UNIVERSITY OF KWAZULU-NATAL

COLLEGE OF LAW AND MANAGEMENT STUDIES

SCHOOL OF LAW

The Crime of Genocide under International and South African Law: A Critical Race Perspective

Celesté Jadine Moodley

215034177

This research proposal is submitted in partial fulfilment of the requirements for the degree of Master of Laws in Advanced Criminal Justice

Supervisor: Mr. C Gevers

2019

DECLARATION

I, Celesté Jadine Moodley declare that:

A. The research reported in this dissertation, except where otherwise indicated, is my original research.
B. This dissertation has not been submitted for any degree or examination at any other university.
C. This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
D. This research does not contain other person's writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted then:
E. Their words have been re-written, but the general information attributed to them has been referenced;
F. Where their exact words have been used, their writing has been placed inside quotation marks, and referenced.
G. Where I have produced a publication of which I am an author, co-author or editor, I have indicated in detail which part of the publication was written by myself alone and have fully referenced such publications.
H. This dissertation does not contain any text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the sources being detailed in the dissertation and in the References section.

Signed: 

Date: 29 July 2020

ACKNOWLEDGEMENTS

I would like to render my heartfelt gratitude to all those who assisted me in the completion of this dissertation, especially:

My Lord and Savior, Jesus Christ, without whom none of my endeavors would be possible. “I can do all things through Christ who strengthens me” (Philippians 4:13).

My supervisor, Christopher Gevers, for his unparalleled wisdom and his guidance and patience throughout this journey. You have truly inspired me and made me believe in capabilities. I will forever be grateful.

My incredible family, Roy, Dianna and Jordache Moodley, for their endless support, love, and inspiration. Everything I am, or ever hope to be, is because of your unconditional love and sacrifice. No amount of words can truly express my gratitude to you.

My partner, Suhail Essop, and my best friend, Netania Padayachee, for being my pillars of strength and for their incredible patience and support throughout this amazing venture.

ABSTRACT

The racial politics of international criminal law has been the subject of controversy for a considerable amount of time. The conceptualization of "race" in the crime of genocide has, in particular, been persistently problematic. Apart from having avoided interpreting "race" in the crime of genocide altogether in some instances, international tribunals and authors have developed inconsistent and ambiguous methods of interpretations for genocidal acts committed against a racial group. As a result, international criminal law has produced interpretations of "race" in the crime of genocide that have fallen short of the strict rules of legal interpretation. Further, such interpretations have been inconsistent with both the very specific historical production of "race" and "racism" and the very specific way in which racial hegemony continues to shape contemporary law and society. In light of this, this study proposes an alternative theorisation of "race" for the crime of genocide using a Critical Race Theory perspective. Complementary to this endeavor, this study particularly considers South Africa's unique race discourse and its possible implications for the interpretation of genocidal acts committed against a racial group in South Africa.

TABLE OF CONTENTS

PART I

INTRODUCTION

1.1. Background

Following the horrors of the Second World War and the atrocities of the Holocaust, the international community resolved to criminalize acts of genocide under international law.[1] The resultant Convention on the Prevention and Punishment of the Crime of Genocide[2] (hereinafter the Convention or the Genocide Convention)[3] seeks to protect four specific groups from intentional physical destruction, namely: national, ethnical, racial and religious groups.[4] Article II of the Convention reads: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (…)."[5] This definition of genocide has been identically reproduced in Article 6 of the Rome Statute of the International Criminal Court (hereinafter the Rome Statute). [6]

Since its implementation, several states have ratified the Genocide Convention and domesticated the crime of genocide under their national criminal laws.[7] For its part, South Africa ratified the Genocide Convention in 1998, thereby creating an international legal obligation on the state to prosecute or extradite alleged perpetrators of genocide.[8] What is more is that South Africa is under a primary obligation to domestically prosecute the crime of genocide, pursuant to its domestic incorporation of the Rome Statute, via the Rome Statute Act, in 2002.[9] It is worth noting that the

---

[1] D L Nersessian 'The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention' (2003) 36 *Cornell International Law Journal* 294.

[2] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951), adopted by G.A. Res. 260(Ill)(A), U.N. GAOR, 3d Sess., pt. 1, at 174, U.N. Doc. A/810 (1948).

[3] The final version of the Convention was unanimously agreed upon in the General Assembly on December 9, 1948 and came into effect in January 1951.

[4] Genocide Convention, supra note 2, article II.

[5] Ibid.

[6] See also article 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and article 4 of the Statute of the International Criminal Tribunal for Rwanda.

[7] Nersessian (note 1 above; 294).

[8] H J Van der Merwe 'The Prosecution of Incitement to Genocide in South Africa' (2013) 16(5) *PER/PELJ* 340/614; Also included is an obligation to prosecute or extradite perpetrators of direct and public incitement to commit genocide. Ibid.

[9] C Gevers 'International Criminal Law in South Africa' in E de Wet, H Hestermeyer & R Wolfrum (ed) *The Implementation of International Law in Germany and South Africa* (2015) 415. This obligation to prosecute international crimes is not, however, mandatory. Our courts can decline or be unable to prosecute international crimes.

definition of genocide as per the Rome Statute (which replicates that contained in the Genocide Convention) has also been directly incorporated into our domestic law through the Rome Statute Act.[10]

A notable feature of the common genocide provision is its failure to accord substantive definitions to the four protected groups.[11] As explained further in part II, numerous complications have arisen on account of this silence, particularly insofar as determining who falls within the ambit of these national, ethnical, racial or religious groups.[12] International criminal tribunals have generally sought to establish group membership by applying either: (1) an objective approach (where the group's existence is dependent upon whether it is a "stable and permanent" fact); (2) a subjective approach (where the existence of the group is dependent upon the perception of the perpetrator as such or on the extent of self-identification by the members themselves); or (3) a mixed approach (where a perpetrator's subjective construction of a protected group is coupled with a baseline criterion of objectivity). While international tribunals traditionally followed an objective approach, some scholars have noted a "quiet shift" in more current international jurisprudence towards using the subjective approach.[13] On the whole, however, the approaches taken by international tribunals have been fraught with inconsistency and ambiguity.[14]

The interpretation of genocidal acts committed against a racial group has been particularly problematic. Since the "appearance" of "race" in the international criminal law arena, the international legal community has either evaded defining "racial groups" altogether or has silenced

---

L Chenwi & S Franziska 'South Africa's Competing Obligations in Relation to International Crimes' (2015) 7 *Constitutional Court Review* 215.

[10] Gevers (note 10 above; 416). Additionally, section 232 of the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter the 1996 Constitution) allows for the crime of genocide to be prosecuted via direct application of customary international law. See Gevers (note 10 above; 425) in this regard.

[11] C Lingaas 'Defining the Protected Groups of Genocide through the Case Law of International Courts' 2015 *ICD Brief 18* at 2.

[12] See for instance W A Schabas 'Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunals for Rwanda' (2000) 6 *ILSA Journal of International & Comparative Law* and G Verdirame 'The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals' (2000) 49 *International and Comparative Law Quarterly* who discuss some of the interpretive complications that have arisen regarding the protected groups under the Genocide Convention.

[13] Verdirame (note 12 above; 592 & 594); C Lingaas 'The Elephant in the Room: The Uneasy Task of Defining 'Racial' in International Criminal Law' (2015) 15 *International Criminal Law Review* 501.

[14] See for instance Schabas (note 12 above); Verdirame (note 12 above) and Lingaas (note 11 above).

the notion of "race" by detrimentally subsuming it under the guise of ethnicity. Notably, substantive attempts to define the "racial group" in the crime of genocide seemed to have only emerge two years after, and subsequently more than a decade thereafter, the institution of the Genocide Convention. Prior to these attempts, the Genocide Convention had been promulgated against a history that has arguably tainted subsequent understandings of "race" and genocide.[15]

In the first attempt to interpret "racial groups", the International Criminal Tribunal for Rwanda (hereinafter the ICTR) adopted a purely objective approach, defining the category with reference to biological markers of identity.[16] Despite its explicit approval of according objective definitions to national, ethnical, racial and religious groups, however, the Trial Chamber failed to classify the Rwandan Tutsi population into one of the distinct protected groups under the crime of genocide. The Trial Chamber in fact evaded the problem of definition altogether by resorting to abstraction: finding that article II of the Genocide Convention should apply to "all stable and permanent groups", irrespective of whether or not the Tutsis could precisely be classified as a national, ethnical, racial or religious group.[17]

Notably, Schabas similarly evades defining each protected group under the Genocide Convention through abstraction. Schabas argues that the four categories in the Genocide Convention should be regarded as "four corner posts", where the categories help to define one another, overlap with each other and limit the categories of the countless number of groups that could conceivably find protection under the Convention.[18] Such an approach has been termed an 'ensemble' or 'holistic' approach, and has sustained heavy criticism on account of its imprecise formulation of the

---

[15] The Genocide Convention being promulgated as a legal reaction to the Holocaust had the effect of genocide becoming historically entangled to refer to the suffering of the Jewish people before and during the Second World War. C Tournaye 'Genocidal Intent before the ICTY' (2003) 52(2) *The International and Comparative Law Quarterly* 447. The international conceptualization of race, in particular, is purported to have been influenced by Nazi racial ideology at the time. C Lingaas 'Imagined Identities: Defining the Racial Group in the Crime of Genocide' (2016) 10(1) *Genocide Studies and Prevention: An International Journal* 84. Lingaas notes that, "the Holocaust was still ongoing when Lemkin [who conceptualized the crime of genocide] published his book, and undoubtedly the Nazi propaganda terminology influenced his use of the term race". Ibid 84. See also Schabas (note 13 above; 381) for further examples on how international bodies referred to Germans and Jews as distinct races). These understandings of race were captured in the Genocide Convention. Lingaas (note 16; 83).

[16] *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998) at paras. 514 & 516. This approach has been criticized by some for preserving a scientifically discredited means of human classification. See for instance Lingaas (note 12 above).

[17] Akayesu (note 17 above) 516.

[18] Schabas (note 12 above; 385).

protected groups of genocide.[19] Lippman also avoids according a substantive definition to a racial group, claiming that, "[t]he concept of racial groups is self-evident".[20]

Analysis of the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (hereinafter the ICTY) likewise reveals a general tendency to avoid according a definition to racial groups altogether.[21] For instance, in the *Krstic* Trial Judgement[22] of the ICTY the Trial Chamber refused to distinctly classify the Bosnian Muslims as an ethnic, a racial, a national, or a religious group.[23] In support of its decision, after considering the drafting history of the Genocide Convention and the work conducted in the context of the international protection of minorities, the Trial Chamber held that there is no clear distinction in law between national, ethnical, religious or racial groups.[24]

When it came to the interpretation of "racial groups" in particular, the Trial Chamber in *Krstic* simply reemphasized the non-distinction in substance between "racial groups" and the other protected groups, instead of endeavoring to substantively define "racial groups" as a category in and of itself:

> In a study conducted for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, F. Capotorti commented that "the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided, in 1950, to replace the word 'racial' by the word 'ethnic' in all references to minority groups described by their ethnic origin". The International Convention on the Elimination of All Forms of Racial Discrimination defines racial

[19] Lingaas (note 16 above; 86).

