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BOOK REVIEW

Reducing Genocide to Law Definition, Meaning, and the Ultimate Crime

By Payam Alhavan

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Who will say that 'genocide is not an ultimate crime'? Here is an author who thinks reasonably different and challenges the authority of such labelling in the international criminal law. He argues that as per taxonomy of crime genocide[1], as it sounds to be barbarous, monstrous, and as a crime of crimes, can be placed on equal footing with war crimes and crimes against humanity. He questions the jurisprudential veracity and power of the word genocide and argues that its genesis is beyond criminal jurisprudence. He probes with scholarly insight into the deepest and sensitive dark areas, where not many dares to look. It can be rightly observed that an important goal of international society is maintenance of order and justice. In justice is not just a consequence of conflict, but is also a symptom and cause of conflict (Mani 2002). The root cause of any conflict is the prevalence of injustice in the society, it is when rule of law turns into law of jungle and evil rise to its extreme. Restoring justice after conflict is as much a political imperative as a social necessity. It is considered to be as important as maintenance of order in

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1. Article II (Convention on the Prevention and Punishment of the Crime of Genocide)In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

global politics. Justice is delivered in many forms from retributive to restorative and it is not only the task of international criminal courts or Ad-hoc tribunals but the obligation is shared by alternative mechanisms. The creation of an international criminal tribunals in troubled and conflicted regions is considered as an important step towards promoting global justice and the protecting of humans against any sort of humanitarian violation i.e. genocide, war crimes, crimes against humanity.

This daring book, written by Payam Akhavana practitioner and scholar, critically examines the crime of genocide and the jurisprudence that revolves around it. He questions whether the prevailing view that genocide as the ultimate crime can be wrong. He attempts to verify whether it is possible that it is actually on an equal footing with war crimes and crimes against humanity. He attempts to look beyond the power of the word genocide to probe into the source where it is derived from; something other than jurisprudence. He furthermore, dares to question as to why a hierarchical abstraction assumes such an importance in conferring meaning on the sufferings and injustices. He reflects on the vital issues that deals with practices and interpretations of international crimes and probes whether reducing a reality that is beyond reason and words that are put into fixed category undermine the very progress of justice that such labelling purports to achieve. It is well said that "*for some these questions may border on the international law equivalent of blasphemy*".[2] But it is pertinent to mention here that the author raises such deep and sensitive questions with an aim to fountain the spirit of global justice. And as said, it is a probing reflection on empathy and our faith in global Justice.

In the opening chapter 'power of a word' the author raises inquiry into reducing genocide to law and demands for its ordering, so that the crime is examined, measured, analyzed, and evaluated as ultimate crime. It is well settled that crimes such as genocide, war crimes, and crimes against humanity, rape and murder do not have a strait jacket formula for categorisation but in his book the author successfully demonstrates the exclusiveness of the categories of such crimes through case laws. The author observes that in many instance, the conduct of accused in question, qualifies for two and more international crimes. He refers the landmark cases of *Akayesu* and *Kambanda*.

2. See Editors comment (cover page)

international crimes. He refers the landmark cases of *Akayesu*[3] and *Kambanda*.[4] It is pointed through the line of reasoning in the *Akayesu* case that the trial chamber explained these multiple convictions without reference to the comparative gravity of the crimes.[5] Thus, the author creates insatiable curiosity in the opening chapter by questioning, with his deep insight, as to "*what is so ultimate about being an ultimate crime"? (p.11)*

The second chapter 'Taxonomy Of Crime' reflects into the question of being ultimate crime through various aspects of proportionality and the purposes of punishment. Here the author uses the reference of a landmark case of Coker vs. Georgia,[6] which not only provides a remarkable illustration in constructing a hierarchy of crimes but also provides point of contrast to the debate of gravity of crime, here, the author attempts to illustrate the gravity of genocide to other international crimes. In this case, the accused was convicted and sentenced to death for crime of rape and murder. While deciding, the appeal, reference of the eighth amendment of the US constitution,[7] was made. Now two issues were at stake firstly, Coker's execution as a mean to promote the goal of deterrence or retribution or both and secondly, to assess the proportionality to the particular crime that he had committed i.e. to consider the comparability of gravity of rape that with murder to justify death sentence. Akhavan observes that if the simple comparison of gravity between the Rape and Murder can bring such controversy and uncertainty in deliberations, "*how does it compare on the more complex designation of genocide as the ultimate crime"?(p.26)*

