiring written authorization for travel outside the communes, and granting/denying passes for

rehearsal mass murders of Tutsi); see *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgement, ¶ 126 (Sept. 2, 1998) (characterizing the genocide as “meticulously organized.”).

240. Newbury, *supra* note 206, at 7.

241. *Statistics*, SURVIVOR’S FUND (Oct. 6, 2021), <https://survivors-fund.org.uk/learn/statistics/> [<https://perma.cc/RTZ7-7APA>].

242. See, e.g., *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 281 (Int’l Crim. Trib. for Rwanda Dec. 6, 1999), <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-03/MS17327R0000620654.PDF> [<https://perma.cc/C7FM-QAYF>] (“[. . .] The Hutus were then asked to show their identity cards and to separate themselves from the group, following which they were allowed to leave. Witness DD also saw a person who tried to pass for a Hutu, shot on the spot. Once the Hutus had been separated, the soldiers began to kill people and throw grenades.”).

243. See Melvern, *supra* note 222; see also *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgement, ¶ 123 (Sept. 2, 1998).

244. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgement, ¶ 116 (Sept. 2, 1998).

245. DES FORGES, *supra* note 7, at 165-66.

246. *Id.* at 166.

travel during curfew periods.²⁴⁷ The information provided to these authorities often resulted in targeted attacks on Tutsis.²⁴⁸

The interim government was eventually militarily defeated by the RPF, ending the genocide period.²⁴⁹ The genocide ended in the assumption of power by the Tutsi-led government and triggered the subsequent shift in legal and politicized identity.

D. Elimination of Identity in Post-Genocide Rwanda

As the identity of Tutsi-victimhood was acknowledged, so too was the identity of Hutu as perpetrators. In the months following the genocide, the newly established Tutsi-led government began attacking refugee camps in Zaire, largely under the veil of “a corporate view of ethnicity” which labeled “all Hutu refugees as *genocidaires* (persons who helped perpetrate genocide).”²⁵⁰ The UN High Commissioner for Refugees estimated the number of victims from RPF killings between April and August 1994 as between 25,000 and 45,000.²⁵¹ A U.N. Independent Commission of Experts recognized the massacres and summary executions committed by the RPF as serious breaches of international humanitarian law and crimes against humanity.²⁵² The ICTR Chief Prosecutor originally announced in 2002 that RPF crimes would be investigated, but in 2008 the files for RPF officials were transferred for domestic prosecution in Rwanda.²⁵³ This transfer was believed by one human rights organization to be based on the potential political conflict if the ICTR proceeded with the crimes and faced the “likely need to indict senior figures in Rwanda’s military or current government.”²⁵⁴ The human rights organization described the later trial against the RPF officials as a “miscarriage of justice,” and called on the ICTR for an official assessment and to recall the case within the Tribunal.²⁵⁵

247. *Id.* at 167.

248. *Id.*

249. *Id.* at 10-11 (noting that killing did not necessarily stop as the RPF ended the genocide, as its troops “committed grave violations of international humanitarian law by attacking and killing unarmed civilians,” specifically killing Interahamwe or others who were believed to have participated in the genocide).

250. Newbury, *supra* note 206, at 8.

251. Kenneth Roth, *Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding The Prosecution of RPF Crimes*, HUM. RTS. WATCH (May 26, 2009, 4:01 AM), <https://www.hrw.org/news/2009/05/26/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf> [<https://perma.cc/6PTW-4U9G>].

252. Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994), ¶ 79-81, U.N. Doc. S/1994/1125 (Oct. 4, 1994).

253. Roth, *supra* note 251.

254. *Id.*

255. *Id.* (describing the trial, “. . . a Rwandan military court charged and tried four RPF officers with war crimes for the 1994 killing of 15 civilians, 13 of them clergy. The trial proved to be a political whitewash and a miscarriage of justice, betraying the rights of victims’ families to

Following the genocide, the Rwandan government adopted a policy referred to by some as “Rwandicite,” the basis of which is the total erasure of race and ethnicity.²⁵⁶ The center of the policy is arguably that, “[i]f awareness of ethnic differences can be learned, so too can the idea that ethnicity does not exist.”²⁵⁷ The newly established government led by the Rwandan Patriotic Front committed to establishing a multiparty system and to eliminating ethnicity from identity cards.²⁵⁸ Not only do ethnic minorities not exist in the law, but there is a prohibition on the use of referencing identities such as Bahutu, Batustsi, or Batwa in official documents.²⁵⁹ A Government adviser regarded classification as “. . . the only way they [the former Government] could maintain their discriminatory system’ [. . .] ‘Otherwise, you could not easily tell who was a Hutu and who was a Tutsi.’”²⁶⁰ Meanwhile former Vice-President Kagame, who has served as President since 2000, noted that self-identification could continue but that the identification “can no longer be used to infringe on somebody’s rights.”²⁶¹

The erasure of ethnic identity is present within the new civil registration system. The 2008 Law on Governing Registration of the Population and Issuance of the National Identity Card required the issuance of national identity cards to every Rwandan sixteen and above,²⁶² and a birth declaration within thirty days from date of birth.²⁶³ The identity cards include: name, date of birth, sex, place of issue, signature, and a national identity number.²⁶⁴ The possession and carrying

obtain justice for their loved ones. Both the prosecution and defense presented the killings and spontaneous reactions by soldiers overcome with grief for their fellow RPF officers who had lost relatives in the genocide. The court heard testimony only from witnesses supporting this version of events, despite evidence [the ICTR] transmitted to Rwanda’s prosecution service indicating that the killings were part of a planned military operation involving more senior officials. Two of the officers confessed to the killings and were sentenced to eight years in prison, reduced to five years on appeal. Two more senior officers were acquitted after a very brief trial.”)

256. Frédéric Mégret, *Protecting Identity By Ignoring It? A Critical Look at the French and Rwandan Paradoxes*, 38 DALHOUSIE L.J. 549, 552 (2015).

257. René Lemarchand, *The Politics of Memory in Post-Genocide Rwanda*, in AFTER GENOCIDE 65, 65 (Phillip Clark & Zachary D. Kaufman eds., 2009) (quoting M. Lacey, *Rwanda: There Is No Ethnicity There*, INTERNATIONAL HERALD TRIBUNE 2 (Apr. 10, 2004)).

258. Raymond Bonner, *Rwanda’s Leaders Vow to Build a Multiparty State for Both Hutu and Tutsi*, N.Y. TIMES ARCHIVES (Sept. 7, 1994), <https://www.nytimes.com/1994/09/07/world/rwanda-s-leaders-vow-to-build-a-multiparty-state-for-both-hutu-and-tutsi.html> [<https://perma.cc/AR2A-RKFE>].

259. Report on Minority Issues, *supra* note 201, ¶ 11.

260. Bonner, *supra* note 258.

261. *Id.*

262. Governing Registration of the Population and Issuance of the National Identity Card Law, art. 11, No. 14/2008 (Rwanda) (July 16, 2008), <https://gazettes.africa/archive/rw/2008/rw-government-gazette-dated-2008-07-16-no-special.pdf> [<https://perma.cc/M6BF-TFXX>].

263. *Id.* at art. 8.

