Received: 2017-04-08
Original scientific article
DOI 10.19233/AH.2018.14

THE INTERPRETATION OF ARTICLES 2 AND 3 OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (1948) IN THE LIGHT OF THE JURISPRUDENCE OF INTERNATIONAL JUDICIAL AUTHORITIES

Bojana LAKIĆEVIĆ ĐURANOVIĆ
University of Montenegro, Faculty of Law, 13 jula 2, Podgorica, Montenegro
e-mail: bojanal@ac.me

ABSTRACT

Through the analysis of the sentences of the International Criminal Tribunal for the former Yugoslavia and the International Court of Justice, the article proposes an interpretation of the second and third article of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations in 1948. On one hand, the author takes into consideration the question of genocide in a socio-anthropological and historical perspective and in the international law, on the other, she highlights the issues of inconsistencies and contradictions that have distinguished other interpretations of the two articles of the Convention.

Keywords: genocide, Convention on the Prevention and Punishment of the Crime of Genocide (1948), International Criminal Tribunal for the former Yugoslavia, International Court of Justice

L'INTERPRETAZIONE DEGLI ARTICOLI 2 E 3 DELLA CONVENZIONE SULLA PREVENZIONE E LA REPRESSIONE DEL CRIMINE DI GENOCIDIO (1948) ALLA LUCE DELLA GIURISPRUDENZA DELLE AUTORITÀ GIUDIZIARIE INTERNAZIONALI

SINTESI

Attraverso l'analisi delle sentenze del Tribunale penale internazionale per l'ex-Jugoslavia l'articolo si propone di interpretare il secondo e il terzo articolo della Convenzione sulla Prevenzione e la Repressione del Delitto di Genocidio del 1948 in seno all'Organizzazione delle Nazioni Unite. Da una parte l'autrice prende in considerazione la questione del genocidio in una prospettiva socio-antropologica e storica e in quella delle questioni del diritto internazionale, dall'altra pone in evidenza il problema delle inconsistenze e delle contraddizioni che hanno contraddistinto le altre interpretazioni dei due articoli della Convenzione.

Parole chiave: genocidio, Convenzione sulla Prevenzione e Punizione del Crimine di Genocidio (1948), Tribunale penale internazionale per la ex Jugoslavia, Corte internazionale di giustizia

INTRODUCTION

Articles 2 and 3 are *essentia legalis* of the Convention on the Prevention and Punishment of the Crime of Genocide, one of the most important legislative instruments in the history of the United Nations. The qualification that "*the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation*" (ICJ Reports, 1951, 23), given by the International Court of Justice in its advisory opinion on the admissibility of reservations to The Convention on Genocide, refers primarily to Articles 2 and 3 of the Convention.

The interpretation of Articles 2 and 3 of the Convention came to the fore only in the second half of the 20th century, before International Court of Justice and ad hoc Tribunals for the former Yugoslavia and Rwanda.

These interpretations suffer, in general, from both inconsistency and contradiction, especially as regards the perception of "the protected group" and the meaning of the word "destruction" of the protected group or its part.

It is precisely this inconsistency that calls for an analysis of the relevant jurisprudence since "*consistency is the essence of judicial reasoning*" (ICJ Reports, 2004, 55, para. 3). It is especially so when it comes to a crime, which, as is stated in the Preamble to the Convention "*shocks the conscience of mankind*" as "*contrary to moral law and to the spirit and aims of the United Nations*."

In this context, it seems adequate to consider the jurisprudence of both the International Court of Justice (ICJ), and the International Criminal Tribunal for the former Yugoslavia (ICTY). Several reasons support such an approach:

(a) Under Article 9 of the Convention, the ICJ is a forum for "*interpretation, application and fulfilment* […] *of the Convention*".
(b) The crime of genocide, due to its specific collective nature, entails cumulatively the responsibility of individuals and that of the State.
(c) It enables interconnecting international jurisdictions relating to genocide for the purpose of "[u]*nity of substantive law as a remedy for jurisdictional fragmentation*" (Kreća, 2015, 3; Cannizzaro, 2007, 7).

GENOCIDE: SOCIO-ANTHROPOLOGICAL AND HISTORICAL PERSPECTIVE

Although our paper deals predominantly with the legislative framework of the crime of genocide and the analysis of the jurisprudence of international judicial bodies (ICTY and ICJ) specifically in relation to Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide, we will first try to give an outline of the observed phenomenon from several other perspectives. First of all, we deem it necessary to provide the definition of genocide put forward by Raphaël Lemkin, American lawyer and historian (1900–1959), who coined the term itself to mark the most heinous phenomenon in human history, which, although occurred many times before did not have a name until after the Second World War. According to Lemkin:

By ‚genocide' we mean the destruction of a nation or an ethnic group [...]. *Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity,but as members of the national group.* (Lemkin, 2005, 78–79).

Following this first definition, from the second half of the 20th century on, experts on genocide from different walks of science have given other, more or less extensive, definitions of this phenomenon, some of which we will list here. Peter Drost (1959) defines genocide as "*the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such.*" (Jones, 2010, 15).

Leo Kuper (1981) expresses his disagreement with the definition of genocide given in the UN Convention believing it should include political groups in the list of protected groups since "*in contemporary world, political differences are at the very least as significant a basis for massacre and annihilation as racial, national, ethnic or religious differences*" (Jones, 2010, 16). To further reinforce his argument, Kuper states that "*the genocides against racial, national, ethnic or religious groups are generally a consequence of, or intimately related to, political conflict*." (Jones, 2010, 16). Isidor Wallimann and Michael N. Dobkowski (1987) define genocide as "*the deliberate, organized destruction, in whole or in large part, of racial or ethnic groups by a government or its agents. It can involve not only mass murder, but also forced deportation (ethnic cleansing), systematic rape, and economic and biological subjugation*" (Jones, 2010, 15–16), while Henry Huttenbach's definition (1988) is, unlike most others, quite concise: "*Genocide is any act that puts the very existence of a group in jeopardy*" (Jones, 2010, 15–16).

Steven T. Katz (1994) sees genocide as "*the actualization of the intent, however successfully carried out, to murder in its totality any national, ethnic, racial, religious, political, social, gender or economic group, as these groups are defined by the perpetrator, by whatever means*." (Jones, 2010, 18). He claims that only the Holocaust fits his definition, thus departing from the widely accepted UN definition by excluding the partial genocides: these were, in his opinion, tragedies, not genocide, since, according to Katz, in no other case was there an actal attempt at extermination of a group. However, other scholars have shown that genocides in Rwanda and Armenia alongside a number of genocides committed against Africans and Native-Americans were examples of extermination attempts. Although perhaps not equivalent to the Final Solution (*die Endlösung der Judenfrage*) in terms of intent and/or ideology, these instances of mass slaughter unfortunately bore sufficient similarity to the Holocaust in other dimensions.

(Shelton, 2005, 189). Barbara Harff's post-2000 definition (2003) reads: "*Genocides and politicides are the promotion, execution, and/or implied consent of sustained policies by governing elites or their agents – or, in the case of civil war, either of the contending authorities – that are intended to destroy, in whole or part, a communal, political, or politicized ethnic group*" (Jones, 2010, 18).

