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THE PLEBISCITE OF DEATH: GENOCIDE, AS SANCTIONED BY INTERNATIONAL LAW

Arindam Mishra¹

“The Bosnia War and the case it spawned before the ICJ serves as a reminder that violence in the form of genocide and warfare cannot be stopped in the Courtroom.”²

ABSTRACT

This paper critically examines the concept of genocide, questioning whether the atrocities committed at Auschwitz were a case of genocide or a crime against humanity. It argues that the term “*genocide*” may not adequately capture the unique experiences of those persecuted. The focus on Auschwitz in academic literature and international legal regimes may have inadvertently overshadowed other instances of genocide. The paper scrutinizes the UN Convention on the Prevention and Punishment of the Crime of Genocide, particularly its definition of “*genocide*” under Article II. It points out the ambiguity and limitations of the definition, especially the qualifiers “*intent*” and “*destroy*”.

The paper highlights the omission of two crucial provisions from the initial draft of the convention - Physical, Biological and Cultural genocide. The deliberate exclusion of “*Ethnic cleansing*” and measures forcing members of a group to abandon their homes from the definition is also criticized. The paper contends that the glorification of “*Auschwitz, never again*” has not only failed to fulfill the objectives of International Human Rights law but has also undermined incidents of similar magnitude without reprimand. It suggests that the current framework is inadequate.

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² Geoffrey S. DeWeese, *The Failure of the International Court of Justice to Effectively Enforce the Genocide Convention*, 26 Denv. J. Int'l L. & Pol'y 625 (1998).

I. INTRODUCTION

Genocide, a term used to describe the *deliberate and systemic destruction* of a *racial, political or cultural group*.³ But was Auschwitz a question of genocide or was it a crime against humanity or perhaps the crime committed at Auschwitz was so severe to have been risen far ahead of the crime of Genocide. But how do we decipher the law on Genocide, if each *incident*,⁴ can be identified as its own, for If the unique lived experience of those ostracised is ignored and subsumed under a generic term of Genocide, the world would be no better than the perpetrators in each of these cases. The fact remains that a deliberate lack of sincere efforts have been effectuated to limit the literature on *other* cases of Genocide, leading to an academic lacuna and general use of Auschwitz as the primary case to remind the world of the wrongs committed in a genocide. The International legal regimes, following the academicians have attempted to ensure that Auschwitz is never repeated again, but the incidents in Darfur, Rwanda, Bosnia and Herzegovina, Cambodia, Nanking, Ukraine are either not worth the designation of a genocide or the international legal mechanisms have clearly failed to recognise the same. This paper will struggle to answer this very question, even after the laws, conferences, and photo-ops that have been conducted at the behest of preventing these incidents, *other incidents* are deliberately subjugated to a lower standard because accepting the failure of International institutions to prevent another Auschwitz is simply not possible. Utilising the different reports of the UN and case laws, this paper will paint black the international legal regime which is not equipped to prevent a genocide. Hence, This paper argues that the glorification of “Auschwitz, never again”, as remarked by Micheline Ishay, has not only failed the object and purpose of International Human Rights law but is also complicit in undermining incidents of similar

³ Meriam webster definition.

⁴ “The Holocaust and Other Genocides,” International Holocaust Remembrance Alliance, <https://www.holocaustremembrance.com/resources/educational-materials/holocaust-and-other-genocides>,

stature without reprimand.

II. AN IDEOLOGY AMENDED: THE GENOCIDE CONVENTION

In the year 1948, the UN Convention on the Prevention and Punishment of the Crime of Genocide, defined the term “Genocide” under Article II, qualifying any acts that contribute towards the crime of genocide as mentioned in the fields with two strong qualifiers. They are, “intent” and the Intent to “destroy”. But, as a civil officer of the state, in an area plagued by violence, would the officer be expected to assess the veracity of the violence and measure it against what constitutes to *destroy*, “in whole or part, a national, ethnic, racial, or religious group,” a term which has not even been defined.

