

СУЧАСНА СИСТЕМА МІЖНАРОДНОГО ПРАВА

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THE CONCEPT OF GENOCIDE IN INTERNATIONAL LAW

КОНЦЕПТ ГЕНОЦИДУ В МІЖНАРОДНОМУ ПРАВІ

КОНЦЕПТ ГЕНОЦИДА В МЕЖДУНАРОДНОМ ПРАВЕ

Holovchenko V. I.

Doctor of Science (Politics), Professor, Professor of the Department of International Organizations and Diplomatic Service of the Institute of International Relations of Taras Shevchenko National University of Kyiv.

Головченко В. І.

Доктор політичних наук, професор, професор кафедри міжнародних організацій і дипломатичної служби Інституту міжнародних відносин Київського національного університету імені Тараса Шевченка.

Головченко В. И.

Доктор политических наук, профессор, профессор кафедры международных организаций и дипломатической службы Института международных отношений Киевского национального университета имени Тараса Шевченко.

Abstract. *The article spotlights genesis and essence of genocide concept, nature of contemporary genocide tragedies based on historical and philosophical, chronological and comparative analysis methods, and founds theirs compliance with international legal definition of genocide's term in the context of not avoiding criminal responsibility for crimes against humanity. It was affirmed that even for the unsteady post-bipolar era roots of tragedies of genocide remains an idea of the nature or historically formed social inequality of ethnic, racial, religious, cultural, linguistic, territorial, social class and other groups and communities, and the desire to increase vital natural or a public resource of one community (group) at the expense of another. It is recognized that term "genocide" is not immediately received wide recognition and was initially not quite identical to the concept of "crimes against humanity". Generally speaking, lawyers and politicians for some time came out that genocide – only one of the possible crimes against humanity. Therefore, the tragedy of the Armenian people 1915-16 still classified in the world as a crime against humanity. Genocide always aims at complete or partial destruction of a national, ethnic, racial or religious group.*

Key words: *crime, genocide, international law, tribunal.*

Анотація. *У статті з використанням історико-філософського, хронологічного й компаративного методів проаналізовано генезу й сутність концепту геноциду, а також природу трагедій геноцидів сучасності, з'ясовано їхню відповідність міжнародно-правовому визначенню концепту геноциду в контексті неможливості уникнення кримінальної відповідальності за злочини проти людяності. З'ясовано, що й за нестационарної постбіполярної доби коренями трагедій геноциду залишається уявлення про від природи дану, чи історично сформовану суспільну нерівність етнічних, расових, релігійних, культурних, мовних, територіальних, соціально-класових та інших груп і спільнот, а також бажання*

збільшити життєво важливий природний чи суспільний ресурс однієї спільноти (групи) за рахунок іншої. Слід визнати, що термін «геноцид» не відразу отримав широке визнання й спершу не цілком був ідентичний поняттю «злочини проти людяності». За великим рахунком, юристи й політики певний час виходили з того, що геноцид – лише один із можливих злочинів проти людяності. Тому й трагедія вірменського народу 1915–1916 рр. досі класифікується державами світу як злочин проти людяності. Але злочин геноциду завжди має на меті повне або часткове знищення національної, етнічної, расової чи релігійної групи.

Ключові слова: злочин, геноцид, міжнародне право, трибунал.

Аннотація. В статті з використанням історико-філософського, хронологічного та компаративного методів проаналізовані генезис і сутність концепта геноцида, а також природа трагедій геноцидів сучасності, а також определено их соответствие международно-правовому определению концепта геноцида в контексте невозможности избегания криминальной ответственности за преступления против человечности. Выяснено, что и в нестационарной постбиполярной эпохе корнями трагедий геноцида остается представление о естественном или исторически сформированном неравенстве этнических, расовых, религиозных, культурных, языковых, территориальных, социально-классовых и других групп и обществ, а также желание увеличить жизненно важный естественный или социальный ресурс одной общности (группы) за счет другой. Следует признать, что термин «геноцид» не сразу получил широкое признание и сперва не совсем был идентичен понятию «преступления против человечности». По большому счету, юристы и политики определенное время исходили из того, что геноцид – лишь одно из возможных преступлений против человечности. Поэтому и трагедия армянского народа 1915–1916 гг. до сих пор квалифицируется как преступление против человечности. Но преступление геноцида всегда имеет целью полное или частичное уничтожение национальной, этнической, расовой или религиозной группы.

