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**The crime of genocide and crimes against humanity
In light of the current regulation of the rome statute**

Abstract

The purpose of this paper is to analyse the current conceptual scope of the crime of genocide against the background of the evolving interpretation of the provisions of the Rome Statute, as well as attempt to formulate *de lege ferenda* conclusions for considering future legislative changes in light of the weaknesses of the current regulation.

Key words: crime of genocide; crimes against humanity; Rome Statute; International Criminal Court.

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“Where does evil come from? From man and man alone.”

~ Tadeusz Różewicz

Introduction

The subject of international crimes, as they touch upon the most important values protected by international regulations, seems to be one of the most important issues for this branch of law in its current dimension. Being a very complex and regulated by a set of various provisions matter, it is, however, burdened with many legal gaps and thus gives rise to interpretational doubts and mutually contradictory views of the doctrine and jurisprudence, showing that even these international legal standards which were established several decades ago can still arouse controversy and a multitude of emotions today.

The aim of this paper is, therefore, to analyze the current scope of the crime of genocide against the background of the evolving interpretation of the Rome Statute, and an attempt to formulate *de lege ferenda* conclusions concerning consideration of future legislative changes in light of the weaknesses of the current regulation.

Theoretical part

Raphael Lemkin, author of the concept of genocide and the draft of the so-called “Lemkin Convention”¹ on the prevention and punishment of the crime of genocide signed on

¹ *Convention on the Prevention and Punishment of the Crime of Genocide*, in accordance with article XIII.

9 December 1948, aptly pointed out that “new concepts require new terms”². This is all the more legitimate as violations of international humanitarian law of armed conflict and international criminal law are increasingly identified as linking to “systemic criminality” or to “collective doing of evil”, mainly due to the fact that these crimes are committed on a mass scale or basing on a systematic pattern of violent acts that clearly distinguishes them from ordinary crimes.³

One of the first who attempted to define the relationship between the crime of genocide and crimes against humanity was Theodor Meron, a judge at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, and William Schabas, an eminent lawyer specializing in international criminal law, author of unparalleled studies and commentaries on, among others, the Rome Statute, cited by major international tribunals, including the International Court of Justice and the International Criminal Court, who accepted that they fell into the common category of international crimes.⁴ Their view quickly gained popularity and to this day has served as a starting point for other research in this area,⁵ as well as for the decisions of, for example, the already mentioned International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda in such important cases as those of *Tadić*, *Kupreskić* or *Krstić*.

² Lemkin (1944): 79.

³ van Sliedregt (2003): 4–5, Drumbl (2007): 3–6, 15, 26–29; May (2005): 122–124.

⁴ Meron (1995): 558; Schabas (2010): 250–256; *National Courts Finally Begin to Prosecute Genocide, the “Crime of Crimes”* (2003): 39–63.

⁵ Greenawalt (1999): 2259, 2293; Frulli (2001): 329; Dinstein (2000): 234–236; Nersessian (2010): 174–175.

In fact, although in light of their separate entities regulated by separate laws it would be unjustified to believe that these crimes are completely cohesive or that their scopes are identical, they both concern mass phenomena as a result of which entire communities are victims, which implies a multitude of similarities that are impossible to ignore. These similarities can be seen on three levels: on the level of the content and scope of the definition of crimes and structure of their attributes (normative similarity), as well as on the axiological and functional level.

And so, on normative grounds, for both crimes to be classified as such it is necessary that there is a systematic pattern of behavior by the perpetrators, the occurrence of a special extended form of the subjective aspect in the form of the so-called special intention or awareness of taking part in an attack against civilians, and the perpetrators' behavior is directed against specific groups of victims.

