

Analysis of the Crime Of Genocide

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Abstract: The emergence of legal rules governing criminal liability for genocide represents the natural response of society in the face of criminal phenomena that can not be categorized otherwise than atrocities. Punishing those responsible for committing these abominations is the result of strong consecration of fundamental principles of international humanitarian law. Regulations concerning the methods and means of warring the war, limiting or prohibiting the use of certain types of weapons and ammunition and protection of victims of armed conflict is precisely the meaning of prevention of genocide. Starting from the basic principles of international humanitarian law, the international community has expressed a desire to define the concept of genocide rigorously and clearly as possible, thus being created the prerequisites for the criminalization of actions and deeds circumscribed to the genocide phenomenon with which humanity faced throughout history. Studying genocide, a serious violation of human rights, can help us understand where that offense and other acts of mass violence are likely to occur and may lead to warning signs of impending violence and can suggest ways such acts can be prevented.

Keywords: genocide; crime; human groups; massacre

1. Introduction

The twentieth century is considered the genocide century as in the last hundred years, were killed more people than all wars throughout history, with an estimated figure of over 170 million people. As the World History Institute in California, USA, the statistics of the twentieth century genocide are shocking:

- 1901-1910: 65,000 Boers, 325,000 Armenians, 140,000 Greeks, 45,000 Zulu 15,000 Macedonians, Romans 10,000;
- 1911-1920: 16 million soldiers, 6 million civilians;
- 1921-1930: 15 million Russians;
- 1931-1940: five million Russians, Chinese 2 million, one million Poles, 350,000 Spaniards;
- 1941-1950: 52 million in Europe and Asia;
- 1951-1960: 60 million Chinese, Koreans 1 million, 2 million in the communist countries, 550,000 in India, 500,000 Vietnamese, 450,000 Christians in Africa;
- 1961-1970: 132,000 in Vietnam, 125,000 in Ethiopia;

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- 1971-1980: 160,000 in the Middle East, 350,000 in Africa;
- 1981-1990: 150,000 in Kuwait, 100,000 Christians in Sudan;
- 1991-2000: 350,000 Iraq 120,000 Indonesia 95,000, Iran.

Although the twentieth century is considered by the literature as the “age of genocide”, we can say that such mass killings have existed throughout history and only have developed ways of committing, with the very human development (massacre Indian population of the American continent, that of Australian Aborigines), sometimes present over large periods of time, whose magnitude significantly exceeds the defined period of the twentieth century.

But the novelty brought by the twentieth century is given by the evolution of technology used by default for committing genocide, thus materializing the systematization of the offense.

For example we can mention the following: the killing of Armenians by Turks in successive innings in the intervals 1894-1896 (100,000 victims only in 1895), 1906, 1915 to 1923 (an estimated total figure of 1,500,000 victims), killing the Herero tribe by German colonies in West Africa during the period 1904-1911, considered the first genocide of the century.

Genocide acts have continued throughout the century with starvation of Ukrainian population (1932-1933), the Holocaust (1933-1945), the extermination of gypsies (known Porrajmos, 1939-1945), genocide in Katyn - the murder of approximately 22,000 Polish prisoners by the Soviets (1940), crimes committed by the allies - the bombing of Dresden and Hiroshima, Indonesians massacres (1965-1966), crimes against the population Ibo of Biafra (Nigeria, 1967 to 1970), the genocide in Bangladesh (1971), in Burundi (1971), Cambodia (1975-1979), Sudan (1983-present), Bosnia (1992-1995), Rwanda (1994).

Genocide occurs on the background of the war between states (Armenian genocide - in the First World War, the Holocaust, Porajmos - in World War II, genocide in Bangladesh - the war of independence with Pakistan, genocide in Bosnia - the Bosnian Serb conflict) or the background of civil war (genocide in Biafra, Sudan and Rwanda), and in the absence of armed conflict on grounds related to other criteria (the Ukrainian genocide, Burundi, Indonesian massacres). (Candea, 2008)

2. The Crime of Genocide

2.1. Definition of Genocide

In 1933, the Polish lawyer of Hebrew origin, Raphael Lemkin (24.06.1900-28.08.1959) made a presentation to the International Criminal Law Conference, organized by the League of Nations in Madrid, where he prepared an essay on the “crime of barbarity” (Crime of barbarity) as a crime against international law.

The concept of this type of crime, which later evolved into the idea of genocide, was based on the Armenian genocide and determined by experience of massacred Assyrians in Iraq in 1933 (SIME massacre).

Raphael Lemkin knew notoriety for creating the term genocide, the word “genos” (Greek = family, tribe or race) and “caedere” (Latin = killing). He first used the word in the paper entitled “Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress” (1944) and defined the term as “*the destruction of a nation or an ethnic group.*”

Following his constant effort, the famous Polish lawyer did legal qualification of genocide as a crime under international law, the initiator of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 09 December 1948 by the United Nations General Assembly.

According to the eminent jurist, the concept of genocide requires the inclusion of suppression action based not only on ethnic groups criteria, but also on political and economic ones, including explicit population decimated by starvation in Soviet Ukraine (1932-1933). But the USSR did not accept the definition of genocide to include these categories.

Institute for the Study of Genocide (New York State University) offers another definition of genocide: is the practical realization of intent - regardless of its success - to kill in its entirety any national, ethnic, racial, religious, political, social or economic, as these groups are defined by the perpetrator, and regardless of the means used.

The famous French philosopher, representative of existentialism, Jean Paul Sartre, whose real name Charles Aymard Sartre, Jean-Paul (born June 21, 1905, Paris, d April 15, 1980, Paris) stated that “every case of genocide is a product of history and bears the imprint of the society that gave birth “in the statement” on Genocide “during the second session of the Bertrand Russell Tribunal for war crimes in Vietnam, held in November 1967 in Denmark.

Note that UN Resolution no. 96 of December 11, 1946 include political reasons in the definition of genocide also (called politicid), but these reasons will not be included in the final definition, after the changes brought by one of the editors of this final version - the USSR. United Nations General Assembly, in its resolution no. 96 (I) of 11 December 1946 stated that genocide is a crime under the law of nations, contrary to the spirit and aims of the United Nations and the civilized world condemns.

Although genocide was initially regulated as a subset of crimes against peace and security of mankind, the offense has gained recognition as a distinct crime on December 9, 1948, when it was adopted Convention on the Prevention and Punishment of the Crime of Genocide, within the UN General Assembly.

Among the positive differences made by the Convention, we can include: defining the crime of genocide, the prohibition of genocide both in peacetime and war, attracting both offender accountability and the State whose authorities are involved in committing this crime, and to penalize other related acts such conspiracy, complicity etc.

On the other hand, we can not overlook the shortcomings of the Convention: lack of cultural genocide and political inclusion in the definition of crime, lack of definition of protected groups and the impossibility of applying the Convention because the courts should apply the law in the matter are the national ones, belonging to the state who committed genocide. An international criminal court, which has not existed for half a century or more States Parties should address the UN to act "*as they see fit*", according to the United Nations Charter. (Candea, 2008, p. 71)

2.2. Genocide - Comparative Aspects between the New and Former Criminal Code and Criminal Law

The crime of genocide has been stipulated in the Criminal Code in art. 356, Title "crimes against peace and humanity." In the current penal code title's name is "Crimes of genocide, against humanity and war" and the stated purpose in the explanatory memorandum that accompanied is to ensure full compatibility between the provisions of the Rome Statute and its provisions.

It must however also mention that the texts included in the current Criminal Code is not limited to a translation of the Statute, but some changes of substance and form were made also. Thus, in addition to the text of the Statute of the Court have been considered the following:

- a) additional incorporation of the provisions of acts of international law (in particular the Additional Protocol I to the Geneva Conventions and Protocol II of 1999 to the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954);
- b) reporting to the elements of crime (according to art. 9 of the Statute), the Preparatory Commission act approved on 30 June 2000;
- c) reporting to international case law post-1998, which could not be incorporated into the Statute.

Another difference from previous legislation is that the structure of the title regarding crime of genocide, crimes againstt humanity and war. If the previous Criminal Code didn't have any subdivision of title, the current Penal Code title contains two chapters. Thus, Chapter I contains specific rules criminalizing crimes of genocide and other crimes against humanity, and Chapter II is composed of rules criminalizing war crimes.

Regarding the crime of genocide, in consideration of the obligations assumed by Romania by ratifying the Convention on the Prevention and Combating Genocide of 9 December 1948, the text of Article 438 of the Penal Code resumes without substantive changes, the text of Article 356 of the former Penal Code.

