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The Urgency to Include Gender as Protected Group under the Crime of Genocide

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Abstract

This research will discuss exigence to assign gender as protected groups in Genocide under Rome Statute which contains about gender (indeed third gender) selective mass killing. This research is inspired from the allegation of selective mass killing to gender in Nanjing, China, India, and Indonesia which begs protection from crime of genocide. This research method used is the juridical normative approach method. The research is conducted by analyzing the data gained from library studies and international conventions related to International Criminal Law. The specification of research is done by describing the related legislations associated with the legal theory and practice of implementing an object of research. The result of this research shows that the gender has similar characteristics exclusive groups as the protected groups under article 6 Rome Statute. What the result of that based on article 9 Rome Statute, amendment protected group is possible to do.

Keyword: Gender, Genocide, International Criminal Court

Urgensi Menempatkan Gender Sebagai Kelompok yang Dilindungi dalam Kejahatan Genosida

Abstrak

Penelitian ini akan membahas urgensi untuk menambahkan gender sebagai kelompok yang dilindungi dalam kejahatan genosida yang diatur di bawah ketentuan Statuta Roma terkait pembantaian berpreferensi gender (termasuk gender ketiga). Penelitian ini terinspirasi dari adanya dugaan pembantaian selektif gender di Nanking, Tiongkok, India, bahkan Indonesia yang membutuhkan perlindungan dari ketentuan genosida. Metode penelitian yang digunakan adalah yuridis normatif. Penelitian dilakukan dengan menganalisis data yang diperoleh dari studi kepustakaan dan studi peraturan konvensi internasional yang berkaitan dengan Hukum Pidana Internasional. Penelitian menggunakan spesifikasi penelitian deskriptif analitis yaitu menggambarkan peraturan yang dikaitkan dengan teori hukum dan praktek pelaksanaan suatu objek penelitian. Hasil dari penelitian menunjukkan bahwa gender memiliki karakteristik yang sama dengan kelompok yang dilindungi dalam kejahatan genosida. Sehingga sesuai dengan Pasal 9 Statuta Roma amandemen terhadap kelompok yang dilindungi dalam kejahatan genosida dimungkinkan untuk dilakukan.

Kata Kunci: Gender, Genosida, Mahkamah Peradilan Pidana

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A. INTRODUCTION

In several countries, the preference for a son over a daughter has created the 'missing' girl phenomenon. At least 100 million newborn infant girls have disappeared or have not been born. In some societies, especially when reproductive decisions are constrained, preferences for a male baby are so strong that female fetuses may be aborted and baby girls killed or neglected. Apart from being a gross violation of human rights, this type of gender-selection also has many social and economic repercussions. The normal sex ratio at birth is around 105 boys for every 100 girls. However, societies' and families' preferences for a son rather than a daughter have grossly distorted the natural ratio.¹

With 255 babies born every minute that amounts to approximately 367,000 babies born each day. Unbeknownst to these newly delivered earthlings, they are participants of a daily, high stakes global lottery. We generally don't think of birth as a type of lottery but that is essentially what it amounts to when we consider the life chances of these babies and how their birth location has a significant effect on the structural inequalities they may face. This analogy of a birth lottery suggests that if fate is on your side, and you are lucky enough to be born in a wealthy country, you will more likely enjoy the great fortunes and opportunities that come from being a citizen of that country. Conversely, if you "lose" the birth lottery, and you are born in a poor country, your life chances and circumstances will mostly likely suffer accordingly. To illustrate the power of the

birth lottery, we can consider some of the typical indicators of inequality and compare the global disparities with the disparities in the United States. As we will see, the discrepancies of inequality on a global scale are significantly more extreme than in the United States.²

Every human being has the inherent right to live in prosperity and feel safe against all kinds of threats.³ This implies that the fulfillment must absolutely be owned by everyone, and no entity can take the lives of others in any way. In China in the period of December 1937 a phenomenon known as the Rape of Nanjing, this case began when the Japanese military invaded the capital of China which was then still in Nanjing, tens of thousands of Chinese women were killed after they were raped simultaneously by Japanese soldiers.⁴ Kenzo Akamoto, a former Japanese soldier on duty at the time described the atrocities of Japanese soldiers with the phrase "We were hungry for women! Officers issued a rough rule: if you mess with a woman, kill her afterwards!".⁵ Many bodies of women scattered on the streets, they were killed after being raped in turns by Japanese legions, and women there were not allowed to wear their clothes during their activities, even many women were found who had their breasts cut off, and the pieces were made necklaces for soldiers, not only adult women, children also became victims of the savagery of Japanese soldiers. Some of the defendants in the Nanjing Massacre case were tried by the International Tribunal for the Far East as convicted of class Crimes (crimes against world peace), war crimes, and crimes against humanity.⁶

¹ Chi Zou (et.al), *Son preference and sex-selective abortion in China: informing policy options*, London: Springer, 2010, p. 459.

² Peter Kaufman, "The Birth Lottery and Global Inequality Everyday Sociology", <https://www.everydaysociologyblog.com/2015/01/the-birth-lottery-and-global-inequality.html>, accessed on 28 June 2018.

