Genocide: A Threat to the International Peace and Security

A Critical Analysis

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ABSTRACT:

This paper intends to provide an overview of the crime of genocide through drawing special attention on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The paper highlights the exigency of a more comprehensive approach to the prevention of genocide globally, by addressing the existing lacunae of the present Convention. The paper interprets the meaning of genocide through a closer look at the various provisions of the Convention.

I. WHAT IS GENOCIDE?

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (article 2) defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group … ", including: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

The Convention confirms that genocide, whether committed in time of peace or war, is a crime under international law which parties to the Convention undertake "to prevent and to punish" (article 1). The primary responsibility to prevent and stop genocide lies with the State in which this crime takes place. Genocide often occurs in societies in which different national, racial, ethnic or religious groups become locked in identity-related conflicts. However, it is not the differences in identity per se that generate conflict, but rather the gross inequalities associated with those differences in terms of access to power and resources, social services, development opportunities and the enjoyment of fundamental rights and freedoms. It is often the targeted group's reactions to these inequalities, and counter-reactions by the dominant group, that generate conflict that can escalate to genocide.

II. CAN STATES COMMIT GENOCIDE ?

Whether a state could actually perpetrate genocide, and engage its responsibility for doing so pursuant to the Convention, remained at the heart of *Bosnia v Serbia* case. The court observed that the obligation on states 'not to commit genocide themselves' was 'not expressly imposed by the actual terms of the Convention'. This was a question better addressed from the article 1 than article 9, which is essentially a jurisdictional provision, it

explained. Although article 1 does not '*expressisverbis* require States to refrain from themselves committing genocide…the effect of article 1 to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Aricle categorises genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described'.[1]

Therefore said the court, parties to the Convention is bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. It added that this also applied to the other acts enumerated in article 3 of the Convention, even though several provisions of article 3 appeared to be specially tailored to the system of individual criminal liability.

In determining that States as well as individuals can commit genocide, the court insisted that the regime of Stte responsibility was quite distinct and that it was not criminal in nature. Nevertheless, the close relationship between State and individual responsibility for genocide cannot be gainsaid. One manifestation of this is in the court's discussion of the burden of proof .Rejecting the arguments of Bosnia and Herzegovina that the Court should apply the ordinary standard of proof, of 'balance of probabilities' or 'preponderence of evidence' it said: 'In respect of the Applicant's claim that the respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation'. This is not identical to the 'beyond reasonable doubt', norm generally applied in international criminal law,[2] but there is certainly a family resemblance.

III. STATE RESPONSIBILITY AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE

The Genocide Convention is principally concerned with prosecution of individuals who perpetrate genocide. In articles 2 and 3, the Convention defines the offence. In article 4, it eliminates the defence of official capacity for senior officials and parliamentarians. In article 5, the Convention requires States Parties to adopt appropriate legislation within their domestic criminal law. Article 6 establishes the jurisdictional bases for such prosecutions, and article 7 addresses extradition issues. The Convention imposes a number of obligations upon States, for which they can obviously be held accountable. However, it does not explicitly declare that States themselves may be responsible for genocide. Nevertheless, States have often been accused of committing genocide. In fact, given the nature of the crime, it is difficult to conceive of genocide without some form of State complicity or involvement.

[1]Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment 26 February 2007.

[2]Rules of Procedure and Evidence [of the International Criminal Tribunal for the former Yugoslavia], UN doc. IT 32, Rule 87(A); Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 66(c)

According to article 9, disputes concerning the 'interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article 3, shall be submitted to the International Court of Justice'. In its February 2007 judgment on the Bosnian application against Siberia, the court confirmed that States as well as individuals may commit genocide, Furthermore it held that article 9 of the Convention gives the Court jurisdiction to adjudicate charges by one State that anther has perpetrated genocide. It is also possible for the International Court of Justice to exercise jurisdiction over States that are not parties to the Genocide Convention, or those that are but that have made reservations to article 9, to the extend that such States have accepted the general jurisdiction of the International Court of Justice in accordance with article 36(2) of its Statute.

IV. INTERPRETATION OF THE CONVENTION

The centerpiece in any discussion of law is the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948.[3] The Convention came into force in January 1951, three months after the deposit of the 20th instrument of ratification or accession.