[20] Matthew Lippman, "Genocide," in International Criminal Law: Sources, Subjects, and Contents, ed. M. Cherif Bassiouni (Leiden: Martinus Nijhoff Publishers, 2008), 412.

[21] Tournaye (note 16 above; 457 & 458).

[22] *The Prosecutor v Radislav Krstic*, IT-98-33-T (2 Aug 2001).

[23] Krstic (note 25 above) 559 & 560.

[24] The Trial Chamber held at para 555 that, "the concepts of protected groups and national minorities partially overlap and are on occasion synonymous…"

discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin".[25]

This approach marks a stark contrast to that taken in *Akayesu*, where the Trial Chamber of the ICTR, at the least, endeavored to separately define, albeit controversially, each of the protected groups, including "racial groups".[26]

A general unease with the term "racial group",[27] and its supposedly vague "a priori" nature,[28] have been advanced as explanations for why both international tribunals and scholars have either avoided interpreting "racial group" altogether or have subsumed the concept into a single criterion for interpreting all four of the protected groups. However, authors have sought to demystify the racial politics of international criminal law, arguing that this avoidance and silencing of race is, in actuality, deliberate.[29]

For instance, Shilliam scrutinizes the research agendas of race in International Relations, with particular focus on the UNESCO 'statements on race'. The author argues that the UNESCO 'statements on race' appear to have purposely favored the narrative of the master.[30] The main purpose of the 1950 and 1951 statements were seemingly aimed towards "separating the biological fact of race from its social myth", as a deliberate attempt to replace the unscientific nature of race with a more "preferable classificatory regime" - ethnicity.[31] As a result of these efforts, racial identities arguably became subsumed into harmless ethnic categorizations.[32] The fourth UNESCO 'statement on race' was, once again, aimed towards disavowing the alleged biological origin of the social myth of race in an effort to strip race of its true historical context and instead collapse it

[25] Krstic (note 25 above) 555.

[26] Akayesu (note 17 above) 515-515.

[27] Schabas (note 13 above; 380).

[28] Lingaas (note 14 above; 495).

[29] See for instance R Shilliam 'Race and Research Agendas' (2013) 26(1) *Cambridge Review of International Affairs*; R C DeFalco & F Megret 'The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System' (2019) 7(1) *London Review of International Law* and C Gevers 'Africa and International Criminal Law' in KJ Heller et al. (eds) *Oxford Handbook of International Criminal Law* (Oxford UP, forthcoming).

[30] Shilliam (note 35 above; 153).

[31] Ibid.

[32] After all, ethnicity had not been historically associated with supremist hierarchy. Ibid.

into a depoliticized understanding of ethnicity.[33] To achieve this, racism was more blatantly linked with slavery, colonialism *and* anti-Semitism.[34]

The more current racial politics of the international criminal court (ICC) has been criticized for promoting an "overly thin" understanding racism, more particularly on account of it conceptualizing racism to be a product of individual, deliberate racist acts rather than that which is entrenched and perpetuated through socio-legal structures.[35] The Genocide Convention in particular had increasingly been interpreted to mean crimes against "physical integrity", causing a silent shift away from implicating political, social and legal mechanisms that may have been designed to bring about genocidal effects (such as the Apartheid regime).[36]

From all of the above, it is evident that defining "race" in the crime of genocide has been, and arguably continues to be, problematic for a number of reasons. As explained above, international criminal law has generally completely avoided according distinct and substantive definitions to "racial groups" (as illustrated above), either: through complete circumvention thereof; by applying generic abstractions to be applied to all four protected groups; or through the surreptitious "silencing" of racial hegemony under the guise of ethnicity. Adding to this, those attempts by international tribunals and scholars to substantively interpret "racial groups" through objective and subjective lenses have created a pendulum effect. Particularly when it comes to the interpretation of the 'racial group' category, there seemingly exists a "back-and-forth" that has resulted in

---

[33] Ibid 154.

[34] Ibid 154. The 1967 UNESCO statement reads, "Many forms of racism have arisen out of the conditions of conquest – as exemplified in the case of Indians in the New World, out of justification of Negro slavery… and out of colonial relationship. Among other examples is that of **anti-Semitism**, which has played a particular role in history, with Jews being chosen as scapegoat to take the blame for the problems and crises met by many societies" (*emphasis added*). UNESCO 'Statement on Race and Racial Prejudice 1967' *HonestThinking* at 7 available at , accessed on 30 June 2019. Further, whilst the statement referred to anti-colonial struggles aimed towards 'eliminating the scourge of racism', it simultaneously disapproved of the ways in which the ethnic groups in Western cultures had to surrender their cultural identities for the sake of assimilating. Shilliam (note 35 above; 154).

[35] Shilliam (note 33 above; 55). De Falco and Megret particularly seek to expose how the ICC's seemingly deliberate blindness towards race, as an anti-racist strategy, may very well be an implicit perpetuation of racism. DeFalco & Megret (note 33 above; 56). This charge is made even more plausible by the "silent" historical production of racial categorization that international criminal law has been implicated in, to seemingly reinforce its racial hegemony over Black Africans. DeFalco & Megret (note 33 above; 71 & 76).

[36] A Sitze 'The Crime of Apartheid: Genealogy of a Successful Failure' (2019) 7(2) *London Review of International Law* 11 of draft.

scholars consistently, and problematically, assuming an ahistorical understanding of "race" and racial hegemony.

1.2. Problem statement

It has been observed from the above that international criminal law has produced interpretations of "race" in the crime of genocide that are inconsistent with both the historical production of "race" and "racism" and the ways in which racial hegemony continues to shape contemporary law and society.

1.3. Statement of purpose and rationale

This study proposes an alternative theorisation of "race" for the crime of genocide using a Critical Race Theory perspective.

International criminal law is legally bound to offer a clear definition of "racial groups", as a distinct category in its own right, lest the category be regarded too redundant and ambiguous to be legally sound. Strict rules of legal interpretation demand for legal terms to have precise meaning because, "each individual word employed in a legal document implies and contributes to an autonomous meaning and must hence be interpreted as a stand-alone component within the norm's substance".[37] The principle of *nullen crimen sine legal* under international and domestic criminal law additionally begs for clear, precise and predictable definitions.[38]

Regarding the South African position, the domestic interpretation of "race", if an alleged genocide were to come to South African courts, arguably calls for thoughtful consideration. This is particularly the case when considering South Africa's unique etymology of "race" (from the formal institutionalization of apartheid in 1948 whilst genocidal acts against a racial group were being outlawed internationally, to the demise of formal apartheid, juxtaposed against the growing chasm of racial inequality in contemporary South Africa). South Africa's unique race discourse also

[37] C Tams, L Berster & B Schiffbauer *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014) 103.

[38] Lingaas (note 14 above; 493).

situates it in a complementary position to the critical engagements and recommendations proposed in this study. This will be illustrated throughout the study.

1.4. Research questions

The following questions will aid the examination of this study:

- How is the notion of "race" conceptualized under international criminal law?
- How is "race" conceptualized in pre-democratic and contemporary South African socio-legal discourse?
- What are the implications of using these conceptualizations in the interpretation of genocidal acts committed against a "racial group", both internationally and in South Africa?
- Can Critical Race Theory aid in providing a more legally and theoretically sound interpretation of "racial groups" in the crime of genocide?

1.5. Research methodology

This study involves desktop-research and is based on a qualitative approach. The desktop-research will rely predominantly on secondary sources, such as article journals and textbooks, for the purposes of gathering a broad perspective on the discourse surrounding the topic. Primary sources (such as international conventions, South African national legislation, international case law and South African domestic case law) will also be consulted and referenced.

1.6. Structure

Part I: 'Introduction'. This part will provide a broad overview of the research's endeavor to find an alternative conceptualization of "race" in the crime of genocide. The study will be situated within its particular context and its aims will be made explicit. This part will also include synopses of forthcoming discussions regarding scholarly discourse surrounding the topic.

Part II: 'Racial Theories'. This part of the study seeks to broadly illustrate, and critically engage with, the dominant, competing conceptualizations of "race" in global and South African race discourse. This will be undertaken primarily with reference to Glasgow's three conceptualizations

of racial theories, namely: racial conservationism, racial eliminativism and racial reconstructionism.[39]

Part III: 'Race and International Criminal Law'. This part of the study considers and analyzes the international criminal law conceptualization of "race" as it relates to the crime of genocide. The discussions herein will particularly focus on how international tribunals and scholars have sought to establish group membership (in general) and race (in particular) under the genocide provisions.

Part IV: 'A Race-conscious Approach'. After gathering its final perspectives on the matter, this part considers South African race discourse and thereafter calls for an alternative theorisation of "race" for the crime of genocide. In its final analysis, the possible legal and theoretical implications of using Critical Race Theory as an interpretive tool for South African domestic prosecutions of genocide on the basis of race are considered.

1.7. Conclusion

This introductory part of the study outlined the background of the study, its research methodology and its aims and rationale. It further provided a brief review of relevant literature, which highlighted the complexities that have come with interpreting the "racial group" in the crime of genocide. The following part will seek to provide a conceptual disaggregation of "race", using

[39] J Glasgow *A Theory of Race* (2009).

Glasgow's distinction between three dominant and competing conceptualizations of "race" in contemporary race discourse.

PART II

RACE THEORIES: A PRIMER

2.1. Introduction

The concept of "race" has been plagued with definitional difficulties and controversy since its introduction. On some readings, "race" is not confined to one particular meaning.[40] Lingaas suggests that the concept of "race" is fluid, and that interpretation of the notion shifts between different points in history and different societies.[41] Compounding the issue further, a variety of widely used dictionaries have commonly defined the notion with reference to hereditary characteristics or a person's physiology,[42] notwithstanding that there is wide scientific consensus that "race" is not an objective biological feature of humans and that it is, rather, a social construction.[43] The contemporary impetus towards regarding "race" as a social construct has also seemingly fostered several theoretical and ideological implications for legal, social and political discourse, with a number of calls being made for either the inclusion or exclusion of the mention of 'race'.

