"UNDERSTANDING GENOCIDE IN TODAY'S CONTEXT"

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INTRODUCTION

The world history is fraught with instances of human violence perpetrated by humans against humans. Since, there was constant disregard of human rights various concepts evolved in the wake of various wars to address and compensate the atrocities perpetrated by the aggressor. The term Genocide was coined in the aftermaths of the World War II in order to define the destructive human behaviour i.e. the Holocaust. The word Genocide was coined for the first time in 1944 by a Polish Lawyer Raphel Lemkin. The term Genocide has been a constant in human history after that point in time. However there seems to be a need for the term to encompass more within its folds. Further it has been noted that in most instances the world community hesitates to term an incident as genocide since it not only brings a very large social, political and economic stigma to the country that has been accused of perpetrating genocide or harbouring an individual who carried out genocide.

TRACING THE JOURNEY OF GENOCIDE

The term genocide was coined by joining of the Greek word *'genos'* which means race, nation or tribe and the Latin suffix *'cide'* which means to kill. The initial intention of this word was to conceptualise the Holocaust perpetrated against the Jews. To that extent Lemkin in his book "Axis Rule of Occupied Europe" defines genocide in the following manner "the destruction of a nation or of an ethnic group […] 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. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[1] The irony lies in the fact that in the Nuremberg Trials, genocide was not part of the rules that established the Nuremberg Tribunal. The major reason this happened was that the concept of genocide did not exist in international law at that point in time. It took almost four years of lobbying by Lemkin in front of the United Nation which was a relatively new organization then, to bring about an instrument that

[1] Lemkin, Raphael. *Axis rule in occupied Europe: laws of occupation, analysis of government, proposals for redress*. Washington [D.C.]: Carnegie Endowment for International Peace, Division of International Law, 1944.

prohibited Genocide. The United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948, was considered a historic milestone in international law. The UN Convention defines genocide in the following manner, "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"[2] It is interesting to note how the definition changed within a span of four years. The definition given by Lemkin was much broader since it was more than just the physical destruction of a group but rather it included attacks on the group's political and social institutions, culture, national feelings, their religion and religious beliefs and the very economic existence of the group. This definition given by him therefore by default brought within its ambit all non- lethal acts that were adopted to undermine the living conditions of the group. Hence by virtue of this wide definition ethnocide as well as non – lethal acts were also a constituent element of genocide. The definition given in the UN convention on the other hand has utilised a very vague approach. The vagueness has been the major cause of many shortcomings. This has in the first instance lead to the application of the definition to a variety of unrelated cases, which arose due to the excessive emphasis on the physical elements in the definition. Moreover, it is apparent that elements listed out in the definition are in reality a mix between lethal and non-lethal acts this give rise to instances where individuals who are opposed to certain actions (such as birth control, prohibition of using a particular language in a region etc) invoking the genocide convention. Further the definition protects only four specified groups. There have been debates and criticisms that it is too restricted and arbitrary. For the first time the legal definition under the Convention was put to test by the two international tribunals in the former Yugoslavia and Rwanda genocide cases. The actual application of the definition led to more complications. The most pressing concern of the tribunals was who is protected as a 'national, ethnic, racial and religious group'[3]? In order to reconcile this question the conclusion arrived at by the Rwanda Tribunal is that the actual question that needs to be addressed is whether the perpetrators have perceived the victims as members of an actual distinct ethnic and racial group. The other major shortcoming that was observed was that the legal definition was solely focused on the intent of the perpetrator and not really on the success or failure of the actions carried out by the perpetrator. Hence, according to the definition there was no need for the whole victim group to be exterminated by the perpetrator before the definition of genocide would be applicable. So in order to reconcile this anomaly the tribunals held that the perpetrator must have aimed at a significant part of the group, which could include the leadership of the group or all the women.

[2] The United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Art.2.
[3] *Ibid*.

WHO ALL SHARE THE RESPONSIBILITY FOR GENOCIDE?

