

CRITICAL REVIEW OF GENOCIDE AS THE MOST DIFFICULT KIND OF CRIME AGAINST HUMANITY

Abstract: The criminal acts against humanity and the international law, amongst which the genocide, represent such actions that breach the international agreements and conventions, impair and endanger the peace among the nations and the safety of humanity, or which violate the regulations of the military law for the actions against the military prisoners, the sick and the civilians.

The emergence of these criminal acts is interconnected with the existence of the international rights which regulate the relationship among the states in a military conditions i.e. the relations of the combatants related to the outbreak of the war and the warfare. Since the beginning of humanity, the wars and the war sufferings of some subjects or groups of nations and of collateral damage, go hand in hand with the total social development. Based on this, as a consequence of the cruel and inhumane behavior within the long history of warfare and armed riots among states and nations, the international military law has developed in order to humanize the inhumane means for solving the interstate and international disputes.

With the occurrence of the international military law, a process has began of gradual limitation of the warring parties' rights and control of their acts, not only towards the civilian inhabitants but regarding the sole beginning of the warfare. This brought to the degree of limitation of the absolute freedom of the states to start and proceed with the war that strictly forbids some actions with unnecessary provocations, murders and tortures. With the sole breach of the military regulations, the criminal acts have occurred.

Key words: *international rights, humanity, international law, human rights, foreign state policy, warfare, military*

Давор ВЕЗЕНКОВ

КРИТИЧКИ ОСВРТ НА ГЕНОЦИДОТ КАКО НАЈТЕЖОК ВИД ЗЛОСТОР ПРТИВ ЧОВЕЧНОСТА

Кривичните дела против човештвото и меѓународното право, меѓу кои се наоѓа и геноцидот, претставуваат такви дејства со кои се прекршуваат меѓународните договори и конвенции и се нарушува и загрозува мирот меѓу народите и безбедноста на човештвото, или со кои се кршат

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правилата на военото право за однесувањето на завојуваните страни кон воените заробеници, болните и цивилните жители. Настанувањето на овие кривични дела е поврзано со постоењето на меѓународните правила со кои се регулираат односите помеѓу државите во состојба на војна т.е. односите меѓу завојуваните страни во однос на започнувањето и водењето на војна. Од настанувањето на човештвото, војните и воените страдања на поединци или групи народи и на колатерални штети, се паралелен сопатник на целокупниот социјален развој. Базирајќи се на ова, како последица на суровото и нечовечко однесување во долгата историја на војувања и вооружени немири помеѓу држави и народи, се развило меѓународно воено право со цел да го хуманизира ова најнехумано средство за решавање на меѓудржавни и меѓународни спорови.

Со појавата на меѓународното воено право почнал еден процес на постепено ограничување на правата на завојуваните страни и контролирање на нивните постапки не само кон цивилното население, туку и во поглед на започнување и водење на војна. Дошло до степен на лимитирање на апсолутната слобода на државите во поглед на започнувањето и водењето на војни, на тој начин што одредени постапки кои претставуваат непотребни првокации, убивања и мачења, се строго забранети. Со самото кршење на овие воени правила, настануваат воените кривични дела.

Клучни зборови: *меѓународно право, човештво, меѓународни права, државна надворешна политика, човекови права, војни дејствија*

Introduction

The term „genocide“ was comprised by the Polish theoretician and lawyer Rafael Lemkin using the Greek word *genos* (*race or tribe*) and the latin *cide* (*killing*). There wasn't a specific reference for the term “genocide” at the Nirmberg's charter or at the verdict of the Nirmberg's tribunal, but it came forth with the conviction and the prosecution mentioned at times. The notion which is known as a genocide, has been prosecuted as a crime against humanity. The prohibition of the crime of genocide has been defined in the Convention for prevention and punishment of the crime of genocide in 1948 and has become a part of the regular international law and the binding norm or *jus cogens*. The genocide has been defined as any act from the given five in the convention with the intention to partially or fully destroy, a national, religious, ethnic or racial group.

