

75 Years of the Genocide Convention- Time to Adopt a Gendered Lens?

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Introduction

War and the consequential violence have been a long-standing characteristic of human life. But as our understanding of such violence and its aftermath grew, attempts to subdue these violent tendencies through a concerted international effort grew. The Genocide Convention, one such effort, is unique, in that it falls at the intersection of three branches of international law –international human rights law, international criminal law, and international humanitarian law.² It is undoubtedly among the most successful instruments of international law. The stance against genocide now forms a part of the customary international law, as was apparent from the ratification of the Genocide Convention by 152 Parties.³

Unfortunately, the failure of the international order to acknowledge the role of gender in the acts of genocide has weakened the protection offered by the Convention. In public imagination as well as in past convictions, genocides have often been used interchangeably with mass murders⁴, and the other

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²Steven R. Ratner, *The Genocide Convention after Fifty Years*, 92, *Proceedings of the ASIL Annual Meeting*, 1,1 (1998).

³United Nations, *The Genocide Convention*, United Nations (5/5/22) <https://www.un.org/en/genocideprevention/genocide-convention.shtml#>.

⁴Gavin Moore, *How Does Genocide Differ from Mass Killing?*, 1 *QPR*, 1,1 (2013).

aspects of genocidal acts are often mostly ignored, if not given much lower attention.

Thus, it is important to find solutions to this enduring problem, and one of the ways of doing that is through an expansion of the Genocide Convention by including gender under its definition. The customary international law has made some progress in this direction already, however, in keeping with the seriousness of the crime, it is hoped that a much due amendment of the Convention takes place.

The article has been organised as described here: Part II of the article deals with the historical component of the concept of genocide. Part III discusses the development of the Genocide Convention and the problems with its interpretation. Part IV provides an analysis of how genocide and gender are linked, and how genocide manifests differently here. Part V brings out the necessity of the change in law. Part VI comprises concluding remarks.

Historical background

In his book *Axis Rule in Occupied Europe*, the renowned Polish author Raphael Lemkin came up with a new name for what was essentially an old phenomenon in the history of mankind- ‘genocide’ from Greek ‘*genos*’ or race or tribe and Latin ‘*cide*’ or killing.⁵

It may appear initially, if taken verbatim, that the definition by Lemkin is restricted to tribes, races or nations, however, it does not seem to fit in with his other arguments. Lemkin’s ideas of genocide were broader, he discussed

⁵ Raphael Lemkin, et al., *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (Foundations of the Laws of War)*, 79, The Lawbook Exchange, Ltd (2nd ed. 2008).

the crime of barbarity on account of hatred towards a social group, including racial or religious.⁶ Lemkin promoted the idea of genocide being committed through the biological, physical and through the cultural destruction of a group as well. He also promoted a holistic idea of genocide, that was not limited to physical destruction, but also included destruction of essential foundations of a society.⁷ Such an understanding gives way for the inclusion of various groups, even gender, which this article makes an argument for.

The Nazi atrocities against the Jewish community and the horrors of the Holocaust, along with Lemkin's efforts, finally prompted the United Nations General Assembly to adopt a Convention on Genocide. Thus, on 11 December 1946, it unanimously adopted a resolution and denounced genocide as *the denial of the right of existence of entire human groups* and describing it as *contrary to moral law and to the spirit and aims of the United Nations*.⁸ This became **The Convention on the Prevention and Punishment of the Crime of Genocide** (Genocide Convention or Convention) of 1948.

The definition under the Genocide Convention

The Convention prohibits acts of genocide and underlines the state obligation to prevent genocide. The definition of genocide under the Convention is particularly important to the discussion, it defines five acts under genocide under Article II, namely: a.) killing members of a group, (b) causing serious bodily or mental harm to members of the group, (c) deliberately inflicting conditions of life calculated to bring about the group's physical destruction, (d) imposing measures intended to prevent births within the group, (e)

⁶ Raphael Lemkin, *Genocide as a Crime under International Law*, 41(1) AJIL 145,151 (1947).

⁷ Lemkin, *supra* note 4, at 80.