264. Ministerial Order 12/07.01, art. 4 (2008) (Rwanda).

the national identity card is obligatory and any act that contravenes the provisions of the law may result in civil and criminal penalties.²⁶⁵

Recent amendments to the Rwandan constitution have caused considerable examination of the State's constitutional provisions related to genocide and the exclusion of identity. The reference to the genocide is immediate in the constitutional preamble,²⁶⁶ and references are continued throughout. The 2003 Constitution overturned the previous practices of removing nationality and provided for the automatic reacquisition of citizenship for those deprived in previous conflict periods.²⁶⁷ Moreover, political organizations based on individualized identity were prohibited.²⁶⁸ Additionally, the eradication of ethnic division and the commitment to fighting ideologies of genocide became fundamental principles for the State,²⁶⁹ while discrimination on ethnic origin was prohibited and punishable by law.²⁷⁰ The effect of the 2003 political overhaul was the banning of the largest Hutu opposition party, *Mouvement Démocratique Républicain* (MDR), which eliminated the "only significant Hutu voice in the Rwandan parliament," and the dissolution of the State's largest human rights organization, *Ligue Rwandaise pour la Promotion de la Défense des Droits de l'Homme* (LIPRODHOR).²⁷¹ The legal basis of both actions were alleged on the grounds of "divisionism."²⁷² The legal grounds of "divisionism" have been

265. Governing Registration of the Population and Issuance of the National Identity Card Law, *supra* note 262, at art. 13.

266. La Constitution de la Republique du Rwanda [Constitution], Aug. 13, 2008 (Rwanda) ("Preamble: We, the People of Rwanda. . . In the wake of genocide against the Tutsi that was organised and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda; Resolved to fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional and any other form of divisions. . . ; Emphasizing on the necessity to strengthen and promote national unity and reconciliation which were seriously shaken by the genocide against the Tutsi and its consequences . . .") [hereinafter *Rwandan Constitution*].

267. Rwandan Constitution, *supra* note 266, at art. 7 ("Every person has a right to nationality [. . .] No person may be deprived of Rwandan nationality of origin. . . No person shall be arbitrarily deprived of his or her nationality [. . .] Rwandans or their descendants who were deprived of their nationality between 1st November 1959 and 31 December 1994 by reason of acquisition of foreign nationalities automatically reacquire Rwandan nationality if they return to settle in Rwanda [. . .] All persons originating from Rwanda and their descendants shall, upon their request, be entitled to Rwandan nationality.").

268. Rwandan Constitution, *supra* note 266, at art. 54 ("Political organizations are prohibited from basing themselves on race, ethnic group, tribe, clan, region, sex, religion or any other division which may give rise to discrimination. . .").

269. Rwandan Constitution, *supra* note 266, at art. 9.

270. Rwandan Constitution, *supra* note 266, at art. 11 ("[. . .] Discrimination of whatever kind based on, inter alia, ethnic origin, tribe, clan, colour, sex, region, social origin . . . culture, language, social status . . . or any other form of discrimination is prohibited and punishable by law.").

271. Clark & Kaufman, *supra* note 239, at 14.

272. Immigr. and Refugee Bd. of Can., Responses to Info. Requests, *Legislation Governing*

criticized by non-governmental organizations and was described in 2007 “. . . to mean any form of opposition to [the current government’s] policies. On occasion, however, (e.g., at the time of the 2003 election) the government has even applied this term to the Liberal Party, a political party strongly identified with survivor groups, because it appealed to survivors to vote for it instead of for the dominant RPF.”²⁷³

As a result of the elimination of ethnic identity, the Twa lost their official designation as a minority ethnic group.²⁷⁴ As a result, the “government no longer recognizes groups advocating specifically for Twa needs, and some Twa believed this government policy denied them their rights as an indigenous ethnic group.”²⁷⁵ The Rwandan government maintained in its periodic report to the Committee on the Elimination of Racial Discrimination in 2011 that from “an anthropological point of view” ethnic groups only exist when there are different “languages, culture, history, and territory.”²⁷⁶ Further, the government considered that despite “divisionist ideologies” the only “inimitable ethnic group in Rwanda” is the *Banyawrwanda*.²⁷⁷ However, experts noted in both 2011 and 2016 that the State’s refusal to recognize minority ethnic groups is both in contravention of international standards and compromising the implementation of policies directed at inequality.²⁷⁸

In constructing criminal penalties post-genocide, Rwanda enacted transitional justice mechanisms that eventually became focused on the U.N.-sponsored international *ad hoc* tribunal, domestic criminal courts, and community-based

Divisionism and its Interpretation (Aug. 3, 2007), <https://www.justice.gov/sites/default/files/coir/legacy/2014/10/14/RWA102565.E.pdf>; *see also* Rwandan Republic, Ministry of Justice, the 9th and 10th Periodic Report of the Republic of Rwanda Under the African Charter on Human and People’s Rights, Period Covered by the Report 2005- July 2009, 22 (2009) [hereinafter *9th and 10th Periodic Report of Rwanda*] (“Rwanda does not have a particular law defining divisionism,” but that “[t]he term . . . is closely linked to discrimination and sectarianism- whose definitions are found in the Law No. 47/2001 on 18/12/2001 on Prevention, Suppression and Punishment of the Crimes of Discrimination and Sectarianism. Divisionism is though generally understood as the use of any speech, written statement or action that is likely to divide people or spark conflicts among people, or cause an uprising which might degenerate into strife among people based on discrimination. It is thus considered illegal to do anything that is tantamount to divisionism based on race, tribal, ethnic, religion, or region in Rwanda.”).

273. 9th and 10th Periodic Report of Rwanda, *supra* note 272.

274. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices for 2018: Rwanda (2018) at 33, <https://www.justice.gov/coir/page/file/1146601/download> [<https://perma.cc/RJX8-QPRC>].

275. *Id.*

276. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶ 12, CERD/C/RWA/CO/13-17 (2010).

277. *Id.*

278. Minority Rights Group International, Rwanda, Twa (2020) <https://minorityrights.org/minorities/twa-2/> [<https://perma.cc/Y9Y8-54E7>].

Gacca courts.²⁷⁹ The basis for later criminal penalties was the legalization of the identity of victims and perpetrators in the genocide, effectively criminalizing any denial that the genocide was a “Tutsi” genocide with “Hutu” *genocidaires*. In conjunction with criminal penalties for genocidal acts was the criminalization of discrimination or sectarianism.²⁸⁰

IV. ANALYSIS

Prior to any comparison, it must be noted that the international community is in consensus that while the acts of genocide may be universal, the context of each genocide is individual in nature.²⁸¹ Thus, while factors may be argued as contributory or identifiable of an escalating context of persecution, the ultimate devolution of a society into genocide is somewhat conditioned on the nature of each society and their law.

A true comparative analysis between the two genocides, both in this context and future scholarly context, may be limited due to three factors. First, despite an increasingly globalized society, the majority of legislation and primary sources predating the 20th Century remain far and few between on legal databases. Second, foreign domestic legislation is often binding only in the original language, and variations in translations confer misinterpretations and misunderstandings of which the impact is arguably inconceivable in a contextual analysis. Third, despite official policies of reconciliation and reconstruction, sovereign States often wish to erase or hide the true effect of former repressive regimes from the international community. The immediate or long-standing approach of transitional governments then is to erase or destroy the documentation that is necessary to conduct a complete analysis. The circumstance of each genocide may present additional factors for difficulty, such as those posed by Donald Kenrick & Grattan Puxon in an analysis of Roma during the Nazi period, including: the destruction of files when the Germans realized they would

279. See Pietro Sullo, *Lois Memorielles in Post-Genocide Societies: The Rwandan Law on Genocide Ideology under International Human Rights Law Scrutiny*, 27 LEIDEN J. INT'L L. 419 (2014).

280. Instituting Punishment for Offences of Discrimination and Sectarianism Law, art.1, No 47/2001 (Official Gazette of the Republic of Rwanda): (“(1) Discrimination is any speech, writing, or actions based on ethnicity, region or country of origin, the colour of skin, physical features, sex, language, religion or ideas aimed at depriving a person or group of persons of their rights as provided by Rwandan law and by International Conventions to which Rwanda is a party; (2) Sectarianism means the use of any speech, written statement or action that divides people, that is likely to spark conflicts among people, or that causes an uprising which might degenerate into strife among people based on discrimination mentioned in article one 1.”).

281. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1224 (“Each genocide is unique. This uniqueness manifests itself in the differences of experiences of genocide survivors, the levels of social mobilization of aggressors, the public or secretive nature of the aggression, and the historical context from which the violence emerged.”).

be defeated, the illiteracy rate among German Roma and Sinti survivors limiting survivors writing of their own experiences, and limited literature compared to that on the persecution of the Jews.²⁸²

A. Comparison of Legal Identity in Pre-Genocide

In the immediate periods before the start of genocide, there are numerous similarities in the Rwandan and German socio-political environments. First, both States had established a state-created identity through legislation or legal mechanisms that influenced the perception of the group's identity in society, and ultimately shifted the construction by including societal and cultural misperceptions into a singular encapsulating ethnic and legal identity. In pre-unified Germany, the previous ethnic misperceptions of Roma related to an itinerate lifestyle inspired the legal codification of stereotypes (e.g. the 1926 registration of all "Gypsies, Vagabonds and the Work Shy" in Bavaria),²⁸³ whereas the ethnic perceptions occurred in Rwanda mostly after the codification and formalization of the distinct ethnic groups.²⁸⁴

Secondly, both States continued the monitoring and enforcement of identities through formalities such as identity cards and administrative registration systems, even after a major transition in the State: German unification and Rwandan independence. Rwanda continued the use of ethnic identification cards following political shifts and tension in 1959, 1962, and 1991 and post-1991 the political administration continued existing discriminatory quota systems for civic benefits and the use of administrative registration systems to identify the number and location of Tutsis within each locality. Following political transformations in Germany, both the Weimar Republic and the National Socialist Party worked towards federalizing the registration and monitoring systems to create and enforce the use of Gypsy registration and identity cards. Additionally, the National Socialist Party created a legal persecutory regime supplementing existing discriminatory laws based on the classification-registration.

However, the requirement of the use of identity cards varied between the two States. In Rwanda, all ethnic groups were required to maintain an identity card with their respective group identity; whereas, in Germany, identity cards and registration were mandated only for specific ethnic groups, and the corresponding card was registered per ethnic group. Thus, the importance of an identity card in Rwanda was based on the ethnic classification on the card, and the importance of an identity card in Germany was whether an individual was assigned one.

Third, both States had administrative authorities classify and assign ethnic and legal identity based on racial science and delineate government benefits based on the assignment. Colonial authorities in Rwanda utilized racial science in pursuit of blood tests and measurements of weight, nasal, and facial

282. KENRICK & PUXON, *supra* note 115, at 69.

283. *See* Milton, *supra* note 13, at 319.

284. *See* Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 172 (Sept. 2, 1998).

characteristics to classify between Hutu, Tutsi, and Twa.²⁸⁵ This classification then related to assignment of political power,²⁸⁶ ethnic-quota systems for employment, and citizen-class status.²⁸⁷ The administrative office of the Racial Hygiene and Population Biology Research Centre in Germany utilized racial science in attributing classifications between part-Gypsy and pure Gypsy.²⁸⁸ Thereafter, the classification similarly related to employment²⁸⁹ and demotion of citizen status.²⁹⁰

B. Comparison of Legal Identity During Genocide

In both genocidal periods, the use of legal identity became an innate factor in the execution of genocide, essentially the identity that the state administered, or arguably created, became the targeted victim group.²⁹¹ Legal identity was used as a means to register, discriminate, persecute, and ultimately to effectuate genocidal policy aimed at the groups' total destruction.

In both Rwanda and Germany, the state-administered forms of legal identity became weaponized to identify targeted group members for mass destruction. In Rwanda, the colonially imposed national identity cards benefited whichever group was in power and were used to grant preferential and unequal treatment in society, until they later became part of an organized and systematic plan to identify, target, and kill Tutsis and later Hutus. Whereas in Germany, the identity documents based on racial classification as "pure" or "part" Gypsy were used to implement discriminatory laws, legitimize internment, arbitrary detention, forced labor, compulsory sterilization, and deportation to concentration camps.

The danger of national identity cards in furtherance of a genocidal policy has previously been advocated. Specifically, Jim Fussell argued that classification based on individual identity in categories such as religion or ethnicity may be a facilitating factor in genocide:

What classification on national ID cards does is take group classification schemes one step further- from the classification of populations as a whole (in aggregate)- to the classification of individual persons by group. The effect of policies which apply group classification upon individuals is to make group identity more rigid and to make one form of societal affiliation excessively prominent (usually religion or ethnicity),

285. van Brakel & van Kerckhoven, *supra* note 207, at 178.

286. *Id.*

287. Report on Minority Issues, *supra* note 201, ¶ 11.

288. KENRICK & PUXON, *supra* note 115, at 61.

289. Law for the Restoration of Professional Civil Service, *supra* note 122.

290. BURLEIGH & WIPPERMANN, *supra* note 93, at 45-49.

291. Prosecutor v. Gacumbtsi, Case No. ICTR-2001-64-T, Judgment, ¶ 254 (June 17, 2004) ("Membership of a group is a subjective rather than an objective concept . . . in a given situation, the perpetrator, just like the victim, may believe that there is an objective criterion for determining membership of an ethnic group on the basis of an administrative mechanism for the identification of an individual's ethnic group.").

highlighting that particular area of difference above others, such as regional or local identity, social class or others [. . .] But the fact that these classification on national ID cards must actually be carried and used by individuals makes the practice unlike other classification practices. The ramifications of this form of classification for individual persons should cause the practice to become of international concern [. . .] Classifications on ID cards are instead a facilitating factor [in engagement in human rights violations], making it more possible for governments, local authorities or non-state actors such as militias to more readily engage in violations based on ethnicity or religion.²⁹²

While Fussell argues that, “ID cards are not a precondition to genocide, but have been a facilitating factor in the commission of genocide,”²⁹³ the pre-genocidal persecutory regimes in National Socialist Germany and pre-1994 Rwanda both show that the national identity cards were used as one of the means to legitimize societal hierarchy based on ethnic perceptions, deprive fundamental rights based on group identity, and to create administrative preparedness for ethnic cleansing and mass extermination. Only after the proscribed legal identity had effectively restricted means of opposition and solidified support for a majority ethnic group were the identity cards able to be used in the commission of genocide. The Trial Chamber of the ICTY previously characterized similar acts as evidence of the specific intent of genocide:

[Specific intent] may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4 [of the ICTY Statute], or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group - acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct . . . this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.²⁹⁴

The societal legitimization and majority group support in both cases may be viewed through the lens of “mirror politics” as initially described by Des Forges and later summarized by the ICTR Chamber in the context of the Rwandan genocide:

To make the economic, social and political conflict look more like an

292. Fussell, *supra* note 71.

293. *Id.*

294. Prosecutor v. Mladic and Karadžić, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-5-R61, ¶ 94-95 (July 11, 1996).

ethnic conflict, the President's entourage, in particular, the army, persistently launched propaganda campaigns which often consisted of fabricating events. Dr. Alison Desforges in her testimony referred to this as “*mirror politics*”, whereby a person accuses others of what he or she does or wants to do. In this regard, in the morning hours of 5 October 1990, the Rwandan army simulated an attack on Kigali and, immediately thereafter, the Government claimed that the city had just been infiltrated by the RPF, with the help of local Tutsi accomplices. Some eight thousand Tutsi and members of the Hutu opposition were arrested the next morning. Several dozens of them died in jail . . . Mirror politics was also used in Kibulira, in the north-west, and in the Bagoguye region. In both cases, the population was goaded on to defend itself against fabricated attacks supposed to have been perpetrated by RPF infiltrators and to attack and kill their Tutsi neighbours.²⁹⁵

The aims of mirror politics were largely disseminated in Rwanda through radio and print media, including in one instance where circulated pamphlets accused Tutsis of planning a Hutu genocide.²⁹⁶ While political propaganda may not reach the specifics of mirror politics in the German genocidal period, the National Socialist Party disseminated numerous propaganda articles depicting Roma and Sinti in the previously constructed stereotypes of “Vagabonds” and encouraged ethnic Germans to “combat the Gypsy plague.”²⁹⁷ Notably, the language used in Nazi propaganda appears to mirror the language used in the discriminatory and persecutory legislative measures, such as the 1938 “Combating the Gypsy Plague Decree.”²⁹⁸ Importantly, Rwandan Tutsi and German Roma and Sinti were already identified through forms of legal identity by the propaganda waves, meaning that both the government and society could differentiate the group identity members from other identities when the governments garnered for societal legitimization and acquiescence in persecution.

