

## Abstract

The long silence held by most of the international public and supranational entities on the plight for justice to those who lost their lives in the 1971 genocide was unexpectedly in stark contrast to uproar following the aftermath of the Bangladeshi authorities' announcement of the re-establishment of criminal court procedures against genocide perpetrators.

Heads of foreign states, the press, diplomacies and even associations that purportedly defend human rights have reacted negatively to the resumption of the Bangladeshi criminal court procedures. Discrediting the role of certain judges as well as claims of partisan bias, formal insufficiencies with procedures and press campaigns shows the observer that the entire portfolio of arguments and manoeuvres is being used to torpedo the trials.

These arguments on the international scene initiated widespread violence in Bangladesh that brought instability and resulted in the plundering of minority communities and demands of radical changes to the secular constitution of the country.

What is the role of memory in justice? How should we evaluate proportionality? How can we find a balance between moral absolutism and relativism? Should we consider victims from South Asia less important than those of other regions? Should we consider religious fanaticism more acceptable than extreme nationalism, racism or any other misanthropic ideology?

## 1. On time

The Portuguese Parliament is currently debating a law proposal which would essentially make the Portuguese State accountable for atrocities committed during the expulsion of Jews – the first wave of extradition dates back to 1497 – by giving Portuguese nationality to those who are able to provide credible evidence that their ancestors were subject to forced displacement.

The genocide of Jews in Portugal is one of the worst crimes ever committed against humanity by Portuguese authorities on Portuguese soil, and was accompanied by a general set of rules and practices geared to a religious fanatic ideology.

And so should we consider the Portuguese Parliament's act irrelevant or outdated? Should we consider five hundred years a too long time? It certainly is an extremely long time to contemplate what the knowledge of Portuguese history combined with basic principles of civilisation should have imposed long ago; it certainly is an act that, however late, however unable to undo the vast pain and sorrow caused, the vast majority of the Portuguese public and most parties of the political spectrum consider a necessary step towards reconciliation.

Apart from the small fringe of Nazi sympathisers gathered in the non-parliamentary "Frente Nacional", no one contested this act in Portugal.

The Portuguese history of intolerance and religious fanaticism is unfortunately able to fill several chapters and books and it will take a long time to seek forgiveness and redemption from the oppressed and persecuted. Victims did not only include Jews, but also other confessions, even within the Christian faith, and in particular those Catholics whose views were considered impure or heretic.

Only by the end of the eighteen century did Portugal authorise the legal burial of non-Catholics (they were buried illegally or dumped somewhere) in a special cemetery, surrounded by high walls and cypress, so the good catholic would not be shocked by such a view. A cemetery that is actually in the vicinity of the place where I was born, and is still known as the British cemetery, as most of the non-Catholic cemeteries established in Portugal were British, now includes the graves of other confessions-Catholics included- as well. The cemetery has evolved from an exclusive arena to an inclusive place where the members of different confessions can mourn their loved ones side by side.

It is highly unlikely that a significant number of the descendants of these victims, which were exposed to these horrendous acts, will ever decide to demand the Portuguese nationality, but I do think that this act has a fundamental symbolic importance.

## 2. The genocide recognition process

The modern history of the concept of Genocide starts in the thirties of last century and was inspired by the Simele massacre of August 1933, the massacre of the Christian population of the Nineveh plains which were

accused

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Paulo Casaca

of secessionism from the new Iraqi state. It was however first applied, in retrospect to the Armenian genocide.

The Simele massacre (in Assyrian, Premta d-Simele) was the first of many massacres committed by the Iraqi authorities during the systematic targeting of Assyrian Christians of Northern Iraq in August of 1933.

The most striking feature of this massacre was the fact that it directly motivated Rafal Lemkin in his lecture to the Legal Council of the League of Nations conference on International Law in Madrid titled "The Crime of barbarity as a crime against international law".

This lecture is widely recognised as the precursor of the concept of Genocide, which was to become the central piece of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

The Simele massacre targeted an Assyrian population that was trying to regain Iraqi soil from Syria – where it was not welcome – and that, in most cases, escaped from Iranian and Turkish territory at the end of the First World War and resettled in the newly created country of Iraq.