According to the Responsibility of States for Internationally Wrongful Acts, 2001 under Art.26 it has been clearly expressed that genocide is one of the peremptory norms that "are clearly accepted and recognized".[4] If one was to see the undertone of the Genocide Convention as well as customary international law, it would be apparent that genocide was a crime that entails individual criminal responsibility and it was a wrongful act that comprised of state responsibility. However, the trend that has emerged over the last few decades clearly indicates that there has been an increased focus on the individual responsibility rather than the state responsibility. The principle that guides the individual criminal responsibility was born out of the Nuremberg and Tokyo Trials. Further all the tribunals that were constituted after Nuremberg Trials were all aimed at going beyond statehood and holding the individual perpetrating the atrocities responsible. It is important and imperative to understand that individual criminal accountability for international crimes cannot be used as a substitute for state responsibility. Actually, these two kinds of responsibilities are of different nature and complement each other. This scenario is particularly true in instances of organized, systemic as well as coordinated violence; all these scenarios are inherently genocide. Since, the world has been focused solely on individual responsibility for the longest time that there does not exist many precedents where the state is the perpetrator of genocide through structural violence like colonialism. Under the Genocide Convention historically the responsibility that has been allotted to the state has been restricted to the prevention of genocide and punishing the perpetrators. However in 2007, this underwent a change when the International Court of Justice deemed that there exists an obligation on the state not to commit genocide.[5] The International Court of Justice in order to determine the attributability of a genocidal act to a state laid down the particular test that can be used to determine the same. It held that the "the acts of genocide at Srebrenica [could not] be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus [did] not on this basis entail the Respondent's international responsibility"[6].

[4] "Report of the Commission to the General Assembly on the work of its fifty-third session" (UN Doc A/56/10) in Yearbook of the International Law Commission 2001, vol 2, part 2 (New York: UN, 2001) at 85 [ILC Articles & Commentary].

[5] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), [2007] ICJ Rep 43 at para 166 [Serbia 2007].

[6] Ibid at para 395. The Court held that Bosnia Serbs were 1) not 'state organs' of the Serbian government, 2) not under the 'direction and control' of the Serb state, and 3) had not received 'aid or assistance' from Serbia.

GENOCIDE'S MISSING VOICES

There have always been voices which have shaped legal history and the same is the case of genocide. The entire drafting process can be divided into three distinct parts. The United Nations Secretariat was requested by the United Nations Economic and Social Council pursuant to Resolution 96(I), to create the draft of the Convention this was the first part. The second draft was edited by the Special Committee that was constituted by the United Nations Economic and Social Council. The third draft which during the second half of the 1948 started to face a large number of contentions. The two most salient contentions that persisted almost through- out the drafting process which became very vocal in the United General Assembly's 6th Commission pertained to the inclusion of cultural genocide and the forcible transfer of children, initially envisioned as "cultural genocide". [7] In this context it is interesting to note that throughout the entire drafting process including all the negotiations on matters with respect to cultural genocide, the indigenous perspective was completely excluded and ignored from the discussions. It was apparent that the omission and silencing of the indigenous voices was more than a mere oversight on the part of the drafting committees and special committees. Almost all colonial states, in fact actively pushed for "cultural genocide" to be excluded from the purview of the convention. This was intentional since they had perpetrated this type of genocide contemporaneously with the drafting of the convention. Hence, they all argued that it would be better if the protection of minorities were addressed through international human rights instruments, since if they were to include the idea of cultural genocide within the ambit of the convention this would definitely hinder the universal ratification of the convention. The overall outcome of all these deliberations was that the draft Article III, which addressed and redressed the issue of cultural genocide, was eventually withdrawn during the negotiations at the United General Assembly's 6th Commission. Although the attempt to enshrine cultural genocide as part of the Convention was defeated, the act of forcible transfer of children found its way into the final version under Artcle.2 (e). This is interesting to note since when Lemkin originally gave the definition this was envisioned to fall under the broad concept of cultural genocide. However, the negotiating countries to the convention thought that it represented physical or biological genocide thus it found its way into the final draft.[8] This has led to extensive debate amongst legal scholars and jurists since it is sometimes perceived as anomalous given the drafting history[9]of the convention. Others see it an opening that can be used to recognise the concept of cultural genocide within the ambit of the Convention.[10] In reality the anomaly resides in the inherent fact that Indigenous people have to work with norms of international law which was decided and drafted by sovereign states who wilfully excluded the Indigenous perspectives in order to serve their

