

AN EVALUATION OF GENOCIDE-THE GENOCIDE CRIME

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ABSTRACT

Genocide crime was through the history of humanity. Genocide crime is known as a crime of crimes, and internationally wrongful act. Because crime's intent is to destroy group of people in whole or in part. Unfortunately, this crime is continuing with increasing and becomes one of the main crimes of nowadays. Therefore there is a constant need to deal with this crime. This crime needs to be seen as a big problem in the world and to be taken as a interdisciplinary crime. It is obligation for international community, international organizations and law to take more active role in this field as well. This crime has a specific challenges for a conviction. Genocide Convention should be more wide-reaching, especially about some crimes, committed to acultural and social groups. State responsibility for genocide must be involved in national legislations, without exceptions.

This study provides reflections on Genocide Convention adopted in 1948, the genocide trials and implementations, punishing genocidaries, evaluating the genocidal situation.

Key words: Genocide, Genocide Convention, International Law, Court Cases



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1. INTRODUCTION

During the history the genocide crime is based on the religious papers, with a lot of examples as a Egyptian pharaohs against Jews, on the Middle East against the Muslims, cases in North and South America, India and examples from near past as Cambodia, Bosnia and Herzegovina, Ruan-da (Drino, Londrc:2016:175). Currently there is a frightening example of Arakan's Muslims in Burma. The crime of genocide caused substantial damages to humanity. Because of that, this crime needs to be examined by large number of researchers and theorists.

According with the recent changes, there are various different concepts of genocide. Some of examples are: the urban crime (urbicide), the environmental massacre (ecocide), the political crime (politicide), the female massacre (femicide), etc.(G. Basic, 2015:102-105).

Considering the future tasks for national and international law which per-cious genocide as a crime, it is important to underline the fundamental and universal duty of law which sees genocide as a crime. This task is to limit human behavior in accordance with organizational or legal system of consequences.

Father of the Genocide Convention is the Polish-Jewish jurist *Raphael Lemkin*. Lemkin remains obscure in the history of international law. For the evolution of the genocide concept therewere discourses, one was a so-cial ontology of "groupism" prevalent in the Eastern European context in which Lemkin was raised. The second was the western legal tradition of international law critical of conquest, exploitative occupations and aggressive wars that target civilians (A. Dirk Moses, 2010:22).

Genocide crime was declared as international crime by the General As-sembly of the United Nations with Convention on the Prevention and Punish-ment of the Crime of Genocide (so called Genocide Convetion) adopted on 9 December 1948(M. Koca: 2010:7).

Article 2 of the Genocide Convention provides list of acts which might to lead genocide. (UN:1948).

1.Killing members of the group; 2. Causing serious bodily or mental harm to members of the group; 3.Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; 4. Impo-sing measures intended to prevent births within the group; 5.Forcibly trans-ferring children of the group to another group.(UN:1948).

The Convention genocide has a three specific elements. First one is group (national, ethnic, religion, national groups, but social or cultural groups are not included. Second one is list of acts in Article 2 and *dolus specialis* – special intent to destroy a group. Mens rea and special intent to destroy a group are looked at separately. All of the acts has a distinct consequences. For example forcibly transferring children of the group to another group is typically biological genocide.

Genocide is a crime based on “dehumanise of the victims.” So in this crime, the victim is not targeted because of his individual characteristics or character, but just because belongs to a group (B. Petrovic, D.Jovasevic, 2010: 235).

Customary rules of genocide impose erga omnes obligation, furthermore, those rules now form part of *ius cogens* or the body of preemptory norms; it means that states may not be derogated from these rules by international agreement (G. Getsadze, 2010:4).

The definition of genocide in Article 2 of the Convention, was unchanged adopted by international court organization such International Criminal Court for Rwanda, the International Criminal Court for the Former Yugoslavia and most recently in development of genocide as a legal norm has been establishment adds the elements of crime of the International Criminal Court Statute adopted at the 1998 Rome Conference.

The influence of the favorable atmosphere created by the duties of the Nuremberg and Tokyo courts, was asscelator for establishing a permanent criminal court (C. A. Ekşi: 2004:4). The proceedings of the former Yugoslavia and Rwanda Courts, made a very good contribution to the reasoning of genocide crime.

One of the element for sucesful international criminal law are the effective santicons and their complience for crimes such as genocide, crimes against humanity and war crimes that profoundly affect the international community (Y.Aksar, 2003:163).

The importance of the Genocide Convention probably can be found not so much in its contemporary potential to adres satrocities, something that is largely superseded by more modern texts, but historic contribution to the struggle for accountability and the protection of human rights (W. A. Schabas, 2010:34)

A.Weiss-Wendt defines genocide as intricately linked to the idea of the modern state, despite a body of scholarship that questions that link. Non – state actors such as radical political parties or armed militias are usuallty

incorporated into the governing structure and therefore rarely perform on their own. The state may deliberately use them as proxies to obfuscate the decision-making process and thus to shift responsibility for the crimes committed.