Moreover, the so-called basic acts, constituting the basis of the subjective aspect (in forms such as, *inter alia*, murder, enslavement, or causing bodily harm) are similar. In particular, the definitions of both crimes are clearly similar in respect of the subjective qualifications of the perpetrator and the victim – the perpetrator may be both a state (directly through its organs and indirectly through controlled entities), and an individual (regardless of their position, including possible participation in state authorities, while as a rule individual perpetration takes place in a configuration which may be called macro crime, consisting of an extensive and complicated pyramid of dependencies between persons), while the victim may be any natural person, provided, however, that they belong to a concrete human group.⁶

⁶ Iwanek (2015): 30–31.

Similar, or even identical, are also the values protected (the object of protection) by the penalization of both crimes, which take the form of individual and group (collective) values. The subject matter of these crimes is made up of the same attributes of criminal acts, on top of which is the requirement of being part of an attack carried out on a large scale. For crimes against humanity, this requirement is included in Article 7(1) of the Rome Statute as an act “committed as part of a widespread or systematic deliberate attack directed against a civilian population,”⁷ while for the crime of genocide in the Elements of the Definition of Crimes,⁸ requiring that each of the underlying acts be committed in the context of a clear pattern of similar conduct directed against a protected group.

Finally, there is also functional similarity, which means that because of the far-reaching connection between the basic acts that can constitute both crimes against humanity and genocide, the application of law by international tribunals is inconsistent and the definitions of the two crimes analysed are uncertain and intertwined. The subsidiary role of crimes against humanity in the jurisprudential pragmatics of international tribunals, resulting from the above, can also be observed. The considerable difficulty of proving that the accused are guilty of the crime of genocide makes it extremely rare for these tribunals to convict the accused for this crime, preferring instead to do so for crimes against humanity, which seems to be best illustrated by the case of *Plavsić*, who was charged simultaneously with the crime of genocide and crimes against humanity. The defendant entered

⁷ *Rome Statute of the International Criminal Court*: Art. 7; 1. Rome Statute of the International Criminal Court.

⁸ *The Elements of Crimes* (2002): part II.B.

into a plea bargain in which she pleaded guilty only as regards the charge of crimes against humanity in exchange for the prosecution dropping the charges relating to the crime of genocide.⁹ How then, in light of the above, to make a desired distinction between the crime of genocide and other crimes against humanity? It will certainly be necessary to look at their current definitions.

Undoubtedly, despite the fact that there are other terms used to define the acts punishable under international law, such as war crimes, crimes under international law or violations of the law of war and humanitarian law, it is the concept of international crimes that seems to be universally accepted,¹⁰ and it is certainly wrong to interchangeably use this term with the concept of “violations of the humanitarian law of armed conflict,”¹¹ since although the latter may qualify as international crimes, they do not exhaust the full scope of the concept, and thus cannot serve as a general definition of a broader concept.

The term “crime” itself is commonly understood as “a serious crime” and “an act deserving, from an ethical point of view, the strongest condemnation”, while the Polish Penal Code, in dividing crimes into felonies and misdemeanors, provides in Art. 7 § 2, that “a crime is an offence punishable by imprisonment for a term of at least 3 years or by a more severe punishment.”¹²

Under international law, however, a crime may be defined as

⁹ Iwanek (2015): 33.

¹⁰ Gaska, Ciupiński (2001): 104; Dynia (1999).

¹¹ Lankosz (2001): 247.

¹² Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny, i.e. Art. 7 § 2.

a criminal act attributable to an individual on the basis of guilt, the commission of which violates the norms of international law directly, i.e., in the form of the application of criminal law principles in international law

or as

an act contrary to international law attributable to a State as a form of *delictum iuris gentium* and giving rise to the international responsibility of the State – whether in the currently alleged form of the so-called international crime of State or the more modern concept of grave breaches of peremptory norms of international law.¹³

And it is to crimes so understood that the jurisdiction of the International Criminal Court is limited according to the wording of Article 5 of the Rome Statute, which states that

the jurisdiction of the Court is limited to the most serious crimes of international concern and includes the following crimes: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression.¹⁴

Although the above enumeration already indicates the separate place of the crimes which are the subject of our deliberations, the full picture of the issue is drawn by two subsequent articles which attempt to define it by enumerating the acts which are their expression. And so, Article 6 of the said

¹³ Iwanek (2015): 36.