Ключевые слова: преступление, геноцид, международное право, трибунал.

Formulation of the problem. At the end of the Cold War, in the post-bipolar world unsteady most actively and gradually developing precisely those states, where the level of national consciousness and patriotism is extremely high, which carefully cherished national traditions and culture, where a proper respect give to their own heritage. Accordingly, the scientific opinion of these countries permanently kept in suspense questions of historical and national memory that serve for creation of fundamentally new synthetic history.

That is why for Ukraine as a country seeking associated relations with NATO and the European Union now are actual researches of key problems of the phenomenon of historical memory and to create a model of national history that could objectively reproduce past states, included in a European context and global development. Ukraine, despite countless predictions of many western and eastern analysts is not split into two or more parts, is not plunged into civil war and economic chaos.

Analysis of the latest publications. As in the Soviet times mentioned problems were extremely ideologized and suffered considerable fraud, entirely inherited (and even ‘multiplied’ with the arrival in the Kremlin of Vladimir Putin) by modern Russian political and historical science. Author in several publications reviewed such of genocide’s problems, especially in the Ukrainian questions [Головченко, 2008; Головченко, 2014; Головченко, 2017], but many aspects of the modern genocides and theoretical appraisals are unclosed.

The purpose of the article is to clarify the essence of the modern genocide, reason and consequences of the contemporary ethnic conflicts which are important for successful implementation of Eurointegration and Euro-Atlantic course of the independent Ukraine.

The main results of the study. The concept of “genocide” (from the Hellenic “γένος” – family, tribe, and the Latin “caedo” – kill) was a bargaining chip in controversial public figures and politicians, historians and lawyers. And this applies not only famine of 1932–33 in Ukraine, but many other tragedies of global and regional scale; deliberate destruction of the Russian Empire and resettlement outside the historical homeland of more than 90% the Circassians during the Caucasian War 1763–1864; extermination by the colonial army of Kaiser’s Germany about 80% of the Herero tribe and the half tribe of Hottentots during the suppression of their uprising 1904–07 (in what is now Namibia); killings and deportations of Christians (Assyrians, Armenians and Pontic Greeks) in the Ottoman Empire during the First World War; Jewish Holocaust and the extermination of the Gypsies by Nazi Germany before and during World War II; mass (about 1,7 mln. persons) for the murder of Cambodians regime “Khmer Rouge” 1975–79; ethnic cleansing in Rwanda in 1990; massacre of Bosnian Serbs over 8 thousand Muslims in Srebrenica in July 1995.

Actually, the term “genocide” was introduced by the Polish-Jewish American lawyer R. Lemkin in his book “Axis Rule In Occupied Europe: Laws of Occupation, Analysis of Government, Proposals For Redress”, which was published in Washington in November 1944 with the support of the Carnegie Endowment for International Development [Lemkin, 1944]. R. Lemkin was born in June 1900 in a family of farmers near the city Volokovysk, Grodno province of the Russian Empire (now – Belarus), after finishing school in Bialystok he studied philology and law at Lviv University, was fluent in nine and can read in fourteen (!) languages.

The killing on March, 15, 1921 in Berlin by insurgent of “Dashnaktsutyun” C. Teyleryan former Interior Minister and Grand Vizier of the Ottoman Empire M. Talaat Pasha, presented as an act of revenge for the bloody tragedy of the Armenian population, and further justification by the court drew attention of R. Lemkin to killer and to the problem of crime of mass extermination of people, even entire nations. He began to study international law to develop regulations to prevent and punish such crimes.