The drafting history of the convention suggests that the Secretariat intended to include two crucial provisions, the lack thereof has had major implications on the enforceability of the Genocide convention, thereby taking away the protections and obligation so granted by Article II’s definition. The initial text of the Article had three categories of genocide—Physical, Biological and Cultural genocide. This mature understanding of the convention would have 75 years later today, proven to be crucial to bring larger actions by state or otherwise within the ambit of what constitutes as “genocide”.⁵ What further aggravates the non-exclusive nature of the definition is the active efforts to exclude “*Ethnic cleansing*” from the definition.⁶ This, combined with the landslide support to exclude prosecution for imposition of “*measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment*”,⁷ dilutes the stronghold that the word ‘genocide’ holds in common parlance to a more prosthetic definition and protection granted as against the same. An argument is therefore well made that, in the

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277.

⁶ Id.

⁷ Id.

process of condemning actions such as in Auschwitz, the International Legal and diplomatic regimes preferred to accord a compromised definition and provided it with limited protection, with no repercussions for violations, in favour of getting enough signatories to effectuate this convention.

III. THE ENFORCERS OF THE LAW: INTERNATIONAL LEGAL ADJUDICATORY BODY

Another form of this compromise is visible from the drafter's explicit rejection of Universal Jurisdiction for the crime of genocide and only recognising territorial jurisdiction. This inherently produces two forms of problems, firstly, that states, who themselves can be perpetrators of violence, under Article VI, will have jurisdictions to try their own cases. And Secondly, such limited jurisdiction leads to states curating their arguments around "Crimes against Humanity" or through *erga omnes* obligations as was the case in *Gambia v Myanmar*. However, on a closer examination of the case, even the principle of *erga omnes partes* ('EOP') has been restricted to groups with "special interests." This limited reasoning merges the expectations to comply with the convention under EOP obligations with an affected state pursuing compliance to the convention due to specific hurt. Whereas Gambia's standing herein lacked 'hurt' personally and thereby had no grounds to claim compliance. Judge Xue's dissent in the *Belgium* case,⁸ observing that the orbiter dictum of 'common interest' in *Barcelona Traction* was misused,⁹ and the state party must show the obligation that was owed under the convention, without which the distinction between a claimant state and a general right to invoke international responsibility to enforce the convention in the court is blurred.¹⁰ Judge *ad hoc* Sur, also recognised that only certain

⁸ Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment, I.C.J. Reports 2012 (II), p. 422.

⁹ *Barcelona Traction* p 34 - *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)*, Judgment, I.C.J. Reports 1970, p. 32, paras. 33-35.

¹⁰ International Court of Justice, *Questions relating to the Obligation to Prosecute or*

categories of interested parties can claim a right under EOP and does not extend to all obligations under the convention.¹¹ However, Jurists such as Judge Cançado Trindade held that fundamental values shared by international community as a whole must apply to the case and therefore the *erga omnes* obligations arise from the *jus cogens* obligations, which has no limitations of time or space.¹² This further drives the International community away from enforcement of a specific wrong under the convention to a general right enforceable against the world, without treaty obligation. Hence, As noted by the International Law commission as well, not all states can vindicate others in the same way as a ‘directly injured state’ could to enforce the Convention amongst its signatories.¹³

In another stark example of the sheer lack of International faith in the prosecution of the *Nazis* and the *Japanese*, the International Military Tribunal (‘IMT’) initially and through their charter, envisioned to prosecute any inhumane acts committed ‘before or during the war’. However, the nature of the tribunals at Nuremburg and Tokyo, limited their scope to a legal fiction called ‘Crimes against Humanity’ engaged only post the commencement of the war.¹⁴ It’s effective application of this fiction also concluded with the final judgement of the Nuremburg Trials, the rest being raised through customary international law not through a convention or a charter.¹⁵

In another case of prosecuting people involved in *Auschwitz*, and the

Extradite (Belgium v Senegal) (20 July 2012), Dissenting opinion of Judge Xue, para 17.

