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CRIMINOLOGICAL SPECIFICITY OF WAR CRIMES, THEIR DIFFERENCE FROM CRIMES AGAINST HUMANITY AND GENOCIDE



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SUMMARY

At the present day sometimes crime of genocide is practically described as a crime against humanity, and the latter is characterized as war crimes. Although some similarity does exist between these kinds of crimes, they have different peculiarities by their constituent elements. These peculiarities possibly may be linked with warfare, but it wouldn't be correct to bind them entirely with warfare. This difference can be found even in the charters of international criminal tribunals, particularly in various articles of Statute of the International Criminal Court: crime of genocide in Article 6, crimes against humanity in Article 7, and war crimes in Article 8 respectively.

Unlike war crimes, crimes against humanity and crime of genocide can be perpetrated both in times of warfare and peace. It's always important to distinguish the latter from war crimes.

Key-words: war, war Crimes, international crimes, genocide, crimes against humanity, International Criminal Court.

Target setting

The humanity is faced with a necessity of renunciation of wars. The states, as well as the specialists constantly seek the ways of establishment of the peace and security in the world. Though human beings strive to live a safe life, unfortunately, reality still proves it to be a dream. The conducted studies and surveys show that while some forces don't intend renunciation of

SPECIFICUL CRIMINOLOGIC AL CRIMELOR DE RĂZBOI, DEOSEBIREA LOR DE CRIMELE ÎMPOTRIVA UMANITĂȚII ȘI DE GENOCID

SUMAR

În prezent, uneori, crima de genocid este, practic, descrisă ca o crimă împotriva umanității, iar aceasta din urmă este caracterizată drept crimă de război. Deși există unele asemănări între aceste tipuri de infracțiuni, ele au particularități diferite prin elementele lor constitutive. Este posibil ca aceste particularități să fie legate de război, dar nu ar fi corect să le legați în întregime de război. Această diferență poate fi găsită chiar și în regulamentele tribunalelor penale internaționale, în special în diferite articole din Statutul Curții Penale Internaționale: crima de genocid la articolul 6, crime împotriva umanității la articolul 7 și, respectiv, crimele de război la articolul 8.

Spre deosebire de crimele de război, crimele împotriva umanității și crimele de genocid pot fi comise atât în timp de război, cât și în timp de pace. Este întotdeauna important să le distingem pe acestea din urmă de crimele de război.

Cuvinte-cheie: război, crime de război, crime internaționale, genocid, crime împotriva umanității, Curtea Penală Internațională.

war, they are even striking out the new and more dangerous types of it. In this case the human rights protection, protection of historic and cultural monuments, avoiding non-combat civilians to be victims of conflicts are receding into the background, all bounds are being gone beyond and the ways are being opened for new crimes. A part planning war uses the public and hidden war methods with more crafty ways, all the war techniques are accepted calmly. On the one hand progressive development of the international law, and on the other hand rapidly growing me-



nance of war and the humanity kept under constant fear. This paradoxical point has arisen in all periods of the history and paved the way for the international crimes damaging the interests and advantages of the governments.

Relevance of the research topic

The humanity and human being have always suffered from the wars, terror and other war crimes and it has never been possible to prevent completely those crimes. It is curious that the governments identify and recognize as an international crime the aggressive war, terror, genocide and crimes against humanity, and at the same time they enable them to be committed and directly make them. These crimes aren't possible to be committed without the finances and resources, so no wonder that they are conducted on a basis of the financial support and political plan of governments. Explanation and interpretation of these crimes which are close and similar to each other often cause the serious discussions and criticism. These crimes confuse even the international community being committed similarly in the different places of the world, and sometimes suggest a thought as if being run from the same center. These days there is a fear in the society that a threat to the peace and security created by harm caused to the humanity by the World War II may return at any time. In fact, the issues of responsibilities for the happened international crimes were identified and the judgments on them to punish the perpetrators were passed as well by establishment of the Nuremberg military tribunals after the war. However, the elements of war crimes, genocides and crimes against humanity hadn't been made completely by then and all the refinements in identifying the responsibilities of the perpetrators hadn't been examined, so afterwards the organizers faced the just criticism. Thus, the crimes a legal element of which hadn't been defined (for example, genocide, crimes against humanity) were interpreted as the war crimes. As a matter of fact it isn't estimated as a case obstructing a judgment of offenders; it's just that these international crimes are similar and so today many disputable and arguable points arise in connection with them. Sometimes a crime of genocide is identified as a crime against humanity, or the crimes against humanity are determined as a war crime in our days too. Though there are similarities between these crimes to some extent, they have the different specifications for the elements of crime. It is also possible that they have some ties relating them to wars, but it wo-

uldn't be true to say them to be connected with war at all. This difference is even specified in the charters of the international crime tribunals, in particular in the certain articles of the Statute of the International Criminal Court. Crime of genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8).

