



WHEN TO REFER TO A SITUATION AS “GENOCIDE”

OBJECTIVE

The question is sometimes asked as to whether specific events, past or present, can be referred to as “genocide.” It is important to adhere to the correct usage of the term, for several reasons; (i) the term is frequently misused in reference to large scale, grave crimes committed against particular populations; (ii) the emotive nature of the term and political sensitivity surrounding its use; and (iii) the potential legal implications associated with a determination of genocide. This note aims to provide guidance on the use of the term “genocide,” based primarily on legal rather than historical or factual considerations.

ANALYSIS

Origin of the concept: The term “genocide” was first coined by Polish lawyer Raphaël Lemkin in 1944 in his book *Axis Rule in Occupied Europe* by combining *geno*, from the Greek word for race or tribe, with *-cide*, derived from the Latin word for killing. Lemkin developed the concept of genocide partly in response to the Holocaust, but also in response to previous instances in which he considered entire nations, and ethnic and religious groups, had been destroyed such as “the destruction of Carthage; that of religious groups in the wars of Islam and the Crusades; the massacres of the Albigenses and the Waldenses; and more recently, the massacre of the Armenians.”ⁱ

Criminalisation of genocide: The indictments and the Nuremberg Trials that followed World War II made reference to “genocide” in the context of crimes against humanity, particularly in relation to the crime of persecution and murder. However, at that time genocide was not listed as a separate crime in the Charter of the International Military Tribunal (Nuremberg Charter) and was used as a descriptive rather than a legal term. The first time that genocide was codified as an independent crime under international law was in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, the Genocide Convention).ⁱⁱ According to Article I of the Convention, “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” The Genocide Convention entered into force on 12 January 1951.

Genocide is also defined as an international crime in the Rome Statute of the International Criminal Court (ICC) (Article 6), the Statute of the International Criminal Tribunal for Rwanda (ICTR) (Article 2/2), and the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (Article 4/2). The International Residual Mechanism for Criminal Tribunals, continuing the ICTY and ICTR’s jurisdiction, and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (Article 4), a UN-assisted tribunal, also have jurisdiction over genocide as defined in the Convention. Many States have also criminalized genocide in their domestic law; others have yet to do so.

Applicability of the Genocide Convention: Article 28 of the Vienna Convention on the Law of Treaties prohibits the retroactive application of treaties “unless a different intention appears from the treaty or is otherwise established”, which is not the case in the Genocide Convention. In addition, in line with the principle of legality, there should be no crime or punishment without a law establishing the crime and authorizing the punishment (*nullum crimen sine lege* and *nulla poena sine lege*, respectively). In line with the text of the Genocide Convention and its *travaux*

préparatoires, the International Court of Justice (ICJ) has confirmed that “the substantive provisions of the Convention do not impose upon a State obligations in relation to acts said to have occurred before that State became bound by the Convention.”ⁱⁱⁱ In conclusion, States are only bound by the Genocide Convention from the date on which it entered into force for the States in question.

The Genocide Convention and customary international law: The ICJ has repeatedly stated that the Convention embodies principles that are part of general customary international law.^{iv} This means that whether or not States have ratified the Genocide Convention, they are bound as a matter of law by the principle that genocide is a crime under international law and that they thus have an obligation to prevent and punish it. In a recent judgment, the ICJ also expressly noted “the fact that the Convention was intended to confirm obligations that already existed in customary international law”.^v However, international courts have not yet had occasion to pronounce on when these obligations of customary law crystallised.

“Historical” cases of genocide: The preamble to the Genocide Convention recognizes that “... at all periods of history genocide has inflicted great losses on humanity...” The *travaux préparatoires* of the Convention also contain numerous references to genocide as an historical fact. Resolution 96(I) (11 December 1946) of the United Nations General Assembly, authorizing the drafting of the Genocide Convention, which was adopted unanimously, states that “many instances of such crimes of genocide have occurred when racial, religious, and other groups have been destroyed, entirely, or in part.” Thus, it can be concluded that the Convention recognises that genocide is not a new phenomenon and that events that occurred before the Genocide Convention was adopted may have fit the definition of genocide as set out in the Convention.

Use of the term “genocide”: The legal definition of genocide is precise and includes an element that is often hard to prove, the element of “intent”.^{vi} The determination as to whether a situation constitutes genocide is thus factually and legally complex and should only be made following a careful and detailed examination of the facts against relevant legislation. This examination is carried out for the purpose of establishing State responsibility or individual criminal responsibility for the crime of genocide and must be done by a competent international or national court of law with the jurisdiction to try such cases, after an investigation that meets appropriate due process standards. According to Article IX of the Genocide Convention, disputes related to its interpretation, application and fulfilment, including State responsibility, should be addressed to the ICJ. With regards to individual criminal responsibility, Article VI determines that persons charged with genocide shall be tried by a competent national court in the territory where the act was committed or by a competent international penal tribunal whose jurisdiction is accepted by the State Parties.