¹¹ International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (20 July 2012), Dissenting opinion of Judge Ad Hoc Sur, para 27.

¹² International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (20 July 2012), separate opinion of Judge Cançado Trindade, para 183.

¹³ UNGA, *Report of the International Law Commission on the work of its fifty-second session (2000)*, UN doc. A/CN.4./513 of 15 Feb. 2001 (available at <https://documentsddsny.un.org/doc/UNDOC/GEN/N01/251/22/PDF/N0125122.pdf?OpenElement>, para. 181 (English).

¹⁴ *Supra* note 4.

¹⁵ *Id.*

struggles of reconciliation from the lack of universal jurisdiction and through the lack of IMT's prosecution of perpetrators of *Auschwitz*, who were engaging in the *destructive* act, before the commencement of war.¹⁶ Adolf Eichmann was able to validly raise the lack of Jurisdiction of Israeli Courts. This forced the Israeli court to creatively carve out a "universality principle" to frame and enforce the charges of Genocide.¹⁷ The court justified their utilisation of this principle by arguing that when Article II was drafted, genocide was a crime under International Law *ex tunc*. In the court's opinion, the effect of the language of Article I & II was to establish the crime of genocide, which was already a part of 'International Customary Law'¹⁸ and therefore, even though they lacked jurisdiction through the convention, the courts utilised Customary Law to prosecute a person who was central to enabling the crimes of genocide. This was further aggravated by Article VI of the convention. The Article calls for people charged with genocide to be 'tried within the territory of which the act was committed' or 'such international penal tribunals as may have jurisdiction',¹⁹ this, if the Israeli courts were to be bound by the convention, they would not have been able to bring this person to justice. The fact that the conventions' provisions were used by the defence counsel to remove jurisdiction from the Israeli courts, speaks volume of the legal paralysis caused by the convention. Another defence raised by Eichmann, as against his charges of 'Crimes against humanity', was that he was "just following orders".²⁰ The convention fails to undertake scenarios where instruments of state themselves commit the crime, especially in a scenario of war, considering the same would constitute a war crime and *not*

¹⁶ INTERNATIONAL MILITARY TRIBUNAL, VOL. 1, TRIAL OF THE MAJOR WAR CRIMINALS 11 (1947).

¹⁷ Treves, Vanni E. "Jurisdictional Aspects of the Eichmann Case." *Minnesota Law Review* 1963.

¹⁸ *id*

¹⁹ *Supra* note 4.

²⁰ Daniel Hautzinger, A Universal Jurisdiction Over Genocide: The Trial of Adolf Eichmann, WTTW Chicago Playlist (Mar. 27, 2017), <https://interactive.wttw.com/playlist/2017/03/27/universal-jurisdiction-over-genocide-trial-adolf-eichmann>.

genocide per the convention.²¹ Furthermore, this trial was special by its unique trial procedure, that for the first time gave a platform to the survivors of a genocide to talk about their lived experiences, even where Eichmann may not have been involved. The court, taking into consideration over 100 such testimonials, eventually handed the highest form of punishment under Israeli law to Eichmann.²² The Convention, doesn't envision giving such a platform to the people who have survived this destructive process which it encodes to punish.

The Office of the High Commissioner for Human Rights ('OHCHR') acts as the principal body of the United Nation, tasked with the promotion and protection of Human rights. And the Special Advisers on the Prevention of Genocide and the Responsibility to Protect, in their own words act as "catalyst to raise awareness of the causes and dynamics of genocide." and aims to advocate and mobilize appropriate action.²³ This office, has published a report titled 'When to refer to a *situation* as "Genocide" .' itself recognises that Genocide Convention can only be applied to events that have occurred post the convention into force, and basis the assessment that this body makes, the "United Nations can advocate for action to prevent, halt and/or punish such "*alleged*" or "*possible*" crimes."²⁴ And then-on passes the baton to the determination of a lawfully constituted court. The United Nation itself recognises that the convention has its limitations in International law and only the domestic courts or appropriate International Legal bodies such as that of the ICC, under Article 6 of the Rome Statue, can help *punish* the perpetrators of these crimes. This is further proven through two recent *incidents* of China and Myanmar, where the states have failed to act and the United Nation's

²¹ Id.