³ Act 6 Paragraph 1 *International Covenant Civil and Political Rights*

⁴ Adam Jones, *Genocide A Comprehensive Introduction*, London: Routledge Taylor & Francis Group London and New York, 2006, p. 329.

⁵ James Yin and Shi Young, "The Rape of Nanking: An Udeniable History in Photographs", Chicago, IL: Triumph, 1998, p. 188 in *Genocide A Comprehensive Introduction*, compiled by Adam Jones, London: Routledge Taylor & Francis Group London and New York, 2006, p. 329.

⁶ Adam Jones, *Genocide A Comprehensive Introduction*, Loc. Cit.

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It did not stop there, a sense of gender-based violence which hit women in China. In the 20th century, this special crime against gender has been repeated once again.⁷ Jesuit, a Chinese Missionary has noted that thousands of baby girls have been abandoned, killed, raped, and exploited just because they are female.⁸ In addition to the patriarchal cultural factor, it turns out that the "one child policy" policy in China began since the Den Xiaoping regime in 1978,⁹ also another factor. The policy of "one child policy" is intended to reduce the population and reduce the level of infant mortality in China. This policy was formally formulated as a legal product only a year after the policy was launched, precisely in 1979 through Population and Family Law of the People's Republic of China (Order of the President No. 63), this policy lasted until 2016 then this was finally revoked by the Chinese Government.¹⁰

Purification of gender also occurred in India, unlike in China this phenomenon is only caused by hate factors embedded in Indian society in the form of dowry.¹¹ The marriage dowry in India is given by female brides, therefore Indian people are reluctant to have daughters, women are considered as a burden on the family and an obstacle to the advancement of the family economy. Just as in China girls in India are also often tortured, thrown away, even killed by their parents because they are female, even doctors in India covertly provide abortion practice services for parents who don't want their daughters to be born.¹² Dowry culture in India causes preference for crime based on gender to

increase, the United Nations noted in India there were 8 women for every 10 men in 2001-2003.¹³

Not only to a general gender universally known (male and female), the purification also occurred to those groups who recognize more than two genders. In Indonesia Bugis ethnic recognize five genders Male, Female, Female transgender, Male transgender, and a bissu (neither male nor female). They were hunted and killed by Moslem rebels who wanted to take over the rightful Presidency and create an Islamic State. In the view of the rebels, these genders considered being a blasphemy which turns out from its nature that it shall be only men and women. The transgender even forced to return to what they were supposed to be. There is no precise data regarding the numbers of victims but targeting them because of their identity shall be relevant to the present issue.

The case of the rape of Nanjing, as well as the phenomenon of gendercide in China and India, has similarities. First, the three cases above are a series of exploitation and crime that target specifically gender, in this case, female's gender. Second, the above phenomenon is a crime that leads to hatred towards one gender with cultural factors that marginalizes female's gender. Third, these crimes have a significant impact on humanity because they directly attack women's gender entities because they will have an impact on the population, both population growth rates and lack of female emancipation. Fourth, the crime considered by international criminal law experts to

⁷ Victor Grech, Julyano Mamo, "Gendercide: a Review of the Missing Women", *Medical Journal University of Malta*, Vol. 26, 2014, p. 8.

⁸ Marry Anne Warren, *Gendercide: The Implications of Sex Selection*, New Jersey: Rowman & Allambeld, 1985, p. 21

⁹ Veronikia Marlova, *One Child Policy in China*, Iceland: B.A. Essay University of Iceland School of Humanities, 2018, p. 3

¹⁰ Population Research Institute "China Announces End of One Child Policy", [https://www.pop.org/china-](https://www.pop.org/china-announces-end-of-one-child-policy/)

[announces-end-of-one-child-policy/](https://www.pop.org/china-announces-end-of-one-child-policy/), accessed at 20 April 2019.

¹¹ Reshma M.A and A. Ramegowda, "Dowry-The Cancer of Society", *IOSR Journal of Humanities and Social Science Oxford University*, Vol. 17, No. 4, 2013, p. 35

¹² *Ibid.*

¹³ United Nation Population Fund-India, "The Multimedia Encyclopedia of Women in Today's World", *SAGE Publication*, 2012, p. 122.

threaten universal values and touch the conscience of the international community.¹⁴

The above phenomenon raised reactions from international criminal law experts and scholars of the feminist movement pioneered by Mary Anne Warren who provides a definition of a series of selective genocide annihilation with Gendercide terminology.¹⁵ The phenomenon of gendercide cannot be answered by current law, because there is no provision of criminal acts at all at the international or national level which includes gender as a protected group. Although in crimes against humanity, it has been regulated that gender is one of the groups protected under the International Criminal Court (ICC) jurisdiction but looking at the criteria and characteristics of criminal acts, the case of gendercide above is not carried out widely and systematically, which where this particular model of attack can only be carried out by the armed forces movement.¹⁶

