AN APPRAISAL OF INTERNATIONAL LAW AND THE CRIME OF GENOCIDE

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Abstract

As an international legal concept, genocide is a relatively recent development, but the facts surrounding the crime of genocide are as old as humankind. The crime of genocide is meant to protect and preserve certain groups from decimation or attempted extinction. Genocide has been restyled the crime of crimes and the supreme crime. This paper seeks to examine the character, the historical component and the general anatomy of the crime of genocide and provides a methodological analysis of the elements of the crime. This paper submits that for all intent and purposes, the existence of a crime of genocide involves a consolidated catastrophic act and intent. It is this combined effort that crystallizes and forms the required intent to destroy a protected group in whole or in Part. In other words, the mere hope of a person to contribute, by way of committing one of the fundamental offences, to the destruction of a group falls short of this legal idea of a realistic genocidal intent and purpose. The foregoing is absolutely in contradistinction to the intuitive definition of the various categories of protected groups. Therefore, care must be taken not to mistake the crime of genocide for an unquantified violation of gigantic human rights which is based on a discriminatory motive. The expansion of the meaning of the words 'intent', 'destroy,' and 'part' have probably led to the over explication of the definition of the crime of genocide. This paper recommends that the word 'intent' suggests that those who commit the unauthorized act have the intention to carry out a plot that targets members of a secured group with the sole aim of annihilating that group, either as a whole or in Part.

1. Introduction

Under international criminal law, it was only in 1994 that the word 'genocide' was formulated by the Polish jurist Raphael Lemkin who later became a foremost crusader in the international criminalization of genocide.[1] The United Nations Economic and Social Council was instructed to formulate a draft convention on the crime of genocide in line with its resolution 96(1). The early drafts submitted by the United Nations Secretary =General and an Ad Hoc Committee of the Economic and Social Council reflected the general concept recommended by *Lemkin.* It was the Committee's work that led to the formation of the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December; 1948, generally known as the Genocide Convention,[2]. The first international conviction for genocide was delivered on 2 September 1998 by the International Criminal Tribunal for Rwanda in the Case of the *Prosecutor v. Akayesu.*[3] One core development was that Article II of the Genocide Convention was transported into Article 6 of the *ICC* Statute verbatim.

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[1] Mykola Gnatorsky, 'The Crime of Genocide in International Criminal Law: A General Description', Ukrainian Journal of International Law, (1) (6) (2006) 84

[2] which entered into force on 12 January 1951.

[3] ICTR, The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Chamber 1, 2 September 1998; footnotes omitted; available on http://www.icty.org] (last visited on 23/04/2022)

One thing that makes the crime of genocide distinctive is the fact that its element requires that the crime be committed with the intention to exterminate, in whole or in part, a group that has a racial or religious inclination.[4] The special denouncement and denunciation that accompanied those convicted for the crime of genocide were alarming, which also led to the international criminalization of genocide which was the gory fact that eight million persons were brutally massacred by the German Nazis on the basis of their race, ethnicity and religion.[5] The fact that this kind of public disapproval continues to prevail even in the recent horrible situations in Sudan (Darfur) and many other places only goes to show the continued condemnation of the crime of genocide by the international community.

2a. Crime of genocide under International Law

It is no longer in doubt that genocide is a crime under general customary international law as well as the subject of an international legal prohibition imposed on states.[6] This is clearly seen in resolution 96 (I) and the Genocide Convention. The International Court of Justice in 1951 pronounced the proscription of genocide as customary in character.[7] The landmark judgement by the International Court of Justice in 2007 in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* Bosnia and Herzegovina v. Serbia and Montenegro again showed the law on genocide and state responsibility.[8]

2b. Link with Crimes against Humanity

One clear distinction between genocide and war crimes is that the latter category presupposes the existence of an armed conflict.[9] Moreso, the crime of genocide typically falls under the category of systemic criminality; the same cannot be said for war crimes. However, this does not mean that genocide may not be committed within the context of an armed conflict.[10] In other words, if the aim of a military intention is to wipe out civilians on a massive scale, the threshold to genocide will be fulfilled where the civilians targeted are Part of a group protected by the rule against genocide and if members of the group concerned are the target. Article 7 of the ICC Statute determines the relationship between the crime of genocide and the crime against humanity.