Both German and Rwandan identity cards were implemented as a means of ethnic identification rather than a strict traditionalist form of legal identity. The intention to establish a state-created legal identity for the sole purpose of a persecutory State intent is manifest in the federal registration of Roma in Germany in 1933.²⁹⁹ The classification of Roma identity into a subsequent

295. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 99-100 (Sept. 2, 1998) (emphasis added).

296. *Id.* ¶ 100.

297. See *Anti-Roma (Gypsy) Propaganda*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/propaganda/archive/anti-roma-propaganda/> [https://perma.cc/6SGD-GGG4].

298. See e.g. Guenter Lewy, *Himmler and the 'Racially Pure Gypsies,'* 34 J. CONTEMP. HIST. 201, 201-14 (1999) (discussing the 1938 decree within the context of existing stereotypes and the previously enacted Nuremberg Laws of 1935).

299. KENRICK & PUXON, *supra* note 115, at 73 (citing the Fight Against the Gypsy Menace Law (1938), art. I.I. (1) “Experience gained in the fight against the Gypsy menace and the

classification of legal identity may demonstrate the Nazi government's attempt to consolidate the variation of group identity within the Roma.³⁰⁰ While the legislation was centrally based on racist ideology, analysis of Roma persecution across the population may be difficult to deduce, as legal identity markers treated German Roma and Sinti differently based on factors such as itinerancy, tribe, or genealogy. Whereas in Rwanda, the intention of the State and the persecuted identities shifted with the political transitions. Rather than stagnant persecution, the protections and benefits of individual legal identity were predicated on the political – and ethnic – group in power.

There are four significant differences in the “genocidal periods,” the period in which acts of genocide were actively being committed. Firstly, compared to Rwanda, the length of the legal persecution of Roma identity in Germany pre-dates and out-dates the typically understood characterization of the genocidal period. The persecutory fundamental deprivations of rights through the law were done systematically, rather than a singular removal of all state-conferred rights and protections. The methodical deprivation may have been specifically designed to allow the discrimination to exist outside of international attention.

The continued use of legal persecution by the National Socialist government may also be explained through the co-occurrence of a large-scale war, the timely practice of directing and implementing existing discriminatory laws in occupied territories, and the desire to essentially legalize and legitimize their actions. While discriminatory practices in Rwanda were similarly significant in length and existed throughout the political transfer of power and independence, the persecution of Tutsis during the genocidal period appears to have largely occurred through political propaganda and societal influence, rather than through legal regimes. However, the heavy reliance on national identity cards and the practice of local administrative officials registering hiding Tutsi to facilitate attacks,³⁰¹ suggests that administrative mechanisms played a significant role in the facilitation of the genocide.

Second, while both genocides existed outside of widespread international knowledge – and correspondingly outside of an international response – the regional and international approaches to each genocide demonstrate the overwhelming failures of the international community to protect the targeted victim groups from genocide.

As occupied Nazi Germany expanded across Europe, so too did the movement to identify, discriminate, persecute, and execute Roma. As governments fell to Germany, anti-Roma policies were quickly adopted by occupied governments, similar to or in conjunction with the adoption of anti-Semitic policies.³⁰² The continual lack of research in some European countries

knowledge derived from race-biological research have shown that the proper method of attacking the Gypsy problem seems to be treated as a matter of race.”).

300. See FINGS ET AL., *supra* note 100, at 32.

301. DES FORGES, *supra* note 7, at 167.

302. See Mark Biondich, *Persecution of Roma-Sinti in Croatia, 1941-1944*, in ROMA AND

increases the difficulty associated with characterizing the *Porajmos*,³⁰³ however existing research shows that most European countries had prevailing anti-Roma stereotypes or persecution in place as some anti-Roma legislative measures predated German military intervention,³⁰⁴ and mass deportations and killings were sometimes prompted or encouraged by local officials.³⁰⁵ Notwithstanding the similar lack of international intervention, the Tutsi- Rwandan genocide was much more geographically localized and largely connected to foreign attempts to maintain influence from the colonialist and imperialist periods. A report published in 2021 by the French government, demonstrated the close relationship between the French and Rwandan presidents and criticizes the French as bearing “‘serious and overwhelming’ responsibilities” for the genocide.³⁰⁶ Similarly, a 1999 report commissioned by former United Nations Secretary-General Kofi Annan, assessed the United Nations failures towards 1994 Rwanda. Specifically, the report identified that the former U.N. peacekeeping mission in Rwanda had an “insufficient mandate”, the U.N. Security Council failed to strengthen ground

SINTI UNDER-STUDIED VICTIMS OF *NAZISM*, SYMPOSIUM PROCEEDINGS, UNITED STATES HOLOCAUST MEMORIAL MUSEUM: CENTER FOR ADVANCED HOLOCAUST STUDIES 34 (2002) (discussing the adoption of a series of race laws in 1941 Croatia which segregated both Jews and Roma, and the adoption of registration for both Jews and Roma two months later).

303. See generally *id.* at 33 (noting the “general neglect of the Roma within the Western scholarly community.”).

304. See, e.g., Denis Peschanski, *The Gypsies in the Upheaval: The Situation in France, 1939-1946*, in ROMA AND SINTI UNDER-STUDIED VICTIMS OF NAZISM, SYMPOSIUM PROCEEDINGS, UNITED STATES HOLOCAUST MEMORIAL MUSEUM: CENTER FOR ADVANCED HOLOCAUST STUDIES 50 (2002) (describing the influence of a 1912 French law which required identification of “Nomads” based on the stereotypes of the “spy-Gypsy” and the “thief-Gypsy,” which were later raised in 1940 prior to German invasion and forbade internal movement); see Giovanna Boursier, *The Nazi Period in Italy*, PROJECT EDUCATION OF ROMA CHILDREN IN EUROPE: COUNCIL OF EUROPE, <https://rm.coe.int/the-nazi-period-in-italy-factsheets-on-romani-history/16808b1ac5> [<https://perma.cc/D97X-JF9R>] (describing a 1926 Italian circular ordering the expulsion of “foreign Gypsies” in order to “cleanse the country of Gypsy caravans which, needless to recall, constitute a risk to safety and public health by virtue of the characteristic Gypsy lifestyle”).

305. See also Peschanski, *supra* note 304, at 51-52 (describing that the “French authorities did not shrink from playing an active role in the decision to intern Gypsies . . . [i]n some cases, these French police officials took advantage of the situation to indulge personal animosities, going further than the German dictates, and rounding up vagrants and other unwelcome groups.”). See Michael Zimmerman, *The Nazi Period in the Baltic States*, PROJECT EDUCATION OF ROMA CHILDREN IN EUROPE: COUNCIL OF EUROPE 3, <https://rm.coe.int/the-nazi-period-in-the-baltic-states-factsheets-on-romani-history/16808b1c1e> [<https://perma.cc/5GXS-LP4K>] (describing a circular by a 1941 Latvian official declaring agreement with mass killings of Roma which resulted in the Baltic state with the largest Roma population having “nomadic and settled Roma . . . handed over for shooting to the [German] Security Police.”).