The existence of barbaric actions and the magnitude of the destruction that has been gained (vandalism) due to the gendercide case in China has claimed 200 million women both infants and adults disappeared.¹⁷ While the mortality rate of women in India in the decade of the 90s reached more than 100 million,¹⁸ This phenomenon has actually touched the conscience of the international community. Adam Jones in his book proposes to review the Genocide crime protection group by

including gender groups as an exclusive group that can be protected, under the provisions of the crime of genocide.¹⁹ If gender can be included in the protection group then this is in line with the original goal of criminalizing the crime of genocide which is regulated under the umbrella of its own international law, and the initial ideals that Raphael Lemkin initiated to protect the existence of human civilization in future generations can be achieved.²⁰

The debate to expand the reach of the genocide crime protection group was apparent at the beginning of the Rome Statute formulation, this idea was initially sparked by a delegation from Cuba who wanted to add social and political groups to be protected in the crime of genocide, but the debate was over because the forum argued that genocide could not be made the norm to protect social and political groups, therefore the proposal from the Cuban delegation to include social and political groups into a protection group was rejected for discussion at the next session.²¹

Delegates who refused to add protected groups from genocide were guided by the International Criminal Tribunal for the Former of Rwanda (ICTR) decision in the Prosecutor v Akayesu case, in its decision the judge stated that the crime of genocide was only shown to groups that were "stable" and "permanent" where members are determined based on birth, and members does not want themselves to voluntarily leave or release their membership. Groups that are stable and

¹⁴ Adam Jones, *Genocide A Comprehensive Introduction*, *Loc. Cit.*

¹⁵ Mary Anne Warren, "A Reply to Holmes on Gendercide", *Bioethics Journal*, Vol. 1, No. 1, 1987, p. 100.

¹⁶ *Ibid.*

¹⁷ Samantha Ufret, "No One Wants a Baby Girl: Analyzing Gendercide in China and India", *Global Majority E-Journal University of Washington. DC*, Vol. 5, 2014, p. 117.

¹⁸ Krystna Palonka, "Gendercide Current Legacy of Demography Control: China and India", *E-Leader*, 2017, p. 5

¹⁹ Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Oxford: Intersentia, 2005, p. 220

²⁰ Nina H. B Jorgensen, *The Responsibility of States for International Crimes*, London: Oxford Monographs in International Law, 2006, p. 67.

²¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, London: Oxford University Press, 2016, p. 135

permanent mean that the nature of the structure is relatively long and does not change quickly, if there are influences from both internal and external, it is considered difficult to destabilize the existence of this group.²² While the nature of the group that is "mobile" where membership can be determined based on voluntary commitments of individuals such as political, economic, and other groups, cannot be protected in the crime of genocide.²³

With the status quo provision of crime of genocide, Elisa von Joeden can be prosecuted as a special crime against gender as long as it fulfills the substantial elements of the party, but with the intention of the perpetrators must be aimed at destroying 4 (four) exclusive groups (race, religion, nation and ethnicity),²⁴ or have to wait for the abusive actions of the perpetrators that resulted in other genders being exterminated.²⁵

Thus, to protect gender from a series of specific crimes against them, and to achieve the initial goal of formulating the crime of genocide, gender position must be recognized as protected groups in the provision of genocide. Therefore, the authors are interested in examining further about the position of gender as a protected group in the crime of genocide.

B. GENDER POSITION AS PROTECTED GROUPS IN GENOCIDE CRIME

The definition of Genocide Crime refers to the Convention on the Prevention and Punishment of the Crime of Genocide (Convention on Genocide) defining the crime of genocide, which was later adopted by the Rome Statute, which:

"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:

1. *Killing members of the group;*
2. *Causing serious bodily or mental harm to members of the group;*
3. *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
4. *Imposing measures to intended to prevent birth within the group;*
5. *Forcibly transferring children of the group to another group.*²⁶

The *bestandelen delicts* elements of the crime of genocide consist of: (1) Intent to destroy; (2) in whole or in part (3) and protected groups such as national, ethnical, racial, or religious groups. Based on the facts of the case of female gender eradication in China and India, it has clearly fulfilled the intent to destroy element because, parents who carry out a series of acts of abortion, exploitation, exile, and even murder are not based on intentions that only exclude or eliminate the child's entity, but in this case the actions taken by the family to eliminate the lives of their children are due to hatred that arises from the gift inherent in their children, namely the female gender which is inherent in the child since they were born. However, this action cannot be criminalized by the provisions of the current genocide.

Departing from the description above, it is necessary to see the provisions of the Rome Statute looking at the status quo, gender position in the crime of genocide, then it can be seen whether gender has the

²² ICTR, *Prosecutor V. Akayesu*, Case No. ICTR-96-4-T, Judgement 1998, p. 3

²³ Michael A. Hogg, "Social Identity and Self-Categorization Processes in Organizational Contexts", *Academy of Management*, Vol. 25, No. 1, 2000, p. 124

²⁴ Arman Murat Necip, "The Concept of Ethnic Cleansing: A Cautious Quest for Justice", *Journal of Law, Policy and Globalization*, Vol. 1, 2011, p. 7

²⁵ *Ibid.*

²⁶ *Act Number 2 of Convention on the Prevention and Punishment of the Crime of Genocide*

urgency to be placed as an exclusive group protected in the crime of genocide.