There are several examples of literal interpretation of the Convention in case laws. In determining whether the Genocide Convention imposed a duty upon States not to commit Genocide, the International Court of justice referred to an 'unusual feature of the text of article 9'. The provision contains the phrase 'including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3.According to the Court, use of the word 'including' tended to confirm that State responsibility was comprised within a 'broader group of disputes relating to the interpretation, application or fulfillment of the Convention'[4].

The Genocide Convention includes a short preamble, but no annexus. The preamble contains a number of important ideas that do not appear elsewhere in the Convention, including the reference to General Assebly Resolution 96(1), the idea that genocide has existed' at all periods of history', and the requirement of international co-operation 'in order to liberate mankind from such an odious scourge'. The pramble has been cited by the International Criminal Tribunal for Rwanda in its sentencing decisions in the Kambanda[5] and Serushago cases.[6] Adoption of the Convention was accompanied by two related resolutions, one calling for the

[3](1951) 78 UNTS 277.
[4]Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment 26 February 2007
[5]*Prosecutor v. Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence 4 September 1998 , para. 16.
[6]*Prosecutor v Seshurago* (Case No. ICTR-98-39-S), Sentence , 2 February 1999 , para. 15.

establishment of an international court[7] and the other concerning extension of the provisions of the Convention to dependent territories.[8]

In its advisory opinion on reservations to the Genocide Convention, the International Court of Justice wrote that 'The origins of the Convention show that it was the intention of the UN to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and resuts in great losse to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.'[9] This important statement is often cited as the judicial recognition of the prohibition of genocide as a customary legal norm, although the Court does not refer to it expressly in this way. The Statute of the International Court of Justice recognizes two non-conventional sources of international law: International custom and general principles.

V. PROTECTED GROUPS WITHIN THE CONVENTION

The four groups listed in the Convention resist efforts at precise definition. The difficulties in the application of the four concepts can be seen in the case of Rwanda. The Rwandan Tutsis and Hutus speak the same language, practice same religion and have essentially the same culture. Mixed marriages are common. Distinguishing between them was so difficult that the Belgian Colonisers established a system of identity cards, and determined what Rwandan law calls 'ethnic origin' based on the number of cattle owned by a famly.[10] Yet the genocide in , 1994 was undoubtedly directed towards a national, ethnical, racial, religious group. And if the Tutsi of Rwanda are not such a group, then what are they? After initially deliberating over the point, Trial Chambers of the International Criminal Tribunal of Rwanda has now taken judicial notice of the fact that the Tutsi, as well as the Hutu and the Twa were ethnic groups within Rwanda at the time of 1994 genocide.[11]

Generally, it is the perpetrator of genocide who defines the individual victims status as a member of a group protected by Convention.[12] In *Berdanin*, the Trial Chamber said '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,

[7] 'Study by the International Law Commission of the Question of an International Criminal Jurisdiction', GA Res. 216B(3).
[8] Application with Respect to Dependent Territories, of the Convention on the Prevention and Punishment of the Crime of Genocide', GA Res. 216C(3).
[9] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion),* [1951] ICJ Reports 16, p.23,.Quoted in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226, para. 31; Case Concerning Apllication of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenagro*), Judgment, 26 February 2007, para 161,
[10] G. Prunier, *The Rwanda Crisis, 1959-1994: History of a Genocide*, Kampala Fountain Publishers, 1995.
[11] *Prosecutor v. Kajelijeli* (Case No.ICTR-98-44A-T), Judgment, 1 December 2003, para.241.
[12] John Packer, Problems in Defining Minorities, in B. Bowring and D. Fottrell, eds., *Minority and Group Rights Towards the New Millennium*, The Hague: Kluwer, 1999.

on the basis of its perceived national, ethnical, racial or religious characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.'[13]

Determination of the relevant protected group should be made on a case-by-case basis, referring to both subjective and objective criteria[14]. The four terms in the Convention not only overlap,[15] they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protrction. This was certainly the perception of the drafters. For example, they agreed to add the term 'ethnical' so as to ensure that the term 'national' would not be confused with political[16]. On the other hand, they deleted the reference to 'linguistic' groups, since it is not believed that genocide would be practiced upon them because of their linguistic as distinguished from their racial, natonal or religious characteristics. [17] The drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to the construction of the other.

