

The 1948 Genocide Convention as an 'Increasingly Meaningless Document'?

Written by Fleur Verbiest

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FLEUR VERBIEST, JUN 5 2014

After 'the blackest day of [his] life', on which the International Military Tribunal limited its judgment to consider genocide as a war crime only, Raphael Lemkin made it his life ambition to see genocide condemned as an international crime by the United Nations[1]. In 1948, the Convention for the Prevention and Punishment of the Crime of Genocide (hereinafter the Convention) was unanimously adopted by the United Nations General Assembly. Setting a benchmark for human rights protection by the codification of the right to life and the protection of ethnic, religious, racial and national minorities, the Convention established important principles for prevention and prosecution, and reflects the values and standards of its time[2]. This entailed recognising 'the crime of all crimes' as an international crime, but it also set a hierarchy with regards to crimes against humanity and excluded cultural genocide from its definition, and political groups from protection[3]. As famously noted by Schwarzenberger, the Convention seems 'unnecessary when applicable, and inapplicable when necessary,'[4] as the scope is both wide and narrow in serving its mission. Schuter remarks that the Convention is becoming increasingly meaningless and calls it 'the nuclear weapon of the human rights and international humanitarian law lobbies,' because it is a codification of a phenomenological understanding of genocide[5].

This essay will discuss the Convention in the light of Schuter's statements by looking into legal and political issues around the interpretation of the Convention. It starts by arguing that the legal significance of the Convention is compelling under the latest developments in international criminal law, reflecting the evolution of the norm. The politicisation of the word 'genocide' as based on the assumption of a legal obligation to act under the Convention however, has led to a utilitarian approach to the 'humanitarian and civilising purpose'[6] of the Convention. As such, I ultimately do not agree with Schuter beyond the nuclear weapons analogy that the historical context in drafting the Convention has defined the scope of its political success for which reason it is now becoming meaningless. Instead, I follow a realist understanding of institutionalism in arguing that the legal success of the Convention in the standardisation of the crime and increasing integration of international criminal law continues to re-establish the norm politically, albeit under misinterpretation and without effect of prevention, as subjected to the norm of state sovereignty.

Defining the Law

The International Court of Justice (ICJ) affirmed in the 2006 Armed Activities Case the prohibition of genocide as a *jus cogens* norm in customary international law, furthermore finding this was supported by 'the objective relationship between the norms and (...) ethical principles' of states[7]. The Genocide Convention however codified this norm and the manner in which its textual ambiguities of responsibility and the mental element of the crime were addressed, importantly shaped how the international community interprets the norm with regards to prevention and punishment.

The Convention was ambiguous in establishing state responsibility in the crime of genocide, as its wording primarily focused on the prosecution of individual perpetrators of genocide. In explicit terms, states were only to implement appropriate legislation in the domestic criminal law system to be able to punish the act of genocide on their own territory (Article 6 of the Convention). In addition, but less precise, State Parties committed to strive after the prevention of genocide (of which it was not clear whether this extended beyond the national territory of a state). While

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for these obligations states can be held accountable, the Convention oddly enough did not specify the accountability of the state for its role in genocide. Its absence reflects the debates during the drafting process between focusing on individual criminal responsibility (a position taken by the United States, Soviet Union, and France) or on mechanisms for state accountability (defended by the United Kingdom)[8]. In the Bosnian Genocide Case the ICJ confirmed that a breach of the Convention emerges from failing to prevent genocide from occurring (as it did earlier in 1996 when confirming the obligation to prevent to exist *erga omnes*[9]), and suggested that state responsibility may be evoked if there exists a 'duality of responsibility' under international law[10]. This means that the Court recognises the possibility that both individual criminal responsibility as well as state responsibility exist for the same acts, leaving aside whether the latter entails a criminal element. Seeing that the Convention does not expressly mention that there is a duty not to commit genocide, a state would merely be held responsible for not preventing genocide,[11] as determined by the politics of drafting the Convention. The textual focus of the Convention on the individual perpetrator reveals as such an orientation towards international criminal law over human rights law in standards of protection of peoples. In addition, to establish criminal responsibility, ad hoc tribunals needed to develop the requirement of the mental element of the crime, which may require a policy element by a state or by a non-state actor.

