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 ISSN: 2582-6433

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EXPLORING THE CHALLENGES IN HOLDING A STATE ACCOUNTABLE UNDER GENOCIDE CONVENTION: A COMPARATIVE ANALYSIS

AUTHORED BY - SUKHADA DHOTE

Abstract-

The researcher has endeavoured to explore various prospects in attributing state responsibility for the humanitarian crime of 'genocide' under the genocide convention and the Rome Statute of ICC. The theory of sovereignty of a state provides immunity to the state which is used as a defence by heads of the state to escape their liability. However, when charges against international humanitarian crimes are imposed, the state has a legal obligation to cooperate with the enforcement machinery of the international community. The researcher has addressed the challenges in holding the state of Sudan responsible for the crime of genocide with the reference to the case study of Omar Al- Bashir, who was the first ever to be charged with the crime of genocide while he was the president of Sudan in the context of Darfur situation. Despite the fact that he was charged for the offence of 'genocide' twice (4 March 2009 & 12 July 2010) by the International Criminal Court (ICC), Al-Bashir successfully managed to escape the arrest for a prolonged period of time and still managed to remain free thereby highlighting the impediments involved in apprehending individuals of this stature under the international law. The article analyses the case of Omar Al -Bashir along with other similar case studies occurred after the convention in highlighting the legal ambiguities in the enforcement machinery of the international community. By examining these challenges in the context of the Al-Bashir and other similar cases, this research contributes to a deeper understanding of the complexities inherent in holding individuals responsible that are been accused of heinous international crimes committed against humanity.

Keywords- Genocide, Rome statute of ICC, challenges, enforcement machinery.

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INTRODUCTION-

Historical context:

During the World War-II (1939- 1945), the nazi regime of Germany systematically killed the ethnic group of Jews and thus it became necessary to codify the rules so that such acts may not be repeated. The estimated deaths in the time period were around 1.47 million[1]. The United Nations prioritized the codification of genocide. In 1946, the assembly in a resolution declared genocide which was defined as the "killing of a group of human beings" is a crime under international law[2]. In the subsequent year, the assembly reaffirmed the above resolution. The convention on the Prevention and punishment og genocide was adopted on December 9, 1948 and it came into force on January 12, 1951. The main objective of the convention was to prevent and punish the genocide, whether committed at the time of war or peace[3]. The convention expressed the principles which had been recognised by the charter of the international military tribunal set up at the Nuremburg trials which held that, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law can be enforced".[4] At the Nuremberg trial, for the first time ever, the administrative officials who committed gruesome crimes were brought into the process of trial and were held to be responsible in person irrespective of whether they had acted in their official capacity or not[5]. The framers of the Genocide convention inherited the principle laid down in the trial and formulated a mechanism to redress the accountability of the crime of genocide; including the persons acting in official capacity or in personal capacity. In order to contain the atrocities of the crime, they explicitly mentioned that any international tribunal as agreed by the parties or competent tribunal of the state having requisite jurisdiction will have jurisdiction for the crime of genocide [6]. One unprecedented component of the convention which stands out from the other international conventions is that it also holds responsible the officials who committed the offences in the past when the statute was not in place.

State Responsibility & ICC Statute-

The ICJ recognises the accountability of an individual as well as the state when they are accused

[1] Stone L. Quantifying the Holocaust: Hyperintense kill rates during the Nazi genocide. Sci Adv. 2019 Jan 2;5(1):eaau7292. doi: 10.1126/sciadv.aau7292. PMID: 30613773; PMCID: PMC6314819
[2] General Assembly resolution 96(1) of December 11, 1946
[3] Article I. The Statute of the International Criminal Court.
[4] See., The judgment of the Nuremberg Tribunal [www.yale.edu/lawweb/ avalon/imt/proc/judcont.htm]
[5] Article VII. Statute of Nuremberg Tribunal
[6] Art. VI of the Convention on prevention and Punishment of the crime of Genocide states that '[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried … by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.

