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Genocide without a Broader Genocidal Policy?

Genocide, "strictly speaking"

Following the arrest of Ratko Mladić, victims organizations turned to Judge Patrick Robinson, the President of the International Criminal Tribunal for the former Yugoslavia (hereinafter, ICTY) requesting the removal of the Judge Christoph Flügge from his role in the proceedings against Ratko Mladić. They did so by referring on the interview given by Judge Flügge to the Spiegel in 2009. According to their interpretation, he denied that the events that took place in Srebrenica in 1995 could be qualified as genocide.

The above assertion is not correct, since he even emphasized that he did not intend to evaluate the specific events:

> "Spiegel: Die Definition des Srebrenica-Massakers als Völkermord ist unter Völkerrechtlern aber umstritten.
>
> Flügge: Ich möchte auf diesen konkreten Fall nicht eingehen, aber allgemein frage ich mich, ob man eigentlich den Begriff des Völkermords, des Genocids, für die Kennzeichnung solcher Verbrechen wirklich braucht. Warum müssen wir hier überhaupt unterscheiden? Was ändert es am Unrechtsgehalt, wenn eine Gruppe nicht aus nationalen, ethnischen, rassischen oder religiösen Gründen, wie es in unserem Statut geregelt ist, umgebracht wird – sondern nur, weil die Menschen alle vor Ort waren?"[2]

Judge Flügge stated *expressis verbis* that he did not want to go into details with regard to the specific case of Srebrenica. He posed the question in general whether there is any need for the distinction between the events when people are killed on a mass scale because of their ethnicity or religious beliefs and the cases when masses are murdered due to the fact that they happen to live in a certain location. From the point of view of the gravity of crimes, there is not much difference.

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[2] 'Ein Sieg der Gerechtigkeit', Spiegel, 28/2009, at 96.

At the same time, proving criminal responsibility for the crime of genocide is hindered by a number of difficulties of proof. Judge Flügge, as a practitioner of the ICTY, is understandably seeking for the solutions to overcome these difficulties. For this aim, he went on in the interview by saying:

> "Vielleicht würde der Begriff des Massenmords manche rechtlichen Abgrenzungsschwierigkeiten überflüssig machen. Damit käme man auch in Kambodscha klar. Dort haben Kambodschaner massenhaft Kambodschaner umgebracht. Was ist das dann, Völkerselbstmord? Soziozid? Der Bergiff Völkermord passt strenggenommen nur auf den Holocaust."[3]

By stating that strictly speaking the term genocide only fits to the Holocaust, Judge Flügge pointed out that if we take the *mens rea* element of the crime of genocide in an extremely narrow sense, the Holocaust would be the only one case where the intent to destroy a protected group without considering geographic, military strategic or any other factors, can be proven without any doubt.

Quoting the words of Professor William A. Schabas, „as a leading international jurist, we would expect no less of him"[4] than reflecting on a legitimate questions of international criminal law such as the scope of the term genocide. Apart from this fact, the views of Judge Flügge that appeared in the interview will not endanger the fairness of the trial to be conducted in the case of Ratko Mladić, since the judgment of the Tribunal delivered in the Krstić case (which established the criminal responsibility of Krstić to have been aiding the perpetrators of genocide in Srebrenica) clearly determines the fate of his case concerning the crime of genocide. In addition, there are a number of procedural guarantees that ensure the impartiality of judges, such as the right of the defense to initiate a disqualification process at any stage of the trial.[5]

The above story indicates the understandably high sensitivity of the issue within the affected society. Legal debates about the qualification of the Srebrenica events as genocide will not change the perception of the society. The crime of genocide is perceived by the public as the crime of crimes, and as such, it has a well-known symbolic meaning and significance.

