Reducing Genocide to Law

Could the prevailing view that genocide is the ultimate crime be wrong? Is it possible that it is actually on an equal footing with war crimes and crimes against humanity? Is the power of the word *genocide* derived from something other than jurisprudence? And why should a hierarchical abstraction assume such importance in conferring meaning on suffering and injustice? Could reducing a reality that is beyond reason and words into a fixed category undermine the very progress and justice that such labeling purports to achieve?

For some, these questions may border on the international law equivalent of blasphemy. This original and daring book, written by a renowned scholar and practitioner who was the first Legal Advisor to the UN Prosecutor at The Hague, is a probing reflection on empathy and our faith in global justice.

PAYAM AKHAVAN is Professor of International Law at McGill University in Montreal, Canada. He was the first Legal Advisor to the Prosecutor's Office of the International Criminal Tribunals for the former Yugoslavia and Rwanda at The Hague (1994–2000) and has served with the United Nations in Cambodia, East Timor, and Guatemala. He is also the author of the *Report on the Work of the Office of the Special Advisor of the United Nations Secretary-General on the Prevention of Genocide* (2005), has served as chairman of the Global Conference on the Prevention of Genocide (2007), and is coproducer of the documentary film *Genos.Cide: The Great Challenge* (2009).

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Definition, Meaning, and the Ultimate Crime

Payam Akhavan

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Contents

Preface

In July 1995, in the shadow of the shocking mass murder of thousands of Bosnian Muslims in Srebrenica, I sat around a table with colleagues from the Prosecutor's Office of the International Criminal Tribunal for the former Yugoslavia (ICTY). We were called upon to review a draft indictment against the notorious Bosnian Serb leaders President Radovan Karadžić and General Ratko Mladić. Those of us assembled in The Hague on that day were considering for the first time ever whether to charge an accused with the crime of genocide. It had just been a few months since the tribunal had become operational, there was a sense of urgency as the war in Bosnia was still raging, and there was little jurisprudence or academic commentary to guide our deliberations. After all, the Genocide Convention had been adopted only in 1948, after the Judgment of the International Military Tribunal at Nuremberg in 1946, and there had been no international criminal jurisdiction to prosecute such crimes until the ICTY's establishment in 1993. As Legal Advisor, I had prepared an exhaustive Memorandum on the Law of Genocide that analyzed every conceivable source of authority – from the *travaux préparatoires* to UN expert studies – and I was confident I had mastery of the subject. But on that day, as we attempted to reduce the enormity of the horrors unfolding in Bosnia to the strictures of legal reasoning, I felt a profound sense of futility.

For a young international jurist, the excitement of this historic moment was palpable. This was, after all, a unique opportunity to shape an obscure and dormant but fundamentally important field of international law that would go on to revolutionize the discipline in significant ways. This was no less than the resumption of the post-Nuremberg project to establish a permanent penal court that the International Law Commission had been entrusted with, but that had

been abandoned in the cynical Cold War era that followed. The "ethnic cleansing" campaign in the former Yugoslavia had prompted the UN Security Council to establish a tribunal as an unprecedented enforcement measure under Chapter VII of the Charter. This unanticipated event, I considered at the time, would surely expedite the establishment of the long-awaited International Criminal Court. My Harvard LLM thesis had lamented as recently as 1990 the conspicuous absence of enforcement mechanisms for the crime of genocide. I could have scarcely imagined then that I would soon have the good fortune of becoming a pioneer in international criminal law at the very beginning of my career.

Juxtaposed with this glorious intellectual enterprise – the defining moment in any jurist's career – were the unspeakable images of human suffering that I had witnessed a few months earlier while serving with the UN in Bosnia. My youthful idealism had collided with scenes from hell. In village after village, I had witnessed wickedness that knew no limits. I came across women with babes in arms murdered in the streets as they attempted to flee, entire families burned alive while sheltering in their basements, the harrowing testimony of children raped in front of their parents, survivors weeping uncontrollably as they sifted through mass graves in search of their loved ones. And the affliction of those unfortunate souls reawakened in my mind the terrible anguish that surrounded my family as we witnessed helplessly the torture and murder of fellow Bahá'ís in the Islamic Republic of Iran after the 1979 revolution. While the distant pursuit of global justice had filled me with a kind of professional hubris, the intimate reality of victims pointed in a very different direction. Instead of the burgeoning war crimes industry and the endless procession of conferences and publications and opportunities for professional advancement, it led to a place where words fail, where legal concepts are found wanting, a place of grief and silence where we are forced to humbly ponder the human condition, ever mindful that it cannot be captured in manageable doctrines and concepts.