 ISSN: 2582-6433

of an offence as complex as that of genocide[7]. However, these two-fold forms of responsibilities set forth challenges in genocide cases. In the case of genocide, officials from various degrees contribute and carry out perplexing actions and omissions in the process of committing it. According to the statute, genocide requires to have a destructive intention to kill an ethnic or a racial group as a precondition to prove a case of genocide[8]. This is a condition required to prove only in the cases of an individual and not in the cases of responsibility of any state.

In the *Genocide case*[9], Serbia put forth an argument that the evidence for a case of genocide shall be constituting of a series of planned events. The court partially agreed to the contention and held that the special intent shall be coupled with the presence of special circumstances or by a plan. The court also added that such a plan shall be of such a nature that the act of genocide should be construed as a direct consequence of such plan. In the current case, the court held that the presence of specific circumstances was not present and further held that, such a pattern will have a decisive evidentiary value. Due to the absence of such a plan, the court held that the act of genocide was not committed and ruled in favour of Serbia.

After the ICJ passed its judgement in the favour of Serbia in the aforementioned case, the court mainly relied on the element of complicity of Genocide. It recognised that providing instructions to anyone in order to commit crime is considered to be a complex action to prove the explicit commission of the offence and not for the complicity. The court opined that only when it is shown that the officials below the rank of the commanding officer were substantially involved with the actions of the state, and provided assistance to the state only then the state can be held liable at an international level.

In the general parlance, intent is crucial when liability for an individual is to be decided but the offence of genocide marks an exception. It is a necessity to prove the genocidal intent in order to conclude that the state has committed the offence of genocide. The question of whether the officials are to held accountable for the offence of genocide was left unanswered by the court in the genocide case and held that such a assertion only needs to be proven in the court when it is accomplished that the officials had the knowledge of the intent of the principal commander, of which the court was satisfied with earlier[10].

[7] *See* Application of Convention on Prevention and Punishment of Crime of Genocide (Croat v Serb.), Judgement, 2015 I.C.J. Rep. 3, 129 (Feb 3)
[8] Art. II of the Convention on prevention and Punishment of the crime of Genocide.
[9] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)
[10] State Responsibility for Complicity in Genocide: The Requirement of Mens Rea, Erika Josefsson

 ISSN: 2582-6433

CHALLENGES WITH GENOCIDE CONVENTION-

The efficacy of the genocide convention should be examined with a thorough analysis of the genocide cases been witnessed by the international community. The same can be done by evaluating the time frames of past and present genocides, the magnitude of killings and torture done by a state and the punitive measures taken by the legal mechanism to contain the atrocities of such a state action as effectively stated in the genocide convention. One must acknowledge that the fundamental failure of the convention can be sited with the cases that occurred after the codification of the convention which was aimed to be prevented by the existence of the convention. By analysing the genocide cases happened after the inception of the convention as well as the contemporary case of Myanmar, let us implore the fallacies in the operation of the international enforcement machinery alongside the convention in addressing the issues related to mass genocide. By critically examining the cases, the discourse shall provide for more clear understanding regarding the lacunae in tackling the global issue of genocide.

The Darfur Crises-

Since 2003, Darfur, a region in Sudan is suffering atrocities and violence. The military has systematically killed around thousands of civilians and has displaced a million of them. It is apparent that the government in place and the president of Sudan, Omar Al Bashir has apparently proven to be involved in the cases as he has prevented the initiatives taken by the enforcement machinery of international community to contain the violence. Endeavours of the International Criminal Court (ICC) have failed in achieving peace in the region by prosecuting the president[11]. But few years after the investigation conducted by the court, the prosecutor for the case filed in a motion for a search warrant at the U.N. Security Council[12] was later issued in March 2009.[13] This was followed by severe criticism by the Sudanese government which was firm on its stand that the ICC has no jurisdiction and the government does not recognise its authority. The ICC, in spite of its issues with the recognition of its jurisdiction and the immunity which the state has because these concerns can be resolved by the security council's resolution and the immunity shall not be applicable to the cases wherein the gravity of the offences is such that the magnitude of the action is felt on an international level. The issue with jurisdiction gives rise to two separate issues in this