2. METHODOLOGY AND SCOPE

In this study literature research and court decisions were examined. Study does not include any empirical research methods. The research is based on the Genocide Convention, other documents adopted by the United Nations. Besides the other documents, international courts cases related to this crime will be analyzed. Study will be focus on the limited number of cases. After that will be made general assesment of the genocide crime.

3. AN ANALYSIS OF GENOCIDE

Genocide was drafted as a crime under international law, not as a crime against international law in its draft and contractual texts. This distinction is very important. Because it is organized as a crime under international law, it reveals the responsibility of natural persons. If it had been regulated as a crime against international law, it would not be possible to impose any liability or accusation on the individual, since the natural persons were not considered to be the subject of international law. Because, in developing international law, although there are trends in the way that real persons become international ones, the international legal personality of real persons is not fully accepted yet. For this reason, the act of genocide is organized as a crime according to international law, and on this account, real persons will be able to avoid punishment.

The problems that constitute the genocide's essence transcend the consideration of the fate of individual victim groups or a particular perpetrator-victim relationship. Alleviating all of these problems, even if not eliminated, depends on the further development of international law, which constitutes the basis of all human rights, including the rights of potential or genuine victims of genocide.

Genocide crime compared to other international crimes, has a unique and special character. This means that the genocide crime is different. Establishing a pyramid-like hierarchy among international crimes and placing genocide on top of the crime may be disrespectful to the victims first of all to privatize the victims' sufferings according to legal principles (C.Fourent, 2007:1).

It is also a fact that the crime of genocide is an act based on the destruction of groups of people, which makes the existence of mankind in danger. Since a certain group is aimed to be removed from the world, that means humanity and civilization as a whole will be destroyed (Tezcan, Erdem, Önok, 2006:51).

4. GENOCIDE IN THE TRIAL

By the time genocide was applied for the first time by international criminal tribunals, courts found themselves confronted not only by the weighty historic legacy that marked its inception but also by the range of emotional and political connotations it had been charged with since (T. Forster, 2012:7)

The Nuremberg and Tokyo Courts are the first such courts to be established in this way and have set an example for subsequent judgments and for the establishment of other courts. In fact, when the authorities do not apply within the scope of a coherence in the case of a series of mass murders that have reached the highest point of the genocide, the unpunished criminal group can obtain the impulse necessary to repeat the crime against the same or a new victim.

Ad hoc courts are very important for international criminal law. Some of the cases like Ruanda Court *Akayesu Case* which was a first judicial decision for a genocide crime by an international tribunal, that decision forcibly transferring children of the group to another group as act is not only taken, at the same time threats of the forced transfer are evaluated (V. N. Akün:2004: 63).

Examples of cases contribute to the understanding of the material element (actus reus) also. It is clear that, membership responsibility in the group is not sufficient for this position to be established alone. Some actions

according with plan and realizing must be carried out. Here direct and indirect participation is sufficient (Cryer, Friman, Robinson, Wilmshurst, 2009:306).

During the international trials, courts taken into account that people were killed, apart from perpetrator's special intent to destroy (T, Alpyavuz, 2009: 55).

It has been argued that in the genocide cases the level of the spiritual element expressed as special intent must be "dolus specialis". In fact, some writers claim that mens rea is both general and special, and some writers argue that special intent is a separate element. In this regard, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunals for Rwanda also stated that the mens rea was a purely intentional act, not a separate element of private custody.

The Cambodian case shows that the destruction intended for such groups not covered by the current definition does not necessarily differ in its quantitative or qualitative dimension in comparison to the destruction intended for groups that fall within the enumerated group types. In terms of the damage intended and caused there is little to differentiate between the treatment of groups that fall within or outside the definition of the crime. Yet, the legal qualification strongly differs.(T. Forster, 2012: 223).

Many interpreters of the crime of genocide have foreseen the crime of genocide as a plan, or at least a joint activity, through which the criminally involved individuals or groups participate through their relations. Contrary to this view, ICTY in case the Prosecutor vs Goran Jelusic noted: "that existence of a plan or policy, is not legal ingredient of the crime". (Jelusic Case No:IT-95-10-T:1999:48). But sometimes existence of plan or policy are required(A. Casesse, 2008:140).

If the group destroyed evidences are unnecessary. If one of the acts constituting the crime of genocide is proved to be accompanied by a special intent element, the perpetrator can be tried and punished for the crime of genocide (Mitrovic Case No:-X-KR-05/24-1: 2009).