²² Id.

²³ United Nations, Protect Human Rights, <https://www.un.org/en/our-work/protect-human-rights> (last visited Oct. 12, 2023).

²⁴ When to Refer to a Situation as Genocide: A Brief Guidance Note, UN OFF. ON GENOCIDE PREVENTION & THE RESPONSIBILITY TO PROTECT (2019), https://www.un.org/en/genocideprevention/documents/publications-and-resources/When_refer_situation_genocide_brief_guidance_note.pdf.

OHCHR's assessment and fact-finding missions have respectively have only had the effect of raising these *incidents* to the global news-stands. Whereas, in the Uyghur Autonomous Region in China, the assessment report, does not even mention the word "genocide".²⁵ Furthermore, recalling the earlier drafting secretarial three-pronged definition of genocide, the report acknowledges the 'increasing restriction of Muslim religious practises and the recurring reports of destruction of Islamic religious sites such as mosques, shrines and cemeteries through its "Strike Hard" campaign'.²⁶ The report contains multiple such atrocities against the native Muslim population, while noting the continuous denial of such allegations from the government. In the case of Myanmar, An Independent fact-finding mission on Myanmar was set up by the United Nations Human Rights Council in March of 2017, wherein in 2019, the UN Expert on this mission commented that "Myanmar's Rohingya are persecuted and are living under threat of Genocide." The report acknowledged that Myanmar is failing in its obligations to prevent genocide, to investigate it and enact effective legislation against it.²⁷ Since then, as discussed, Gambia attempted to plead before the International Court of Justice ('ICJ') to help enforce the convention obligations, but as will be discussed later, the ICJ as an institution is also helpless to enforce such conventions against states that do not recognise these incidents as "*genocide*" per the definition given under the convention.

IV. ICJ: THE FORUM WITHOUT POWERS

The convention also brought with it duties such as that of preventing this crime, obligating the states to enact legislations to punish the crime and a requirement to cooperate with extradition. Noting the significance of this,

²⁵ OHCHR, Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China (31 August 2022) [OHCHR Report]

²⁶ Id.

²⁷ Independent investigation Myanmar's Rohingya Persecuted, Living under Threat of Genocide, UN Experts Say, OHCHR, 16 September 2019, [<https://www.ohchr.org/en/press-releases/2019/09/myanmars-rohingya-persecuted-living-under-threat-genocide-un-experts-say?LangID=E&NewsID=24991>]

The International Court of Justice's very existence was questioned through the enforcement of the convention in the "Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))" is the foremost case of the application of the convention, the powers of the ICJ, its intersection with the United Nations Security Council and the extent of "Genocide". During the stages of adjudication of provisional measure, the court had initially reassured both sides that whatever decision the court made, the same would not prejudice either party. However, then in Paragraph 52A(1) of the judgement, the court initially asked Yugoslavia to "*take all measures within its power to prevent the commission of the crime of genocide.*"²⁸ Then-on, the court voted 13 to 1 that Yugoslavia should in particular ensure that any military organisation under its control, do not commit any acts of genocide against Bosnian Muslims. Finally, the court voted unanimously that "*both parties should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide or render it more difficult of solution.*"²⁹ The courts, while recognising the concerns of genocide that Bosnia was facing, recognising this specific right under the genocide convention i.e. "*the right of the People and State of Bosnia and Herzegovina to be free at all times from genocide and other genocidal acts perpetrated upon Them by Yugoslavia (Serbia and Montenegro), acting together with its agents and surrogates in Bosnia and elsewhere.*"³⁰ Further, Bosnia had earlier claimed that its territory is being impacted through the actions of Yugoslavian agents, extending to its territory. The court herein stated that such requests or claims for protection of territory, was not within the scope of Genocide Convention, "*Which is aimed at protecting people, not territory.*" It is crucial to note that

²⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn12. & Herz. v. Yugo.), Provisional Measures, Order of 8 April 1993, 1993 I.C.J. Rep. 33.