Genocide, "the crime of crimes"

In the public opinion genocide has been perceived as the worst of all mass atrocities. Similarly, the notion of „the crime of crimes" has appeared in international justice as well. The

[3] Ibid.
[4] 'Controversy about Judge Flugge's Remarks on Genocide', *PhD Studies in Human Rights*, available at http://humanrightsdoctorate.blogspot.com/2011/06/controversy-about-judge-flugges-remarks.html (July 21, 2011)
[5] ICTY Rules of Procedure and Evidence, Rule 15
For further guarantees with regard to impartiality of judges see Antonio Cassese, *International Criminal Law*. OUP, 2008, at 379-380.

International Criminal Tribunal for Rwanda called genocide as such in its Kambanda Judgment, as follows

> "Regarding the crime of genocide, in particular, the preamble to the Genocide Convention recognizes that at all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international cooperation to liberate humanity from this scourge. […] the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence."[6]

Genocide is a unique crime of an international character which can theoretically raise the responsibility of the state as well. It was confirmed by the judgment delivered by the International Court of Justice (hereinafter, ICJ) in the Bosnia v. Serbia genocide case in 2007. Genocidal conducts of a state qualify as violations of an imperative norm of international law. Unfortunately, in the specific case the ICJ failed to demand the unreduced versions of documents about the meetings of the Supreme Defence Council of the FRY that Bosnia and Herzegovina believed to be probative. Hence, the Court did not establish the responsibility of the state of Serbia for genocide leaving room for strong disappointment in the applicant and its people. The revelation of the relevant documents was highly expected first and foremost by victims, but they were unavailable due to the ICTY confidentiality order imposed upon the request of Serbia. As Professor Richard Goldstone stated, "the Court undermined its potential to play this much needed role in the region"[7] by failing to demand Serbia to issue the documents. However, it is important not to underestimate the fact that the application of Bosnia, in fact, led to a judgment. It demonstrates the fact that states can be called to account at the ICJ for the violation of the imperative norm of the prohibition of genocide. This again underpins the extraordinary character of genocide among the crimes of an international character.

Some authors argue that the crime of genocide cannot be disconnected from the state itself, since genocide does not erupt spontaneously, it requires premeditation, usually by a government, and it is ultimately driven by ideology.[8] The following views of Anton Weiss-Wendt seem plausible:

> "Pogroms, massacres, ethnic cleansing, or even mass killings – all these violent acts may have their origins in popular culture, perpetuated and, perpetrated by the masses. But not genocide! The plan to wipe out a group […] can only be born in the upper corridors of power, or alternatively to crystallize on its way up through the existing hierarchies. In either case, it requires the machine of state to implement the utopian vision of society."[9]

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[6] Prosecutor v. Jean Kambanda, Judgement and Sentence, Case No. ICTR-97-23-S (September 4, 1998), para 16.
[7] Richard J. Goldstone, Rebecca J. Hamilton, 'Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', 21 *Leiden Journal of International Law* (2008), at 110.
[8] Anton Weiss-Wendt, 'The State and Genocide', *The Oxford Handbook of Genocide Studies* (eds. Donald Bloxham, A. Dirk Moses). OUP, 2010, at 81-84.
[9] Ibid., at 99.

With the symbolic meaning and the practical characteristics of genocide in mind, the legitimacy of the efforts to apply the definition of the crime to isolated cases seems to be limited. This leads us to the question whether a genocidal policy is needed for criminal responsibility for the crime of genocide.

The requirement of a broader genocidal policy

The development of the international legal regime clearly does not speak "strictly" about the crime of genocide. It does not indicate that the term of genocide would fit only to the Holocaust. Sadly enough, the time has not arrived when the crime of crimes is not committed anymore.

The purpose of extending the frames of the notion appeared already at the date of birth of the definition. As Professor Schabas emphasized, the intent that the definition should apply not only to the Holocaust appeared already in the mind of Lemkin himself, as proven by the memories of Henry T. King:

> "When I saw him at Nuremberg, Lemkin was very upset. He was concerned that the decision of the International Military Tribunal – the Nuremberg Court – did not go far enough dealing with genocidal actions. This was because the IMT limited its judgment to wartime genocide and did not include peacetime genocide."[10]

Although the acceptance of peacetime genocide is not a question anymore, the contours of the definition of the crime are still not crystal clear.

