SUMMARY

GENOCIDE AND HUMANITARIAN LAW: AN ANALYTICAL STUDY IN INTERNATIONAL LAW

The fact genocide is as old as humanity’, wrote Jean Paul Sartre. The law is, however, considerably younger. This dialect of the ancient fact yet the modern law of genocide follow from the observation that, historically, genocide has gone unpunished. Hitler’s famous comment ‘who remember Armenians?’’ is often cited this regard. Genocide has existed in all periods of human history, but prior to the contemporary period it was rare as an aspect of war, or, in the sixteenth century and nineteenth century as an aspect of development. To a large extent, genocide also appeared in a form of specific to given period –conquest, religious persecution, and colonial domination. In the last century, genocide has been a common occurrence; moreover, the forms it has taken are diverse and spring from different motives; there has been a convergence of destructive forces of our period. During the Second World War there was rule of violence, brutality and terrorism by German government in the territories occupied by its forces. Millions of people were destroyed in concentration camps; many of them were equipped with the gas chambers for the extermination of Jews and Roma (Gypsies) and members of other ethnic or religious groups. This deliberate and systematic destruction of Jews and Roma (Gypsies) by German authorities during the Second World War was responsible for the birth of new term called Genocide. Raphael Lemkin, a Polish legal scholar coined the term in 1944 to describe the Nazi Germany’s annihilation of groups by direct murder and by indirect means during the Second World War. The Nazis specific attempt to completely destroy the Jews and the Roma (Gypsies) became known as the Holocaust. Which is the worse form of genocide? Genocide has been a crime under international law since 1951. Earlier used words of genocide were “Barbarity” and “Vandalism”. The past century has suffered a lot in terms loss and exodus of people taking refuge in different nations, imperialistic amplitudes of western powers, failure of democracies, emerging theocratic states further decrease the human record to new low.

The Second World War proved how wrong such a strategy was; demonstrating just how much the use of armed force by a nation could impact on civilians, including its own civilians. Several million deaths later, the nations tried to make amends for this slip in political appreciation by setting up the International Military Tribunal at Nuremberg and
by ratifying new international agreements. In 1948 states adopted the Convention on the Prevention and Punishment of the Crime of Genocide and in 1949 they signed at Geneva four conventions of which one, the fourth, is entirely devoted to the protection of civilians in armed conflict. With the greatest respect to our contemporaries, the law of war is not the product of a humanist conscience that has arisen in the twentieth century. That particular century has rather distinguished itself for crimes against humanity than for humanism. There have always been people interested in the law of war. Neither pacifist nor particularly holy, the law of war is the product of centuries of thought on all continents and by all cultures on the way war is waged. Think only of the codes of medieval knights-errant or Japanese Samurai. No doubt such codes had their limits; still it is important to note that every war has given rise to new attempts to codify a humanitarian law. In every period it stems from the society in question seeking to limit its own ability to create havoc.

The two Additional Protocols to the Geneva Conventions adopted in 1977 to equalize and improve the protection granted to victims of war. The first Protocol reinforces and completes the protection afforded by the fourth Geneva Convention to victims of international armed conflict. The second 1977 Protocol takes account of anti-colonial wars and the civil wars which succeeded them. It is an addition to the protection afforded by Common Article 3 of the four Geneva Conventions for the benefit of victims of wars which are not international. In order to achieve its ends, the law relies on a dynamic of deterring of war crimes through making individuals criminally responsible, and on a dynamic of preventing war crimes through the codification of a right to aid, entrusted to humanitarian organizations. Such an arrangement makes it imperative that humanitarian organizations should not allow the rationale of aid at any price to outweigh the rationale of identifying mass crimes. If international law has to deal with war crimes, massive violence, genocide and even rape cases etc. Then what is the role and place of international humanitarian law vis-a-vis genocide and similar crimes against humanity? International law and ICJ cannot fully deal with genocides etc. Because these do not fall in line with usual war crimes or other related crimes on international political framework. Genocide is a crime of crimes and it is one of the worst instances of crime against all humanity. That is why there is need for special international humanitarian law to look into the matter.

The Genocide is most heinous crime against humanity during armed or non–armed conflict. The individual was not a part of International law or Law of nations, there was
no legal protection for offences against humanity, but after individual became a part of International Law, there was perceptible change in the outlook of international community in fighting crimes against humanity. The term “genocide” is not used in the Geneva Conventions or in their Additional Protocols, but the acts that constitute genocide also fall under the category of grave breaches of the Geneva Conventions and would be war crimes if committed in the course of an international armed conflict. Additionally, any act that constitutes genocide and is committed in the course of a non-international armed conflict is a violation of Common Article 3 and of protocol I of Geneva Conventions. These grave breaches, or war crimes, are those violations of international humanitarian law (IHL) that incur individual criminal responsibility, including but not limited to murder, the ill-treatment of civilian populations or prisoners of war, the plunder of public or private property and devastation that is not justified by military necessity. The origins of criminal prosecution of genocide begin with recognition that persecution of national, ethnic and religious minority was not only morally outrageous; it might also incur legal liability. As a general rule, genocide involves violent crimes against the person, including murder. The Charter of the United Nations (1945) stipulates that the threat or use of force against other states is unlawful, except in the case of self-defence.

