

CHAPTER FIFTEEN

GENOCIDE

1. GENOCIDE IN INTERNATIONAL CRIMINAL LAW

Genocide constitutes a consolidated international crime in the system of international criminal law.¹ The 1948 Convention on the Prevention and the Punishment of the Crime of Genocide was essentially formulated to condemn the mass killings of groups during the Second World War. While legislation against the crime of genocide is rather new, the crime has been repeatedly committed in the relations between states for many centuries. According to the Convention, in order for a crime to be identified as genocide several principles must exist. These are the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The following acts constitute genocide: (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.

¹ For the crime of genocide, see For further analysis and references see Id., p. 119. For example on the non-ratification of the international Convention on Genocide see J. Duffett, *Against the Crime of Silence* (1968). W. Michael Reisman, 'Legal Responses to Genocide and Other Massive Violations of Human Rights', 59 (75) *Law and Contemporary Problems* (1996); William L. Hurlock, 'The International Court of Justice: Effectively Providing a Long Overdue Remedy for Ending State-Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia)', 12 (299) *American University Journal of International Law and Policy* (1997); Beth van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', 106 (2259) *Yale Law Journal* (1997); John D. van der Vyver, 'Prosecution and Punishment of the Crime of Genocide', 23 (286) *Fordham International Law Journal* (1999); Mary Robinson, 'Genocide, War Crimes, Crimes Against Humanity', 23 (275) *Fordham International Law Journal* (1999); William A. Schabas, *Genocide in International Law* (2000); Matthew Lippman, 'Genocide', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. I (2008), pp. 403–435. In particular see the statements of Bertrand Russell and the Russell International War Tribunal held in Stockholm, Sweden, May 2 to 10, 1967 and Roskilde, Denmark from November 20 to December 1 1967. Sartre id. The Tribunal was essentially created as a result of different meetings in London in 1966.

One of the serious criticisms against the crime of genocide in the system of international criminal law is that the legal application of the concept of this crime is very difficult and in most cases may be purely hypothetical. This is because the convention does not clarify the definition of 'intent' or 'intent to destroy' and many other terms such as 'in part', 'deliberately inflicting' and so forth.² All these terms are conditional and can therefore be interpreted differently. One difficulty is that one cannot assert when the 'intent to destroy' has begun. It is very doubtful whether the killing of just one member of a group is sufficient to constitute genocide. This is because the legal language of the Convention speaks of the crime of genocide 'in whole' and 'in part'. The definition of the term 'in whole' may be much more relevant than the definition of the term 'in part'. The term 'in part' can apply to any number of people and the legislator, by the term 'in part', did not only mean the killing of, deliberately inflicting on, imposing measures to, and forcible transferring of just one member of a group. These are some of the greater difficulties found in the application of the relevant provisions of the convention of genocide.

There is also another problem with the genocide convention, in most cases the perpetrators of the crime of genocide are those who decide about the enforcement of the provisions of the Convention. Although we cannot reject that some governments like the Iraqi and Turkish governments have been identified as having committed the international crime of genocide, this has never been implemented as a reason to stop the commission of acts of genocide. There have been many instances denoting the commission of the crime of genocide; nevertheless no government has admitted to having committed the crime of genocide. A clear example of this is the commission of genocide during the Vietnam War by the United States.

In recent decades, there have been some new developments in the system of international criminal law regarding the prosecution and punishment of those who have been engaged in the commission of genocide. These developments are especially notable in the case of the ICTY, the ICTR and the Special Court for Sierra Leone. All three courts are dealing with the questions of genocide of a very serious nature which have been the reason for the murdering of a large number of populations of the world. The Statutes of these courts have therefore formulated certain rules applicable to the crimes. The ICTR has in one of his judgments

² For further examination see Malekian, *International Criminal Law*, vol. I, pp. 295–299.

stated the difference between genocide and murder. According to it “A distinguishing aspect of the crime of genocide is the specific intent (*dolus specialis*) to destroy a group in whole or in part. The *dolus specialis* applies to all acts of genocide mentioned in Article 2(a) to (e) of the Statute, that is, all the enumerated acts must be committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’ It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder.”³

The most recent example is the Omar Hassan Ahmad al-Bashir case, the Sudanese president, who has been accused of committing various crimes by the prosecutor of the ICC. The prosecutor has based the case on the Statute of the ICC which is dealing, at present, with three core crimes. These are crimes against humanity, war crimes and genocide.