One of the questions raised with regard to the *mens rea* element of the definition has been whether a broader genocidal policy is needed for the commission of the crime. The issue came to the focus of stakeholders of international criminal law by the ICTY Judgments in the Jelisić case.

Goran Jelisić acted under the authority of the police in Brčko district of Bosnia and Herzegovina in the summer of 1992. The police at that time was under the control of the Serbian forces. The detention center in Luka was under the authority of the police. The 24 year old Jelisić, who called himself the "Serb Adolf" killed five people at the Brčko police station and eight at the Luka camp. The accused plead guilty of all counts of crimes against humanity and violations of the laws or customs of war included in the indictment. Thereafter, the proceeding was limited to the count of genocide.

[10] 'Remarks of Henry T. King, Jr., Case Western Reserve University School of Law, Genocide Conference', September 27, 2007, at 1. cited by William A. Schabas, 'The Law and Genocide', *The Oxford Handbook of Genocide Studies* (eds. Donald Bloxham, A. Dirk Moses). OUP, 2010, at 127.

The Trial Chamber in the Jelisić case held that although the prosecution failed to prove that the crimes committed by Jelisić were part of a general plan to destroy the Muslim population in Brčko district, it did not exclude the theoretical possibility of convicting the perpetrator individually for the crime of genocide. According to this reasoning, the genocidal intent can be proven on an individual basis and the perpetrator of the crimes can be held accountable for the crime of genocide even without a broader genocidal policy.

In practice, however, if a perpetrator has genocidal intent without a broader system of genocide, it is likely that the perpetrator turns out to have psychological disorder that indeed, was diagnosed in the case of Jelisić. Consequently, although the Trial Chamber came to the theoretical conclusion that he could be convicted for the crime of genocide,[11] under the specific circumstances Jelisić was not convicted as a lone genocidaire. He was acquitted on the count of genocide already at the phase of Rule 98 *bis* proceeding. On the other hand, he was sentenced to imprisonment of 40 years for crimes against humanity and violations of the laws or customs of war. Nevertheless, the Appeals Chamber confirmed as well that a broader genocidal plan or policy is not required for the conviction for the crime of genocide.[12]

The foregoing theoretical conclusion seems to be controversial with regard to the fact that if any accused desires the destruction of a protected group without an awareness of a broader genocidal policy, it would always amount – as Morten Bergsmo says – "to a mental state that lacks the resolve that characterizes the intent to undertake action with a view to that action's ensuring at least the partial destruction of the targeted group".[13]

Prosecutor Serge Brammertz added to the dialogue on the theoretical possibility of a lone genocidaire that "resources in the international justice system are most appropriately directed towards genocide cases involving a more systematic pattern of conduct".[14]

This opinion has been confirmed by other practitioners and academic actors. However, Professor Cassese emphasized that the contextual element is not required with regard to two categories of the acts of genocide, namely, the one of killing members of the protected group and the acts of causing serious bodily and mental harm to the members of the protected group. The other three categories of acts of genocide inevitably take the shape of some sort of organized action. He argues that those who represent their view that a genocidal policy is a requirement for the crime of genocide, base their opinion not on the interpretation of the Genocide Convention, but on the phenomenological construction of genocide as a historic event.[15] However, he shares the view of

[11] Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment (Dec 14, 1999), para 100-101.
[12] Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeal Judgment (July 5, 2001), para 48.
[13] Morten Bergsmo, 'Intent', *The Genocide Studies Reader* (eds. Samual Totten, Paul R. Bartrop). Routledge, 2009, at 30.
[14] Serge Brammertz, 'Reflections on Genocide', *Proceedings of the Second International Humanitarian Law Dialogs : August 25-26, 2008, at the Chautauqua Institution*. ASIL, 2009, at 61.
[15] Antonio Cassesse, 'Is Genocidal Policy a Requirement for the Crime of Genocide?', *The UN Genocide Convention – A Commentary.* (ed. Paola Gaeta) OUP, 2009, at 130-131.

