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## ENVISIONING ETHNIC CLEANSING AS A SEPARATE HEADING UNDER THE ROME STATUTE

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### ABSTRACT

*This article's primary purpose is to explore the inclusion of the term 'Ethnic Cleansing' which, although has remained in popular usage, holds no legal connotation in the present world. The author believes that ethnic cleansing and genocide need to be differentiated to ensure that proper delivery of justice takes place. With the broad but hard-impacting header of genocide, the International Court of Justice has had to tread lightly and very few judgments have been delivered which hold that genocide **did** happen. These are extremely specific trials, like the **Nuremberg Trials**, wherein the Nazi had left extremely detailed plans<sup>159</sup>. Thus, a separate head of 'Ethnic Cleansing' is necessitated.*



<sup>159</sup> Layla Quran, *What's the difference between genocide and ethnic cleansing?*, PBS NEWSHOUR, (Sept. 8, 2023), <https://www.pbs.org/newshour/world/whats-the-difference-between-genocide-and-ethnic-cleansing>.

## **Introduction and Roadmap for the Article**

As is evident from the heading of this article itself, the primary motive of this Article shall be to differentiate Ethnic Cleansing from the umbrella term that is Genocide. However, before this task is undertaken, it is necessary that we firstly understand the term that we aim to shun. The term 'genocide' was given by Polish Lawyer Raphael Lemkin in 1941, during World War II, by a combination of two Latin words<sup>160</sup>. These words are *Genos*, meaning a race, tribe or a nation, and *Caedere*, meaning the work of killing<sup>161</sup>. Raphael Lemkin further defined the term as the 'destruction' of a group of common ethnicity via the execution of a coordinated plan against certain individuals merely because these individuals belong to the aforementioned ethnic group.

On the other hand, the term 'Ethnic Cleansing' is believed to be the literal translation of the Serbian-Croatian expression '*etnicko ciscenje*'. However, the roots of this foreign term in itself lie unresolved and shrouded in uncertainty<sup>162</sup>. Thus, to investigate whether the term 'ethnic cleansing' can be established as a separate head under the Rome Statute, we must firstly clear any confusion with regards to the usage and standing of these terms. As we move forward with our discussions on the Rome Statute, we shall take a short detour and take up India's stance on the Rome Statute and development of statutory provisions in the nation on the topic of Genocide and Ethnic Cleansing.

Thereafter, the article shall take up three prominent case studies – the Bosnian Genocide, commonly referred to as the 'Srebrenica Genocide' due to the area of Srebrenica wherein this happened, the Myanmar genocide,

and the 1990 'exodus' of Kashmir<sup>163</sup>. Finally, after covering the basics, we shall look at the arguments for establishing ethnic cleansing as a separate head with the help of various articles, online sources and the valuable judgments of the International Court.

## **Taking up the Rome Statute**

The Rome Statute was a result of years of negotiations, which finally resulted in the Diplomatic Conference held from 15<sup>th</sup> to 17<sup>th</sup> of July, 1998 in Rome. This Conference resulted in the setting up of the International Criminal Court (ICC) by a landslide vote wherein 120 nations were in support, 7 nations were against and 21 nations abstained<sup>164</sup>.

The Statute established four core International crimes which the International Criminal Court is equipped to deal with, given under Article 5 of the Statute<sup>165</sup>. These are:

- Genocide
- 'Crimes against Humanity'
- War crimes
- Aggression

The statute further elaborates that it shall not be any limiting statute for these crimes. However, there is a catch; the ICC can only step in for investigation when the nations themselves are either incapacitated to take relevant steps or unwilling to take up these investigations<sup>166</sup>.

As the vote on the Statute was not recorded, it is not certain as to who are the seven nations which voted against it. The United States of America, Israel and People's Republic of China have confirmed their negative votes. However, there are four other nations which go unnoticed. Explanations of vote were publicly declared by India amongst other nations<sup>167</sup>.

<sup>160</sup> 10 the concept of ethnic cleansing

<sup>161</sup> Dan Stone, 'Raphael Lemkin on the Holocaust', 7(4) Journal of Genocide Research 536, 539-550 (2005).

<sup>162</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, 'Definitions – Ethnic Cleansing: Background', (Sept. 9, 2023), <https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml>.

<sup>163</sup> Holocaust Museum Houston, 'Genocide in Bosnia', (Sept. 9, 2023), <https://hnh.org/library/research/genocide-in-bosnia-guide/>.