Conducted research level

The meaning, scope and overall examination of crimes against humanity and their interrelation with war crimes as well as comparison with the genocide as the grave violation of fundamental international law principles have always been the hot topic for scholarly writings. Detailed studies were conducted by A.Cassese, M. Bassiouni, S. Macedo, L.Huseynov, R.K.Mammadov and others in the area of post-Soviets adn Europe. Nevertheless, the current academic investigation is dedicated to the particular specifics of war crimes, their distinctive criminological features what differ them from other crimes committed during the armed conflict period and peace time which could play the role of updated scientific approach applied in international criminal law and international humanitarian law.

Research objectives

The term of „war crimes” is a general concept and means a violation of norms of the international humanitarian law applicable in armed conflict [11, p. 198-201]. In the light of above-mentioned, the current academic study follows the objective of defining specific aspects of war crimes what clearly differentiate them from other violations of international law principles and norms. Sometimes it is stated that war crimes cover only the acts established in the Geneva Convention for the Protection of War Victims (1949), but those acts embrace just a part of war crimes, the most dangerous and serious acts. And a common term isn't used in the international normative and precedent practice as well.

Main content

Article 6 of the Charter of the Nuremberg Tribunals uses an expression of “the violations of the laws or customs of war” in. Such violations include the followings:

- a) murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory;
- b) murder or ill-treatment of prisoners of war or persons on the seas;
- c) taking of hostages;
- d) plunder of public or private property;

e) wanton destruction of cities, towns or villages;

f) devastation not justified by military necessity; and other crimes.

According to these acts, war is actually waged between the fighting parties, but at that time the civilians not taking direct part in hostilities also experience violence, moreover, such acts occurred cause the elements of war crime as they aren't justified by military necessity. The specified acts can be considered the war crimes because they aren't justified by military necessity, war is actually waged between the fighting parties, but at that time the civilians not taking direct part in hostilities also experience violence and tortures.

Besides the Charter of the Nuremberg Tribunals, the norms related to the war crimes are represented in the Draft Code of Crimes against the Peace and Security of Mankind, Charter of the Tribunal for former Yugoslavia and Statute of the International Criminal Court.

The Charter of the Tribunal for former Yugoslavia includes two separate articles related to war crimes (Articles 2 and 3). The particular acts are listed under name of the grave breach of the Geneva Convention from 1949 in the Article 2, and under name of "the violations of the laws or customs of war" in the Article 3. This distinguishing is related to two parts of the international humanitarian law – the protection of the human right in armed conflicts (Geneva Law) and limits on the methods and means of warfare (Hague Law).

War crimes are a broad legal category that covers the grave breaches of the international humanitarian law in armed conflicts of both international and non-international character. Each of these violations is a certain criminal act and gives rise to international criminal responsibility [10, p. 145]. Therefore it is necessary to specify all elements of crimes included to this category to get a comprehensive view on war crimes.

The accurate list of war crimes is established in the Statute of the International Criminal Court. The war crimes committed in the non-international armed conflicts were also included into jurisdiction of the Court. Based on the Charter and provisions of the International Tribunal for former Yugoslavia, the Statute of the Court considers as the war crimes the acts committed in the armed conflicts of both international and non-international character. The war crimes are divided into four categories. Two of them are the crimes committed in the international armed conflicts, and another two categories are the crimes committed in the non-international armed

conflicts. It should be assumed as a progress in law that the acts committed in the non-international armed conflicts are also considered as the war crimes. The acts considered as the war crimes in the Statute are mainly the acts represented as the grave breaches in the Geneva Conventions and Additional Protocols to them. At the same time the acts not considered a grave breach in the international humanitarian law are also identified as the war crimes [7, p. 45]. For example, conscripting or enlisting children into the armed forces, transfer by the occupying power of parts of its own civilian population into the territory it occupies, deportation of the population of the occupied territory within or outside this territory are identified as the war crimes in the international legal documents. However, use of chemical, bacteriological and nuclear weapons, or unreasonable delay of repatriation of prisoners of war and civilians and attacks in knowledge causing injury to civilians and damage to civilian objects which are recognized as a war crime aren't represented in the Statute as a war crime.

Public danger of war crimes is characterized by appearance of a vague number of people making choice of a calling of getting a material reward in return for taking part in the armed conflicts and military operations, and destruction of many people not only from the military forces, but even from civilians of the hostile parties in a result of participation of those people.