The five parts are, as follows:

- *Murder of the group member;*
- *Posing serious bodily of psychologically injuries/harm of the group members;*
- *Intentional imposing living conditions of the group, intended to lead to a*

- partial or full physical destruction;*
- Imposing regulatives with the intention to retain the procreation within the group;*
- Involuntary transportation of children from the group to another group.*

Likewise, the crime genocide may be defined as a crime according to the international law, which means neglecting the right of existence of the whole human groups, neglecting that shocks the humanity consciousness and leads to a huge loss for humanity that defies the moral rights, as well as the spirit and the objectives of the United Nations.... The primary consequence which stems from this realization is that the principles of the basis of this convention are the ones that have been approved by the civilized nations, are binding to the states, even without any conventional obligation. The second consequence is the universal character and the prosecution of the genocide and the necessary collaboration “in order to free humanity from this abominable evil”²

Conceptual determination of genocide

The genocide is the worst form of crime against humanity. Whilst the other crimes against humanity, the civilian population is required to be a part of the goal of widespread or systematic attack, the genocide requires specific intention for full or partial destruction of an ethnic, racial or religious group of people. Although the prosecution relies upon the same parts and the same crime act to prove both, the crime against humanity and the act of genocide, whose victims are the above mentioned, the crime against humanity can be included in the subgroup of the crime of genocide and be punishable thereof, if the preconditions for the crime of genocide are proven.³

The victim of the crime of genocide is the group itself, not the individual. The conventional criteria for the four groups protected with the Convention of genocide provides that – the membership in these groups normally seems not to be denied by its members, who automatically belong to it, in a permanent and often unchangeable manner“.

The aforementioned protected groups of nationals by the Convention are, as follows:

- A national group** is a collection of people who are thought to share a legal obligation based upon the shared, accompanied with the reciprocity of the rights and obligations.⁴

²) Preamble of the *Convention on prevention and punishment of the crime of genocide*, Paris, 1948

³) *The Prosecution against Clement Kaishema and Obed Rusindana* (Case no. ICTR-95-1-T, ICTR T. Гл. II, 21st Mai 1999)

⁴) *Akayesu*, article 512

- **Ethnic group** is a group which members share a mutual language and culture. The Ethnic group can be identified, or distinguished by the others, including the genocide practitioners.
- **Racial group** is different from other racial groups by the inherited physical characteristics, identified within the certain geographical area, regardless the linguistic, culturological, national or religious factors.⁵
- **Religious group** is a group where the members share the same religion, faith, a cult of worship or general beliefs.

The Genocide can be conducted within certain borders of a geographical area or region, whereas all necessary conditions for genocide are met. According to the common international law, formed at the Genocide Convention in 1948, the genocide can be conducted within the context of peace or within the armed conflict.

The implementation of the provisions from the convention within the contemporary criminal legislation implies a developed concept of the genocide, according which the genocide appears in the following three shapes:

- **Physical** – is comprised from different acts of destruction of a national, ethnic, racial or religious group;
- **Biological** – comprises acts that impose the procreation, or the extension of the group;
- **National** - cultural – represents violent acts which lead to losing the cultural, national, ethnic, racial or religious identity of the group.

Such definition has been given by the Macedonian Criminal Law, using more interchanges of the aforementioned basic forms:

*Those who have the intention to fully or partially destroy a national, religious, ethnic or racial group, will give orders for conducting murders or harmful bodily injuries or harming the physical or mental health of the members or forced emigration of the nationals or the group, in order to conduct them to such living conditions which can stop the procreation among the members of the group, or who conduct forced emigration of the children into another group, or those who has the intention to conduct any of the afore mentioned acts, shall be punished with at least ten years or life imprisonment.*⁶

The objective element of the genocide

The objective element (actus reus) consists of conducting some of the numerous acts that can be considered as criminal acts. The act of conducting is to order or conduct some of the mentioned acts in the disposition of the acts.

⁵⁾ *Акаџесу*, article 514.

⁶⁾ Article 403 from CL, Official Gazette no.37, 1996

The nomination of the ordering command as a primary act is very obvious, which can be explained with the sole character of this criminal act, that is comprised form strategic and systematic act towards the destruction of certain groups. Namely, in the command for conducting of these acts lies the core of danger of this act to society, which explains why this act is at the top position. This by all means, doesn't mean that the other acts of direct performing of the afore mentioned activities, aren't socially dangerous at the same level and that they don't deserve the same order of punishment like the command of performing of the act.