VI. SPECIFIC INTENT TO COMMIT GENOCIDE

Article 2 of the Convention specifies that the offender must intend 'to destroy' a protected group. Raphael Lemkin took a large view of this concept, observing that genocide involved the destruction of political institutions, economic life, language and culture. Physical destruction was only the ultimate or final stage in genocide.[18] Nevertheless, the drafters of the Convention clearly chose to limit its scope, in terms of the acts of genocide set out in the five subparagraphs of article 2, to physical and biological genocide. Still, an important problem of interpretation arises as to whether the destruction that is part of the intent, in the first part of article 2, must correspond to the physical or biological destruction defined in the second part of article 2. For example, a State might intend to destroy a group by eliminating its political structure, economy and culture, but not its physical existence in the sense of mass killing or similar acts. In the course of such measures, perhaps only in an incidental way, members of the group might be killed. If destruction is viewed from this large perspective, then such killing would meet the definition of genocide being killing of members of a group with the intent to destroy the group, even though the intent is not to destroy the group by killing.

The words of the Convention can certainly bear such an interpretation. This might facilitate extending the Convention to cases such as ethnic cleansing, where an intent at physical destruction ois not obvious but where

[13]*Prosecutor v. Brdanin* (Case No.IT-99-36-T), Judgment, 1 September 2004, para.683.
[14]*Prosecutor v. Brdanin* (Case No.IT-99-36-T), Judgment, 1 September 2004, para.684; *Prosecutor v. Kajelijeli* (Case No.ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para.811.
[15]'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind , by Mr. DoudouThiam, Special Rapporteur', UN Doc. A/CN.4/398,para. 56.
[16] UN Doc. A/C.6/SR.73 (Petren, Sweden); UN Doc. A/C.6/SR.74 (Petren , Sweden).
[17]UN Doc. A/401.
[18]Lemkin ,*axis Rule*, pp.79 and 87-9.

the intent to destroy the community as a political, economic, social and cultural entity is beyond question.[19] While these questions were not specifically debated during the drafting of article 2, the spirit of the discussions resists extending the concept of destruction beyond physical and biological acts.

VII. PROSECUTION OF GENOCIDE BY INTERNATIONAL AND DOMESTIC TRIBUNALS

Genocide may be prosecuted by national or international courts. The preference of international law for genocide can be seen in the decision of the drafters of the Convention, to establish an obligation to repress genocide without at the same time, creating an international jurisdiction, although such a possibility was certainly contemplated and, indeed, expected at some time in the future. Pursuant to the principle of 'complementarity', genocide offenders are preferably, to be tried before domestic or national courts. [20] Only when these fail should the international jurisdiction become operational. However, one or the other system may not always be preferable for genocide convention.

Article 5 of the Genocide Convention requires States to implement their obligations in domestic law, specifically by providing for trial and punishment of those responsible for the crime. Article 6 says trials should be held by the courts of the territory where the crime took place, but does not explicitly, address whether there are other options. These may include prosecution by the State of nationality of the offender, or of the victim, or any State prepared to see that justice be done. Article 6 also recognizes the possibility of trial by an international criminal court. To facilitate prosecution the Convention also addresses extradition. An obligation to co-operate in extraditing genocide suspects is set out in Article 7.

VIII. INTERNATIONAL CRIMINAL TRIBUNALS

In addition to courts with territorial jurisdiction, article 6 of the Genocide Convention mandates prosecution for genocide before 'such international penal tribunal as may have jurisdiction with respect to those Contracting parties which shall have accepted its jurisdiction'. The Convention establishes no hierarchy or preference between the two regimes. In a sense, article 6 was also a mandate to the international community , to the States parties and to the United Nations to ensure the creation of an international jurisdiction. The first international tribunal giving effect to article 6, the International Criminal Tribunal for the former Yugoslavia, was established in May 1993, with a mandate that was severely restricted in both time and space. Following the genocide in Rwanda in 1994, a second, similar body was created.