3. See Akayesu, trial Judgment (ICTR,2 September 1998), Paras. 157ff (as cited in the book)
4. See Kambanda, Trial Judgement (ICTR, 4 September 1998), see 83-84. (as cited in the book)
5. Having regards to its statute, the chambers believe that the offences under the statute have different elements and, moreover, are intended to protect different interest. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Convention and of additional protocol II is to protect non-combatants from war crimes in civil war. These crimes have different purposes and are, therefore, never co-extensive. Thus, it is legitimate to charge these crimes in relation to the same set of facts. See Akayesu, trial Judgment para. 469
6. Coker v. Georgia, 433 U.S. 548 (1987)
7. [A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion of the severity of the crime. A punishment might fail the test on either ground.

Akhavan asserts that "genocide is the ultimate crime only in limited and qualified sense" in comparison with war crimes and crime against humanity. He observes that genocide is not categorized, in a strict sense, in legal jurisprudence but brings greater stigma and higher sentence to the accused. Though, the same conduct under war crimes and crimes against humanity is charged with variation. His views reflection the paradoxes of international criminal law and its limited and qualified hierarchical distinction. The author brings out the historical legacy behind the evolution of crimes against humanity from particularity of Jewish point of view to universality of humanity. He asserts that "invoking this symbolic argumentation, the particularity of crimes against Jewish people' was reconciled with international law, bringing the legislation under which Eichmann trial was prosecuted within the realm of legitimacy and transcendent relevance reserved for universal norms." (p.119) He successfully brings out the genre of Hannah Arendt's book *Eichmann in Jerusalem* that brought Holocaust back into mainstream consciousness and, from, "particularity to universality of genocide." In the presiding chapter, the author explains the core elements of international crime especially of genocide. Giving due weight to the principle of doluseventualis, dolusgeneralis, and dolusspecialis, the author observes and point finger on both ICTR and ICTY for underscoring the centrality of the degree of intent to this crime. As held in Kambanda judgement "genocide is unique because of its element of 'dolus specialis' (special intent)."[8] And this essential "mensrea" makes genocide unique in the class of international crimes; crime of crimes. It has been vehemently argued by Alex de Waal,[9] that it is the need to move beyond the traditional definition of genocide which takes the holocaust as its prototype and engage with genocide in all its forms.

In the chapter "Naming the nameless crime" the author refresh the memories of the scholarly article written by Mamdani,[10] in which he

8. Kambanda, Trial Judgement (ICTR, 4 september 1998), para.16; see also Akayesu, Trial Judgement (ICTR, 2 September 1998), para 498.
9. Alex de Waal, "Reflections on the Difficulties of Defining Darfur's Crisis as a Genocide," *Harvard Human RightsJournal*, Vol. 20, Spring 2007.
10. Mamdani, Mahmood. In his scholarly article "Responsibility to Protect or right to punish?"in the book Humanitarian intervention, 2010: 131.brings his critical reflection on the emerging norm of responsibility to protect.

vehemently criticise the western politics behind the language of genocide and its manipulation by "great powers". It can be observed that the contestation between peace and justice can be problematized by saying that "peace without justice is only a symbolic peace" (Menchu 1996). This further bring out the fundamental question of global justice as to whose justice is to be followed, as when Darfur was going through humanitarian catastrophe, the international community was debating less on the dynamics driving the violence than on how to name it; genocide or not. The legal implication of naming or defining follows how a thing is named, as genocide goes with international responsibility to intervene (Mamdani 2010). It further justifies humanitarian intervention as prescribed by law. The politics of language is often used as a weapon; words are seldom neutral but carry political & ideological baggage. It is pertinent to mention here that if happening in Darfur, Sudan is described as a "genocide", there is a strong moral pressure on the international community to "do something", but what happens if it is described as "tribal warfare", the cataclysm would have continued? Thus, Akhavan assertion that the genesis of genocide is beyond criminal jurisprudence is remarkable.