306. Norimitsue Onishi, *France Has ‘Overwhelming’ Responsibility for Rwanda Genocide, Report Says*, N.Y. TIMES (March 26, 2021), <https://www.nytimes.com/2021/03/26/world/europe/france-rwanda-genocide.html> [<https://perma.cc/9DV3-CZHV>].

support following earlier warnings of genocide, and the Security Council failed to act once killing had started.³⁰⁷

Third, one area of discrimination in legal identity which is largely missing from Rwanda is the legal prohibition of inter-group marriage. The Law for the Protection of German Blood prohibited all non-Aryan and Aryan marriages,³⁰⁸ and while the Hutu Manifesto proposed the prohibition of marriage,³⁰⁹ the practice of inter-group marriage was already so ingrained as a societal practice that the proposal did not garner any legitimacy. Despite inter-group marriage between Hutu and Tutsi, there are no “hybrids,” or “Hutsi.”³¹⁰ As Mamdani explained

[w]hen cohabitation takes the form of marriage, the wife takes on the identity of the husband. The social identity is passed on through patrilineal descent. If the father is a Tutsi, then the child will be socially identified as Tutsi; and if the father is a Hutu, the child will be identified as Hutu. As the child takes on a unidimensional identity, that of the father, the identity of the mother- whether Hutu or Tutsi- is systematically erased.³¹¹

Notably, while there was not a prohibition of marriage in Rwanda, the prevalence of inter-group marriage did not influence the genocidal intent to target Tutsi, and there were examples of pregnant Hutu women being targeted during the genocide because of their unborn child being fathered by a Tutsi.³¹²

Fourth, there is a significant variation in the collective number of victim identities between the two genocides. In Germany, the total victims of persecution included groups such as political opponents, Jehovah’s Witnesses, homosexuals, Jews, Roma, Black people, Poles, and Slavs.³¹³ The variation in victim identity can also be rationalized by the existence of a pluralistic German society following unification in 1871. In Germany, despite a large majority of ethnic “Aryans,” the unification amassed a population containing numerous ethnic minorities.³¹⁴

However, in viewing identity in Rwanda through either cultural or social classification, Rwandan society was arguably composed of only two, at most

307. Nicole Winfield, *UN Failed Rwanda*, A.P. (Dec. 16, 1999), <https://archive.globalpolicy.org/component/content/article/201-rwanda/39240.html> [<https://perma.cc/L3EJ-9QWM>].

308. KENRICK & PUXON, *supra* note 115, at 71. Roma were also targeted with mass sterilization to prevent births within the group; see FINGS ET AL., *supra* note 100, at 91-94.

309. Hurst, *supra* note 202.

310. MAMDANI, *supra* note 69, at 53.

311. *Id.*

312. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 121 (Sept. 2, 1998).

313. United States Holocaust Memorial Museum, *Classification System in Nazi Concentration Camps*, <https://encyclopedia.ushmm.org/content/en/article/classification-system-in-nazi-concentration-camps> [<https://perma.cc/TF4Y-ZYCJ>].

314. See U.S. State Dep’t., *supra* note 97.

three, groups. Thus, the mentality of perpetrators in Rwanda differed from that in Nazi Germany in only targeting one ethnic group as Rwanda was largely a dualistic rather than pluralistic society. Additionally, while some scholars have vigorously attempted to gather the documents of both genocidal periods, there appears to be considerably more records of primary sources from the Holocaust, even with a large portion of Nazi records being intentionally destroyed. This gap may be explainable through the complex system of administrative systems that different regimes in the Rwandan government implemented following independence, or the concerted German effort to document and implement their genocidal policies across conquered land throughout World War II.

C. Comparison of Legal Identity Post-Genocide

While comparison of post-genocidal legal identity may lead to greater similarities due to similar mechanisms of transitional justice,³¹⁵ the creation and implementation of these structures are arguably distinct in each State. The influence of internal state actors was essential in determining the direction of post-genocidal justice; the rebuilding of which is similar in theory to the concept of “post-conflict reconstruction”³¹⁶ and “reconciliation.”³¹⁷

While ethnic politicization was a forefront in both government systems, Rwanda’s positioning of two competing political manifestations was, and arguably still is, distinct. As the successive regime in Rwanda, the Tutsi-led Rwandan Patriotic Front was able to construct the entire State narrative of the genocide in legislation, affecting the legal identity of victims, the corresponding rights and protections of a victim, education of the genocide, memorialization, criminalization, and punishment of a constructed perpetrator identity. The State narrative was a codification of both the legal and victim identity of Tutsis, and the legal and perpetrator identity of Hutus.

Additionally, it is important to note that the end of the recognized genocidal period did not end persecution based on a state-created legal identity in either

315. For a definition of transitional justice, see Ruti Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J., 69 (2003) (“the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”).

316. Compare WORLD BANK, POST-CONFLICT RECONSTRUCTION: THE ROLE OF THE WORLD BANK 14 (1998) (defining post-conflict reconstruction as, “the rebuilding of the socioeconomic framework of society; reconstruction of the enabling conditions for a functioning peacetime society [to include] the framework of governance and the rule of law.”) with John J. Hamre & Gordon R. Sullivan, *Toward Postconflict Reconstruction*, 25 WASH. Q. 85, 89 (2002) (“[P]ost-conflict reconstruction should include providing and enhancing not only social and economic well-being and governance and rule of law but also other elements of justice and reconciliation and, very centrally, security.”).

317. Clark & Kaufman, *supra* note 239, at 3 (defining reconciliation as, “rebuilding fractured individual and communal relationships after conflict, with a view to encouraging cooperation among former antagonists.”).

State. The RPF persecuted Hutu moderates and refugees for months following the genocide, as well as contributing to ethnic violence in bordering states.³¹⁸ The RPF's acts were even argued by many to be crimes against humanity and were largely ignored by the international community, despite the effect of regional weakness and large-scale violence.³¹⁹ Despite a regime shift and government reorganization in Germany, the Roma were persecuted by the same State officials and through the same laws as during the genocidal period.³²⁰ The persecution against the Roma was rooted in the same racist and xenophobic rationales proscribed by the Nazi government and was also largely ignored by the international community.

Due to the similar emergence of new post-conflict legal regimes, scholars have previously compared the current Rwandan and German constitutions in numerous provisional aspects, such as through the paradigms of free speech and the right to association.³²¹ Comparison is also relevant on the different approaches the two legal regimes have enacted for the explicit protection of the previously persecuted groups, the frameworks for the prevention of discrimination based on ethnic identity, and the current construction of previously exploited mechanisms of legal identity.

The federal German government recognizes and protects German Roma and Sinti as a national minority through the groups' fulfillment of the criterion of being German nationals, having a minority language and culture, the traditional residence of the group being in Germany, and the current residence of the group in settlement areas.³²² The Rwandan government has stated that there is only one ethnic group in Rwanda, and that ethnic groups require different "languages, culture, history, and territory."³²³ The approach of the Rwandan government conflicts with the approach of utilizing both subjective and objective lenses to determine group identity, and denies the Twa minority benefits and protections which they may be entitled to under international law. Additionally, the approach conflicts with the principle of self-identification³²⁴ and contrasts the criterion

318. Sec. Council, Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935, ¶¶ 79-81, U.N. Doc. S/1994/1125 (1994).

319. *Id.*

320. *The Search for the Nazi Race Files, European Holocaust Memorial Day For Sinti and Roma*, <https://www.roma-sinti-holocaust-memorial-day.eu/recognition/the-search-for-the-nazi-race-files/> [<https://perma.cc/5Z9U-SVF3>].