A connotative analysis suggests that the relationship between the crimes of genocide and crime against humanity is one of reciprocal or bilateral peculiarity.[11] One major difference between both crimes is that crimes against humanity primarily violate individual rights, while the crime of genocide violates group rights. It is still a developing conversation as to whether a conviction for

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[4] Caroline Fournet and Clotide Pegorier, 'Only One Step Away From Genocide: The Crime of Persecution in International Criminal Law', International Law Review, (10) (5) (2010) 728

[5] Ibid, 737

[6] Sandra Gaqro, Marissabele Skoric, 'The Crime of Genocide in the Case-law of International Criminal Ad Hoc Tribunals', Journal of Eastern European Law, (58) (6) (2008) 34

[7] K.R.R. Sastry, 'Genocide- A Crime in International Law' Allahabad Law Journal, (45) (34) (1985) 78

[8] *https://www.icj-cij.org › case › judgments*

[9] Vikramaditya Pandey, 'Genocide: One of the Greatest Crime under International Law', Human Rights Quarterly, (38) (16) (2020) 76

[10] Tatiana Synoid, 'Criminalization of Genocide in International Law', Journal of Eastern European Law, (39) (17) (2015) 26

[11] Jeffrey Morton, 'The International Legal Adjudication of the Crime of Genocide' ILSA Journal of International and Comparative Law, (7) (2) (2001) 335

genocide should subsume a crime against humanity. Many jurisdictions have their laws fixed to mean that any conviction for genocide should subsume a crime against humanity.[12]

2c. Fundamental Construction of the crime of genocide

It is now trite that going by the rule against genocide, a single human being is not capable of destroying one of the groups protected, whether in whole or in Part.[13] The occurrence of a crime of genocide thus involves a collaborative activity aimed at achieving a catastrophic and calamitous goal. In other words, the general motive and intendment for any act of genocide are to show a well-arranged plan of different actions which are aimed at the annihilation of fundamental foundations of the life of national groups, with the sole motive of destroying the groups themselves. The individual act which is the reason for a conviction of genocide is thus naturally Part of organized criminality.[14] It is on the basis of this that many bodies and panels have taken time to enquire into whether or not there is a genocidal intent against a group in Part or a whole in any allegation of any act of genocide. This was what the *ICTR* Chambers concerned themselves with from the beginning on the question of whether or not there was a nationwide genocide in Rwanda in 1994.[15]

Notwithstanding the above, the *definition* of the crime of genocide does not obviously show this distinguishing reciprocity between a collective act and an act by an individual. There is no objective measure to determine the contextual element of the collective action. This is in addition to the fact that the definition does not contain any special intent requirement which suggests any collective activity.[16] It is the interpretation of the concept of genocidal intent that can conveniently reconcile the *ICC* Elements of Crimes with the definition of the crime.[17] This intent must be pragmatic and must therefore be taken to require more than a pious hope. What this means is that there must be a crystal clear genocidal campaign as the main reason for the attack on a protected group or any civilian population.

3. Evidential Components *(actus reus)*

3.1. Those who are alleged to have committed an act of genocide

The crime of genocide can be committed by even a member of the targeted group.[18] For the crime of genocide to be committed, it is compulsory for such a person to be holding any key position in the State. This is because the crime of genocide is not a leadership crime. The forbidden acts can be formulated and committed by even subordinates.