1. *Status Quo* Gender in the Crimes of Genocide

Customary international law²⁷ defines genocide as denial of the right of existence of entire human groups,²⁸ whether committed on religious, political, or any other grounds.²⁹ Moreover, *travaux préparatoires* of the Genocide Convention 1948 intentionally provides an open interpretation of the classifications of the protected groups³⁰ It stipulates that the crime of genocide is not limited to ethnic, racial, religious, and national groups.

William Shabas claimed that there were no recorded debates of the sub-committee exist to explain the addition of "political and other groups," and the summary records of the plenary Sixth Committee are silent on the subject. It has subsequently been argued that the presence of "political and other groups" within the 1946 definition suggests the existence of a broader concept of genocide than that expressed in the Convention, one that reflects customary law. But given the meager record of the debates, the haste with which the resolution was adopted, the novelty of the term, and the fact that the subsequent Convention excludes "political and other groups," such a

conclusion seems adventuresome at best. That Resolution 96 (I) also omits ethnic and national groups is a further argument against it being taken as an authoritative list on this issue.³¹

Terminologically there are differences that are reported by these scientists only on the object of extermination. For example, gendercide which focuses on the extermination of a group but emphasizes the object of genocide, namely men, which is considered a threat, while women are excluded from the list of objects of murder because they are considered harmless. There are also femicides whose object of slaughter is women only because they are women. And many other terms that focus on objects of defense such as povercide in poor people and politicide in a political group.³²

Referring to the elements in a part actually can refer to one of the genders which are the target of extermination. Substantial part elements do not question the quantity number of victims targeted, such as the case of the Sabra and Shatila massacre, for example, this case has been determined as a crime of genocide even though the number of victims is only under the hundreds, the International Criminal Tribunal for the former Yugoslavia assessed to fulfill the

²⁷ Rome Statute, Art. 21(b); *see also: Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Reports of Judgement, Advisory Opinions and Orders of the ICJ, 3 June 1985, pp. 29-30, para. 27.

²⁸ UN General Assembly ["UNGA"] Resolution 96(I), *The Crime of Genocide*, A/64/Add.1, 11 December 1946.

²⁹ UNGA Resolution 96(I), *The Crime of Genocide*, A/64/Add.1, 11 December 1946; *see also: Republic of France, Criminal Code of the French Republic*, 2005, Art. 211-1; Republic of Romania, *Criminal Code of the Republic of Romania*, 2009, Amendment in 2012, Art. 172; *Akayesu*, Judgement of the Trial Chamber I ICTR, ICTR-96-4-T, 2 September 1998, paras. 511-516.

³⁰ *Ad Hoc* Committee on Genocide of the UN, *Basic Principles of a Convention on Genocide Proposed by the*

Delegation of the Union of Soviet Socialist Republics on 5 April 1948, U.N. Doc. E/AC.25/7, 1948, Art. I; *see also: Ben Brandon and Max du Plessis, The Prosecution of International Crimes*, London: Commonwealth Secretariat, 2005, pp. 35-36; David L. Nersessian, *Genocide and Political Groups*, Oxford: Oxford University Press, 2010, p. 62.

³¹ William A. Schabas, "Groups Protected by The Genocide Convention: Conflicting Interpretations from The International Criminal Tribunal for Rwanda", *ILSA Journal of International & Comparative Law*, Vol. 6, 1998, pp. 375-376.

³² Adam Jones, *Genocide: A Comprehensive Introduction*, New York: Routledge, 2006, p. 26-28.

formula in a part.³³ The ICTY explained that in genocide crimes that fulfill the 'substantial part' element, genocide perpetrators must target individuals who are leaders in the target group, or individuals who are targeted to have quality to support the existence of the target group's survival..³⁴

In the case of the Bosnian Muslim massacre that occurred in 1992-1995 for example, there were around 8,000 Bosnian Muslims died, as a result of the massacre by General Ratko Mladic (Commander of the Republic of Srpska forces).³⁵ Looking at the proportionality of the number of victims which ranges from 8,000 with the overall number of Bosnia Muslims falling to 40,000,³⁶ in fact, this number does not significantly interfere with the existence of Muslim groups in Bosnia, but in the perspective of Islam, the absence of a man as a family imam or leader can have an effect on a wife's helplessness in accepting the proposal of another male candidate because she was not divorced by her previous husband even though her husband has died the world. In the socio-cultural perspective, the absence of men can also have an effect on poverty for families left behind, because of this it threatens the killing of Muslim groups in the next generation.³⁷

Actions of perpetrators who eradicate women's gender shall fulfill the substantial part, but in understanding the crime of genocide or

general crime in general, it must look at the elements as a whole with other elements contained in a provision of criminal acts and may not be understood separately.³⁸

In the case a quo which is the target of the perpetrators of crime is the female, because of the intention of the perpetrator lies in the intensity of him to carry out a series of acts of exploitation, abortion, and even murder to destroy female's gender, due to hatred of the existence of female's gender. This argument is supported by the Al Bashir case, the first ICC pre-trial judge refused to issue an arrest warrant to Omar Al Bashir for alleged crimes of genocide.³⁹ This is because Al Bashir explained that his intention to carry out a series of heinous acts was directed at the militant Sudan Liberation Movement (SLM) group, which by chance all its members were ethnic Fur, and all members were Muslim.⁴⁰ In this case we can see that the crime of genocide is a special crime that has distinguishing characteristics from international crimes under other ICC jurisdictions, in this case even though the target of the victim is an exclusive group in the crime of genocide, but in order to qualify it into genocide, the intention of the perpetrator must be intentionally immediately wants to eradicate an exclusive group of race, religion, nation, or tribe in whole or in part.