¹⁴ *Rome Statute of the International Criminal Court*: Art. 5.

Statute states that genocide is: (a) the murder of members of the group; (b) the causing of serious bodily or mental harm to members of the group; (c) the deliberate creation of conditions of life for the group calculated to cause its physical destruction in whole or in part; (d) the use of measures intended to stop births within the group; or (e) the forcible transfer of children of members of the group to another group; – done with the intention of destroying in whole or in part of a national, ethnic, racial or religious group,¹⁵ while Article 7 lists as crimes against humanity (a) murder; (b) extermination; (c) slavery (d) deportation or forcible transfer of a population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity; (h) persecution of any identifiable group or collectivity for political, racial, national, ethnic, cultural, religious, gender or other reasons generally considered as inadmissible under international law, in connection with any act to which this paragraph applies or any crime within the jurisdiction of the Court; (i) enforced disappearances of persons; (j) the crime of apartheid; (k) other inhuman acts of a similar nature intentionally causing great suffering or serious injury to the person or to mental or physical health; – committed as part of a widespread or systematic deliberate attack directed against a civilian population.¹⁶

Although at first glance the definitions developed in this way seem to be transparent and permitting unambiguous classification of the criminal act in the appropriate category,

¹⁵ Ibidem: Art. 6.

¹⁶ *Rome Statute of the International Criminal Court*, Art. 7.

they still provide difficulties even for the International Criminal Court itself. Therefore, it is undoubtedly worth looking at the circumstances in which they emerged.

Early examples of genocide include the destruction of half the population of China during the Mongol conquests, the native populations of the Americas during their colonization and great geographical discoveries, and the Cathars during the crusades led by the Catholic Church. In the 20th century, genocide was common during wars, just to mention the slaughters of Armenians, Assyrians and Pontic Greeks in Turkey, the massacres of the warring parties in Africa and Asia, or the extermination of the Jewish (Holocaust) and Gypsy (Porajmos) populations carried out by the Nazis. In Poland, according to sources, considered genocide, in addition to the Nazi crimes identified in the judgment of the Nuremberg Tribunal, are the Katyń Massacre, the pogrom in Miednoje, the murder in Jedwabne, or the slaughter in Volhynia. Among the contemporary defendants of the crime of genocide, who will stand trial before the International Criminal Court, Omar Hassan Ahmad Al Bashir is, without doubt, a leading figure to be mentioned.

To the extent that a hierarchy of international crimes is accepted, genocide is considered a “crime at the top” and is sometimes called a “crime of crimes”.¹⁷ Its current definition is the same as the one originally devised by the aforementioned Rafał Lemkin. It was used for the first time, essentially unchanged, in the indictments in the so-called Nuremberg trials, which were held from 20 November 1945, to 14 April 1949, against those responsible for Nazi crimes during World War II who had committed systematic, deliberate genocide,

¹⁷ Schabas (2016): 124.

i.e. the extermination of racial and national groups of the civilian population in the occupied territories with the aim of destroying specific races, classes, nations, peoples, national and religious groups, including Poles and Jews.¹⁸ Even before the conclusion of the last Nuremberg trials, on 9 December 1948, the UN General Assembly adopted the aforementioned Convention on the Prevention and Punishment of the Crime of Genocide,¹⁹ where the concept of genocide appeared for the first time in the form of a legal regulation, in fact equivalent to that functioning to this day in the Rome Statute. It transpires that it protects the physical integrity of national, ethnic and religious groups, while the possible object of the perpetrators of genocide is the group, both permanently (where membership is necessary) and temporarily (where membership depends on choice).²⁰ Such a group should be considered to be made up of at least a few individuals, with a certain degree of permanence and organization, who possess specific characteristics of enduring cultural values, which make it possible to distinguish the group from the rest of the population. Among them we can distinguish groups of national (whose basic identity is connected with belonging to a recognized nation or state), ethnic (which refer in their identity to the issue of cultural or linguistic minorities, functioning within a state or outside a state), racial (which relate to being born into a particular race), and religious (which relate to belonging to a theistic, non-theistic, or atheistic congregation) nature.²¹ For the legal classification of genocide, it must be established

¹⁸ Sawicki (1949): 25, 26.