The author not only reflects analytically on the western political hypocrisy in dealing with crimes such as genocide by saying that "this surreal moral landscape of evasion and indifference masked in the language of concern illustrates just how removed this self-contained universe of powerful was from the reality of the subjects". Though, his endorsement to the ideas of "white men's burden" somewhere eco the tendency of dependence. It reminds one of famous quote by George Orwell" Political language is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind." But the question remains regarding the vital issues of global justice and whether responsibility to protect or right to punish is global norms. Well, the significance of R2P is not that it represents the birth of a new moral consensus, but it reveals the failure of west in generating a new global norm surrounding the idea of humanitarian intervention by the West (McCormack 2011). As earlier observed the important goal of international society is maintenance of order and justice and restoring justice after conflict is as much a political imperative as a social necessity; a shared responsibility. Furthermore, it can be observed that a constructive approach needs to be developed as the world is witnessing constant shift from uni-polarity to multi-polarity; giving more way to multi lateralism.

The author brings out the sharp contrast between legal reasoning and its rationalism and boundaries with that of the subjectivity of human emotions in the chapter "Contesting genocide in jurisprudence". He gives reference of a landmark judgement of Chester v. Waverley Council,[11] wherein the suit for damages for negligence was dismissed by trail court and the high courts as well, but interestingly the majority view based on legal rationalism, regarding the consideration of the issue whether such damages (that is nervous shock) was "within the reasonable anticipation of the defendant", was in negative.[12] The dissenting views expressed by Justice Herbert Evatt expressed empathy and sensitivity of human emotions which developed as a judicial trend later. This may sound confusing to many, at least to me as I remember Aristotle said that the "Law is reason, free from passion". But it is understandable that the author raise same perennial question about the emotion of a judge presiding over a genocide trial. He asserts that the gravity of genocide can easily overwhelm our capacity for dispassionate legal reasoning and hence reducing genocide to law calls for ordering and analysis. He highlights some of the important aspect the ICTY and ICTR jurisprudence demonstrated in the case laws. He does not hesitate to exposes the anxiety of the ad-hoc tribunals in concluding in affirmative, whether the facts of some cases of crimes in Bosnia-Herzegovina and Rwanda were genocide or not.

It has been vehemently argued by the author that the legal analysis raise doubts on juridical categorization of the events in Rwanda and he questions whether this categorisation can be named as genocide or not. The main issue raised in this context is whether the Tutsi can be considered an ethnic group protected by genocide convention. He asserts that it is natural to take teleological approach in which certain legal interpretations are deliberately ignored to boost the effort to label genocide. Though, he acknowledge that fact of normative gap in the definition of genocide, and argues that the concept of genocide should protect any group slated for destruction based

11. Chester v. Waverly Municipal Council, [1939] HCA 25, 1939) 62 CLR 1 6 (June 1939) (sited in the book)

12. Ibid "A reasonable person would not foresee" that the negligence of the defendant towards the child would " so affect" a mother …death is not an infrequent event, and even violent and distressing deaths are not un common. It is, however, not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child.

on an integral element of human identity[13] as reflected in the definition of the statute. crime against humanity of persecution under article 7(1)(h)[14] of the Rome. The author clarify and points out that there is no urgency to amend the definition of genocide to include more groups but what is significant to the author is, "the terminological query concerning its potential impact on those who seek to achieve meta- legal closure through appropriations of genocide, and, to assess how far the law can be stretched to accommodate such demands without complete departure from the strictures of legal interpretation and reasoning."(Akhavan 2012, 147). He observes that the law's exclusion of certain groups raises the question of moral and descriptive consistency.

The author discusses the celebrated case of Akayesu[15] that springs the questionable methodology adopted by ICTR in defining the status of Tutsi as a protected group. Akhavan is not concerned with the issue whether classifying the Tutsis as an ethnic or protected group under genocide convention was as per legal strictures. He is concerned with the relevant jurisprudence that reveals a determination to label the killing in Rwanda as genocide. He is interested in the issue of gravity of the Rwanda cataclysm. He peeps into the historical background and give reference of Gerard Prunier[16] authentic findings that the Hutu and Tutsis have often and inappropriately been called the "tribes" of Rwanda. According to the learned view it was because of whims and fancy of European colonizers that, the socially heterogeneous but racially mixed and ethnically homogeneous, Rwandans were divided. Even the trial chamber in the Akayesu case recognise such a grotesque construction of the Tutsi "*ethnic*" identity and surprises how the social rather than ethnic consideration were given due weight.

