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Genocide in international criminal law with reference to Srebrenica – prevention and challenges

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Abstract

In 2025 will be 30 years since the end of the war in Bosnia and Herzegovina (BiH). In May 2024, the United Nations adopted a resolution to establish 11 July as *International Day of Reflection and Commemoration of the 1995 Genocide in Srebrenica*. The author focuses in this article on the crime of genocide, which is often referred to in the literature as the "crime of crimes" with a special reference to Bosnia and Herzegovina, i.e. the Srebrenica genocide. The analysis of this issue is based on the convention concept of genocide arising from the legal construction defined in the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948. The most important segments of the text are: examination of the genocide crime through the prism of the general legal and social context, the convention concept of genocide with reference to the misuse of the concept of genocide, as well as to the negation or denial of the crime, the glorification of the persons legally convicted of committing genocide and other war crimes. The genocide committed in Srebrenica in July 1995, where between 7000 and 8000 people were killed, must be a warning to humanity with a clear preventive message that genocide will never and nowhere be repeated, and that the international community will take all necessary actions to provide adequate protection. The essential problem in establishing or proving the existence of genocide is primarily related to the complexity of establishing the specific genocidal intent of the perpetrator as a specific and unique feature of this crime. The crime of genocide is precisely recognisable by specific genocidal intent as the subjective component of this crime, which distinguishes it from other related international crimes. Additionally, the intention of the author is to point out the importance of establishing judicial truth, general prevention, affirmation and promotion of the universal human values, on which the civilised world rest, in order to reconcile, coexist and ensure peace, security, human rights and freedom, the rule of law, the culture of dialogue, humanity and so on. The article also emphasises the inability of the

international community to find effective enforcement mechanisms aimed at the timely detection and prevention of risky behaviour that may escalate into a crime. For this reason, the author appeals for strengthening international cooperation in criminal matters and using the full potential of criminal law as a preventive instrument.
Keywords: genocide, Bosnia and Herzegovina, genocidal intent, human rights in Europe, prevention.

Ludobójstwo w międzynarodowym prawie karnym w kontekście Srebrenicy – zapobieganie i bariery

Streszczenie

W 2025 roku minie 30 lat od zakończenia wojny w Bośni i Hercegowinie. W maju 2024 roku ONZ przyjęła rezolucję ustanawiającą 11 lipca *Międzynarodowym Dniem Refleksji i Upamiętnienia Ludobójstwa w Srebrenicy w 1995 roku*. W związku z tym, autor skupia się w niniejszym artykule na zjawisku ludobójstwa, które w literaturze często określane jest jako „zbrodnia zbrodni" ze szczególnym uwzględnieniem Bośni i Hercegowiny, tj. ludobójstwa w Srebrenicy. Analiza omawianego zjawiska opiera się na normatywnej definicji ludobójstwa wynikającej z *Konwencji o zapobieganiu i karaniu zbrodni ludobójstwa* z 1948 roku. Główne segmenty tekstu obejmują analizę ludobójstwa w kontekście prawnym i społecznym, przedstawienie koncepcji ludobójstwa i problemu niewłaściwego użycia tego pojęcia, a także kwestię negowania ludobójstwa, zaprzeczania zbrodniom oraz gloryfikowania osób prawomocnie skazanych za ludobójcze lub inne zbrodnie wojenne. Ludobójstwo popełnione w Srebrenicy w lipcu 1995 r., w którym zginęło od 7000 do 8000 osób, powinno być ostrzeżeniem dla ludzkości z jasnym przekazem zapobiegawczym, że ludobójstwo nigdy i nigdzie nie powinno się powtórzyć, a społeczność międzynarodowa podejmie wszelkie niezbędne działania w celu zapewnienia odpowiedniej ochrony. Znaczącą trudność w ustaleniu lub udowodnieniu istnienia ludobójstwa stanowi identyfikacja konkretnego ludobójczego zamiaru sprawcy jako unikalnej cechy tej zbrodni. Zbrodnia ludobójstwa jest rozpoznawalna po konkretnym ludobójczym zamiarze, będącym subiektywnym elementem tej zbrodni, co odróżnia ją od innych pokrewnych zbrodni międzynarodowych. Ponadto, intencją autora jest wskazanie znaczenia ustalania prawdy sądowej, ogólnej prewencji, potwierdzenia i promowania uniwersalnych wartości ludzkich, na których opiera się cywilizowany świat, w celu pojednania, współistnienia i zapewnienia pokoju, bezpieczeństwa, praw człowieka i wolności, rządów prawa, kultury dialogu, ludzkości itd. Artykuł wskazuje również na niezdolność społeczności międzynarodowej do znalezienia skutecznych mechanizmów egzekwowania prawa, których celem byłoby terminowe wykrywanie i zapobieganie ryzykownym zachowaniom, które mogą przerodzić się w przestępstwo. Z tego względu autor apeluje o wzmocnienie międzynarodowej współpracy w sprawach karnych i wykorzystanie pełnego potencjału prawa karnego jako instrumentu prewencji.
Słowa kluczowe: ludobójstwo, Bośnia i Hercegowina, zamiar ludobójczy, prawa człowieka w Europie, zapobieganie ludobójstwu

