

Reappraising the Nature and Scope of the Crime of Genocide in International Law

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Abstract

The crux that guides the conduct of this paper is on the Nature and Scope of the Crime of Genocide in International Law. The point of departure was strictly on the cases of group targeted violence which have occurred throughout history and even before the Convention came into effect. The work adopts qualitative the doctrinal research methodology and focuses on secondary data. Also, the research work focused on the issue of direct criminal responsibility as it relates to the offence of genocide in international law, and the effort made through the provisions of the Genocide Convention aimed at curbing and or reducing the occurrence of this heinous act. Furthermore, the paper discusses the shortcomings witnessed in the provisions of the Convention and proffer solution that will to a large extent, control the commission of the offence of genocide. The paper concludes that Human life is very sacred and deserved 'to be protected. The United Nations should take definite. Steps at, proclaiming a convention: aim at intervening i in states 'where acts of genocide are perceived to be taking place or about to take place. The paper recommends among others that the Convention should provide punishment for attempt or conspiracy to commit the crime of genocide as-seen in Municipal Laws.

Keywords: *Genocide, International Law, Humanity, Crime, Convention*

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Background to the Study

The general perception of international system lies on the adage that, no nation is an island of its own. This is predicated on the fact that; each nation needs one another and therefore they must be rules that guides the conduct of this relationship. The term Genocide did not- exist before 1944. It is a very specific term, referring to violent crimes committed against groups with the intent to destroy the existence of the group. Human right as laid out in the U.S Bill Of Rights or the 1948 United Nations Declaration of Human Rights concerning the right of individuals. In 1944, a Polish-Jewish lawyer joined Raphael Lemkins (1900-1955) sought to describe Nazi policies. of systematic murder, including the destruction of the European Jews. He formed the word “Genocide” by combining Geno-from Greek word for race or tribe, with Comes from Latin word for killing. In proposing the new term, Lemkin had in mind a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the group themselves. The following year, the International Military Tribunal held at Nuremberg, Germany, Charged Nazis with) crimes against humanity. The word Genocide was included in the indictment, but .as a descriptive, not legal term. Against this backdrop, this work is set to discuss the nature and scope of crime of genocide in international law.

Conceptual Clarification

The Meaning of Genocide

It was in the word of a Polish lawyer, Raphael who first devised the concept of genocide in response to atrocities perpetrated against the Armenian population of the Ottoman Empire, which took place between 1915 and 1923.

On 11 December 1946 the General Assembly of the United Nations resolved that genocide was a crime under international law. This was approved and ratified as a Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948. The Convention 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, 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 intended to prevent births within the group
5. Forcibly transferring children of the group to another group

A number of specific actions have been deemed to be punishable under the Convention. These are:

- i. Genocide
- ii. Conspiracy to commit genocide
- iii. Direct and public incitement to commit genocide
- iv. Attempt to commit genocide
- v. Complicity in genocide

Actions do not need to lead to deaths to be considered to be acts of genocide – causing serious bodily or mental harm or the deprivation of resources such as clean water, food, shelter or medical services can be regarded as inflicting conditions of life calculated to bring about physical destruction. Causing serious bodily or mental harm includes the infliction of widespread torture, rape and sexual violence. It is also a criminal offence to plan or incite genocide – even before the killing starts. This recognizes that genocide does not just happen. There is always a path that leads to genocide.

Genocide is a complex legal term, and a full criminal trial in an international court is necessary to determine what is and is not genocide. This is partly because genocide is not only the act of murdering or persecuting many people, but it is defined as a crime where there is intent to destroy a group – which is difficult to prove, particularly in retrospect. Generally, Genocide is defined as the deliberate and systematic destruction, in whole or in Part, of an ethnic, racial, religious, or national group. While many cases of targeted violence have occurred throughout history and even since the Convention came into effect, the legal and international development of the term is Concentrated into two distinct historical periods: the time from the coining of the term until its acceptance as international law, that is 1944-1948 and the time of its activation with the establishment of International Criminal Tribunal to prosecute the crime of Genocide, that is 1991-1998. Shearer, (1994),

What is International Law

Generally, International law (also known as public international law and the law of nations) is the set of rules, norms, and standards that states and other actors feel an obligation to obey in their mutual relations and generally do obey. In international relations, actors are simply the individuals and collective entities, such as states and international organizations, which can make behavioral choices, whether lawful or unlawful. Rules are formal, often written expectations for behavior and norms are less formal, customary expectations about appropriate behavior that are frequently unwritten. It establishes norms for states across a broad range of domains, including war and diplomacy, economic relations, and human rights Letsas, George (2013)..