One might notice that these definitions became more inclusive with time, so as to expand the definition of genocide beyond the distruction of what we might term "traditional" national-ethnic and religious groups to include other minority groups, primarily political, social and gender groups, which may be targeted to be destroyed. In *Encyclopedia of Genocide and Crimes Against Humanity*, Dinah Shelton summarizes several theories on genocide relying on both the UN definition, which distinguishes between total and partial genocide, and Leo Kuper's distinction between domestic and foreign genocide, "*in respect to the geographical and social boundaries of the state*" and concludes that it is possible to distinguish between four basic types of genocide: (1) total domestic (Armenians under the Young Turks, the Tutsi in Rwanda); (2) total foreign (Polish Jews under Nazi occupation, the Herero under German colonialism, etc.); (3) partial domestic (the gassing of the Kurds in Iraq under the regime of Saddam Hussein); and (4) partial foreign (Poles and others under Nazi occupation) (Shelton, 2005, 188).[1] Shelton's research into genocide theories has not identified any general theory for the phenomenon apart from the fact that genocide indubitably entails the dehumanization of its victims.[2]

Regrettably, the history of mankind abounds in instances of destruction of entire or parts of ethnic or religious groups, and in not such distant past, throughout the entire 20th century, even in its second half, a large number of people were killed in bloody ethnic-religious conflicts in former Yugoslavia and Rwanda, only due to their ethnic or religious affiliation.

These recent events have contributed to a renewed interest in genocide of a large number of professionals of various profiles: historical (Docker, 2008), psychological and psycho-sociological (Hinton, 2005; Dutton, 2007; Waller, 2007), cultural-anthropological (Hinton, 2005; Hinton, 2009), and historiographic (Curthoys & Docker 2001; Weiss-Wendt et al., 2008).

In his comprehensive historiographic study of genocide, John Docker considers what he calls "*the sombre implications of Lemkin's reconceptualization of history*", that is, the sad fact that "*rather than violence being abnormal, it is 'an intrinsic characteristic of human activity'*" (Docker, 2008, 2). This not particularly optimistic view of Lemkin's was supported by the findings of the British primatologist, ethnologist and anthropologist Jane Goodall, who observed drastically different forms of behavior among lower primates (the Gombe chimpanzees: the Kasakela and the Kahama groups) towards members of one's own group (those perceived as belonging to the group) and members of another group

1 For sake of brevity and clarity only one or two examples have been given for each of the types. For more detailed information, see Shelton, 2005.

2 This is confirmed by research in social psychology.

of the same species (those perceived as not belonging): the same individuals are capable of extreme sacrifice and love towards members of the same group and the most violent aggression and creuelty towards members of the rival group (Goodall in: Docker, 2008, 27). Jared Diamond, ecologist, biologist and anthropologist, has a rather pessimistic view of the progress of human society, arguing that:

> *genocide amongst human groups probably began millions of years ago, when the human species was just another big mammal. He believes that perhaps the commonest motive for genocide in history occurs in disputes over* lebensraum (Diamond in: Docker, 2008, 29).

Most studies of genocide are devoted to Holocaust research: scholars focused on the psychological structure of individuals, the concept of "authoritarian personality", traditions of militarism, autocracy and anti-Semitism. In the early 1960s, the research turned from the psychological analysis of individuals and the special features of German history to the social psychological analysis of the behavior of certain groups (Pust, 2009, 635–636).

James Waller observes the phenomenon of genocide from the standpoint of social psychology:

> *As collectives, we engage in acts of extraordinary evil, with apparent moral calm and intensity of supposed purpose, which could only be described as insane where they committed by an individual. How do we explain the extraordinary evil that we perpetrate on each other in the name of our country, race, ethnicity, political party, or god?* (Waller, 2007, xiii).

Waller approaches the answer to these questions by developing an explanatory model based on three elements: actor, context of the action and definition of the target, which can make us sensitive to the forces that shape our responses to authority and thus help in cultivating moral sensitivity so as to curb our capacity for etraordinary evil. This model defines two sets of dispositional influences most relevant to "*understanding perpetrators of extraordinary evil: the innate, evolutionary tendency for ethnocentrism, xenophobia and the desire for social dominance*" (Waller, 2007, 144), and "*cultural beliefs systems, moral disengagemente and rational self-interest*" (Waller, 2007, 177). The context in which unimaginable crimes occur is *a culture of cruelty*, and the elements of the context are: "*professional socialization, binding factors of the group, and the merger of role and person*" (Waller, 2007, 203). In pepetrating extraordinary evils, it is also important to define the target: it involves a psychological and social construction of victims as "otherness" and their "social death", whereby the victims are kept "*outside the perpetrator's universe of moral obligation*" through three cognitive mechanisms: thinking in the categories of "us vs. them", dehumanization of the victims, and blaming the victims (Waller, 2007, 234).

The paradoxical nature of attempts to "destroy" a particular group is especially pronounced in situations where differences between conflicting groups are small, or

barely existent. Thus, Christopher Hitchens, British and American writer, religious and literary critic and journalist observes the role of a phenomenon defined in psychology as "*narcissism of small differences in atrocities worldwide*":

> *In numerous cases of apparently ethno-nationalist conflict, the deepest hatreds are manifested between people who—to most outward appearances—exhibit very few significant distinctions. It is one of the great contradictions of civilization and one of the great sources of its discontents, and Sigmund Freud even found a term for it: 'the narcissism of the small difference.' As he wrote, 'It is precisely the minor differences in people who are otherwise alike that form the basis of feelings of hostility between them'* (Hitchens, 2010, 1).

In his article, Hitchens ponders over the examples of this phenomenon worldwide, emphasizing the essentially minor differences between the peoples/ethnic groups that are the subject of our paper. He draws on Michael Ignatieff's *The Warrior's Honor* (1998) where the author tries to elucidate

> *'what it was that made soldiers in the Balkan Wars – physically indistinguishable from one another – so eager to inflict cruelty and contempt upon Serb or Croat or Bosnian, as the case might be. Very often, the expressed hatred took the form of extremely provincial and local rivalries, inflamed by jealousies over supposed small advantages possessed by the other. Of course, here again there are latent nationalist and confessional differences to act as a force multiplier once the nasty business gets started, but the main thing to strike the outsider would be the question of 'How can they tell?' In Rwanda and Burundi, even if it is true, as some colonial anthropologists used to claim, that Hutu and Tutsi vary in height and also in the delimitation of their hairlines, it still doesn't seem enough of a difference upon which to base a genocide* (Hitchens, 2010, 1).

D. G. Dutton reaches a similar conclusion specifically when it comes to conflicts in the territory of the former Yugoslavia. Examining the psychopathological aspects of this phenomenon, he concludes his discussion of the ethnic conflicts in the territory of Bosnia and Herzegovina on the following note:

> *After the hostilities were stopped and forensic tests done on the victims, DNA testing failed to find any genetic differences between Muslims, Serbs, and Croats.70 The differences we construct amongst groups of human beings are largely symbolic* (Dutton, 2007, 37).