According to the norms of the international law the civilians shouldn't be subjected to any violence as the military operations are conducted between the armed forces of the hostile parts. Acts of violence against civilians can't be considered an acceptable method for winning. Civilians shouldn't be attracted to take part in fights and they should be shown respect in all circumstances. If security of civilians requests the solid military considerations, an occupant state may carry out complete or partly evacuation through certain territory. During such evacuation the persons in custody can be transferred only within the occupied territories. It makes an exception when not possible practically. In this case the evacuated persons should be returned to their places as soon as the military operations are over in those territories. We consider that such shown cases has found practical expressions in some great events of the history and met negatively by the international community. Namely the barbarous acts committed by the armed forces of criminal character in the Nagorno-Karabakh and neighbored regions of conflict can be mentioned as an instance of it.



Concept of the crimes against humanity

Compared to the war crimes the crimes against humanity and crime of genocide occur both in times of war and peace. It is an issue of interest to distinguish from the war crimes the crimes against humanity when they occur under war conditions. For example, torture, deportation, enslavement, rape is both the crimes against humanity and the war crimes. In respect to attack of the hostile part against civilians it is considered as a breach of the norms of the international humanitarian law and causes an element of war crimes. As well as if a large-scale feature of the act is offered to interpret it as the crimes against humanity, obviously it won't be accepted as the crimes against humanity yet, because war crimes also have a large-scale feature. In this case, in which circumstances the acts committed in warfare is interpreted as the crimes against humanity?

In general, the objective element of crimes against humanity is too broad and it includes the various acts. According to the article 20 of the Draft Code of Crimes against the Peace and Security of Mankind, a prerequisite to consider a committed criminal act as a crime against humanity it must be committed in a systematic or large-scale form. Two prerequisite is requested to interpret any act as a crime against humanity [2, p. 410-418]:

- act must be committed „in a systematic or large-scale form”;
- act must be encouraged or led by a government or any organization or group.

A large-scale form of an attack includes the followings:

- political purpose intended against certain civilians;
- establishment of the parallel institutions to pursue such politics;
- attracting the high rank political or military official quarters;
- large-scale repetitive long-sustained in the same form act against certain civilians with a use of the strong financial, military and other resources.

The features expressing the large-scale actions aren't represented in the Charter of the Nuremberg Tribunals, but interpreting the committed inhumane acts as the crimes against humanity the Tribunal stated that terror politics undoubtedly carried out on a large scale. Contrary to it, intentional regular repetition of the similar crimes expresses a systematic nature. Carrying out of such plan or politics may be a ground to commit inhumane act regularly or constantly. To note that this request is also not provided in

the Charter of the Nuremberg Tribunals, but the Tribunal especially emphasized in its sentence that the committed inhumane acts are the integral part of terror politics and in many cases they have organized and systematic character.

A systematic nature includes some features:

- systematic nature is a certain action or ideology intended destruction, victimization or weakening of a certain community or society by representing a certain political purpose or plan;
- committing and repetition of a large-scale criminal act against a group of civilians or sequence of the inhumane actions connected with each other;
- preparing the significant public or special resources or use of them for military or other purposes;
- attracting the high rank political or military official quarters in preparation, organization and performance of a plan.

Representing a large-scale and systematic nature, crimes against humanity include mainly three forms:

Apparently, in execution of a plan prepared for committing the crimes against humanity it may be divergence of views between a group making decisions and a person or persons performing them. Of course, it shouldn't be understood as a defense to liability. Whereas this person has as a preliminary agreed to commit the crimes against humanity, and taken part in execution of some plans. If a person being a member of the criminal group has just taken part in making of the planned decision, but then hasn't taken part in any process, he is liable for planning such crime and not taking any step to prevent it though he knew about it to be executed.

Concept of the crime of genocide

We noted above that compared to war crimes, genocide carries a broader sense. It can be committed against citizens, foreigners, civilians or combatants. Genocide isn't limited by the strict requirements belonging to military necessity. The main difference is related to „a criterion of intent” that is an essence of crime of genocide [1, p. 318]. Thus, it must be intent to destroy in whole or in part a certain group to commit genocide. Although, it may be not achieved in the military operations as well.

Public danger of crime of genocide is characterized by destruction or creating a risk of destruction in whole or in part of any national, ethnic, racial or religious groups as a group. Crime of genocide can also be committed in both peace and war conditions like crimes against humanity.