To date, only a few events have been determined by competent judicial bodies to constitute genocide. At the international level, the ICTR determined the 1994 killings of Tutsi and moderate Hutus in Rwanda to be genocide. The ICTY has determined that the events of 1995 in Srebrenica (Bosnia & Herzegovina) were genocide. The ICJ also qualified the events of Srebrenica as genocide. In other instances, charges of genocide have been brought against specific individuals, but the trial or final decision in the cases in question are still pending and therefore genocide has not yet been established. Such charges have been brought, for example, by the International Criminal Court in the case of Darfur (Sudan); and by the Extraordinary Chambers in the Courts of Cambodia. At the national level, a few domestic courts have ruled that particular events constituted genocide. When considering these cases, it is important to compare the definition of the crime of genocide in the national legal framework with the international definition.

National legislative and executive authorities have sometimes characterised certain incidents or periods of violence as genocide, following processes that include political assessments alongside legal considerations. These characterisations cannot be treated as authoritative or determinative, at least beyond the States concerned.

Other terminology: Where there has not been a legal determination of genocide under the Genocide Convention by an appropriate court of law, different terms have been used to refer to events that have been particularly traumatic and devastating for populations and that have involved serious violations of international human rights and humanitarian law which, in certain cases, could constitute genocide. For instance, the attempted extermination of the Jews, Roma and other populations of Europe by the Nazi regime is often referred to as the “Holocaust”. The

expression “Killing fields” is often used in relation to the mass killings by the Khmer Rouge regime in Cambodia in the 1970s.

Other international crimes: Events that do not meet the definition of genocide may constitute war crimes or crimes against humanity, which are separate crimes under international law. Although genocide has been labelled “the crime of crimes”, it must be stressed that there is no established “hierarchy of gravity” of international crimes. Crimes against humanity or the most severe war crimes can assume equally shocking and heinous proportions.

CONCLUSION

As established, responsibility for a breach of the Genocide Convention can only be applied to events that have occurred after the entry into force of the Convention for the States in question. Consequently, under the Convention, a State cannot bring a complaint for events that took place before its entry into force for that State. This does not prevent the application of customary international law or general principles of international law to a situation that predates the Convention, nor prevents the term “genocide” from being used as an historical reference in relation to events that occurred prior to that date.

The political organs of the United Nations play an important role in supporting the implementation of the Convention,^{vii} but not in making a legal determination as to whether a situation constitutes genocide under the Genocide Convention or under international criminal law. Only a mandated judicial body can make a legal determination as to whether genocide did indeed occur, and who was responsible. Where there has been a legal determination of genocide in relation to specific events, use of the term may become less politically contested, though not necessarily free of controversy. Where such a determination has not been made, use of the term is likely to be vigorously contested by affected communities and can result in political tensions.

Notwithstanding, discussions about the nature of events that may constitute genocide and other atrocity crimes, past or present, should not be avoided. This means acknowledging serious violations of international human rights and humanitarian law that may have been committed in the past or are ongoing, including where there has not yet been a legal determination of the type of international crime that may have been committed. It may also involve making an assessment based on reliable information of whether there is risk of genocide in a particular situation, or whether genocide may be on-going or may have taken place.^{viii} Based on that assessment, different actors, including the United Nations, can and should advocate for action to prevent, investigate, halt and/or punish such “alleged” or “possible” crimes.”

ⁱ Raphaël Lemkin, *Genocide*, «American Scholar», vol. 15, no. 2, April 1946, pp. 227-230.

ⁱⁱ Raphaël Lemkin led the campaign to have genocide recognised and codified as an international crime. However, the original definition proposed by Raphaël Lemkin and the notion finally agreed to by the international community in the Genocide Convention are not identical, though similar, particularly in relation to the types of groups targeted.

ⁱⁱⁱ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 46, para. 100.

^{iv} *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 110-111, para. 161.

^v *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 45, para. 95.

^{vi} Article II of the Genocide Convention defines genocide as “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.”

^{viii} The United Nations Office on Genocide Prevention and the Responsibility to Protect has developed a *Framework of Analysis for Atrocity Crimes* to support the assessment of the risk of genocide, crimes against humanity and war crimes. This tool is available at http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf.