

Modern Genocide: Part of National Aggressive Policies. Undefined Definition

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Abstract

Today, foreign policy often uses such an aggressive violent tool as genocide, which necessitates the study of this phenomenon. This issue is of particular relevance in view of the full-scale invasion of Ukraine by the Russian Federation. Therefore, the purpose of the article is to analyse the existing international normative definition of the concept of 'genocide', its main shortcomings and gaps, and possible ways to address them. For this purpose, the author uses general scientific analytical research methods, as well as the content analysis method. Comparative methods allow us to critically analyse case law and identify certain imperfections and trends inherent in the process of considering genocide cases and making relevant court decisions. This allowed the author to formulate arguments to substantiate that the content of such elements of the concept of genocide as 'extermination' and 'protected group' is incomplete and sometimes even undefined. It is emphasised that the construction of the concept of 'genocide' is inadequate, since it does not actually define the content of this phenomenon through the description of its attributive and stable features, but only lists some forms in which genocide may exist. Under such conditions, this concept remains undefined, which leads to situations when courts and tribunals consider the existence of the crime by substituting the proof of the accused's actions with the interpretation of certain events in terms of their 'similarity' or 'dissimilarity' to genocide. After all, judges do not work with facts, but with interpretations of these facts, which gives rise to a diversity of judicial practice and creates the basis for the politicisation of genocide trials. The author concludes that the phenomenon of genocide needs to be studied with due regard for the experience of legal application of this concept, and that it should be improved, which will allow lawyers to assess facts and acts and establish their compliance with the legal definition of genocide

Keywords: *genocide; concept of genocide; protected group; elements of the crime; intent to commit genocide.*

Сучасний геноцид – частина національних агресивних політик. Невизначене визначення

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Анотація

Сьогодні у зовнішній політиці нерідко використовуються такий агресивний насильницький інструмент, як геноцид, що зумовлює необхідність дослідження зазначеного явища. Це питання набуває особливої актуальності з огляду на повномасштабне вторгнення військ російської федерації в Україну. Тому метою статті є аналіз існуючого міжнародного нормативного визначення поняття «геноцид», його основних недоліків і прогалин та ймовірних шляхів їх усунення. Задля цього використовуються загальнонаукові аналітичні методи дослідження, а також метод контент-аналізу. Порівняльні методи дозволяють критично проаналізувати судову практику й виокремити певні недосконалості та тенденції, притаманні процесу розгляду справ щодо геноциду та прийняття відповідних судових рішень. Це дозволило сформулювати аргументи для обґрунтування того, що зміст таких елементів поняття «геноцид», як «знищення» та «захищена група», є неповними, а подекуди й не визначеними. Наголошено, що конструкція поняття «геноцид» є неналежною, оскільки фактично не визначає зміст цього явища через опис його атрибутивних і стійких ознак, а лише перераховує деякі форми, в яких може існувати геноцид. За таких умов це поняття залишається невизначеним, що тягне за собою під час розгляду судами та трибуналами появу ситуацій підміни доведення наявності в діях обвинуваченого складу цього злочину тлумаченням певних подій у розрізі їх «схожості» або «несхожості» на геноцид. Адже судді працюють не з фактами, а з інтерпретаціями цих фактів, що породжує неоднозначність судової практики й створює підґрунтя для політизації процесів з геноциду. Сформульовано висновок, що феномен геноциду потребує вивчення з урахуванням досвіду юридичного застосування цього поняття, а також його вдосконалення, що дозволить юристам оцінювати факти та діяння й встановлювати їх відповідність правовому визначенню геноциду.

Ключові слова: геноцид; поняття геноциду; захищена група; елементи складу злочину; умисел на вчинення геноциду.

Introduction

Disciplined society and genocide. Two polar mass manifestations. It would seem that each is the diametric opposite of the other. Whereas genocide is

the pinnacle of the brutal violation of humanistic values, the disciplinary society is the pinnacle and apotheosis of total control, manageability and, arguably, tolerance.

But reflection and historical experience indicate that there are many similarities between these phenomena. More to the point. I will attempt to outline the close connection between these phenomena and their intersubjectivity. At least I will put it forward as a hypothesis.

If genocide is a kind of chaos generated by ideas of advantages that are supposedly inherent in some and denied to others, then a disciplined society is "chaos" taken to an extreme point. Looking ahead, I mean that the ideas that fuel genocide arise and take shape in mature, stable societies, whose institutions acquire such a fundamental and strong character that they begin to have a "reverse" effect on the members of such a society and on the actors who make large-scale decisions. Genocide, as a phenomenon involving the destruction of entire groups of people, contains at its core the idea of domination, superhumanity. The logical conclusion of this idea is that social life must be purged of "dangerous" elements. It seems that this is precisely where the line that unites the two phenomena in question lies. After all, in fact, this is one of the main aspects of the idea of a disciplined society – the presence of advantages for some (the disciplined) and the absence of these advantages for others (the undisciplined). The undisciplined must be displaced

Why does this essay discuss this and draw some parallels between these two phenomena? Because it can help to realise the essence of genocide and come to a conclusion about its probable existence and the possibility of such events occurring in the future. It is also necessary in order to understand to what extent the existing definition of genocide corresponds to contemporary events that may qualify as genocide. This in turn is important because genocide has very serious implications for people, their groups, for jurisprudence and jurisprudence, for understanding the processes that generate genocide and feed its origins.

Literature Review

The literature on the topic of genocide is vast. Perhaps it can be said that the topic of genocide is one of the most developed. However, the existing difficulties in the application of legal norms related to genocide and the interpretation of this concept only emphasise the need for further study of this phenomenon and the need to clarify the concept of genocide.

The literature on genocide touches upon various branches of knowledge and social sciences. It is about history, sociology, jurisprudence, anthropology,

political sciences etc. In addition, the fiction dealing with this topic is very extensive.

In this paper I have tried to use some of the most authoritative works, as well as works whose authors are pioneers in this field. Of course, I am referring to the accessible works of Raphael Lemkin. There is no single systematised work on genocide in his oeuvre, but it was he who laid the foundations for the recognition of genocide as an international crime.