[7] UNGA Sixth Committee, 3rd Session, 82nd Meeting, UN Doc A/C.6SR.82 (1948).
[8] Supra
[9] William A Schabas, Genocide in International Law: The Crime of Crimes, 2nd ed (Cambridge: Cambridge University Press, 2009) at 294 [Schabas, Genocide].
[10] Claus Kreß, "The Crime of Genocide under International Law" (2006) 6:4 Int Crim L Rev 461 at 484.

own interests. The drafting process not only failed to include Indigenous perspective but the various interpretations that have been accorded to the definition also fails to address very crucial "gender facts of genocide"[11]. When genocide is viewed through a gendered lens it becomes abundantly clear that gender "is woven into the perpetrator's planning and commission of coordinated acts that make up the continuum of genocidal violence"[12]. So in particular, a gender destructive act allows the perpetrator to maximize the crime's destructive impact on protected groups.[13] Despite the fact that there exists a co-dependent occurrence of gender's prevalence and its indispensability in the commission of genocide, the gendered impacts of genocide has been largely understudied. This has resulted in "the expansive female experience of genocide is often reduced to rape and other acts of sexual violence, just as the male experience is frequently and erroneously limited to killings."[14] Genocide comprises of both lethal as well as non-lethal acts, which includes acts of "slow death"[15] and in almost all cases these acts have had very specific impacts on women including girls. For the first time the recognition was given to the gender specific violence perpetrated under the ambit of the legal definition of genocide in the Rwandan genocide. They affirmed that "rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm."[16] Further it was affirmed that "rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[17] It further considered that "[s]exual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself."[18] This judgement was instrumental in marking the first important step in the recognition of women and girl's particular experiences during genocide. It led to the understanding that the targeting of victims in a gender-oriented manner eventually led to the destruction of the very foundation of the group as a social unit. In the long term it would leave very long lasting scars which would mar the groups social fabric from within leading to the complete disintegration of the group as a whole.

[11] The preamble of the Convention expresses the aim to "liberate ***mankind*** from [the] odious scourge of genocide" (emphasis added).
[12] Global Justice Centre, "Beyond Killing: Gender, Genocide, & Obligations under International Law" (2018) at 2, online (pdf): Global Justice Centre.
[13] *Ibid.*
[14] *Ibid* at 9.
[15] I.e., acts that does not "lead immediately to the death of members of the group": see e.g. g. Prosecutor v Clément Kayishema and Obed Ruzindana, 95-1-T, Judgment and Sentence (21 May1999) at para 116 (International Criminal Tribunal for Rwanda, Trial Chamber) [Kayishema Trial Judgement].
[16] Prosecutor v Jean-Paul Akayesu, 96-4-T, Judgement (22 September 1998) at para 731 (International Criminal Tribunal for Rwanda, Trial Chamber) [Akayesu Trial Judgement].
[17] *Ibid.*
[18] *Ibid* at para9.

GENOCIDE OR COLONIALISM?

Colonialism is indeed a unique for of violence which does not easily fit within the definition of genocide as it is understood under international law. This is so because of the way that the concept of genocide developed over the years, where the major focus was on assigning and establishing individual responsibility rather than state responsibility. This lends an explanation as to why the traditional and legal understanding of genocide has been considered incompatible with that of colonial genocide.