⁸ UN General Assembly, *The Crime of Genocide*, 11 December 1946, A/RES/96.

forcibly transferring children of the group to another group. To constitute genocide, the intent behind these acts must be to destroy, wholly or partly, a national, racial, ethnical, or religious group.⁹

This definition in the Convention has remained untouched for almost 75 years now, and has been replicated as it is in other forums as well; for example- Article 6 of the Rome Statute of the ICC (International Criminal Court).¹⁰ The Convention has successfully stood the test of time and is now considered to be a part of *jus cogens* or compelling laws by many scholars of international law. *Jus cogens* rules are absolute principles of international law that do not allow any derogation by states and render any international treaty void if it contradicts them.¹¹

Clearly, the text of the Convention is keeping with the definition put forward by Lemkin, wherein killing is only one among the five identified acts that constitute genocide. It proposes no hierarchy in the lethal versus non-lethal crimes that constitute genocide. In practice, however, genocide has come to be equated with murder or mass killings, as a general understanding, and it might be appropriate to pay attention to how this impacts the justice for the non-lethal acts especially with gender being a primary area of disparity in this case.

Therefore, in spite of its endurance and near universal acceptance, the definition must change to stop the continued injustice against other victims of

⁹ UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, A/RES/3/260.

¹⁰ UN General Assembly, Rome Statute Of The International Criminal Court, 17 July 1998, A/CONF.183/9.

¹¹ Yishak Kassa Tefferi, The Genocide Convention and Protection of Political Groups against the Crime of Genocide, 5 MEKELLE U. L.J. 29 (2017).

genocide. While there are quite a few areas which require attention when it comes to this issue, this article has confined itself to highlighting why a gender-neutral approach should not be continued here forth by the language of the Convention. The approaching 75th anniversary of the Genocide Convention could prove as an excellent opportunity for the Convention to revamp itself.

Gender & Genocide

For the most of the 20th century, the role of gender in genocide crimes was generally disregarded, this took a turn after 1990s and the horrifying acts committed against women in Yugoslavia and Rwanda¹² gained widespread attention. Genocide and its identification with killing of members of a group, must be brought to an end, for, through the appropriate use of the term, genocide is multifaceted, and there is a difference in how its various components impact different genders, which makes a gendered analysis critical. Genocide, when committed against a woman or a girl of a particular group, is a crime against that community and against her as a female, and usually reflects the deep-seated misogyny in the means adopted by the perpetrators.

What Comprises a Genocide?

Gendered analysis in relation to genocidal acts involves understanding how acts against a particular gender, male or female, or sexual acts like rape are in fact genocidal acts. By letting the perception of genocide equated with murder grow unhindered, there is a tendency to lessen the weight of these acts and

¹² Lisa Sharlach Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda, 22 New Political Science 89, 90 (2000).

resultantly hampers the justice for its victims. The sufferers of genocidal acts undergo through varied and sometimes innovative forms of brutality, all of which must fall under the ambit of genocide. For example, most female survivors of the Rwandan genocide had been raped and were six times likely to have been infected with AIDS. Most of these victims fell to a slower death, but the intention of the perpetrators was to use the disease as a weapon as well.¹³ This caused not only physical suffering but also mental trauma and eventually loss of life to the victims. This, and other such means by which victims undergo a slower death are kept out of the purview of genocide.

More recently, in spite of the strategic use of mass rape as a part of Myanmar military's attacks on Rohingya women or the various similar mass brutalities committed against women across multiple genocides,¹⁴ many experts continue to look for the number of people killed in determining whether genocide has occurred.¹⁵

The killing of the older Yazidi women along with men, by the Daesh, is more or less accepted as a commission of genocide against the Yazidis. What is unclear is the stance taken against the various brutal acts that were committed against younger Yazidi girls and women, who were captured by ISIS and sold into sexual slavery. Many of these girls have sustained continued sexual and physical violence or abused or even driven to suicide. These indirect deaths as a consequence of abuse or suicides are undoubtedly due to the actions of

¹³ Global Justice Center, BEYOND KILLING: Gender, Genocide, & Obligations Under International Law, 16 (2018) <https://www.globaljusticecenter.net/files/Gender-and-Genocide-Whitepaper-FINAL.pdf>.

¹⁴ Erin F. Rosenberg, Gender and Genocide in the 21st Century, 6 (New Lines Institute 2001). https://newlinesinstitute.org/wp-content/uploads/Gender-and-Genocide-in-21st-cent-MM_FINAL.pdf.

¹⁵ Paul Boghossian, The concept of genocide, 12 *Journal of Genocide Research* 69, 80 (2010).

the ISIS,¹⁶ but whether the perpetrators of these crimes would be held guilty of genocide for this is unclear.

By not giving genocidal acts such as preventing birth or forced sterilization etc. the owed importance, the victims are being robbed of what is due to them. Viewing genocide through a narrow interpretation often leads to the ignoring of harm done and reflects a wider gender bias in itself. This causes a skewed understanding of how genocide works and results in incomplete grasping of its components.

