СУЧАСНА СИСТЕМА МІЖНАРОДНОГО ПРАВА

УДК: 341.1

GENOCIDE IN THE HISTORY OF INTERNATIONAL LAW: THE CRIME AND FORMATION OF THE CONCEPT OF THE CRIME

ГЕНОЦИД В ІСТОРІЇ МІЖНАРОДНОГО ПРАВА: ЗЛОЧИН ТА СТАНОВЛЕННЯ КОНЦЕПЦІЇ ЗЛОЧИНУ

Olga Butkevych
Doctor of Law, Professor at the International Law Chair of the Educational and Scientific Institute of International Relations of Taras Shevchenko National University of Kyiv. E-mail: butkevych.o@gmail.com

Ольга Буткевич
д.ю.н., професор кафедри міжнародного права НН Інституту міжнародних відносин Київського національного університету імені Тараса Шевченка. E-mail: butkevych.o@gmail.com

Abstract. *Although the Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948, the acts of genocide were known to humankind long before that. Throughout the history, attitudes to mass killings of people in the theory of international law and legal consciousness have been changed. Although these crimes have been known for a long history of international law, the concept of punishment for them has not been shaped uniformly during different epochs. The 19th and early 20th centuries were the period of active development of the idea of genocide as an international crime, however it was finally formed with the adoption of the mentioned Convention.*

Key words: *genocide, the crime of genocide, human rights, criminal responsibility in international law, history of international legal responsibility*

Анотація. *Конвенція «Про попередження злочину геноциду та покарання за нього» була прийнята 1948 р., проте самі діяння, що складають злочин геноциду згідно з нею, були відомі людству задовго до цього. Протягом історії ставлення до масових знищень людей в теорії міжнародного права та правосвідомості народів змінювалось. І хоча самі такі злочини були відомі протягом тривалої історії міжнародного права, концепція покарання за них формувалась не рівномірно у різних народів та епох. Періодом активного розвитку концепції злочину геноциду є XIX та початок XX ст., а її кінцевим оформленням стало прийняття згаданої Конвенції.*

Ключові слова*:* *геноцид, злочин геноциду, права людини, кримінальна відповідальність у міжнародному праві, історія міжнародно-правової відповідальності*

Genocide is a phenomenon, that has been known to mankind almost throughout its history. However, it was enshrined as a crime, and as the most serious international crime (“the crime of crimes”) only after World War II. The main impetus for this was the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. The “last straw” which made international community to adopt the aforementioned Convention were the mass crimes against civilian population committed by the Soviet and Nazi regimes in the 1930s and 1940s.

The main ideologist of the concept of genocide as an international crime was Rafal Lemkin. Moreover, on the basis of his concept the relevant Convention was later developed [Lemkin, 1944].

Due to R. Lemkin, the concept of genocide as an international crime was finally established in international law. Manifestations of extermination (sometimes complete extermination) of the population have been known in the history before. However, it was Rafal Lemkin who finally proved that genocide can be prevented as a "crime of crimes" only by legally distinguishing it from other crimes, including serious ones (such as war crimes and crimes against humanity), and by establishing the highest degree of responsibility for its committing.

Main Lemkin's argumentation in his concept of genocide was the evidence of the two most telling examples of physical extermination of the nations – the Holodomor and the Holocaust – crimes committed by the Soviet and Nazi regimes against two most close to Lemkin peoples [Lemkin, 1953].

The adoption of the Convention coincided with the rapid development of the international human rights protection. From that time, international legal support for the human rights and a set of measures to prevent their violation began to function in the system. In fact, the beginning of the idea of homocentricity of international law and the formation of its two key branches - international human rights law and international criminal law - was laid.

