The Crime of Genocide in International Law

Outline of Topical Issues for the FSPAC Institute of Holocaust and Genocide Studies

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I. Origins

- "a crime without a name": this is how British Prime Minister Winston Churchill referred to the atrocities perpetrated by the Nazi Germany in its military campaign against the Soviet Union in a radio broadcast of 5 August 1941, following a meeting at sea with US President Franklin D. Roosevelt
- In a book written in 1943 and published in 1944, a Polish-Jewish lawyer named Raphael Lemkin (1900-1959) sought to describe Nazi policies of systematic murder, including the destruction of the European Jews. He formed the word "genocide" by combining *geno-*, from the Greek word for race or tribe, with *-cide*, derived from the Latin *caedere* (killing). In proposing this 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 groups themselves." (*Axis Rule in Occupied Europe* (1943), Chapter IX)
- The 1945 Charter of the International Military Tribunal at Nuremberg did not include the term. The large-scale slaughter of ethnic, racial or religious groups was included in the term "crimes against humanity"
- The International Military Tribunal at Nuremberg dealt with the extermination of the Jews under the heading of persecution (a crime against humanity) and did not use the term 'genocide'
- In two later judgments of the United States Military Tribunal (*Altstötter et al.* 1947 and *Greifelt et al.* 1948) the word 'genocide' was used, but not as a distinct crime

II. The 1948 Convention for the Prevention and Punishment of the Crime of Genocide

- Adopted by the United Nations General Assembly on 9 December 1948

- Provides for the criminal responsibility of individuals and states for acts of genocide
- It also imposes on Contracting States the duty to prevent and repress genocide
- ***Article II*** of the Convention states:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :

(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."

- Furthermore, ***Article III*** of the Convention states:

"The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide."

- The Convention currently has 146 state parties
- Now widely viewed as expressing international customary law

III. Elements of the crime of genocide

- Also called "the crime of crimes" in international criminal law
- The key components of genocide are <u>threefold</u>:

(1) There must be an <u>underlying offence</u> committed with the requisite *mens rea* (subjective element)

- It has to be one (or more) of the five categories named in Article II of the Convention (killing, causing serious bodily or mental harm, inflicting

conditions of life leading to destruction, preventing births, forcibly transferring children)

- Cultural genocide (the destruction of the language and culture of a group) was considered and rejected as an idea by the drafters of the Convention, because they found it too vague

(2) The underlying offence must be directed against a protected national, racial, religious or ethnical group

- Political or economic groups (e.g. liberals) were considered and rejected by the drafters of the Convention – they opted for groups that could be more clearly defined
- Although the last decades saw increasing criticism of these restrictions, as national, racial, religious or ethnic groups are also social and cultural constructs
- ICTY cases have shown that defining a group along ethnic or religious lines can also prove to be difficult (e.g. defining Bosnian Muslims in the Trial Chamber Judgment of *Krstic et al.*, 2 August 2001)
- Groups defined by other parameters, such as sexual orientation (e.g. transsexuals) are also not protected by the Convention

(3) The underlying offence must be committed with genocidal intent – the specific intent to destroy the group

- In other words, killing members of a group not only with the intent to kill (murder), but also with the intent to destroy the group
- This is where the particular odiousness comes from: the *dolus specialis* (special intent element) of the crime of genocide: the specific intent to destroy a national, racial, religious or ethnical group as such, in whole or in part, through one of the five categories listed in Article II of the Convention
- Genocidal intent is very difficult to prove (see below)
- Mass killing of a group or a part thereof does not automatically show genocidal intent; it may qualify as a war crime or a crime against humanity, without reaching the level of the specific intent, to destroy the particular group
- For instance, many acts of intimidation and violence aimed at the displacement of a group qualify as acts of persecution (a crime against

humanity), but they may fall short of genocidal intent (e.g. displacing a particular population for the strategic gain of territory of the enemy army or for the purpose of moving the enemy civil population in does not qualify as genocide, unless it is shown that these acts were also committed with the special intent of destroying the group as such)

IV. International jurisprudence on genocide

- Extraordinary Courts Martial of the Ottoman Empire (1920) dealing with the "massacres of Armenians carried out with the goal of annihilating them" (especially the cases of *Ahmed Mithad Bey et al.*, *Mehmed Ali Bey et al*. and *Bahaeddin Sakir et al.*) – the word of genocide did not exist yet
- The International Military Tribunal at Nuremberg (the extermination of the Jews handled under the crime of persecution, not genocide)
- The US Military Tribunals mentioning the term genocide (see above)
- The Eichmann Trial in Jerusalem (1961-1962) – Eichmann was tried for "crimes against the Jewish people", an offence under Israeli law which incorporated all the elements of the definition of genocide (and the Israeli Supreme Court held in 1962 that the "crimes against the Jewish People" correspond to genocide);
- The 1963-64 Tel Aviv trial of Hirsch Barenblat, the head of the Jewish police in the ghetto of Bedzin, Poland (accused by some survivors from the city of having brutally turned Jews over to the Germans for deportation to death; sentenced to five years for crimes against the Jewish people, but acquitted on appeal)
- The crime of genocide was included in the Statutes of both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY)
- Proceedings before the ICTR: especially the *Akayeshu* trial (trial judgment 1998, appeal judgment 2001) and the *Kayishema and Ruzindana* trial (trial judgment 1999, appeal judgment 2001)