[12] Ronald Timmons, 'Darfur and the Crime of Genocide' International Journal of Legal Information, (36) (3) (2008) 541

[13] Romeo Dallaire, Andrew Coleman, 'Genocide: Beyond Definition, Reducing Genocide to law, meaning and the Ultimate Crime', Human Rights Quarterly, (35) (3) (2013) 28

[14] Ralph Ruebner, 'The Evolving Nature of the Crime of Genocide' John Marshall Law Review, (38) (4) (2005) 1231

[15] Scott Newton, Law and Power in Rwanda in the Shadow of the Genocide', Journal of Comparative Law, (2) (1) (2007) 165

[16] Mykola, Op Cit, P.87

[17] Mark Findlay, 'Enunciating Genocide: Crime, Rights and the Impact of Judicial Intervention', International Criminal Law Review, (13) (1) (2013) 297

[18] Federico La Vattiata, 'The Crime of Genocide, Questions about the Mens Rea, Criminal Justice Issues'. Journal of Criminal Justice and Security Studies, (6) (12) (2018) 419

3.2. Groups protected by the law.

In the definition of the crime of genocide, only a few protected groups were recognized and accepted[19]. This list of protected groups excluded political groups even though some states have some deviations. The definition and interpretation of the attributes of these protected groups and whether or not they should be based on objective or subjective methods are controversial. The general view is that the definition of these protected groups should not be left in the hands of the perpetrators of the crime of genocide.[20] The general interpretation of a protected group excludes any condition of the communal life of inclusion. This is in addition to the fact that members of the group must not belong together and live within one delineated domain. This means that protected groups can stay away from the enclave of a State like racial, national, ethnic and religious groups. This is certainly the case as regards racial and religious groups, but it may well be true also for national and ethnic groups. That is why the territorial constituents should be taken as parts of the larger group in line with the meaning of the definition of genocide. This paper now considers the concept of protected groups in brief.

3.3. National and Ethnical

The concept of a national group can be limited to the nationals of a state. There are many elements[21] that make up the components of national or ethnic groups. It is not necessary for all the elements to be present all together at a time. It suffices if one or two exist to lay the foundation for the identity of the group. In line with the definition of genocide, it is also not necessary that members of a protected national or ethnic group have the identity of the nationality of the State. What is important is that the group of persons is not only large in number but consistently and perpetually lives in the domain of the State under consideration. It is submitted that there are some groups that are not characterized by such distinctive features as a language, culture or religion.[22] This brings to mind the difficult borderline cases of the concept of an ethnic group that the international community had to grapple with in the situations in Rwanda and Sudan (Darfur). The dilemma in both cases mentioned above was a concurrence between the self-perception of the targeted group and the perception of the perpetrators.[23]

3.4. Racial

This element or group does not have a generally accepted international definition. This element does not have the same meaning as the ethnic group. Many people consider this term antiquated and imprecise.[24] Despite the foregoing, it is important to give it some modern explication. It suffices, therefore, to say that the most popular view is that view that racial groups consist of persons who have a common genetic origin as well as somatic characteristics.[25] It is this kind of peculiar definition of this group that obviously shows the susceptibility of its members.

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[19] They include national, ethnic, racial or religious groups

[20] Romeo & Andrew, Op Cit, 39

[21] Such as common culture, history, way of living, language or religion

[22] Payam Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence', International Criminal Law Review, (15) (3) (2015) 245

[23] Ines Grillich, 'Between Light and Shadows, The International law against Genocide in the International Court of Justice's Judgement in Croatia v Serbia', Pace International Law Review, (28) (1) (2016) 29

[24] Ibid, 32

[25] Tatiana, Op Cit. 29

3.5. Religious

The word 'religious' is given a restricted meaning in this paper. It connotes a supernatural and transcendent belief in the existence of a deity or spiritual being. This kind of belief can be in a customary religion or modern religion. A religious group is different from an atheist group.[26] The religious group must not be in a specific or organized manner. What is important is its continuous existence and firmness.[27]

4. A brief discussion on some elemental Offences

4.1. Killing

Killing simply means deliberately causing the death of another person.[28] For the purposes of this paper, it suffices to say that it is causing the death of a member of a protected group.