³³ Otto Triffterer/Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, Gottingen: Collaboration C.H Beck-Hart-Nomos, 3rd Edition, 2015, p. 133.

³⁴ *Prosecutor v. Krstić*, note 26, Paras. 15–16 in Otto Triffterer/Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, Gottingen: Collaboration C.H Beck-Hart-Nomos, 3rd Edition, 2015, p. 133.

³⁵ The Guardian "Bosnian Serb warlord Ratko Mladic disrupts genocided verdict hearing", <https://www.theguardian.com/world/2017/nov/21/r>

[atko-mladic-bosnian-serb-genocide-war-crimes](#), accessed at 19 January 2018.

³⁶ Otto Triffterer/Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary, Op. Cit.*, p. 134.

³⁷ *Ibid.*

³⁸ Moeljatno, *Asas-Asas Hukum Pidana*, Jakarta: Bina Aksara, 1987, p. 40.

³⁹ *Pre-Trial Chamber 1, Prosecutor v. Omar Al Bashir*, No. ICC-02/05-01/09, Notes 105, para. 50.

⁴⁰ *Ibid.* p. 5

2. A Stable and Permanent Gender Group

The enumeration of the groups protected by the Convention's definition of genocide is perhaps its most controversial aspect. Critics have argued that the omission of political, economic, social, gender and other groups is illogical and incompatible with the Convention's lofty mission. Some domestic legislatures, when enacting implementing legislation, have expanded the list of groups covered by the term genocide, the most extensive of these being the recent amendment to the French Code penal which defines genocide as the intentional destruction of any group based on arbitrary criteria.⁴¹ Indeed, since the Convention's adoption in 1948, surely far more has been said and written lamenting the restrictive scope of the groups covered by the definition found in article HI of the Convention than on its interpretation per se.⁴²

In *Prosecutor v. Akayesu* held in ICTR in 1998, the Court found that it is necessary to put any stable and permanent group under the protection from the crime of genocide.⁴³ Moreover, in *Prosecutor v. Rutaganda*, held in ICTR in 1999, the Court found that assessment on whether or not a certain group should be protected from the crime of genocide has to be conducted on a case-by-case basis taking into account the relevant evidence proffered and the political and the cultural context.⁴⁴ In order to determine the membership of permanent and stable

group, the members must not join through individual voluntary commitment,⁴⁵ as they have to be identified as such by all.⁴⁶

Perplexed by difficulties in determining how to categorize the Tutsi group, the Trial Chamber ultimately ruled that article U of the Genocide Convention should be interpreted to apply to all "stable and permanent" groups, whether or not the Tutsi could be neatly fit within the scope of the terms "national, ethnic, racial or religious."⁴⁷ Months later, a second Trial Chamber of the same Tribunal, in *Prosecutor v. Kayeshema and Ruzindana*, took a very different approach to the issue, ruling that the Tutsi were an ethnic group not because they met the definition in any objective sense but because Rwandan laws had defined them as such.⁴⁸

The protected group in status quo were selected predominantly on the basis of their stable and permanent nature: a criterion equally as applicable to men or women. As stated in *Akayesu* case:⁴⁹

"On regarding through the travaux preparatoires of the genocide convention... it appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as

⁴¹ Penal Code (France), Journal Official, July 23, 1992, art. 211-1

⁴² William A. Schabas, *Loc.Cit.*

⁴³ *Akayesu*, Judgement of the Trial Chamber I ICTR, ICTR-96-4-T, 2 September 1998, para. 516.

⁴⁴ *Rutaganda*, Judgement of the Trial Chamber I ICTR, ICTR-96-3-T, 6 December 1999, para. 58

⁴⁵ *Akayesu*, Judgement of the Trial Chamber I ICTR, ICTR-96-4-T, 2 September 1998, para. 511.

⁴⁶ *Musema*, Judgement of the Trial Chamber ICTR, ICTR-96-13-A, 27 January 2000, paras. 160-163.

⁴⁷ William A. Schabas, *Loc.Cit.*

⁴⁸ *Prosecutor v. Kayeshema and Ruzindana*, (Case no. ICTR-95-I-T), Judgment (May 21, 1999)

⁴⁹ *Akayesu*, Judgement of the Trial Chamber I ICTR, ICTR-96-4-T, 2 September 1998, para. 516.

political or economic group. Therefore, a common criterion in the four types of groups protected by the genocide convention is that membership in such groups would seem to be normally not challengeable by its member, who belong it automatically, by birth, in a continuous and often irredeemable manner."