The fundamental historical essay by Naimark, Norman M, on the history of genocide allows us to trace in historical retrospect how this phenomenon gradually came to its vivid and large-scale manifestations. In his work he demonstrates that genocide has deep roots and has been known to mankind for a long time, but it was in the twentieth century that it acquired such a clear ideological colouring, became aggressive and mass.

British lawyer Philip Sands is known for his participation in a number of interstate disputes in the framework of the procedures of the International Court of Justice (UN Court of Justice), including cases in which the question of prosecution of those responsible for genocide was raised. His book "East West Street. On the Origins of 'genocide' and 'crimes Against Humanity'", although not strictly scientific, contains a great deal of reflection on the nature of genocide.

A well-known and authoritative author who has written about genocide is Anna Arendt. She is considered the founder of the theory of totalitarianism. In her works devoted to this phenomenon, she considered genocide as one of the manifestations of the policy of terror and violence, as one of the instruments of this policy. Moreover, the author believed that it was a fairly typical tool, which to a greater or lesser extent is inherent in all totalitarian politicians. Her illustrative examples were Nazi Germany and the Soviet Union. Both countries used genocide extensively in their domestic policies.

Much material examining genocide as a legal phenomenon contains court documents and judgements in cases where charges of genocide were brought. Since the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, international jurisprudence has known a number of such cases – genocide in Rwanda, genocide in Srebrenica. Some such crimes were not recognised by the courts as genocide for various reasons. These include the Pol Pot regime, the Holodomor in Ukraine in 1939, and the Holocaust.

Many contemporary Ukrainian authors also address the topic of genocide. In Ukraine and a number of other countries, the Holodomor of 1939 is recognised as genocide. This national tragedy is the subject of study by

historians, sociologists and anthropologists. In 2024, a book by Viktoriy Malko was published.

Ukrainian Intellectuals and Genocide: the Struggle for History, Language and Culture in the 1920s and 1930s [1]. The author considers the Holodomor as a key event for the destruction of the self-identity of Ukrainians. It was during that period that a significant number of Ukrainian intellectuals were exterminated. This act caused irreparable damage to the Ukrainian nation and undermined the foundations and possibilities of further formation of Ukrainian statehood. The author analyses how this process took place and what role intellectuals played in Ukrainian society.

As can be seen, the literature on the topic of genocide is very diverse and extensive, which makes it possible to have a broad discussion on genocide.

Materials and Methods

In conducting the presented research, scientific methods most common in social sciences were used. In particular, the following:

Taking into account the specificity of the object of research, data collection was conducted mainly from secondary, including open sources. The data obtained characterise the object of research, as a rule, from a qualitative point of view. The main criterion for selecting sources for their study was their direct relevance to the subject of the research. The use of quantitative (statistical) data is very limited, given that there are few officially recognised cases of genocide.

Data collection was conducted mainly through the study of literature sources and their review. The observation is detailed by methods of content analysis. Studies of scientific literature, collation of information and collected data, open sources – journal articles, publications, reports, reviews, etc. Content analysis focused on those sources that contain information about what genocide is, who the victims of genocide are, how they identify themselves, how the perpetrators of criminal orders understand these orders, how hate speech is formed and how it influences the perpetrators, etc.

The study used materials of jurisprudence of international courts and special tribunals that raised the issue of qualification of certain actions as genocide. The main attention was paid to those court decisions that interpreted specific signs of genocide and those where these signs were critically assessed. Of particular interest was the case of the Srebrenica massacre as an example of the destruction of part of a protected group. It seems that this episode has some common features with the events that are taking place in Ukraine and on which the author relies in the study.

The collected data and information was analysed using the historical method, which made it possible to trace changes and some dynamics in the views on the phenomenon of genocide, its description and definition of the content of this concept. Taking into account that scholars often use the concept of genocide in a broad sense, meaning all cases of mass extermination of people, I tried to focus on the concept of genocide in its legal sense, which is relevant for the establishment of legal facts.

The comparative method was used to analyse the collected material, including in a sense a more special method of comparative jurisprudence. It allowed us to trace the differences in the perception and criminalisation of genocide in different countries and legal systems. It also made it possible to make sure that genocide always has a significant ideological component, which often plays a decisive role in the implementation of genocide and its justification in the eyes of the general public.

The described methods were applied in a complex, which allowed approaching the object of study with different tools and taking into account different points of view on the problem of genocide.

At the same time, I am well aware that the use of all the methods described above does not exclude some bias in the material presented. As mentioned above, the topic of genocide is well researched and has been addressed by specialists from various fields of knowledge. I recognise that the difficulties in defining the concept of genocide discussed in this paper are largely due to the inability to approach this phenomenon with a single measure. Genocide is too multifaceted and brutal, and at the same time its understanding is quite seriously distorted by the speculations that exist both around the concept. As well as around the phenomenon that this concept describes.

All of this leads to the fact that in writing this paper I was aware of the fact that, in order to explore the concept of genocide in even greater depth, I still significantly lacked lively discussions with researchers and lawyers who are currently working with this issue.

Results and Discussion

Challenges of defining genocide

If we turn to the existing definition of genocide, we see that it describes just that. Genocide is the intention to destroy a protected group as such. A protected group can include large groups of people united by different attributes. In particular, the legal definition contained in the text of the Rome Statute (hereinafter – the Statute) recognises such characteristics as nationality, ethnicity, race or religion. It is quite logical to compare the displacement from a certain territory of representatives of a group

belonging, say, to a religious group, and the displacement from a certain territory of those who do not meet the standard of discipline accepted in this territory.

Of course, different methods are used and it is in them, according to the authors of the Charter, that the whole essence of genocide as one of the most serious international crimes lies. However, it seems that the roots of these phenomena have much in common.

Here I would like to point out one, in my opinion, problematic component of genocide as a crime. If we take into account the idea that probably underlies genocide, we can come to the conclusion that genocide is, as stated, a method. In this case, the question arises about the expediency of the existence of genocide as a separate and most dangerous crime. If we use legal terminology, then in fact we are talking about a qualifying feature. Genocide is a kind of special cruelty. if this is true, then we are dealing only with the "degree" of the offence, but not with a separate criminal-legal phenomenon. However, it is obvious that genocide is not just a qualifying feature that may entail more severe liability, but a crime that differs from any other by its essential, attributive features. And here we come to the main question of what are these attributes?

