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Genocide: The Gap between the Legal Framework and the Responsibility to Protect (R2P)

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Introduction

There is a huge gap between the legal and social ideas and the concept of Genocide. The legal aspect encompasses the 'specific intent' to exterminate a specific group in a physical manner. On the other hand, the social concept of genocide emphasises the widely understood idea of killings committed on a large scale. This difference in understanding and opinion rationalises the debate on what acts can be termed as genocide and what can be categorised as crimes against humanity. This is also one of the reasons behind widespread accusations and denials of genocide in any international conflict.

Recently, the European Union (EU) and Ukraine have claimed alleged Russian-orchestrated genocide in Ukraine. Similarly, there have been claims and assertions made by scholars and politicians even regarding Kashmir and to some extent, Palestine. This paper analyses the cases of Sudan, Yugoslavia and, Rwanda to determine why the killings in these states was termed as 'genocide' while the killings in the former group of countries was not designated as such. In doing so, the paper also aims to reflect on the existing gap between moral duty to act and the nuances of legal framework(s).

Understanding the Concept of Genocide

The legal concept of genocide demarcates four main groups (i.e., racial, ethnic, religious, and, national) within the Genocide Convention of 1948. [1] Whereas, academics tend to include all the human groups that are being targeted. Herik mentions that some recent developments have necessitated the expansion of the legal definition of genocide.[2] For instance, the Kristic Appeal Judgment [3] and the Blagojevic Judgment: [4]

The Appeals Chamber unanimously finds that "genocide was committed in Srebrenica in 1995"

> *[…] Bosnia Serb forces carried out genocide against the Bosnian Muslims […]. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and, religions provide. This is a crime against all humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.*[5]

A close inspection of both the aforementioned judgements reveals that the International Criminal Tribunal for the former Yugoslavia (ICTY) was convinced to determine the definition and presence of the act of genocide in a more lenient manner. Herik also highlighted the case of Rwanda and Sudan, to express the idea that a more subjective approach could be used in order to identify victim groups.

The Case of Rwanda and Specific Intent

The massacres in Rwanda in 1994 are an example of a legally accepted genocide. The International Criminal Tribunal for Rwanda (ICTR) judges were the pioneer judges in international law who inferred and applied the legal definition of genocide. It is necessary for

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genocide that there is specific intent, not just a general intent. This means that the perpetrator acted with the express motivation to cause the obliteration of the affected people. In the case of Rwanda, one of the crucial indicators of specific intent was the fact that the killings were entirely random in manner. The targeted individuals included men, women, children and, the elderly. This clearly shows the intent to destroy an entire group rather than individuals.

The Genocide Convention protects four groups, i.e., national, ethnic, racial and, religious. However, it is pertinent to question why wide-scale murder on these groups be termed as genocide while similar acts of violence on other groups cannot be termed as such. Judges from ICTR also could not manage to apply the legal definition of protected groups within Rwanda; hence they had to come to the conclusion that ethnicity and race are social constructs.

In the words of the Trial Chamber in the Semanza Judgment,

> *The determination of whether a group comes within the sphere of protection created by Article 2 of the Statute ought to be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators.*[6]

The Case of the Former Yugoslavia

There were some questions raised as to whether the events in Yugoslavia can be termed as genocide or simply ethnic cleansing. It is noteworthy that ethnic cleansing is not the same as genocide as the main goal of ethnic cleansing is not to obliterate an entire population, but rather, to forcefully make the group/population abandon a specific area. There were only two specific cases in Yugoslavia that concluded in a conviction of genocide. These were the Kristic Case[7] and the Blagojevic and the Jokic Case[8].

The Genocide Convention and the Customary International Law prohibit only the physical and biological destruction of a group, not the national, linguistic, cultural and, religious identities of the group in question. However, it was the cultural destruction and the forcible transfer that was brought to the fore in the case of Srebrenica. This was clearly beyond the scope of the legal definition of genocide and demonstrated that genocide in fact converged with crimes against humanity to an interchangeable point.

The Case of Sudan

The International Commission of Inquiry on Darfur[9] was established by the United Nations Secretary General in 2004 to ascertain if what took place in Darfur could be regarded as genocide. He appointed a five-member panel of highly regarded legal experts including, Antonio Cassese (who was the Chairperson of the panel), Mohammed Fayek, Hina Jilani, Dumisa Ntsebeza and, Thérèse Striggner Scott.

The UN Darfur Report, issued by the Commission, declared that the atrocities committed did not constitute genocide. This was due, in large part, to the fact that they did not feel that specific intent could be proved in this case. The organised destruction of large swathes of population, is in legal terms, a crime against humanity and not genocide, unless certain specific criteria is fulfilled.

The main feature that sets genocide apart from other war crimes, mass killings or even crimes against humanity, is the obligation to prove that the perpetrator possessed *"the intent to destroy in whole or in part, a national, ethnic, racial or religious group."* This has been termed as genocide's special intent or *dolus specialis* by the ICTY and the ICTR.[10]

The Darfur Report further highlighted the fact that the threatened populations or

groups should be recognised using a subjective and objective approach. The Commission stated that:

> *If objectively the two sets of persons at issue do not make up two distinct groups, the question arises as to whether they may nevertheless be regarded as such subjectively, in that they perceive each other and themselves as constituting distinct groups.*[11]

The UN Commission did admit that certain groups were being targeted but it denied that there was any 'specific intent' or *dolus specialis* to exterminate the specific group.