Whereas R. Lemkin's ideas formed the basis for the future field of international criminal law, another native of Lviv region, Hersh Lauterpacht, made a special contribution to the development of international law for the protection of human rights. Professor Lauterpacht's contribution to the development of a modern system of international human rights protection is one of the most significant. Especially this is true about his concept of individual rights and international mechanism of their protection. Even the date of the publication of H. Lauterpacht's program work "International Law and Human Rights" (1950) [Lauterpacht, 1950], which substantiates the international legal personality of the individual and which underpins modern concepts of international human rights law, has become symbolic. 1950 can be considered as the "year of birth" of the international legal personality of individual in modern international law (historically in previous periods the individual was already considered a subject of international law, but his international legal personality was rejected and was not recognized in the classical era of positivist international law).

That was the year when all three components of the individual's international legal personality were finally formed: in 1946, the Nuremberg and Tokyo Tribunals for the first time in history formulated the principles of international responsibility of individuals; in 1948, the Universal Declaration of Human Rights (which adoption was inspirited inter alia by H. Lauterpacht) recognized the international human capacity at the universal level (although even before that the individual enjoyed some rights under international law), and in 1950 the European Convention on human rights (which was also influenced by Lauterpacht's ideas) provided the individual with an international capacity to act – the possibility to apply for and defend ones rights in the European Court of Human Rights.

Also H. Lauterpacht was among the first who noticed the tendency towards homo-centricity of international law and revealed the essence of this law as a law of international society. Already in his textbook on international law, Lauterpacht provided an expanded and concise definition of international law; the latter is laid down as: "the law of the international community" (this definition opens the first volume of the textbook) [Lauterpacht, 1970].

The recognition of an individual as a subject of international law, in particular, contributed to the establishment of international criminal responsibility for persons who commit international crimes. It became a significant contribution to the development of international criminal law.

Further it will be considered on some examples how the law of nations responded throughout history to the phenomenon that today is called "genocide". The process of formation of the concept of the crime of genocide in the 20th century will also be considered.

On the concept of crime in international law and international legal responsibility

The most severe responsibility in international law, as in municipal one, comes for the gravest crimes aimed at undermining the foundations of society (in this case – international community). According to P.-M. Dupuy, each historical epoch, reflects the concept of responsibility that is more in line with the specific existing legal relationships and the social environment in which they occurred. Rudolf von Jhering considered that each state punishes most severely for those crimes that threaten its fundamental principles. Although he said that about the institute of responsibility in domestic law, this is also true of international law.

The institute of international responsibility has been quite controversial throughout the history of this law, and even today, according to some scholars, it is just emerging.

For a long time in the doctrine, the basis and main expression of international legal responsibility was the obligation of the state to repay damage caused by its unlawful act or international crime.

Up to the classical period of international legal science, the main basis for international legal responsibility was negative action against a foreigner or foreigners.

Manifestations of crimes against humanity in the ancient period and the attitude towards them

In the history of international law since its appearance, in the ancient and medieval periods one can see examples of acts that are today interpreted as genocide.

In the region of the ancient Near East and Asia Minor (Mesopotamia, Hittite Kingdom, Egypt, Ugarit, Marie, etc.), there were rather few restrictions on the means of warfare. Some restrictions were dictated not by considerations of humanity but by economic expediency. In the Hittite law of war, there was an institution of "conquest at the scene of conflict", which consisted in the peaceful transition of the territory surrounded by Hittites under their jurisdiction. This prevented the destruction of cities and the economy and the population as a potential labourforce. Assyria and the country of Marie actively used the practice of economic blockade - as an alternative for hostilities [Grayson, 1987]. However, these examples confirm only the unwillingness of the conquerors to destroy economically profitable lands.

Both the cause and the consequence of the crimes under consideration spread from the very nature of international responsibility in the ancient period, which had a collective character.

The reason for the collective nature of responsibility was that a person in primitive society was considered an integral part of this society (tribe, clan, family, chiefdom, pre-state entity, etc.). In the international sphere, the possibility of collective punishment was very important for international law. The whole population could have been killed with their head if the latter had committed a serious wrongdoing.

