CONVENTION FOR THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

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The text of the Convention for the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948. After obtaining the requisite twenty ratifications required by article XIII, the Convention entered into force on 12 January 1951.

The term "genocide" was first used by Raphael Lemkin in his book *Axis Rule in Occupied Europe*, published in late 1944. Although the word appears in the drafting history of the Charter of the International Military Tribunal, the final text of that instrument uses the cognate term "crimes against humanity" to deal with the persecution and physical extermination of national, ethnic, racial and religious minorities. Prosecutors also used the term occasionally in their submissions to the Nuremberg Tribunal, but "genocide" does not appear in the final judgment, issued on 30 September - 1 October 1946.

The failure of the International Military Tribunal to condemn what some called "peacetime genocide" prompted immediate efforts within the United Nations General Assembly. In effect, the Tribunal had confined the scope of crimes against humanity to acts perpetrated after the outbreak of war, in September 1939. At the first session of the General Assembly, in late 1946, Cuba, Panama and India presented a draft resolution that had two objectives: a declaration that genocide was a crime that could be committed in peacetime as well as in time of war, and recognition that genocide was subject to universal jurisdiction (that is, it could be prosecuted by any State, even in the absence of a territorial or personal link). General Assembly resolution 96 (I), adopted on 11 December 1946, affirmed "that genocide is a crime under international law which the civilized world condemns". It was silent as to whether the crime could be committed in peacetime, and although it described genocide as a crime "of international concern", it provided no clarification on the subject of jurisdiction. Resolution 96 (I) mandated the preparation of a draft convention on the crime of genocide.

Drafting of the Genocide Convention

Drafting of the Convention proceeded in three main stages. First, the United Nations Secretariat composed a draft text. Prepared with the assistance of three experts, Raphael Lemkin, Vespasian Pella and Henri Donnedieu de Vabres, it was actually a compendium of concepts meant to assist the General Assembly rather than any attempt to provide a workable instrument or to resolve major differences. Second, the Secretariat draft was reworked by an Ad Hoc Committee set up under the authority of the Economic and Social Council. Finally, the Ad Hoc Committee draft was the basis of negotiations in the Sixth Committee of the General Assembly, in late 1948, which agreed upon the final text of the Convention, submitting it for formal adoption to the plenary General Assembly.

Certain aspects of the drafting history of the Convention have figured in subsequent interpretation of some of its provisions. For example, the definition of genocide set out in article II is a much-reduced version of the text prepared by the Secretariat experts, who had divided genocide into three categories, physical, biological and cultural genocide. The Sixth Committee voted to exclude cultural genocide from the scope of the Convention, although it subsequently agreed to an exception to this general rule, allowing "forcible transfer of children from one group to another" as a punishable act. The drafters also voted down, by a very substantial margin, an amendment that sought to add a sixth punishable act to article II. It would have enabled prosecution for imposing "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment". References to these debates have bolstered judicial decisions that essentially exclude "ethnic cleansing" from the scope of the definition.

In addition, the drafters quite explicitly rejected universal jurisdiction for the crime. Article VI recognises only territorial jurisdiction, as well as the jurisdiction of an international criminal tribunal. There was, of course, no international criminal tribunal at the time. But when it agreed to the Convention, the General Assembly also adopted a resolution directing that work begin on a draft statute for such a court. This was the beginning of sporadic work that would eventually lead, half a century later, to the adoption of the Rome Statute of the International Criminal Court.

Over the next fifty years, the two related but distinct concepts of genocide and crimes against humanity had an uneasy relationship. Not only was genocide recognised by treaty, it came with important ancillary obligations, including a duty to prevent the crime, an obligation to enact legislation and to punish the crime, and a requirement to cooperate in extradition. Article IX gave the International Court of Justice jurisdiction over disputes between States parties concerning the interpretation and application of the Convention. Crimes against humanity were also recognised in a treaty, the Charter of the International Military Tribunal, but one that was necessarily of limited scope and whose effective application concluded when the judgment of the first Nuremberg trial was issued. The only other obligations with regard to crimes against humanity at the time existed by virtue of customary international law.

Key provision

The preamble makes reference to General Assembly resolution 96 (I), and re-affirms that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world". It declares that genocide has inflicted great losses on humanity at all periods of history, and that international cooperation is required in order "to liberate mankind from such an odious scourge".