Genocide – social and legal context

The crime of genocide, by its nature, method of execution, destructive consequences and some other specifics (heinousness, brutality, cruelty, etc.), causes special attention of the scientific, professional and general public in the world. By its destructiveness directed against conventionally protected groups and the existence of specific genocidal intent as a subjective component of the perpetrator, this crime constitutes an autonomous and independent international crime, that is, a crime against humanity and values protected by international law. Therefore, genocide is specifically distinguished from other international crimes (crimes against humanity, war crimes, crimes against peace – aggression), and for good reason is often referred to in the literature of international criminal law and the practice of international justice as the "crime of crimes". The drafting and adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide* in 1948, after the Second World War, represents a particularly significant international legal document. Genocide is not only a crime under general international law but is also the subject of an international legal prohibition imposed on States (Kreß 2006: p. 468).

The milestone that expresses the clear commitment of the international community to prevent this crime and to punish the perpetrators irrespective of their political, military, economic or other status or position in a particular country. The Convention also foresees the responsibility of the state parties for genocide, and the possibility that states, as subjects of public international law, initiate a dispute against each other before the International Court of Justice in order to determine responsibility for this crime (Gurda 2015: p. 37).

Particularly for this reason, this international legal document also contains a very important preventive message, since high-ranking political, military, police or other officials are not exempt from criminal prosecution, when there is a justified suspicion that they participated or contributed in any way to the commission of the crime of genocide (execution, complicity, order, command responsibility). "One of the most important issues of international criminal law is the principle of individual criminal liability, according to which those who commit international crimes are personally liable for them, regardless of their position or function" (Czeszejko-Sochacka 2022: p. 98).

The atrocities of World War II were the ultimate alarm, when the international community had to undertake certain activities in terms of drafting and adopting one such document (convention) that would send an important preventive but also repressive message (punishment) to the world. However, the Genocide Convention has certain shortcomings and omissions and the most noticeable are: the definition of genocide does not include cultural and economic genocide, does not include extermination on political grounds; no criteria have been established to define conventionally protected human groups; and the enforcement mechanism provided for in the Convention is not effective (Cassese 2005: p. 110–111).

The term genocide is attributed to the Polish jurist Raphael Lemkin who coined the term by combining the Greek word "genos", meaning race, people, or tribe, with the Latin

term "cide" (*caedere, occidere*) meaning to kill (Lemkin 1944: p. 79). This concept was originally much broader. Due to the lack of one voice and consensus on certain issues, it is narrowly limited to only certain genocidal acts, with the existence of genocidal intent directed against certain human groups, but not all human groups, since some other human groups (cultural, sexual, economic, political or other), are omitted from the list of protected human groups.