The author exposes that, the way, the trial chambers explained how the privileged social status of the Tutsi nobility becomes transformed to an "*ethnic*" identity. It shows the compromise of *dolusspecialis rule,* that despite knowing that Tutsis do not properly fall within the scope of the groups expressly enumerated in the definition of genocide, the Trial chambers concluded in affirmative. It is

13. See, e.g., Steven R. Ratner and Jason S. Abrams, *Accountability for Human rights Atrocities in international law: beyond the Nuremberg Legacy* (New York: Oxford University Press, 1997), 43. (as cited in the book)

14. Which applies to attack against 'any identifiable group or collectivity' on any ground that is 'universally recognized as impermissible under international law.'

15. Akayesu, trial Judgment (ICTR,2 September 1998), Paras.80,510 (as sited in the book).

16. Gerard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University press,1995),5.

interesting to discover, how the word "ethnic group" was stretched in the judgements of Akayesu and Kayishema,[17] how the principle of *ejusdem generis* (same kind) is applied to justify its "reasoned judgement" the unsupported reference to the assumed intention of the drafter of genocide convention explain the conclusion that the Tutsi constitute stable and permanent group. Thus, the reader can draw inferences that it's the jurist's interpretational chutzpah to accommodate in the burgeoning phase of western global justice.

Interestingly, the author observes that the juristic deliberations in the ad-hoc tribunals reduced genocide to the cage of legal terminology, allowing it to escape its taxonomy. In author's opinion the power of the word genocide overwhelms legal reasoning. He raises substantial question of how does either conferring (as in Akayesu) or withholding (as in Jelisic[18] the potent symbolism of genocide make a difference in confronting this evil? Thus, Akhavan doubts the juristic intentions in judgement deliberations by remaining silent over the vital issues of legal reasoning, he express his concern by questioning whether silence is "*courage and heroism or the cover of cowardice and self-interest."*[19] The author questions whether the disregard of "*positive"* law is a cause for celebration or a corruption of jurisprudence for purpose that should remain extraneous to the law. The author brings out his frustration and questions the issue of hierarchical abstraction of categorising crime that assume more importance than injustice and sufferings of the victim. Thus, reflects his impatient feelings for injustice and sufferings that exist in the name of global justice.

The scholarly contribution, of Akhavan's reducing genocide to law, in the realm of genocide studies has not only brought out an insightful and progressive approach towards jurisprudential and rules of interpretational development of the crime of genocide but it may be helpful in transforming the sentencing practices and the future of international criminal law in preventing and also addressing the crime of genocide. Not only a deviation from the traditional approach but a critical reflection with the review of

17. Kayishema, Trial Judgement (ICTR, 21 May 1999), para 98
18. Jelisic Trial Judgement (ICTY)
19. Haidu, "The dialectics of unspeakability," 278, (as quoted in the book page 181).

literature associated with the field of genocide studies, it guides us to address the complex judicial jurisprudence and answers to modern moral issues and causes of international crime. It is a well-researched work with crucial researched questions substantiated by balanced interpretations and relevant theoretical evidence and a comparative analysis between different illustrative case laws. It suggests new outlook and strategies to deal with heinous crime with an object to improve policy and practices of international criminal justice. The ideas generated in this book are helpful in easing out tense environment in today's world order. It can be assumed that the world is not only debating about causes of direct and indirect wars, conflicts and its resolution but also with sleeping sentiments for philosophical aspect of humanity. The author stressed that with constructive political will, we can implement practical solutions to prevent genocide and brings a new approach to international criminal law. The problem addressed within the book is worthy of investigation, is of interest to the students of International relations and law, and is relevant in the professional context. The legal compromis of international crimes especially genocide are addressed through a number of clearly articulated research questions.The book is a must-read for students, teachers, lawyers, judges and policy decision makers.

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