321. For a comparison of the two constitutions in the areas of speech and association and laws addressing social stability in the post-genocide context, see Zachary Pall, *Light Shining Darkly: Comparing Post-Conflict Constitutional Structures Concerning Speech and Association in Germany and Rwanda*, 42 COLUM. HUM. RTS. L. REV. 5 (2010).

322. *Minorities, Federal Ministry of the Interior, Building and Community supra* note 175.

323. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶¶ 12, CERD/C/RWA/CO/13-17 (2010).

324. See Report on Minority Issues, *supra* note 201, ¶¶ 12-14 (discussing the right to identity as belonging to an ethnic, religious, or linguistic group as being well-established in international

proposed by the German Ministry. Through denying the right to self-identification and denying the existence of ethnic groups in Rwanda, the State is not only attempting to ascribe one legal identity but is also challenging individualized and group identity. Though there is sufficient evidence that the original distinctions of Hutu and Tutsi were State-created, the erasure of the entire history of individualized identity is most likely hostile to the goals of reconciliation in the post-genocide period.³²⁵

Both Rwanda and Germany still implement identity cards as a mechanism for legal identity. While neither law appears to require information on identity of an ethnic group,³²⁶ Germany's legislation does require the registration of legal membership of a religious group.³²⁷ Also absent from both States is an indication of a monitoring mechanism or anti-discriminatory framework specifically for civil registration and legal identity mechanisms. Germany does have an anti-discrimination legislative framework which encompasses many of the previous benefits and protections previously oppressed, but there does not appear to be any indication of a preventative or monitoring mechanism,³²⁸ nor does Rwanda appear to have a comparable mechanism. The absence of an anti-discriminatory monitoring mechanism limits the ability of the individual states and the international community to recognize future trends in discriminatory and persecutory legal measures, especially those related to legal identity.

There is a significant concern in societal education and acknowledgment of both post-genocide societies. The difference in education encompasses education in schools and academic interpretations. The prevalence of historians to classify Nazi legislation which applied to all "non-Aryans" as solely "anti-Semitic" may be dangerous in providing full recognition and treatment of victims. By implying that "non-Aryan" solely meant "non-Jewish," historians are systematically erasing all other identities in claim for victim identity and for societal acceptance and recognition of a victim identity. The Special Rapporteur on Minority Issues specifically noted a concern for the limited global awareness of Roma persecution during the Holocaust and highlighted throughout the report the continued vulnerability of the group from State actors, including forced sterilization, arbitrary detainment due to identity, and violent attacks.³²⁹ The implementation of a Holocaust victim identity which acknowledges German Roma and Sinti could significantly impact German and European understanding of the Roma population.

Education of the genocide in Rwanda is strictly proscribed through the

law).

325. See generally Clark & Kaufman, *supra* note 239, at 3.

326. Compare Governing Registration of the Population and Issuance of the National Identity Card Law (Rwanda), *supra* note 262, with Federal Act on Registration, *supra* note 188.

327. Federal Act on Registration, *supra* note 188, at sec. 3(11).

328. See generally The Guide to the General Equal Treatment, *supra* note 180.

329. Report of the Special Rapporteur on Minority Issues, Comprehensive Study of the Human Rights Situation of Roma Worldwide, with a Particular Focus on the Phenomenon of anti-Gypsyism, ¶¶ 19-22, U.N. Doc. A/HRC/29/24 (2015).

government and classroom discussion of the genocide is effectively censored through the genocide ideology laws, any mention of the moderate Hutu victims would be sufficient for a criminal conviction.³³⁰ The textbooks have been rewritten to change the previous education based on “highlighting how to physically distinguish between Hutus and Tutsis,” but the changes were made to describe “a factually incorrect “pre-colonial golden age” in which there were no conflicts between Hutu and Tutsi.”³³¹ The education of the previous identity crises which escalated to acts of genocide should be essential for Rwandan students who “are being taught that they need to say they are ethnically blind, their lived reality is that ethnicity still structures access to power and sometimes still structures their daily life.”³³²

V. ADDRESSING LEGAL IDENTITY IN FUTURE POLICY: INTERVENTION AND THE ABSENCE OF FORCE

A. Responsibility to Prevent

The importance of an effective preventative regime in international law is best characterized by Justice Jackson in his closing argument at the Nuremberg Trials, “[i]f we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to say that this twentieth century may yet succeed in bringing the doom of civilization.”³³³ In post-genocidal periods, international leaders often acknowledge the lack of a timely international response through thinly-veiled apologies to victims and condemnation of non-intervention.³³⁴ While arguably existing as competing

330. *Rwandan Schools Face Tricky Task Teaching Genocide History*, NEWS24, (July 28, 2017), <https://www.news24.com/news24/Africa/News/rwanda-schools-face-tricky-task-teaching-genocide-history-20170728> [<https://perma.cc/LM2S-F3A3>].

331. *Id.*

332. *Id.*

333. Robert H. Jackson, *Closing Arguments for Conviction of Nazi War Criminals*, 20 TEMPLE L. Q. 85 (1946), https://www.roberthjackson.org/wp-content/uploads/2015/01/Closing_Argument_for_Conviction_of_Nazi_War_Criminals.pdf [<https://perma.cc/5WV6-LAG7>].

334. See *President Clinton's Speech in Kigali*, CBS NEWS (Mar. 25, 1998, 3:44 PM), <https://www.cbsnews.com/news/text-of-clintons-rwanda-speech/> [<https://perma.cc/PC5Z-F4L6>] (“The international community, together with nations in Africa, must bear its share of responsibility for this tragedy, as well. We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe havens for the killers. We did not immediately call these crimes by their rightful name: genocide. We cannot change the past”); see U.N. Security-General Kofi Annan addressing the Parliament of Rwanda, SG/SM/6552 (May 6, 1998) (“ . . . The world must deeply repent this failure. Rwanda’s tragedy was the world’s tragedy. All of us who cared about Rwanda, all of us who witnessed its suffering, fervently wish that we could have prevented the genocide. Looking back now, we see the signs which then were not recognized. Now we know that what we did was not nearly enough We will not deny that, in their greatest hour

ideas, the norms of non-intervention³³⁵ and the obligation to prevent genocide³³⁶ are rarely, if not absolutely, implemented evenly. The obligation to protect populations from genocide is conveyed as a primary responsibility to the international community.³³⁷ As specified in the 2005 World Summit Outcome, the responsibility includes the commitment to assist other States “build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and assist those “under stress before crises and conflicts break out.”³³⁸

However, under its current development the responsibility remains theory-based and presents a challenge to accountability. The most significant actions completed under the current theory include thematic U.N. Resolutions,³³⁹ reports by Special Advisers,³⁴⁰ and a Framework of Analysis for Atrocity Crimes.³⁴¹ Additionally, some states have adopted national legislation which incorporates a national obligation to prevent genocide.³⁴² However, there are stark criticisms

of need, the world failed the people of Rwanda.”).

335. For codification of the norm of non-intervention and the principle of state sovereignty, see U.N. Charter art. 2.

336. The obligation to prevent genocide is ratified through the Genocide Convention. The obligation under Article 1 has become a norm of customary law: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” However, further recognition of preventative acts is recognized in the Genocide Convention through Article VIII, “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.”

337. U.N. Sec. Council, Implementing the Responsibility to Protect: Accountability for Prevention, ¶ 2, A/71/1016-S/2017/556 (2017).