It should be clarified that in this article I have only managed to outline some basic theses that require further study and consideration.

It goes without saying that we must first look to the past. History knows many examples when we can speak about genocide with a high degree of probability. And these events and facts took place not only after genocide was called genocide in the middle of the 20th century and its definition was formulated (obviously, the existence of a phenomenon is possible even without a clear definition).

Examples of genocide from the distant past include the genocide of the indigenous peoples of the Americas, Africa and Asia. Virtually the entire history of the discovery of the "new world" and its further colonisation is littered with acts of genocide. This is not a new statement. Similar thoughts were expressed by Raphael Lemkin, the author of the concept of genocide, and by scholars who have studied the history of colonisation.

This paper is not intended to examine the historical stages of genocide, but to use the historical method as an illustration that can help trace the patterns of this phenomenon and the connections that unite them. Also, historical retrospection will bring us closer to one of our aims, which is to raise the question of the close relationship between certain types of policies, their content and narratives (particularly disciplinary and control mechanisms) that are linked to the emergence of acts of genocide.

In this regard, the genocide that took place in Srebrenica (Bosnia) during the wars in Croatia and the Bosnian War, in the territory of the former Yugoslavia, as well as the recent events in Ukraine, where some lawyers and researchers also see the presence of genocide, is of great interest.

Why genocide in the former Yugoslavia? This episode of recognised genocide is one of the largest war crimes in the history of modern Europe, committed in the recent past at a time when international mechanisms designed to ensure international peace and security were already in place. Until the events in Ukraine, the Srebrenica genocide is perhaps the most serious crime in Europe that has been judicially recognised as such.

Also, this event has a number of peculiarities that give grounds for reflection on the essence of genocide, on its possible causes and factors giving rise to it.

Historical episodes of genocide

So, the historical discourse shows that genocide can be considered as a continuation of the development of policies of civilised, developed countries, which have ambitions of metropolises and empires. This is also pointed out by researchers of the history of genocide: "[...] Meanwhile, the Spanish conquest became the model for policies of later colonial governments, just as opponents of the extirpation of native peoples in Australia and North America often mentioned the writings of Bartolomé de Las Casas, the notable Dominican critic of Spanish brutality in the new world. One of the first observers of linkages between episodes of genocide was Hannah Arendt, who noted the influence of colonial brutality and racism on the development of the genocidal policies of Hitler in Europe. 10 The widespread killing of native peoples in the colonies, French, British, Italian, and especially German, translated in some fashion into mass murder during World War II. 11 A number of historians have noted some continuity in personnel and policies between the German military's attempts to eliminate the Herero and Nama peoples in Southwest Africa (1904-1907), their role as advisers in the Armenian genocide (1915), and the Wehrmacht's role in the Holocaust. 12 Hitler stated to his generals on the eve of his onslaught against Poland and the Poles: 'Who, after all, speaks today about the annihilation of the Armenians?' In the same speech, Hitler also chose to cite the positive example of Genghis Khan as an empire builder. Hitler's message was clear: the German war leadership should not shy away from killing large numbers of Poles and Jews in the attack" [2].

In general, studying the events that have signs of genocide in historical retrospect, there is a strong impression that its origins, as an organised purposeful action aimed at the destruction of "others", lie in the basis

of Christian religious doctrine. If we generalise and, perhaps, simplify somewhat, genocide is ultimately the same crusade, the purpose of which is adjusted depending on the political component, geopolitical claims and the general international situation.

Of course, events similar to genocide occurred before the formation of Christian doctrine, but organised forms and targeted genocidal efforts, which would be accompanied by categorical intolerance, perhaps developed only in the conditions of Christianity's dominance and campaigns to convert indigenous and 'infidel' peoples to the Christian faith.

As Norman M. mentioned: Generally, the Mongols were tolerant of religious differences and, as such, promoted the interaction between the culturally rich communities of faith in Central and South Asia, Europe and the Middle East [Ibid].

It seems that in those times, the issues of total annihilation and assimilation were not so acute. And this circumstance indicates that the conquest of territories and subjugation of peoples is not always connected with the destruction of peoples. At the same time, it does not give grounds to exclude genocide under such conditions.

What can this mean for our study? It may point to one important, even defining feature of such events. Namely, that genocide is a more "intellectual" phenomenon. As I pointed out above, it is based on an idea that rallies around it people who have access to significant resources and enough power to extend that idea to a sufficiently large number of perpetrators. As a hypothesis, I assume that it is a predominantly organised campaign, usually by a more stable, powerful society, which is directed against less stable or less powerful societies or states.

The above conclusion may also give grounds for saying that genocide is always, on the one hand, the eradication of what exists and, on the other hand, the imposition of what the aggressor brings with him. In this case, it is probably not so much the territories and administrative power that are decisive, but the creation of an environment favorable to the aggressor and displacing the victims and their way of life. The creation of such an 'environment' may in the long run lead to the transfer of administrative power and territories under the control of the aggressor.

Ideological roots of genocide

In this regard, it should be pointed out that genocide is not an isolated phenomenon. It does not appear as an end in itself. It is always part of a larger program, or rather a policy. In her work "Origins of totalitarianism" Anna Arendt, describing the actions resorted to by representatives of totalitarian regimes, pointed out that for most of them (Nazi Germany, the

Soviet state of Stalin's time) the practices having all the signs of genocide were often applicable and widely used. In particular, she notes: the Baltic States were directly incorporated into the Soviet Union, and they fared much worse than the satellites: more than half a million people were deported from the three small countries, and "a huge influx of Russian settlers" led to the threat that the local population might become a minority in their own countries [3].

This conclusion seems very significant. It suggests that, in order to establish genocide, the decisive factor is the existence of violent policies that provide a common background for the emergence of genocidal intent and its subsequent realisation. At the same time, as I noted above, the realisation of this intention does not necessarily involve the physical destruction of a protected group. Obviously, destruction is carried out by all possible methods, among which physical destruction is not the only or the main one.