This part of the study seeks to broadly illustrate the dominant, competing conceptualizations of "race" in contemporary discourse (namely, racial conservationism, racial eliminativism and racial reconstructionism).[44] Briefly, *racial conservationism* argues for racial categories and markers to

---

[40] 'Race' (*noun*) is defined by a number of well-known dictionaries, with each containing more than one formal definition of 'race'. The Lexico dictionary defines 'race' as, inter alia, "Each of the major divisions of humankind having distinct physical characteristics; A fact or condition of belonging to a racial division or group; the qualities or characteristics associated with this; A group of people sharing the same culture, history, language, etc.; an ethnic group. 'Race' available at https://www.lexico.com/definition/race, accessed on 7 April 2019. The Merriam-Webster dictionary defines it as, inter alia, "A family, tribe, or nation belonging to the same stock; a category of humankind that shares certain distinctive physical traits'. 'Race' available at https://www.merriam-webster.com/dictionary/race, accessed 7 April 2019. The Macmillan Dictionary defines 'race' to be, inter alia, "People who are similar because they have the same skin colour or other physical features; a group of people who are similar because they speak the same language or have the same history or customs". 'Race' available at https://www.macmillandictionary.com/dictionary/british/race_1, accessed on 7 April 2019.

[41] Lingaas (note 14 above; 485).

[42] See note 49 above.

[43] Lingaas (note 14 above; 485-486).

[44] Glasgow (note 46 above).

be conserved[45], *racial eliminativism* argues for any references to "race" and racial categorization to be removed from our legal practices, systems, discourses and private attitudes,[46] and *racial reconstructionism* advocates for a race-conscious approach, which calls for racial discourse to be reconstructed in such a way that it that it no longer maintains and produces racial hegemony.[47]

Throughout this discussion a Critical Race Theory analysis of current race discourse will be undertaken. This will be done for the purpose of problematizing the applicability of these theorisations in the interpretation of "racial groups" in the crime of genocide. This critical engagement will be complemented by analyses of South Africa's pre- and post-1994 legal and public race discourse. Such a task will further seek to uncover the racial ideologies inherent in adopting these conceptualizations in race discourse. An additional purpose is to later examine the compatibility of international race discourse and the crime of genocide with that of South Africa. Given the deeply rooted legacy of racism that continues to unsettle South African society structurally, according to Modiri, "….what meanings we attach to race, and how we choose to approach it, is an obviously important starting point".[48]

2.2. Racial conservationism

Proponents of racial conservationism argue for racial categories and labels to be preserved in contemporary discourse, on the basis of its presumably fundamental role in determining society's truths, identities and power relations.[49] Supporters of racial conservationism further argue for racial classifications to acquire legally protection.[50] By preserving racial labels, the presence of racialized systems, practices and attitudes are too argued to be retained in modern discourse, justifying even those systems and thoughts that are guised under language and cultural heritage.[51]

---

[45] J M Modiri 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in Post-Apartheid South Africa' 2012 *SAJHR* 413; Glasgow (note 48 above; 1 & 2).

[46] Modiri (note 54 above; 412).

[47] Ibid 413 & 414; Glasgow (note 48 above; 152).

[48]Modiri (note 54 above; 411).

[49] Ibid 413.

[50] Ibid.

[51] Ibid.

Justification for racial conservationism is further premised on the purported materiality of racial identities in society in providing meaning to present life experiences and a means to accurately anticipate future life experiences.[52] "Race" is thus conceptualized by conservationists to be a valuable cog in the functioning of society, even if it is no longer used to entrench oppression and inequality.

It has been argued that racial conservationism can be utilized positively in present day discourse, to repair disparities caused by racial inequality and to create political and social alliances aimed at overcoming racism.[53] The preservation of racial categorization is, however, arguably flawed on a number of fronts, not least for its insidious perpetuation of a false biological version of race in present-day discourse (one which had historically been used to justify exploitation, subordination of specific groups and the creation of racial hegemony). More specifically, it can be argued that these racist agendas have arguably been dragged into the present by socio-legal structures (which have had as much of a prominent role in entrenching such agendas in the past as it does in the present).

The apartheid-state's practice of racial classification is one such example of the use of racial conservationism and the problematic consequences that are allied to the conceptualization's historical use. Apartheid biological and hereditary justifications for racial categorization were strategically masked by the apartheid state to be a more superficial, objective version (one that is associated with a person's outer appearance, specifically the color of a person's skin).[54]

By bureaucratizing racial classification as a social concept, however, the apartheid state strategically circumvented the need for rigorous scientific defenses.[55] In doing so, that practitioners of racial classification had carte blanche to 'interpret the bureaucratic criteria for racial classification in ways that allowed them to draw widely and idiosyncratically on the popular

[52] Glasgow (note 48 above; at 134).

[53] Modiri (note 54 above; at 413).

[54] D Posel 'Race as Common Sense: Racial Classification in Twentieth-Century South Africa' (2001) 44(2) *African Studies Review.*

[55] Ibid 89.

litanies of biological stereotypes'.[56] These biological versions of race discreetly underpinned the racialization of society under apartheid; it became deeply subsumed into the materiality of the lives of South Africans through the workings of racially bias institutions, such as the law[57]. It manifested itself, however, in a more "objective" and obvious reality (what Posel argues to be a "common sense" understanding).[58]

Notably, the Population Registrations Act 30 of 1950 (hereinafter Act 30 of 1950) encapsulated the Apartheid State's bureaucratization of race as "common sense".[59] Three racial categories were defined in the Act as follows:

> A "white person" …a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person.[60]
>
> A "native"… a person who is in fact or is generally accepted as a member of any aboriginal race or tribe of Africa.[61]
>
> A "coloured" person… a person who is not a white person nor a native.[62]

The Act clearly endorsed racial categorization on seemingly objective grounds (on the basis of a person's outer appearance). As previously mentioned, Posel argues that the reason for this "more obvious" form of racial classification was to offset the expectation of scientific rigor in defining race, which would have otherwise led to the demise of apartheid project from the beginning.[63] Consequently, according to the author, the "common sense" racial designation adopted by the state became inextricably embedded in the subjective experience of race through the lived hierarchies

---

[56] Ibid.

[57] Ibid 87.

[58] Ibid 89.

[59] Ibid 102.

[60] Act 30 of 1950, section 1(xv).

[61] Ibid section 1(x).

[62] Ibid section 1(iii).

[63] Posel (note 64 above; 101).

of class and status.[64] As a result, the notion of race became an indisputable social construction, predicated upon popular biological stereotypes.[65] The author further notes how the Act of 1950's crystallization of a "common sense" racial classification became both the cause and effect of a person's "future entitlements and prospects, as much as those that had marked that person's past".[66]

Notwithstanding the repeal of the Population Registration Act of 1950, the "common sense" conceptualization of race proliferated during the apartheid era during the 1950s still seems to permeate present-day South African discourse. Arguably the most troubling and incessant avenues through which it is perpetuated are the structures and institutions that inform society.

This argument is perhaps best exemplified by the recent debacle surrounding a controversial study conducted by the Sport Science Department of Stellenbosch University.[67] The study culminated in the publication, and subsequent retraction, of an article by Nieuwoudt, Dickie, Coetsee, Engelbrecht, and Terblanche (2019), titled, 'Age- and education-related effects on cognitive functioning in Colored South African women'.[68] The study claimed that 'Coloured' women of South Africa have an increased risk for low cognitive functioning, due to a combination of (amongst others socio-demographic factors) ethnicity, low education levels, unhealthy lifestyle and employment.[69] The published and peer-reviewed article was challenged by high levels of criticism, both nationally and internationally, on the basis of the study's apparent racist and sexist underlying preconceptions about 'Coloured' women.[70] The article was subsequently retracted after

[64] Ibid 87.

[65] Ibid 102.

[66] Ibid 103.

[67] R Grobler 'Authors retract Stellenbosch University study coloured women's 'low thinking function'' (3 May 2019) *News24* available at https://www.news24.com/SouthAfrica/News/authors-retract-stellenbosch-university-study-on-coloured-womens-low-thinking-ability-20190503, accessed on 15 June 2019.

[68] S Nieuwoudt; K E Dickie; C Coetsee C; L Engelbrecht & E Terblanche. (2019). Retracted article: Age- and education-related effects on cognitive functioning in Colored South African women. Aging, Neuropsychology, and Cognition. Advance online publication. doi:10.1080/13825585.2019.1598538

[69] Ibid 10.

[70] L Hendricks; S Kramer; K Ratele 'Research shouldn't be a dirty thought, but race is problematic construct' (2019) (00)(0) *South African Journal of Psychology* 1.

a successful call for an online petition to remove the article, owing to its "colonial stereotyping of 'Coloured' women".[71]

Hendricks, Kramer and Ratele best sum up, through a postcolonial critique, the troubling ideologies that the presuppositions adopted by the University assumed in their conducting of the study. They argue that the study, "draw[s] heavily on colonial racist stereotypes portraying all Coloured women as intellectually deficient and make sweeping racist and sexist generalisations from their study".[72] The scholars particularly recall how a specific understanding of "race" was disseminated and entrenched by apartheid segregationist practices since the 1950s, and thereafter argue that the study conducted by the University preserves the very ideological tenets of colonialism and apartheid.[73] It does so through its use of the apartheid-engineered racial designation 'Coloured' as a stable variable for scientific research.[74] According to the authors, such an approach "injudiciously homogenises people", having the effect of reproducing harmful stereotypes and oppression disguised as a science.[75]

Thus, racial conservationism still seems to find its sanctuary in institutions, like Stellenbosch University, and academic research. By attributing biological and social conditions exclusively to certain racial groups, it can be argued that there exists, at once, a perpetuation and a denial of the effects that segregationist and racist policies and practices of apartheid had (and continue to have) on different sectors of South African society. The denial is arguably manifest in a mischaracterization of the cause, through a failure to take into consideration the socio-economic

[71] Ibid 2.

[72] Ibid 1.

[73] Ibid 3.

[74] Ibid.

[75] Ibid.

factors that has become inextricably linked to a person's identity, through the workings of structural racism, since the apartheid era.

2.3.Racial eliminativism

Protagonists of racial eliminativism argue for the complete elimination of the notion of "race" from political and legal processes, private thoughts and means of identifications.[76] It has been argued that the agenda behind approaching racial discourse through racial eliminativism is to achieve non-racialization and harmony amongst a society that has been previously divided along racial lines.[77] In understanding racial eliminativism, Glasgow makes mention of three versions of racial eliminativism, namely; the 'political version', 'public eliminativism' and 'global eliminativism'.[78] Glasgow argues that dissecting these versions are fundamental to evaluating eliminativist assertions.[79]

The 'political version' calls for the elimination of racial categories from state policies, administrations and processes, whilst 'public eliminativism' calls for the removal of racial thinking from both politics and public and social discourse.[80] Proponents of public eliminativism assert that, in order to facilitate the effective removal of race from public and social discourse, race is not to be recognized or used in a way that advances or disadvantages a particular group.[81] Lastly, 'global eliminativism' not only calls for the removal of racial discourse from state and public spheres, but

[76] Modiri (note 54 above; 412).