GENOCIDE(S) IN HISTORY

For centuries, genocide has been a constant companion to war and destruction and entire nations and groups have been exterminated in military and revenge campaigns

or as part of the policy of "ethnic cleansing". Some of the examples from the list of the historically recorded genocides are: the Roman destruction of the Carthage and the extermination of its population (146 BC) and the destruction of Jerusalem and subsequent displacement of the Jews by Emperor Titus (72 BC). During the conquest of Gaul, Caesar killed over a million Gauls.

In the Middle Ages, especially in Europe, dissenting religious groups were exterminated. In the Saint Bartholomew's Day Massacre (August 23–24, 1572), an estimated 70,000 Protestants were murdered in France. The Spanish king and the Roman Pope praised the slaughter as the victory of "true faith" (Comerford & Pabel, 2001, 55). During the Thirty Years' War (1618–1648), the population of Germany fell from seventeen million to ten. Entire nations perished at the hands of conquerors (Mayans, Aztecs and Incas, North American Indians).

Genocide is closely related and often inspired by imperialism (settler colonialism), which involves the occupation of the territory and displacement of indigenous population. Recently, attention of researchers, has been particularly focused on "genocide famines", deliberate starvation of certain ethnic and other groups, which were also imperial in character (Britain, the USSR or China) (Conquest, 1986; Becker, 1998; Davis, 2001; Jones, 2010). The most such case that of the Great Hunger in Ireland in 1840.

In only one year (1897–1898), British imperial policy in India led to over 11 million deaths, the total death toll amounting to between 12 and 16 million casualties. The famine of 1899–1902 was even deadlier leading to the 1901 estimate of as many as 19 million deaths by famine in the preceding decade. *Holodomor* is the name for the excess starvation-related mortality in the territory of the Ukrainian SSR during 1932 and 1933. This great famine was due to food shortages caused by forced collectivization of food production and unfavuorable weather conditions. However, according to Ukrainians, *Holodomor* was deliberately provoked by the Soviet government to reduce the political influence of Ukraine.

Belgian King Leopold's brutal exploitation of the indigenous population in the Congo led to the death toll of 10 million people. Australian Aborigines were almost exterminated between 1788 and 1901, their number plummeting from 750,000 to only 31,000. The German genocide against the Herero people in Namibia (1904) is considered the first genocide committed in the 20th century: mass murders of men, women, and children and chasing survivors into the Kalahari reduced the Herero population by almost a half (45 %). The scope of the terrible massacre and deportation of one and a half million Armenian by the Young Turks, the Armenian genocide (1915–1923), has relatively recently begun to be recognized worldwide. Among the horrors of the Second World War the extermination of two thirds of European Jews in the Holocaust (1939–1945) is certainly one of the greatest. In the period 1975–1979, during the Khmer Rouge's rule in Cambodia, around 1.5 million people – "class enemies" – perished, either by direct killings, or as a result of exhaustion from forced labor or starvation. This horrible list can be expanded by the massacre of nearly half a million Indonesians (1965–1966) and mass killings and genocide in Bangladesh (1971), Burundi (1972) and East Timor (1975–1979). It is estimated that the number of men, women and children victims of mass

murders and genocide in the last century amounted to a horrifying number of 60 million.

The bloody conflicts in the territory of the former Socialist Federal Republic of Yugoslavia (SFRY) and Rwanda in the 1990s left behind hundreds of thousands of dead and have been the most recent examples of the suffering of large proportions caused by ethnic conflicts. These two cases differ from other similar conflicts in that they led to the subsequent establishment of two international tribunals. Since this paper focuses on the legal aspects of genocide, the application of the existing legislation, i.e., an analysis of Articles 2 and 3 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in the judicial practice of these two tribunals will be its essential part.

In his book *Becoming evil: How ordinary people commit genocide and mass killing*, James Waller calls the 21st century "*the age of genocide*" (Waller, 2007, xii). The twenty-first century brought about much controversy in scholarly circles as regards some "sensitive" cases whereby certain widely accepted notions and attitudes have been challenged. For certain scholars, this means the expansion of the term to many military or economic actions by mainly Western countries that have not been regarded genocidal so far. In his study *Genocide: A comprehensive introduction*, Adam Jones deals, among other things, with such cases (Jones, 2010, 50). Unlike Michael Ignatieff, Jones sees the institution of the Atlantic slavery as genocide, despite Ignatieff's argument that the interest of slave owners was to keep slaves alive and not to exterminate them. Another controversial events are the bombing of German and Japanese cities by British and US air forces, and atomic bombs dropped on Hiroshima and Nagasaki at the very end of the war in 1945. The key question in both cases is when a "necessary" military action turns into genocide, given the fact that, for example, between 300,000 and 600,000 people were killed in the allied bombing of Germany. In the allied military actions close to the end of the war, 900,000 people were killed in Japan. Similar controversies exist about the sanctions imposed on Iraq after the Iraqi invasion and occupation of Kuwait.

The period since the 1960s has witnessed an increased interest in the phenomenon of "*structural violence*" (Johan Galtung). The question of to what extent destructive relations built into social and economic systems could be considered genocidal (since they often drive certain vulnerable groups to the verge of physical destruction either in whole or in part) has become ever more relevant. In 2005, Jean Ziegler, UN the Special Rapporteur on the Right to Food stated that "*Every child who dies of hunger in today's world is the victim of assassination," referring to the daily death of hundreds of thousands as to "the massacre of human beings due to malnutrition*" (Ziegler in: Jones, 2010, 27). According to Jones, the term genocide should be expanded so as to include infanticide and even high maternal mortality and names the phenomenon *gendercide* (Ziegler in: Jones, 2010, 27).

GENOCIDE IN INTERNATIONAL LAW

The prohibition of genocide is considered a peremptory norm of international law (Bassiouni, 1996, 68). From a legal point of view, this is an "*extremely serious offense, whereby it is necessary to examine the moral and legal issues of the general and special*

part of the criminal law, the relationship between international and domestic criminal law, the political inertia of the international community, and much more" (Korošec, 2006, 216).

The crime of genocide, which has been known as a phenomena since ancient times was legally regulated by the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. The Convention determines "*that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish., consisting in the deliberate partial or complete destruction of a national, ethnic, racial or religious group as such*". According to Korošec and Sancin (2012), even without detailed analyses of the contents of the Convention and international criminal law at the time of its adoption, at least the following is on the whole clear: the descriptions of the crime of genocide and other crimes within its framework are broad and vague – this especially refers to the boundaries between these crimes and individual crimes against humanity, which are not very clear not only in legislative technical terms, but above all in terms of criminal policy. Already at this point, it should be noted that some scholars observed that incompleteness and imperfection were to be expected, but not necessarily admissible consequences of the the concomitant development of the concept of crimes against humanity and the concept of crime of genocide and their partial overlapping in terms of content (Ambrož et al., 2012, 165–167).

It should also be noted that the prohibition of genocide also exists outside the Convention, since it belongs to the category of *jus cogens* norms, that is, fundamental principles of international law, from which derogation is not permitted and is, as such, compulsory for all states in the international community, including those which may not be signatories to the Convention (Ambrož et al., 2012, 165–167).