¹⁹ *Convention on the Prevention and Punishment of the Crime of Genocide*, in accordance with article XIII.

²⁰ Sawicki (1949): 48.

²¹ Lippman (1999): 598.

that the conduct in question has been committed with the intention of destroying, in whole or in part, a particular group.²² Knowledge of the consequences is not a sufficient basis for the imputation of the crime, there must be a clear aim of destroying the group.²³ The omission of motive was undoubtedly the right move in the construction of the definition of genocide; otherwise, motive would have to be proved each time, while its variety – obtaining living space for the members of one's own group, a desire for financial gain, or racial or ethnic hatred – would make it considerably more difficult.²⁴

And when it comes to other crimes against humanity, some of the most famous examples are those that were investigated during the Nuremberg trials. During the “trial of major war criminals” the cases of twenty-four people who were accused of crimes against humanity were heard. Of course, not all were able to be tried – several members of the Nazi party – including Adolf Hitler himself and two of his most important associates, Heinrich Himmler and Joseph Goebbels – committed suicide before being brought to trial, and some went into hiding abroad for the rest of their lives. Following the conclusion of these initial trials, “more Nuremberg trials” were held at Nuremberg. One of these trials was the “Doctors Trial”, in which 23 people were accused of committing crimes against humanity, such as conducting medical experiments on prisoners of war, some of whom were children. Another of these later Nuremberg trials was also the “trial of the Judges”. The trial involved 16 lawyers and judges who were accused of helping the Nazis to manipulate the laws of the Third Reich to suit their plans. Among

²² Schabas (2016): 128.

²³ Kabatsi (2005): 391.

²⁴ Milanovic (2006): 557.

the contemporary perpetrators of crimes against humanity who have stood or are scheduled to stand trial at the International Criminal Court are Omar Hassan Ahmad Al Bashir, Al-Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Jean-Pierre Bemba Gombo, Saif Al-Islam Gaddafi, Laurent Gbagbo, Charles Blé Goudé, Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman, Abdel Raheem Muhammad Hussein, Germain Katanga, Uhuru Muigai Kenyatta, Al-Tuhamy Mohamed Khaled, and Callixte Mbarushimana.

What is not clear, however, is in what context the term “crimes against humanity” was first developed. Some point out that the term was used as early as the late 18th and early 19th centuries, particularly in the context of slavery, slave trade, and the atrocities associated with European colonialism.²⁵ Others point to a declaration issued in 1915 by the Allied governments (France, Britain and Russia) condemning the mass killing of Armenians in the Ottoman Empire.²⁶ Since then, the concept of crimes against humanity has evolved under customary international law and through the jurisdiction of international courts such as the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda. Although, unlike genocide or war crimes, crimes against humanity have not yet been codified in a treaty of international law devoted to them, they have been recognized as a peremptory norm from which no derogation is permitted and which applies to all states. In its current functioning in the Rome Statute, mentioned many times before, it mirrors its original draft laid down in the Charter of the International Military

²⁵ Schabas (2012): 51–53.

²⁶ Bassiouni (1999): 62.