International criminal responsibility of crime of genocide was firstly established in the resolution No. 97 of the UN General Assembly adopted in 1946. And its legal basis is the Convention on the Prevention and Punishment of the Crime of Genocide entered in force in 1951. According to the Convention, genocide expresses the acts intended to destroy in whole or in part of any national, ethnic, racial or religious groups. Reacting to the crimes occurred in the Second World War, the Convention interprets the followings actions as genocide:

- 1) killing of members of the national, ethnic, racial or religious groups;
- 2) causing serious bodily or mental harm to family members of such groups;
- 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- 4) imposing measures intended to prevent births within such group;
- 5) forcibly transferring children of the group to another group.

The same definition is also provided in the Statute of the International Criminal Court. Taking into consideration the above-mentioned we come to a conclusion that the direct object of crime of genocide is life and health of a national, ethnic, racial or religious group, and the national, ethnic, racial or religious groups appear for victim of such crimes.

Holding the discussion on the acts causing the elements of genocide, the Preparatory Committee of the International Criminal Court has come to some conclusions.

Firstly, an act causing the element of genocide is considered killing of members of the national, ethnic, racial or religious groups. This act includes the followings [3, p. 294-297]:

- one or more persons must be killed by offender;
- the killed persons must belong to certain national, ethnic, racial or religious groups.

The second act is considered causing serious bodily or mental harm to family members of such group. Causing mental harm shall be understood to mean performing acts intended getting serious mental diseases of the group members, destroying their abilities to think reasonably, and etc. This act includes the followings [3, p. 294-297]:

- a person committing the crime must cause serious bodily harm to one or more persons, influence mentally on them, and such actions must include inhumane or disparaging treatment with torture, violence or sexual actions, by not limited by them;

- such person or persons must belong to the certain national, ethnic, racial or religious groups;
- offender must have an intent to destroy a national, ethnic, racial or religious group in whole or in part.

The third act is considered the measures intended to destroy any group or groups in whole or in part. And this act puts together the following features:

- offender creates living conditions for one or more persons aimed at physically destroying of them;
- such persons or people must belong to the certain national, ethnic, racial or religious groups;
- creating such condition a person committing the crime must have an intent to destroy the people belonging to that group.

The forth act is considered forcibly transferring children of the group to another group. And this act includes the followings:

- a term of „forcibly” hereof means not only physical violence, but also threat of force and constraint (for example, threatening by violence, roughness, constraint, arrest, harassment, as well as the actions characterized as threatening or constraint against one or more persons by abuse of power or authority);
- the act means taking forcibly a person from a certain human group and giving to another human group. Transferring person must be under 18;
- a person committing the act must know that the transferring child is under 18.

The fifth act is considered the measures intended to prevent births within such group. The characteristic features for this act are the followings:

- executor impose the certain measures against one or more persons belonging to a national, ethnic, racial or religious group;
- executor of the crime must have an intent to destroy the people belonging to this group;
- marriages, sexual contacts must be forbidden between the group members, they must be sterilized forcibly, pregnancy must be forcibly aborticided;
- all the measures imposed must be intended to prevent births within such group. In just the same way this act is also a crime committed against a certain national, ethnic, racial or religious group and causing destruction of that group.

Genocide is a crime with material and formal element. The criminal acts like killing of the group members, causing serious harm to their health and mental ability for a purpose to des-



troy a national, ethnic, racial or religious group in whole or in part mean killing, serious harm to health and mental ability. Creating living conditions intended to destroy the group in whole or in part, preventing births within the group, forcibly transferring children belonging to the group to another group are considered as completed from the time of committing of such acts.

Such living conditions mean:

- deprive of the resources required for normal life (such resources could be the subsistence or medical support);
- systematic deportation from the place of residence (this act is a crime against a national, ethnic, racial or religious group and intended to destroy is as such).

Just like the crimes against humanity, crime of genocide also has an element of large-scale. But they shouldn't be equated. Namely this element is described from the several aspects. One of them is that the Legal Committee on War Crimes of the UN Commission considered in 1948 that the acts without large-scale character can't be accepted as a crime against humanity.

According to the Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide from 1948, genocide is an international crime and it includes the following acts:

- conspiracy for a purpose to commit genocide;
- direct and public incitement to commit genocide;
- attempt to commit genocide;
- complicity in genocide.

Each of the acts originating genocide is the deliberate, intended and volitional acts by its nature. No wonder that an individual won't commit these acts if he doesn't know their specific consequences. These acts can't be committed accidentally or by negligence by all means. Nevertheless, an intention to commit the mentioned acts or generally scienter of their possible consequences are insufficient to interpret them as genocide. On this account it is required to expose a specific state of thought of offender or a certain intention related to the negative consequences of the act [9, p. 14-46].