338. G.A. Res. 60/1, 2005 World Summit Outcome ¶ 139 (Sept. 20, 2005) (describing the responsibility to use appropriate diplomatic, humanitarian and other peaceful means).

339. *See e.g.*, S.C. Res. 1366 (2001); S.C. Res. 2150 (2014); Human Rights Council Res. 28/34, U.N. Doc. A/HRC/Res/28/34 (Apr. 7, 2015), G.A. Res. 69/323, International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of This Crime, Human Rights Council Res. 33/19, U.N. Doc. A/HRC/Res/33/19 (Oct. 5, 2016), Human Rights Council Res. 37/26, U.N. Doc. A/RC/Res/37/26 (Apr. 6, 2018), Human Rights Council Res. 43/29, U.N. Doc. A/HRC/Res/43/29 (June 29, 2020).

340. *See, e.g.*, Rep. of the S.C. on the Prevention of Genocide, U.N. Doc. A/HRC/41/24 (2019), Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees On Non-Recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide, Joint Study on the Contribution of Transitional Justice to the Prevention of Gross Violations and Abuses of Human Rights and Serious Violations of International Humanitarian Law, Including Genocide, War Crimes, Ethnic Cleansing and Crimes against Humanity, and their Recurrence, U.N. Doc. A/HRC/37/65.

341. *See* U.N. FRAMEWORK OF ANALYSIS FOR ATROCITY CRIMES, A TOOL FOR PREVENTION (2014).

342. *See* Elie Wiesel, Genocide and Atrocities Prevention Act of 2018, Public Law No: 115-

of these legislative measures and advocates argue that politicians ignore attempted civic engagement, do not properly publicize prioritized risks allowing for civil participation, and that accomplishments so far only benefit political willpower and popular criticism rather than active engagement.³⁴³

A premier scholar on atrocity crimes, David Scheffer, originally called for categorizing international crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity as *atrocity crimes* to promote accuracy and simplify communication.³⁴⁴ Scheffer both characterizes the responsibility to protect as a dual principle incorporating prevention and response, as well as cautions triggering the responsibility to account for deference to the principle of substantiality, especially when calling for states to take extreme measures for genocide.³⁴⁵ There are slightly competing approaches to the theory of the obligation to prevent “atrocity crimes.” The obligation in international law exists as an individual State obligation. However, former U.N. Secretary-General Ban Ki-moon referred to a “collective obligation.”³⁴⁶ The characterization of the prevention of genocide as a collective obligation may be more aligned with the findings of the International Court of Justice, which stated the Contracting Parties’ obligation to prevent genocide *within Article I* of the Genocide Convention created a direct obligation to prevent genocide, “over and above those imposed by other Articles of the Convention,”³⁴⁷ and which is not territorially limited.³⁴⁸

In the 2017 Report of the Secretary-General on Implementing the Responsibility to Protect: Accountability for Prevention, it was noted that in approaching implementation, “precision is needed on who is responsible for the prevention of atrocity crimes,” and through this precision an agenda for

441 (2019) (directing “the U.S. Department of State to provide additional training for Foreign Service Officers assigned to a country experiencing or at risk of mass atrocities, such as genocide or war crimes. The training shall include instruction on recognizing patterns of escalation and early signs of potential atrocities, and methods of preventing and responding to atrocities.”).

343. Daren Caughron, *Advocates for Peace Disappointed with State Department Report on Atrocities Prevention*, FRIENDS COMMITTEE ON NATIONAL LEGISLATION (Aug. 12, 2020), <https://www.fcnl.org/updates/2020-08/advocates-peace-disappointed-state-department-report-atrocities-prevention> [<https://perma.cc/WBB8-CNJN>].

344. David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. INT’L L. 111, 111 (2007).

345. *Id.* at 121.

346. *Learning from Rwandan Genocide Only Way To Shape A Better Future*, U.N. REG’L INFO. CTR. FOR W. EUR. (Apr. 12, 2012, 11:44 AM), <https://archive.unric.org/en/latest-un-buzz/27483-learning-from-rwandan-genocide-only-way-to-shape-a-better-future> [<https://perma.cc/3HDJ-BXS5>].

347. Application of the Convention On the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgement, 2007 I.C.J. 47 ¶ 165 (Feb. 26).

348. *Id.* at ¶ 153-54.

individual and collective action may be deduced.³⁴⁹ Arguably, precision is needed, in essence, because there is no norm of enforcement of an active collective obligation, and there is no associated norm of acting on the findings of early-warning mechanisms. In constructing warning mechanisms under a collective obligation, rather than an individual and non-enforceable individual obligation, the international community would have an opportunity to fulfill both the commitments to assist States and assist before conflicts are so large-scale as to require military intervention.

A monitoring mechanism centered around the principle of early warning should be entrusted with monitoring the legal identity of at-risk groups, monitoring civil registration and legal identity mechanisms, and constructing a universal legal identity that omits the classification of individuals into state-created groups. As characterized by Scheffer and echoed in reports by national governments,³⁵⁰ policymakers are hesitant to call early attention to “genocide.”³⁵¹ Scheffer argues that by acknowledging precursors to genocide and other international crimes as “atrocities,” thereby avoiding the political upheaval associated with the word genocide, States would be more likely to promote earlier policymaking and intervention.³⁵² While early warning is a key task of the United Nations Office on Genocide Prevention and the Responsibility to Protect, there are essential factors absent from its current structure: (1) the existing frameworks do not fully incorporate risk factors involving the manipulation and exploitation of group legal identity, and (2) there is a lack of publication and informing of the global community.

The current mechanisms primarily operate under the Framework of Analysis for Atrocity Crimes. The framework includes common risk factors of all atrocity crimes,³⁵³ and specific risk factors for genocide.³⁵⁴ The current risk factors do

349. U.N. Secretary-General, *Implementing the Responsibility to Protect: Accountability for Prevent*, ¶ 9 U.N. Doc. A/71/1016-S/2017/556 (Aug. 10, 2017).

350. See Advisory Committee on Issues of Public International Law and External Advisor on Public International Law, Joint Advisory Report: Advisory Report on the Scope for and the Significance and Desirability of the Use of the Term ‘Genocide’ by Politicians, CAVV Advisory Report No 28/EVA Advisory Report (Mar. 3, 2017) (Nethl.), <https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2017/03/03/the-use-of-the-term-genocide-by-politicians> [<https://perma.cc/3YPS-9ESQ>].

351. David Scheffer, *Arresting War Criminals: Mission Creep or Mission Impossible?*, 32 CASE W. RES. J. INT’L L. 319, 319-24 (2003).

352. *Id.*

353. *Framework of Analysis for Atrocity Crimes*, U.N.v. (2014), https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf [<https://perma.cc/H5H3-TZQF>] (listing common risk factors: “(1) Situations of armed conflict or other forms of instability; (2) Record of serious violations of international human rights and humanitarian law; (3) Weakness of State structures; (4) Motives or incentives; (5) Capacity to commit atrocity crimes; (6) Absence of mitigating factors; (7) Enabling circumstances or preparatory action; (8) Triggering factors.”).

354. *Id.* at 9 (listing specific risk factors: “(9) Intergroup tensions or patterns of discrimination

incorporate indicators such as lack of protection in national legal frameworks,³⁵⁵ ideologies and politicization of past grievances,³⁵⁶ and increased politicization of identity³⁵⁷ that all would have contributed to early indications to genocide in Rwanda and Germany. But the Framework does not incorporate indicators explicit to legal identity, such as increased oppression or elimination of state-conferred rights or protections or re-configuration of legal identities based on a politicized or ethnically motivated individualized identity basis.³⁵⁸ All of these factors likely would have indicated an early warning of the genocides in Rwanda and Germany.