Nature and Scope of the Crime of Genocide Under International Law

Basically, the offence of Genocide is a crime against the peace, security of mankind: hence, the International Law Commission provisionally adopted a Draft Code of Crime. Against the Peace and Security of Mankind in 1991. Article 6 of the draft provides that a state in whose territory an individual alleges to have committed a crime, against the peace and security of mankind is present shall either try or extradite him. By virtue of Article '19 of the Draft, the crime against the peace and security of mankind, for which there is individual responsibility include genocide.

Individual Responsibility in the Crime of Genocide Under International Law

It is truism to understand that, Genocide as a crime imposes direct criminal responsibility upon individuals. Individual responsibility may only be involved for violations that are defined 'In international instruments as crimes under international law. The Convention provides for

framework for cooperation in which the contracting parties confirm that genocide is a crime under international law and consequently will prevent and punish genocide committed by individuals, so, the state is instrument rather than the object of criminalization. The objective of individual criminal responsibility was aptly expressed by the international Military Tribunal at Nuremberg:

“Crime against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”. Also, the General Assembly of the United Nations affirmed in 1946, the Principles of the Nuremberg Charter and the decision of the Tribunal. Via Resolution 95(1) that Genocide was a crime under international law bearing Individual responsibility. This was reaffirmed in the Convention of 1948. Consequently, the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 declared apartheid to be an international crime involving direct, individual responsibility.

State Responsibility in the Crime of Genocide

Article 1, of the Convention-only-formulates two main obligations for state, namely to prevent and punish genocide. The Convention does not expressly prohibit state from committing genocide; thus, prohibition is historically only addressed to individuals. The 1948 Genocide should in this regard 'be situated in the historical context of the Nuremberg trials which, as it is well known, in a revolutionary fashion broke away from traditional state responsibility by introducing the notion 'of individual 'criminal responsibility in international law. The primary motivation for*this departure from classical state centered international law was to exclude the use of international responsibility for the perpetration of crimes. This objective was aptly expressed by the International Military Tribunal at Nuremberg. There is continued efforts from United Kingdom during the negotiation of the Convention to insert links to states responsibility in the provisions but was rejected by most states." only at the final of the negotiation was a joint amendment to Article 9 reference to state responsibility for genocide successful and then only when it was “watered down” to a civil-like responsibility”.

Also, article 19, of the International' Law Commission Draft Article on State Responsibility," in particular provides that an international crime for which a 'State may be liable may result from serious breach on wide- -spread scale of-an international obligation, of essential importance for safeguarding the human being, such as those prohibiting genocide. The issue of state responsibility, has come before the International Court of Justice in the case concerning application of the Convention on the Prohibition -and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia, Serbia and Montenegro), in that case, Bosnia had alleged inter alia breaches of the Genocide Convention for which Yugoslavia (Serbia and Montenegro) is 'responsible. The Court in its Order of 3rd, April; 1993 on the request for the indication of provisional bases, held that: Article 9 of. the Convention which provides: that disputes bowel the contracting parties, relating to the interpretation, application, or fulfillment of the 'present Convention, including those relating to the responsibility of the state for Genocide or for many of the other acts enumerated in Article 3, shall be submitted to the international Court rue of Justice at the request of any of the parties to the-dispute. This

provides a valid jurisdictional basis, while re-affirming the view expressed in the Advisory Opinion on Reservation to the Genocide Convention that the Crime of Genocide shocks the conscience of mankind, result in great losses to humanity... and is contrary to moral law and to the spirit and aims of the United Nations.

The ICJ called upon both parties not to take any action that may aggravate or extend the dispute over the Prevention and Punishment of the Crime of Genocide. The Court of Yugoslavia (Serbia and Montenegro), was requested to take all measures within its powers to prevent commission of the crime of genocide, and was specifically called upon to ensure that “any military, para- military or irregular armed units which may directed or supported by it, as well as any organizations or persons which may be subject to its control, direction or influence, do not commit any act of genocide. This provisional measure was re- affirmed by the Court in its Order on provisional measures of 13 September 1993 as measures which should be immediately and effectively implemented. It should be noted that on the 11th, July 1996, the Court rejected the preliminary objections raised by Yugoslavia. In particular, the Court emphasized that it followed from the object and purpose of the Genocide Convention that the rights and obligations contained therein were rights and obligations erga omnes and that the obligation/upon each state to prevent and punish the crime of genocide was not dependent upon the type of conflict involved in the particular situations (whether international or domestic) and was not territorially limited by the Convention.