<sup>164</sup> ICRC Database, Treaties, States Parties and Commentaries, 'Rome Statute of the International Criminal Court, 17 July 1998', (Sept. 10, 2023), <https://ihl-databases.icrc.org/en/ihl-treaties/icc-statute-1998>.

<sup>165</sup> Article 5 Rome Statute

<sup>166</sup> Claire Klobucista and Mariel Ferragamo, 'The Role of the International Criminal Court', COUNCIL ON FOREIGN RELATIONS, (Sept. 10, 2023), <https://www.cfr.org/background/role-international-criminal-court>.

<sup>167</sup> United Nations Meetings, Coverage and Press Releases, 'UN Diplomatic Conference Concludes in Rome with Decision to establish Permanent International

This was followed by another conference held in Uganda, in the city of Kampala from 31<sup>st</sup> May to 11<sup>th</sup> June in 2010. The amendments brought herein are known as the 'Kampala Amendments', and these amendments are responsible for the addition of 'aggression', along with expanding the list of 'war crimes' in the Statute<sup>168</sup>.

The position of India on the Rome Statute is *interesting* to say the least, as it has been an active campaigner of International co-operation and participated in the 'Preparatory Committee for the Establishment of International Criminal Court', called the 'Prep Com' as well as the Rome Conference. Yet, the nation has neither signed nor ratified the statute<sup>169</sup>.

### **Exploring the Intricacies of Genocide and Ethnic Cleansing**

As mentioned earlier, it is necessary to explore the terms themselves before they're differentiated. For this purpose, we **need** to take up a two-step procedure. Firstly, the statutory definition should be taken up, if possible. Thereafter we shall trace the etymological development of the term through socio-political history.

#### **Genocide**

The term 'genocide' has been defined in Article II of the 'Convention on the Prevention and Punishment of the Crime of Genocide', signed in 1948 by a unanimous vote of 56 participants in the 179<sup>th</sup> Plenary meeting of the United Nations General Assembly (UNGA)<sup>170</sup>. According to the Article, genocide is one of the following acts committed by someone, intending to partially, or wholly, destroy a group which is formed on the basis of nationality, race, religion or ethnicity. These acts are:

- Killing
- Bodily or Mental harm
- Infliction of conditions of life which bring physical destruction upon the group
- Prevent births within the group
- Transfer children from the target group to a different group

Although the terms may appear to cover all grounds that genocidal crimes may pertain to, there have only been very limited cases which the International Court has deemed to be genocide, of which the Nazi genocide of Jewish people is the most prominent one<sup>171</sup>.

#### **Ethnic Cleansing**

As mentioned earlier, the roots of the term ethnic cleansing originate from the Serbian-Croatian expression of '*etnicko ciscenje*' whose literal translation stands unknown. The term itself has originated much later than genocide, as it was used in a formal sense firstly in a document in the early 1990s, precisely 1993<sup>172</sup>. However, the political usage of the term was going on from an earlier time to define the violence inflicted by Kosovo-Albanian separatists against Serbian individuals<sup>173</sup>.

However, the political usage of the word 'cleansing' in this context has been severely criticized, as 'cleaning' implies the presence of a 'dirty element'. This is in line with the terminology used by the enablers of the killings of the ethnic group under target, as they use words such as 'disinfection' to explain their procedure, and the ethnic groups are often termed as 'germs' and 'parasite'<sup>174</sup>.

#### **The Responsibility to Protect (R2P)**

The Responsibility to Protect is a concept that has emerged in light of gruesome incidents in the modern times, the Yugoslavian and Rwandan genocides in the 1990s. The concept of R2P was developed by the 'International

*Criminal Court*, (Sept. 10, 2023), <https://press.un.org/en/1998/19980720.12889.html>.

<sup>168</sup> Review Conference of the Rome Statute of the International Criminal Court (May 31 – June 11, 2010).

<sup>169</sup> Devashresh Bais, '*India and the International Criminal Court*', 54 FICHL POLICY BRIEF SERIES (2016).

<sup>170</sup> Audiovisual Library of International Law, '*Convention on the Prevention and Punishment of the Crime of Genocide – Procedural History*', (Sept. 11, 2023), <https://legal.un.org/avl/ha/cppcg/cppcg.html>.

<sup>171</sup> *Supra* note 1.

<sup>172</sup> Arman Murat Necip, '*The Concept of Ethnic Cleansing: A Cautious Quest for Justice*', 1 J.L.POL'Y & GLOBALIZATION 6 (2011).

<sup>173</sup> Rony Blum, et. al., '*Ethnic Cleansing bleaches the Atrocities of Genocide*', 18 EURO J. PUB. HEALTH 2 204-209, (2008).

<sup>174</sup> *Supra* note 14.

Committee on Intervention and State Sovereignty' in 2001<sup>175</sup>. This was then unanimously adopted at the UN World Summit in 2005, which is the largest gathering of Governments and Heads of States in the history of the United Nations. The statutory definition of the term is given under paragraphs 138/139 of the 'World Summit Outcome Document'.

Within this document, paragraph number 138 and 139 stipulate that responsibility be balanced across three pillars enumerated as:

1. Each and every State has the 'Responsibility to Protect' its people from four particular crimes. These are: a) genocide, b) war crimes, c) crimes against humanity and last but not least d) ethnic cleansing.
2. The entire international community is responsible for supporting and promoting other states to meet this responsibility.
3. The international community as a whole must be ready to take appropriate and sufficient action against a State which fails to meet its outlined responsibility.

These pillars were listed out by the Secretary-General of the United Nations in his 'Report on Implementing the Responsibility to Protect', in January of 2009. This was then reaffirmed by the passing of a consensus resolution, taking note of the Secretary-General's report, by the States<sup>176</sup>. Post-2009, there has been very little discussion about R2P itself, as the United Nations General Assembly held its first debate on the Responsibility to Protect in 2018 after the release of this report. Furthermore, the development of the Responsibility to Protect as a Doctrine has been perceived to be underdeveloped and has been critically held to be a subsidiary doctrine for guiding the principles of International Law.

However, this does not connote that there has been a lax attitude with regards to the

Responsibility to Protect. This norm has been brought up in over 50 'Human Rights Council' resolutions and in about 13 UNGA resolutions<sup>177</sup>. The repeated invocations of this principle is a positive sign that international co-operation can take place and put populations out of risk.

Of the three pillars, the third and final pillar is a preventive fail-safe to ensure that there are no slip-throughs of carelessness, whether passive or active. For pillars one and two, there have been various national initiatives to ensure that there are no crimes or atrocities against any group.

For the purposes of this paper, the Responsibility to Protect presents an interesting observation as paragraph 138 of the 'World Summit Outcome Document' mentioned genocide and ethnic cleansing as separate heads. Unfortunately, the document in itself does not shed light on the differentiation of the two terms, but the same does not mean that the two shall be clubbed within the Rome Statute.

Looping back to the Rome Statute, the author believes that the stance taken by India over the Rome Statute is interesting at the very least and extremely concerning and dangerous at the most. The nation, in the upcoming socio-political 'World Order' is bound to play a big role with its humongous population and increased activity in the recent times<sup>178</sup>. Hence, we shall take up this aspect in the following section.

### **Evaluating the stance of India on the Rome Statute**

The stance of India is perplexing as it took part in the follow-up of both the Rome Statute as well as the Kampala amendments enthusiastically, however, has neither signed nor ratified the statute. However, there have been reasons that, some would deem valid, which hold the nation's approval.

<sup>175</sup> Global Centre for the Responsibility to Protect, 'What is R2P?', (Sept. 14, 2023), <https://www.globalr2p.org/what-is-r2p/>.

<sup>176</sup> Resolution A/RES/63/308

<sup>177</sup> *Supra* note 17.

<sup>178</sup> Divya Dwivedi, 'India has a major role in shaping a New World Order', MINT, (Sept. 15, 2023), <https://www.livemint.com/opinion/online-views/india-has-a-major-role-in-shaping-a-new-world-order-11694446473084.html>.

### Potential Reasons for the stance

The primary reason that India has abstained from the Rome Statute has been the abundant powers showered unto the United Nations Security Council (UNSC) coupled with the fact that weapons of mass destruction were left outside the ambit of the Statute<sup>179</sup>. The State had other reasons as well, that the ICC's jurisdiction shall be restricted to when the 'internal machinery' has collapsed and that the crime of 'terrorism' be included within the folds of the Rome Statute.

However, the foremost reasoning, as has been maintained by the State itself, has been that it believes that the ICC shall be a free judicial authority<sup>180</sup>. Being bound by the UNSC means that the same does not protect its impartial nature. This is something that the nation believes will vitiate the very rationale of having an international Criminal Court.