[77] Ibid.

[78] Ibid.

[79] Ibid.

[80] Ibid.

[81] Ibid.

additionally argues for the elimination of racialized private thoughts and attitudes.[82] Global eliminativism, thus, calls for the total purge of the very idea of race from our discourses.[83]

Modiri argues that, although the racial eliminativism approach asserts important anti-racist claims, it inevitably normalizes the current state of affairs by denying the history of racialization.[84] The author highlights how race has historically been institutionalized as a tool for domination, subordination and deprivation, and how structural racism continues to further these agendas in modern-day society.[85] The author uses the affirmative action policy in South Africa to illustrate how adopting racial eliminativism would undermine attempts to redress systemic inequality.[86] Thus, racial eliminativism fails to recognize racism a systemic problem.

The agenda of racial eliminativism to achieve non-racialization through a supposed 'race-blind' approach is, arguably, further perpetuated through the call for liberalism, one of the mainstream legal approaches against which Critical Race Theory has formed an oppositionist and radical movement.[87] According to Modiri, liberalism advocates for a 'color-blind' approach to achieving non-racialization.[88] However, Modiri emphasizes that this seemingly neutral approach, in fact, normalizes the status quo.[89] Thus, similar to racial eliminativism, to adopt a liberalist approach to racial discourse is to overlook 'the structural nature of racial power, the ingrained and banal nature of anti-black racism and the role of law in enforcing unearned white privileges'.[90]

Most significantly, Modiri proposes that an additional, fundamental consequence of adopting a neutral and 'color-blind' approach to racial discourse is that racism becomes viewed from the perspective of the perpetrator.[91] In this regard, racism is reduced to only the most blatant,

[82] Ibid.

[83] Ibid.

[84] Ibid.

[85] Ibid.

[86] Ibid 412-413.

[87] Ibid 415.

[88] Ibid 416.

[89] Ibid.

[90] Ibid.

[91] Ibid.

individual and abhorrent acts of racial discrimination, 'committed by a conscious wrongdoer'.[92] As a result, through an overemphasis on the individualized act of the perpetrator, the systemic nature of "race", and its subordination through distribution of wealth, power and employment, is masked.[93]

Upon this consideration, it can be reasoned that adopting a racial eliminativism approach to racial discourse means treating the notion of "race" as a purely subjective phenomenon, manufactured solely by the perpetrator. According to Modiri, through an ahistorical and privatized understanding of "race", racism is seen as 'irrational behavior and prejudice', without which racism would not exist.[94] The author argues that this irrational behavior is seen a deviation from the supposedly unbiased way of treating others and of the distribution of wealth, power and employment.[95] Thus, according to the Modiri, the liberal legalist insists on 'the dated formalist desire for neutral principles and reasoning (in the name of 'jurisprudential discipline')'.[96] These 'race-neutral', seemingly objective laws, however, only address individual and blatant acts of racism.[97]

The result is a perpetuation of the idea that outside of a privatized understanding of "race", "race" has no real presence and effect in law and legal processes.[98] Upon this consideration, it can therefore be observed that adopting an eliminativist approach to race means that an act of racism becomes, instead, conditional upon and inseparable to an *individual's* subjective construction of race. This perpetrator-centered approach arguably results in a failure address the structural power of race that is engrained into the modus operandi of law and society.

2.4.Racial reconstructionism

At its core, racial reconstructionism calls for a race conscious approach to current race discourse, where the manner in which certain racial groups have been either subordinated or privileged

[92] Ibid.

[93] Ibid.

[94] Ibid.

[95] Ibid.

[96] Ibid.

[97] Ibid.

[98] Ibid 424.

through racial discourse is confronted.[99] Reconstructionism implores the need to shed light on race and its implications in "our social, political and legal lives", whilst at the same time taking race to be an 'illusionary' concept manufactured by social forces (i.e. a purely 'social phenomenon').[100] By recognizing it as such, one is able to (according to reconstructionists) confront the materiality of race in present 'social, political and legal' discourses and use it as tool for transcending the effects of a racialized history (where racial discourse is reconstructed in such a way that it that it no longer maintains and produces racial hegemony).[101]

Building on Glasgow's theory, Modiri calls for legal discourse regarding race to be approached from this race-conscious position.[102] The author additionally argues that Critical Race Theory embraces the essence of this approach (although being a more radical version of it) and urges to engage with the complexities of racial discrimination in legal systems through the lens of critical/radical thought.[103] Modiri proposes that racialization and racial oppression is, first and foremost, an institutional and systemic problem.[104] The author rejects a conception of race that is founded on individual "prejudice and stereotyping based on skin colour".[105] Modiri notably argues that current legal scholarship on race is founded on Western and imperialist concepts of 'rationality' 'reason' and 'liberal paradigms', which remain too ideologically limited to address the complexities of how racial hegemony is, in actuality, perpetuated through structures such as the law.[106] White supremacy arguably manifests itself in "structures of power (economics, law, politics) and institutions of life (society, history, education, sex)".[107] Thus, by moving away from conservative, imperialist and liberal legal frameworks, and towards situating race at the center of

[99] Glasgow (note 48 above; 152).

[100] Modiri (note 54 above; 412).

[101] Glasgow (note 48 above; 152); Modiri (note 54 above; 413).

[102] Modiri (note 52 above; 411).

[103] Ibid 414.

[104] Ibid 411.

[105] Ibid.

[106] Ibid 436.

[107] Ibid 435.

the modus operandi of legal systems, racial politics in law will be exposed and discourses on law and legal theory radically altered.[108]

Taking racial reconstructionism a step further, to demystify liberalist and imperialist mainstream theories, Mills conceptualizes a more appropriate framework to be "global white supremacy".[109] Mills uses "global white supremacy" to capture both "de facto … as well as de jure white privilege" (more broadly, European global domination that has patterned economies, politics and cultural power along racial lines).[110] The author argues that white supremacy is evident in the current distribution of "goods and resources, status, and prestige" and that conceptualizing "global white supremacy" as a political system would allow for the recognition of (often ignored) racial realities, as well as various phenomena that seek to either enforce or resist the "global white" system.[111]

2.5.Conclusion

This part of the study broadly illustrated and critique the dominant, competing conceptualizations of "race" in contemporary race discourse, with reference to Glasgow's distinction between racial conservationism, racial eliminativism and racial reconstructionism. In sum, it has been submitted that conceptualizing "race" through the lenses of racial conservationism and racial eliminativism produces ahistorical assumptions of the notion of "race". In addition, both approaches to race discourse troublingly overlook the structural persistence of racial hegemony in contemporary

[108] Ibid.

[109] C W Mills *Blackness Visible: Essays on Philosophy and Race* (1998) 98.

[110] Ibid 98.

[111] Ibid 102, 105 & 130. Mills brings to the fore an example of a phenomenon that accounts for white supremacy – the "dark ontology" of Herrenv. This theory captures the current political population as it was originally (that is, a political divide into "white persons and nonwhite subpersons").

society. The next part of the study will specifically consider the international criminal law conception of “race” in the crime of genocide.

PART III

RACE AND INTERNATIONAL CRIMNAL LAW

3.1 Introduction

This part of the study considers the international criminal law conception of "race" in the crime of genocide, with particular focus on how international tribunals and authors have vacillated generally between three ways of establishing group membership: (1) the objective approach (where a group is treated as a stable, permanent fact, often crystallizing biological understandings of race); (2) the subjective approach (where the existence of the group is dependent on the perception of the perpetrator as such or on the extent of self-identification by the members themselves); or (3) a mixed approach (where a subjective construction of a racial group is coupled with a baseline criterion of objectivity).

Discrepancies in interpretation persist, however, in defining the four protected groups. Authors such as Schabas, Verdirame, Szpak, Nersessian, Tournaye and, more recently, Lingaas have acknowledged the presence of these definitional difficulties as a result of conflicting interpretations offered by international tribunals.[112] Further, in light of this quandary such scholars have suggested tools of interpretation to define the "racial group" and, more broadly, the protected groups.

It will be suggested, however, that both judicial interpretation and the tools of interpretation offered by international scholars are equally vexed in its understanding of "race". It will be illustrated that the various interpretations of "race" offered have produced inconsistencies and ambiguities which are arguably detrimental to a proper conception of "race" and the crime of

[112] See Schabas (note 13 above); Verdirame (note 13 above); A Szpak 'National, Ethnical, Racial and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals' (2012) 23(1) *EJIL*; Nersessian (note 1 above); Tournaye (note 16 above); Lingaas (note 14 above); and Lingaas (note 16 above).

genocide within South Africa's domestic legal framework (an analysis which follow in part IV of the study).

3.2. Defining the protected groups of genocide

3.2.1. *Objective approach*

The ICTR was the first international criminal tribunal to secure a conviction for the crime of genocide. The tribunal reasoned that it was imperative to objectively determine whether the Tutsi victims of the atrocities committed in Rwanda constituted "national, ethnic, religious or racial group" for the purposes of legally qualifying the atrocities as a genocide.[113] Being the first genocide trial to come before an international tribunal, the ICTR undertook a seemingly detailed task of defining each of the four protected groups. More specifically, the ICTR defined a racial group as follows:

> The conventional definition of racial group is based on the **hereditary physical traits** often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.[114] (emphasis added)

The ICTR's construction of a "racial group" as a biological phenomenon has since been criticized on the basis of the wide scientific discreditation of there being a heritable gene for "race".[115] The ICTR's approach has further been criticized for its predominantly objective reading of "race" that seemingly disregards the social and historical context of a group.[116]

Notwithstanding the scientific consensus, however, a number of scholars have persisted in defining "racial groups" by way of "hereditary" physical appearance. Such scholars have advocated for either a purely objective classification of "racial groups" or a means of classification that incorporates a baseline criterion of objectivity. In Hans Vest's definition of race, the author refers to physical characteristics or biological ancestry.[117] Adding to this, LeBlanc defines race as

---

[113] *Akayesu* (note 17 above) 510.

[114] Ibid 514 & 516.

[115] Lingaas (note 12 above; 8).

[116] Ibid.

[117] H Vest *Genozid durch organisatorische Machtapparate* (2002) 120.

"associated with physical characteristics of a people such as color of skin"[118], whilst Nsereko characterizes "racial groups (…) according to genetically transmitted differences", using physical markers as a way of classification (such as skin colour, hair, eyes and stature).[119] Similarly, Werle considers a "racial group" to be a social group that consists of individuals who genetically possess the same observable physical characteristics (such as skin color or physical stature).[120]

In consideration of the above, it can be argued that the objective approach not only preserves an antiquated means of classification but runs the risk of biological racism being re-introduced through an overemphasis of corporeal markers of identity. Moreover, such an emphasis fails to address the role that structural racism continues to play in perpetuating racial hierarchy.