All "modern" events that have been recognised or regarded as genocide (the Armenian genocide by the Ottoman Empire (1915), the German genocide of the Guerreros and German colonists (1904), numerous episodes of genocide of Jews in the first third of the twentieth century and during the Second World War, the Holocaust, etc.) had one thing in common – they were always part of a conscious policy. Genocide was never an end in itself, but always an indispensable component of policies that are generally oriented towards the conquest of new territories, the spread of influence and power, subjugation, etc. This means that genocide was often an "unspoken" goal-appropriation. It belonged to larger agendas. I would venture to argue that genocide "in and of itself" does not exist. We can hardly find a genocide that is committed out of context

This feature is extremely important for understanding that the victim group, or "protected" group as the official definition of genocide calls it, was never targeted with the proviso 'as such'. All members of the "protected" group, who were perceived as the main obstacle, as bearers of some kind of identity that could make it more difficult to seize territories, spread power and influence, were to be destroyed. But it was not necessary to destroy the group completely. It was enough to reduce it to such an extent that it ceased to exist as a 'magnet' of self-identification. In other words, genocide is always a means, not an end.

This conclusion is all the more important because it substantiates the fallacy of the basis of the definition of genocide. This goal, being part of a more global design, cannot stand alone. It cannot be established as the only one that emphasises its focus on the destruction of a group, as such, because, being part of something larger, it is an instrument. Therefore, the

sign of the destruction of the group "as such" is rather optional. Otherwise, we are dealing with obsession, with madness, after all. And this, as we know, is a prerequisite for the establishment of insanity, i.e. the inability to bear responsibility

The events of genocide in the former Yugoslavia also belong to modern genocides. And it, as well as other acts from this time period, is inherent in the presence of an aggressive policy, which is associated with either the seizure of territory or the redistribution of spheres of influence and power.

The Srebrenica massacre is associated with a number of wars in the former Yugoslavia. Of course, the so-called "Balkan nationalism" also played a role. According to some researchers, Balkan nationalism was a peculiar response to the clash of interests of three empires in these territories – Habsburg, Ottoman and Russian. The nationalists' goal was not just the separation and clash with the political ruler – the Ottoman or the Habsburg – but also with the cultural ruler – the Greek or the Hungarian [4, p. 33].

Here, it was under the shadow of nationalist policies that the fruit of genocidal intent matured. Nationalism is probably not the main feature, as history shows diametrically opposite cases when genocide was a kind of reaction to nationalist sentiments. However, in this case too, it involved the "confrontation" of different nations or races or religious ideas.

And yet one feature remains very stable – the presence of a conscious, consistent and organised policy of seizure of territory or distribution of spheres of influence or power.

Here again we come back to the fact that the intent to genocide and its implementation always arises and comes from an organised, civilised, stable and strong "author". Even if this author cannot be called strong (for example, the genocide of the Tutsi people in Rwanda), he is in any case endowed with sufficient resources to realise such a large-scale action as genocide.

This point is important to realise in order to understand the fact that genocide, as mentioned above, is always an instrument, an intermediate goal. And secondly, genocide is most often not endowed with a program, which would describe the successive steps and measures to be taken for its implementation. This does not mean that they cannot exist (for example, the genocide of the Nazis during World War II had such qualities), but it indicates that such program, methodicalness is not an attribute without which genocide cannot be identified and stated

This peculiarity is also important in the context of the above-mentioned parallels between a disciplined society and aggressive politicians, including genocide as their tool. Statistically, in most cases, the idea of genocide

originated with more organised communities, societies and states. Those that had the strength, resources and will to pursue their aggressive policies towards those they chose as their victims. Of course, a less organised and self-identified community has a higher degree of victimhood on the one hand and a lower 'ideological' character on the other.

So, as an example, we have chosen the genocide that took place during the war in Yugoslavia. In particular, we are talking about the episode of mass murder of Muslim men, boys and young men, which took place during the Croatian and Bosnian war in the town of Srebrenica, which at the time of the crime was on the territory of the Republika Srpska. At that time, 8,372 civilians were killed. The event was recognised as genocide by the Special Military Tribunal for the Former Yugoslavia. Many disagreed with that judgement. However, again, one factor was recognised unconditionally, including in Serbia. A study on the events in Srebrenica notes: "[...] the RS president at the time, Dragan Cavic, stated: The Report [...] is the beginning of difficult, and probably, for all of us, sometimes the empty road of disclosing of the truth. It is on relevant state bodies and institutions to process these and such results of the Commission's work, and it is on us to continue walking towards the truth. Only this is the way to avoid the situation of having our children hate each other in the future, only because they are Croats, Bosniaks, or Serbs" [5].

As we can see, the political leadership of the country is well aware that all these events, as well as many others during the war, are the result of political processes that can lead to mutual hatred of representatives of different ethnicities and nationalities. At the same time, some representatives of the Serbian authorities believed that the events that took place in Srebrenica were isolated random war crimes, which were committed by the sudden intention of individual initiators [6]. Such statements are very revealing, because they indicate that many see genocide as one element of a well-known and familiar *modus operandi*, the purpose of which is something even more extensive than genocide. This way must be formulated (not necessarily in the form of a verbal order) and understood by all the perpetrators. In fact, the authors of such statements point out the need for such a criterion of genocide as the existence of an idea embodied in a policy that results in acts of genocide. In this case, genocide, as mentioned above, turns out to be a political tool. Obviously, this approach is understandable and indisputable in its own way. However, this criterion is absent in the normative acts that describe the crime of genocide and establish the criteria for its detection. It seems that my hypothesis about the "non-autonomy" of genocide is confirmed by what can be called the usual thinking of a politician.

It is noteworthy that the resolution on the genocide event in Srebrenica, which was confirmed by the materials of the investigation and trial of the Special Tribunal for the former Yugoslavia, was not supported at the UN level by representatives of countries that have a predilection for nationalist or totalitarian forms of government [7]. These include Russia and China. Interestingly, these countries can be grouped together on the basis that they have a relatively short history of taking over colonies. Perhaps that is why they see such actions as one of the permissible tools of colonisation. By not voting for the resolution, Russia and China leave themselves room for genocidal manoeuvres in the future. And this is not an accident, but a quite natural phenomenon. Those countries that have organised and aggressive politicians with a strong ideological component do not accept the idea of genocide as such. It is too risky for them, because genocide, as we pointed out above, is the result of a consistent, systemic policy that pursues invasive goals. And such countries, as a rule, pursue exactly such policies, and therefore often use genocide as one of the methods of realisation of these policies.