### Scope for Change in India's stance

However, even though the same may be a fair consideration, the country must at the very least inculcate the provisions into its own domestic laws. The Country, as of now, does not have an explicit provision on Genocide, which has resulted in sub-par conclusion of justice in three prominent genocides which took place in the country – the 1984 Anti-Sikh Riots, the 1989 Bhagalpur Riots and the 2002 Gujarat Riots<sup>181</sup>.

With respect to whether there is a scope of change in India's stance, it is unlikely that the considerations of India, especially with regards to the subordination of the International Criminal Court to the Security Council, will be resolved any time soon. The ICC is here to stay and it is apparent that India must pick up things that the contemporary discussion has deemed relevant into its existing provision<sup>182</sup>. Thus, there

is limited scope for external factors to bring about a change in the stance taken by India on the Rome Statute.

Coming back to the primary discussion around Genocide and Ethnic Cleansing, there are three prominent cases that this article shall try to evaluate and interpret to seek the differentiating aspects of Genocide and Ethnic Cleansing. These are:

- The Bosnian-Serbian case: also known as the '**Srebrenica Massacre**'.
- The Myanmar case: also known as the '**Rohingya Genocide**'.
- The Kashmir case: also known as the '**Exodus of Kashmiri Hindus**'.

### Case Studies

The most important and well discussed case, that we shall firstly discuss, is the **Srebrenica Massacre**, which took place in Bosnia.

### The Srebrenica Massacre of Bosnia-Herzegovina

The Srebrenica Massacre refers to the genocidal killing of over 8000 Bosnian Muslims<sup>183</sup>. This happened as a follow-up of the disintegration of Yugoslavia as a state and, of all the other states which were formed as a result of Yugoslavia splitting into six different nation-states. Bosnia and Herzegovina had a ethnic variation which consisted of – 43% Muslims, 33% Serbs, 17% Croats and the rest were constituted by various nationalities.

The leaders of Croatia and Serbia met secretly in 1991, wherein they decided to split the region into three – Bosnia, Herzegovina and a small enclave for the Muslims. Thereafter, when a vote (which was boycotted by the Bosnian Serbs) concluded that the region demands freedom. Thus, began the Serbian assault on the region, which led in the ethnic cleansing and the genocide of Bosnian Muslims<sup>184</sup>. It was

<sup>179</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, (15 June - 17 July, 1998), OFFICIAL RECORDS, Vol. 2.

<sup>180</sup> *Supra* note 11.

<sup>181</sup> FreeLaw, '*Genocide and It's Relating Law in India*', (Sept. 15, 2023), <https://www.freelaw.in/legalarticles/GENOCIDE-AND-IT%E2%80%99S-RELATING-LAW-IN-INDIA>.

<sup>182</sup> Dilip Lahiri, '*Should India continue to stay out of ICC?*', OBSERVER RESEARCH FOUNDATION, (Sept. 16, 2023),

<https://www.orfonline.org/research/should-india-continue-to-stay-out-of-icc/>.

<sup>183</sup> International Criminal Tribunal for the former Yugoslavia, '*The Conflicts: Bosnia and Herzegovina – 1992-1995*', (Sept. 16, 2023), <https://www.icty.org/sid/322>.

<sup>184</sup> R. Jeffrey Smith, '*Srebrenica Massacre*', BRITANNICA, (Sept. 17, 2023), <https://www.britannica.com/event/Srebrenica-massacre>.

acknowledged by the International Criminal Tribunal for former Yugoslavia that the Serbs planned to create an ethnically Serb State under the name of *Republica Srpska*. For the same, the Srebrenica region was deemed extremely important to facilitate that the imagined, and sought after State, would not remain divided into two separate chunks<sup>185</sup>.

This case is a very prominent one as the same was taken up by the International Court of Justice (ICJ), and is popularly referred to as the 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide'<sup>186</sup>, between Bosnia and Herzegovina on one side, and Serbia and Montenegro on the other. Thereafter, the International Criminal Tribunal for the former Yugoslavia was established which ruled this as genocide under the Rome Statute. Although the parties in the case weren't party to the Rome Statute or the CPPCG (Convention on Genocide), the Rome Statute's provisions enabled and allowed international intervention in cases wherein the domestic legal system cannot try the same.

The question that we aim to evaluate is, Can the charges of 'Genocide' and 'Ethnic Cleansing' be separated into two different, distinct silos or are the two interchangeable, or inseparable, factors. It is pertinent that this question is raised, and evaluated once the fact scenarios of all three cases are fully laid out.

