Naturalism and the UN Convention on Genocide

Natalie Sands

Naturalism has informed the UN Convention on the Prevention and Punishment of the Crime of Genocide, making it both an effective and ineffective legal instrument for the prohibition of genocide. The implications of employing naturalism can be explored and challenged by analyzing the origins of and use of the Convention. This paper will use a constructivist approach, taking into consideration the legal aspects of the Convention, in order to contrast the epistemologies of these two theories. The Convention has been treated in the international law arena as a 'natural law' or a 'divine law.' Fournet explains that this is problematic because “the idea that international law knows of superior norms, no matter how compelling, sits nonetheless uncomfortably with the very essence of public international law as a law made by and for states."[1] The ascension of the law to universal jurisdiction removed the Convention from the context in which it was developed. While naturalism enabled the Convention to be universalized to more effectively bind all states, its ascension to a universal law hinged on the assumption that this model had identified the true nature of genocide, making the Convention ineffective when it came to applying the universal law to particular situations.

Naturalism

In order to discuss naturalism and its use in political analysis, a brief outline must be given as a base for the discussion. This summary is not meant to be a comprehensive overview of naturalism; it is meant to focus on a few of the important aspects that pertain to the formation and use of the Convention. Naturalism is based on an ontology stating that only one reality exists and that

this reality exists independently of our observation. Building on this way of understanding the world, the epistemology of naturalism answers questions about what constitutes knowledge of that world. Knowledge of reality is understood to be the "capacity *to represent a respective subject matter as it is, on an appropriate basis of thought and/or experience.*"[2] According to naturalism, true knowledge is that which "matches up" with reality, while false knowledge is that which fails to "match up" with reality. The question of methodology then arises. One might ask how can one know which claim to truth "matches up" with reality and which does not?

Before tackling this question, it is important to understand that knowledge is not synonymous with the reality that it represents; it is only a model of reality. This distinction is quite important as the question of whether or not reality can be known has intrigued philosophers for millennia. In his critique of naturalism, Willard explains that we cannot "experience such 'truth,' [and] can never directly *find* the fit (or lack of fit) between representations and what they are of or about."[3] If the discussion begins with the ontological statement that reality can never be known, two approaches may be the taken to differentiate between truth and falsity. If knowledge is taken to be false until proven true, then all knowledge would essentially be false. However, if knowledge is taken to be true until proven false, then claims to truth can be made. This statement is not meant to imply that an endless number of claims to knowledge can be made and remain true until proven false. Rather it is intended to explain how, with proper testing, one can remove the “unnecessary clutter; to reduce the world to a simplified model of essential principles” and reveal truth.[4] Even though direct knowledge of reality may never be possible, the naturalist assumes that truth about the nature of reality can exist in carefully constructed models.

This paper will argue that the UN Convention on Genocide has relied on the naturalist assumption that truth can exist in

models. By giving the Convention the status of a 'natural' law, proponents have assumed that the Convention represents the true nature of genocide. In order to conduct this analysis, the implications of naturalism and how it has played out in the Convention and the prohibition of genocide will be explored. Proponents of naturalism would support that if reality exists independently of our observation, then true knowledge of that reality does not change over time or throughout history.[5] This implies that truth, understood as a representation of reality, can be removed from the context in which it was developed and still remain true.

Universalizing the Particular

The UN Convention on Genocide, now treated as a natural law, emerged in a very specific context. Contrary to the first implication of naturalism, it is still very much tied to this context. The Convention was developed in the wake of World War II with the purpose of preventing crimes of the nature of the Holocaust from being repeated.[6] The term "genocide" was coined by a Polish-Jewish lawyer, named Raphael Lemkin, who had lost his entire family in the Holocaust.[7] It was meant to be narrower in definition than "crimes against humanity" so that criminals perpetuating these kinds of crimes could be prosecuted and punished in a different manner. In fact, Lemkin was very open about his concern that the Nuremburg trials had not gone far enough in punishing the Nazis for the atrocities committed against Jews during peacetime. [8] This particular event influenced the convention very deeply, as Article I states that "the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".[9] Lemkin wanted the convention to have universal jurisdiction so that violators would be held accountable regardless of where the crime was committed or where they were caught.[10] From the naturalists point of view, Article I was added to allow the convention to represent the true unrestricted nature of genocide.