Serbia, as a kind of "heir" to the Yugoslavia case, has similar ambitions. And the roots of these ambitions probably lie not only in the distant historical, but also in the relatively close, Soviet past. Nostalgia for it remains inherent in many Serbs. A striking example of this is Emir Kusturica, the Yugoslav and Serbian film director, who stands out for his active negative stance on the break-up of Yugoslavia and is quite supportive of all contemporary events that have the hallmarks of genocide.

It is also probable that the forceful internal policy of the former Yugoslavia, which concerned most of the social relations in the country, consistently and logically caused the incredible outbreaks of violence during the Yugoslav Wars.

The existence of a methodical and consistent policy is noted in his study by Robert J. Donia. He states: In the summer of 1995, Karadžić was a more experienced executioner than was the party president of 1992 who had first orchestrated widespread mass atrocities. But even though his heart was hardened and his conscience moribund, Karadžić did not order the deeds of July 1995 solely out of contempt for Bosniaks. He took action only after an improbable convergence of Serb battlefield defeats, maneuvers of the international community, bitter rivalry with Mladić, and his realization that little time remained to realize his Serb utopian vision in all of eastern Bosnia. Karadžić was not a victim of circumstance, however; he was the master of it. We will never know if he might have ordered the actions in a different set of circumstances or at a different time, but we do know that he acted with forethought, decisiveness, and calm detachment in the

circumstances in which he found his movement in July 1995. He acted distressingly methodically in pursuing his goals by putting into action a carefully considered plan [8].

Elements of the concept of genocide

Now let us return to the definition of genocide. Genocide is a phenomenon that has been and continues to be defined in different ways. As we mentioned above, Raphael Lemkin included a much larger scope of acts than was eventually accepted. But in any interpretation genocide is regarded as one of the most serious crimes. And it is recognised as such in virtually all legal systems that profess universal human values.

And this is understandable, since the object of its encroachment is entire human communities, their existence as such. The intention to destroy a person reaches a high level of public danger. Especially when the act encroaches on the lives of a large number of people, and this intention is aimed at the complete or partial destruction of such people not because they behave aggressively or commit any acts affecting the rights or interests of other people, conduct military actions, commit serious crimes. None of these are mentioned in the offence of genocide. The very intention to destroy is justified only by the very fact of existence of a certain group of people, who have common features, which often do not have a visible material embodiment, or if they do, then by their very nature cannot affect the rights and interests of other people just by the very fact of their existence

It is precisely the feature of the "unconditionality" of genocide, its non-personalisation, that makes this crime so horrifying and grave.

However, as mentioned above, in my opinion this attribute is unstable. In any case, the intent to commit genocide has a conditionality or motive. If it did not, it would be impossible to imagine the "prevalence" of genocide, its "contagion" to other perpetrators. If it were unconditioned, it is likely that acts of genocide would not be so massive and all-encompassing. Indeed, they would have been limited to individual episodes in which it could be argued that they were individual war crimes. All this suggests that genocide is always part of a larger plot, part of a broad program of extermination.

And yet, considering the objective manifestation of genocide – the seemingly unprovoked destruction of an entire community of people – makes us turn to the distinctive features of the people in such groups. Destruction of whole communities of people only because they have separate differences in religious rites, in appearance, in belonging to ethnic groups and states indicates that the perpetrators of genocide are guided exclusively by bloodthirsty, inhuman motives, believe that some categories of people do not deserve to live, assuming the functions of the creator of the world,

pursuing the goal of cleansing the planet of some representatives of the human race

There is an ongoing debate about the completeness of the concept of genocide and the inclusion of additional groups. Many examples of different content of the concept of genocide are given by William Schabas [9]. In this regard, the definition of genocide in the French Criminal Code is noteworthy – Art. 211-1 "Constitue un génocide le fait, en exécution d'un plan concerté tendant à la destruction totale ou partielle d'un groupe national, ethnique, racial ou religieux, ou d'un groupe déterminé à partir de tout autre critère arbitraire, de commettre ou de faire commettre, à l'encontre de membres de ce groupe, l'un des actes suivants" [10]. Here the legislator allows any criterion for defining a protected group, which certainly expands the possibility of identifying genocide in the actions of the suspect. This, in our opinion, is a very interesting definition, which, on the one hand, removes 'restrictions' from the possible accusation of genocide and allows to establish what actually happened, rather than to go down the path of excluding what cannot be substantiated in the act (positive proof, when certain circumstances and features inherent in the event are proved, and negative proof - when the investigating authorities exclude other options, indirectly establishing this or that corpus delicti), and on the other hand, it actually gives the right to establish the offence of genocide.

The very fact that there are different interpretations and an ongoing debate on the acceptability and sufficiency of the concept of genocide is a clear indication of the imperfection of the international concept of genocide.

The Rome Statute defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

- a) The killing of members of such a group;
- b) Causing serious bodily or mental harm to members of such a group;
- c) The deliberate infliction on a group of living conditions calculated to bring about its physical destruction in whole or in part;
- d) Measures calculated to prevent procreation in the environment of such group;
- e) Forcibly transferring children from one human group to another.

As we can see, the corpus delicti is formulated in an atypical way, as it includes separate independent corpus delicti offences, which under certain conditions may acquire the characteristics of genocide. That is, these actions are already crimes in themselves. In order for them to acquire the characteristics of genocide, there must be an intention to destroy a certain group of people, and this intention must obviously exist simultaneously

among a large number of people. Otherwise, it would only be an episode, which could be regarded as an accident and would not carry the same degree of public danger.

In fact, the Statute describes genocide as the destruction of a protected group in a certain way. It seems that, from a legal point of view, this construction of the offence is not very reliable. It is enough to change the way in which genocide is realised and the act falls outside the jurisdiction of the genocide rule. For example, intimidating members of a protected group to force them to leave the group, to stop identifying with it. As a result, the group is destroyed and the act cannot be recognised as genocide.