The genocide of Christian Armenian, Assyrian-Chaldean and Greek populations at the end of the first World War and immediately afterwards, would actually become the first well-known "modern" genocide in the history of mankind and is directly connected with the 1933 genocide committed in Iraq against Assyrians (theme of a famous book by Lieutenant Colonel R. S. Stafford, the British Administrative Inspector for the Province, "The tragedy of Assyrians").

Lemkin himself, from the position of Public Prosecutor for the district court of Warsaw that allowed him to launch the basis of the international attack on genocide, had to escape from the Holocaust as a Polish Jew, managing to escape to the US and to restart his work.

Lemkin redefined "Barbarity" into "Genocide" in the course of the holocaust. While a precise definition varies among genocide scholars, a legal definition is found in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG). Article 2 of this convention defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group's conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group."

Legislation from political bodies – regardless of their level and responsibilities – always reflects a political equilibrium, and this is also the case with Genocide, both in 1948 and 1971, when most of the West turned a blind eye on the biggest genocide that took place after the second world war, or indeed in our day, thanks to the overwhelming direct and indirect political and financial clout of Bangladeshi genocide perpetrators that are now on trial.

This state of affairs leads to different reactions from which we think two are the most important.

The first is to consider the original political compromise to be unacceptable and insubstantial. The Genocide Convention should in this view not be considered the sole auth

ority on the crime of genocide, but one of them. The prohibition of genocide should rather be seen as a paradigmatic jus cogens norm, a customary and peremptory norm of international law from which no derogation is permitted. The jus cogens prohibition of genocide, as expressed in a variety of sources, is therefore broader than the Convention's prohibition.

The attempt of the framers of the Genocide Convention to limit the prohibition of genocide by deliberately excluding political groups from Article II is therefore seen without legal force to the extent that it is inconsistent with the jus cogens prohibition of genocide. Therefore, when faced with mass killings evidencing the intent to eradicate political groups in whole or in part, domestic and international adjudicatory bodies should apply the jus cogens prohibition of genocide and invoke the Genocide Convention vis-à-vis signatories only insofar as it provides practical procedures for enforcement and ratification.

This approach leaves the door open to questioning the whole written text as, one way or the other, it reflects political compromises and not only humanitarian concerns.

The second response to this situation is to consider "political genocide" as something different from genocide that should encompass a separate treatment, and therefore should be viewed as a crime of "politicicide". Some authors prefer "genocidal politicicide" to distinguish it from other uses of the word "politicicide".

This second approach raises two questions: (1) if a politicicide is different from genocide, in which legal framework should it be considered? (2) Eventually all forms of politicicide have a certain link with other forms of genocide, doesn't this approach open the door to progressively making "diluting" the concept of genocide itself?

The issue might be better understood under an historical perspective, and indeed, the case of the Nineveh plains Christian persecution exemplifies how we cannot separate political indicators from other criteria regarding Genocide.

Some Middle East Christians, similarly to other minorities as the Jews, tried to negotiate with the Allied Forces, with the British in this case, their protection and survival through the creation of states that would succeed the end of the Caliphate. In this respect, the main difference between Israel and Nineveh was the resisting capacity of the Jewish minority that prevented the same sort of massacre that made the Christian communities nearly disappear from the whole region (Turkey, North-western Iran, North-eastern Syria and the broader Nineveh).

Although the political movement for an independent Nineveh based Christian state or at least autonomous region still exists, it became a territorially nearly impossible, as Christians were concentrated in small pockets in wide areas dominated by non-Christian areas.

Other Middle East Christians thought that the best chances of survival were to bet on the separation of "Arab nationalism" and Islam, espousing therefore Arab nationalism in the hope of escaping persecution. This was, for instance, the strategy behind the creation of the Baath Party created by a Christian in 1947.

The strategy broadly meant that Christians could only rely on political protection as long as they emphasised their Arab patriotism and shun from worshipping their single

cultural, linguistic and religious roots.