To determine whether we should charge genocide or not, I explained to my colleagues with a fluent command of the law that a core element of the crime is a somewhat elusive factor of scale or gravity. Was the evidence sufficient to prove beyond a reasonable doubt – as required by the definition of genocide – that Karadžić and Mladić had the intention to destroy a "substantial part" of the Bosnian Muslim group, or not? The debate wavered from abstract statistical assertions about the

numerical proportion of civilian deaths to the gravity of particular incidents in detention camps. Suddenly, amidst this intellectual chaos, a colleague exclaimed: "But this is not the Holocaust!" There was an uncomfortable silence as the weight of those words sank in. Absent a mathematical formula that would determine the threshold of genocide, what exactly qualified the Bosnian atrocities one way or the other? Was this an exercise in legal reasoning, or a comparative survey built on the archetypal image of the Holocaust from which the concept of genocide first emerged? Some colleagues eventually mustered the courage to disagree with the proposition that only Hitler's crimes were worthy of being labeled as the ultimate crime: "This *is* genocide. The atrocities are truly heinous, truly shocking. They are the worst of the worst. What would the victims think if we don't charge genocide?"

The year before, in 1994, as close to one million Tutsis were exterminated in Rwanda, the refusal of United States officials to label the events genocide had caused a storm of controversy. It was as if there was a special power in invoking this word, whether to justify or avoid humanitarian intervention. Most intriguing was the invocation of the term to give victims a measure of recognition that their suffering deserved the hierarchical primacy reserved for genocide. I revisited this issue in relation to the International Criminal Tribunal for Rwanda (ICTR) that had been established in 1994 by the UN Security Council. What, I wondered, if the Tutsis were actually a "social" group and not an ethnic or racial group encompassed by the definition of genocide? Could a charge of genocide fail on such grounds and what would it mean for the victims and the credibility of global justice? I would encounter the issue in yet other countries where I served the UN. In Cambodia in 1997, victims and jurists were full of rage and disbelief to consider that the mass murder of "political" groups by the Khmer Rouge might not qualify as genocide in proceedings before the yet to be established Extraordinary Chamber in the Courts of Cambodia. By contrast, in Guatemala in 1998, the Mayan victims celebrated when the UN Historical Clarification Commission recognized their mass murder as genocide.

Increasingly, I felt something perverse in this discourse, in its privileging of hierarchical abstractions over the far more compelling stories and scenes that had been seared into my memory. The emotional connection with those people and events, it seemed, could be captured only by remaining ineffable, by recognition that taxonomic distinctions and definitions were grossly inadequate in conveying their

meaning. The triumphant international law narrative quickly gave way to a more profound reflection on how the legal debate on defining genocide masked other unexplored sensibilities about how the jurist comes to grips with intense suffering and overwhelming emotion. It also implicated my family upbringing – as a child of both eastern and western civilizations, I was steeped in oriental mysticism and a spiritual worldview – with my formal legal education – in the tradition of occidental rationalism and its place of distinction for objective theoretical learning divorced from subjective experience. As I embarked on a scholarly writing project for my doctoral dissertation in those years, there was a great temptation to transform my groundbreaking Memorandum into an authoritative treatise on the law of genocide. The prevalent sense of futility, however, shifted the focus elsewhere. The ambitious jurist had succumbed to that search for answers that is born of existential angst. In straying beyond law, I attempted to convey a truth that could not be contained in carefully regimented chapters and sequential paragraphs, offering the reader a dazzling panoply of intellectual prowess and conceptual wonders. The project that emerged was decidedly not an authoritative treatise, but rather a series of reflections on the encounter between the rationalist credo of law and the ineffability of emotions, viewed through the prism of genocide.