Prosecutor Brammertz that in reality, even these acts are hardly conceivable as isolated or sporadic events.[16]

The possibility of a lone genocidaire can be described only as "little more than a sophomoric *hypothèse d'école*".[17] According to Professor Schabas, "(i)n practice, genocide within the framework of international law is not the crime of a lone deviant but the act of a state".[18] Other authors took the view that the inclusion of the possibility of the lone genocidaire in the interpretation of the notion of genocide might lead to the expansion of the concept of genocide[19] over the frames of the Genocide Convention. The main aim behind the Convention was not to focus on lone murderers with a mental disorder, but the cases of mass massacres comparable to the Holocaust.

Due to the exceptional character of the crime, one cannot remain on the terrain of a positivist approach. Taking the symbolic significance of the crime into consideration, the view that a genocidal policy is required seems to be plausible. Quoting the words of Professor Claus Kreß,

> "the contextual elements should not be seen as an addition to the crime's *actus reus* but as an *objective point of reference* for the determination of a *realistic* genocidal *intent."*[20]

> "intent must be realistic and must thus be understood to require more than the vain hope of a single perpetrator of hate crimes to destroy (a part of) the hated group."[21]

Furthermore, the need for a genocidal plan is underpinned by the fact that the contextual element establishes a link between genocide and crimes against humanity where the historical roots of genocide lie.[22]

The negotiations about the Elements of Crimes (assisting the International Criminal Court in the interpretation of the Rome Statute), were following the same line of reasoning. Consequently, the conclusion was the same, namely, that the acts of genocide shall take place "in the context of a manifest pattern of similar conduct directed against that group" or they shall themselves "effect such destruction".[23]

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[16] Cassese, *Supra* note 4, at 335.
[17] William A. Schabas, 'Darfur and the „Odious Scourge": The Commission of Inquiry's Findings on Genocide', 18 *Leiden Journal of International Law* (2005), at 877.
[18] Schabas, *Supra* note 9, at 138.
[19] See Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*. Cambidge University Press, 2010, at 207.
[20] Claus Kreß, 'The Crime of Genocide and Contextual Elements – A Comment on the ICC Pre-Trial Chamber's Decision in the *Al Bashir* Case', 7 *Journal of International Criminal Justice* (2009), at 299.
[21] Ibid. at 304.
[22] Claus Kreß, 'The International Court of Justice and the Elements of Genocide', 18 EJIL (2007), at 621.; Mark A. Drumbl, 'The Crime of Genocide', *Research Handbook on International Criminal Law* (ed. Bartram S. Brown). Cheltenham, 2011, at 52.
[23] ICC Elements of Crimes, 9 September 2002, Art 6 (a) and 6 (b) 4, Art 6 (c) and 6 (d) 5 and Art 6 (e) 7.

Conclusion

As a number of outstanding authors have argued, the crime of genocide can only retain its awesome nature if its definitional elements are not trivialized. Enlarging the definition weakens the terrible stigma associated with the crime.[24] The above discussed arguments lead us to the conclusion that, although the crime of genocide clearly fit to cases other than the Holocaust, in order to preserve the symbolic meaning and the exceptional character of the crime, a broader genocidal policy should be a prerequisite of criminal responsibility for the crime of genocide in the cases of all five categories of *actus reus*. The contextual element should be always a starting point for the ascertainment of criminal responsibility for genocide.

[24] Stylianos Malliaris, 'Assessing the ICTY Jurisprudence in Defining the Elements of the Crime of Genocide: The Need for a Plan', 5 *Review of International Law and Politics* (2009), at 119-120. quoting Benjamin Whitaker and William A. Schabas.