

**ՄԻՋԱԶԳԱՅԻՆ ՔՐԵԱԿԱՆ ԻՐԱՎՈՒՆՔ / INTERNATIONAL CRIMINAL LAW /
МЕЖДУНАРОДНОЕ УГОЛОВНОЕ ПРАВО****ՍԿՈԲԻՈԱԼԱ ԴԻԱՆԱ**

իրավաբանական գիտությունների դոկտոր, դոցենտ, Մոլդովայի
Հանրապետության արդարադատության ազգային ինստիտուտի տնօրեն

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ՅԵՂԱՍՊԱՆՈՒԹՅԱՆ ՀԱՆՑԱԿԱԶՄԻ ՏԱՐԵՐԻ ՍԱՀՄԱՆՄԱՆ ԶԱՐԳԱՑՈՒՄԸ***EVOLUTION OF DEFINING ELEMENTS OF THE CRIME OF GENOCIDE*****ЭВОЛЮЦИЯ ОПРЕДЕЛЕНИЯ ЭЛЕМЕНТОВ СОСТАВА ПРЕСТУПЛЕНИЯ ГЕНОЦИДА***

The term “crime against humanity” has been used since World War I, more specifically in the context of the implementation of the Treaty of Versailles. Based on Article 227 of the Treaty of Versailles, the Allied Powers decided to create an international tribunal for bringing the Prussian Emperor Wilhelm II to individual liability that was incriminated with the violation of international provisions during the World War I. Thus, for the first time, the idea of individual criminal liability based on international law has been acknowledged in international treaties.

Moreover, the 1915-1923 events have echoed in modern time, following the World War I Allied Powers desire to punish crimes against humanity. In this regard, in October 2019, an U.S. Democratic-controlled House voted 405-11 in favor of a resolution asserting that it is U.S. policy to commemorate as genocide the killing of 1.5 million Armenians by the Ottoman Empire from 1915 to 1923. The vote marked the first time in 35 years that such legislation was considered in the full

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House, underscoring widespread frustration in Congress with the Turkish government, from both Democrats and President Donald Trump's fellow Republicans. After the Armenian genocide vote, House lawmakers from both parties also backed legislation calling on President Trump to impose sanctions on Turkey over its offensive in northern Syria, another action likely to inflame relations with NATO ally Turkey. The Democratic-controlled House voted 405-11 in favor of a resolution asserting that it is U.S. policy to commemorate as genocide the killing of 1.5 million Armenians by the Ottoman Empire from 1915 to 1923. The fate of both measures in the U.S. Senate is still unclear, with no vote scheduled on similar legislation.

The year of 1945 has brought cardinal changes to the mankind as it regards the creation of a new world order. The Second World War conflagration was about to end and the international community had already attempted to take measures to conceive an international cooperation and security system that would be more effective than its predecessors – The League of Nations.

It can be undoubtedly stated that among some of the major accomplishments of that emblematic year is the creation of the United Nations Organization on 26 June 1945 when in the framework of San Francisco Conference, the Charter of the United Nations Organization has been adopted. The paramount goal of this newly created organization can be taken out from the Charter's Preamble namely; practicing tolerance and living together in peace as good neighbours and the international security are among the organization's main goals¹.

The World War II affected the entire international society, both morally and legally and these affections were the consequences of all atrocities recorded during this World War. The fact of committing these hateful crimes posed the problem of bringing to liability of those responsible for planning, organizing and committing these crimes.

In June 26 – August 7 1946 during London Conference, the Allies (United States of America, France, Great Britain and the Soviet Union) initiated the creation of the necessary legal and institutional cadre needed for trying war crimes within an international military tribunal. The works of the conference culminated in the adoption of the Statute of the International Military Tribunal from Nuremberg, instituted by the London Agreement of 8 August 1945.

In drafting the jurisdiction to be covered by the Tribunal's powers, the drafters defined the crime against humanity as being "*namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated*".

According to the drafters, the goal of this definition was to encompass the atrocities committed on the territory of Germany against the Germans, thus the definition being different than the war crimes committed against the civilians on the territories occupied by Germany.

The statute of Nuremberg Tribunal can be considered as the first "proof" of International Criminal Law. The Statute's main thesis is that the commission of crimes against peace and the crimes against humanity triggers the individual criminal liability according to the provisions of international law². Furthermore, the codified provisions of the Nuremberg Tribunal have been mirrored in the International Military Tribunal for the Far East (IMTFE), also known as Tokyo War

¹ Charter of the United Nations (June 26, 1945). [On-line]: <https://www.un.org/en/charter-united-nations/> (Visited on 29.11.2019).