After defending in 1928 doctoral dissertation at the University of Heidelberg, R. Lemkin worked as an assistant prosecutor in Berezhany (Poland), and then taught at Warsaw. Subsequently, the lawyer representing Poland at international legal conferences in Brussels and Copenhagen, and in October 1933, which was not only the year when Hitler came to power in Germany, but the peak of famine in Soviet Ukraine, which R. Lemkin had already knew, he prepared for Madrid League of Nations conference for the unification of criminal law proposal to declare the destruction of racial, ethnic or social groups a crime under domestic law. Those who hate large group of people to harm members of the group, R. Lemkin proposed to be considered guilty of “barbarism” and those who destroyed cultural treasures of this group to hate it – the “vandalism”, insisted on the arrest of these people wherever they were, conviction and punishment;

The second, it acts of violent aggression on individual physical and social entities; forcible interference with privacy representatives of specific groups; deliberate destruction of historical, cultural and economic foundations of these groups; but despite all the efforts of R. Lemkin to push forward these proposals they didn’t successfully finish. When Nazi Germany (and soon also the Stalinist Soviet Union) attacked Poland, R. Lemkin volunteered to the Polish Army, took part in the defense of Warsaw, was wounded and later forced to flee from the Nazis to neutral Sweden. In April 1941 a colleague of R. Lemkin from the Law Faculty in Duke University, Durham (State Northern California) helped him get permission to enter the United States. During the

years of the Holocaust R. Lemkin lost 49 relatives, the destruction of his family was a mirror of the destruction of Jewish life in Europe.

In the US R. Lemkin's experience in international law it became useful: lawyer got a job at Duke University and has advised government agencies: the State and War Departments. At the same time he developed in 1943 for the Polish Government in Exile (in London) draft law on the punishment of Nazi criminals and also worked on the study of how Nazi Germany and its allies ruled states occupied during the War War II. It was published in November 1944 and contained a definition pioneering proposed by R. Lemkin – the term “genocide” as an act of deliberate destruction of a nation or ethnic group.

And the lawyer-foreign suggested that “genocide does not necessarily mean the immediate destruction of a nation, except in cases where carried out mass killings of all members of the nation. Rather, it means a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups to their extermination. The purpose of this plan is the disintegration of the political and social institutions, culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity and even lives of individuals belonging to such groups” [*Lemkin, 1944: 83*].

It is generally believed that R. Lemkin created the term “genocide” specifically for the Holocaust, but in fact its original purpose was to introduce the term to describe the ancient military tactics, the Nazis revived [*Manjikian, 2007: 48*]. When the lawyer formulated a definition mentioned term, he was referred to the extermination of Armenians in 1915–16 by “Young Turks” as the basic example of “genocide” [*Auron, 2004: 9*]. Logically, at Nuremberg process 1945–46 against Nazi war criminals R. Lemkin advised the US chief prosecutor – member of the Supreme Court R. J. Jackson.

Generally Lemkin's works were the basis of the Charter and the Nuremberg Tribunal verdicts. In particular, Art. 6 of the Charter Court on August, 8, 1945 had been prescribed two categories of genocide: 1) killing members of a particular group, the destruction of religious attributes, forced enslavement and mass deportations; 2) crimes against humanity for political, racial or religious grounds. In conclusion the Tribunal indictment on October, 18, 1945 was stated that the accused committed deliberate and systematic genocide – the extermination of racial and ethnic groups, the destruction of the civilian population of the occupied territories for liquidation of certain nations and classes, some national, ethnic and religious groups, particularly Jews, Poles, Gypsies and other peoples [21].

Considering exactly this meaning of the term already the 1st session of the UN approved on December 11, 1946 resolution that identified: “According to international law, genocide is a crime condemned by the civilized world and the conduct of which the main culprits must be punished” [*Rubinstein, 2004: 307*]. Since the mass extermination of people have been common in the history of the phenomenon and the threat of their recurrence remain relevant, the United Nations recognized the need to introduce the concept of genocide in international law. This created a legal basis for establishing international cooperation in combating such crimes, including persons endowed by the constitution supreme authority.