3.2.2. Subjective approach

Shifting away from the predominantly objective approach taken by the Trial Chamber in *Akayesu*, the Trial Chamber in *Prosecutor v. Kayeshema and Ruzindana*[121] adopted a starkly different method of establishing group membership under the crime of genocide, deciding that a subjective approach was to be adopted for determining group membership generally (as well as avoiding the "stable and permanent" criterion adopted in *Akayesu*).[122] The Trial Chamber decided that because the Tutsis were an ethnic group *as defined by Rwandan laws* they should be classified as such.[123] The Tribunal reaffirmed its approach by holding that an ethnic group could be "a group identified as such by others, including perpetrators of the crimes".[124]

Further perplexing the issue of membership of a racial group in particular, however, the Tribunal stated that a "racial group is based on hereditary physical traits often identified with geography".[125]

---

[118] L J LeBlanc 'The United Nations Genocide Convention and Political groups: Should the United States Propose an Amendment?' (1988) 13(2) *Yale Journal of International Law* 273.

[119] D N Nsereko 'Genocide: A Crime Against Mankind' (2000) 1 *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* 131.

[120] G Werle *Principles of International Criminal Law* (2005) 197.

[121] *Prosecutor v. Kayeshema and Ruzindana*, (Case no. ICTR-95-I-T), Judgment (May 21, 1999).

[122] Schabas (note 13 above; 383); Lingaas (note 14 above; 503); Szpak (note 130 above; 173).

[123] Kayeshema and Ruzindana (note 157) 98.

[124] Ibid.

[125] Ibid.

This presumably is an unequivocal approval of the objective classification of a "racial group" that was outlined in the *Akayesu* judgement, despite the Trial Chamber's subjective definition of the "ethnical group" by means of self-identification or identification of others.[126]

Similarly, the ICTY in the *Jelisic*[127] case clearly favored a subjective approach, being based on the perpetrator's perception. The Tribunal held that:

> … to attempt to define a national, ethnical or religious group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorization. Therefore, it is more appropriate to evaluate the status of a national, ethnical or religious group from the view of those persons who wish to single that group out from the rest of the community.[128]

Further, unlike the ICTY in *Kayeshema* and *Ruzindana*, the ICTR in *Jelisic* explicitly rejected the objective approach taken in *Akayesu* in determining group status.[129] Despite the ICTY's subjective inquiry, however, the Tribunal in *Jelisic* took the view that the Convention was limited to "stable" and "permanent" human groups to which individuals belonged, regardless of their own desires.[130] Thus, despite the emphasis on the subjective stigmatization of the group, the Tribunal did not approve of an extension of protection to groups otherwise excluded by the Convention (such as political or social groups).

Some scholars have likewise advocated for a subjective approach to determining group membership of the victims of genocide broadly, and to "racial groups" more particularly. In a recent study, Lingaas specifically assumes an analysis of the notion of "racial" in the provisions of the crimes of genocide, persecution and apartheid.[131] The author correctly acknowledges that the notion of "race" is a social construct that is often used by social actors to justify inequality.[132] However, the author stops short of a scrutiny into the role of institutionalized racism in

---

[126] Lingaas (note 16 above; 95).

[127] *The Prosecutor* v. *Jelisic*, Case No. IT-95-io-A, Trial Judgment (14 December 1999)

[128] Ibid 70.

[129] Ibid 61.

[130] Ibid 69.

[131] Lingaas (note 14 above; 485).

[132] Ibid 511.

perpetuating racial hierarchy. Lingaas instead suggests that race should assume a "double-subjective" approach – which allows for either self-perception, the perpetrator's perception or a combination of both.[133] According to the author, it is of paramount importance for the subjective approach to equally account for both the victim's perception of their difference and the perpetrator's.[134] In doing so, Lingaas rejects any attempts to define a "racial group" objectively on the basis that to do so would mean relying on highly contested, outdated and scientifically refuted notions of racial difference based on physical characteristics.[135] The author further cautions that, "any efforts to objectively define a protected group have proven to be artificial, suffered from serious analytical flaws and bore no relation at all to the group as ultimately targeted".[136]

Similarly, Gaeta rejects the proposed practicalities of an attempt to define the four enumerated groups objectively, arguing that these groups are purely social entities,[137] and argues that applying objective notions could reveal that some groups are objectively and scientifically non-existent.[138] The author instead advocates for a purely subjective approach that is entirely dependent on the perception of the perpetrator, provided that that "the genocidal intent of the perpetrator [is] directed towards one of the enumerated groups".[139] The author further finds it unnecessary to establish whether victims of genocidal acts actually belong to the group that is being targeted, reasoning that it is more the perpetrator's belief that the victim is part of the group being targeted that is fundamental.[140]

Lingaas too rejects a subjective approach that is unrestrictedly based on the perception of the perpetrator,[141] arguing that by relying solely on the perpetrator's perception there exists a

---

[133] Ibid 516.

[134] Ibid 512.

[135] Ibid.

[136] Ibid.

[137] P Gaeta 'Genocide' in W.A Schabas & N Bernaz (ed.) *Routledge Handbook of International Criminal Law* (2011) 113.

[138] Ibid.

[139] Ibid.

[140] Ibid.

[141] Lingaas (note 14 above; 512).

possibility of any group becoming a target for genocide.[142] In respect of the definition of a "racial group", Lingaas cautions that following such an approach would risk an expansion of the definition of the same.[143]

In a more recent study, Lingaas suggests incorporating the theory of 'Imagined Identities' into law to cure the inadequacies of using either a purely objective or a purely subjective approach.[144] The theory of 'Imagined Identities' essentially holds that a group is treated as real once its members have formed a "like-mindedness" with those who they perceive to be similar to them.[145] This group simultaneously perceives themselves as distinct from others who are supposedly not similar to them.[146] The "realness" of this differentiation is solidified with the passing of time, with two groups eventually being created: '"us" and "them"'.[147]

Lingaas then extends the application of this theory into law.[148] The author builds on the essence of the current subjective approach but incorporates the theory of 'Imagined Identities' to bring the perception of the perpetrator in line with the principle of legality (more specifically, the principles of foreseeability and specificity).[149] According to Lingaas, a group is treated as real once it becomes 'effective'.[150] Relative to the crime of genocide, the 'effectiveness' of the group is generated when a perpetrator sees victims as members of a "racial group" and treats them as such.[151] It is when the perpetrator stigmatizes and "inferiorizes" the group according to this

[142] Ibid.

[143] Ibid.

[144] Lingaas (note 16 above; 100 & 101).

[145] Ibid 90.

[146] Ibid.

[147] Ibid.

[148] Ibid 90 & 91.

[149] Ibid 92.

[150] Ibid.

[151] Ibid.

perception, however, that there exists a risk of genocide.[152] When this happens, the group becomes an objective category worthy of legal and social protection.[153]

Lingaas suggests that, on this approach, "any initially subjective and imagined differences between the groups become solidified, effective and real, thereby providing the courts with the objectivity required in order to determine the victim groups of genocide".[154] Such an approach still gives prominence to the perpetrator's perception, whilst acknowledging the contemporary view that "race" is a social construct.[155] To acquire legal protection from genocide, the victim's membership to a racial group must be determined by the perpetrator's perception.[156] This approach also clearly steers away from problematic objective verifiers of "race" and instead depends entirely on the perception of differentness.[157] The author accordingly suggests removing the classification of victims (into one of the protected groups) from the actus reus and requiring it in the proof of the perpetrator's mens rea instead.[158] According to Lingaas, the prosecution would, therefore, be tasked with having to prove the perpetrator's subjective belief that the victim was a member of the relevant group.[159]

Verdirame similarly argues for the idea of collective identities being regarded as purely social constructs, having been exclusively derived from perception:

> collective identities (…) are by their very nature social constructs, 'imagined' identities entirely dependent on variable and contingent perceptions, and not social facts, which are verifiable in the same manner as natural phenomena or physical facts.[160]

Scholars have acknowledged, and in some cases supported, the supposedly "quiet" shift towards this predominantly subjective approach taken by the ICTR and the ICTY in determining group

---

[152] Ibid.

[153] Ibid.

[154] Ibid 101.

[155] Ibid.

[156] Ibid.

[157] Ibid.

[158] Ibid 102.

[159] Ibid.

[160] Verdirame (note 13 above; 592).

membership under the genocide provisions[161]. It can be argued however that adopting such an approach is particularly problematic when it comes to the interpretation of a "racial group". By affording primacy to the perception of the perpetrator, the subjective approach has the effect of treating the hierarchization of "race" as a practice that has no existence outside the mind of the perpetrator. It, thus, reduces "race" to an individualized social fiction. It can be argued, however, that, in actuality, racial hierarchy is perpetuated through institutionalized means. Accordingly, racial hegemony is an ever-present phenomenon that has a material effect; it exists notwithstanding the purely social construction of the notion of "race" and the subjective stigmatization of others by an individual. To overlook this is to undermine the dire the consequences that structural racism has in law and society.

Regarding Lingaas' "Imagined Identities", the author rightfully takes cognizance of the social construction of "race" and the need to move away from crystallizing the notion into controversial objective measures. In addition, it is agreed with the author that legal rules of interpretation, which dictate for legal terms to be given both precise definition and maximum effect, must be given due recognition. It can be argued, however, that the author's approach can too be deemed problematic in a number of respects. In the first, the author seems to revert to adopting a generic approach to all four protected groups generally, and thus a historically deficient approach to race specifically. By not accounting for the very specific way in which racial hegemony has been constituted, the general application of the theory of 'Imagined Identities' into law renders the notion of "race" virtually indistinguishable from the etymologies of ethnicity, religion and nationality.

In the second, the author's approach can arguably be confronted with the same critiques as those already postulated against adopting a purely subjective (eliminativist) approach. The author's approach arguably treats the existence of racial classification (and thus the 'realness' of race) as entirely conditional upon the subjective mind of the perpetrator. Racial categorization is therefore treated as a choice, in which racial status is taken to be "more voluntary and consequently less imposed, less 'ascribed'".[162] As a result, the deliberate assignment of group identity on the basis of race, that has been historically used for the establishment of human hierarchy, domination and

[161] Ibid 592 & 594; Lingaas (note 14 above; 501);

[162] M Omi & H Winant *Racial Formation in the United States* 3 ed (2015) 22.

subordination, becomes undesirably underplayed. This arguably has the adverse effect of stripping "race" of all historical context and bypassing the entrenchment of racialization as a material constant in the fabric of society by structures.