2. GENOCIDE IN ISLAMIC INTERNATIONAL CRIMINAL LAW

2.1. Prohibitions

Islamic international criminal law, like the system of international criminal law, prohibits the mass killing of individuals or groups for whatever purposes. This includes any form of plan and practice which is essentially intended to destroy a group and nation in any way and/or by whatever means. Mass killing constitutes a serious crime against humanity and a punishable crime under Islamic international criminal law. Even though, the law does not, necessarily speak of the type of genocide formulated in the genocide Convention, it does prohibit the killing of members of groups, regardless of whether the act has been committed in whole, in part or only against a single member of a given group. It is the intention of killing, causing serious bodily harm, destroying or imposing forcible measures upon the members of any group which constitutes a crime. This is regardless of whether the criminal act has been committed against several or a single member of a group. In Islamic international criminal law, it is the motive of ill-action which gives rise to the concept of crime and not the existence or non-existence of various elements enumerated in the genocide Convention. As a general principle of Islamic criminal law, bloodshed is basically prohibited by divine law and a person who has committed this crime cannot obtain mercy under the Islamic sovereignty

³ *Kayishema (ICTR-95-1-T)*, Judgement, 21 May 1999, para. 91.

of law, as long as certain specific punishments have not been inflicted. Still, mercy and amnesty largely depend on the character of a crime and whether or not the crime is a forgivable one.

2.2. *Classification*

Islamic international criminal law is against any type of mass killing and/or destruction and recognises such acts as being against the whole theory of the Islamic legislation in the *Qur'ān*. The legal reasoning in Islamic international criminal law rests on the effect of such crime on the community of nations as a whole. The crime of mass killing or genocide can easily be classified under one of the categories of crimes recognised as *Qesas* in Islamic international criminal law. *Qesas* (constituting the second category of crimes) do not necessarily have a fixed definition or penalty and they have basically evolved through various social needs including judicial process, analogy reasoning, political consideration and even the adaptation of modern philosophies of crime and criminology.

This category of crime in Islamic criminal law criminalizes among other things, murder and intentional crimes against a person. Since in the genocide Convention the intention to commit genocide constitutes one of the important elements for the recognition of the crime of genocide, the crime therefore simply falls under *Qesas* or the second category of crimes in the Islamic criminal justice system. The reason why the crime of genocide can be classified under this category is that this category guarantees both concepts of genocide. These two concepts are: murder which results in the death of the victim of the crime of genocide and the intention to kill but the action might not have resulted in the death of the victim.

2.3. *Criminalization in Human Rights*

Other reasons why mass killing is prohibited under Islamic criminal law are its principles of human rights under which murder, killing and intentional injury for whatever reason are prohibited and recognised as prosecutable and punishable crimes. The Cairo Declaration on Human Rights in Islam has, especially dealt with the question of genocide. The Declaration condemns acts of genocide and recognize it serious crimes against the philosophy of Islam. It reads that:

- (a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to

protect this right from any violation, and it is prohibited to take away life except for a Shari'ah-prescribed reason.

- (b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind.
- (c) The preservation of human life throughout the term of time willed by God is a duty prescribed by Shari'ah.
- (d) Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari'ah-prescribed reason.⁴

The value of Islamic international human rights and its rules and principles against the crime of mass killing or genocide can be especially examined under the rules of warfare.⁵ Islamic international criminal law prohibits any type of collective killing of groups who are non-combatant and this is irrespective of whether the victims of the crime belong to other groups which have or have not the same nationality as one of the conflicting parties. It is upon this principle that Islamic international criminal law takes chronological priority to the system of international criminal law in the case of criminalizing genocide as an international crime. This means that the International Military Tribunal in Nuremberg could have recognised the killing of Jewish nationals as constituting the crime of genocide, if and only if, they had taken into consideration the long establishment of Islamic international criminal law against the perpetrators of war crimes and crimes against humanity including the international crime of genocide.⁶

⁴ Article 2.

⁵ See chapters eight and twenty-eight.

⁶ While our purpose is only to present the facts and principles of Islamic international criminal law in the elimination of serious international crimes and we have only assumed here to draw comparative conclusions, no serious objections could have been made against the Tribunal if it had simply referred to the existence of a number of customary international criminal principles which had already been codified within the international laws of other nations in the international community as a whole. This would mean that the jurisdiction of the Tribunal would have been criticized less in the public history of international criminal law and the establishment of other international criminal tribunals might have been possible a long time ago.