The first use of the term genocide in an official court document was recorded in the Basic Indictment of the Committee of Chief Prosecutors, which, inter alia, stated that the accused before the Nuremberg Tribunal "*conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others*" (Nuremberg Trial Proceedings, 1948, 12). The conclusion of the indictment filed by Yugoslavia with the International Military Court in Nuremberg reads:

> *During the occupation itself, they unlawfully annexed and dismantled the territory and destroyed the state organization of Yugoslavia, in order to systematically prepare their criminal plan of 'the Germanization of the land' by destroying the population. The result of their aggression and occupation was the destruction of the identified one million and six hundred and fifty thousand, and most probably two million Yugoslavs, that is, for a relatively short period of four years, almost a seventh of the total population.*[3] *This result came through their commonly known system and plan, which*

3 The number of victims is subject to contesting claims of Serbian and Croatian scholars. For more detail, see Žerjavić, 1990; Kočević, 2005; Đorđević, 1997.

Fig. 1: A symbol of a fair trial (photo by Bojana Lakićević Đuranović).

> *begins with looting and ends with mass murders, camps and crematoria* [...] (Report of the Yugoslav State Commission, 1947, 55).

In the judgment of the International Military Court, genocide is not explicitly mentioned as a special international crime. Despite much and convincing evidence, the Court refrained from explicitly mentioning genocide, for formal reasons, i.e. out of respect for the principle of legality, since the Statute of the Nuremberg Tribunal did not provide for the crime of genocide. The crime of genocide was, in fact, included in the crimes against humanity which encompassed:

> *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* (Nuremberg Trial Proceedings, 1948, 14).

Although the Nuremberg Tribunal did not include crimes of genocide in its judgement, it is beyond doubt that its judgment paved the way towards defining the crime of genocide and that it was the last stage in defining this crime in international law. The knowledge of the nature and techniques of genocide carried out by the leaders of Nazi Germany, alongside the abundance of clear and unequivocal evidence about it, contributed significantly in this respect .

The issue of genocide was also dealt with by *ad hoc tribunals*. In the last decade of the 20th century, two *ad hoc* criminal tribunals were established – the International Criminal

Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The Tribunal for the former Yugoslavia was established in 1993 and is competent to punish those responsible for serious violations of international humanitarian law committed in the former SFRY since the beginning of 1991. The Tribunal's jurisdiction *ratione materiae*, among other crimes, relates to the crime of genocide. The Tribunal consists of the Trial Chamber and the Appeals Chamber.

AN ANALYSIS OF ARTICLE 2 OF THE GENOCIDE CONVENTION

Under Article 2 of The Convention for the Prevention and Punishment of the Crime of Genocide (1948), genocide means any of the following acts 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.

Article 2 does not provide a general definition of genocide, but enumerative. Genocide, therefore, means any of the actions listed in paragraphs (a) to (e). The enumerative definition was chosen for practical reasons. Opting for a general definition could have led to different interpretations, in particular in terms of extending the notion of genocide to the acts covered by *jus in bello* (the law in waging war), or by the area of the protection of human rights or the rights of minorities. Therefore, it can be said that the absence of a general definition decreases the systematicity of the Convention, but it contributes to legal certainty and strict application of its rules.

Genocidal intent is what distinguishes the crime of genocide as a separate crime. It implies the intention to destroy a national, ethnic, racial or religious group as such, which is the differential element, that is *differentia specifica*, by which the crime of genocide differs from other international crimes with which it shares essentially the same material and objective elements (Robinson, 1949, 15).

Similar to Article 2 of the UN Convention on the Prevention and Punishment of the Crime of Genocide, the second paragraph of Article 4 of the Statute of the ICTY lists the protected groups as well as the acts legally defined as genocidal. The ICTY Statute does not distinguish between genocide in war and genocide outside of it, nor does it imply extensive or systematic destruction or other activities of such scope or content to be a condition for a crime to be defined as genocide (Ambrož et al., 2012, 164–165).

Killing members of the group

Among the actions referred to in Article 2, only the meaning of the phrase "*killing members of the group*" is clear in its own right and should not cause complications

in the application. Other actions listed are broadly formulated and allow for different interpretations.

Causing serious bodily or mental harm to members of the group

The Convention does not provide criteria to determine when a physical or mental harm is "serious". Hence, there are great differences in the interpretation of the term "*serious harm*". These differences are manifested not only in referring to various actions that inflict "*serious physical and mental harm*", but also in attempts, incoherent and often opposed, to determine serious harm in a "*general, substantial sense*". Rape is, beyond any doubt, a grave crime that, nevertheless, by its very nature belongs rather to war crimes and crimes against humanity. As with some other acts of execution, the insistence on their genocidal nature has been motivated by the noble intention to cause an appropriate reaction of the state and the international community.

It is obvious that the elements of subjectivism in the interpretation of the expression "*serious harm*" have their basis in an isolated and semantic interpretation of the word "serious" and are often under the influence of extralegal factors. It seems inevitable, in interpreting the term "serious harm", to put emphasis on a targeted and systematic interpretation. Given that the Convention does not give the elements of "serious harm", these two methods of interpretation appear to be the only acceptable. What does that mean? If the goal of the Convention is to prevent genocide and punish the perpetrators, then the means and methods that inflict physical and mental harm on members of the protected group are not automatically acts of committing genocide. Only those actions that can objectively lead to the destruction of a national, religious, racial or ethnic group can be qualified as such. Therefore, we believe the interpretation given by the United Nations International Law Commission to be correct, whereby "*to support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part*" (Report of the International Law Commission, 1996). In the Krstić case, the Trial Chamber of ICTY "*finds that serious bodily or mental harm* [...] *is an intentional act or omission causing serious bodily or mental suffering*" (Prosecutor v. Krstic, Case No. IT-98-33-T, para. 513). In this case, the Trial Chamber found that "*serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life*" (Prosecutor v. Krstic, Case No. IT-98-33-T, para. 513).

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

It is impossible to define in advance the "*conditions of life*" that fall under the prohibition laid down in Article 2; "*the intent and probability of the ultimate goal can determine in each particular case whether the act of genocide was committed (and attempted) or not*" (Robinson, 1949, 64). In the dispute between Bosnia and Herzegovina and the Federal

Republic of Yugoslavia/Serbia[4], Bosnia and Herzegovina cited alleged shelling and starvation, deportation and expulsion, and the destruction of historical, religious and cultural monuments as *deliberate infliction on the group conditions of life calculated to bring about its destruction* (The Memorial of Bosnia and Herzegovina of 15 April 1994, 40).

The International Court of Justice, in its judgment, expressly or tacitly took a stance whose basic elements are:

1) "*Reserving the question whether such acts are in principle capable of falling within the scope of Article II, paragraph (c), of the Convention, the Court [did] not find sufficient evidence that the alleged acts were committed with the specific intent to destroy the protected group in whole or in part*"(ICJ Reports, 2007, Judgment, para. 328). It reffered to the Galić case where it was found that
the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear the primary purpose of the campaign was to instil in the civilian population a state of extreme fear (Prosecutor v. Galic, Case No. IT-98-29-T, para. 593).