The proposed changes concern only the form, for better correlation with art. 6 of the Statute of the International Criminal Court.¹ Thus, it was replaced the notion of “community” with the “group” favorite in recent international regulations and it was stated in lit. c) the possibility of destroying the group to be total or partial. The current form of the text - “(...) likely to lead to physical destruction” - is misleading and may suggest that only total destruction of the determines the retention of this crime. In addition to the provisions of the Statute, according to the draft criminalizing understanding [para. (3)] and incitement [para. (4)] the crime of genocide, incrimination required by Art. 3 b) and c) of the Convention of 1948.

2.3. Analysis of the Crime of Genocide

The new Criminal Code includes in Title XII, Art. 438 crime of genocide and the applicable penalties, as follows:

2.3.1. The legal content

Genocide (1) Committing in order to destroy, in whole or in part, a national, ethnical, racial or religious group, one of the following acts:

- a) killing members of the group;
- b) physical or mental harm to members of the group;
- c) subjecting the group to conditions of life that leads to physical destruction in whole or part thereof;
- d) imposing measures to prevent births within the group;
- e) forcibly transferring children belonging to a group to another group, punishable by life imprisonment or imprisonment for 15 to 25 years and deprivation of certain rights.

(2) If the facts of par. (1) is committed in time of war, the penalty is life imprisonment.

(3) Conspiracy to commit offense of genocide shall be punished with imprisonment for 5-10 years and deprivation of certain rights.

(4) Incitement to commit the crime of genocide, directly committed in public is punishable by imprisonment of 2-7 years and deprivation of certain rights.

The first observation that must be done is that the criminalization of genocide is in line with Art. 6 of the Statute of the International Criminal Court, according to

¹ Ratified by Law no. 111/2002 (Official Monitor No. 211 of March 28, 2002).

which the crime of genocide means any of the acts listed below committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, namely:

- a) killing members of the group;
- b) serious harm to the physical or mental integrity on group membership;
- c) subjecting the intention of the group conditions of life calculated to entrap \rightarrow succeed to divest total or partial physical destruction;
- d) measures to prevent births within the group;
- e) Forcibly transferring children belonging to a group to another group.

2.3.2. Preexisting conditions

a). The object of the crime, a) specific legal object is those social relations that ensure the existence and coexistence of peoples and social groups formed along national, ethnic or religious.

The crime of genocide includes content criminalizing acts as crimes against persons (murder, grievous bodily harm, unlawful confinement) and, therefore, covers the legal side of social relations on the right to life, physical integrity or health etc.

The essential difference results, on the one hand, from the purpose of the conduct, destruction in whole or in part of a community or a national, ethnical, racial or religious group, and on the other hand, that the person against whom these facts are committed, are not taken into account in their distinct individuality, but as members of that community, or of that group.

The adjacent legal object protects the social relations of life, body or health of the members of group. Acts of murder or serious bodily injury or health group members are the means to commit genocide.

b) The material object is the body of persons against whom the offending action is moving. There is also the view expressed by some authors who believe that genocide does not have a material object, but can not be admitted.

A. Subjects a) Active subject of this crime can be anyone. The law does not request a special quality, therefore the person can be within the group or outside it.

It also does not matter if the person acting on behalf or at the instigation of or with the consent of another person or the order of the authorities. Participation is possible in all its forms. In the penultimate paragraph, the law provides a form of plurality established, consisting of the understanding of more person to commit the crime of genocide, and in the last paragraph legislature sanctioned a form of incitement committed publicly and directly to the commission of this crime.

The literature has expressed the view that the authors of this crime must have a special quality. The special condition, the quality of which must meet offenders is to be employed in a state structure – on the various hierarchical levels - or to work at the order of an employee such as this. (Diaconescu, 1991, p. 109)

b) Passive subject is always collective, represented by a national, ethnical, racial or religious group, submitted to actions targeting its partial or total extermination. We could define a whole group of people brought together (on a regular or temporary) based on a community of interests, concepts and so on, which have caused social relations and subject to the same rules of behavior.

By group we mean a social group organized by certain political or economic criteria, which lead his existence in a certain space, regardless of its size and its recognition by the state structures or other similar structures. By default there is a secondary passive subject, adjacent, represented by the person subject to immediate actions criminalized by law.