²⁹ 1993 I.C.J. 3 (Order of April 8, 1993),

³⁰ *Id*

at this juncture, that although only people are protected under the convention, the application of the convention must be territorial in nature. This also therefore restricts application to the genocide convention and fails to take into account situations of relocation of people, by subjugating them to be separated from their homes, in the interest of state-sanctioned re-education camps as was the case in China, who would therefore do not have any *per se* violation of the Genocide convention.

However, the orders of the court to curb violence and prevent the genocide, the court in its order dated April 8, noted that “*great suffering and loss of life has been sustained by the population of Bosnia-Herzegovina in circumstances which shock the conscience of mankind.*”³¹ The court expressed its shock to the extent of recognising the crime of genocide, but fell short of actually naming the crime, or adjudicating in a swift manner to curb the same. This was happening despite there being, multiple United Nations Security Council resolutions condemning the ethnic cleansing. The court, in later hearings, finally admitted that it was “*not satisfied that all that might have been done has been done to prevent commission of the crime of genocide.*” Frustrated by the non-compliance of its orders, the court asked the parties again to adhere to the initial orders instead of passing new ones. Finally, when the parties, clearly failing to make any adherence to the orders of the ICJ, Justice Ajibola finally remarked “*Must the court make orders in vain?*”³² A sentiment that is shared by the international community even today with regards to the enforcement of the Convention. The court remarked that its initial orders have not been complied with, but stopped itself from adjudicating on the binding nature of its own orders, in fear of further disrespect, instead remarking this adjudication to be “*difficult*” in nature. Justice Weeramantry instead called for the binding nature of ICJ’s orders as “*Logic and common sense would consider it ridiculous and absurd for the Court to be unable to preserve the*

³¹ *Id.*

³² *Id.* (Separate Opinion of Judge Ajibola).

rights of the parties pending the final judgment.” He further argued that if the court could nit issue binding orders for such measure, the Statute and Rules of the court would not have relied on the same.³³ Therefore to give effect to such orders, the Court was reliant on the Security Council of the United Nations. Finally, the court stated that the orders “*should be binding and enforceable, otherwise, ab initio, there may be a good and reasonable ground to question its being issued at all.*”³⁴ The orders of the court ultimately had no effect on the thousands who has died as part of the atrocities committed by Yugoslavia.

V. CONCLUDING REMARKS

The truth is that post-Auschwitz, the International community was so overwhelmed by the wrongs committed, that the International framework was focused on restoring those wrongs through instruments such as that of the Terezin declaration, which was a programme specifically to address the restitution of communal and immovable property for the victims of the Holocaust. Measures such as these are simply unprecedented for other victims of genocide who may not have been fortunate enough to receive such stature of restitution, let alone recognition of the atrocities committed against them.

This is a stark reminder of the fact that perhaps ICJ is not the place to settle disputes over issues as pressing as genocide,³⁵ simply on the lack of enforceable action that the court can undertake. The decrees of this court being bound to the political, diplomatic and the economics of warfare through the Security Council will ultimately weaken the faith in the International Legal system to give effect to the Conventions that states undertake to bind themselves towards. The remarkable feat achieved at Nuremburg may never be repeated again to bring to justice the

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

perpetrators of genocide, be it in Bosnia, Rwanda, Cambodia, Ukraine, Hiroshima or countless other acts that simply couldn't pass through the high and vague scales of "*Genocide*". The way forward will only include the separation of the ICJ and other competent adjudicatory bodies to be able to enforce and repatriate the victims of genocide. These lost voices of the Genocide convention speak volumes of the international recognition or the lack thereof to the atrocities committed even after Auschwitz, clearly failing the war cry of "*Auschwitz, Never Again.*"