² Верле Герхард. Принципы международного уголовного права. М.: Транс Лит, 2011. Р. 9.



Crimes Tribunal (created on 19 January 1946 by the Proclamation of the Supreme Commander of Allied Powers, General Douglas MacArthur).

By most of the scholars and researchers, that step is considered a unique and revolutionary step during that period in the overall development of international law. That is, because by that time the state was liable for any illicit deed committed in regard to the nationals of other countries. The unique or novel feature of such a decision could be highlighted by the International Military Tribunal itself, namely: *“The crimes against humanity are committed by the people, but not by abstract subjects and only through punishment of individuals who committed these crimes an observance of international law provisions shall be ensured”*.

Besides criminalizing the crimes against peace and war crimes, the Statute criminalizes the crimes against humanity. The main goal of this criminalization was to protect own nationals against such atrocities, in comparison with war crimes where the main goal is the protection of foreign nationals. The concept of the crimes against humanity was built on the thesis that certain serious attempts gain an individual international character, if these are directed against some concrete groups of persons.

One of the worst forms of violation of international law is the *genocide*, a new type of crime against humanity. The reason for seriousness of approaching this crime was that the genocide was not legislatively covered either by the Tribunal’s statute or by its judgments.

The Nazi genocide has been reviewed during the Nuremberg trials through the lenses of war crimes and the crimes against humanity. Hence, during the trials, the actions encompassing “the extermination” or “persecution” received increased attention. Following the results obtained upon the conclusion of the Nuremberg Tribunal, the UN commenced activities aimed at recognizing and codifying the genocide as an international crime.

Nevertheless, the Statute of the Nuremberg Tribunal also received certain harsh criticism. The criticism referred to the fact that the actions criminalized by the Tribunal had already had recognition according to the international law as being illegal while committed. A sound example in this regard could serve bringing to individual liability for the *aggression crime* that was based on a quite fragile legal cadre – Briand-Kellogg Pact of 27 August 1928.

As it concerns the crimes against humanity, it can be stated with certainty that various crimes such as murder, slavery, torture and sexual assaults have been recognized as crimes in all existing legal systems at that certain time. In the same context, it was not about the fact of criminalizing these crimes, but about the investigation of individuals for these crimes in the framework of that “legal tier” of crimes against humanity and direct criminalization for their commission based on the provisions of international law¹.

For the first time the genocide has been acknowledged as an international crime on 11 December 1946 by the General Assembly of the United Nations (UN) via Resolution 96 (I) on “The Crime of Genocide”². However, the mentioned UN resolution referred to genocide as in the past and described it as a crime that “took place”³. The explanation why this resolution refers to this definition in the past tense could be revealed in the issue of codifying the crime of aggression in the

¹ Верле Герхард. Принципы международного уголовного права. М.: Транс Лит, 2011. P. 14.

² UN General Assembly Resolution 96 (I) of December 11, 1946. Genocide [On-line]: [https://undocs.org/en/A/RES/96\(I\)](https://undocs.org/en/A/RES/96(I)) (Visited on 29.11.2019).

³ William A. Schabas Ос Мриа. Genocide in International Law. The Crimes of Crimes. Second Edition, Cambridge University Press, 2009. P. 17.



framework of international law and the justification of actions undertaken by the Nuremberg tribunal in criminalizing this international crime. Taking as a basis such resolution that highlights the importance of codifying the genocide in international law, the process of codification and definition of genocide in criminal law had been initiated.

In this regard, taking into account that Resolution 96 (I) recommends to the Member States to undertake measures on initiation of an international cooperation in order to facilitate the prevention and a punishment of genocide, on 9 December 1948, the General Assembly adopted the Convention on Prevention and Punishment of Crime of Genocide. Through this convention, “genocide” has been codified as a stand-alone crime and ratified and entered in force in 149 countries.

In this context, the International Court of Justice (ICJ) stated several times this Convention that embodies the principles found in the international general law. This means that regardless of the fact whether countries have ratified or not the 1948 Genocide Convention, these are committed to observe the provisions of the Convention through the lenses of the principle that genocide is a crime that is banned by the international law. Moreover, ICJ stated that the prohibition of genocide is an imperative norm found in the international law (i.e. *ius cogens*) and subsequently there should be no derogation from it¹.