3.2.3. Mixed approach

The mixed approach has been proposed as an alternative to addressing the inadequacies (illustrated above) of using either a purely objective or a purely subjective approach. Such an approach, however, is arguably no less contentious than that which it seeks to resolve with regard to its usefulness in establishing group membership of a racial group in particular. It will be illustrated that, in general, international tribunals have struggled to adequately outline the exact contours of the mixed approach. Further, those scholars who have attempted to add substance to the mixed approach have done so controversially.

The ICTY in the *Brdanin*[163] took precisely a mixed approach, claiming, firstly, that the relevant protected group:

> … may be identified by means of the subjective criterion of the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived (...) racial (...) characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.[164]

The Tribunal then went on to suggest that the determination of a protected group ought to be made on a case-by-case basis, using both objective and subjective criteria.[165] The Tribunal acknowledged the inadequacy of exclusively relying on subjective criteria for the determination

[163] *The Prosecutor* v. *Brdanin*, Case No. IT-99-36-T, Trial Judgment (1 September 2004)

[164] Ibid 683.

[165] Ibid 684.

of group membership.[166] It failed, however, to disclose the what factors an objective assessment would require for the legal definition of the protected group.[167]

The ICTR in *Bagilishema*[168] acknowledged that the four protected groups, including the racial group, do not enjoy a widely accepted definition.[169] The Tribunal went on to suggest that, while the membership of the targeted group must be an objective feature of the relevant society, there is also a subjective dimension that must be given due consideration.[170] The Tribunal therefore also seemed to suggest a mixed approach to determining group membership. The Tribunal took care in detailing the subjective approach, holding that if a victim is perceived by a perpetrator as belonging to a protected group, the victim would be considered a member of such group for the purposes of genocide.[171] The tribunal neglected, however, defining the elements of the objective portion of the assessment.

Nersessian too argues for a hybrid approach (involving the subjective view of the perpetrator coupled with a baseline objective standard) to understanding the four protected groups in the Genocide Convention.[172] Szpak concurs with Nersessian in suggesting that an objective-subjective approach is the most appropriate method for determining the existence of a protected group.[173]

Nersessian, unlike the ad hoc tribunals however, has suggested what the content of the objective criteria should entail:

> At a minimum (…) there must be some colorable evidence that the victim group has some recognize racial, national, ethnic or religious existence outside of the mind of the perpetrator.[174]

According to the author, this 'colorable evidence' can be drawn from the objective features of group membership that were outlined in *Akayesu* and *Kayishema* and *Ruzindana*. The difference

---

[166] Ibid.

[167] Lingaas (note 16 above; 100).

[168] *The Prosecutor* v. *Bagilishema*, Trial Chamber Judgment, June 7, 2001, ICTR-95-1A-T.

[169] Ibid 65.

[170] Ibid.

[171] Ibid.

[172] Nersessian (note 1 above; 326).

[173] Szpak (note 130 above; 164).

[174] Nersessian (note 1 above; 312)

with Nersessian's approach, however, is that the objective evidence will operate as limiting-mechanism to ensure that there is a logical connection between a perpetrator's subjective existence of the group and the group's "pre-genocidal existence".[175] In following this method, Nersessian and Szpak argue the limitations of a purely subjective approach.[176]

Although acknowledging the confines of using a purely subjective approach marks a step right direction, it can be argued that the mixed approach remains too ambiguous and indeterminate for the purposes of securing a proper legal definition for the racial group. It can be further argued that scholars who have suggested the contents of the objective elements of a mixed approach sustain the same critique that has been posited against attempts to accord a degree of objectivity to a racial group - that it preserves an antiquated means of classification, by drawing on biological characteristics.

3.3. Conclusion

This part of the study considered and critically engaged with international criminal law's conceptualization of "race". It specifically focused on the issues surrounding the interpretation of "racial groups" in the crime of genocide and the methods of interpretation offered by international tribunals and scholars in respect of such. It has been submitted that the existing methods of interpretation detrimentally assume ahistorical understandings of the notion of "race" and overlook the structural nature of racial hegemony and its materiality in contemporary society. On this basis, the final part of this study will seek to offer an alternative theorisation of "race" in the crime of genocide, using Glasgow's third racial theory ('racial reconstructionism') as a theoretical basis.

[175] Ibid 313.

[176] Ibid 296; Szpak (note 126 above; 164).

This will presumably aid in providing a more legally sound interpretation of “racial groups” in the crime of genocide.

PART V

A RACE-CONSCIOUS APPROACH

4.1 Introduction

This part of the study aims to bring together the critiques of the objective and subjective approaches offered by international tribunals and scholars, and Glasgow's racial theories (racial conservationism and racial eliminativism respectively), in order to highlight the flaws inherent in adopting either approach. This part will then call for an alternative theorisation of "race" in the crime of genocide, using Glasgow's third racial theory ('racial reconstructionism') as a theoretical basis. Such an approach, it will argue, provides a more legally sound interpretation of "racial groups" in the crime of genocide, and takes into account the particular role of "race" in South Africa's recent past.

4.2 Theoretical parallels

4.2.1 The objective approach and racial conservationism

As discussed in part I, proponents of racial conservationism essentially argue for racial categories and labels to be preserved in contemporary discourse. It has been argued, however, that conceptualizing "race" through the lens of racial conservationism in modern-day race discourse is problematic for a number of reasons. First, racial conservationism overlooks that the practice of classifying humans on the basis of their skin color has troubling antecedents in biological and hereditary justifications for racial hierarchization, domination and subordination. Second, racial conservationism disregards the ongoing perpetuation of racial hegemony through structures, such as the law.

A comparison of racial conservationism with the objective approach to interpreting "racial groups" arguably reveals that the latter embraces the perturbing ideological tenets of the former. Attempts by international ad hoc tribunals and legal scholars to apply an objective approach to interpreting "racial groups" in the crime of genocide have been consistently inundated with references to distinctions based on corporeal markers of identity. This arguably remains the case whether a purely objective approach or a certain degree of objectivity when defining the group has been suggested. As a consequence, (and as previously mentioned) the objective approach has been

criticized for preserving an antiquated, scientifically discredited and historically hegemonic means of differentiation.

Additionally, attempts to crystallize the four protected groups, in general, into objective, stable and permanent notions can be criticized for its failure to take cognizance of the well-reiterated fact that "race", in particular, is a purely social construction. The notion of "race" has been historically manufactured by those in power, to justify inequality and subordination. Thus, to treat the concept of "race" as a social fact is to detrimentally mischaracterize the origins of racialization. Further, an overemphasis on racialization based on physical identifiers arguably runs the risk of institutionalized racial hierarchy, and its role in the conserving and widening the chasm of racial hegemony, becoming fatally diminished in legal considerations.

4.2.2 The subjective approach and racial eliminativism

Protagonists of racial eliminativism argue for the complete elimination of the notion of "race" from political and legal processes, private thoughts and means of identifications.[177] The purported agenda behind approaching racial discourse through racial eliminativism is to ultimately achieve non-racialization and harmony amongst a society that has been previously divided along racial lines. A number of fundamental criticisms have been leveled, however, against adopting an eliminativist approach to contemporary race discourse. This approach has been criticized for, in the first, normalizing the current state of racial inequality. It arguably does so by denying the historical role of "race" and overlooking the structures that continue to reinforce and perpetuate racist agendas in modern-day society.

Further criticism, in the second, is premised on racial eliminativism's theoretical parallels to liberalism. Liberalism similarly advocates for a 'color-blind' approach to achieving non-racialization.[178] It has been argued, however, that a troubling consequence of adopting a 'color-blind' approach to racial discourse is that "racism" becomes reduced to only the most blatant, individual acts of racism. The result is a perpetuation of the idea that, outside of a privatized understanding of "race", "race" has no real presence and effect in law and legal processes. It has, therefore, been argued that adopting an eliminativist approach to race discourse means that acts of

[177] Modiri (note 54 above; 412).

[178] Ibid 416.

racism becomes conditional upon and inseparable to an individual's *subjective* construction of "race", more specifically the subjective view of the perpetrator of racist acts.

The ideological similarities between racial eliminativism and adopting a subjective approach to "racial groups" in the crime of genocide are striking. It can be argued that the subjective approach to "racial groups" is problematically charged with the ideological creeds of racial eliminativism. When it comes to the interpretation of "racial groups" in particular, it has been reasoned that affording primacy to the perception of the perpetrator (through the subjective approach) overemphasizes only those acts of racism that are the most blatant and individual. This presumably has the effect of treating the hierarchization of "race" as a practice that has no existence outside the mind of the perpetrator. The subjective approach, thus, reduces "race" to individualized attitudes. In doing so, using the subjective approach results in a failure to recognize that racial hegemony is an ever-present phenomenon that is perpetuated through structures, and that has a material effect in society. It overlooks that racial hegemony exists notwithstanding the purely social construction of the notion of "race" and the subjective stigmatization of others by an individual.

4.3. Overall analysis

Review of the relevant literature arguably reveals that, overall, attempts by international tribunals and scholars to develop means of interpretation through objective and subjective lenses have created a pendulum effect. Particularly when it comes to the "racial group" category, this "back-and-forth" has resulted in scholars consistently, and problematically, assuming an ahistorical understanding of "race" and racial hegemony. By insistently engaging in an objective/subjective interpretive debate, the cumulative result is one of producing interpretations of "race" that are incommensurate with the etymology of its construction, its materiality in the fabric of society and its structural persistence in contemporary discourse. The pertinent question thus arises as to what then will arguably account for such gaps, whilst adhering to strict rules of legal interpretation?

4.4. South Africa's current race discourse

Even more troublingly, South Africa's post-1995 legal discourse has problematically shifted largely towards an eliminativist approach. This 'color-blind' or neutral approach arguably manifests itself as an indifference to, both, the most apparent form racism that existed during the

apartheid era and the more insidious structural presence of "race" that has since become engrained into the daily lives of South Africans.

In the case of *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*[179] (hereinafter AZAPO), the Constitutional Court was faced with a challenge to the constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 (hereinafter Act 34 of 1995).[180] Most strikingly, at the advent of democracy (in 1996) the Constitutional Court in AZAPO was quick to sidestep, from the outset, the very notion that underpinned the workings of apartheid – race. Interestingly, whilst the Court in AZAPO evaded the mention of race altogether in 1996, in 1998 the International Criminal Tribunal for Rwanda was more explicit in its conceptualization of race.

In the first paragraph of its judgement, the Constitutional Court refers to apartheid as, 'a deep conflict between a minority which reserved for itself all control over the political instruments of state and a majority who sought to resist that domination'.[181] Thereafter, reference is made to "those who were in power" and "those who resisted".[182] The use of this seemingly neutral terminology arguably depicts a failure to explicitly acknowledge that the conflict existed between Whites (the majority at the time) and Blacks (the minority at the time). Moreover, the Constitutional Court seems to mischaracterize the very cause of the oppression of that "minority", describing it as a result of the resistance against those in control, rather than one caused by racist machinations by the apartheid state.[183] This shows an evasion of the mention of "race" and "racism", at its most basic conceptualization.