4.2. Causing Serious Bodily or Mental Harm

One other element is the concept of causing serious bodily or mental harm to a person. The term 'serious bodily harm' is self-explanatory. What needs to be added here is the fact that the harm is hazardous and fatal to the health of a person and is capable of causing irreparable damage to the person in question. The words 'serious mental harm' even have a broader definition. These words now connote inhuman suffering, degrading treatment as well as the deprivation of rights of a person.[29] The International Criminal Court components of Crimes include acts of torture, rape, sexual violence or inhuman or degrading treatment. It is important to state that the harm inflicted must not be permanent or irremediable.[30] It is sufficient that a grave and long-term disadvantage to a person's ability to lead a normal and constructive life has occurred and, in this case, to a member of the protected group.

4.3. Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about its Physical Destruction in Whole or in Part

This is a method of destruction by which the perpetrator does not immediately kill the group members even though his action will eventually lead to their ultimate physical destruction. Another key distinction is that the destruction goes beyond one member to other members of the protected group. This prohibited act is distinct in that the described conduct must be extended beyond one member of the protected group. That is, the unauthorized act is against the group in whole or Part.

4.4. Imposing Measures Intended to Prevent Births within the Group

This forbidden act connotes the biological variation of genocide that focuses on decimating the reproductive capability of the group.[31] The acts include sexual mutilation; the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.[32] It suffices

[26] Mykola, Op Cit., 87
[27] *Ibid.*
[28] See generally: https://www.google.com/search?client=firefox-b-d&q=killing
[29] Sandra & Marissabell, Op. Cit., 33
[30] Dragan Jovasevic, 'Criminal Liability and Punishment of the Crime of Genocide', (15) (1) (2018) 88
[31] William Schabas, 'The Jelisica case and the Mens Rea of the Crime of Genocide', Leden Journal of International Law, (14) (!) (2001) 134
[32] Sastry, Op Cit. 72

that there were attempts intended to prevent births, no matter how subjective it is. The wording suggests that at least an order has been made since the designing stage was over.
The word 'imposing' also suggests that the (principal) perpetrator of this forbidden act must be a person who holds some form of authority.

5. The Mental components *(mens rea)*

For any conviction for genocide to be made, two distinctive mental elements must be satisfied. They include the general intent condition, which has to do with the material components and the special intent condition, which requires that the perpetrator must act with the special intent to destroy, either in whole or in part, a protected group.

5.1. What does the Word 'destroy' connote?

The word 'destroy' contextually speaking can be taken to mean the disbandment of the group as an organized structure or the somatic elimination of the members of the group. The elucidation attached to the word 'destroy' in this context cannot be lowered to the somatic elimination of the members of the group as it can be seen at the time of the general genocidal advancement but must go beyond all possible consequences of the general campaigns which represent a marked structure of the forbidden acts in one or two ways.[33] Attempts at expanding the concept of 'destroy' beyond mere somatic elimination make sense also from the standardized perspective because it suggests a dissimilar meaning to the word 'destroy' as regards the context of genocidal intent in contradistinction to the meaning of somatic annihilation within the context of the forbidden act.[34]

5.2. The connotation of the Words 'in part.'

The intention of the words 'in part' may not mean outright elimination of a group from the face of the world.[35] It will still amount to genocide, even if it is the perpetration of one forbidden act with the intention to annihilate a mere number or even just one member of the group. This is in contradistinction to the permutation that suggests that 'the part must be a sizeable part of the group'.[36]

5.3. What does the Word 'intent' connotes?

The word 'intent' connotes a situation where the offender perpetrated the unauthorized act with the deliberate understanding to further carry out a calculated advancement which targets members of a protected group with the pragmatic aim to destroy that group in whole or in Part.[37] The word 'intent' can be considered from a goal-driven vis-a-vis awareness-driven point of view.[38] The question is: does it suffice that the offender is aware that the aim of a campaign is for mass