Despite the adoption of this convention, the criminalization of genocide crime, the results obtained during the activities of the Nuremberg Tribunal, the creation of a robust mechanism aimed to counter-act the actions that persecuted certain groups based on criteria set forth in article 2 of the Convention have not been sufficient enough. Later on, in the 1960s of the XX century, the international community faced a series of tragic events that happened in Nigeria. In 1967, as a result of an internal armed conflict between the government and the country’s eastern regions, the ethnical population Ibo became a target of a continuous process of persecution, harassment and purge. This armed conflict has led to a horrendous death toll of an ethnic group estimated between 600,000 up to 1,000,000 people.

At the beginning of 1990s of the XX century, the atrocities committed on the territory of former Yugoslavia and Rwanda, have terrified the entire international community. In Rwanda, during three months about 500 000 persons have been slaughtered based on ethnic and racial criteria. In former Yugoslavia the militia units of Bosnian Serbs persecuted and exterminated Bosnian Muslims².

In response to the unbearable events, the United Nations Security Council create two international ad-hoc tribunals whose main objective was to “...bring to justice those responsible for serious international humanitarian law violations committed on the territory of ...” Rwanda and former Yugoslavia. Both international ad-hoc jurisdictions through their statutes incriminated the crime of “genocide” through Art. 4, paragraph (2) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY)³ Article 2, paragraph (2) of the International Criminal Tribunal for Rwanda (ICTR)⁴.

¹ Genocide. [On-line]: <https://www.un.org/en/genocideprevention/genocide.shtml> (Visited on 29.11.2019).

² Верле Герхард. Принципы международного уголовного права. М.: Транс Лит, 2011. Р. 291.

³ Statute of the International Criminal Tribunal for the Former Yugoslavia. [On-line]: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (Visited on 29.11.2019).

⁴ Statute of the International Tribunal for Rwanda. [On-line]: http://legal.un.org/avl/pdf/ha/ict_r EF.pdf (Visited on 29.11.2019).



It is worth mentioning that through the history, the issue of “genocide” has been a sensitive one for the international community. The definition of international law cannot be corroborated with the realities of Ancient times or to the period of classic international law (Post-Westphalia period). A specific feature of the international law consists in its capacity to develop continuously depending on the needs and problems that are to be overcome by the subjects of the international law at a certain historic stage. This is also a situation that refers to the definition of the concept of genocide crime and its codification as an international crime.

As it was mentioned earlier, the Nuremberg Tribunal judgments do not make a reference to “genocide” as to a crime. Thus, the dilemma of defining the genocide and outlining that this is not a new phenomenon for the XX century was revealed in the Preamble of the Convention that acknowledges “*that at all periods of history genocide has inflicted great losses to humanity*”¹.

Following this order, Article 2 of 1948 Genocide Convention has proposed to the international community a definition of genocide that is defined as any of the following acts set forth below, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) *Killing members of the group;*
- (b) *Causing serious bodily or mental harm to members of the group;*
- (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) *Imposing measures intended to prevent births within the group;*
- (e) *Forcibly transferring children of the group to another group*².

Up until the present, the definition of genocide, codified by Article 2 of the 1948 Convention remains unchanged in its initial version and is practically reiterated by all subsequent codifications in the areas of international criminal law. Analysing the provisions of Article 2 of the 1948 Genocide Convention, we can establish that the main emphasis is placed on the protection of four big, identifiable groups, in line with the following criterion – national, ethnic, religious, racial or religious. However, during the activities of drafting the text of the current convention, the final option of this definition has been preceded by another draft that obviously provided another definition to “genocide”.

Hence, in the draft text of the secretariat, Article 1 incorporated the following definition: “...*The purpose of the present Convention consists in preventing the destruction of racial, linguistic, religious and political groups of human beings...*”³. The same draft defines genocide as any action aimed *against any mentioned group mentioned with the purpose to destroy in whole or in part or prevent its preservation and development*. The actions that were to be classified as “acts of genocide” were the following:

- 1) *Causing the death of members of a group or damaging health and physical integrity through:*

¹ Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948). [On-line]: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf (Visited on 29.11.2019).

² Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948). [On-line]: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf (Visited on 29.11.2019).