This strategy, ultimately, did not work as it made the Christians fair game for the Islamists that took over Iraq from 2003 onwards on the grounds that Christians were Baathist accomplices. A similar fate is now under way in Syria as well, as the Islamists are increasingly gaining the upper hand in the Arab Spring movement of the country.

The consideration of politicicide as something different from genocide also leads to the Genocide denial promoters to emphasise the political aspect of a Genocide so as to argue it should not be eligible for consideration as a Genocide, but just as a politicicide, or even as just a political struggle.

Another important issue regarding the Genocide recognition process is somehow implied by the use by Lemkin of "Barbarism" before the Holocaust and "Genocide" after it, that is, up to what point can we consider genocide to have been a modern feature of humanity?

The masterpiece on Genocide, "Genocide: Its Political Use in the Twentieth Century; 1915 800.000 Armenians; 1939-1945 6 million Jews; 1971: 3 million Bangladeshis and 1972-1975 100.000 Hutus" famously stated "the word is new, the crime ancient" emphasising the implicit distinction within the transformation of the early Barbarity concept into the concept of modern Genocide.

Essentially he tells us that whereas "the essential structural base for genocide is the pluralistic society based on persistent and pervasive cleavages between its segments" and this is nothing new, "technological developments have made massacres more feasible".

The Bangladesh genocide is quite well-known; the figures related to it were considerably consensual up to recent times; it is well-established and until recently no one was seriously contesting its validity. The opposition to its qualification as a "genocide" used to come from well-determined quarters, Pakistan – and its main political supporters, the US and China. However, the genocide denial has been becoming considerably more "en vogue" and widespread lately.

## 3. Bangladesh genocide denial in present times

The criminal persecution of the perpetrators of the Bangladesh Genocide was interrupted shortly after it began and was resumed only recently in 2010 – initiating a vast movement of denial.

The new Court, although international, was set up by domestic law and was based on the 1973 Court proceedings. It only considered the domestic side of the Genocide, that is, it excluded Pakistani nationals from its evaluation – whose crimes were supposed to be dealt with by the Pakistani authorities – and focussed exclusively on those of Bangladeshi citizenship.

This did not, however, diminish the Genocide denial pressure, if anything it increased dramatically with strong international pressure being matched by increasingly violent actions from the Genocide perpetrators.

There are three basic genocide denial arguments: (1) the aim of the Court is political, since those who stand accused are members of the political opposition; (2) the number of victims, the motivations for the Genocide, the nature of the conflict, although previously well established and overwhelmingly accepted by the international community are being portrayed as

major sources of controversy; and (3) the number of years passed does not justify the continuation of the procedures.

The second and third lines of reasoning are typical of all genocide revisionist movements, and they do not differ from those we are accustomed to hear on behalf of the Holocaust perpetrators. However, the first argument is different.

The difference in arguments is the result of the difference in situations. In the case of the Holocaust, its perpetrators were denied a return to power, whereas in Bangladesh they did not only return to power but also founded a vast economic, social and financial empire in the country that includes banks, universities, companies and hospitals.

So this argument actually consists in turning the reality upside down: whereas the absence of proper procedures against the Genocide perpetrators is the reason why the Genocide perpetrators now have the leverage of power to escape further persecution, the argument inverts this sequence. As the Genocide perpetrators remain powerful, any measure to investigate their past should be seen as a "political measure against opposition".

By extension, this argument also serves to "politicise" the procedure – a coded form of saying that the original "political" exception of 1948 stands – trying to blur the mainly religious fanatic moulding of the 1971 genocide.

This argument was supported in an overwhelming diplomatic campaign. Other than the direct pressure of states; a brutal publicity campaign was done through opposition friendly media and certain high-level associations.

The press campaign went as far as the use of sophisticated electronic hacking by the "Economist"; a highly influential British weekly whose editorial opinions normally mimic the views of the British Foreign Office views.

The hacking predated the outcry within public opinion regarding the recent major electronic communications hacking by British authorities. With the present revelations one understands how this sort of practice by the British authorities has been widespread.