The main issue connected with the objective element is the term of group of victims and identification of the four groups as well (national, religious, racial and ethnic). The first issue covers the exact meaning of the term "group", and the second reflects the standards which help identify each of the four groups.

The terms, national, religious, ethnic and racial group are very extensive, and up till now, there haven't been general and international consistent definitions for them. Each of them is being presented by the light of the particular political, social and cultural area. The affiliation of a group is more and more connected to the subjective, rather than the objective element. The offender of genocide sees the victim as if it is being predestined to be destroyed. In certain cases the victim itself can be a part of such a group.

The subjective element of the genocide

The subjective element of genocide (*mens rea*) comprises any of the afore mentioned acts that can represent conducting of a criminal act, and they must be undertaken with the intention to destroy, fully or partially, some national, religious, ethnic or racial group. The premeditation itself, separates this criminal act from the rest international criminal acts defined in the international acts. Therefore, the premeditation for genocide must never be leveled with the motive. An important element of the genocide is the intention for destroying a certain group, not the reason for such intention, whether it's revenge, aspiration for war dominance, hate and many other reasons. *Mens rea* must be formed before conducting the crime of genocide meaning that the act is being conducted in order to promote the intention for genocide. Accordingly, it doesn't mean that the accused had an intention to conduct crimes towards large geographical area or to eliminate important or large part of the population. Still, the crimes conducted by the offender must be showing that the offender, whether belonging to a higher hierarchical position or being a common person, had a clear knowledge or intention to seek full or partial destruction of the certain group of people.

The performer of the criminal act, depending on the type of criminal act can be, as follows:

- Commander;
- Performer.

Accordingly, the commander is the one who has a given position in the state or war hierarchy and who, having this position, is able to order those acts to other persons. Also, it can be a person who, according to the circumstances, is able to give such an order.

Any person can be in the position of the performer. ⁷

The Convention against genocide from 1948

The genocide has gotten its autonomic meaning as a separate crime in 1948, when the General Assembly of the Organization of the United Nations adopted the Convention against genocide. If you analyze the convention carefully, two of its aims can be noticed:

- To bind the contracting parties to qualify the genocide as a crime and to punish its performers within the framework of the legal system of the each party;
- To secure a legal collaboration between the contracting parties in order to stop the criminal act.

All of the above has been clarified in the Preamble, where its developers, after signifying the genocide as a crime according to the international law, manifest their conviction, that in order to free the humanity of such a gruesome evil, an international collaboration is necessary. The Developers of the Convention thought that, after the terrible genocide against the Jews in World War II and after the strict punishments by the courts for crimes against many who planned and conducted them, the contracting parties won't dare to get involved in the genocide. Probably this assessment is the reason for the implementation of the nonconventional provision which determines that the individuals accused for genocide must be accused and judged by the judiciary government within the territory where the act is committed and by, the future, International Criminal Court.

The main values of the Convention

The convention has many values. Among other matters it supplies a clear definition of the criminal act itself, it punishes other acts interconnected with the genocide (conspiracy, accomplishment etc.), and it forbids the genocide whether it's committed in time of war or peace. Thanks to the Convention and its widespread acceptance by the countries, on the level of state responsibility

⁷⁾ Vlado Kambovski, *International Criminal Law*, Skopje, 1998 p.264

it's been widely accepted that the traditional rules connected to the genocide create obligations towards all the other member states of the International Community, meanwhile assigning the right of any country to seek for ending the genocide. Additionally, those regulations represent an additional part of the *jus cogens* or the body of unconditional standard; which means, they cannot be ceded from using an international agreement (nor they are conditioned by the internal legislation).