[11] *See*, e.g., Rep. of the Int'l Criminal Court, 34, U.N. Doc. A/63/323 (Aug. 22, 2008) [hereinafter ICC Report]. The International Criminal Court (ICC) has made two indictments in the case of Darfur, but neither individual has been surrendered to the Court, and one still serves a political position in al-Bashir's administration. See id.; Q & A: Crisis in Darfur, HUM. RTS. WATCH [hereinafter Crisis in Darfur], http://www.hrw.org/ english/docs/2004/05/05/darfur8536.htm (last updated Apr. 25, 2008)

[12] The United Nations first referred the situation in Darfur to the ICC in 2005 through UN Security Council Resolution 1593. S.C. Res. 1593, available at U.N. Doc. S/RES/1593 (Mar. 31, 2005).

[13] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest, at 8 (Mar. 4, 2009).

 ISSN: 2582-6433

current case, that according to the Rome statute of the International Criminal Court, ICC has limited jurisdiction.[14] Even after multiple instances wherein the security council has issued a motion to ICC to consider the matter of Darfur, Omar Al- Bashir does not accept the jurisdiction, the reason being that Sudan is not a party to the Rome statute, the statute which has created the ICC. ICC is not a body which can function without the involvement of the party states, it is dependent upon the states for their cooperation in order to enforce its authority. In the current case, this issue can be magnified into denying justice to millions. The prosecution of this state leader can also be restricted by the usage of the customary law that ensures the immunity from any proceedings against the head of the state done in their official capacity. Even though, the Rome Statute explicitly mentions that the jurisdiction of ICC can override this immunity.[15]

The security council being an important entity in the treaty, has the authority to put forward or terminate any prosecutions. [16] The government of sudan has undeniably has been submissive to the security council henceforth, the prosecution in the current case shall rely on this recourse as a method to exercise the ICC's jurisdiction over Sudan.

Ultimately, the state immunity in international law has enfeebled to the instance where the principle in any case refrain ICC to prosecute the Sudanese president.

International actors have acknowledged the security council's authority in this aspect forcing it to intrude in the proceeding of Al- Bashir.[17] Bashir, himself has interacted with the heads of neighbouring countries to ask them to assist in this procedure as that of Turkey, which is a not a permanent member of the security council.[18]

In furtherance of it, the council has a general power pertaining to the international concerns. The U.N. Charter provides the security council with the faculty to authorize over international disputes, provide for sanctions[19], and widespread powers to ensure peace and stability by whatever way possible[20].

[14] Rome Statute of the International Criminal Court arts. 12-13,July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].
[15] *Id.* Art. 27
[16] Rome Statute, supra note 14, arts. 13, 16.
[17] See Laura Trevelyan, UN Urged to Suspend Sudan Case, BBC NEWS (Feb. 16, 2009), http://news.bbc.co.uk/1/hi/world/africa/7892063.stm.
[18] See Zeynep Gurcanli, Sudan Seeks Turkey's Support in UN Security Council to Save al Bashir, HORRrvET DAiLY NEWS & ECON. REv. (Feb. 4, 2009), http://www.hurriyet.com.tr/ english/world/10927100.asp?gid=244; see also Al-Bashir Seeks Egypt's Help on Darfur Warrant, NEWSVINE.COM (Feb. 22, 2009), http://www.newsvine.com/-news/2009/02/22/2464187- al-bashir-seeks-egypts-help-on-darfur-warrant.
[19] U.N. Charter arts. 36-37.
[20] U.N. Charter arts. 39-51.

 ISSN: 2582-6433

Notwithstanding the fact that, Sudan is not a signatory to the Rome statute but it is a party to the Security council, which indeed obligates Sudan to its decisions. A staunch argument can be provided in favour of Sudan that if one has to invoke the council's powers then it will act as a threat to Sudan's sovereignty as an individual state. The government of Sudan finds this solution equivalent to attacking its identity as a state. According to the settled principles of international law State can very well execute its sovereign functions and duties henceforth can invoke their immunity[21] however the objective of this essential power of statehood is to provide with the right to the states to carry out tehri functions in a flexible manner and to secure them from being governed according to the laws of any other country. The current case is a blunt misuse of the liberties been provided to the states and therefore the intrusion of the security council is justified. It will be well within the ambit and jurisdiction of the security council to oversee the situation because as provided earlier, the council has the powers to bring in peace and security according to the U.N. Charter. The situation is very different from any other threat, and even if the sovereignty of the government is compromised, the same should be meted against the interests of humanity. The Sudanese government will not conduct the trial in its own criminal court. The government claims to punish its former president, Ali Kushayb but there is no evidence for the same and the government refuses to hand him over to the ICC[22]. In furtherance of it, there is no proof of the matter that the trial is indeed happening in Sudan. Taking an account of this precedent, it is highly improbable that Sudan will investigate the matter in its own country.