A concept of genocide consists of two core elements:

- 1) essential intent;
- 2) forbidden act.

As noted above the most significant element is an existence of a special intent. It distinguishes genocide from the similar international crimes, as well as from the crimes against humanity. This intent involves some aspects [8, p. 135]:

- a) intent must not be accidental and involve

to destroy not one or more persons belonging to a certain group, but the group;

- b) intent must involve to destroy a group as such, as a separate group detached from the others. In this context, a difference between genocide and murder (homicide) is that genocide refuses to recognize the subsistence right a whole human group, but murder refuses to recognize the right to life of the certain human beings;

- c) intent must involve to destroy a group „in whole or in part”;

- d) intent must involve to destroy the above-mentioned groups namely for national, ethnic, racial or religious reasons. As we can see, other groups, especially political and social groups aren't included into this list, that is to say an object of genocide isn't social groups, but ethnic groups.

It may be said that these features characterizing genocide were a constituent element of the politics of some countries pursued against Azerbaijan during the period of Soviet Union and after. One of the gravest crimes committed against the Azerbaijani people in the armed conflicts of latter period was the Khojaly genocide happened over the night from 25 to 26 February 1992. It is often expressed an opinion that this act isn't a genocide. So it is necessary to conduct some investigation to determine is there any compliance between the Khojaly events and genocide.

In Khojaly, the armed forces perpetrated a cruel massacre against the non-combat civilians attacking on Khojaly over the night from 25 to 26 February [4, p. 56]. According to the evidence of the witnesses the tens of women, children from 2 to 15 and elderly people were killed that night, it was found the signs of torture on some corps given in different forms. The children's ears were cut off and they were scalped, the skull of an old man was torn out. The ones, who flight to the scene on helicopter first on 28 February 1992, saw the territory within a radius of 500 meters was overlaid by corpses [4, p. 74]. There is an abundance of facts that killing of the civilians in Khojaly was executed in a form of state policy. One of the evidences may be a fact that the escape paths of the population had been previously closed. Thus, it was impossible for the civilians to survive from criminal violence. Military groups of criminal nature killed a part of the people in the hidden places on the escape paths specially prepared in advance. The population trying to flee was shot down by assault rifles and machine guns.

It was stated above that a core element for genocide is a specific intent. Each of the acts ori-

ginating an element for genocide is the deliberate, intended and volitional acts by its nature. None of these acts can be committed accidentally or by negligence by all means. Nevertheless, an intention to commit the mentioned acts or generally scienter of their possible consequences are insufficient to interpret them as genocide. On this account it is required to expose a specific state of thought of offender or a certain intention related to the negative consequences of the act. These actions occurred against the civilians in Khojaly prove again that the intention of criminally armed forces was exactly to commit genocide. Killing the people trying to flee by assault rifles and machine guns in the hidden places specially prepared in advance affirms genocide intent indeed. Furthermore, the crime in Khojaly was intended against the Azerbaijanis as a national group what is proven this act as genocide.

The specified acts happened against the people from the ethnic group of Tutsi in Ruanda in 1994. Exposed to mass destruction 500.000 Tutsi were killed that year [5]. Therefore, crime of genocide was included above all others into the jurisdiction when the Ruanda Tribunal was established. The Tribunal determined that mass destruction of such a great number of people can't be accidentally in no way, and it was executed under the plan prefabricated by the state officials. And with this view the Tribunal passed its first judgment in connection with the genocide in 1998 against I. P. Akayesu, the mayor of the Taba Region.

We said above that it is wrong to consider crime of genocide as a crime against humanity. Genocide and crimes against humanity are the international crimes with the separate elements. Unlike genocide, there isn't any specific intent in crimes against humanity and they aren't intended against any ethnic group. But contrary to genocide, crimes against humanity are committed on a large scale. If crime of genocide not limited by warfare represents an action intended to destroy a national, ethnic or religious group in whole or in part, crimes against humanity are considered a component of attack intended against civilians in a result of state policy and activity [6]. When the act belonging to crimes against humanity are committed on a large-scale and systematically not against any national, ethnic or religious groups, but generally against a civil person or persons, it is assumed to jurisdiction of the International Criminal Court.

Conclusion and recommendations

In conclusion, one may summarize that war crimes, crimes against humanity and crime of ge-

nocide: all of them are the international crimes with separated elements. Some of these elements are common, but there are distinctive features as well. Confirmation of this comes from the statutes of the international criminal tribunals, as well as the Rome Statute of the International Criminal Court. In other words, though all of these three international crimes are similar, they are identified and described separately as the crimes with the different elements. Therefore, the responsibility to be imposed for causing these crimes will also be different.

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