³ William A. Schabas *Os Mria. Genocide in International Law. The Crimes of Crimes. Second Edition, Cambridge University Press, 2009. P. 655.*



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- a) *Groups massacres or individual actions;*
 - b) *Subjecting to such life conditions that because of lack of adequate living, clothing, food, food, hygiene and medical case, of excessive labour or physical activities can lead to debilitation or persons' death;*
 - c) *Mutilation or biological experiments inflicted for purposes other than treatment related ones;*
 - d) *Deprivation of all living means, through confiscation of property, robbery, restraining labour, the refusal to offer shelter and of other assets that can be provided to other people living on this territory.*
- 2) Restricting the number of birth through:
 - a) *Sterilization and/or compulsory abortion;*
 - b) *Segregation based on sex;*
 - c) *Restriction on marriages.*
 - 3) Destruction of certain features of a group through:
 - a) *Forced transfer of children to another group;*
 - b) *Forced and systematic exile of persons that represent the culture of a group;*
 - c) *Prohibition of using the language even in private relations.*

In the Republic of Moldova the 1948 Genocide Convention took effect on 26 April 1993 the year when Moldova has begun a comprehensive effort to join the most paramount international treaties and conventions and among them, the Genocide Convention. However, in the national laws the crime of genocide has found the most comprehensive regulation in at the beginning of 2000, when a new brand-new Criminal Code has been drafted and regulated. Hence, article 135 of the Moldovan Criminal Code the genocide (article 135) is criminalized within the Chapter “Crimes against Peace and Security of Humanity, War Crimes”. Article 135 defined the genocide as being – Commission aimed at the destruction, in whole or in part, of a national, ethnic, racial, or religious group of any of the following acts:

- a) *Killing members of this group;*
 - b) *Causing serious bodily or mental harm to members of the group;*
 - c) *Imposing measures intended to prevent births within the group;* d) *trafficking in children of the respective group;*
 - e) *Deliberate exposure of the group to living conditions leading to its physical destruction in whole or in part.”*
- *Shall be punished by imprisonment for 16 to 20 years or by life imprisonment.”*

It is worth mentioning that the drafters of the Moldovan Criminal Code have studied and analyzed specific case-law developed by ICTR and ICTY and used both international criminal tribunals' findings and solutions to substantiate the commentaries and rationale that were to be presented to the Moldovan legislators.

However, at the international level, the major milestone achieved was the successful adoption on July 17 1998 of the Statute of International Criminal Court (ICC) in Rome. Article 5 of the Statute provides for expressly what are the categories of international crimes that fall under the ambit of the courts' jurisdiction. The first that is indicated is the genocide crime¹. Article 6 ICC Statute defines

¹ Art. 5, Rome Statute of the International Criminal Court (July 17, 1998). [On-line]: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (Visited on 29.11.2019).



the genocide using the same formulation and text as it was approved during the negotiations held in 1948¹.

Throughout the years, the definition offered by the 1948 Genocide Convention had a major impact as it concerns the further development of the definitions of genocide crime, both at the international level as well as the national one. The same commitment is requested on behalf of UN Member States by Resolution 96 (I) of 11 December 1946.

Article 5 Genocide Convention provides for that the Contracting parties commit to undertake, in compliance with their constitutions, the necessary legislative measures for ensuring the application of Convention. Logically, the genocide definition has not been ignored in this regard by the Contracting Parties.

During the negotiations of the ICC Statute, the drafters wanted to introduce also the political and social groups within the definition. However, most of the delegates to negotiations have taken the decision to deviate from the text of the definition acknowledged by the international society².

From those exposed, we reach to the conclusion that the provisions of genocide implemented in all international forums are direct descendants of genocide crimes tried by the Nuremberg Tribunal. Moreover, Article II of the 1948 Genocide Convention, for the first time codified a definition of genocide through a mandatory international instrument. Taking into account that the definition of genocide has been reiterated in the constitutive elements of ad-hoc and permanent international instruments that followed after 1945, the relevant case-law of these tribunals confirmed the fact that the substance of Article II of the Convention of 9 December 1948 is a part of the international customary law^{3, 4} and is a *jus cogens* and *erga omnes*^{5, 6}. Likewise, the International Court of Justice (ICJ), by its Advisory Opinion of 28 May 1951 has focused the attention on the fact that taking into account the origins of 1948 Genocide Convention, following the conviction and punishment of genocide as primed by the UN GA Resolution of 11 December 1946, the principles that are at the basis of the Convention are the ones unanimously recognized by the civilized nations as being compulsory for other states even though without conventional obligations and the conviction of genocide and the necessary cooperation for “freeing humanity from such an odious scourge”⁷ has an universal character¹.