In addition to these features, the existing jurisprudence of international ad hoc tribunals indicates that proving genocide is very difficult, largely due to the presence of signs of repetition and systematic nature of such actions, and also tends to an overly conservative perception of the ways and means of execution of this offence.

Raphael Lemkin's ideas on genocide

This is probably due to the fact that genocide as a criminal offence was formulated in the middle of the twentieth century and received its place in criminal law and legislation with great difficulty. In justifying its necessity and "right to exist", Lemkin had to make considerable efforts and compromises. The latter, incidentally, led to the fact that the accepted notion of genocide had very little in common with what Lemkin had originally understood and justified as one of the most terrible crimes.

What did Lemkin mean by genocide? Unfortunately, he did not leave a definition of genocide in the conventional sense of the word. However, in his short article "Soviet Genocide in Ukraine", describing the actions of the Soviet regime in Ukraine, he actually defined the stages of genocide and highlighted the criteria that form the crime of genocide. Recognising the complexity and unnecessary destruction of all representatives of the protected group (at the time of the Holodomor in Ukraine its population was about 30 million people), Lemkin identified four stages of genocide [11]:

- 1) extermination of the national elite. It can always be eliminated completely, as it is usually not too large;
- 2) elimination of the national church. Also not a difficult task for the same reason – the relative small number of clergy;
- 3) destruction of a significant part of the Ukrainian peasantry, as carriers of folk traditions and ethnic "code" of the nation. This is where the Holodomor was needed;
- 4) mixing of the Ukrainian people with other nationalities through deportations and resettlement.

Now it is not difficult to formulate the criteria and signs of genocide, which Lemkin considered determinative. It is about the fact that the protected group includes people united by different features and criteria. The main feature is their relatively compact residence, united by a common household and social structure and legal identification. The second point is the cultural basis of genocide. It is perhaps the main one for the survival of the group and includes both the intellectual elite and the clergy. And the third feature is the destruction and dispersal of the 'popular' basis of the protected group. In particular, those who stand at the origins of traditions. And these traditions include both traditions in the conduct of the economy and ethnic and folklore traditions. It is obvious that in the legal definition of genocide there is no trace of the features given by Lemkin. It is also necessary to recognise that Lemkin unambiguously pointed to the presence of genocidal policy on the part of the aggressor.

This understanding, by the way, points to one of the most significant features, in my opinion. Namely, that genocidal policy is always connected with the elimination from the human community of those of its representatives who may violate the course of circumstances or the desired organisation of society desired by the author of such a policy. This circumstance, by the way, complicates the establishment of intent to commit genocide. After all, if it is part of a larger policy, if it is a tool, it is very difficult to claim that the perpetrators have a clearly articulated word 'genocide' in their heads. It simply disappears behind other "words" and goals.

Genocide and a disciplined society

Incidentally, this is where the link to efforts to create a disciplinary society comes through. A prime example of such an intention, which clearly carried a very dangerous charge, was the events that took place during the COVID pandemic. In many countries, restrictions were imposed that cut out of public life many people who found themselves in opposition to such restrictions and measures.

Of course, I can be reproached for too free and broad interpretation of the content of the concept of genocide. But who is to say that the concept formulated by the Rome Statute is an impeccable one that takes into account all the signs of such an intention? On the contrary, the Rome Statute does not take into account many signs of genocide.

In fact, as F. Sandes notes in his book "East-West Street", the formation of the international legal concept of genocide was precisely on the edge of the "struggle" of conceptual approaches in jurisprudence. One of these approaches gravitated towards the right of a sovereign state to dispose of

the lives and destinies of its citizens or subjects; the other, on the contrary, introduced the idea of individual protection of human rights. A protection that extended also to the actions of the state. The main objections to Lemkin's notion of genocide were precisely due to the fact that the subject of the attack was a group of potential victims, the boundaries of which were undefined [12].

All this points to the uncertainty of the concept of genocide. More precisely, its "compromise" definition, which does not allow the authors of aggressive colonial policies to be prosecuted.

Even more should be said. Genocide should be defined precisely and completely. In my opinion, genocide can exist not only in relation to groups limited by the criteria (race, religion, ethnicity, nationality) that are currently contained in the Rome Statute. Genocide can occur and be realised in relation to groups united by a wide variety of criteria. It is this approach that is most consistent with the protection of the rights of the individual and the principle of individual responsibility.

History knows many cases of genocidal attacks on members of a group united by other criteria. For example, cultural, political, etc. Why such groups will not be protected, but racial or ethnic groups will be? Say, the Nazis during World War II were not very interested in Jews who found themselves in the United States or South American countries. So they didn't exterminate all Jews, but only those who "got in their way". Does this mean that there is no genocide? Or on the contrary, there are examples when representatives of the opposing political force were slaughtered by the thousands. Why would such a group be denied a defence? After all, they were not killed because it is necessary to kill this particular person as a bearer of their individual qualities! They killed because this person (and in principle it does not matter what kind of person he is) belonged to a different political force.

I believe that King Herod's slaughter of the infants in Bethlehem is a classic example of genocide that does not fall at all within the modern concept of genocide in international law. We have a group that includes male infants born in a particular place and that has been destroyed all as such. But this episode would not be recognised as genocide based on the definition of genocide given in the Rome Statute. After all, this group is not united by any of the features that are considered by the legislator as indicating the presence of genocidal intent. So, such a group does not deserve international legal protection. Of course, it can claim protection within the framework of the crime against humanity, but the difference in intent is obvious, and it indicates a greater degree of public danger to the

one who targets people on a certain basis. Using this angle of consideration of the crime of genocide, in my opinion, the question about the reasons for the legislator's choice of such a limited range of features of an act that can be recognised as genocide arises quite logically and is very acute.

The main attributes of an international criminal law should be humanity, comprehensibility and justice. Justice as a moral and ethical category. It is obvious that it is not right to kill a person for his political views, it is not right to kill a person for what cultural traditions he follows and what music he listens to. It is understandable and just. The task of jurisprudence in this part is to follow the obvious and absolutely clear to the common sense and to set legal markers that will allow to detect the presence of intent to destroy "no matter what kind of person just because he is a member of a certain group". The French realised this and wrote it down in their Criminal Code.