[33] Beth Schaack, 'The Crime of Political Genocide: Repairing the Genocide Conventions Blind Spot', Yale Law Journal, (16) (7) (1997) 45
[34] Duro Degan, 'Crime of Genocide before the Hauge International Court', Fordham International Journal, (53) (2) (2016) 354
[35] Jennifer Balint, 'Genocide and Law: International and National Dimensions' Bulletin of the International Studies of the Philippines, (14) (3) (1998) 36
[36] Payam Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence', Journal of international criminal justice, (3) (4) (2005) 992
[37] Claus Kreb, 'The Crime of Genocide and Contextual Elements: The Arrest Warrant against the President of Sudan: Reasoning and Implications of the ICC Decision', Journal of International Criminal Justice, (7) (2) (2009) 301
[38] *Ibid*, 307

eradication of the group in whole or in Part[39] or is it sufficient that the offender has the sole intention to achieve a result that is elimination driven? A more acceptable interpretation is the view that the perpetrator of the crime of genocide needs to compulsorily have the intention, motivation, reason and inclination to eliminate part of a protected group.[40]

In other words, the offender deliberately craves and desires to carry out the unauthorized act that culminates in the elimination of the protected group in part or whole. It needs to be noted that even when there is no longing to eliminate, it does not automatically exclude individual criminal responsibility.[41] It is equally important to note that even when an offender does not confess or expressly state such a longing to eliminate such a conclusion can be made through inference.[42]

The foregoing is true because it is practicable to infer genocidal intention that can be seen in a specific act from the basic circumstances surrounding the commission of other acts that are designed and planned against the same group meant to find out whether these acts were perpetrated by the offender or by others. Another way to infer the intent of any act is to examine and determine the magnitude of the cruelty perpetrated as well as the basic classification and category of such acts.

This is still the case, whether it is a collective intent or individual intent.[43] No matter what the intent is, what is important is also to hold subordinates accountable in a genocidal campaign for the crime of genocide.[44] This is certainly the ultimate intention of the drafters of the Genocide Convention. The point is that the search for genocidal intent should not be allowed to becloud the fact that genocide is still the worst crime known to humanity.[45] This simply shows how horrible and horrific the international Criminal law sees the crime of genocide.

5.3.1. The implication of Knowledge and Realization of the unauthorized Act

What remains to be discussed here is whether the perpetrator must have the genocidal intent alongside the expectation of its actual realization. The argument elsewhere is that the perpetrator may have the genocidal intent but may not know that the act is actually capable of destroying in whole or in Part the protected group.[46] In other words, apart from the mental requirement, the perpetrator must know that his act would annihilate the protected group.

[39] Which is the awareness point of view
[40] Tatiana, Op Cit., 19
[41] Elizabeth Pljzer, 'Does the International Crime of Genocide Always Require a Genocide Policy Perth?' International Law Journal, (3) (4) (2018) 34
[42] Vyver Vander and D. Johan, 'Prosecution and Punishment of the Crime of Genocide', Fordham International Law Journal, (23) (1) (1999) 311
[43] Rene Beres, 'Justice and Realpolitic: International Law and the Prevention of Genocide' American Journal of Jurisprudence, (33) (4) (2008) 147
[44] Edward Day, Margaret Vandiver and Richard Janikowski, 'Teaching the Ultimate Crime: Genocide and International Law in the Criminal Justice' Journal of Criminal Justice Education, (14) (1) (2003) 125
[45] Kassa Tefferi, 'The Genocide Convention and Protection of Political Groups against the Crime of Genocide' Mekelle University Law Journal, (5) (1) (2017) 26
[46] Thomas Mahony, 'Genocide as an International Crime', Bar Bulletin, (18) (10) (1947) 275

This combination of a personal hunger and craving must exist alongside the genocidal intent and knowledge of the act that the actual act can destroy in whole or in Part of the protected group is a more acceptable view in line with international criminal law.[47] What the foregoing suggests is that the concept of genocidal intent must exclude a pious hope that a protected group may be eliminated.[48]

6a. Recommendations

6a.i. The definition of the crime of genocide appears too restrictive, and it therefore calls for an amendment to the Genocide Convention.