It is difficult to understand a group more permanent and stable than a gender group; membership of which is determined automatically, continuously, irremediable, and without any challenge could be denied by other members. While a person might be born into a national group, it is still very possible (although difficult) to change nationality or move his or her territory. A person born into a particular ethnical group meanwhile may 'share a common language or culture',⁵⁰ yet such culture is so often modified as time goes by and by the people who might come to the local culture, and while a person might be struggle to amend their characteristic of their race, the religious groups are clearly more mobile, since people are 'free to join and to leave them'⁵¹ a fact asserted by the United Kingdom delegate during the negotiation proves for the Genocide convention. A person born of one gender however, cannot (as a general rule, and current medical advances notwithstanding) change such gender themselves, not least because society perceives a person's sex to be determinant of their gender.⁵² Unlike nationalities, ethnicities, races or religions which can become inter-linked

by crossbreeding, movement of peoples and the increasingly interwoven nature of societies, gender groups remain stable and permanent. For the overwhelming majority of the world's populations, there are only two sexes, we are born male or we are born female, and out societal identification ensures that the sex we are biologically, is the same as the gender we are socially. Whilst to some extent, we already recognize some people who determined themselves as third gender or even non-binary gender.

As Schabas-sceptical of extending the definition of the protected groups-concedes, 'if the basis of the enumeration is groups that are "stable and permanent". As proposed by the ICRT in Akayesu, it can certainly be applied to women'.⁵³

C. THE URGENCY OF INCLUDING GENDER AS PROTECTED GROUPS IN THE GENOCIDE CRIMES

Gender is the result of community construction that distinguishes the role, function, and position of an individual that is embedded through long interpersonal interactions, where the individual will declare an identity to be male or female.⁵⁴ It is this long-embedded individual identity that makes this group "stable" and "permanent", even though its membership is a community construction, but to obtain membership status is not easy, but needs to go through a long and relatively long process. But some sociological experts such

⁵⁰ Chile Eboe-Osuji, *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, Boston: Nijhoff, 2010, p.178

⁵¹ General Assembly Sixth Committee UN Doc A/C.6/SR/69 (1948) Shawcross, United Kingdom; Chile Eboe-Osuji, *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, Boston: Nijhoff, 2010, p.178

⁵² Chile Eboe-Osuji, *Loc.Cit.*

⁵³ William A. Schabas, *Genocide in International Law: The Crimes of Crimes*, New York, Cambridge University Press, 2000, p. 147.

⁵⁴ Candace West & Don H. Zimmerman, "Doing Gender", *Gender & Society*, Vol. 1, No. 2, 1967, p. 125.

as Kurt Jonassohn also mention that Gender is inherent in each individual for the gifts given by the Creator (lottery of birth), individuals born to a human being outwardly have different genders, both men and women.

Therefore, in this article the differences in terms of both gender and sex (sex) do not have universal meaning, therefore the author does not further examine both the concepts of gender and sex (sex), because it does not have enough substance to be discussed in the article. Furthermore, gender group membership can be obtained based on two ways, namely through the way of birth and through medical methods such as sex reassignment surgery, the acquisition of identity can characterize this group as "stable" and "permanent" considering the way to obtain membership is relatively difficult, as the criteria for protected groups in the crime of genocide.

It has been established that theoretically, the spirit of genocide protection applies as equally to gender groups as to others, the final words of the Convention mentioned 'as such' require addressing. Put simply, and in keeping with the ordinary meaning of the Convention's text, the fact that such a group must be targeted 'as such' requires that the group be targeted for destruction. In many ways, it repeats the *mens rea* for the crime, focusing on the fact that the victims may have not been selected as individuals, but by virtue of their membership of a particular community.⁵⁵ Byron explains, "the addition of the words 'as such', simply emphasizes that it is the group itself which is the target of the genocide".⁵⁶ a view with which the ICJ recently agreed. Applying this context of

gender groups merely means that a gender group must be targeted on the basis of their man or womanhood per se. Such women or men must be chosen for destruction on the basis of their gender rather than for their individual characteristic.

Gerda Lerner explained that in the classical period in the Middle East, besides the thick patriarchal culture there was a habit of killing or mutilating male prisoners in large numbers and the practice of rape for female prisoners.⁵⁷ Quoting Lerner's explanation, the phenomenon of genocide is a twist of cultural forms of misogyny (hatred of women), in a condition of armed conflict, where the enemy is a man who is a combatant killed, and the remaining populations are women, women will be enslaved as a commodity.⁵⁸

Since the practice of selective slaughter of gender has been used as a form of war strategy, distinguishing between communities based on descent is a biased approach, because often in armed conflicts it is very difficult to distinguish between combatant and non-combatant groups. Genocide is a form of crime that is difficult to prove because it requires frames of perpetrators of massacres.