Moreover, the Court seems to blatantly express an eliminativist approach to our post-1995 racial discourse by referring to a "previous history" of inequality, the "unjust consequences of the past" and the call to "close the book on that past".[184] By referring to racism as exclusively a matter of

---

[179] (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996).

[180] Section 20(7) of Act 34 of 1995 states that, "No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence."

[181] AZAPO (note 252 above) 1.

[182] Ibid 2, 3 & 4.

[183] Ibid 1 &2.

[184] Ibid 3.

the past, the Court failed to acknowledge the material effect that race currently has in the lives of South Africans. According to Modiri, this "past" inequality is, in reality, entrenched post-1995 through the economic, cultural and social structures engineered during apartheid that continue to operate unchanged. The author argues that this racial inequality reveals itself through the present unequal distribution in wealth, education, power and employment.[185] Significantly, the conclusion reached by the Court (that Section 20(7) of Act 34 of 1995 was not unconstitutional) marked the beginning and end of the possibility of prosecutions for atrocities committed during apartheid that were granted amnesty, including those acts that could possibly be classified as a genocide.[186]

The eliminativist approach to race also infiltrates more current South African legal discourse and attitudes surrounding racism. A prime example of this is arguably seen in recent efforts to criminalize hate speech, through the tabling of the Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016 (hereinafter the Bill) and public comments submitted on its draft. More specifically, the charge of eliminativism in contemporary South African discourse is based on South Africa's policy efforts to give further permanency to the already largely privatized

[185] Modiri (note 54 above; 406 & 431).

[186] AZAPO (note 252 above) 50 & 51.

understanding of race, where racism is seen to be manifested through only the most blatant acts committed by individuals.

Notably, the Bill defines the 'offence of hate speech' to be:

> 4. (1) (a) Any person who intentionally publishes, propagates or advocates anything or communicates[187] to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—
>
> (i) be harmful or to incite harm; or
>
> (ii) promote or propagate hatred.
>
> based on one or more of the following grounds: …
>
> (ll) race…[188]

In a briefing on the Bill, the Deputy Director-General of Legislative Development, Ms. Kalayvani Pillay, stated that the Bill was proposed to address the rising number of hate crimes and hate speeches in the country and the spate of incidents that were motivated by prejudices based on hate crimes and hate speeches.[189] Amongst the surge of recent incidents involving offensive comments was one that occurred in January 2016, where Penny Sparrow (a white South African) took to Facebook to describe black beachgoers as "monkeys".[190] Sparrow's comment was posed as a reaction to the seemingly littered state that the beaches were left in after New Year's celebrations.[191] Other allegedly racist comments by Whites soon followed, with Chris Hart tweeting about, what he views to be, the growing sense of entitlement, victimhood and hatred

---

[187] The Bill's definition of communication widely includes any 'written, illustrated, visual, or other descriptive matter', as well as any 'display', 'oral statement' or 'electronic communication'. Section 1 of the Bill.

[188] Section 4(1) of the Bill.

[189] 'Prevention and Combating of Hate Crimes and Hate Speech Bill & International Crimes Bill: Briefing, with Minister and Deputy Minister' *Parliamentary Monitoring Group* available at https://pmg.org.za/page/Prevention%20and%20Combating%20of%20Hate%20Crimes%20and%20Hate%20Speech%20Bill%20&%20International%20Crimes%20Bill:%20briefing,%20with%20Minister%20and%20Deputy%20Minister, accessed on 20 July 2019.

[190] J Wicks ''It's just the facts' - Penny Sparrow breaks her silence' (4 January 2016), *News24* available at https://www.news24.com/SouthAfrica/News/its-just-the-facts-penny-sparrow-breaks-her-silence-20160104, accessed on 20 July 2019.

[191] Ibid.

towards minorities 25 years after the end of apartheid.[192] He was subsequently suspended by his employer on account of the alleged racist undertones of his statement.[193] As a reaction to such comments, Velaphi Khumalo, an employee of the Gauteng provincial administration, called for Whites to be "hacked and killed like Jews" and for their children to be "used as garden fertilizers".[194] He too was suspended by his employer.[195]

The Bill imposes penalties to prevent and combat the offence of hate speech.[196] Any person convicted of hate speech, the intentional electronic distribution of hate speech, or any of the other stated ancillary offences, is liable on a first conviction for a fine or to imprisonment for up to three years, or to both of these penalties. Subsequent convictions are liable to a fine and/or imprisonment of up to ten years.[197] The Bill was purportedly proposed in line with the need for sustained campaigns against, amongst other prejudices, racism.[198]

It is evident that the Bill unequivocally seeks to combat racism that assumes the form of intentional and obvious individual prejudices. This is arguably a stark manifestation of the consequences of adopting an eliminativist approach to race discourse that South African legal discourse has embraced. An individualized understanding of racism is arguably overemphasized to the detriment of recognizing racism as that which is troubling embedded and perpetuated through structures as well.

Interestingly, the submissions on the Bill made by the South African Institute of Race Relations (hereinafter the IRR) shed light onto contemporary attitudes surrounding racism. The IRR report[199]

---

[192] F Salie 'Standard Bank suspends Chris Hart over 'racist' tweet' (4 January 2016), *Fin24* available at https://www.fin24.com/Companies/Financial-Services/standard-bank-suspends-chris-hart-over-racist-tweet-20160104, accessed on 25 July 2019.

[193] Ibid.

[194] E Mabuza 'Velaphi Khumalo's comment on SA being 'cleansed of white people' is hate speech –Equality Court' (5 October 2018), *TimesLive* available at https://www.timeslive.co.za/news/south-africa/2018-10-05-mans-white-sas-deserve-to-be-killed-like-jews-comment-is-hate-speech--high-court/, accessed on 28 July 2019.

[195] Ibid.

[196] Parliamentary Monitoring Group (note 262 above).

[197] Section 6(3) of the Bill.

[198] Parliamentary Monitoring Group (note 262 above).

[199] South African Institute of Race Relations NPC (IRR) *Submission to the Department of Justice and Constitutional Development regarding the draft Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016* (2017).

notes that two recent field surveys conducted in 2015 and 2016, commissioned by the IRR, reveal that few South Africans in general (and even fewer Black people) identify race as a serious problem.[200] The surveys purportedly revealed that people were more concerned with issues such as employment, poor education, service delivery failures and inadequate housing. The field surveys additionally asked respondents about their personal experiences of racism.[201] In 2016, approximately 71% of blacks purported to have not experienced racism in their daily lives.[202] The IRR notes that these two surveys consisted of a carefully balanced sample of South Africans, taken from all provinces and all socio-economic groups.[203] They further note that the samples were fully representative in terms of race, age, employment status and other factors.[204]

Perhaps the methodology of the study can be critiqued for its liberal approach to race relations in South Africa. However, proceeding on the assumption that these statistics assume a more wholistic perspective, the results are useful in revealing that the acknowledgement of structural racism by a considerable number of South Africans is minimal, if not, non-existent. Particularly the demand for resolving issues such as employment, poor education and inadequate housing, instead of individual racism, arguably reveals that contemporary attitudes overlook the systemic nature of race. It overlooks the racialized patterns that the system produces and sustains through the very distribution of wealth, power, education, housing, service delivery and employment. This, coupled with the privatized understanding of racism adopted by policymakers, perturbingly resounds an eliminativist approach that pervades South African race discourse.

4.4. Recommendations: a race-conscious approach

It is submitted that the solution to the interpretation of "racial groups" in the crime of genocide is simple: a race-conscious approach that entails a reading down of "an act committed with intent to

[200] Ibid 5. The surveys purportedly reveal that, in the 2016 survey, 3.2% of the respondents– and 2.4% of blacks – identified racism as a serious unresolved problem. Together with inequality and xenophobia, those numbers rose to 6.4% of all respondents and 5.9% of blacks. This number saw a slight increase from September 2015. Ibid.

[201] Ibid.

[202] Ibid.

[203] Ibid 4.

[204] Ibid.

destroy a racial group" to mean "white global supremacy". Although simple in its claim, such an approach arguably tackles multiple complexities of interpretation at once.

Approaching legal interpretation of "race" in the crime of genocide through the critical framework of "global white supremacy" would importantly entail, in the first, putting "race" back on the agenda. It would involve a significant move away from current eliminativist/liberal conceptual frameworks, which treat "race" and "racism" as virtually non-existent in contemporary socio-legal discourse. The current subjective approach (which affords primacy to the subjective mind of the alleged perpetrator of genocide) arguably adopts problematic eliminativist understandings of "race". This has the undesirable effect of removing racism as a material reality and, instead, reducing it to an individualized social fiction (where racism could seemingly "come and go" at the whim of the perpetrator). From a Critical Race perspective however, racism is that which is perpetuated and embedded in society through structures, such as the law. To ignore this would arguably be to deny the ongoing effects of racial hegemony. Especially if an alleged genocide committed against a racial group were to come to South African courts, one cannot simply ignore the very specific form of racism that has, since pre-democratic South Africa, been institutionally embedded into the workings of society and which arguably reveals itself through unequal distribution in wealth, education, power and employment.

In the second, approaching the crime of genocide using 'white global supremacy' as the primary conceptual framework will limit acts perpetrated against a racial group to only those acts perpetrated against non-Whites. This is premised on the reality that racial hegemony assumes a very specific social ontology, that has been historically constituted in a very specific manner.[205] As pointed out by Rodney in Mills:

> The essence of **White Power** is that it is **exercised over [nonwhite] peoples** -whether or not they are minority or majority, whether it was a country belonging originally to whites or to [nonwhites].[206] (emphasis added)

As such, racial hegemony and racism has historically been the exertion of White power over non-White people. This power-play arguably continues to exist in the current social, economic and

[205] Mills (note 126 above; 106).

[206] Ibid 99.

legal schemas of contemporary society. Importantly, on this reading, "White" is understood to be a systemic and hegemonic phenomenon[207]; it is not a specific phenotype of persons.[208] Mills argues that "whiteness" is, in fact, that which is *learned* by a certain phenotypic group of persons who grow up in a racist society that institutionally privileges whites, as a group, over non-whites.[209] This is not to say that genocide cannot be committed against persons historically classified as "White". In fact, any such group of persons (who do not fall within this very specific definition of acts committed against a non-White racial group) could very well constitute an ethnic, national or religious group for the purposes of genocide. The purpose of such an approach is to conceptually separate genocidal acts perpetrated against racial groups from those perpetrated against ethnic, national and religious groups, to better comply with the rules of legal interpretation.