Killing the Men, ‘Stealing’ the Women

The genocidaires are not gender-blind even if the law that punishes them is. In most instances of genocide, the perpetrators usually target and kill the men and boys first, whereas the women and girls are usually seen as ‘spoils of war’¹⁷. The terms ‘raping and looting’ are often used together signifying how women are seen as belongings during acts of crime.

The reasoning behind the killing is also because of the role the genders occupy according to the perpetrators, thus, the men seen as leaders, fighters, heads of household or guardians of the particular group. The genocidaires seek to remove the persons from what they perceive to be positions of power, so that they may come to hold more dominance over the group. This extends to the women and children of the group.

¹⁶ UN Human Rights Council, "They came to destroy": ISIS Crimes Against the Yazidis, 15 June 2016, A/HRC/32/CRP.2. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf

¹⁷ M. I. Rey, Reexamination of the Foreign Female Captive: Deuteronomy 21:10–14 as a Case of Genocidal Rape, 32 *Journal of Feminist Studies in Religion* 37 (2016).

On the other hand, generally, the violence against female members of the group often continues for a longer period and serves in eroding the groups morale in various ways. The men of the group, looked upon as the protectors of the women, are forced by the perpetrators to interpret this as their powerlessness, and in turn their defeat.

The form of non-lethal genocidal violence include rape, forced pregnancies and sterilisation leave a lasting and irreversible trauma upon a girl or woman. It is often seen that survivors undergo social outcast, sexual apathy, depression, confusion about one's identity, loss of sense of womanhood and other physiological and psychological complications¹⁸. In rape or other forms of non-lethal gender-based violence, it is difficult to ascertain the physical and psychological harm that has occurred and the intent to bring about the group's destruction is rarely recognised. Hence such crimes are often considered war crimes or crimes against humanity. The trauma of such violence is not limited to the individual alone, but spreads throughout the family and perhaps the entire community, which makes it a particularly effective tool of genocide.¹⁹ These social factors are especially targeted by the perpetrators of genocide and a gendered understanding of genocide will help in addressing this.

For instance, during the Bosnian genocide there were operations of forced impregnation of the Bosnian Muslim women by the Serb forces, and these women were forced to carry out these pregnancies.²⁰ The aims behind this

¹⁸ Lisa, *supra* note 11, at 102.

¹⁹ UN Commission on Human Rights, *The elimination of violence against women*, 17 April 1998, E/CN.4/RES/1998/52.

²⁰ UN Security Council, *Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992)*, 27 May 1994, S/1994/674.

operation are easily identified as an intention to destroy the community morale and to reduce their population and race.

Genocide affects both men and women in horrific ways, but there is a vast difference in how both the sexes have faced genocide. The failure to identify the complexity of genocide and how it is committed against men and women denies the victims the chance to proper justice, and hampers the enforcement of the law. The victims of non-lethal acts of genocide have been female more often than not. Undoubtedly, by privileging killing, even the men who suffer similarly have been denied the recognition they have deserved.

Why the Gender-Blindness Needs to End

In *Bosnia v. Serbia*, 2007, the ICJ underlined the obligation to prevent genocide as *normative and compelling*, and it should not be merged or understood as a component of the duty to punish.²¹

An approach that is excessively focussed on the number of people killed limits the State and institutional capacity to recognise the early signs of a genocide being committed or even the risks for this, thus, makes them unable to prevent genocide which has been upheld as duty. For instance, though the United States acknowledged the Sinar attack as genocide against Yazidis, it failed to recognise the gravity of all genocidal acts committed against the community. The gender based and sexual violence against women were removed from the act of genocide here and was placed within ‘crimes against humanity’ instead.²²

²¹ *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007 I.C.J. 191 (2007).

²² Erin, *supra* note 12, at 6.

A gendered approach in the defining genocide is required as the atrocities caused by such forms of acts affect males and females differently. If we aspire for true justice, it's imperative that the regulatory framework acknowledges this and points the accountability towards the perpetrators of such crimes. A gendered analysis of the genocide convention will ensure that the multidimensional nature of this crime is brought forth and provide justice to the gamut of unnamed, unrecognised victims.

Far too often rape has been used as a tactic by the soldiers or militia to cause psychological and physical harm. Rape and other forms of non-lethal genocidal violence are difficult to prove as there are no corpses left as evidence, and there have been a limited number of instances where soldiers have been prosecuted for rape. Rape, as a tactic was seen in the wars in Bosnia–Herzegovina, Rwanda civil war, Croatia and Kosovo against Serbia and East Pakistan's secession.²³ A gendered analysis of genocide will help to highlight the ways in which genocidaires weaponize patriarchal and sexist societal views in genocidal campaigns.