Either consciously or unconsciously, Lemkin employed the naturalist approach by removing the convention from its context so that it could be applicable across time and space. That is, by identifying the *real* nature of genocide hidden beneath everyday sensory perceptions, the Contracting Parties of the Convention were able to universalize the particular and create an international law.[11] In this way, the Convention marked an attempt to break the historical patterns of genocide that had inflicted great losses upon humanity in the past.[12] By identifying this 'natural' law, the hope was that humankind would be liberated from this historical pattern by preventing genocide in the future. However, from the constructivist point of view, the ascension of the Convention to universal jurisdiction in international law was problematic because the law was not natural; it was constructed "by states and for states" and was very much tied to the time and space in which it came into being.[13]

Despite these problematic assumptions, the Contracting Parties had to interpret the prohibition of genocide as a natural law in order to give it the universal jurisdiction that it would need to be effective. According to Allot, "natural law could, and would necessarily, apply to the lawgivers themselves to regulate their co-existence, since there was no lawgiver to impose law on the lawgivers."[14] The Convention could then be more effective in preventing genocide by modeling the law as a peremptory norm or *jus cogens* norm, which contained within it the identification of a nonderogable norm to which all states had to comply.[15] This is not the case with all international laws, as public international law is seen as a consensual order of state consent. The Convention was unique in that if it was to function as its Contracting Parties had intended it to, it had to be seen as "transcending the will and autonomy of states" in order to prevent "the exoneration of noncontracting states".[16] If the prohibition of genocide was not seen as a natural law, legally binding all states to its adherence, states engaging in genocide would simply opt out.

From the naturalist perspective, universalizing the Convention and removing it from its context was necessary to make it more effective. While this may be true, the constructivist would note that this leap of faith also made the Convention an ineffective tool for the UN to actually halt or prevent genocide. It is useful here to return to the previous explanation of 'true' knowledge as not synonymous with reality, but as a *representation* of reality. Hartman explains that problems with naturalism arise when "would-be scientists begin to take the models too seriously and to believe that they have discovered great truths about human nature."[17] If the model is understood as merely a construction of the world by a subjective observer, then treating that model as a representation of reality is simply a leap of faith. The Convention is then understood as an ineffective tool because it is a model of what genocide looked like in 1948 and cannot necessarily be applied effectively today.

Even though the Convention has universal jurisdiction over all states as a peremptory norm and a 'natural' law in theory, theory does not always translate into substance. The Convention was assumed to exist outside of and separate from state consent because it was a ‘natural’ law. Fournet states that "this assumption [that peremptory norms are ever independent from state consent] is purely and simply wrong."[18] States are still the principal actors in the international system as it is states that brought the Convention into being and it is up to states to apply it. In many instances, states have blatantly prevented the Convention from being applied by voting against UN action to intervene in cases of genocide. Totten and Bartrop argue that since the 1948 establishment of the Convention, genocide has occurred in Bangladesh, Burundi, East Timor, Indonesia, Iraq, Rwanda, Cambodia, Guatemala, the former Yugoslavia and likely many more.[19] During the Cold War, the USA and USSR repeatedly prevented the UN from intervening in many of the states in which genocide was occurring because these states had been designated as having strategic significance.[20] Furthermore, the protection of state sovereignty from the

subordination that accompanies the universal jurisdiction of peremptory norms has generally been favored by the international community. For example, even after the Cold War, when proponents of the Convention were hopeful that it would become more effective, states continued to arm other states engaged in genocide. During the 1990s, in spite of an international arms embargo, Egypt continued to sell massive shipments of weapons to the Hutus in Rwanda, thereby fueling the genocide for its own self-interest.[21] In this sense, although its effectiveness hinged on the ascension of the Convention to having universal jurisdiction over all states, many of these states continued to violate the supposedly 'natural' law.

Particularizing the Universal

The universalizing of the particular cases of genocide that had been experienced prior to 1948, giving special attention to the occurrence of genocide during WWII, led to a very narrow definition of genocide.[22] Contracting Parties and the international courts that interpreted the Convention assumed that their knowledge of genocide was objective and that it could be removed from the context in which it was created and remain true. In this way it could provide a tool for measuring and identifying genocide regardless of when or where it was occurring.[23] Problems arose when the UN was then faced with particularizing the universal law they had constructed. In an analysis of the application of the Convention, Chalk and Jonassohn found that "the wording of the Convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it."[24] For example, in 1972 when news leaked out of the genocide in Burundi in which the minority Tutsi government tried to eliminate the entire majority class of Hutus, the world did little to intervene or prevent further violence. When the waves of state violence against its own citizens began the following year, it appeared as if "all foreigners had banded together in a conspiracy of silence."[25] Totten and Bartrop have also argued that that "since its establishment in 1948, the

success rate of the United Nations in preventing genocide has been dismal."[26] While there are many factors contributing to the inaction of the International community and the UN in preventing genocide, some of the problems that the UN has faced with actually using and applying the Convention can be related back to the leap of faith made by the naturalist.