This socio-structural conceptualization of "race" also clearly avoids attaching discredited biological generalizations to groups of persons (that almost invariably comes with attempts to apply an objective approach to "race"). By conceptualizing racism as "global white supremacy", the classification of a group of persons as a "racial group" for the purposes of genocide is not dependent on physical markers of identity. Instead, such a classification becomes entirely contingent upon whether a non-White group has been historically and structurally subordinated by the social phenomenon that is White power. Such an approach also accommodates for the fact that "race" is purely a social construction, rather than a scientific and biological fact.

4.5. Conclusion

In sum, approaching legal interpretation of the crime of genocide through the race-conscious framework of "Global White supremacy" will arguably produce the following outcomes at once: "race" is understood as material enough to be objective, socially constituted enough to be a social construction and specific enough in definition to comply with the strict rules of legal interpretation. Consequently, a reading down of genocidal acts committed against a racial group to be "global

[207] Ibid 100.

[208] Ibid 105.

[209] Ibid 102. Mills argues that white supremacy is maintained in contemporary discourse, not only through the law, but "through inherited patterns of discrimination, exclusionary racial bonding, cultural stereotyping, and differential white power deriving from consolidated economic privilege". Ibid 102.

White supremacy" will have the effect of detaching the notion of "race" from the conceptual matrix that has entangled it since its very inclusion (and exclusion) in international criminal law. Race (and all the consequences that have come with its misuse) has been historically conceptualized in a very specific manner. To think otherwise would arguably mean to, firstly, disregard the workings of racial hegemony and the ways in which it continues to insidiously structure contemporary society to produce racialized outcomes, including genocidal ones. Secondly, it would arguably be in conflict with the very rules of legal interpretation, which strictly demand for legal terms to have clear and precise meaning.

4.6. Implications for South Africa

Such an approach is particularly important when considering the current social, legal and political state of South Africa. As illustrated above, South African socio-legal discourse has problematically moved towards an eliminativist approach to "race". This is evident in the largely eliminativist attitudes of contemporary society, the privatized understanding of racism adopted by our policymakers and the "colourblind" approach to race taken by the highest court in our land. If a case of alleged genocide against a racial group were to come to South African domestic courts, could we simply "turn a colourblind eye" to the deeply rooted legacy of racism that continues to unsettle South African society structurally? If we were to, it can be argued that there could conceivably be a "flipping" of victims, where claims of genocidal *racism* could be launched against those who continue to be victims of our deeply troubled past, by those who continue to benefit from it. Perhaps the current research begs a further question of whether, on Mill's

conception that takes “Whiteness” to be a hegemonic and structural phenomenon, there could ever be a “White” genocide in South Africa.

BIBIOGRAPHY

Primary Sources

Table of cases

Azanian Peoples Organization (AZAPO) and Others v *President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996).

Prosecutor v *Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998).

The Prosecutor v *Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber Judgment (7 June 2001).

The Prosecutor v Brdanin, Case No. IT-99-36-T, Trial Judgment (1 September 2004).

The Prosecutor v *Jelisic*, Case No. IT-95-io-A, Trial Judgment (14 December 1999).

Prosecutor v *Kayeshema and Ruzindana*, (Case no. ICTR-95-I-T), Judgment (May 21, 1999).

The Prosecutor v *Radislav Krstic*, IT-98-33-T (2 Aug 2001).

Table of statutes

Constitution of the Republic of South Africa Act 108 of 1996

- Section 265

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951), adopted by G.A. Res. 260(IIl)(A), U.N. GAOR, 3d Sess., pt. 1, at 174, U.N. Doc. A/810 (1948).

- Article II

Population Registrations Act 30 of 1950

- Section 1 (xv);
- Section 1(x)

- Section 1(iii).

Secondary sources

Books

Gaeta, P 'Genocide' in W A Schabas & N Bernaz (ed) *Routledge Handbook of International Criminal Law* London and New York: Routledge, (2011) 109-120.

Gevers, C 'International Criminal Law in South Africa' in E de Wet, H Hestermeyer & R Wolfrum (ed) *The Implementation of International Law in Germany and South Africa.* Pretoria: Pretoria University Law Press (PULP*)*, (2015) 403-441.

Gevers, C 'Africa and International Criminal Law' in KJ Heller et al. (eds) *Oxford Handbook of International Criminal Law* (Oxford UP, forthcoming).

Glasgow, J *A Theory of Race* New York: Routledge, (2009).

Lippman, M 'Genocide' in MC Bassiouni (ed) *International Criminal Law: Sources, Subjects, and Contents* Leiden: Martinus Nijhoff Publishers, (2008). Vol 1.

Nsereko, D N, 'Genocide: a crime against mankind' in G K McDonald & O Swaak-Goldman (ed) *Substantive and Procedural Aspects of International Criminal Law* The Hague: Kluwer Law International, (2000). Vol 2(3), 115-140.

Schabas, W A *Genocide in International Law: The Crime of Crimes* Cambridge: Cambridge University Press, (2000).

Tams, C; Berster L & Schiffbauer, B *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, (2014).

Vest, H *Genozid durch organisatorische Machtapparate* Baden-Baden: Nomos Verlagsgesellschaft, (2002).

Werle, G *Principles of International Criminal Law* The Hague: TMC Asser Press, (2009).

Journal articles

Chenwi, L; Franziska, S 'South Africa's Competing Obligations in Relation to International Crimes' (2015) 7 *Constitutional Court Review* 199-245.

DeFalco, R C; Megret, F 'The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System' (2019) 7(1) *London Review of International Law* 55-87.

Hendricks, L; Kramer, S; Ratele, K 'Research shouldn't be a dirty thought, but race is problematic construct' (2019) (00)(0) *South African Journal of Psychology* 1-4.

LeBlanc, L J 'The United Nations Genocide Convention and Political groups: Should the United States Propose an Amendment?' (1988) 13(2) *Yale Journal of International Law* 268-295.

Lingaas, C 'Defining the Protected Groups of Genocide through the Case Law of International Courts' 2015 *ICD Brief 18*.

Lingaas, C 'The Elephant in the Room: The Uneasy Task of Defining 'Racial' in International Criminal Law' (2015) 15 *International Criminal Law Review* 485-516.

Lingaas C 'Imagined Identities: Defining the Racial Group in the Crime of Genocide' (2016) 10(1) *Genocide Studies and Prevention: An International Journal* 78-106.

Mills, C W *Blackness Visible: Essays on Philosophy and Race* New York: Cornell University Press, (1998).

Modiri, J M 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in Post-Apartheid South Africa' 2012 *SAJHR* 405-436.

Nersessian, D L 'The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention' (2003) 36 *Cornell International Law Journal* 293-327.

Nieuwoudt, S; Dickie, K E; Coetsee, C; Engelbrecht, L & Terblanche, E. Retracted article: Age- and education-related effects on cognitive functioning in Colored South African

women. Aging, Neuropsychology, and Cognition. Advance online publication (2019).doi:10.1080/13825585.2019.1598538.

Omi, M & Winant, H *Racial Formation in the United States* 3 ed New York: Routledge, (2015).

Posel, D 'Race as Common Sense: Racial Classification in Twentieth-Century South Africa' (2001) 44(2) *African Studies Review* 87-113.

Schabas, W A 'Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunals for Rwanda' (2000) 6 *ILSA Journal of International & Comparative Law* 375-387.

Schmolzer, S 'Implementing European Standards: The Competence of Specialized Bodies to Combat Racism and Racial Discrimination and Deal with Individual Cases' (2012) 2014(1) *University of Oslo Faculty of Law Legal Studies Research Paper Series.*

Sitze, A 'The Crime of Apartheid: Genealogy of a Successful Failure' (2019) 7(2) *London Review of International Law* 181-214.

Shilliam, R 'Race and Research Agendas' (2013) 26(1) *Cambridge Review of International Affairs* 152-158.

Szpak, A 'National, Ethnical, Racial and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals' (2012) 23(1) *EJIL* 155-173.

Tournaye, C 'Genocidal Intent before the ICTY' (2003) 52(2) *The International and Comparative Law Quarterly* 447-462.

Van der Merwe, H J 'The Prosecution of Incitement to Genocide in South Africa' (2013) 16(5) *PER/PELJ* 328-368.

Verdirame, G 'The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals' (2000) 49 *International and Comparative Law Quarterly* 578-598.

Internet sources

Salie, F 'Standard Bank suspends Chris Hart over 'racist' tweet' (4 January 2016), *Fin24* available at https://www.fin24.com/Companies/Financial-Services/standard-bank-suspends-chris-hart-over-racist-tweet-20160104, accessed on 25 July 2019.

Grobler, R 'Authors retract Stellenbosch University study coloured women's 'low thinking function'' (3 May 2019), *News24* available at https://www.news24.com/SouthAfrica/News/authors-retract-stellenbosch-university-study-on-coloured-womens-low-thinking-ability-20190503, accessed on 15 June 2019.

Wicks, J ''It's just the facts' - Penny Sparrow breaks her silence' (4 January 2016), *News24* available at https://www.news24.com/SouthAfrica/News/its-just-the-facts-penny-sparrow-breaks-her-silence-20160104, accessed on 20 July 2019.

'Race' *Lexico* available at https://www.lexico.com/definition/race, accessed on 7 April 2019.

'Race' *Merriam-Webster* available at https://www.merriam-webster.com/dictionary/race, accessed 7 April 2019.

'Race' *Macmillan Dictionary* available at https://www.macmillandictionary.com/dictionary/british/race_1, accessed on 7 April 2019.

'Prevention and Combating of Hate Crimes and Hate Speech Bill & International Crimes Bill: briefing, with Minister and Deputy Minister' *Parliamentary Monitoring Group* available at https://pmg.org.za/page/Prevention%20and%20Combating%20of%20Hate%20Crimes%20and%20Hate%20Speech%20Bill%20&%20International%20Crimes%2

0Bill:%20briefing,%20with%20Minister%20and%20Deputy%20Minister, accessed on 20 July 2019.

Mabuza, E ‘Velaphi Khumalo’s comment on SA being 'cleansed of white people' is hate speech – Equality Court’ (5 October 2018), *TimesLive* available at https://www.timeslive.co.za/news/south-africa/2018-10-05-mans-white-sas-

deserve-to-be-killed-like-jews-comment-is-hate-speech--high-court/, accessed on 28 July 2019.

UNESCO 'Statement on Race and Racial Prejudice 1967' *HonestThinking* at 7 available at , accessed on 30 June 2019.

Other sources

South African Institute of Race Relations NPC (IRR) *Submission to the Department of Justice and Constitutional Development regarding the draft Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016* Johannesburg: South African Institute of Race Relations, (2017).

Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016.