Given the current wording of the concept of genocide, it has been largely reduced to a war crime, the peculiarity of which is an increased degree of public danger. The boundary between genocide and a war crime or a crime against humanity is solely a field of interpretation and discussion. This is not a suitable field for defining genocide as an international criminal offence.

A significant number of scholars and jurists argue that it is a difficult task to identify and justify genocide. In my opinion, the main difficulty is not so much with the factual circumstances, but with interpretations. After all, in the majority of cases in which a suspicion of genocide is traced, there are no doubts about the commission of grave crimes, which are of a mass nature and directed against large communities of people. As a rule, difficulties arise where it is necessary to establish the existence of intent to destroy a protected group. But this "difficulty" is not a particular point. There has not been a time, from the very beginning of the formulation of this offence, that proving genocide has not been difficult. This, in turn, may point not only and not so much to the difficulty of proof as to the vagueness of the concept of genocide. In other words, legal scholars have not agreed on what is meant by genocide. And this, as I pointed out above, turns out to be a rather surprising feature. It is a surprising situation when there is an act and it is obvious to everyone, but it is impossible to formulate its concept. This is due, in my deep conviction, to the unwillingness to define genocide clearly and precisely. Thus, the 'problem' of genocide is largely artificial.

Much is explained by modern aggressive geopolitics, which are being realised in the world today. Today, war and genocide have become tools to achieve political goals. Wars of independence and wars of liberation

are a thing of the past. In today's world, where the number of states with unlimited access to weapons can be counted on the fingers, no one else, except these very states, can wage war. In fact, only armed states can defend themselves or attack. All others either enter into agreements and alliances in which they become part of this "division" of the world, or find themselves defenceless. All this accounts for the "reluctance" to formulate the notion of genocide in such a way that it is equally applicable to any actor in international relations. Another side of the coin was that its formulation, as mentioned above, turned out to be very specific. The authors of the concept, and subsequently the judges of international courts, proceeded from the assumption that this intent must ultimately be obvious and publicly manifested. But the realities of the present time indicate that is far from being necessary to express in public space a call for genocide. Especially given the fact that this term, as we pointed out above, representatives of some countries avoid using it. And in this avoidance they are consistent. In the ideological narratives of these states, the word 'genocide' is replaced by another word (liberation, denazification, etc.).

Since the adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute, the situation of genocide has changed significantly. The acts that have been recognised as genocide also indicate that today this crime is being perpetrated using other means and methods. At the time of the most heated discussions on the notion of genocide, no one considered the possibility of realising genocidal intent through the use of weapons of mass destruction, mass media broadcasting narratives of total terror and intimidation, systematic devaluation of culture and traditions. The modern world has a completely different arsenal of means to commit this crime. Today genocide may well be realised latently, and its consequence is not the physical destruction of the group's representatives, but their "de-identification" (and thus the destruction of the group). They will consciously or under compulsion "move" to other groups in order to stop being a target for violence of threats and attacks. Incidentally, this has happened before, when Jews during World War II hid their origins. Their ethnicity became their secret or curse. In this connection, by the way, distinguishing so-called "ethnic cleansings" from genocide and not recognising them as acts of genocide looks strained, artificial and even false.

All these facts are evidence that genocide has acquired all the features of not just a legal concept, but a phenomenon. That is, something more than the result of the efforts of lawyers-legislators. This phenomenon needs to be studied, and given that it carries a huge and dangerous aggressive charge, of course it must be absolutely criminalised.

Modernity demonstrates the real possibility of acts of genocide, the purpose of which is the destruction of a protected group. This is especially true for countries that have a significant number of weapons of mass destruction, including nuclear weapons. Such weapons do not always have a specifically defined victim. Such weapons destroy a large predetermined number of people, and for others they create an atmosphere of fear and hopelessness.

Under such circumstances, there is a logical question of revising the standards for defining genocide and revising the description of this offence. It is necessary, based on the realities of the modern world, to approach the qualification of this crime with those measures that are more appropriate to the nature and intensity of the acts of aggression used and the goals they pursue.

Apart from the fact that the forms of realisation of genocidal intent have changed, there are also gaps in the definition of genocide. They lie on the plane of defining genocide not by pointing to its inherent attributes, but by listing other types of crimes that may be genocide if [...] In fact, this is an example of the absence of a definition. More precisely, it is an example of how a definition is given through a list of attributes of other phenomena rather than the one being defined.

Decisions in genocide proceedings are made on the basis of reflection and evaluation, not so much of what happened, but of how it was perceived by both the perpetrator and those against whom it was committed. This does not seem to be a very reliable way of doing things. After all, the victim perceives the situation quite differently from the perpetrator, and the perpetrator will never claim to have committed genocide for defence reasons.

It turns out that the principle of legal certainty does not work in genocide proceedings. This is probably why proving genocide is difficult. The definition of this act has no clear independent features, so it is impossible to qualify this offence in a strictly formal sense. It can, as stated above, be identified through interpretations and reactions to the needs of the current political moment. But in this case the question arises about the existence of the concept of genocide. The concept must contain a definition, and we do not observe such a definition.

At the same time, this does not mean that genocide does not exist. Raphael Lemkin has defined genocide very precisely and comprehensively, noting that the physical destruction of a protected group is not the only defining element of genocide. Groups are numerous and genocidal intent in terms of destroying a group often fails to achieve the result. Trial proceedings which have determined that genocide may also involve a part of a group

have certainly demonstrated that quantification in genocidal offences is of evaluative value and cannot be regarded as a decisive criterion. For example, in *Prosecutor v. Radislav Krstić – Appeals Chamber – Judgment – IT-98-33 (2004) ICTY 7* "considered the issue of part of the group" and stated that the part which is the object of the offence must be significant enough to affect the group as a whole. Decision paragraph 12 states: "The intent requirement of genocide under Art. 4 of the Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Art. 4" [13].

As can be seen, the Court's conclusions are replete with value judgements that a part of the group should be "significant", "significant", "important", "emblematic/symbolic" for the group as a whole. Of course, this approach equally allows any part of the group to be considered both significant and important and not-significant and unimportant.