The main author and promoter of unanimously adopted on December 9, 1948 by the 3rd session of the UN “The Convention on the Prevention and Punishment of the Crime of Genocide” was R. Lemkin, who then read lectures on criminal law at Yale. Already the article I of the Convention stated: “Parties agree to confirm that genocide, whether committed or in peacetime or in wartime, is a crime that violates international law and against which they undertake measures to prevent and punish its implementation”. Article II filed such generalized definition of geno-

cide, which was included in the national criminal legislation of many countries and is reflected in the Rome Statute of the International Criminal Court: “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” [6].

The Convention entered into force on January, 12, 1951 – on the 90th day after the Secretary-General of the UN Trygve Lie received first deposited 20 instruments of ratification or accession states to the document. Since the Convention has become a tool of genocide prevention, the effectiveness of which has increased significantly after the Cold War. The fact that at the time of Convention enters into force only two of the five permanent UN Security Council members have become parties to the treaty: France and the Republic of China. USSR ratified the Convention only in 1954, after Stalin’s death, the United Kingdom – in 1970, the US – in 1988, and Peoples China – in 1983. The long delay with ratification of the Convention by superpowers made it weak for more than four decades. Only with the collapse of the bipolar system international law on genocide became full force, in the beginning of 2017 147 UN member states have ratified or acceded to “The Convention on the Prevention and Punishment of the Crime of Genocide”.

Purpose and scope of its application has been described by the UN Security Council and has already considering the first bitter lessons of the bloody disintegration of postcommunist Yugoslavia. Established October, 6, 1992 UN Commission of Experts, who studied violations of international humanitarian law committed in the former Yugoslavia was guided by the following: “Convention was adopted for humanitarian and civilizational goals. They are to ensure the existence of certain human groups and confirmation elementary principles of humanity and morality. According to her legal obligations to refrain from genocide are recognized as “*erga omnes*” – “relative to all”.

When the Convention was developed, it was assumed that it will spread not only to then existing forms of genocide, but also to “any means that can be developed in the future to destroy the physical existence of the people”. As emphasized in the preamble to the Convention, genocide has found its place in all periods of history and has evolving nature. The Convention shall be interpreted in good faith in accordance with the generally accepted meaning of the provisions in the necessary context, in light of the object and purposes. Furthermore, the Convention must be interpreted in a way that made sense and meaning of each word. None of word can not be neglected or considered as superfluous, unless it is absolutely necessary for a holistic reading of all the provisions of general.

Genocide is a crime under international law, regardless of “whether committed or in peacetime or in wartime” (article I of the Convention). Thus, regardless of the context in which genocide occurs, it is a punishable international crime [Schabas, 2006: 180]. But formulated in “The Convention on the Prevention and Punishment of the Crime of Genocide” legal norms did not give an absolute guarantee in all cases the identification mass annihilation of people as genocide. Fully answered them only Holocaust during World War II, the Nazis exterminated Jews either when and where they were found, or created them physically impossible living conditions. In fact, the Convention also was designed by bloody heels of the Holocaust, and cases of mass annihilation of people that have occurred to it are not always identified as genocide for another rea-

son: specialists, lawyers did not want to make exceptions in applying the key rules of law – the law is not retroactive. Aptly leading Canadian legal expert on issues of genocide – V. Shabas wrote that authors of “The Convention on the Prevention and Punishment of the Crime of Genocide” create “a monument to the past rather than weapons to maintain order in the future” [Schabas, 2009: 157].

The first draft of the Convention included in the definition of the nature of genocide also murder of political and social groups and contains reference to “national cultural genocide”, but these provisions were removed through imperatives for objections from individual countries, especially the Soviet Union - a permanent member of the UN Security Council as a sign of political and diplomatic compromise. The Kremlin then falsely claimed that the definition set forth in the Convention, should follow the etymology of the term, and obviously wary of greater international attention to their own mass repressions: Famine of 1932–33, “Great cleansing” 1937–38, Violent deportations of nations during World War II and others. The remaining states feared that entering the political groups in the definition of genocide would lead to international intervention in their internal politics [Staub, 2002: 8].