2) In relation to the deportation and expulsion, the position of the Court, also, is not unequivocal The court says:

even assuming that deportations and expulsions may be categorized as falling within Article II, paragraph (c), of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part (Prosecutor v. Galic, Case No. IT-98-29-T, para. 334).

3) The Court's position, however, is clear when it comes to the destruction of historical, cultural and religious heritage:

The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention.

Since, as noted in the Krstić case, "*even in customary law*", "*despite recent developments*", (Prosecutor v. Krstic, Case no. IT-98-33-T, para. 580) the definition of acts of genocide is limited to those seeking "*the physical or biological destruction of a group*" (Prosecutor v. Krstic, Case no. IT-98-33-T, para. 344).

4 The case concerning Bosnia and Herzegovina and the FR of Yugoslavia / Serbia was the longest and, at the same time, one of the most complex cases decided before the International Court of Justice. The trial before the Court lasted for almost fifteen years. It was launched on March 20, 1993, and ended with the passing of the judgment on the merits on February 26, 2007. It was complex both in terms of the subject-matter and the procedural and substantive law which the Court had to apply in the proceedings. It was the first time that a lawsuit for genocide was lodged before the ICJ.

Unlike the acts of execution in paragraphs a) and b) of Article 2, the act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction does not require proof of the outcome or result.

Imposing measures intended to prevent births within the group

Prevention of birth within the group represents biological genocide. In the Krstić case, the ICTY includes in this form of genocide many killed and missing men who accounted for about a fifth of the Srebrenica community, which caused the disappearance of the Bosnian Muslim population in Srebrenica. The tribunal points out:

> *In the present case, General Krstic participated in a joint criminal enterprise to kill the military aged Bosnian Muslim men of Srebrenica with the awareness that such killings would lead to the annihilation of the entire Bosnian Muslim community at Srebrenica* (Prosecutor v. Krstic, Case no. IT-98-33-T, para. 644).

Forcibly transferring children of the group to another group.

Considering the nature of the crime of genocide, as it is conceptualized in the Convention, the act of forcible transfer of children from one group to another may be the most controversial. The formulation of paragraph e) of Article 2 of the Convention, interpreted semantically, refers to cultural genocide. In practice, the implementation of such understanding of the concept of transferring children from one group to another is found in the opinion given by the Australian Commission on Human Rights and Equal Opportunities for Forced Transfer of Indigenous Children to Non-Indigenous Institutions and Families. The Australian Human Rights and Equal Opportunities Commission concluded that:

> *the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture* […]. *Removal of children with this objective in mind is genocidal because it aims to destroy the 'cultural unit' which the Convention is concerned to preserve* (Schabas, 2000, 178).

The Convention does not provide parameters as to what is meant by the "*part of the group*"under Article 2 of the Genocide Convention and on the basis of which criteria the "*part of the group*" should be determined. In *Axis Rule in Occupied Europe, Laws of Occupation – Analysis of Government – Proposals for Redress*, Lemkin states that the destruction of a national or ethnic group takes place in the form of killing *en masse* (Lemkin, 2005, 79). According to Lemkin, the crime of genocide should be qualified as a coordinated plan of various actions designed to destroy the essential foundations of life of national groups. Lemkin's interest in this subject dated from his student days when he took a keen interest in the attempts to prosecute the perpetrators of the Armenian massacre (Schabas, 2000, 25).

Nehemiah Robinson, one of the first and most respected commentators of the Genocide Convention, says: "*the intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if those persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial.*" (Robinson, 1949, 63). Therefore, Robinson identifies "*part* of a group" with a substantial number of members of the group.

A number of objections can be made to the stigmatization criterion (ICJ Reports, 2007, Individual Opinion of Judge Kreca, para. 92–94). The main objection is that the criterion of stigmatisation of the group departs from the basic principle of criminal law, according to which the perpetrator of the crime cannot determine the protected group at their own will. This brings the instability and chaos in terms of determination of the protected group, which, according to the Convention and the general legal logic, is a matter of objective law. In the Krstić case, the Tribunal for the former Yugoslavia pointed out:

> *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 Article 4* (Prosecutor v. Krstic, Case no. IT-98-33-A, para. 12).

In addition, in the recent Judgment of the Trial Chamber in the Mladić case, the Tribunal confirms this interpretation by failing to declare the accused guilty on the first count of the indictment (genocide against Muslims in the municipalities of Sanski Most, Vlasenica, Foča, Kotor Varoš and Prijedor):

> *The Bosnian Muslims targeted in each individual municipality formed a relatively small part of the Bosnian-Muslim population in the Bosnian-Serb claimed territory or in Bosnia-Herzegovina as a whole. The Trial Chamber received insufficient evidence indicating why the Bosnian Muslims in each of the above municipalities or the municipalities themselves had a special significance or were emblematic in relation to the protected group as a whole. The Trial Chamber is, therefore, not satisfied, beyond reasonable doubt, that the only reasonable inference that can be drawn from the surrounding facts and circumstances is that the physical perpetrators possessed the intent to destroy the Bosnian Muslims in Sanski Most, Foča, Kotor Varoš, Prijedor, and Vlasenica Municipalities as a substantial part of the protected group* (Prosecutor v. Mladic, Case no. IT-09-92-T, 3 of 5, para. 3535).

On the other hand, the Trial Chamber found:

> *that the Bosnian Muslims in Srebrenica constituted a substantial part of the Bosnian-Muslim population in Bosnia-Herzegovina* […] [and] *that the physical perpetrators committed the prohibited acts with the intent to destroy the Bosnian Muslims*

> *in Srebrenica, as a substantial part of the protected group of Bosnian Muslims in Bosnia-Herzegovina, which constituted the crime of genocide* (Prosecutor v. Mladic, Case no. IT-09-92-T, 4 of 5, para. 5129).

The definition of the crime of genocide given in Article 2 of the Convention is based on a symbiosis of two elements: the material (*actus reus*) and the subjective (*mens rea*). As we pointed out above, genocidal intent is what distinguishes the crime of genocide as a special crime. It implies the intention to destroy a national, ethnic, racial or religious group as such – an element that is *differentia specifica*, according to which genocide differs from other international crimes with which it essentially shares the same material and objective element (Robinson, 1949). Namely, the acts of execution of the crimes of genocide overlap with the acts of execution of war crimes and crimes against humanity. In order to differentiate war crimes and crimes against humanity on the one side from the crime of genocide on the other, and, more specifically, in order to treat them as independent crimes, genocidal intent is required. Without genocidal intent, the acts listed in Article 2 of the Convention are simply punishable offenses that fall within the scope of other crimes.

In the Kupreškić case, the ICTY emphasized the importance of *dolus specialis* in the crimes of genocide. In this regard, the Tribunal, among other things, points out:

> *The mens rea requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of mens rea, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide* (Prosecutor v. Kupreskic et al., Case no. IT-95-16-T, para. 636).

In relation to the Kupreskic case, Slovenian law professors Damjan Korošec and Vasilka Sancin observe that the *cogent nature* of the prohibition of crimes of genocide was confirmed in this case, recalling also the judgement in the *Barcelona Traction* case when the International Court of Justice gave the prohibition of genocide the character of *erga omnes* norms, that is, obligations owed by states to the international community as a whole (Ambrož et al., 2012, 171–172).