The Judgement of the International Criminal Tribunal for Rwanda in *Prosecutor v. Akayesu*, 1998, has proved to be an important milestone in regards to a gendered analysis of genocide. Akayesu was the first case where the court involved the prosecution of rape as a component of genocide. It found the sexual violence caused physical and mental harm and thus was a genocidal act;²⁴ it helped to bring to attention the component of genocide largely faced by the female members of the group.

²³ Lisa, *supra* note 11, at 102.

²⁴ *Prosecutor v. Akayesu*, ICTR-96-4-T (1998).

It is disheartening that even post the relatively progressive *Akayesu* judgement we have miles to go with respect to the policy structure. The legal pathways established through the *Akayesu* case are yet to find a foothold in prosecutor's charge sheets. Prosecutors have mostly charged genocide in cases where mass killings occurred, whereas non-lethal genocidal acts, usually faced by the women, were put in the category of war crimes, or crimes against humanity²⁵. Such decisions side-line the female sufferers of genocide and distort the historical record of the actual crimes of genocide. For instance, in the infamous *Kunarac et al.*²⁶ case, in 2001, three Bosnian Serb army officers were accused of being the brains behind organising the infamous rape camps. In these camps, Bosnian Serb army officers used to assemble Muslim women where Serb soldiers raped them. These crimes of perpetrators, which should have fallen under the definition of genocide, were considered to be crimes against humanity instead.

The evolution of the law and for that the Convention is critical to end the impunity in our violent world, for in spite of the promise of '*never again*'²⁷ we have been faced with similar situations time and again. A significant portion of the gendered analysis of international law is being carried out by feminist jurists and practitioners, most of whom are female. *Akayesu* is noteworthy also on account of a female judge who pioneered gender jurisprudence in this case.²⁸ Possibly, the inclusion of more women working

²⁵ Erin, *supra* note 12, at 6.

²⁶ Prosecutor v. Kunarac et al., IT-96-23 & 23/1 (2001).

²⁷ OHCHR. (2018, September 18). Genocide: "Never again" has become "time and again" Retrieved May 14, 2022, from <https://www.ohchr.org/en/stories/2018/09/genocide-never-again-has-become-time-and-again>

²⁸ Suzanne Chenault, And Since *Akayesu*? The Development of ICTR Jurisprudence On Gender Crimes: A Comparison Of *Akayesu* And *Muhimana*, 14:2 New Eng. J. Of Int'l & Comp. L 221, 231, (2008)

in such positions will contribute towards furthering this issue. With the rise of novel challenges like climate change, there is a further risk of exacerbation of civil unrest, conflict and violence. There is a strong chance, going by the precedents, that the impact of these changes and the ensuing harm from them will affect women and other vulnerable sections disproportionately. Expanding the terminology of the Convention before such violence takes place might prove to be a preventative step if taken in time.

Conclusion

Through the *Akayesu* judgement, the ICJ has already provided the scope for inclusion of a gendered approach to the Genocide Convention. It seems that, unfortunately, the continuing problem is the lack of political will and the public apathy to implement a gender lens. Today, unlike when the Convention was adopted, there is a more nuanced understanding of the concept of genocide and of the accompanying atrocities which affect men and women, usually very differently. If we are serious about preventing any more genocides, especially in the face of climate change and growing extremism, then ensuring proper criminalization of behaviour that causes such harm is crucial. And for that, the broad acceptance of genocide as including gender-based harm is crucial, among other such changes.

Though separate, the obligation to prevent and punish are linked. Research has confirmed that societies that are at most risk of committing genocide are those that have taken such actions in the past and got away with it, thus, “impunity is a breeding ground for genocide.”²⁹ By continuing to accept the

²⁹ Araks Kasyan, Elisa von Joeden-Forgey: Impunity is fertile ground for recurrence of genocide, Armenpress (4/23/2016). <https://armenpress.am/eng/news/844655/elisa-von-joeden-forgey-impunity-is-fertile-ground-for-recurrence-of-genocide.html>.

conventional lens of viewing genocide as killings and refusing to punish perpetrators for the real scope of the crime, we are providing a fertile ground for this to happen. It appears to be the time for the Convention to undergo expansion, enabling it to evolve and become more accountable in ensuring stronger protection for various human groups. Incorporating a gendered approach not only aligns with our growing understanding of genocide's nuanced impact on different genders but also serves as a crucial step towards addressing the historical pattern of impunity, ultimately strengthening the Genocide Convention's capacity to prevent and punish these heinous crimes.