The definition that was given by Lemkin only provided the world with a limited prototype of genocide. Under this prototype he encompasses a time intensive, mass murder which was calculated and coordinated within a nation-state. This action was further well planned by an authoritarian leader who espoused an ideological worldview. Although ideologically the definition of colonialism does contain many of these elements, the narrow conception of genocide that was accorded to the definition failed to give it a true meaning which borrowed the diverse live experiences of other sects of minorities. Further, colonial genocide is very slow moving as compared to the other instances which have been termed as genocide. The traditional genocide as it is seen in international law as in the case of the Holocaust (12 years), the Armenian Genocide (8years) and the Rwandan Genocide (3 months). In comparison to this colonial destruction of Indigenous people has taken place insidiously and over centuries. The intent to destroy these Indigenous people was not only implemented gradually but also intermittently by using varying tactics against distinct communities. The tactics adopted affected the lives of the Indigenous communities in different ways ranging from threat to life and security as well as violation of their economic, cultural and social rights. Further the non-lethal tactics used were no less destructive than the lethal tactics and technically fall within the scope of the crime of genocide. However, these tactics adopted in the guise of sovereign governmental policies do fluctuate in space and time and in some instances are still on-going. It thus becomes difficult without a clear start or end-date to quantify colonial genocide. Since, colonial genocide does not really conform to the popular notion that exists in the determination of an event as genocide. Moreover, most interpreters of the international legal definition of genocide have subscribed to the uncritical view that genocide can only be committed in a totalitarian and authoritarian regime. Furthermore, it is inherent in the utilization of the definition that there exists a very strong notion that genocide can only possibly be the product of an individual mastermind with a deranged reactionary ideology which is unfettered by the safeguards of democracy and the rule of law.[19] It is true that to an extent racist ideologies play a role in colonialism and there are key historical figures who have and who are promoting racist ideologies, which advocate for the use of violent physical as well as cultural destruction of Indigenous people. However, the reduction of colonialism to individual culpability in reality tends to negate the collective nature of

[19] Dirk A Moses, "Toward a Theory of Critical Genocide Studies" (18 April 2008), online: Online Encyclopaedia of Mass Violence [Moses, "Critical Studies"].

"colonial design" [20] and that the reality is that "bureaucratic mechanisms are employed in the destruction of culture"[21] both in democratic contexts as well as totalitarian contexts.

NEED TO REDEFINE GENOCIDE

The very basis of what the definition of genocide wishes to address is indiscriminate and systematic destruction of members of a group solely because they belong to that group. The genocide can range from small (wherein a small number of victims are massacred systematically over a short period of time) or large or full scale as was seen in the case of the Jewish Holocaust. What the current existing definition fails to address is that genocide can occur in levels or degree. Since the current definition specifies 'in whole or in part' it leads to the belief that any act of genocide no matter how big or small can fit in the definition of just genocide. It is important to note that the human mind does not perpetrate the exact same amount of violence to each of the victims of genocide. The degree of torture, violence, humiliation suffered not only varies from victim to victim but also from perpetrator to perpetrator. So to classify all acts under one sweeping head does not really give justice to victims. However, the number of victims does not make it any less nor more barbaric but it is essential to take into consideration the degrees of violence perpetrated under each instance of genocide. The object was to protect all human groups. So in order to achieve that definition there is a need to make the victim group inclusive and limit the overall physical elements that ensure the exclusion of ethnocide. Since the current definition does not encompass cases where the victims targeted belong to a particular political or social group. This change in the definition would enable us to overcome the inherent deficiency in the Conventions definition. Under this new change it would ensure that any kind of indiscriminate killing of one group, irrespective of the fact that it is war or peace time will be labelled as genocide. This will do away with the need to use qualifying terms such as genocidal massacre. However, it is imperative that the word 'group' should be defined in such a manner that the perpetrator should not utilize the opportunity to portray a socially acceptable group as an anti-social group in order to unleash violence on the group.

CONCLUSION

Genocide in not a new concept it has been a part of human history since the very beginning. The only difference is the word did not exist then. Over the last few years it has been noted that the cases of genocide has dwindled. Is this the actual reality or is this because the atrocities that are taking place have been coloured with terms like human rights violations, minority rights violation

[20] Pam Palmater, "Genocide, Indian Policy, and Legislated Elimination of Indians in Canada" (2014) 3:3 Aboriginal Policy Studies 27 at 28, citing Dean Neu & Richard Therrien, Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People (Blackpoint, NS: Fernwood Publishing, 2003) at 8.
[21] *Ibid* Palmater.

etc.? It is however true that with the changing global scenario there exists a need to re define the concept of genocide since the world has changed considerably since 1948. Also there is a need to include the past in the new definition as well to include colonialism within the ambit of genocide. Genocide is not a narrow term but in reality it is very broad and covers a multitude of the violent human facets that human beings portray in their quest for dominance.