The ICC had issued a warrant against Bashir, there is no assurance that the court will be ever be able to physically bring him into its jurisdiction. Even if Al-Bashir travels to a different country, the court can request the country state to extradite him however, this solution doesn't seem very promising especially when the country has maintained cordial relations with Sudan. This problem provides a major challenge to the ICC's authority, even if the trial takes place *ex-parte*, there will not be any justice served.

Rwandan Genocide-

Rwanda is a small country with having a population of around 13 million. It has a long-standing history of monarchical rule, which resulted in a failure because of the troubles caused by the Hutu ethnic group in 1962. This led to create an ethnic tussle in the nation and resulted in conflicts that came to an end in the ongoing civil war and genocide of 1994. After analysing Rwandan history,

[21] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 206(a) (1987)
[22] See Nick Wadhams, Indicted Over Darfur, Sudan's President Feints and Punches Back, TIME (Oct. 21, 2008), http://www.time.com/time/world/article/0,8599,1852448,00.html.

 ISSN: 2582-6433

one can arrive at a conclusion that that the nation had a hierarchical system which was centralized at the time, and the watertight distinction between the two social groups were not prevalent. The colonial powers manipulated the ethnicities and this was a major reason for the rising tension at the end of the colonial rule. This was followed by a series of violence amongst the ethnic groups. In 1959, a revolution led by the Hutu community compelled over 300,000 Tutsis to leave the country. By 1961, the Hutus had forced the tutsi emperor and established a republic. The pinnacle of the tussle between hutus and the tutsis was in the year 1994, which ended in a bloody massacre, that lasted 100 days and killed over 800,000 people. The official start of the genocide can be marked in a plane that carried both Habyarimana and Burundi's president Ntyaryamira. The president was shot down in the airspace of capital city of Kigali on their way to a negotiation with Tutsi rebels. The people responsible for the incident were never known, however the hutu militia groups started blocking the roads and setting up barricades and slaughtering the Tutsis. The very first victim of the massacre was the Hutu prime minister, which created a political void which was subsequently filled an extremist Hutu leader who ensured that the mass killings were continued.[23] The genocide lasted from 6 April 1994 to 19 July 1994, and as a result 800,000 people dies, inclusive of Rwandans, Hutus and people from Tutsi community.

In spite of the presence of ICTY, the Rwandan genocide was carried out in an unauthorized manner and the international instruments took a negligible action towards it. The international criminal Tribunal for Rwanda (ICTR) was set up to look into the matter of the Rwandan genocide and other violations committed in the neighbouring states. The ICTR was consisting of three organs- the chambers, the office of the prosecutor and the registry.[24] The tribunal, aided in narrowing down the meaning of the genocidal intent, however not very clearly, but by touching upon the component of intent in an unprecedented manner. The tribunal also settled the principle that in cases where a confession from the accused is not brought, his intent can be precluded from various presumptions of fact. Although, even after progressive steps of explaining the requirement of intent, the ICTY & ICTR have miserable failed to ascertain the pre-requisites for the offence of genocide. Moreover, the tribunal did not have a very long serving purpose for the Rwandans as a lot of them wasn't even aware that the tribunal existed. This happened because the tribunal was located in the northern Tanzania, which was away from the focal point of the region which needed the help.

[23] "Rwandan Genocide." HISTORY, 2022.
[24] United Nations. "Statute of the International Criminal Tribunal for Rwanda." UN Audiovisual Library of International Law. 2012.