### **The Rohingya Genocide of Myanmar**

The country of Myanmar has had troubles when it comes to political stability, and the case of Rohingya people is reflective of the same. Post the enactment of the Burmese nationality law in 1982, the Rohingya people were denied citizenship<sup>187</sup>. In the north-western part of Myanmar, known as the Rakhine State, the population is pre-dominantly Buddhist, with about a million Rohingya people. It has been tension between the Buddhist and Muslim

communities which had led to violence in the Rakhine state<sup>188</sup>.

Over 730 thousand Rohingya have had to flee to Bangladesh and about 600 thousand Rohingya continue to remain under the thumb of a Myanmar which has, once again, ousted its democratically elected leader and has opted for military rule<sup>189</sup>. Thus, there has been a mass expulsion of Rohingya people from the State of Myanmar, more than killings.

### **Exodus of Kashmiri Hindus**

This incident pertains to the 'migration' of Kashmiri Pandits in the 1990s from the Muslim Majority state of Kashmir<sup>190</sup>. For the background of this case, the state's history itself has to be looked at for starters. Kashmir has had a special status in the country of India, with Article 370 according it a special status. There has always existed a passive enmity between the majority Muslims, who were economically weaker in general and the Kashmiri Pandits who were more economically well-off.

This tension boiled over in 1990, as calls of '*Ralive, Galive ya Tsalive*' rang through the streets of Kashmir. The Pandits were given three choices – convert to Islam, die or leave the state. Thus began the mass 'migration' of Kashmiri Pandits which, has often been referred to as 'Ethnic Cleansing'<sup>191</sup>.

Looking at the three cases, and referring to the established definition of Genocide in various provisions, the following observations may be noted:

- There are factors of 'expulsion' which remain unaccounted for in the CPPCG.

<sup>188</sup> Oliver Holmes, 'Myanmar seeking ethnic cleansing, says UN Official as Rohingya flee prosecution', THE GUARDIAN, (Sept. 17, 2023), <https://www.theguardian.com/world/2016/nov/24/rohingya-flee-to-bangladesh-to-escape-myanmar-military-strikes>.

<sup>189</sup> Human Rights Watch, 'Myanmar: No Justice, No Freedom for Rohingya 5 Years On Anniversary of Atrocities Highlights International Inaction', (Sept. 18, 2023), <https://www.hrw.org/news/2022/08/24/myanmar-no-justice-no-freedom-rohingya-5-years>.

<sup>190</sup> Alexander Evans, 'A departure from History: Kashmiri Pandits, 1990-2001', 11 Contemporary South Asia 1, 19-37 (2002).

<sup>191</sup> Peerzada Ashiq, 'Even as locals protest Kashmiri Pandit's killing in Pulwama, fear grips those staying back since 1990s', The Hindu, (Sept. 20, 2023), <https://www.thehindu.com/news/national/other-states/even-as-locals-protests-over-kashmiri-pandits-killing-in-pulwama-fear-grips-among-those-staying-back-since-1990s/article66560633.ece>.

<sup>185</sup> Prosecutor v. Radislav Krstic, ICTY, IT 98 33 A, ¶15 (2004).

<sup>186</sup> Bosnia and Herzegovina v. Serbia and Montenegro, 2007 ICJ 91.

<sup>187</sup> Jonathan Head, 'What drive the Rohingya to sea?', BBC NEWS, (Sept. 17, 2023), <http://news.bbc.co.uk/2/hi/asia-pacific/7872635.stm>.



- In all of these case studies, there is a common feature of an attempt to rid an area of a group based on their ethnicity.
- This act is nowhere defined in the CPPCG, and thus cannot be taken up by any international authority for ruling.
- Hence, this necessitates the need for creating a new head under the Rome Statute, which is the leading authority on this subject, to ensure that the same does not go unpunished.

### **Conclusion**

Via the course of this article, we firstly explored the definition of genocide and ethnic cleansing from various sources. Thereafter we evaluated the Rome Statute and India's stance on the same. Henceforth, certain case studies were discussed which highlight that the existing provisions, whilst covering 'Genocide' sufficiently, do not take up the topic of ethnic cleansing, even though the same can form a separate head of crime. Thus, the author believes that the ILC should work on a separate head of crime under the title 'Ethnic Cleansing', focussed on the prospect of residents being forced to leave a region on grounds similar as genocide.