¹ Art. 6, Rome Statute of the International Criminal Court (July 17, 1998). [On-line]: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (Visited on 29.11.2019).

² Верле Герхард. Принципы международного уголовного права. М.: Транс Лит, 2011. P. 349.

³ Democratic Republic of the Congo v. Rwanda, ICJ, Judgment of February 3, 2006, par. 64. [On-line]: https://books.google.md/books?id=e81LBAAAQBAJ&printsec=frontcover&dq=Gerhard+Werle+International+Criminal+Law&hl=en&sa=X&ved=0ahUKFwjjpKSVz_LiAhWCyKQKHfSmCqAQ6AEIKDAA#v=onepage&q=Gerhard%20Werle%20International%20Criminal%20Law&f=false (Visited on 29.11.2019).

⁴ Prosecutor v. Radislav Krstic, ICTY, Judgment of August 2001. Par. 541. [On-line]: <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> (Visited on 29.11.2019).

⁵ Application of the Convention on the Prevention and Punishment of the Armed Activities (Judgment) 31 29 Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 616, para. 31). [On-line]: <https://www.icj-cij.org/files/case-related/91/091-19960711-JUD-01-00-EN.pdf> (Visited on 29.11.2019).

⁶ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23. [On-line]: <https://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-EN.pdf> (Visited on 29.11.2019).

⁷ Preamble to the Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948). [On-line]: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf (Visited on 29.11.2019).



Finally, the crime of genocide, as regulated by Article 6 of the ICC Statute covers the acts of genocide committed during peacetime as well as during armed conflicts, and can also be tracked and found in the national laws of the states that are members of 1948 Genocide Convention and the ICC Statute.

Ամփոփագիր: Հոդվածում քննարկվում են ցեղասպանության հանցակազմի սահմանման պատմական զարգացման առանձնահատկությունները: Մասնավորապես, նշվում է, որ ցեղասպանությունը, անկախ նրանից, խաղաղ պայմաններում, թե պատերազմի ժամանակ է այն կատարվում, մարդկայնության դեմ ուղղված ծանրագույն հանցագործություն է, որով խախտվում է մարդու իրավունքների մի ամբողջ համալիր: Բացի դրանից, վերլուծելով միջազգային-իրավական համապատասխան փաստաթղթերն ու ներպետական օրենսդրությունը, հեղինակները հանգում են եզրակացության, որ ուսումնասիրվող հանցագործության հանցակազմի տարրերի սահմանման հիմքում բոլոր դեպքերում դրված է «գենոցիդ» եզրույթը, որն օգտագործվել է Նյուրնբերգի միջազգային ռազմական տրիբունալի 1945 թվականի դատավճռում՝ նացիստական կառավարության ներկայացուցիչներին մարդկայնության դեմ ուղղված հանցագործություններում մեղավոր ճանաչելու կապակցությամբ:

Аннотация: В данной статье рассматриваются особенности исторического развития определения элементов состава преступления геноцида. В частности, отмечается, что геноцид, независимо от того, совершается ли он в мирное или военное время, является тягчайшим международным преступлением против человечности, нарушающим целый комплекс прав человека. Кроме того, анализируя соответствующие международно-правовые акты и внутригосударственное уголовное законодательство, авторы приходят к выводу, что во всех случаях в основе определения элементов состава исследуемого преступления лежит термин “геноцид”, который был использован в приговоре Нюрнбергского международного военного трибунала в 1945 году, в связи с обвинением нацистского правительства в преступлениях против человечности.

Հիմնարաներ¹ ՄԱԿ, միջազգային իրավագործություն, Միջազգային քրեական դատարան, ցեղասպանություն, մարդկայնության դեմ ուղղված հանցագործություններ, միջազգային անհատական պատասխանատվություն:

Key words: UN, international jurisdictions, International Criminal Court, genocide, crimes against humanity, international individual liability.

Ключевые слова: ООН, международная юрисдикция, Международный уголовный суд, геноцид, преступления против человечности, международная индивидуальная ответственность.

¹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23. [On-line]: <https://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-EN.pdf> (Visited on 29.11.2019).