AN ANALYSIS OF ARTICLE 3 OF THE GENOCIDE CONVENTION

The following acts are punishable:
(a) Genocide.
(b) Conspiracy to commit genocide.
(c) Direct and public incitement to commit genocide.
(d) Attempt to commit genocide.
(e) Complicity in genocide.

Genocide

As we can see, the solution contained in Article 3 of the Convention is specific and deviates from the generally accepted standards in national criminal legislations. In other words, it does not distinguish between the committed crime of genocide and preparatory actions for the commission of the crime

In developed national criminal legislations, punishable acts, the so-called "incomplete crimes" are included in the general part of the criminal law, and the crime itself, as a rule, is criminalized in the special part. It should be noted that the practice of national criminal legislations is transposed into some instruments in the field of international criminal law. Thus, the *Rome Statute of the International Criminal Court*, as well as the *Draft Code of Crimes against the Peace and Security of Mankind* (Report of the International Law Commission, 1996: UN Doc. A/51/10, Art 17) include "*other punishable acts*" in the general provision dealing with the commission of the crime, applicable not only to genocide, but also to other crimes, such as crimes against humanity and war crimes. By contrast, the Statutes of the two ad hoc tribunals include the punishable actions in the definition of the crime of genocide.

The International Court of Justice dealt with the issue of genocide in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* initiated by Bosnia and Herzegovina against Serbia and Montenegro. The central question was whether a state could be held responsible for genocide, as was requested by Bosnia and Herzegovina. In its 2007 judgment, the International Court of Justice confirmed the case and stated unequivocally that a state could be held responsible for the commission of genocide, as well as for all other forms of execution and participation under Article 3 of the Convention. Moreover, it is stated that the obligation to prevent genocide is a completely independent legal obligation of states, which is separate from those in the following articles of the Convention (Ambrož et al., 2012, 170).

Conspiracy to commit genocide

Conspiracy to commit genocide was not the subject of specific discussions during the drafting of the Convention. The definition of conspiracy as a punishable act was relatively easy agreed upon, regardless of both the lack of general consent on what is

meant by "conspiracy" in the main legal systems of the world and the unbalanced practice of international tribunals.

The conspiracy in Article 3 of the Genocide Convention was shaped by the standards of the Anglo-Saxon law. The conspiracy thus understood was also provided for in the Charter of the International Military Tribunal in Nuremberg. Namely, Article 6 (a) of the Statute defines crimes against peace also as "*participation in a common plan or conspiracy for the accomplishment of planning, preparation, initiation or waging of a war of aggression*" (Nuremberg Trial Proceedings, 1948, 39–40). However, the concept of conspiracy defined in this way was not strictly followed in the jurisprudence of the Nuremberg Tribunal. The Tribunal abandoned the concept of conspiracy as an independent criminal offense approaching the idea that it is rather a form of participation in the crime itself.

The Statutes of the two ad hoc tribunals, although taking over the entire Article 3 of the Convention, did not build a consistent jurisprudence in that regard.

Direct and public incitement to commit genocide

Incitement is, by its very nature, a form of complicity by which another person is deliberately instructed to commit a criminal offense. Central to incitement is encouraging other person to commit a criminal offense. Therefore, incitement is sometimes also determined as a deliberate provocation or an assertion of a decision in a person encouraged to commit an unlawful act which will achieve characteristics of a criminal offense (Stojanović, 2006, 242; Srzentić & Stajić, 1968, 367). In its jurisprudence, the ICTY did not have indictments for incitement as a punishable act.

In his book *Genocide in Contemporary Criminal Law*, Korošec analyzes the Criminal Code of Slovenia in relation to the criminalization of genocide and explicitly states that the equal punishment of incitement and orders of genocide as its direct execution has been given explicitly in the very definition of genocide. He also referred to the specifics of the Slovenian legislation, adding that the punishment of complicity in genocide (Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide and Count B of the third paragraph of Article 4 of the Statute for Yugoslavia) was achieved through the general criminalization of criminal association under Article 297 of the Criminal Code of Slovenia and criminal conspiracy under Article 298 of the Criminal Code (Korošec, 2006, 217).

Attempt to commit genocide

It is on *attempt to commit genocide* that the drafts preceding the Convention contain the least material. The Secretariat Draft and the Ad Hoc Committee Draft completely coincide. The provision of paragraph (c) of Article 3 of the Convention was accepted virtually without discussion. This state of affairs is explained by the nature of the judicial authorities which decided in cases of international crimes. The ICTY and the ICTR did not specifically deal with attempts to commit the crime. Without precisely determining

the notion of attempt, there is a danger of criminalizing preparatory actions that, by their nature, do not belong to punishable actions. Bearing in mind the jurisprudence of the two ad hoc tribunals in terms of *actus reus*, which is undeniably large and often goes beyond the letter and spirit of the Convention, the absence of a precise definition of "attempt" can have particularly dangerous consequences.

Unlike the Rome Statute of the International Criminal Court, the Slovenian CriminalCode provides for general punishability of criminal attempt (including the attempt at genocide). This different approach in the Slovenial legislation draws from the liability for offence commited by order, whereby, according to the Slovenian legislation, it is necessary to combine provisions of Article 283 of the Criminal Code concerning liability for offence committed by order of a superior in the course of military service and that committed outside the army – the general provision on mistake of law under Article 21 of the Criminal Code. According to the their effects, both provisions are very similar (Korošec, 2006, 217).

Complicity in genocide

One of the features of international criminal law until the adoption of the Rome Statute of the International Criminal Court was the absence of a precise definition of complicity. In the provisions of the ad hoc Tribunal, the single notion of the perpetrator of the crime was applied. Article 7 (1) of the ICTY Statute treats equally a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime

The ad hoc tribunals have made an effort to draw the distinction between execution and complicity, defining various forms of complicity. However, this difference did not have much effect since it was relativized by the fact that, regardless of a person's role in the commission of the crime, the single notion of the perpetrator was applied. Despite the fact that the ICTY Statute does not concretize certain forms of complicity, it is immediately clear that it wants to include complicity in genocide precisely, potentially even to a wider extent than the Genocide Convention itself (Korošec, 2006, 206).

The ICTY has recognized several forms of complicity:

a) ordering;

b) planning;

c) aiding and abetting;

d) incitement.

Ordering implies an act whereby a person in the position of authority instructs another person to commit a criminal offense (Prosecutor v. Blaskic, Case no. IT-95-14-A, para. 42; Prosecutor v. Kordic and Cerkez, Case no. IT-95-14/2, para. 28; Prosecutor v. Galic, Case No. IT-98-29-T and IT-98-29-T-A, para. 176). Ordering differs from instigating in that the person ordering the commission of a crime "*have authority over the person physically perpetrating the offence. A causal link is required between the act of ordering and the physical perpetration of a crime analogous to that which is required for 'instigating'*". (Prosecutor v. Strugar, Case no. IT-01-42-T, 332). "*The actus reus of 'planning' requires*

that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated" (Prosecutor v. Kordic and Cerkez, Case no. IT-95-14/2-A, para. 26). In the ICTY's practice, in the Kordić i Čerkez case, "*it is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct*" (Prosecutor v. Kordic and Cerkez, Case no. IT-95-14/2-A, para. 26).