Discussing genocide under criminal law necessitates the establishment of the required elements. Mass scale murders only amount to genocide in law, contrary to regular usage of the word, when 'the material elements of the crime' are 'mirrored in its mental elements'[12]. The perpetrator must have acted 'with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such.' Under ordinary intent, the victim's membership of the group as the reason for the killing or removal is considered, which would amount to ethnic cleansing[13]. With regards to special intent as evoked in the Akayesu trial, *dolus specialis* ('seeking to produce the act charged,' which differentiates it from crimes against humanity), two approaches can be taken. A knowledge-based interpretation demands that the perpetrator kills the victim for his group identity, in the awareness of a genocide taking place and the act's contribution to this goal (hence called 'contextual element')[14]. A purpose-based approach is narrower and demands that the act is committed with the purpose of genocide,[15] as such differentiating between the perpetrator and the abetter[16]. The difference in approach highlights the distinction of viewing genocide as a hate crime or as a systemic crime[17]. The difficulties over the interpretation of the 'special intent' requirement are visible in the cases judged by the ad hoc tribunals reviewing cases arising from the occurrence of genocide in the former Yugoslavia and Rwanda. The Jelacic case provides an example where the knowledge-based approach was necessary to establish an act of genocide, and Cassese, first President of the International Criminal Tribunal for the former Yugoslavia, argues that the necessity of a contextual argument may be categorical (not to be required in acts of killing or causing bodily or mental harm)[18]. Yet, a dominating focus on the individual (and not the systemic element) by ad hoc tribunals however would entail a shift towards crimes against humanity, decreasing the meaning of the Genocide Convention in establishing a hierarchy between them, which has been the position taken by the Appellate Chambers of the International Criminal Tribunals[19]. This flexibility reflects the importance that Chuter (and policymakers and general opinion) attaches to gravity and extent rather than to the 'exact state of mind of the perpetrator'[20].

Today, the Rome Statute has followed up on Article VI of the Convention in seeking to 'end impunity for the most serious crimes of international concern and to contribute to the prevention of such crimes' under a global legal system[21]. It has copied the Convention's definition of genocide and developed Elements of Crimes to clarify the requirements and note the importance of establishing the *mens rea* requirement on a case-by-case basis. While not all states are State Parties to the Rome Statute, its principles are increasingly incorporated in their regulations. In particular, the Convention might even serve to overcome the difficulty the International Criminal Court is facing in the refusal of legal assistance in the Darfur case by providing an additional basis for the obligation to cooperate[22]. Yet, the political implications of establishing a hierarchy of international crimes under a level of legal ambiguity with regards to responsibilities in the face of genocide and establishment of the act of genocide continue to obstruct Lemkin's mission. It has proven necessary to pass UN Security Council Resolution 1593 to demand full international cooperation in holding President Al-Bashir of Sudan accountable for the allegations of genocide in Darfur.

The Politics of Semantics

The Genocide Convention gave 'the crime without a name' a name and an international norm shape. Its greatest contribution however was restricted by the politics of ratification, determining state responsibilities and protection of

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groups. While the state's responsibility to prevent genocide was originally formulated as 'in such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations,' negotiations on the text struck the phrase out to replace it by 'as they consider appropriate'[23]. While Lemkin had in mind that prevention could consist of intervention in another territory, states mostly feared such an obligation. Moreover, the above-described legal ambiguities resulted in allowing the erosion of the norm by international politics to become an *idée fixe* language game.

The power of the word 'genocide' has become apparent in the 1990s and its power was feared. The ontological background to the Convention suggested that the moral outrage that ought to arise would move states to act, giving it strong 'ideational power' in legal, political and social expectations[24]. One of the most pressing questions from the Convention remaining unresolved concerns the word 'prevent' and whether it raises an obligation for states to intervene outside their borders. So the word 'genocide' was considered to carry a heavy historical weight and moral duty, to be handled cautiously. At least, this was the conviction of the Clinton administration in 1994, when the atrocities occurring in Rwanda became known. The prevailing belief was that 'declaring genocide' would create 'unwanted political and social pressure to act'[25]. Its efforts to avoid the word touched upon ridicule, but under President George W. Bush, whose mantra 'not on my watch' probably considered more the fear of the name than genocide itself, the declaration of genocide was made without an overwhelming response to intervene in Darfur. Meanwhile, the willingness to undertake action to end the atrocities, as exemplified by Secretary of State Colin Powell's words 'we must act now' and the US diplomatic efforts to put in place forceful measures, was mitigated by the UN Darfur Report[26]. The UN Commission followed the Tribunals in placing genocide and crimes against humanity on the same level, but rather than broadening the scope of international concern, it 'deflated the urgency'[27]. As such, the word 'genocide' became an end in itself; the Bush administration had shown credibility by acknowledging the situation but was exempted from further action and could withdraw its statements. Rather than a means of intervention to prevent, bestowing the term became an instrumental condemnation and 'a badge of honour' for victims[28]. The legal flexibility to address crimes in their context rather than to a rigid standard had been met by positivist instrumentalisation of the word 'genocide' in politics.