In India, according to the Laws of Manu, there was a community responsibility for a crime committed within its territory if the offender remained unknown [Bühler, 2018]. The same rule applied in the countries of Asia Minor, where, in the event of the attack of bandits or pirates on a trade delegation or caravan or embassy of another state, the whole state in whose territory the attack took place has been responsible.

Military reprisals became a special type of international responsibility. They were originated from the principle of collective responsibility. They can be described as the responsibility imposed on the whole nation, the country, for wrongful acts or violations of its international obligations by its ruler – the subject of international law. The notion of military reprisals is closely related to and based on the doctrine of "just war".

Although the category of responsibility for war crimes did not exist in the ancient period, there were provisions for the regulation of warfare. Thus, responsibility for exceeding the rules established by a treaty or custom of warfare occurred as a liability for breach of a treaty or custom.

Responsibility for international offenses by individuals of another state or its officials should be noted separately. In particular, such responsibility was envisaged in mutual assistance treaties and military alliances. They generally stated that foreign military officials or military contingent members in the territory of a foreign state (staying there under the treaty provisions) should comply with the order and rules of the host country. In the case of committing a crime against the local population, the same treaties envisaged their responsibility.

Ancient Assyrian laws of war differed the concept of the conquering war and the punitive campaign (the status of the enemy and the attitude to the civilian population was appropriate). The first campaigns were for the territories that Assyria conquered for the first time and which had the status of hostile countries, they were subject to ordinary military conquest by war. The punitive campaigns of Assyria differed in inhumane treatment of enemies and prisoners of war: the torture was applied to the captives, the civilian population was massively taken into slavery, there were cases of mockery of the bodies of the dead. Most often, such actions were carried out against the provinces of Assyria, which resorted to disobedience in breach of their obligations to Assyria. Such campaigns had a character of punishment [Grayson, 1987].

A similar difference in the legal characteristic of the wars of ancient Egypt is found in the descriptions of the military campaigns of the Pharaohs: "When his majesty imposed a punishment on the Asians-from-the sands, his majesty gathered many thousands of armies from all over Upper Egypt" (Asian Campaign of Pepi the I); "His Majesty surrounded everyone who rebelled against him and killed them" (Amenhotep II Asian Campaign) [Ancient Near Eastern Texts, 1955].

However, in the ancient period, there were many conflicting facts regarding the attitude to the hostile population during the war. In many cases the formation of own army from among the conquered population were frequent. This fact cannot indicate a potentially negative attitude towards them. Having conquered Samaria, Assyrian king Sargon II deported 27,000 inhabitants, "having created a contingent of 50 chariots and retaining their former social status for the inhabitants." [Ancient Near Eastern Texts, 1955].

The conquests of the Assyrians were often accompanied by mass deportations of the conquered population, assimilating it and accessing its own population. Thus, the Israelites were deported from Samaria to Mesopotamia, Jews from Judea to Babylon, etc. The policy on the deportation of peoples began around the 12th century BC, it was actively continued by the Assyrian emperors of the 8th - 6th centuries BC. Hostilities were carried out both against foreign armies and against the civilian population. In many ways, violent, inhumane acts against the foreign population were dictated by the concept that the conquest brought in the territory of other countries more perfect rule of law, which required an obligation to the gods. In doctrine this phenomenon, even, was called "theology of conquest" [Kemp, 1978].

In ancient doctrine, a negative attitude to mass killings is already emerging. The general doctrinal views of war in ancient China provided with the idea of limiting the means of warfare, humanizing it, and even, if possible, abandoning the military resolution of international disputes. Lao Tzu insisted on this, according to the theory that "a person who owns and uses the Tao is not in a military state and does not use military force to solve problems, either inside or outside his kingdom" [The Ancient Classics Collection, 2015].

Examples of mass killings and the formation of attitudes toward them in medieval doctrine

In the Middle Ages, the Han emperors deported the Xiong tribe to the inland regions of China, and in their place relocated the Huangyi and Xiang tribes, carrying out other people's movements in order to neutralize the nomadic periphery that was dangerous to the center.