> *The actus reus of 'instigating' means to prompt another person to commit an offence. While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime* (Prosecutor v. Kordic and Cerkez, Case no. IT-95-14/2-A, para. 27).

Aiding implies that a person resorting to aid undertakes actions aimed at helping, encouraging or providing moral support to the commission of a criminal offense, whereby this support must substantially influence the commission of a criminal offense.

The ICTY also defined a subjective element in the forms of complicity. As regards ordering, as a form of complicity, a direct intent is required although the person ordering was aware of the probability that in the execution of his order a criminal offense would be committed (Prosecutor v. Blaskic, Case no. IT-95-14-A, para. 42; Prosecutor v. Kordic and Cerkez, Case no. IT-95-14/2-A, para. 30 and 112). With regard to planning, in the Brđanin case the Tribunal pointed out that "*Responsibility for 'planning' a crime could thus, according to the above definition, only incur if it was demonstrated that the Accused was substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance*" (Prosecutor v. Brđanin, Case no. IT-99-36-T, para. 357). This was considered to be too high a stanard, and in another case the Appeals Chamber held that ordering is also when a person who plans an act or omission is aware of the substantial likelihood that a crime will be committed in the execution of that plan (Prosecutor v. Kordic and Cerkez, Case no. IT-95-14/2-A, para. 31).

With respect to "*instigating*", the form of the subjective element is *dolus directus* if a person who instigates another person to commit an act or omission is aware of the substantial likelihood that a crime will be committed in the execution of that instigation (*dolus eventualis*) (Prosecutor v. Kordic and Cerkez, Case no. IT-95-14/2-A, para 32).

CONCLUSION

The jurisprudence of ICJ and the ICTY could hardly be called consistent and clear with regard to the interpretation of Articles 2 and 3 of the Genocide Convention.

Not only is the jurisprudence of the ICJ inconsistent with that of the ICTY, but the jurisprudence of the ICJ is inconsistent in itself, as is the jurisprudence of the ICTY.

What is particularly important is that this inconsistency is perceived in relation to the crucial elements of the Genocide Convention: the concept of destruction (Article 2 of the Convention) and punishable acts (Article 3 of the Convention). Thus, in its ruling

in the dispute between Croatia and Serbia, the ICJ emphasized that "the scope of the Convention is limited to the physical and biological destruction of the group" (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), para. 136).

However, in its judgement in Bosnia case the ICJ based the conclusion that genocide was committed on the ICTY judgement in Krstić and Blagojević case, whereby the ICTY understood destruction in social rather than in physical or biological terms. In the *Krstić* case the Trial Chamber found, inter alia, that the destruction of a sizeable number of military aged men "*would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica*" (Prosecutor v. Krstic, Case no. IT-98-33-T, para. 595) since "*their spouses are unable to remarry and, consequently, to have new children*" (Prosecutor v. Krstic, Case no. IT-98-33-A, para. 28). Such a conclusion, therefore, reflects the idea of a social destruction, rather than a physical or biological one. The perception of destruction in social terms is even more emphasized in the *Blagojević* case. The Trial Chamber applied "[a] *broader notion of the term 'destroy', encompassing also 'acts which may fall short of causing death'*" (Prosecutor v. Blagojevic and Jokic, Case no. IT-02-60-T, para. 662).

In the jurisprudence of the Tribunal, the concept of joint criminal enterprise was widely used as a mode of principal liability. By April 2007, 64 % of the ICTY indictments were charged explicitly under the doctrine of joint criminal enterprise, including those of genocide, compared with 16 % of the indictments issued at ICTR (Danner & Martinez, 2005, 107–108; Damgaard, 2008, 164).

Joint criminal enterprise (JCE) is a legal doctrine to which the first reference was provided by the ICTY Appeals Chamber in the Tadić Judgment. It is unclear whether JCE is part of the customary law or *lex ferenda*. The Permanent International Criminal Court did not include an extended joint criminal enterprise either in its Statute or in Elements of Crimes and Rules of Procedure and Evidence. In addition, The Extraordinary Chambers in the Courts of Cambodia refused to apply extended joint criminal enterprise.

We are of the opinion that identifying ambiguities, inconsistencies and contradictions in the interpretation of Articles 2 and 3 of the Genocide Convention is a necessary condition for their consistent application. This is precisely where we see a possible contribution of our paper.

INTERPRETACIJA 2. IN 3. ČLENA KONVENCIJE O PREPREČEVANJU IN KAZOVANJU ZLOČINA GENOCIDA (1948) V LUČI PRISTOJNOSTI MEDNARODNIH SODNIH ORGANOV

Bojana LAKIĆEVIĆ ĐURANOVIĆ

Univerza Črne Gore, Pravna fakulteta, 13 jula 2, Podgorica, Črna Gora

e-mail: bojanal@ac.me

POVZETEK

S tolmačenjem oziroma interpretacijo 2. in 3. člena Konvencije o preprečevanju in kaznovanju zločina genocida pridemo do sklepa, da so sodišča ad hoc bolj ali manj potrdila splošne razlage relevantnih odredb teh členov Konvencije o genocidu, zlasti v zvezi z bistvom uničenja – fizičnega ali biološkega, kot tudi specifične namere (dolus specialis) kot bistvene značilnosti genocida.

Genocidna namera ne pomeni le zavedanja njegovih posledic, ker je to le intelektualni element namere, ampak zahteva tudi dodaten, kvalifikacijski element: to je volja, da se dejanje izvrši.

Genocid se šteje za edinstven zločin ravno zaradi močne povezave med zavestjo in voljo. V zvezi s tem je Mednarodno sodišče za vojne zločine na območju nekdanje Jugoslavije prispevalo k stabilizaciji zakona o genocidu. V obravnavani zadevi je Sodišče zavzelo stališče glede razlage 3. člena Konvencije, da gre za namerno izpostavljanje skupine pogojem, ki bi vodili do uničenja, domnevno granatiranje in shiranje ter izgon in deportacija prebivalstva, kakor tudi uničenja zgodovinskih, verskih in kulturnih spomenikov.

V 2. členu Konvencije o genocidu so posebej natančno navedena dejanja, ki se štejejo za genocidna, hkrati pa člen ne omogoča, da bi se tudi druga dejanja lahko štela za genocidna.

Ključne besede: genocid, Konvencija o preprečevanju in kazovanju zločina genocida (1948), Mednarodno sodišče za vojne zločine na območju nekdanje Jugoslavije, Meddržavno sodišče

SOURCES AND BIBLIOGRAPHY

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). Judgment, I.C.J. Reports 2007. http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia). http://www.icj-cij.org/en/case/118.