Article I provides the important clarification that genocide can be committed "in time of peace or in time of war", distinguishing it from crimes against humanity, about which there was still, in 1948, much doubt about its application absent an armed conflict. The provision also links the concepts of prevention and punishment. Noting the connection, the International Court of Justice, in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* judgment of 26 February 2007 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), said that not only was genocide prevented because of the deterrent

effects of punishment, the duty to prevent genocide had its own autonomous scope which was both "normative and compelling".

The crime of genocide is defined in article II, the provision that sits at the heart of the Convention. Genocide is a crime of intentional destruction of a national, ethnic, racial and religious group, in whole or in part. Article II lists five punishable acts of genocide. This definitional provision has stood the test of time, resisting calls for its expansion, and it is reproduced without change in such instruments as the statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court. The obstinate refusal to modify the definition is not explained by some innate conservativism in the international lawmaking process. Rather, the gaps left by the somewhat narrow definition of genocide in the 1948 Convention have been filled more or less satisfactorily by the dramatic enlargement of the ambit of crimes against humanity during the 1990s. The coverage of crimes against humanity expanded to include acts perpetrated in time of peace, and to a broad range of groups, not to mention an ever-growing list of punishable acts inspired by developments in international human rights law. For much the same reason, judicial interpretation of article II has remained relatively faithful to the intent of the drafters of the provision. Thus, it remains confined to the intentional physical destruction of the group, rather than attacks on its existence involving persecution of its culture or the phenomenon of "ethnic cleansing".

Article III lists four additional categories of the crime of genocide in addition to perpetration as such. One of these, complicity, is virtually implied in the concept of perpetration and derives from general principles of criminal law. The other three are incomplete or inchoate offences, in effect preliminary acts committed even where genocide itself does not take place. They enhance the preventive dimension of the Convention. The most controversial, "direct and public incitement", is restricted by two adjectives so as to limit conflicts with the protection of freedom of expression.

Reprising a principal established in the Charter of the International Military Tribunal, article IV denies the defence of official capacity to Heads of State and other leading political figures. Article V requires States to enact legislation to give effect to the Convention's provisions, and to ensure that effective penalties are provided. Many States have accordingly enacted the relevant texts of the Convention within their own penal codes, whereas others have deemed that the underlying crimes of murder and assault were already adequately addressed so that perpetrators of genocide committed on their own territory would not escape accountability.

One of the more controversial and difficult provisions says that genocide will be punished either by a competent tribunal of the territorial State, or by "such international penal tribunal as may have jurisdiction". Little more than a decade after article VI was adopted, the Israeli courts dismissed Adolf Eichmann's claim that the provision was an obstacle to the exercise of universal jurisdiction over genocide. It was held that despite the terms of the Convention, exercise of universal jurisdiction was authorised by customary international law.

Pursuant to article VII, States parties to the Convention are obliged to grant extradition "in accordance with their laws and treaties in force". There is some practice to suggest that this rather vague formulation is nevertheless taken seriously, and that States consider themselves obliged to facilitate extradition when genocide charges are involved,

subject to recognised principles prohibiting *refoulement* where there is a real risk of flagrant human rights abuses in the receiving State.

Article VIII declares that a State party to the Convention may appeal to "competent organs" of the United Nations for them to take action pursuant to the Charter. This provision, which is largely superfluous because the right to seize the organs of the United Nations exists in any event, has apparently been invoked only once, by the United States of America in September 2004 (9 September 2004, Secretary Colin L. Powell, Testimony Before the Senate Foreign Relations Committee, United States of America).

The International Court of Justice is given jurisdiction over disputes "relating to the interpretation, application or fulfilment" of the Convention by article IX. In *Bosnia and Herzegovina* v. *Serbia and Montenegro*, the International Court of Justice confirmed that States could, in effect, commit genocide, and that the Court could adjudicate the issue pursuant to article IX. Several applications charging genocide have been filed before the Court, but only one, *Bosnia and Herzegovina* v. *Serbia and Montenegro*, has come to a final judgment.