Although with less aggressive means, many other influential public opinion makers and political leaders engaged directly or indirectly in a war of attrition geared at discouraging or blackening the whole effort for the application of justice in Bangladesh.

"Human Rights Watch" – a private organisation that does not disclose the sources of its funding and does not reveal conflicts of interests of its responsible personnel – is the most clear example of a partisan campaign where an independent human rights checking was expected.

"Equality" and "proportionality" are two of the most basic principles of international customary law, and I believe they should lay at the heart of any appreciation of the way the International Criminal Court was established and acted in Bangladesh.

Many or possibly the vast majority of the criticisms raised on the procedures followed by the Bangladeshi authorities are most likely warranted by themselves, the issue here is to appraise up to what point these criticisms respect these two general principles.

In the first press release publicising recommendations addressed by HRW to the newly elected Bangladeshi authorities in 2009, no direct mention is made to the Court issue but only a small reference of the need of amending legal provisions in the letter to the Bangladeshi authorities.

Shortly afterwards, in the context of a general report titled "Ignoring

Executions and Torture Impunity for Bangladesh's Security Forces" HRW, while rightfully criticising the long-existing culture of impunity on crimes against humanity in the country, introduces a paragraph that in practical terms contradicts the call to end impunity:

"In January 2009, the Bangladesh parliament adopted a resolution requesting the government to take immediate action "to try the war criminals. "In March, Law Minister Shafique Ahmed announced that the trials would be held under the International Crimes (Tribunal) Act, 1973. The Act does not require Bangladesh's regular criminal procedure and evidence laws to be applied. This raises concerns that the trials may not meet international fair trial standards and may be subject to political influence. Death sentences may be handed down."

HRW does not offer any argument which could explain this contradiction, how can it claim to be in favour of ending impunity while at the same time denouncing any measure directed towards ending impunity?

The only reason it gives for raising the issue of "politics" in the procedures is a declaration from the leader of the main opposition party, the BNP as quoted from a newspaper. It is quite extraordinary that HRW accusation of mixing politics with human rights is done on the sole basis of the declaration of a political leader; that is, HRW explicitly mixes human rights and politics and subsequently accuses others of doing so.

HRW made a first exclusive press release on the institution of the Bangladeshi International Criminal Court on the 8th of July 2009 that, while apparently congratulating the country for the act, gives clout to accusations on alleged failures to adapt the law to the evolution of international law. The chosen title to the press release clearly indicated what were HRW concerns and objectives: "Bangladesh: Upgrade War Crimes Law Failure to Meet International Standards Could Undermine Credibility of Trials for 1971 Atrocities".

By this unjustified and unwarranted publicity HRW downgraded the Genocide crime into "1971 Atrocities". The title also shows the other objective of the organisation: to argue with eventual failures of the process to undermine the credibility of the trials.

As it did in its first positioning in May 2009, HRW keeps referring in general terms to incongruence between international and Bangladesh law, but fails to make explicit, for instance, what are the supposed contradictions of the Genocide definition used by Bangladesh and international law.

From there onwards, we can easily follow HRW vast and ever more radical array of public positions and arguments against the international court by reading the extensive propaganda made by the political forces behind those accused in the international Court.

HRW press releases afterwards became ever more frequent and politically biased. Whereas very little is said on the widespread terror actions targeting minorities by the defenders of those convicted for Genocide a set of implausible and unchecked stories is publicised aimed at building an image of an "India/Bangladeshi conspiracy fabricating proofs against good Muslim leaders".

Whoever followed HRW set of press releases in the last few years will find a sectarian and biased account of events with a clear political agenda set on attacking Bangladeshi authorities and whitewash Islamists standing accused of Genocide crimes in the past and present.

That an organisation which was supposed to fight impunity and to act independently on behalf of human rights does exactly the opposite is perhaps the biggest drama of our present times.

Whereas the plight for memory and justice has been always a political battle – and the above mentioned Genocide Convention procedures shows how much a political issue Genocide is – it is also a battle for values.

The Shabagh movement, politically independent and based on the Bangladeshi youth is proof that memory and justice will resist time and will prove to be more powerful than any strategic political manoeuvring or any political development.