[19] This interpretation was adopted by a German Court: 30 April 1999, 3 StR 215/98. It is suggested by the International Criminal Tribunal for Rwada in *Prosecutor v. Kayishema et al.*

[20]Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90. Complementarity governs the relationship between the ICC and national legal orders.Article 17 of the Rome Statute allows the ICC to step in and exercise jurisdiction where states are unable or unwilling to investigate or prosecute, without replacing judicial systems that function properly.

A. JURISDICTION

The fundamental difficulty with genocide prosecution based on territorial jurisdiction is a practical one. States where the crime took place are unlikely to be willing to proceed, either because the perpetrators remain in power or influence, or perhaps because a post-genocide social and political *modus vivendi* is built upon forgetting the crimes of the past. For this reason, it is often said that universal jurisdiction must be a *sine qua non* if those responsible for genocide are to be brought to book. Raphael Lemkin urged that universal jurisdiction be recognized for the crime of genocide.[21] Recognition of universal jurisdiction over genocide was one of the objectives of those who proposed General Assembly Resolution 96(1) in October 1946.

B.EFFECTIVE PENALTIES

Article 5 of the Convention imposes an obligation to 'provide effective penalties for persons guilty of genocide or any of other acts enumerated in Article 3'.Penalties for genocide were considered by the international law commission, in the context of its work on the Code of Crimes Against the Peace and Security of Mankind and on the draft statute of an international criminal court,[22] as well as during the drafting of the Rome Statute of the International Criminal Court.[23] International Law now frowns upon capital punishment[24] and the maximum sentence for genocide allowed by the Code of Crimes, the statutes of the *ad hoc*tribunals and the Rome Statute of the International Criminal Court Tribunal for the former Yugoslavia imposed a sentence of, forty six years imprisonment in a conviction for genocide[25] but this was reduced to thirty five years when the judgment was reversed and one of aiding and abetting genocide substituted in its place[26]. Another Trial Chamber imposed a sentence of eighteen years where the conviction included a coumt of complicity in genocide.[27]

IX. CONCLUSION

Several of the provisions of the Convention contemplate the obligations assumed by States in matters of criminal law legislations, jurisdiction and extradition. Scrutinty of the domestic law provisions by which States introduce the crime of genocide in their own penal codes shows that many states have enacted the crime of genocide, although there are some notable exceptions, including the tragic example of Rwanda which acceded

[21] Raphael Lemkin, *Axis Rule*, pp. 93-4
[22] See William A. Schabas, 'International Sentencing: From Leipzig (1923) to Arusha (1996)' , in M. CherifBassiouni, *International Criminal Law*, 2nd revised edn, New York: Transnational Publishers, 1999, pp.171-93;William A Schabas, 'War Cri,es, Crimes Against Humanity and the Death Penalty,' (1997) 60 *Albany Law Journal*, p.736.
[23] See William A. Schabas, 'Penalties in the Statute of the International Criminal Court', in Antonio Cassese, Paola Gaeta and John R.W..D. Jones, *The Rome Statute of the International Criminal Court: A commentary*, Oxford: Oxford University Press, 2002, pp.1497-534.
[24] William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rdedn, Cambridge: Cambridge University Press, 2002.
[25]*Prosecutor v. Krstic* (Case No. IT-98-33-T),Judgement, 2 August 2001, par. 726.
[26]*Prosecutor v. Krstic* (Case No.IT-98-33-A), Judgement, 19 April 2004, par.275.
[27]*Prosecutor v. Blagojevic(*Case No.IT-02-60-T*)*, Judgement, 17 January 2005.

to the Convention and neglected to amend its penal code. There are also significant and relatively widespread shortcomings in terms of the legal rules that accompany the crime itself. This indicates that the introduction of the crime of genocide in domestic penal legislation is often rather perfunctory. Incorporation of the Rome Statute in national legislation has provided the opportunity to enact the crime of genocide in the legislation of States that had not previously done so.A treaty can only be implemented within domestic law to the extent that it is self-executing. The Genocide Convention provisions cannot easily be applied within domestic law without some additional legislation and are therefore, in a general sense, not self-executing.[28]This is confirmed by the text of article 5 itself,. For example, the offence of genocide defined in articles 2 and 3 of the Convention is not accompanied by a precise sanction or penalty.