Tribunal (the Nuremberg Charter), where, in response to Nazi crimes during World War II, including the crime of the Holocaust, it was raised that

murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during the war, or prosecutions on political, racial or religious grounds in execution 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.²⁷

The contextual element specifies that crimes against humanity involve either a large-scale attack on a significant number of victims or its extension over a wide geographical area (widespread), or a methodical type of violence (systematic), which excludes random or isolated acts of violence, which does not have to be proven in the case of crimes of genocide.²⁸ Furthermore, Article 7(2)(a) of the Rome Statute provides that crimes against humanity must be committed in furtherance of the policy of a State or organization to commit an attack,²⁹ while they do not have to be explicitly defined or formally adopted, and can therefore be inferred from the totality of the circumstances. Unlike genocide, crimes against humanity also do not have to target a specific group. Instead, the victim of an attack can be any civilian population, regardless of affiliation or identity. Another important distinction is that in the case of crimes against humanity, it is not necessary

²⁷ URL = <http://www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanity>.

²⁸ Schabas (2016): 143.

²⁹ *Rome Statute of the International Criminal Court*: Art. 7.2 (a).

to prove that there is a general specific intent – a simple intent to commit any of the listed acts, except for the act of persecution, which requires additional discriminatory intent. The perpetrator must also act with the knowledge of the attack on the civilian population and that his action is part of that attack. Finally, thanks to the significant evolution of international law, there is now no requirement to link crimes against humanity to a state of war, or any armed conflict,³⁰ or a discriminatory purpose or motive.³¹

For British lawyer Philippe Sands, author of *Lawless World*, the difference is that the systematic, indiscriminate killing of very large numbers of people will constitute a crime against humanity, whereas genocide focuses not on the killing of individuals but on the destruction of groups, and thus the two concepts will have different objectives – one is aimed at protecting the individual, the other at protecting the group.³² The conflict between the two concepts stems, Sands says, from the fact that calling mass murder “genocide” diminishes the importance of individual victims. This can be seen as unjust because people are human beings and therefore should be protected or served justice as individuals (a view promoted by a prominent figure of the legal scene – Hersch Lauterpacht – co-author of the Charter of the International Military Tribunal at Nuremberg, author of the concept and definition of “crime against humanity”, judge of the International Court of Justice). Hence, the argument for the term “crimes against humanity” because it emphasizes the humanity of every hu-

³⁰ Schabas (2016): 168.

³¹ Ibidem:171.

³² URL = <https://www.theatlantic.com/international/archive/2013/03/whats-the-difference-between-crimes-against-humanity-and-genocide/274167/>.

man being. However, it can also be argued that people who become victims of mass murder because of their ethnic or religious affiliation are repressed for belonging to that group, and therefore this connection cannot be ignored in their case (a view promoted by the already mentioned Rafał Lemkin). In other words, they did not become victims simply because they were individuals, and thus genocide is more appropriate.

In his commentary on the Rome Statute, aforementioned William Schabas stresses that, if charges are to be considered under both provisions, the judges of the International Criminal Court must decide on a case-by-case basis whether to allow cumulation of sentences, but although he admits that to a certain extent those who opt for the statement that that genocide is an aggravated form of a crime against humanity are right to find that cumulative sentences that include both genocide and crimes against humanity are permissible, since these crimes have materially different elements,³³ as confirmed by, among others, the International Criminal Tribunal for Rwanda in the *Musema* case. Recently, however, both charges were heard by aforementioned Omar Hassan Ahmad Al Bashir.

Final conclusions

In light of the above argumentation, the distinction between genocide and crimes against humanity must be considered to be most valid. This argument has proved, however, that there are still certain inconsistencies which may make this procedure problematic, even for the International Criminal Court itself, leading to lengthy proceedings before that body

³³ Schabas (2009): 13.

and to considerable difficulties for the Office of the Prosecutor in proving the accused guilty.

Therefore, it is only to be hoped that the scope of the concept of crimes of genocide and individual crimes against humanity will be more clearly defined, as even the law based for several decades on the same, seemingly stable pillars should take into account the margin of error that can be seen in successive cases brought before the International Criminal Court, and better respond to the dynamics of an ever-changing reality, despite the passage of years no less cruel.

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