Even today, both theory and practice, recognises numerous questions, different understandings, attitudes and dilemmas that require adequate answers and solutions in order to properly understand and interpret the legal nature of the crime of genocide. Especially, when it comes to defining this crime, distinguishing it from other international crimes, determining the protected convention group and proving the existence of a subjective intention of the perpetrator (genocidal intent) by which this crime is recognizable. The common characteristics of international crimes sometimes lead to unnecessary comparisons, which is wrong from a legal aspect and causes numerous dilemmas and conflicts, when understanding the legal elements (Karović 2012a: p. 792). Despite all the efforts and dedication of the international community and the civilised world after the Second World War to prevent this crime, we have witnessed its repetition in an even more destructive form (Rwanda, Bosnia and Herzegovina – Srebrenica), which requires a critical review of the preventive-repressive capabilities, capacities and resources for the prevention of this crime. War destruction, systematicity, its organisation and the number of people killed, especially children and civilians, in the Gaza Strip (Palestine) clearly demonstrate that human destruction is on the increase, that crimes are still part of our daily lives and that they require an adequate response from the international community in terms of prevention and adequate punishment. It is quite clear that certain economic sanctions, political and diplomatic appeals or certain warnings are not adequate and proportionate. Therefore, the international community must demonstrate determination at the implementation level, in order to achieve the purpose of the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948, as well as the purpose of numerous other international instruments guaranteeing the protection of the fundamental human rights and freedom of every individual irrespective of his or her national, ethnic, religious or racial affiliation or other personal characteristics.

This means that the implementation plan must establish adequate preventive protection mechanisms aimed at the timely prevention of genocide, it is necessary to identify at an early stage all risky behaviors that, by their nature and destruction, can 'develop' into the crime of genocide. The area of criminal etiology requires special attention, i.e. causation, with the intention of eliminating or at least reducing etiological (causal) factors that directly or indirectly contribute to the occurrence of the crime of genocide. On the other hand, attention and reaction occurs mainly when on the social "scene", i.e. in practice, we have very harmful and destructive consequences, when the conflict escalates in full capacity, which is completely wrong because in that case it is much more difficult to stop and bring certain destructive processes and events under control.

Conventional concept: defining genocide – (mis)use of the term

(a) Defining the term genocide

A correct understanding and interpretation of the definition, i.e. the conventional concept of genocide, is of the utmost importance for the correct legal qualification of certain events in the world, given that the concept of genocide is very often misused for certain political, ideological or other purposes, neglecting or ignoring its legal nature and definition. With the drafting and adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948, this crime acquired its autonomy and independence as a specific international crime, since this convention determined the objective and subjective elements that constitute the legal construction of this crime. Prior to the drafting and adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide* in 1948, the crime of genocide existed as a subset of the crime against humanity. Genocide is the deliberate act of certain actions against members of a national, ethnic, racial or religious group with the aim of its complete or partial physical or biological destruction (Fabijanić Gagro, Škorić 2008: p. 1388).The crime of genocide consists of undertaking various actions with the aim of the total or partial destruction of a national, ethnic, racial or religious group (Babić 2011: p. 136). Considering its content, the feature of a passive subject and above all, the subjective component – the genocidal (destructive) intention of the perpetrator, genocide is often referred to as "the crime of crimes, or the most serious, so-called "capital crime" (Škulić 2020: p. 240). From the aforementioned definitions of genocide, which are identical in content, we note that they include the same determinants that make up the definition, namely: certain acts of execution, genocidal intent (total or partial destruction of a certain human group) and certain protected human groups as the object of this crime (national, ethical, religious or racial group). It is very important to emphasise a clear differentiation or distinction between genocide and other international crimes in order to avoid the misidentification of genocide with other crimes. In scientific and professional debates, there are different opinions and understandings regarding the legal qualification of certain events, especially in the part related to the standards of proof, the determination of the protected group, the determination of the subjective component (genocidal intent) of the perpetrator and other specificities of this crime.

The practice of international justice in specific criminal cases has established high standards of proof of the crime of genocide, in order to ensure the specificity of this crime in relation to other international crimes. Recognising that the *Convention on the Prevention and Punishment of the Crime of Genocide* is generic, and that it has not prescribed more precisely and clearly certain concepts relevant to a proper understanding of genocide, the practice of international justice has offered certain answers of a practical nature and has removed certain dilemmas and ambiguities.

The relatedness and certain similarities of the crimes against humanity and the values protected by international law (genocide, crimes against humanity, war crime, crime against peace – aggression) may be the cause of misclassification of the above-