Publication of early warning signs is also a necessary factor in inspiring active engagement, post-conflict analysis, deterrence, and international pressure. Currently, the majority of the work of the U.N. Office on Genocide Prevention and the Responsibility to Protect exists “outside of the public domain.”³⁵⁹ While some work and diplomacy must operate behind closed doors, by limiting the information available to the international community, actors are allowing for passive responses. International leaders are elected through their country’s population, and it is often at the will of this population that leaders choose to act. By limiting the information of the global community, there is less accountability for early action through diplomatic or economic measures. Further, the longer the ignorance of the international community, the longer the mass atrocity or genocide is allowed to engulf a population group. The result of which begins the cycle of apologies, reconciliation, and a difficult individualized and group healing.

In upholding the obligation to prevent genocide, and in furtherance of the idea that genocides are often planned and organized, existing mechanisms of legal identity and civil registration must incorporate adequate protections. While acknowledging the argument that identification can act as a source of empowerment, legal identity mechanisms are often easily susceptible to discriminatory policies and create effective tools to identity and persecute group members. The examples of Germany and Rwanda demonstrate that legal identity even after genocide can continue to be manipulated as tools, either by continuing

against protected groups; (10) Signs of an intent to destroy in whole or in part a protected group.”).

355. *Id.* at 12 (discussing indicators to Risk Factor 3, Weakness of State Structures).

356. *Id.* at 13 (discussing indicators to Risk Factor 4, Motives or Incentives).

357. *Id.* at 16 (discussing indicators to Risk Factor 7, Enabling Circumstances or Preparatory Action).

358. *Id.* at 18. The risk factor and indicators involved in identity are primarily discussed within the context of direct acts of discrimination. For example, “Denial of the existence of protected groups or of recognition of elements of their identity.” However, this context does not allow for recognition of when States are responsible for ascribing a formal legal identity based on misperceptions or stereotypes of the group.

359. *Early Warning*, U.N. Off. on Genocide Prevention and the Resp. to Protect <https://www.un.org/en/genocideprevention/early-warning.shtml> [https://perma.cc/EG7D-5YLT].

discrimination through existing mechanisms or by eliminating all claims and connections to an ethnic identity which creates internal, individualized struggles of identity and external, legal struggles of recognition. This conclusion, however, does not mean that mechanisms for legal identity should not exist. Any mechanism has the potential for exploitation, but effective countering structures will not be introduced and mainstreamed unless first accepted as a potential issue.

The United Nations Statistics Division (UNSD) is responsible for developing norms in statistical activities and supporting individual country efforts to strengthen national statistical mechanisms.³⁶⁰ The UNSD is also one of the U.N. subsidiary mechanisms that contributes to the U.N. Legal Identity Expert Group, an inter-agency group with the goal of building legal identity systems founded on civil registration through a human rights approach.³⁶¹ However, out of the numerous publications, letters, and guidelines, there appear to be no practical recommendations on oversight or regulation to prevent civil registration or legal identity from being exploited as tools for discriminatory laws or policies. For example, the discussion of the protection of vulnerable populations in the Draft Guidelines on the Legislative Framework for Civil Registration, Vital Statistics and Identity Management is limited to a discussion of ensuring protection and access to vulnerable populations and the responsibility of States to ensure confidentiality to prevent misuse.³⁶² While the right to be recognized under the law (through mechanisms of identity documents) is a protected right under international law, the discussion of the frameworks and mechanisms should not stop after the initial establishment of a legal identity. Rather, legal frameworks should expand to enforce the responsibility to prevent genocide and atrocity crimes by incorporating norms of oversight and monitoring, thereby recharacterizing the efficacy of early intervention.

VI. CONCLUSION

The terms “legal” and “identity” may be at odds in the divergence between the “what” and the “who.”³⁶³ Moreover, identity may be “in principle [. . .] an

360. *About Us*, U.N. STAT. DIV., <https://unstats.un.org/home/about/> [<https://perma.cc/PEY4-JLJ6>].

361. *UN Legal Identity Task Force (UN LIA TF)*, U.N. LEGAL IDENTITY AGENDA, <https://unstats.un.org/legal-identity-agenda/> [<https://perma.cc/6AKE-FF5S>].

362. U.N. Stat. Div. & Vital Strategies, *Guidelines on the Legislative Framework for Civil Registration, Vital Statistics and Identity Management*, ¶ 153-164 (2019), https://unstats.un.org/unsd/demographic-social/Standards-and-Methods/files/Handbooks/crvs/CRVS_GOLF_Final_Draft-E.pdf [<https://perma.cc/S5BS-UW5J>] (discussing fundamental human rights in protection against racial discrimination, gender discrimination, children born out of wedlock, religious discrimination, intersex and transgender individuals, discrimination against persons with disabilities, indigenous and tribal persons, elimination of statelessness, refugees, and internally displaced persons).

363. Jessica Clarke, *supra* note 4, at 42-43 (describing the “what” as an impersonal legal category and the “who” as the subjective and cultural aspect of identification).

individual's self-awareness."³⁶⁴ Despite the obscure dimensions of identity and the co-existing, perhaps irreconcilable, multi-disciplinary approaches, legal identity is the establishment of a vital relationship with the State and provides for essential forms of protection, entitlement, and enforcement of benefits. Moreover, the oppression, restriction, or elimination of a legal identity in furtherance of persecution may facilitate an environment in which State-classified groups are at risk for widespread violence, ethnic cleansing, or genocide.

It is necessary for future literature to consider the interactions and dimensions of ethnic identity, identity politics, and legal identity through the multi-faceted lens of law, history, sociology, and anthropology to revisit the age-old question of how individuals and States identify and regulate societies. In the literature surrounding transitional justice in Rwanda, Clark and Kaufman addressed a gap in holistic multi-disciplinary approaches.³⁶⁵ Their proposal saw the legal paradigm as a hindrance to an approach that addressed the physical, psychological, and psycho-social needs of groups post-conflict.³⁶⁶ However, in adopting a truly holistic approach, legal paradigms must be acknowledged as both the institutional blocks for identity-based discrimination and persecution and as a hinderance to future advancement if not incorporated into a post-conflict approach.

The phrase "never again" has become predominantly associated with the post-genocidal phase of domestic and international memorialization of a failure to prevent, and an apology to try harder next time. The hope of the international community is for a solution, not a broad and unenforceable commitment or an arguably limited prosecutorial mechanism after the genocide.³⁶⁷ The hope of this discussion on identifying precursors or contributory factors to genocide, therefore, is best aligned with that of Fussell, whose hope for future scholarship was that "'never again' can become a motivation not only for commemorating victims or punishing the perpetrators of past genocide, but also a basis for rejecting and condemning policies that make genocide more likely."³⁶⁸

364. *Handbook on Civil Registration*, *supra* note 82, ¶ 451.

365. Clark & Kaufman, *supra* note 239, at 1 (discussing the absence of holistic, multi-disciplinary literature on Rwanda and the genocide; "Holistic approaches explore responses to the physical, psychological and psycho-social needs of individuals and groups during and after conflict, reflecting the intricacies of the situations they seek to address. Often standing in the way of holistic analyses, the legal paradigm has become dominant in the study of conflict and post-conflict societies, proffering procedural, academic and institutional "remedies" that too often fail to recognize other important perspectives. Legal processes have their place as responses to mass violence, but they reflect only one among many means of addressing atrocities.").

366. Clark & Kaufman, *supra* note 239, at 1.

367. Melvern, *supra* note 222, at 31 n.40 (discussing that the initial list of suspected core group genocidaires in Rwanda was close to 240 individuals, and that the majority of these individuals had not yet been investigated by the ICTR and no effort had been made to extradite the individuals from the Western countries where they were residing at the time).

368. Fussell, *supra* note 71.