International criminal law is undergoing a rapid transformation. One of the most important events in this evolution was the coming into force of the Rome Statute of the International Criminal Court (the “ICC”) on July 1, 2002. There is no doubt that the international community is entering a new era in which perpetrators of international crimes will no longer enjoy impunity. The creation of the new international Criminal Court will prove a catalyst for states to take the national enforcement of international human rights law much more seriously than has hitherto been the case. Many states, recognizing the potential scope of the International Criminal Court’s jurisdiction— particularly in relation to the so-called “principle of complementarily”—have already enacted broad-ranging criminal legislation to ensure that all the crimes within the Rome Statute are covered by domestic penal law. The overwhelming motivation for this unprecedented criminal law reform is to maximize the potential benefits of the principle of complementarily in the event of allegations against a State’s own nationals. The Rome Statute is one of the sources of international criminal law. The pre-existing sources on which the Statute was built not only include rules of international humanitarian law, and in particular those contained in the Geneva Conventions and their additional protocols, but also the rules and categories established under the
Nuremberg and Tokyo War Tribunals—war crimes,” “Crimes against Humanity,” and the crime of “aggression.” Another important source includes the experience gained from the ad hoc tribunals created by the UN Security Council—the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

The special war tribunals were set up for prosecuting war criminals after second world war, the major development of International Humanitarian Law occurred with adoption of four Geneva conventions of 1949, which came into effect on 1950 and two additional protocols of 1977, The International Humanitarian law is regarded as an integral part of Human Rights law. The International Humanitarian law includes two components one is law of warfare and another is human rights law. Another major development in International law is state terrorism and state torture, now it is regarded as international crime under International Law, the U.N declarations on Torture in 1975 condemned the state torture, it violates Article 7 of International Covenant on civil and political rights, 1966., which came into effect in the year 1976, which clearly prohibit torture as instrument of oppression by the state. The International criminal court was formed after Rome statute enacted, the ‘genocide’ is recognized as war crime and perpetuators are liable to be prosecuted under ICC charter.

There is a need to create a world-wide movement to end genocide, like the movement to abolish slavery in the nineteenth century. The International Campaign to End Genocide, organized at the Hague Appeal for Peace in May 1999 intends to mobilize the international political will to end genocide., genocide Just as the nineteenth century was the century of the movement to abolish slavery, let us make the twenty-first the century when we abolish genocide. Genocide, like slavery, is caused by human will. Human will – including our will. Prosecution of persons who have committed grave breaches of international humanitarian law, such persons must be prosecuted by any State party under whose authority they find themselves. That State may, however, extradite the suspect to another State Party which is willing to prosecute him. Individuals accused of violating humanitarian law may also be tried by an international criminal court. The United Nations Security Council has established two such courts: the Tribunals for the former Yugoslavia and for Rwanda. On 17 July 1998, a Diplomatic Conference convened by the United Nations in Rome adopted the Statute of the International Criminal Court Domestic legislation on implementation: Many provisions of the Geneva Conventions and of their Additional Protocols imperatively require each State Party to enact laws and issue other regulations to guarantee full implementation of its international obligations. This holds particularly true for
the obligation to make grave breaches of international humanitarian law (commonly called "war crimes" like genocide). Further, it is to be submitted that apart from United Nations, some monitoring agencies should be constituted to keep a watch so that acts of genocide can be reported and action can be taken as soon as possible. By this way number of would be victims can be protected. It is further suggested that some reparation is to be given to the victims, so that they can start living a life again. Again, it is further suggested that some kind of initiatives is to be taken, by the international community for the rehabilitation of the victims who survive the crudest crime against humanity. There is not only a legal but also a moral obligation on the part of the international community to take appropriate action in order to ensure that a measure of justice be done in respect of the victims of the genocide. The past sixty years have not been kind to the promise of the Genocide Convention. As evidenced by the campaigns of slaughter in Cambodia, the former Yugoslavia, Rwanda, and now Darfur, genocide, rather than being relegated to the history books, has become only more common in the years since the ratification of the Genocide Convention.