The type of state responsibility envisaged under Article 9 of the Convention did not exclude any form of state responsibility. In addition, the court observed that the Convention did not contain any clause the object or effect of which was to limit the scope of its jurisdiction rationed temporize so as to exclude events prior to a particular date. It follows from the foregoing that event in recent times and crises involving States especially between Israel and Palestine over the disputed Gaza strip could be regarded as Genocide for which either Israel or the Palestine state could be responsible. Although, the crisis could be regarded as war over the disputed area, the act of firing rockets and targeting civilian base by both countries have led to the killing and death of many civilians on both sides. The Jewish Nation is regarded as National or group on the side of the state of Israel while the Hamas in Palestine are also a group for which acts of killing by either state of each of these group could be regarded as genocide.

The Distinction Between Genocide and Crime Against Humanity

The Rome statute of the ICC finally published in 2002, genocide has been ranked alongside “crime against humanity”, “war crime” crimes of aggression, as one of the major criminal categories in international law Lauterpacht, (1984). The Rome Statute definition of genocide followed the line established in the 1948 Genocide Convention. The Rome statute did not alter the definition of genocide but rather clarify the concept of crimes against humanity which had hereto been insufficiently defined in international law, thereby enabling genocide to be clearly distinguished from category of crimes against humanity, and granted a new and unique position.

The comparison of this to the Rome' Statute new definition of crime against humanity, one appreciates many points they have in common in terms "of punishable acts. So, what are the differences between these terms? The first is that while the victims of genocide are defined as belonging to one of four types of group (national, ethnical, racial or religious), the victims of crimes against humanity are ordinary citizens, civilians. The second difference is that while genocide requires intent to destroy, in whole or in part, one of the four types of group mentioned above, there is no such stipulation for crimes against humanity. In summary, while genocide appears to double up with crimes against humanity on the surface, in fact, it differs from the latter in that victims must be members of one of four fixed categories of group, and must aim at the destruction, in whole or in part of the group.

Jurisdiction in the Crime of Genocide under International Law

Generally, the accepted universal jurisdiction to apprehend and try war criminals applies to the offence of genocide. Specifically, however, the 1948 Genocide Convention established what might be termed a quasi- universal jurisdiction in providing for the exercise of jurisdiction Lauterpacht, (1984). The Convention declares that person charged with genocide shall be tried by a competent tribunal of the state in the territory of which the offence was committed or, by such international panel, tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction?' Starke, (1984), For instance, the Statute of both the International Tribunal for the former Yugoslavia and the International Tribunal for Rwanda established to deal with international crimes committed by individuals within defined geographic and chronological jurisdictional limits, have provided for. The Prosecution of individual for the crime of genocide

State Cooperation in the Fight Against Genocide

Events all over the world in recent past, especially the uprising in the Arab world, in Tunisia, Syria, Yemen, Egypt and Libya have brought into question 'the machineries and the effectiveness of the enforcement procedure in the law of genocide Robinson (1960). The question of the cooperation of states in the fight against genocide is a matter of serious concern. Recently, General Ratko Mladic, a former-Bosnian Serb Commander who was alleged to have, committed genocide and crimes against humanity including, the 1995 Srebrenica Massacre of 7,500 Muslim men and boys, was only arrested' on 26" may, 2011 after 16 years of which he 'has been on the run in Lazarevo Village, North of Belgrade Shaw, (1997). Consequently, according to Serbia's Deputy war crimes Prosecutor Bruno Verkaric, Gen. Mladic would be sent to the UN war crimes Tribunal for the former Yugoslavia (ICTY) in The Hague "as soon as possible to face trial for genocide, having lost in his appeal before a Serbian war Crimes Court at stopping his extradition to the United Nation Tribunal in the Hague to face genocide charges.

There is therefore need for greater cooperation by states in the arrest, extradition and prosecution of persons alleged to have committed acts of genocide. Alleged acts of Genocide are currently being committed in Egypt, Yemen, Syria. Following Popular revolt against the Government of these states.

Conclusion/Recommendation

Human life is very sacred and deserved 'to be protected. The United Nations should take definite steps at proclaiming a convention: aim at intervening in states 'where acts of genocide is perceived to be taking place or about to take place. It is worthy of note that Article 3 of the Convention on the Prevention and punishment of the crime of Genocide, 1948 prescribes that Immunity is not a defense in the crime of genocide, hence sitting head of states/presidents who commit acts of genocide should have arrested promptly and Presoaked before it escalates.

Furthermore, the fundamental question whether states can commit crime is of great importance. In criminology there is an increasing interest in the involvement of the state in international crimes but, international law has largely been in this denial since the introduction of individual criminal responsibility. Therefore, the United Nation should amend the Convention to include direct criminal responsibility 'on' states as these crimes are in most 'cases carried 'out by department of states within which the crime is committed. Also, the Convention should provide punishment for attempt or conspiracy to commit the crime of genocide as-seen in Municipal Laws.

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