When the crime of genocide is tackled, there is also evidence that the person charged with the intent to destroy a criminally committed group is one whose intent is to destroy the national, ethnic, racial and religious groups (Trbic Case No: -X-KR-07/386:2010).

Ad hoc courts have taken the term killing synonymously with killing or registered murder (there is also an area left for intentional homicide, as the saying that killing criminal elements may change by causing death)(W. Schabas, 2009:98).

International criminal courts need to make decisions based on compelling legal arguments. Applying general principles to law is an effective way to strengthen legal causality (F.Radimondo, 2008:74).

5. STATE AND INDIVIDUAL RESPONSABILITY IN CRIME OF GENOCIDE

The rapid development of international criminal law, its institutions and the resulting jurisprudence have initiated a more conscious approach to international crimes in general and genocide, in particular (T. Forster, 2012: 221). The international law has established mechanisms, which are helpful for invoking state responsibility.

Responsibility of individuals and their punishment for international crimes became one of the fundamental principles for responsibility for internationally wrongful acts. The “shield” of state was taken from individuals. For international crimes both state and individual become equally responsible (G. Getsadze, 2010:70).

Even though the crime of genocide is seen as possessing characteristics of a collective crime, criminal responsibility for it can be attributed to individuals.

For instance, from practical perspective, individual responsibility may influence subsequent determination on state responsibility. Fact, that individual responsibility can influence and lead to state responsibility, does not mean that responsibility of the state for genocide might be proven without proving individual liability of this crime (G. Getsadze, 2010:9).

In the *Gelisic case* about the existence plan or politics of genocide, Former Yugoslavia Court stated that individuals' crimes of genocide would occur theoretically possible, without having to be organized or planned by a state or similar entity(Deđirmenci,2007:97).

For example, a state is responsible for an act of genocide committed by its de jure organs, say a military unit, even if these organs act ultra vires or in contravention

of instructions.⁸² In such a case the state leadership would not possess genocidal intent – far from it – but the state would still be responsible for the commission of genocide. The issue does get more complicated when we are dealing with de facto control as a basis for attribution, which will be dealt with in more detail below, but the same principle still applies. It is the fact of control that is dispositive, not any shared intent, the proof of which would be even more difficult than establishing the individual criminal responsibility of the direct perpetrators (M. Milanovic, 2006:568).

Unfortunately, the International Court of Justice developed such a high threshold for state responsibility that it has been considered a pyrrhic victory. It only covers the most serious acts of state responsibility and requires a very high standard of proof. The Court limited itself to an analysis which heavily drew from international criminal law when it considered the violation of the Convention. It dealt with state responsibility, not with criminal responsibility, but factually applied criminal law standards and thereby missed part of the obligation under the Convention (A.Seibert, Fohr, 2010: 258).

6. CONCLUSION

When we deal with the latest developments, the Genocide Convention has a some deficiencies. This means that is need to make some additions to this contract by United Nations. Such as culture crime and political crime can be good examples.

The Genocide Convention restricted the concept of genocide to the destruction of “national, ethnic, religious and racial” groups. The Statute of International Criminal Court reproduced this definition. Many states have used this definition in their national legislation, others have changed the definition of genocide in their national legislation, making it too broad or too narrow in response to international law. First, many national laws have expanded the groups to be protected; for example, political groups, social groups and various other groups that are not included in the convention.

Secondly, several states have broadened the category of genocide protection so that it can be defined according to criteria of choice. Finally, there are also states that do not extend or even narrow the definition of genocide in their national legislation. Some examples like Bolivia removed racial groups from the genocide act, El Salvador and the Czech Republic ethnic groups and Nicaragua removed racial and nacional group.

This means that Convention should be more wide-reaching, but some of

the more crucial points like groups etc. Must be forbidden for removing from Convention by the states in their national legislations.

The genocide is a matter to be dealt with by different sciences. According to encountered events this kind of crime can not be limited with one science. Regulations about genocide on the international level have not been effective enough. Recent observations in Bosnia and Herzegovina, Rwanda and the latest in Arakan confirm this finding. For this reason, the UN Genocide Convention needs to be expanded with new provisions. For example, ethnic cleansing should be considered as a crime of genocide.

Genocide convention is very important document for state responsibility. This directed for International Criminal justice and his responsibility of the states for genocide. *It was deficient because ICTY and ICTR statutes involve just individual criminal responsibility.*

Especially crimes like genocide, committed by individuals or the state to international courts and jurisdiction need to be empowered. State responsibility for genocide is very problematic, still states are able to claim against other state, which has committed genocide.

Justice is the basis of the freedom, welfare, prosperity and equality. But to get justice is a possible just with fair trial. It's the best instrument for stopping this crime of crimes and destroying of the groups and civilizations in the whole.

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