Genocide severely limits the intentions of the main subject of the protected group. In the case of the holocaust, for example, Hitler's intention to eradicate Jewish descent could not be clearly demonstrated.⁵⁹ The intentions of his actions were very much refuted by scholars at that time, due to not only were the Jewish groups targeted, Austrian residents, and others also found in the Auschwitz

⁵⁵ Chile Eboe-Osuji, *Op.Cit.*, p.176.

⁵⁶ *Ibid.*

⁵⁷ Adam Jones, *Genocide and Genocide*, UK: Routledge, 2000, p. 186.

⁵⁸ Barbara Ehrenreich, *Blood Rites: Origins and History of the Passions of War*, New York: Metropolitan Books, 1997, p. 130

⁵⁹ Kurt Jonassohn and Karen Bjornson, *Genocide and Gross Human Rights Violations*, New Brunswick: NJ Transaction Publisher, 1998, p. 132

camp.⁶⁰ Intention can only be proven through direct information from the perpetrator and a series of actions that can characterize his intention, therefore if the protection group is expanded then it has the consequence of facilitating the verification of prosecutors who are only concerned with proving "intention" only.

Selective extermination of gender for both men and women must be seen as a new formulation for the provisions of genocide. This is an innovative step in analyzing new forms of crime of genocide.⁶¹ In addition to the gendercide that occurred in China and India, there was a form of *elitocides* (*massacre of elites*), and *politicides* such as the phenomenon of controlling the demographic numbers of the Soviet Union at the time of Stalin's regime.⁶² Gendercide can also be interpreted as a special study of special killings that are specific to gender. This term was first coined by Mary Anne Warren in 1985 in her book entitled *Gendercide: The Implications of Sex Selection*. Warren describes the meaning of gendercides by using concepts similar to genocide. The American Dictionary of Oxford defines genocide as intentional racial extermination, while gendercide as human extermination based on gender or gender. Sometimes there are some experts who use other terms such as genocide and femicide. However, in terms of the etymology of gyn phrases and fem only refers to the eradication of women, while gendercide has a more general meaning, meaning not only refers to the female gender or male gender. Warren gave a view that murder based on sexual discrimination which is only categorized as ordinary murder, is a completely wrong view.

Special selective extermination of victims of gender exclusively (gendercide) by including the intention to destroy the group is theoretically still disputed by international criminal law. The preference of perpetrators who commit barbaric acts regardless of ethnicity, religion, nation, or race, but only look at gender because the quality of victims who submit or declare themselves voluntarily to be part of one of these genders cannot be answered by international criminal law. The provisions of the criminal act or international conventions only mean gender groups as one of the civil groups that are protected in criminal acts against humanity, war and aggression even though they see the initial purpose of the criminalization of genocide aimed at protecting a group with a "stable" nature and "permanent" from a condition of extinction, the group is the world civil inheritance.

The concept of genocide, in general, does not only apply to actions that result in the total annihilation of the human race. But it is sometimes appropriate to talk about certain actions that should qualify as crimes of genocide. Furthermore, not all genocide events involve direct killings, cultural disintegration conflicts, or even unintentional negligence may also be a form of genocide.⁶³ Ideally, the concept of genocide must be interpreted broader such as the denial of the right to reproduce.⁶⁴

This group is respectively then, on the basis of separable distinct 'protected groups' under the Genocide Convention. These aforementioned protected groups are distinguishable from larger mixed gender and mixed age groups that constitute the local community. Meanwhile, the women and child in

⁶⁰ Loise Ridley, "The Holocaust's Forgotten Victims: The 5 Million Non-Jewish People Killed by the Nazi's", https://www.huffpost.com/entry/holocaust-non-jewish-victims_n_6555604, accessed at 24 April 2019.

⁶¹ Adam Jones, *Gendercide and Genocide*, *Op. Cit.*, p. 224

⁶² *Ibid.*

⁶³ Mary Anne Warren, "Gendercide: The Implications of Sex Selection", *Op. Cit.*, p. 22-23

⁶⁴ *Ibid.*

Genocide convention protected groups are properly considered then per Article 2 as: (1) specific group targets of genocidal acts in and of themselves: that is, as 'women' and 'child' groups respectively symbolizing the society's larger dimension of the women or child group or any other incidental dimension of the group which may have been present and as (2) specific group targets of genocidal acts as a means of perpetrating genocide on a specific national, racial, ethnic or religious group. According to Von Joeden-Forgey added 'Families reproduce groups-so, in studying the destruction of 'national, racial, ethnical, and religious groups' as such, we are studying families by default.⁶⁵ Applying this to our current example, this issue of an identifiable group is even more complicated. Clearly, the mention of a gender group cannot mean the entire of one gender; roughly half the global population.⁶⁶

The question would be where the ring-fence can be drawn to classify the girls as protected groups, not least given that the convoluted nature of this issue often combines with the aspect of the *mens rea* allowing for partial destruction. Moreover, a gender group can also be ring-fenced on a regional basis, using the criteria of geographical limitation. It has been accepted by the International Criminal Tribunals that the intent to destroy the group need not cover the entire of its members the world over.