Many States have enacted provisions within their domestic penal codes providing for a specific offence of genocide. In some cases, they have simply taken article 2 of the Convention and incorporated it within a special part of their codes, [29] adding a provision setting out the applicable penalties. There are also examples where States have incorporated the Convention definition by reference, making it an offence to commit an offence defined by article 2 of the Convention.[30] A few States have expanded upon article 2, particularly with respect to the groups protected.[31] Sometimes, the definition has been slimmed down, for example, by removing a protected group or a punishable act.[32]

The Convention's failure to recognize universal jurisdiction is one of its historic defects, but one that is now resolved by the evolution of customary international law. Article 6, which declares that offenders are to be tried by the courts of the State where the crime took place (or by an international court), was a pragmatic compromise reflecting the primitive condition of international law at the time the Convention was adopted. Although universal jurisdiction and the related concept of *autdedereautjudicare ,* had been long recognized for certain crimes, committed by individual outlaws, few in 1948 wanted to extend it to crime which would, as a general rule, involve State complicity. The Israeli Courts in the *Eichmann* attempted to manoeuver around the obstacle of article 6, but their reasoning was unconvincing. Nevertheless, it was gradually recognized that States could exercise universal jurisdiction over genocide without any amendment to the convention or other

[28] This view was presented by Dean Rusk of the State Department to the *United States Senate in 1950: United States of America, Hearings Before a Subcommittee of the Committee on Foreign Relations, United States Senate, Jan* 23 1950, Washington: United States Government Printing Office , 1950, p.23.

[29] Among them Albania (Penal Code Art. 71); Austria (Penal Code, art. 321); Croatia (Penal Code, art. 119); Cuba (Law No. 62, Penal Code); Czech Republic(Penal Code, art. 259).

[30] For example, Antigua and Barbuda (Genocide Act, Laws of Antigua and Barbuda, Vol.4, Chapter 191, s.3); The Israeli law declares that it is 'consequent upon the Convention on the Prevention and Punishment of the Crime of Genocide' : the Crime of Genocide (Prevention and Punishment) Law, s.10.

[31]Bangladesh(International Crimes (Tribunals) Act 1973, s.3(2)(c)) providing for political groups; Canada (Criminal Code, RSC, 1985, c. C-46, s.318), which adds reference to political groups defined by colour.

[32]Bolivia (Penal Code, 23 August 1972, chapter 4, art. 138), which removes reference to racial groups; Canada Criminal Code, RSC, 1985, c. C-46, s.318), which removes reference to national groups.

authorization by some normative document Today there can be little doubt that genocide is a crime subject to universal jurisdiction.

Extradition is another area where the provisions of the Convention seems insufficient. States undertake to ' grand extradition in accordance with their laws and treaties in force', but article 7 might be deemed inapplicable if there is no treaty between the two States concerned Extradition ought to be mandatory, even there is no treaty. Arguably, when article 7 is combined with the obligation to punish set out in article 1, this is implicit in the Convention. Practice is so limited that it is hazardous to attempt much in the way of conclusions as to how states view the scope of article 7.

The prohibition of genocide is closely related to the right to life, one of the fundamental human rights defined in international declarations and conventions.[33] These instruments concern themselves with the individual's right to life, whereas the Genocide Convention is associated with the right to life of human groups, sometimes spoken of as the right to existence. General Assembly Resolution 96(1) adopted in December 1946, declares that 'genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of the individual human beings'. States mustensure the protection of the right to life of the individuals within their jurisdiction by such measures as the prohibition of murder in criminal law.

The Convention definition of genocide has seemed too restrictive, too narrow. It has failed to cover, in a clear and unambiguous manner, many of the major human rights violations and mass killings perpetrated by directors and accomplices. In the past, jurists often looked to the Genocide Convention in the hope it might apply, and either proposed exaggerated and unrealistic interpretations of its terms or else called for its amendment so as to make it more readily applicable. The principal deficiency, many argued, is that it applies only to national, racial, ethnical and religious groups.

[33] Universal Declaration of Human Rights, GA Res. 217 A(3), UN Doc. A/810, art. 3; International Covenent on Civil and Poltical Rights, note 20 , art 6; Convention for the Protection of Human Rights and Fundamental Freedoms, (1955) 213 UNTS 221, ETS 5, art.2; American Convention on Human Rights,(1979) 1144 UNTS 123,OASTS 36, art.4.