Responsibility to Protect (R2P)

Genocide has come to be understood, specifically by the general public, as the worst crime that can be committed. It also seems to suggest an international obligation to act in order to prevent it or punish the perpetrators. However, the fact remains, that there is no legal basis for these two ideas. The Appeals Chamber in the Rwanda Case asserted that,

> *There is no hierarchy of crimes under the Statute and all of the crimes specified therein are serious violations of international humanitarian law, capable of attracting the same sentence.*[12]

Kofi Annan while reflecting upon "the prospects for human security and intervention in the next century" challenged the UN Member States to "find common ground in upholding the principles of the Charter, and acting in defense of common humanity."[13] He repeated the challenge in his 2000 Millennium Report, stating:

> *[…] if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?*[14]

In response to this challenge, the Responsibility to Protect (R2P) norm was first suggested by the International Commission on Intervention and State Sovereignty (ICISS) in 2001. However, it must be noted that R2P is only an ethical principle since it falls somewhere between a norm and a law. Every argument in favour of the R2P focuses on Article I of the Genocide Convention which dictates:

> *The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.*[15]

However, the duty to prevent genocide lies first and foremost with the concerned state. When governments are unwilling or unable to protect their populations, the international community should rely on a continuum of measures including prevention, reaction to violence, if necessary, and rebuilding shattered societies. This response should be the exercise of first peaceful and then, if necessary, coercive or forceful steps to protect civilians.

Another argument for the legal obligation to protect civilians is derived from within the Genocide Convention (i.e., from its Article VIII) which states:

> *Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.*[16]

It is argued that this article authorises competent UN organs with the use of force, which in this case is the Security Council. Proposals have been issued as to the Code of Conduct of the Security Council and that veto should not be exercised in cases where there is a blatant violation of human rights and also in cases of suspected or proved genocide. However, these suggestions continue to lack any legal authority, further enabling the

unethical use of veto in cases such as Kashmir and Palestine.

Conclusion

The main aim of the Genocide Convention is to prevent and punish genocide. Pragmatic actions to prevent genocide and crimes against humanity are far more crucial than bracketing such heinous crimes under either of those categories. If the matter pertains to preventing genocide, then it does not matter what the exact legal definition states. While debating on the cessation of all forms of genocide, social concepts, morals and norms should take precedence over the legal concept.

However, in view of the international criminal law, the legal concept and definition becomes extremely important. A conviction for the perpetrators can only be secured if there is proof beyond a reasonable doubt, and with regards to genocide, that can only be determined once *specific intent* can be proved in the court of law. Hence, as David Luban has suggested, maybe it is time to amend the definition of genocide to include the term, *"the crime against humanity of extermination."*[17]

In doing so, we are not making genocide any less horrendous, but are claiming that extermination is just as abhorrent.

Notes and References

1. Convention of the Prevention and Punishment of the Crime of Genocide, Article II, 9 December 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280 (entered into force January 12, 1951) [hereinafter Genocide Convention].
2. Larissa van der Herik, "The Schism between the Legal and Social Concept of Genocide in Light of the Responsibility to Protect," In Ralph Henbuam and Paul Behrens (eds.), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate, 2007) 75, p2.
3. Prosecutor v. Kristic Case No. IT-98-33-T, Judgment, 541 (Int'l Crim. Trib. For the Former Yugoslavia August 2, 2001).
4. Prosecutor v. Blagojevic and Jokic (Trial Judgment), IT-02-60-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 January 2005.
5. Prosecutor v. Kristic Case No. IT-98-33-T, Judgment, 541 (Int'l Crim. Trib. For the Former Yugoslavia 2 August 2001).
6. The Prosecutor v. Laurent Semanza (Judgment and Sentence), ICTR-97-20-T, International Criminal Tribunal for Rwanda (ICTR), 15 May 2003, para. 317.
7. Prosecutor v. Radislav Kristic (Appeal Judgment) IT-98-33-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 19 April 2004, para 144.
8. Prosecutor v. Blagojevic and Jokic (Judgment on Motions for Acquittal pursuant to Rule 98 Bis), IT-02-60-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 5 April 2004.
9. Larissa van der Herik, 'The Schism between the Legal and Social Concept of Genocide in Light of the Responsibility to Protect' in Ralph Henbuam and Paul Behrens (eds), The Criminal Law of Genocide: International, Comparative and Contextual Aspects (Ashgate, 2007) 75, 8.
10. Prosecutor v. Kristic Case No. IT-98-33-T, Judgment, 541 (Int'l Crim. Trib. For the Former Yugoslavia 2 August 2001).
11. G. Prunier, 'The Ambiguous Genocide', (London: Hurst Publishers, 2005), para 509.
12. Prosecutor v. Clement Kayishema and Obed Ruzindana (Trial Judgment), ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999.
13. UN Secretary-General (UNSG), *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, 6 August 1999.
14. UN General Assembly, *United Nations Millennium Declaration, Resolution Adopted by the General Assembly*, 18 September 2000.
15. Convention of the Prevention and Punishment of the Crime of Genocide, Article I, 9 December 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280 (entered into force 12 January 1951).
16. Convention of the Prevention and Punishment of the Crime of Genocide, Art. VIII, 9 December 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280 (entered into force 12 January 1951).
17. David Luban, "Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report," *Chicago Journal of International Law* 7, no. 1 (2006), https://chicagounbound.uchicago.edu/cjil/vol7/iss1/14/.