Lemkin's main emphasis was on habitat destruction for the protected group. And this should be the point of departure for the normative definition of the offence of genocide. He noted that genocide is primarily a co-ordinated plan of various actions aimed at destroying the essential bases of life of national groups with the aim of destroying them. The purpose of such a plan would actually be the destruction of the protected group's environment, which may consist of the eradication of the political and social institutions, culture, language, national feelings, religion and economic existence of national groups, as well as the destruction of the personal security, liberty, health, dignity and even life of persons belonging to such groups.

It is these signs that are decisive, since killings, even mass killings, especially in war, cannot unequivocally indicate the existence of genocide. But a coordinated plan, coming from authoritative and powerful, resource-rich sources, is unequivocal evidence of genocide.

The most important indicators that point to the existence of the crime of genocide are, first and foremost, the context, which should include not

only current but also preceding events and acts, the roots and unfolding of a certain situation over time, the historical background, the resources involved and the efforts expended or to be expended in the future, etc. By taking into account the factors and events listed above, it is possible to build an objective picture of the results achieved by all these efforts. The factual situation and the practice of the International Criminal Court and the tribunals that have tried and are still trying cases in which genocide is suspected indicate that the statutory definition of genocide does not work. To be more precise, it requires constant clarification in each specific case. And it is not the actual circumstances that need clarification, but the definition of genocide. That is, its attributes. And once again: it is not the presence of signs of genocide in this or that act that is clarified, but the signs themselves. What the legislator meant by genocide is always examined. We must admit that this is a strange situation. If we draw a parallel with other crimes, we should try to imagine a judge puzzling over what is murder? And he is not puzzling over the question of whether murder was committed in this case, but over the question of what murder is in general. It is only after realising this that he can move on to the second part of the question, namely, the question of whether a murder has taken place in this case.

Besides this strangeness there is another circumstance. Since, as we have seen, the concept of genocide does not exist, but charges are brought for this offence, we are dealing with a situation that violates a fundamental, basic principle of criminal law – *Nulla poena sine lege* – there is no offence without the law stating so. So what can we do – there is genocide, but its definitions are not defined?

The existing definition does not allow for determining what a protected group is and who belongs to it, how to define its boundaries, is genocide physical destruction or can it take other forms? At what point is genocide considered to have been carried out? Should the entire protected group be destroyed or only a part of it? If part, which part? What criteria should be used to determine that the living conditions created were indeed designed for the total or partial physical destruction of the protected group and that the creation of such conditions was genocidal? How to establish intent to destroy a protected group, are there objective signs of such intent?

The courts and tribunals have each time clarified these questions on a case-by-case basis through interpretation. And it should be emphasised that it is not a question of the presence or absence of certain signs in the act and the possibility of qualifying the actions on the grounds of genocide! We are talking about the possibility to identify the signs of genocide that are absent in the normative definition of this crime. That is, to identify

something additional, which will indicate the presence of genocide. But if this is so, then we still know what genocide is and where is the boundary beyond which it is certainly present.

This means that there is currently no definition of genocide. Genocide is not defined in terms of content and essence, but only as a hint that such a phenomenon exists and that other crimes may conceal genocide.

Conclusions

But the concept of "genocide" is ultimately a legal concept. Or rather, it should be legal. This view arises from the thought of whether the killing of 100,000,000 people of different ethnicities is morally different from the killing of 100,000,000 people of the same ethnicity? To accept the idea of genocide is to accept the proposition that killing "in whole or in part" a group of people united by a single criterion is somehow worse than killing an equivalent number of random people. Why? Because their language, culture and heritage die with them, and such eradication is deeply offensive to liberal humanism (and to humanity as a whole). But doesn't liberalism affirm, among other things, human rights? But if killing groups is worse than killing equal numbers of individuals, then human rights are in some part denied, or more accurately judged somewhat 'lower' than the right of an ethnicity to exist.

Obviously, that is not the point. Obviously, it is a matter of assessing the severity of the intent to commit the destruction of a group of people as such. And since we are talking about assessment, it is very likely to indicate that we have moved to the plane of judgement and then to condemnation. This is what I mean by pointing out that the term genocide is primarily a legal term.

If it is primarily a legal term, it needs precise and exhaustive criteria that will make it possible to establish the existence of this act in the actions of a person. Otherwise, we will have a situation when we have to establish legally significant facts with the help of a non-legal term. This is always fraught with errors, inaccuracies and speculation and is particularly dangerous in criminal law.

International legal scholars have raised the issue that defining genocide as a crime against a group of people may have the opposite effect. Groups, instead of being protected by having a common identity, may begin to "hate" each other, potentially giving rise to "group" intolerance and clashes. This thesis was born along with the very idea that the crime of genocide exists. However, this argument does not seem very convincing. Firstly, because group intolerance is as much a phenomenon today as genocide itself. Secondly, the notion of the "legal" underlying any rule of law cannot be

overridden by the "risk" that the defence of such a legal may lead to negative consequences. The defence of any protected interest is capable of producing negative consequences. These consequences can be very different – from revenge to negative consequences from the fact of serving a sentence. And there are many such arguments. Therefore, when criminalising genocide, one should not "look back" at possible negative consequences in the form of "intolerance" of groups towards each other.

Today we have examples of Russia waging a war of aggression against Ukraine, in the course of which it is quite probable that genocidal intent has been established. This is all the more likely if we pay attention to the rhetoric of the Russian political elite, as well as the course of events in the occupied territories and in certain regions where hostilities have been or are being waged. An example is the city of Mariupol. In it, between February 24, 2022 and May 20, 2022, events took place that resulted in the complete destruction of the city with a population of almost 450,000 inhabitants, the killing of a large number of civilians, the destruction of civilian and critical infrastructure, the introduction of filtration procedures accompanied by torture, the deportation of children and adults, enforced disappearances, and so on. Moreover, all these events are in no way related to the military objective that was declared by the Russian political leadership at the time of the outbreak of the war. However, despite all this, many lawyers are sceptical about the possibility of qualifying these actions as genocide. And this scepticism is based on the fact that there is no legal concept of genocide today.

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