Furthermore, regulations or policies can also be said as crimes of genocide. First, produce massive mortality from racial or cultural groups. Second, there is no moral objection from the ratio of human common

sense because it contradicts the essential nature of human rights.⁶⁷ Therefore, in accordance with the provisions of Article 9 of the Rome Statute, amendments to the elements of a crime that fall under the jurisdiction of the International Criminal Court (ICC) can be carried out, provided that there are member countries that propose such changes.

In the other hand, there was also a case where gender base genocide occurs not only targeting gender in general (male and female). In Bugis ethnic communities in South Sulawesi Indonesia exists 5 (five) genders, such as (1) organic (male); (2) manure (female); (3) calabai (transgender male); (4) calalai (transgender woman); (5) bissu (embodiment of Gods according to customary beliefs). Gender diversity is the teaching of Sureq I La Galigo, which is a guideline for traditional Bugis beliefs.⁶⁸

In the belief that the Bugis inland bissu occupy the highest position because it is an embodiment of Deities in the human body, Bissu acts as the Customary Chief, pastor, shaman, and ritual trance expert. They are the link between the physical world and the astral world and have a mystical partner from heavenly beings. Based on Portuguese literary sources which at that time occupied the Sulawesi plains, it can be seen that bissu had a deviant sexual orientation, which was surprising to the Portuguese because in the 16th century in Europe gay and lesbian were immoral acts.⁶⁹

On August 7, 1953, Kahar Muzakkar proclaimed the south-Sulawesi region as part of DI / TII. Starting that year, until around 1965, DI / TII Kahar Muzakkar rebelled against a legitimate government. That year, the rebellion went hand in hand

⁶⁵ Elisa von Joeden-Forgey, "The Devil in the Details: "Life Force Atrocities" and the Assault on the Family in Times of Conflict", *Genocide Studies and Prevention: An International Journal*, Volume 5, 2010, p. 8.

⁶⁶ Chile Eboe-Osuji, *Loc.Cit*

⁶⁷ *Ibid.*

⁶⁸ Harvey Barbara Sillars, "Tradition, Islam, and Rebellion: South Sulawesi 1950-1965", *Doctoral Dissertation at Cornell University*, 1974, p. 19.

⁶⁹ Christian Pelras, *The Bugis*, Oxford: Blackwell Publisher, 1996, p. 97

with the purification of Islam. The Islamic state imagined by DI / TII tends to be anti against everything that smells of culture and traditions of the people.⁷⁰

Bissu, calabai, and calai are one of the victims of the purification process. They were hunted and arrested, because they were considered idol worshipers, guardians of ancient rituals and nurses of the tradition of feudalism. Their existence violates nature as well as the teachings of Islam. These two things make the bissu one of the most wanted targets by the DI / TII. They were hunted to the forests, until finally, they moved from one area to another which was considered safe. The bissu were hunted down, chased, and arrested and then forced to become masculine men again as to what their nature was.⁷¹

In 1966 the transgender group recalled the times that were not as bad as the DI / TII period, in the year the crackdown on the Indonesian Communist Party surfaced, the transgender group was also targeted in Tallua's Tumbu operations and Mappatoba operations or Toba operations.⁷²

This event can at least be considered to be a form of crime of genocide, because in fact this group was the target of purification. Historical documents do not provide clear data about the number of victims of DI / TII troop savagery led by Kahar Muzakkar but referring to the proportion of bissu in South Sulawesi in the past decade, there are very many victims who have died.⁷³

D. CONCLUSION

In preceding research has sought the utility of the gender study framework, inclusively

approached, across a broad range of law and historical contemporary case studies. It has been found that gender framework studies could be conducted by another variable in a legal approach. Moreover, the contemporary legal approach cannot answer gender-selective mass killing that is debated in the United States of America and Europe Scholar.

One of possibility objection in this research should be anticipated whether Bosnian Moslem massacre isn't genocide which all of the victim is a male can't be debated by ICTY Judges. Indeed, Nanjing Massacre, gendercide in China and India cases can be found the proper answer, as well as the Bissu Massacres in Indonesia need the right answer on why they were being hunted and killed for their gender orientation that has become a culture.

If the gender can be leveled-up, and it is no longer a civilian group in current international criminal law notions, but rather to stable and permanent groups which is the group that formed based on naturally by birth, for no one actually could request of what gender they wanted if they were born as it is known as lottery of birth. So, it has the implication to make it easier for the Prosecutor to prove the perpetrator intent, instead of arguing exclusive protected groups repeatedly.

In additions, this research sought the existence gendercide phenomenon based on normative or historical, construction of gross human rights violations specific in a genocide must restructured, because this idea has so long been pent-up. Thereof researchers have a desire that this research will serve as a new compass in various disciplines legal research, especially international criminal law and comparative

⁷⁰ "Siasat di Tengah Tarian para Bissu: Sebuah Catatan untuk gerakan LGBT di Indonesia", <http://www.gusduri.net/id/article/headline/Siasat-di-Tengah-Tarian-Para-Bissu%20/>, accessed at 25 April 2019.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

criminal law, so that scholars could explore the treasury, further criminal law with another approach.

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