Simultaneously, the errors and failures that appear in the Convention must be taken into consideration. The most apparent are the following:⁸

- The definition for genocide does not cover the cultural genocide (the destruction of a language and a culture of the group). The probable explanation for this is that the cultural genocide is a pale concept*. Also the genocide doesn't involve the extermination of the group based on political grounds. This is an obvious intentional oversight. Whether the elimination on political grounds corresponds with the genocide is a rather questionable matter. It is obvious that the Convention limits itself on the physical destruction of a relatively stable groups where the individuals, in the most cases, are subconsciously included from the birth itself.
- The four classes of the protected groups (national, religious, ethnic and racial) have not been defined nor have the criteria for their definition met.
- The mechanism for implementation that has been envisioned by the Convention, is non-efficient. This represents a flaw because the local government of the state (or individuals supported by the government) is the one that is mostly prone to committing crimes of genocide, so the national bodies of the exodus would rarely be capable of conduct it

Judging by the level of implementation the Convention has been proven as non-effective from long ago. The United Nations have only once labeled one case of massacre as genocide. This is about the case of Sabra and Shatila, when the General assembly of the United Nations Organization characterized the mass murders of Palestinians by the Christian Phalangist troupes as an act of genocide.⁹ Later, in 1993, the state took a case for genocide before the International Court of Justice for the first time; Bosnia against Serbia. In 1999 Croatia has started a discussion before the International Court of Justice against Serbia for breaching the Convention against genocide.

⁸⁾ Antonio Cassese, *International Criminal Law“* , *Educational work, 2008 (Macedonian edition)*

⁹⁾ Resolution 37/123 D of the UN General assembly, the 16th December 1982

The holocaust – genocide of the largest scale

The holocaust, from the Greek word hollokauston (holos - totally and kaustos – burnt), is a term used for describing the genocide of about six million European Jews during World War Two, as a part of the program for intentional extermination, planned and conducted by National Socialists Party and the regime guided by Adolph Hitler. Many other groups have also been murdered, including Romas, the war prisoners, homosexuals, the Slavs, the ill and all the political opponents. Yet, the holocaust has been defined as genocide of Jews, or better known as a “final solution” to the European issue. When we take all the victims from the Nazi regime in consideration, the total number of victims is between eight and eleven million. The exile and the genocide were conducted in several phases. In the beginning, after Hitler took the power on the 30ieth of January 1933 as a Chancellor, he started to adopt legislation for extermination of the Jews from society. Marching squads were activated all over Berlin. Manchester Guardian was reporting on the beaten Jews: “there was blood running from their heads and their backs were covered with wounds. Many of them lost consciousness and were left lying on the streets.”¹⁰

On the seventh of April, the concept of racial inequality, among the German Jews and the other Germans got a legal status by the orders of the German government for dismissal of all the public officials who didn't have an gentile origin. By giving all the German non-Jews, a status of gentiles, Hitler formally divides all the people in two groups. There was also an order for carrying a badge (The Star of David) by every Jew, This order was also been given by the Fascist Bulgaria, where by the Ministry of Internal Affairs and Social Health in Sofia was published that “ from the 29th of September 1942 the people who have a Jewish origin must wear a badge”.¹¹ The two laws, ratified by Hitler himself, defined the nationality of the Reich and contained rules for German bloodline and honor. According to the first law, only Germans had the right of nationality, and according to the second, the Jews were defined as people without German blood. The Jews reacted in different ways on these exiles, but mostly they were leaving Germany as fugitives. More than five thousand emigrated to Palestine. Yet, many of them stayed hoping that the storm would pass. But the storm didn't pass, it came even stronger. “The Crystal night ” was only one part of Hitler's bloody road. 177 Synagogues were burnt, many Jewish shops, workshops and homes were robbed, 20,000 people were arrested, and only 36 death cases were reported. The Crystal Night began with 36 death victims and ended with six million liquidated Jews from

¹⁰⁾ M. Gilbert, *The holocaust – The History of Jews from Europe during World War Two*, Skopje 2002

¹¹⁾ Z. Clonomos, V. Vangelju, *The Jews in Macedonia*, Skopje, 1986

all over Europe.¹²

One of the central issues imposed is: When did the Nazis decide to murder all the Jews? It is considered that the plan for the extermination was central in the Nazi ideology from its very beginning, from its founder Hitler: "We fight for the survival and the expansion of our race and our people. We fight for the existence of our children. For the purity of our blood... The big events in life of the people are not the result for chance but regularly arise from the endeavor of every people for the conservation and the procreation of the kind and the race... Everything in this world that does not represent a good race is a chuff... The complete opposite of the Gentile is the Jew. If they were alone in this world, the Jews would inevitably drown in their own dirt. The Jew carries only dead within. Wherever it sets foot, the people that lived and worked there, sooner or later starts to die out... The Jews live as parasites on the bodies of the other nations and states.... Taking all the reasons for our German catastrophe in consideration, we come to the same conclusion: non grasping of the Jewish danger."¹³

