Unimaginable Evil: The Legislative Limitations of the Genocide Convention

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Introduction

The crisis in Darfur, the western region of Sudan, has surged relentlessly up the international humanitarian agenda during the past year and a half. Its mix of atrocity and manmade calamity is a familiar one. So too, the world’s bleary-eyed, sluggish response. A response made up mostly of words.1 These words, used to deplore and condemn, have been gradually peeled of their diplomatic patina. Still, even these words seem feeble in the face of physical facts: mass murder, rape and destruction. Only one word has a resolute ring. The UN’s Security Council has equivocated but the US State Department has said it: genocide.2 The consequent paralysing formulation of moral panic, outrage and inaction exemplify the Genocide Convention’s systemic shortcomings and systematic misapplication. This article endeavours to explore, and propose a possible resolution to, the tension between genocide’s divergent legal and rhetorical meanings. In so doing it is divided into six parts: 1. The Meanings of Genocide, which notes the mismatched meanings of genocide in political rhetoric and legal definition; 2. The Protest and Purpose of the Convention, which reviews the consequences, both intended and unintended,

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1 United Nations Security Council Resolution 1593 (2005) adopted 31 March 2005, referred the conflict in Darfur to the International Criminal Court (ICC) enabling jurisdiction to be exercised under Article 13(b) of the Court’s Statute. The investigation is in its infancy and does not enjoy the co-operation of the Government of Sudan – which, disingenuously or not, prefers local justice – although the Security Council’s Chapter VII powers compels compliance. Whilst this action is welcome, it fits with a pattern of prevarication – international criminal justice is brought to bear in time to assuage moral blame, but too late to prevent atrocity.

2 U.S. Secretary of State Powell said before the Senate Foreign Relations Committee, 9 September 2004, “…genocide has been committed in Darfur and that the Government of Sudan and Jingaweit [sic] bear responsibility – and that genocide may still be occurring.”
of the Convention’s drafters; 3. The Legal Limbo of a Genocide Determination, which considers the way in which genocide often goes undetermined by the Convention’s workings; 4. The Convention’s Limitations, which reviews the legal delimitations of the Convention; 5. The Indefinite Expansion of the Convention, which considers the corpus of genocide jurisprudence in regard to the aforementioned analysis and 6. Restoring the Integrity of the Genocide Convention, which looks at the way in which the use of crimes against humanity – already precedented – can restore the memorial meaning and credible operation of the Genocide Convention.

The Meanings of Genocide

Genocide has one, commonly used meaning, when it is used to describe – and condemn – methodical, mass violence suffused with racial hatred. The Oxford English Dictionary calls it, “the deliberate and systematic extermination of an ethnic or national group.” This sense of the word is familiar and instinctive. In the range of a denunciatory vocabulary, “genocide” offers an outer limit. The politics of the word “genocide” often comport with a retrospective impulse to condemn unprevented mass atrocity in the strongest (if not necessarily the most legally accurate) terms possible.

But, genocide has a rarer, legal, meaning. The limit of the genocide legislation is that the popular meaning and the legal meaning don’t match exactly. The limited legal meaning of genocide has been stretched by some courts to better fit its rhetorical use. The consequence is a complex and uncertain law – Darfur burned and bled whilst a legal determination of genocide was awaited. The Genocide Convention describes with sufficient precision a single historical event, an unimaginable, unrepeatable evil. But, in its modern application, the Genocide Convention kills more people than it protects or prosecutes.

There is a macabre fixation with finding a modern genocide. This sadly obscures the fact that other crimes are anyway committed. These crimes are carried on irrespective of a genocide finding. Genocide has come to be

3 Genocide Convention, 1954.
4 Acting pursuant to Security Council Resolution 1564 (2004) an “International Commission of Inquiry on Darfur to the United Nations Secretary General,” chaired by the eminent jurist Antonio Cassese, reported on 25 January, 2005, grave violations of international humanitarian law had taken place but concluded that “the Government of Sudan had not pursued a policy of genocide” (p.4 of the Report). Furthermore, the Commission recommended that the Security Council refer the matter to the ICC for investigation and prosecution. Throughout this time, the humanitarian crimes occurring in Darfur have gone unprevented.