If the Convention is understood not as a representation of the reality of genocide, but as a construction of the conceptualization of genocide based on a specific historical context, then it would not hold that the Convention could be removed from its original context and applied across time and space. This narrow definition of genocide developed in 1948 could not be applied to more recent cases in which genocide was thought to have occurred, because the nature of genocide had changed. In contrast to the naturalist, the constructivist approaches history as dynamic as it is constructed by its writers. Allot explains that "there are as many pasts contained in the past as there are those who write its story."[27] This lies in stark contrast to the naturalist view of history, as a pattern that the Convention can liberate us from. Following the constructivist argument, the inaction of the international community in preventing genocide can then be attributed to the restrictive nature of the Convention tied to the historical context of 1948. For example, although Chalk and Jonassohn and other political analysts have classified the violence that erupted in 1971 surrounding the secession movement in Bangladesh as a genocide, the UN failed to do so.[28] Although ethnic groups, such as Bengalis and Hindus, were intentionally targeted by the Pakistani Government, genocide deniers continued to argue that the case did not fit the accepted definition of genocide. Excuses ranged from classifying the violence as a civil war between the government and rebels, to claiming that no mass violence actually occurred. Following this logic, the inaction of the UN in the 1972 and 1973 genocides in Burundi can also be attributed to the difficulty of “matching up” the particular case to the universal model of genocide outlined in the Convention.[29]

Conclusion

The naturalist approach to political analysis can be understood by considering how it has informed the UN Convention on Genocide. By employing a constructivist approach in this analysis, the assumptions were exposed and the epistemologies questioned. This analysis of the Convention is not intended to explain why the convention has failed. Rather, it is intended to show how naturalism has been both effective and ineffective as an approach to political analysis. While the UN has treated the Convention as a model representing the true nature of genocide, it can also be understood as a constructed term that is connected to the temporal and spatial context of its creation in 1948.[30] When one considers the Convention as a constructed term and not a 'natural' law, presenting it as a law that stands alone and above states appears problematic and unwarranted. Naturalism enabled the Convention to be universalized, having legitimate jurisdiction over all states; however, Hartman explains that while models can be useful for understanding the world and providing precision, they are only models.[31] Just as models cannot be treated as limitless and without conditions, genocide cannot be universalized without recognizing the limitations of these assumptions.

Notes

[1] Caroline Fournet, "The Universality of the Prohibition of the Crime of Genocide," *International Criminal Justice Review, 19*(2) (2009): 132 – 149, 132.

[2] Dallas Willard, "Knowledge and Naturalism," in *Naturalism: A Critical Analysis*, ed. William L. Craig & J.P. Moreland (London and New York: Routledge, 2000), 31.

[3] Willard, "Knowledge and Naturalism," 36.

[4] Jonathon Moses and Torborn L. Knutsen, *Ways of Knowing: Competing Methodologies in Social and Political Research* (New York and Hampshire: Palgrave Macmillan, 2007), 32.

[5] Ibid., 29.

---

[6] William A. Schabas, "Origins of the Genocide Convention: From Nuremburg to Paris," *Case Western Reserve Journal of International Law, 40*(1/2) (2008): 41.

[7] Henry T. King Jr., Benjamin B Ferencz, and Whitney R. Harris, "Origins of the Genocide Convention," *Case Western Reserve Journal of International Law, 40*(1/2) (2008): 13-14.

[8] Ibid., 14.

[9] UN General Assembly, Hundred and seventy-ninth plenary meeting, "Resolution 260 (III) Convention on the Prevention and Punishment of the Crime of Genocide," 9 December 1948, 174.

[10] King et al., "Origins of the Genocide Convention," 15.

[11] Moses and Knutsen, *Ways of* Knowing, 32; Phillip Allot, "International law and the Idea of History," *Journal of the History of International Law, 1*(1) (1999): 14.

[12] UN General Assembly, Resolution 260(III), 174.

[13] Fournet, "Universality of the Crime of Genocide," 132.

[14] Allot, "International Law," 9.

[15] Fournet, "Universality of the Crime of Genocide," 132.

[16] Ibid., 135.

[17] Edwin M. Hartman, "Virtue, Profit, and the Separation Thesis: An Aristotelian view," *Journal of Business Ethics, 99*, (2011): 5.

[18] Fournet, "Universality of the Crime of Genocide," 135.

[19] Samuel Totten and Paul R. Bartrop, "The United Nations and Genocide: Prevention, Intervention, and Prosecution," *Human Rights Review, 5*(4) (2004): 9.

[20] Ibid.

[21] Ibid., 13.

[22] Schabas, "Nuremburg to Paris," 36, 46.

[23] King et al., "Origins of the Genocide Convention," 15.

[24] Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies. (*New Haven: Yale University Press, 1990): 11.

[25] Ibid., 384-385.

[26] Totten and Bartrop, "United Nations and Genocide," 9.

[27] Allot, "International Law," 16.

[28] Chalk and Jonassohn, *The History of Genocide,* 396-397.

[29] Chalk and Jonassohn, *The History of Genocide,* 384-385; Willard, "Knowledge and Naturalism," 34.

[30] King et al., "Origins of the Genocide Convention,"14.

[31] Hartman, "Virtue, Profit and the Separation Thesis," 5; Fournet, "Universality of the Crime of Genocide," 135.