While unable to morally defend in the face of large-scale crimes against humanity, states have consistently resisted the establishment of a legal basis for humanitarian intervention. In order to protect their sovereignty, states eliminated 'cultural genocide' as well as 'political groups' from protection, leading the ICTR to describe Hutus and Tutsis, merely socially and politically distinguishable, as 'ethnic groups' in order to establish genocide[29]. This stands in sharp contrast with the killings in Sri Lanka in 2009, which did carry an ethnic element, but took place under the name of 'counterterrorism'. What the ICJ and the International Criminal Tribunals sought to punish and prevent was mass-scale atrocities, but states pointed at the moral hazard of intervention, as observed in the Balkans,[30] which would ultimately lead to not preventing but stimulating the occurrence of genocide and crimes against humanity.

Conclusion

In Lemkin's lifelong efforts to give meaning to 'Never Again', he had meant to seek the elevated protection of groups over individuals both in times of war and peace, as humanity would suffer under the disappearance of its peoples. The Genocide Convention as understood in Lemkin's spirit has indeed become increasingly meaningless, and no longer carries the historical or normative weight to move states, people, or international organisations to prevent genocide.

While the Convention nevertheless spurred the development of international criminal law, its focus was on individual criminal responsibility rather than on states. In understanding the required *mens rea* for genocide, the International Criminal Tribunals for Rwanda and the former Yugoslavia balanced interpretations of genocide as a hate crime or a systemic crime, as to respond to the need to distinguish between a perpetrator and an abettor of genocide, as well the need to recognise the extermination of a people as genocide. While relevant for the strengthening of a global legal criminal system and the evolution of its norm, in a wider context these developments have effaced the hierarchy of crimes and led to the belief that a narrow scope lowers the responsibility for states to respond to humanitarian disasters. The 'nuclear' power of the word 'genocide' hence dissipated in the evolution of its aim (to include crimes against humanity) and in the historical distance from its horrific origin. As state sovereignty remains the framework for

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interpretation of other norms of the international community, doctrines for external humanitarian intervention are doomed to disappoint. Finally then, Hannah Arendt's observation with regards to punishment comes to mind in the context of the efforts of international lawyers, as dealing with prevention 'explodes the limits of law.' [31]

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[1]Korey and Steinlight, *An Epitaph for Raphael Lemkin*, 25.

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[2]Schabas, "1. Genocide and Crimes against Humanity."

[3]Shaw, *International Law*.

[4]Schwarzenberger, *International Law*, Vol. 1:143.

[5]Chuter, *War Crimes*, 81-85.

[6] Reservations to the Genocide Convention Advisory Opinion, 1951 I.C.J. Rep. 15, 23.

[7]Lepard, *Customary International Law*, 145.

[8]Schabas, *Genocide in International Law*, 418-419.

[9]1996 Genocide Convention Case, Preliminary Objections, 1996 I.C.J. Rep. 595, 616, para. 31.

[10]ICJ, Bosnian Genocide Case, supra n.1, Judgment, p. 115, para. 170.

[11]Simma, "Genocide and the International Court of Justice," 264-265.

[12]Shaw, *International Law*.

[13]Safferling, "The Special Intent Requirement in the Crime of Genocide," 169.

[14]Ibid., 171-172.

[15]Ibid.

[16]International Criminal Tribunal for Rwanda (ICTR), Prosecutor v. Akayesu, Case ICTR-96-4, Judgment, 2 September 1998, Paras. 544-547.

[17]Kirsch, "Distinguishing Macro Phenomena and Individual Misconduct," 146-147.

[18]Cassese, "The Policy Element of Genocide," 137.

[19]Luban, "Calling Genocide by Its Rightful Name," 4.

[20]Chuter, *War Crimes*, 84.

[21] Luis Moreno-Ocampo in Wilt, Wilt, and Vervliet, *The Genocide Convention*. xxvii.

[22]Sluiter, "Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case."

[23]Schabas, *Genocide in International Law*.

[24]Glanville, "Is 'Genocide' Still a Powerful Word?," 468.

[25]Ibid., 472.

[26]Luban, "Calling Genocide by Its Rightful Name," 3.

[27]Ibid.

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[28]Wilt, Wilt, and Vervliet, *The Genocide Convention*.

[29]Luban, “Calling Genocide by Its Rightful Name.”

[30]Kuperman, “The Moral Hazard of Humanitarian Intervention.”

[31]Bruno Simma, “Genocide and the International Court of Justice.”

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