ICJ Reports, 1951 – Reservations To The Convention On The Prevention And Punishment Of The Crime Of Genocide. http://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-EN.pdf

ICJ Reports, 2004 – Case Concerning Legality of Use of Force, Serbia and Montenegro v. Belgium, Judgement. Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, AI-Khasawneh, Buergenthal and Elaraby. http://www.worldcourts.com/icj/eng/decisions/2004.12.15_use_of_force10.htm

ICJ Reports, 2007 – International Court of Justice (ICJ), Individual Opinion of Judge Kreća, Judgment. http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf.

Nuremberg Trial Proceedings (1948): Nirnberška presuda. Beograd, Arhiv za pravne i društvene nauke.

Prosecutor v. Blagojevic and Jokic, Case no. IT-02-60-T. Judgement of 17 January, 2005. http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf

Prosecutor v. Blaskic, Case no. IT-95-14-A. Judgment of July 29, 2004. http://www.icty.org/case/blaskic/4.

Prosecutor v. Brđanin, Case no. IT-99-36-T. Judgment of September 1, 2004. http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf.

Prosecutor v. Galic, Case No. IT-98-29-T. Judgment, of December 5, 2003, Case no. IT-98-29-T-A, Judgment, of November 30, 2006. http://www.icty.org/case/galic/4.

Prosecutor v. Kordic and Cerkez, Case no. IT-95-14/2. Judgment, February 26, 2001, http://www.icty.org/case/kordic_cerkez/4

Prosecutor v. Kordic and Cerkez, Case no. IT-95-14/2-A. Judgment of December 17, 2004. http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf

Prosecutor v. Kupreskic et al., Case no. IT-95-16-T. Judgment of January14, 2000, http://www.icty.org/case/kupreskic/4.

Prosecutor v. Krstic, Case no. IT-98-33-A. Judgment of April 19, 2004, http://www.icty.org/case/krstic/4.

Prosecutor v. Krstic, Case no. IT-98-33-T. Judgment of August 2, 2001. http://www.icty.org/case/krstic/4.

Prosecutor v. Mladic, Case no. IT-09-92-T. Judgment of Novembar 22, 2017, http://www.icty.org/case/mladic/4.

Prosecutor v. Strugar, Case no. IT-01-42-T. Judgment of January 31, 2005, http://www.icty.org/case/strugar/4.

Report of the International Law Commission (1996): on the Work of Its Forty-Eight Session, 6 May-26 July 1996 (UN Doc. A/51/10).

Report of the Yugoslav State Commission (1947): Izveštaj Jugoslovenske državne komisije za utvrđivanje zločina okupatora i njihovih pomagača Međunarodnom vojnom sudu u Nürnbergu. Beograd, Federativna narodna republika Jugoslavija.

The Convention on the Prevention and Punishment of the Crime of Genocide. https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf.

The Memorial of Bosnia and Herzegovina of 15 April 1994. http://www.icj-cij.org/files/case-related/91/8616.pdf.

Ambrož, A. et al. (2012): Mednarodno kazensko pravo. Ljubljana, Uradni list Republike Slovenije.

Bassiouni, M. C. (1996): International Crimes: Jus Cogens and Obligatio Erga Omnes. Law and Contemporary Problems, 59, 4, 63–74.

Becker, J. (1998): Hungry Ghosts: Mao's Secret Famine. New York, Holt.

Cannizzaro, E. (2007): Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ. European Journal of Legal Studies, 1, 1–18.

Comerford, K. M. & H. M. Pabel (2001): Early Modern Catholicism: Essays in Honour of John W. O'Malley, S. J. Toronto, University of Toronto Press.

Conquest, R. (1986): The Harvest of Sorrow: Soviet Collectivization and the Terror-famine. New York, Oxford University Press.

Curthoys, A. & J. Docker (2001): Introduction-Genocide: definitions, questions, settler-colonies. Aboriginal History 25, 1, 1–15.

Danner, A. M. & J. S. Martinez (2005): Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law. California Law Review, 93, 75, 75–169.

Damgaard, C. (2008): Individual Criminal Responsibility for Core International Crimes. Berlin, Springer.

Davis, M. (2001): Late Victorian Holocausts: El Niño Famines and the Making of the Third World. London, Verso.

Docker, J. (2008): The origins of violence: religion, history and genocide. Chippenham and Eastbourne, Pluto Press.

Dutton, D. G. (2007): The psychology of genocide, massacres, and extreme violence: why "normal" people come to commit atrocities. Westport, Connecticut, London, Greenwood Publishing Group.

Đorđević, Ž. (1997): Gubici stanovništva Jugoslavije u Drugom svetskom ratu, Beograd, ABC Grafika.

Hinton, A. (ed.) (2002): Genocide: an anthropological reader. Oxford, Wiley-Blackwell.

Hinton, A. (2005): Why Did They Kill? Cambodia in the Shadow of Genocide, Berkeley, University of California.

Hinton, A., O'Neill, K. (ed.) (2009): Genocide: Truth, Memory, and Representation, Durham &London, Duke University Press.

Hitchens, C. (2010): The Narcissism of the Small Difference. Fighting Words. http://www.slate.com/articles/news_and_politics/fighting_words/2010/06/the_narcissism_of_the_small_difference.html

Ignatieff, M. (1998): The Warrior's Honor: Ethnic War and the Modern Conscience. London, Macmillan.

Jones, A. (2010): Genocide: A comprehensive introduction. London, New York, Routledge.

Kočević, B. (2005): Sahrana jednog mita – žrtve Drugog svetskog rata u Jugoslaviji. Beograd, Otkrovenje.

Korošec, D. (2006): Genocid in sodobno kazensko pravo. Ljubljana, Inštitut za kriminologijo pri Pravni fakulteti.

Kreća, M. (2015): Relationship between the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia in Respect of the Adjudication of Genocide. Anali Pravnog fakulteta u Beogradu, 63, 3, 1–22.

Kuper, L. (1981): Genocide: Its Political Use in the Twentieth Century. Harmondsworth, Penguin,

Lemkin, R. (2005): Axis Rule in Occupied Europe, Laws of Occupation – Analysis of Government – Proposals for Redress. New Jersey, The Lawbook Exchange.

Pust, K. (2009): A review of Leonard S. Newman, Ralph Erber (ur.): Understanding genocide. The Social Psychology of the Holocauast (2007). Acta Histriae, 13, 3, 635–638.

Robinson, N. (1949): The Genocide Convention – its Origins and Interpretation. New York, World Jewish Congress.

Schabas, W. A. (2000): Genocide in International Law. Cambridge, Cambridge University Press.

Shelton, D. L. (ed.) (2005): Encyclopedia of genocide and crimes against humanity. Detroit, Mitch., Thomson Gale.

Srzentić, N., Stajić, A. (1968): Krivično pravo, opšti i posebni deo. Sarajevo, Zavod za izdavanje udžbenika.

Stojanović, Z. (2006): Krivično pravo. Beograd, Pravna knjiga.

Waller, J. E. (2007): Becoming evil: How ordinary people commit genocide and mass killing. Oxford, Oxford University Press.

Weiss-Wendt, A. et al. (2008): The historiography of genocide. Basingstoke, New York, Palgrave Macmillan.

Žerjavić, V. (1990): Stradanja Jugoslavena u drugom svjetskom ratu, Viktimologija, 1, 1–2, 39–48.