6a.ii. There is certainly an urgent need to expand the definition of genocide into the domain of crime against humanity.

6a.iii. Care must be taken not to mistake the crime of genocide for an unquantified violation of gigantic human rights which is based on a discriminatory motive.

6a.iv. The definition of the protected groups should not be left in the hands of the perpetrators of the crime of genocide.

6a.v. The search for genocidal intent should not be allowed to becloud the fact that genocide is still the worst crime known to humanity.

6a.vi. There is need to revisit the discussion on why cultural genocide should be excluded from the scope of international criminalization.

6a.vi. There is a need to carry out a reconfiguration and renewal of the crime of genocide and the crimes against humanity.

6b. Conclusion

The definition of genocide appears too restrictive, and that calls for an amendment to the Genocide Convention.[49] This is because, at the moment, only a few atrocities qualify as genocide under international criminal law.[50] There is certainly an urgent need to expand the definition of genocide into the domain of crime against humanity.[51] In other words, the crime of genocide should be subsumed and assimilated into the list of crimes against humanity in line with the relevant provisions of the ICC statute. There is need to revisit the discussion on why cultural genocide should be excluded from the scope of international criminalization.[52] This is important on the basis of international case law on ethnic cleansing, which has not found any solution as to whether or not it should be excluded or included. One thing that is certain is the fact that cultural genocide and ethnical genocide cannot be used interchangeably.[53] One crucial point is the need to conclude the discussion as to whether or not the definition of genocide on contextual component should be brought in line with that of crimes against humanity. Perhaps a more comprehensive overhaul would be to carry out a reconfiguration and renewal of the crime of genocide and the

[47] Karol Karski, 'The Katyn Massacre as a Crime of Genocide in International Law', Polish Quarterly of International Affairs, (20) (1) (2011) 28

[48] Ben Saul, 'The International Crime of Genocide in Australian Law', Sydney Law Review, (22) (1) (2000) 575

[49] 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide

[50] Aaron Schwabach, 'Ecocide and Genocide in Iraq, the Marsh Arabs and Environmental Damage in Non-International Conflicts', Colorado Journal of International Environmental Law and Policy, (15) (10 (2004) 26

[51] Baolan Birzu, 'The Subjects of the Crime of Genocide', Law Annals from Titu Maiorescu University Journal, (15) (1) (2015) 52

[52] Ben Saul, 'The International Crime of Genocide in Australian Law', Sydney Law Review, (22) (1) (2000) 576

[53] Mykola Gnatorsky, 'The Crime of Genocide in International Criminal Law: A General Description', Ukruinian Journal of International Law, (4) (1) (2006) 87

crimes against humanity. The argument that the intention to destroy in whole or in Part the human race does not constitute an expression of genocidal intent is misconceived and fallacious. This is because the crime of genocide is a crime of crimes and a super crime.[54] The reason for any campaign with a realistic genocidal intent is to destroy the human race and nothing more. This is in line with the general configuration of international criminal law. This is a sure way to emancipate the definition of genocide from the components of group discrimination and ensure that the intendment of the law against genocide serves the purpose of being protected against any form of destruction of any number of those groups of mankind which form the essential pillars of world civilization. The crime of genocide is not only retrogressive but a barbaric international crime that needs continuous international condemnation.[55] Indeed, genocide in all its ramification is an aberration, and whoever engages in it is abnormal.[56]

[54] Federico, Op Cit,. 418
[55] Vikramaditya, Op Cit., 29
[56] Louis Rene, 'International Law, Personhood and the Prevention of Genocide', Ioyola of Los Angela International and Comparative Law Journal, (11) (1) (1989) 43