- Proceedings before the ICTY: especially the *Jelisic* trial (trial judgment 1999, appeal judgment 2001), *Krstic* trial (trial judgment 2001, appeal judgment 2004), the *Popovic et al*. trial (trial judgment 2010, appeal judgment 2015)
- The crime of genocide was also provided for in the Statute of the International Criminal Court (ICC), established in 2001
- Currently, the ICC does not have any ongoing cases dealing with the crime of genocide; nonetheless, the indictment against Sudanese President Omar al-Bashir accuses him of this crime among others, but the case has not started yet and it is not known if it will ever start (the accused is still at large)
- Further, it was included in the founding documents of the Special Panels for East Timor and the Extraordinary Chambers of the Courts of Cambodia
- Some domestic courts have tried individuals for the crime of genocide. For example:
    - The Higher State Court of Dusseldorf convicted Nikola Jorgic of genocide for his role during the Bosnian-Serb war. The judgment was upheld by the Federal High Court and the German Constitutional Court. The case was also brought before the ECtHR, but the Court decided that no violation was committed by the German courts
    - *Mengistu and others* (Ethiopia) – former Ethiopian President Megistu was tried *in absentia* for genocide
    - The War Crimes Court of Bosnia and Herzegovina has tried many cases of genocide in the last ten years

V. Problematic aspects of the crime of genocide

1) How to identify the various protected groups

- Four groups enunciated by the Genocide Convention: national, racial, religious and ethnic
- The allegedly objective features defining an ethnic group may be more subjective than one would think
- The ICTR tried to clarify the definition of "group" in the *Akayeshu* case, stating that membership in such groups would seem to be normally not

challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner (ICTR, *Akayeshu* Trial Judgment, para. 511)

- Differentiating the Hutus and the Tutsis in the Rwandan context was indeed problematic as these two groups shared language, religion and culture, lived in the same areas, and there was a high rate of mixed marriages. It was because of a Belgian law introduced in 1931 (that divided the Rwandan population in three groups (Hutus, Tutsis and Twa) and required carrying an ID with the particular ethnicity decided) that the different ethnic groups came to existence
- Because of this reality, the court in *Akayeshu* looked at the fact of individuals being *treated as* Hutus or Tutsis, introducing a subjective element in the determination of a 'group'
- In the *Rutaganda* case, the ICTR pushed the subjective element even further, stating that "for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept." (ICTR, *Rutaganda* case, Trial Judgment, para. 56)
- It remains to be seen how this subjective approach to the definition of a group evolves and whether it will allow the inclusion of other groups in the protected sphere of the Genocide Convention

2) Whether acts of genocide always require an underlying genocidal policy by a state or an organizational authority

- There is an ongoing debate regarding the requirement of an underlying genocidal policy by a state or other organizational authority
- The Appeals Chamber in the *Jelisic* case (ICTY) stated that such a requirement was not a "legal ingredient" of the crime, but that it could help prove the crime (reiterated by later ICTY cases)
- Various other commentators are of the view that such a policy is always needed (e.g. William Schabas)
- It could be said that the first two underlying acts through which genocide can be committed (killing and causing bodily or mental harm) can be theoretically committed by one or more individuals without a state policy

- The remaining three acts, however, are more difficult to be materialized without the existence of some sort of a policy or plan
- It remains to be seen how this factor plays out in future case law

3) How to discern genocidal intent

- "intent is a mental factor which is difficult, even impossible to discern" (ICTR, *Akayeshu*, Trial Judgment, para. 523)
- Discerning genocidal intent was fairly straightforward in the case of the Nazis, who kept records of statements, speeches, reports in which they clearly stated and elaborated on their genocidal intent against the Jews
- In other cases, it is more difficult to point at genocidal intent
- For instance, Ottoman officials referred to the Armenians in 1915 as "a deadly illness whose cure called for grim measures" – Taner Akcam, p. 144 (From Empire to Republic: Turkish Nationalism & Armenian Genocide), but one or a few such statements are not necessarily sufficient to find genocidal intent
- In the case of Rwanda, many non-official statements expressing genocidal intent were made by speakers via the radio, with little proof of official, public statements of similar intent
- The 2010 *Popovic et al.* Trial Judgment of the ICTY stated:

> "By its nature, intent is not usually susceptible to direct proof" because "[o]nly the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent". Absent direct evidence, the intent to destroy may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts." (para. 823)

- Inferring genocidal intent from circumstantial evidence is very difficult and could easily lead to false conclusion regarding the guilt or innocence of an accused