 ISSN: 2582-6433

The shortcomings of the convention are endless, weighted against the atrocities carried out by the Hutu extremist leaders. The convention has failed, miserably in the two case studies which we have analysed now, that states the inefficacy of the convention and its enforcement. The case study which we will be discussing is of a recent context and is currently ongoing. However, it still provides for a ray of hope in our spirited minds that atleast the convention will stay true to its promise of *"never ever"* and will be committed in providing assurance to the victims, if not absolute justice.

Application of the Convention in Myanmar-

Myanmar, formerly known as Burma, is an ethnically Buddhist state. Rohingyas are a minority Muslim community and they reside in the Rakhine province. They were discriminated on many counts and were excluded from the citizenship rights of Myanmar. Myanmar military and security forces in the month of October, 2016 began widespread and systemic 'clearance operation' against of the Rohingya groups during the course which they committed mass murder, rape and other forms of violence, often with inhabitants locked inside burning houses with the intention to destroy the Rohingya as a group in whole or in part. Such acts were continued from August 2017 with the resumption of 'clearance operation' on a more massive and geographical scale. Rohingyas started fleeing to the neighbouring Bangladesh and other South Eastern states in search of shelter. The massive exodus added new grief to their lives, such as health concerns and low standard of living. Gambia, a majority Muslim nation with the help of organisation of Islamic cooperation filed a suit on 11 November, 2019 in front of the international court of Justice alleging the minority Muslims community and it has been violative of the convention on the prevention and Punishment of Genocide of 1948. It requested to the court to adjudge and declare that Myanmar has violated the obligations it had towards the convention. Gambia also requested to the court to in its application for indication of certain provisional measures to take with immediate effect to prevent further genocide of the Rohingya groups. The court in the case, *Gambia v Myanmar* [25]observed that it cannot be ruled out that disproportionate force was used by members of the defence services of Myanmar in disregard of the international humanitarian law. It was observed further that there may also have been failures to prevent civilians from destroying property. In the view of fundamental values sought to be protected from the Genocide Convention the court considered that the other acts threatening their existence as a group, are of such a nature that prejudice to them is capable of causing irreversible harm.

[25] "Application of the Convention on the Prevention and Punishment of the Crime of Genocide" p3

 ISSN: 2582-6433

On 23rd January 2020, the court ordered provisional measures pending its final decision which Myanmar is obligated to take within its powers to prevent the commission of all acts within the scope of genocide convention. The provisional measures are considered to be equivalent to the injunctions and are ordered when there is an ongoing legal violation from which it or the situation continues to suffer harm whilst the court considers underlying claims. The court added that, Myanmar shall take care that its military and armed forces should not commit or attempt to commit the offence of genocide. The order of ICJ are obligatory on Myanmar and moreover these decisions are considered to be historic and unanimous by the international community. On a brighter note, the compliance with these provisions were observed even at the time when the world went into a pandemic due to the outbreak of COVID-19. There is an ardent need for the collective efforts of the international community jointly to call for the accountability of Myanmar against the atrocities committed by Myanmar. This ICJ case was just a step closer towards obtaining justice but as illustrated by the analysis of the history of Myanmar and the Gambia, prompt accountability is crucial to address the genocide being committed by Myanmar. The case requires a great amount of global attention and action in order to set the precedents by the international legal organizations.

CONCLUSION-

In general parlance, international law is attributed as a weak law, with certain authoritative legislative and executive powers. The international community therefore requitres a sincere commitment to justice. Humans are indeed prone to flaws and pain is in human nature but the torture does not need to be one. After tracing the evolution of the genocide cases from the period of the World War- II, we have implored several limitations in the genocide convention that has in a way aided the state actors in escaping their liability and commitment towards the convention. The convention has been scrutinized for decades now and as it requitres a reformative effort in order to offer justice to the victims which it intended to provide protection. It is essential that the convention should be elevated to the status of an authority that will be inclusive of the right of modifying its own definitions of crime, ensure awareness about genocide, and most importantly, prosecute crimes while the crimes are being committed. In order to ensure justice and democracy, collective efforts of the international machinery is required and indeed it will require effort, hard work and constant dedication towards punishing the actors behind such a gruesome crime and the global community owes it to the lives which have been lost to remorseful hatred.