The remaining provisions of the Convention are mainly technical in nature, and concern such issues as the authentic language versions, application to non-self-governing territories, entry into force, revision and denunciation. The Convention is silent on the subject of reservations. In its 1951 Advisory Opinion *(Reservations to the Genocide Convention, I.C.J. Reports 1951, p.15)*, the International Court of Justice confirmed that reservations to the Convention were not prohibited, to the extent that they were not incompatible with the instrument's object and purpose. Several reservations have been formulated, many of them without widespread objection. Most of the reservations have concerned the jurisdiction of the International Court of Justice set out in article IX.

Influence of the Genocide Convention

The Genocide Convention was the first human rights treaty adopted by the General Assembly of the United Nations. It focuses attention on the protection of national, racial, ethnic and religious minorities from threats to their very existence. In that sense, it sits four-square within the priorities of both the United Nations and the modern human rights movement, aimed at the eradication of racism and xenophobia. Furthermore, it stresses the role of criminal justice and accountability in the protection and promotion of human rights.

The Convention has been much criticised for its limited scope. This was really more a case of frustration with the inadequate reach of international law in dealing with mass atrocities. As history has shown, this difficulty would be addressed not by expanding the definition of genocide or by amending the Convention, but rather by an evolution in the closely related concept of crimes against humanity. Accordingly, the crime of genocide has been left alone, where it occupies a special place as "the crime of crimes".

Case law of the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia has confirmed a restrictive approach to interpretation of the definition of genocide, resisting its extension to cases of ethnic cleansing and similar attacks upon groups aimed at their displacement rather than at their physical extermination. At the same time, in its 2007 ruling the Court found a robust concept of the prevention of genocide within the vague words of article I of the Convention. It spoke of a duty of "due

diligence" imposed upon States, one that extended even to acts committed outside of their own borders by entities over which their influence may extend. This obligation to prevent genocide dovetails nicely with the responsibility to protect, recognised in 2005 by the United Nations General Assembly and endorsed the following year by the Security Council.

Unlike most of the other main human rights treaties, the Genocide Convention does not establish a monitoring mechanism. There have been periodic calls to set up a treaty body, possibly by an additional protocol to the Convention or perhaps simply by a resolution of the General Assembly. In 2004, the Secretary-General of the United Nations established the high-level position of Special Adviser on the Prevention of Genocide.

In its report to the United Nations Secretary-General in January 2005, the International Commission of Inquiry on Darfur insisted that crimes against humanity might, in some cases, be just as serious as genocide. Its comments highlighted what is often a sterile debate about whether to characterise acts as genocide or as "mere" crimes against humanity. Indeed, crimes against humanity was the label attached to the Nazi atrocities at Nuremberg, and it remains one of the "most serious crimes of concern to the international community as a whole" listed in the Rome Statute of the International Criminal Court. Nevertheless, alongside the legal definition of genocide, rooted in the 1948 Convention and confirmed in subsequent case law, there is a more popular or colloquial conception. In practice, this lay understanding of genocide is more akin to crimes against humanity, in that it comprises a broad range of mass atrocities.

Related Materials

A. Legal Instruments

London Charter of the International Military Tribunal, London, 8 August 1945.

Statute of the International Criminal Tribunal for the Former Yugoslavia, Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704), 3 May 1993.

Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 (1994) of 8 November 1994.

Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, p. 3.

B. Jurisprudence

International Court of Justice, *Reservations to the Genocide Convention, Advisory Opinion, I.C.J. Reports 1951, p. 15*.

District Court of Jerusalem, *The State of Israel* v. *Adolf Eichmann*, Case No. 40/61, 11 December 1961.

Supreme Court of Israel, *Adolf Eichmann* v. *The Attorney General,* Criminal Appeal 336/61, 29 May 1962.

International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Radislav Krstić*, Case No: IT-98-33-A, 19 April 2004.

International Court of Justice, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda*), *Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 6.

International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment of 26 February 2007.

C. Documents

Security Council resolution 1674 (2006) of 28 April 2006, paragraph 4 (responsibility to protect).

2005 World Summit Outcome, General Assembly resolution 60/1 of 16 September 2005, paragraphs 138-139 (responsibility to protect).

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council resolution 1564 (2004) of 18 September 2004, 25 January 2005.

Security Council resolution 1564 (2004) of 18 September 2004 (establishment of an international commission of inquiry on Darfur).

The crises in Darfur, Secretary Colin L. Powell, Testimony Before the Senate Foreign Relations Committee, United States of America, 9 September 2004, 2004/955 (Press release).