After the German annexation in March 1938, and after the mass arrests, more than 15,000 Jews were sent out in Dachau and the new camps where many cruelties took place. In the concentration camp the people were used as a working force till they were worn out and died from exhaustion and illness. Gradually, with the conquering of the new territories from the neighbor states, the Jew extermination project was gaining momentum, which firstly was developing through building more and more camps for forced labour, and where the political oponents were tortured and murdered.. After 1939, the camps became places where the jews were forced to live as slaves or were tortured and murdered. It is considered that there were around 15 000 such camps, mst of them in Poland. Gradually other more efficient and more lasting methods of mass destruction were found. The purchase of instruments and machines for killing using poisonous gas had started. It was the new method. The concentration camps started to arise. Till the end of 1941 a large number of concentration camps already existed on German territory. The Railway was of utmost importance for the process of murdering and every camp of death was set along the Poland railway. The Construction of the special camps started and Helmno, the first finished camp started operating in December that year. In the beginning the Jews were killed in mobile gas wagons. Everyone inside died from carbon monoxide poisoning. After Helmno, such objects were installed in Velzec, Sobibor, Treblinka, Maidanek and Aushvic. These six Polish camps became industrialized killing centers, where around 4 million people were murdered. In these camps there wasn't mandatory work selection, everyone was murdered. Between 1942 and 1943 the German railways transported

¹²⁾ M. Gilbert, 2002

¹³⁾ Adolph Hitler, *My kampf*, Skopje, 2006

people from all over Europe to their deaths. Jewish men, women and children were transported into open wagons or closed vehicles without any food or water for the whole time of their trip. The people had to stand or sit one on top of another and even on top of the ones who died during the trip. At the end of their trip the Jewish people worked, were starved, or were tortured or murdered with medical experiments. On the second of May 1945 Berlin surrendered to the Red army. The war was over, the systematic killing of 6 million Jews also saw its end. But its echoes can be heard in the present. Too much blood was flown till the eight of May when the end of this story and the tragedy of 200 000 survived people of the ghettos, camps and marches of death, was marked. Just like Dr. Zalman Greenberg, who managed to survive the ghetto in Kovno, would say to the survived ones who even after a whole months after the liberation, still lived in the cabins in Dachau: “Hitler lost all the battles, except the battle against the helpless and unarmed men, women and children.”

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The development of the traditional procedures for international protection after World War Two had a huge influence on the global awareness for the human rights. The holocaust provided such a large change in the way of thinking, which led to huge changes in the international system of human rights. Up till the World War Two, the international law didn't regulate the manner of acting of the sovereign states towards their citizens. The International Law regulated the way of treatment towards the war prisoners, their protection from torture, but regarding the way the state treats its citizens, there weren't any mechanisms, even when it imposed genocide against them, it was impossible to act from outside. The holocaust, when such genocide took place caused a new way of thinking for the principle of invulnerability of the state sovereignty. ” The holocaust is a machinery for systematic discrimination and extermination, that was carefully planned by the state and pointed at its citizens, because of their ethnic or religious affiliation, sexual orientation, political belief... The holocaust was a national politics of discrimination, fascism and racism. “¹⁵

Given that reason it was unsupported to prosecute the Nazis for the war crimes, not for the crimes they committed to their citizens. From then on, The United Nations fight for prioritizing the human rights, before the principle of the state sovereignty, and this fight lasts till present. The present result is “.unified universally recognized system of values... The focus on the human rights is pointed at the lives and dignity of the humans. The dignity of a person is impaired when it is subjected to torture, forced to live in poverty or slavery.”¹⁶

¹⁴) M. Gilbert, 2002

¹⁵) M. Nowak, *Introduction to the international human rights regime*, Martinus Nijhoff Publishers, 2003