The exclusion of social and political groups as victims of the Genocide Convention definition is still criticized by some historians and sociologists. In particular, M. Hassan Kakar in his book “Afghanistan: The Soviet Invasion and the Afghan Response, 1979–1982” argues that the international definition of genocide is too limited, it should include political groups or other groups that are recognized invaders [Kakar Hassan, 1995: 170]. With him, in fact, F. Chalk and K. Jonassohn united, they concluded that “genocide – a form of one-sided mass killing in which a state or other authority intends to destroy a group, when the state and its members are determined criminals” [Chalk, Jonassohn, 1990: 368]. While there are different definitions of the term, – said Professor University of British Columbia, political scientist A. Jones, – most researchers believe that the “intent to destroy” is a prerequisite qualifications act of genocide, and the growing recognition criteria for including physical destruction” [Jones, 2006: 20–21].

B. Harff and T. Gurr outline the genocide as “the promotion and implementation of measures by the state or its agents, leading to the destruction of a large part of the group... Victims determined primarily by national characteristics, that is ethnic origin, religion or nationality”. Researchers distinguish at the same time genocide and politicide on the grounds of state identification group members. In the case of politicide group of victims are defined primarily in terms of their hierarchical position or political opposition to the regime or dominant group [Harff, Gurr, 1988].

Scientists at Washington University D. Polsby and Don B. Kates Jr. agreed with this definition of genocide. They emphasize proposed by B. Harff “distinction between genocide and “massacre”, which she describes as a short-lived attacks of the crowd, despite the frequent indulgence of the authorities, rarely lasts long. As violence continues for a sufficiently long period Harff says that the difference between connivance and complicity disappears” [Polsby, Kates, 1997: 1237].

By R. J. Rummel, the concept of genocide has three different meanings. In the usual sense – it is a killing of people by the government because of their national, ethnic, racial or religious affiliation. The legal meaning of genocide refers to the international treaty: “The Convention on the Prevention and Punishment of the Crime of Genocide”. Third, the definition of genocide includes not only murders but also the elimination of groups by preventing childbearing or forcibly transferring children from one group to another. Summarized meanings of genocide similar to the usual definition, but also includes government killings of political opponents or otherwise intentional murder. To avoid confusion regarding the nature of the term, R. Rummel to the third variant of understanding coined the term “democide” [16].

Emphasizing the possibilities of public and private subjects to commit genocide in the twentieth century, for example in failed states or acquiring by non-state actors of nuclear weapons, British lawyer-foreign A. Gallagher defines genocide as “a situation where the carrier of collective power (usually the government) deliberately uses basis of its power to implement the process of destroying the group (how it is defined by villain), in whole or in significant part, depending on the relative size of the group”. The definition proposed by scientist provides a central place for intention, multidimensional understanding of destruction, expands the definition of group identity, compared with the formulation in the 1948 Convention, and claims to be destroyed a significant part of the group before it can be classified as genocide [Gallagher, 2013: 37].

However, the above mentioned W. Shabas argues that “careful consideration does not confirm popular literature assertion that included resistance to inclusion (to the 1948 Convention) of political genocide was a Soviet machinations. Soviet views shared by a number of other countries, for which it is difficult to set any geographical or social common denominator: Belgium, Brazil, Venezuela, Dominican Republic, Egypt, Iran, Lebanon, Peru, Uruguay, the Philippines and Sweden. Excluding of political groups was supported by non-governmental organizations, including the World Jewish Congress, in line with the vision of the nature of the crime of genocide by Raphael Lemkin” [Schabas, 2009: 160].

Thanks to the friendly relations with the Ukrainian community, and especially the long head of the Ukrainian Congress Committee of America and Georgetown University Professor L. Dobriansky, R. Lemkin still the most widely interpreted the concept of “genocide”, highlighting the separate “Soviet genocide”. Accordingly, he considered as a genocide famine of 1932–33 in the Soviet Ukraine and took part in a memorial celebration of the Great Famine, organized by the Ukrainian community in New York in 1953 [Serbyn, 2009]. At the meeting R. Lemkin made a speech, typing the text of which is stored in the Archive Fund of the New York Public Library folder, which contains other materials to his “History of Genocide”. Lawyer worked on the study for a long time, but it has never been published in full, as the speech was released in 2008 [9]. In it R. Lemkin directly called crimes of Stalin’s regime as genocide against the Ukrainian nation and stressed that it had ordained exactly towards ethnic Ukrainian. This is consistent with the requirements of the UN Convention 1948, which does not recognize social groups possible victims of genocide – thus, does not recognize the artificial famine directed only against the peasants as genocide. In the Ukrainian genocide R. Lemkin saw four components:

- 1) elimination of Ukrainian intelligentsia – the brain or the mind of the nation;
- 2) liquidation of the Ukrainian Autocephalous Orthodox Church – “the soul of Ukraine”;
- 3) Holodomor of the Ukrainian peasantry – the guardian of national spirit, Ukrainian culture, language and literature, folklore and music, traditions, etc.;
- 4) population of Ukraine by another ethnic elements for a radical change of the ethnic composition of inhabitants.

R. Lemkin argued that in 1932–33 five million of Ukrainians have been driven to starvation and “Soviet leaders tried to justify this blatant violence as a necessary economic measure related to the socialization of cultivated land and the liquidation of the kulaks – independent farmers”. In fact, according to the lawyer, “Ukrainian peasantry was sacrificed to eliminate the Ukrainian nationalism and establish a terrifying monotony of the Soviet state. The methods used in this part of the plan is not limited to any particular group. All suffered – men, women, children”.

R. Lemkin said the gathering that the harvest in 1933 “was enough to feed not only people but also animals in Ukraine, although it was slightly lower than the previous year, largely due to the struggle for collectivization. But hunger was required by Soviets, so they created it “on demand” by the incredibly inflated grain procurement rules. In addition, thousands of acres of

wheat were never collected, harvest left to rot in the fields. And that was collected, was sent to public bin, until the authorities decide what to do with the harvest. Most of this grain, vital to Ukrainian people, was moved to export as payment for foreign loans. Under conditions of hunger in the country, thousands of people left the rural areas and moved to town to get food. When they were caught and deported back to the village, they refused their children in the hope that at least they will survive... In thousandths villages there were now no more than a hundred residents; in the second half the population of the villages disappeared,... every day perished 20-30 people. Cannibalism was commonplace”.

Striking visionary R. Lemkin’s conclusion on future of the Soviet Ukraine: “Until Ukraine maintain its national unity, as long as its people also considers himself Ukrainian and press for independence, Ukraine will be a serious threat to the very essence of Soviet ideas. It is not surprising that the communist leaders attach great importance to the Russification of this independent member of “The Union Republics” and decided to fit it under templates of united Russian nation. As Ukrainians are non-Russians and they never were. They have a different culture, a different temperament, a different language, a different religion. Living very close to Moscow, they did not accept collectivization despite the threat of deportation also even death. Therefore it is essential to drive the Ukrainian people in the Procrustean bed of the ideal Soviet man”. It is no accident that on November 20, 2015, in the midst of an active phase of hybrid war against Ukraine, R. Lemkin’s article “Soviet Genocide in Ukraine” was introduced by the Kremlin in the Federal List of Extremist Materials.

Conclusions. It is recognized that term “genocide” is not immediately received wide recognition and was initially not quite identical to the concept of “crimes against humanity”. Generally speaking, lawyers and politicians for some time came out that genocide – only one of the possible crimes against humanity. It is this opinion in 1947 US military tribunal, which operated in the Western Germany, expressed in the decision of Nazi judges. It should be noted that Israeli law “On the punishment of the Nazis and collaboration with the Nazis” 1950 also important to understand the essence of the concept of “genocide”. In it the term “genocide” was used close to the concept of “crimes against humanity” formulation – “crimes against the Jewish people”. And definition of such a crime is literally repeated determination of genocide enshrined in the Convention 1948.

Therefore, the tragedy of the Armenian people 1915–16 still classified in the world as a crime against humanity. Since the story does not recognize the subjunctive mood, interested readers can now only compare the definitions of these crimes in the Rome Statute of the International Criminal Court 1998. We note the main difference between them: genocide always aims at complete or partial destruction of a national, ethnic, racial or religious group. Crimes against humanity aim against civilians, but does not foresee total or partial destruction of them only by belonging of individuals to that population.

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