This book was written first and foremost as a means of reckoning with the pursuit of juridical redemption in the face of irredeemable loss. It grapples with both the potentialities and the limitations inherent in law, in search of the boundary between legal reasoning and that other realm of experience where structures built on words and arguments collapse. As such, it embraces jurisprudence and literature, theory and storytelling, in a complex multilayered inquiry that attempts to convey through its medium the message at its core. That the reader must first read patiently through legal doctrine and theory to arrive at the more penetrating but unwieldy chapters is a matter of deliberate choice.

Acknowledgments

This book is based on a dissertation submitted in 2001 for the Doctor of Juridical Sciences degree at Harvard Law School. It was completed under the supervision of Professor Henry Steiner to whom I am indebted for his years of support and guidance. My exceptional reader and enduring mentor, Dean Martha Minow, deserves special gratitude for encouraging me to venture beyond the familiar but narrow understanding of academic writing to explore other paths to knowledge and meaning.

The manuscript first began in 1993 as a Memorandum of Law written at the request of Professor Antonio Cassese of Florence University, then president of the ICTY, whose contributions to jurisprudence and scholarship over the years have been a source of respect and admiration. The streams of thought reflected in the book emerged during my years as Legal Advisor to the Prosecutor's Office of the ICTY (1994–2000), serving under two distinguished jurists, Richard Goldstone and Louise Arbour, and engaging in countless spirited legal debates with colleagues such as William Fenrick, Morten Bergsmo, and Rodney Dixon.

My stint as Visiting Lecturer and Senior Fellow at Yale Law School during the fall 1998 semester, thanks to the support of Professor Harold Koh, and the fruitful exchanges with Michael Reisman and other faculty members were a welcome respite from the intense pressures of work at the ICTY to begin conceptualizing the manuscript. The initial dissertation was completed in the winter of 2001 while I was a Visiting Lecturer and Senior Fellow at the E. M. Meijers Institute of Legal Studies of Leiden University in the Netherlands with the support of the Open Society Institute.

The manuscript's publication was delayed for several years by life circumstances until it was revisited and substantially revised in the

2009–10 academic year, while I served as professor at McGill University Faculty of Law, where I found a splendid home thanks to the tremendous support and friendship of Dean Nicholas Kasirer and Professor Irwin Cotler. Over the years, I have also benefited greatly from those at the forefront of genocide studies, including especially Professor Frank Chalk of Concordia University. Among those that provided inspiration and friendship who are no longer with us, I wish to mention Professor Thomas Franck of New York University, Professor Erik Marcussen of Southwestern University, and Alison des Forges of Human Rights Watch, three extraordinary human beings who left a deep imprint on all those who had the good fortune of knowing them.

The final revision of the new manuscript would not have been possible without the invaluable assistance of my editor Stephen Scher and my research assistant Sam Walker. Both were phenomenal in their professionalism. The patience of Professor James Crawford and Finola O'Sullivan of Cambridge University Press, from the first review of the doctoral dissertation in 2002–03 until submission of the final manuscript in 2010 after seemingly never-ending revision, also merits special mention.

Special gratitude is reserved for all those that inspired a deeper meaning of justice and what it means to survive the unthinkable through their personal example. They include Professor Thomas Buergenthal who first introduced me to the United States Holocaust Memorial Museum, and my sister Esther Mujawayo whose heroic efforts have given a voice to Rwanda's forgotten widows and their children. The courage and sacrifice of another sister, Mona Mahmudnizhad, who on 18 June 1983 was hanged at the age of 16 in Shiraz with nine legendary Iranian Bahá'í women, I shall never forget for, being of the same age and community, all that separated us was the arbitrariness of fate. Of these heroines it can be said that they were truly spiritual giants.

And since this book is about reconciling the distance of our vocation as jurists and scholars with the intimacy of emotions, it is to my family that I dedicate this book, because it is their abiding love that has sustained my hope amidst despair and, after years of confronting death, it was my precious children whose arrival in this world awakened me to the miracle of life.