¹⁶) M. Nowak, 2003 p.2

The Armenian genocide

The holocaust may be the most horrifying act and the most massive without competition, but it was far from being the only act that occurred in history and has all the elements of the international crime of genocide. A sufficient example for illustration of the horrifying elements of itself is the Armenian genocide better known as the Huge massacre which occurred before the international public to recognize the sole criminal act of genocide. The Armenian slaughters or the Huge massacre happened in the period of 1894 – 1896 when mass murders of the Armenians occurred in order to suppress the Armenian National Movement in the Ottoman Empire. The High Gate was obliged to implement “without any postponing, bigger improvements and reforms required from the local conditions in the areas populated by the Armenians, and to provide safety from the Cherceess and Kurds”.¹⁷ In 1880 the Great States, responsible for supervision on the implementation of the agreement (Russia, Austro – Hungary, Germany, Great Britain, France and Italy), called on the implementation of this stipulation by Abdul Hamid II, which didn't show any results. The administrative – territorial division of the Western Armenia was done in such manner that the Armenians became minority in all four of the vilayets where they lived, in Van, Erzurum, Bitlis and Diyarbakir, and the violence from the Kurds feudalists proceeded having the support of the local authorities. In the beginning of the 90s an Armenian revolutionary organization was founded. The repressions escalated in August 1894, after the failed uprising of the Armenians in the area of Sasun. In August 1896 group Armenian revolutionaries took over the building of the Ottoman bank in Constantinople requiring an implementation of the non-fulfilled reforms. As a respond to this action an exile of the Armenian community in town has begun, and the repression transferred into other parts of the Empire. The number of the victims reached 300 000.

Steps of the genocide development and efforts for its prevention

The theoretical law and political science, through many of its findings and reasearches in the period from the appearance of the genocide itself like an international criminal act till today, has noticed a development of the genocide in eight phases:

- **Classification** – People classify in „us“ и „them“. The main preventive of this primary stadium is developing universal institutions which surpass and evades the de facto classifications.
- **Marking** (symbolisation) – Along with hate, towards the members of the affected group, different markings and symbolisms can be imposed,

¹⁷⁾ Art. 61 from the Berlin Agreement, Berlin, July 1878.

- against their will. In the name of the fight against the marking, the symbols of hate and the hate speech as well, can be legally forbidden.
- **Dehumanisation** – With the dehumanization itself, the normal human hate against killing is evaded and elapsed, in order to justify the horrifying act.
 - **Organizing** – The genocide is almost always organized. Special military, paramilitary and police units are often trained for such intentions and plans. In order to suppress this stadium, the organization should be legally forbidden.
 - **Polarization** – The groups who stand behind the hate speech and are responsible of the hate as a whole, emit polarization propaganda. The preventive can be successful by using a certain protection of given peace leaders and organizations for human rights protection.
 - **Identification**– The victims are often identified and separated from the majorities because of their ethnic or religious differences and affiliations. The importance of the fight against genocide must be clearly specified in this stadium and there should be active public participation against it.
 - **Extermination** – In this stadium, only rapid and emergent, and powerfull military intervention can oppose to and stop the genocide. Active and secured areas or corridors for evacuation of the fugitives must be established with the help of heavily armed international protection.
 - **Negligence** –The perpetrators of this international criminal act decidly neglect that they have committed any crime. The only answer to the negligence is a certain punishment before the eyes of the international public, and before the international criminal courts or before the national courts.

Conclusion

In relation to the fact that humanity, or a certain nation, race, ethnic group, has a very big problem with covering the tracks of and hiding it from the eyes of the world wide public when such criminal acts occur. They can not face the large medium's aggression and curiosity, the strong attacks and pressures for more efficient sollutions of the problems and the legal consequences created by the international criminal acts. Therefore, it is necessary to be very thorough, patient in order to prove the genocide in its true form, qualified as such and quantitatively persistant.

It is very important to detect the genocide using clear and irrefutable evidence, in order not be dismissed, demanted its true values as a fact, and not as an imaginary statement. It is undoubtedly true that the genocide, with all its elements, represents a term in the international criminal law, that must be observed sainly and actively in every way, both from theoretical and practical and from scientific, sociological, historical and many other aspects.

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