The slogan “Never Again” seems quaint and idealistic; indeed, “Again and Again” might more accurately characterize the years that have passed since the Genocide Convention was adopted. The reasons for this failure are many, including naked political calculations, imperfect knowledge, and deference to sovereignty, and isolationism. However, political explanations do, not tell the entire story. It is true that ex-ante considerations have often left nations reluctant to intervene in order to prevent genocide from occurring. However, the ex-post judicial responses once genocide has occurred have been perhaps equally fatal to the promise of the Genocide Convention. The Genocide Convention and the international criminal tribunals enacted to give force to its provisions, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), have twin purposes: To prevent genocide and failing that, to punish genocide. Because the international community has largely been unable to prevent genocide through ex ante measures, prevention may ultimately only be achieved through the deterrent force of punishment. During the past so many years, the ICTY and ICTR have carried out the first significant post-Genocide Convention attempts to punish the perpetrators of genocide. These ad hoc Tribunals have played a critical role in responding to the crime of genocide. For the first time since Nuremberg, perpetrators of genocide have been brought before the international community and held accountable for their crimes. Moreover, the ad
hoc Tribunals have developed a significant body of legal precedent with respect to the crime of genocide that is now available to future tribunals should the need arise.

Unfortunately, the Tribunals have made a critical jurisprudential error that has deprived the Genocide Convention, and the Tribunals enacted to enforce it, of an extremely significant deterrent effect. Under the Genocide Convention and the Statutes of the ICTR and ICTY, complicity in genocide is a stand-alone crime, ripe for prosecution. However, recent decisions of the Tribunals have understandably, but erroneously, determined that complicity in genocide is merely a form of liability for the crime of genocide, and not a crime itself.

The ad hoc Tribunals appear to have arrived at this decision through the mistaken conflation of two separate crimes. The first is the crime of complicity in genocide, as nominated for punishment in Article 2.3(e) of the ICTR Statute, a substantive crime provision. The second is the crime of aiding and abetting genocide, as created by the interplay of Article 2.3(a), also a substantive crime provision, and Article 6.1, the liability provision. To arrive at this errant conclusion, the Tribunals appear to have inferred that complicity in genocide is a redundant fact born of the verbatim inclusion of portions of the text of the Genocide Convention within the ICTY and ICTR Statutes. This error is understandable, but critical. The crime of complicity in genocide captures a class of perpetrators broader than those implicated by aiding and abetting the crime of genocide. This is a distinction seemingly recognized by the drafters of the Genocide Convention and of the ICTY and ICTR Statutes. One found guilty of aiding and abetting the crime of genocide must have the heightened measure of the genocidaire—what it is submitted as term “specific intent specific motive nexus;” by comparison, one who commits the crime of complicity in genocide need not have this heightened measure. Instead, a lesser measure, such as malice evidenced by reckless disregard, or “specific intent without specific motive,” should suffice to attach guilt. Thus, the two provisions are designed to capture very different perpetrators. One guilty of aiding and abetting the crime of genocide had as his very purpose the facilitation of the commission of genocide. The perpetrator of the crime of complicity in genocide, in contrast, may not have had genocide as his purpose. Instead, genocide may merely have been the foreseeable result of his actions.

By incorporating Article 4.3 in the Statute [of the ICTY], the drafters of the Statute ensured that the Tribunal has jurisdiction over all forms of participation in genocide prohibited under customary international law. The consequence of this approach, however,
is that certain heads of individual criminal responsibility in Article 4.3 overlap with those in Article 7.1 of the Statue of international criminal tribunal for Former Yugoslavia. The failure by jurists to appreciate that complicity in genocide is a stand-alone crime whereas aiding and abetting is merely a form of liability for the crime of genocide creates a gaping loophole, providing unwarranted sanctuary to those who commit the crime of complicity in genocide. Moreover, it signals to would-be facilitators of genocide, whether military commanders, elected officials, arms dealers, or nations themselves, that genocidal conduct more often than not goes unpunished. The failure to hold these players accountable threatens to significantly weaken the Genocide Convention and the criminal tribunals enacted in its wake. Only by correcting this jurisprudential error can the “Never Again” ethos of the Genocide Convention be fully realized. Moreover this “never again” perspective has to function within the inherent limitations of the international law. A state’s compliance decision is made based on an assessment of its self-interest. That self-interest can be affected by international law in two ways. First, it can lead to the imposition of direct sanctions – such as trade, military, or diplomatic sanctions. Second, it can lead to a loss of reputational capital in the international arena, if the direct and reputational costs of violating international law are outweighed by the benefits thereof, a state will violate that law.

International law is in a state of influx as it always is, what is most important thing is noticeable is a potential shift in its paradigm. Positive law, having dominated the international legal system for most of Westphalian era, is under mounting threat from a natural law revival. There is a casual connection between the emergences of international human rights law since 1945 and this potential shift. As with many casual connections, however, it is not always easy to determine which of the two sides of the equation is most responsible for the change.

In the face of civilian populations increasingly becoming victims during armed conflict or peace time, the need for the international community to continue search for solutions to eradicate violations of international law is necessary. New development such as responsibility to protect, which provide clarity and extra focus upon the existing obligations of states to ensure the protection of the population, are necessary, such developments need to re-enforce existing legal framework, such as international humanitarian law, and international law.