The key challenge lies in determining the genocide should refer to the concept of the group as a victim, taking into account, however, the four categories of groups established by the Convention, namely national, ethnic, racial and religious. (Boroi, 2011)

In this approach, the decision of the International Criminal Tribunal for Rwanda (Akayesu case) is undeniable progress since it establishes that protected groups should not be limited to the four categories, but include “*any group permanent and stable*”.

2.3.3. Constituent content

A. The objective side, a) The material can appear in several ways, namely:

- *Killing members of national, ethnic, racial or religious group.* Murder as a way of committing genocide has the meaning given that term in art. 188 NCP. By killing a person means any material action which results in the death of a man.

- In a second way, genocide consists of *physical or mental harm to members of the group.* In light of the new provisions, injury is the fact of assault and other violence that caused any of the following: disability, injuries or damage to a person's health, aesthetic severe and permanent injury, abortion or endangering a person's life.

- *Submission of the group to life conditions that leads to total or partial physical destruction thereof.*

Examples of this would be situations where group members are subjected to inhumane conditions of food, clothing, housing or obligation of making overly

strenuous work, healthcare failure or failure of heat in homes etc.. The crime of genocide will be retained in this way regardless of whether the action was total or partial destruction.

- *Taking measures to prevent births within the group* is another way of achieving material element. Specifically this can be done through actions like sterilization, castration, prohibition of sexual relations, forced abortions etc. These facts are particularly dangerous, since a group can not subsist if they impede the natural process of reproduction. While repeating these actions may result in the extermination of the group. (Boroi, 2011, p. 719)

- *Forced transfer of children belonging to a group to another group is another option to commit genocid.* By transfer we understand the action of transmission, transfer, transshipment, travel from one location to another.

In these situations we are all in the presence of indirect method of destruction of the group, but this time by deploying or disperse the younger generation. Transferring must target children, those parts of the group that are likely to be more easily broken from thier home. Transfer must be forced, against the will of the members of that group. (Boroi, 2011, p. 719)

Particular seriousness of these facts it is apparent from the very flagrant violation of the right to identity in terms national, ethnic, racial or religious groups of each individual and formed on the above criteria from which the individual belongs. In addition, the existence of the crime in the way that the act is required to regard more children, the transfer can be achieved gradually, but in the shown order. It was acknowledged in the literature that along action, the inaction may constitute material element of the offense.

c) Normally in these situations the causation must be proven.

In the last normative way the law criminalize the act of transfer of children, the immediate consequence resulting from the very materiality of the crime.

B. The subjective side. Form of guilt is just the direct intention, given that the acts described are done to destroy in whole or in part a certain group. Although the law does not require a specific motive, is generally known that such acts are committed for reasons relating to certain concepts or feelings of nationalistic, fascist, xenophobic, racist or religious intolerance.

2.3.4. Forms. Methods. Penalties

A. Forms. Usually the acts of preparation are not punishable, but when they take the form of agreement to commit genocide, the law considers distinct crime, incriminating them in art. 438 penultimate paragraph of the New Penal Code.

The attempt is punishable. The crime is consumed when the offense was made in one of the alternative ways to product the required result of the incriminating text.

B. Method. In addition to the five legal ways there is an aggravated way, in para. (2) which corresponds to the conduct in wartime.

C. Penalties. The penalty for the five normative ways is life imprisonment or imprisonment for 15-25 years and deprivation of certain rights. For the aggravated way, the only penalty imposed is life imprisonment. If the penultimate paragraph, punishment is imprisonment from 5 to 10 years and deprivation of certain rights, and for the last paragraph punishment is imprisonment from 2-7 years and deprivation of certain rights.

3. Conclusions

Past experiences in the field of genocide should be the true lessons of history, so that we can develop combating primarily by implementing strong action to prevent, namely by establishing specific roles and responsibilities of each state and international player in the field.

If we start from the term of humanity, as part of the expression that denotes the analyzed crimes and continuing with the most simplistic definition of the concept, that of the entire people in the world and the whole human race, we come finally to the common denominator which is the human being, that must be protected through legal norms of international law and criminal law.

Also, socially speaking, evolutionary process itself will be affected in the absence of individual defense as physical entity, based on the ancient concept expressed by the Greek philosopher Protagoras (b. 490 BC - AD 420 AD) that man is "the measure of all things" and quoting Leonardo da Vinci (born April 15, 1452, Anchiano/Vinci, Italy - died May 2, 1519, Cloux/Amboise, France) which states that "looked in his species and dimensions, a man is a human, i.e. a human animal".

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