It is worth mentioning the fact of medieval history, which researchers (often exaggerating) call "the first international criminal tribunal" or the first court for crimes against humanity. That is the case of Peter von Hagenbach in 1474. This tribunal was convened under the auspices of the Holy Roman Empire against the governor (head of the Burgundian authorities) of the Austrian city of Breisach P. von Hagenbach. The latter was accused of committing massacres during his governorship, effectively creating a "regime of terror" in subordinate territory. Hagenbach was sentenced to death. Although in its pure form this court cannot be characterized as an international tribunal, and the term "crimes against humanity" cannot be transferred to the medieval times (but in fact criminal acts consisted in the destruction of civilians), this fact was clearly of precedent [Gordon, 2013].

Human life was protected by the medieval concept of just war. Due to Francisco Vittoria: "if a war is justly launched, it cannot be conducted in such a way that it destroys the people against whom it is directed: it should be waged only to restore violated rights or protect ones country; and so that, as a result of this war, peace and general security may be established over time". In another work, F. Vittoria considers it quite legitimate to kill a civilian population for the offenses of its ruler (military reprisals as a type of collective responsibility): "The state as a whole can be rightfully punished for the sin of a monarch. If any ruler launches an unjust war against the other, the offended party can plunder, rightfully fight and destroy all subjects of the offending king, even if they themselves are not guilty" [Vittoria, 1964].

Hugo Grotius was one of the first scholars who begin to deny the possibility of collective responsibility, considering it the fiction that the whole nation could be responsible for the crime or offense of one or several individuals [Grotius, 1925].

Formation of the concept of responsibility for crimes against humanity

The aftermath of the World War II and the events that followed it (the San Francisco Conference and the adoption of the UN Charter in 1945, the condemnation of Nazi criminals at the Nuremberg and Tokyo Tribunals in 1946) resulted in the formation of several institutions of international law and the consolidation of its imperative principles.

The influence of the Nuremberg and Tokyo tribunals on the development of international law, which can be compared with the most significant events in the history of this law, manifested itself in several following ways:

(1) For the first time in the history of this law, an international court has been created to investigate war crimes. All previous attempts of the international community to condemn the perpetrators and all those who had committed the gravest crimes against civilians and war crimes proved futile (that was caused by the concept of state sovereignty, where the person is subject exclusively to the judicial jurisdiction of the state concerned).

(2) The concept of international crimes, which are the gravest crimes against human beings, was formulated. Responsibility for such crimes is determined solely by international law, as well as the mechanism of conviction and punishment for them.

(3) A precedent has been created whereby every person who commits an international crime should be subject to international jurisdiction and to be punished in accordance with international law. Including with the top officials and heads of states.

(4) The tribunals have promoted the value of respect for the human person, its life, liberty and dignity, as well as the idea of direct international legal protection of human rights. The basis of human-centrism in international justice was laid, which at this stage would be determined by the value of human rights.

This is how the concept of international crimes was developed, with international legal responsibility being imposed on anyone who committed them. At the Nuremberg Tribunal, international crimes were referred to: crimes against peace (planning, preparation, initiation or waging of an aggressive war), war crimes (enshrined in the Hague Conventions of 1899 and 1907), and crimes against humanity (such as genocide), and also conspiracy to commit such crimes. These categories of crimes were classified as the gravest in international law.

This fact reinforces the idea of international humanitarian intervention, as a responsibility of the world community to intervene to protect human rights that are violated, even by a legally elected government. However, according to the International Court of Justice, the institute of humanitarian intervention is legitimate only after the appropriate sanction for such action by the UN Security Council.

Given the experience of the tribunals and on the basis of the Nuremberg Principles, a number of codifications of international law were created (in particular, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide). The damage caused by World War II, primarily in the form of civilian casualties, influenced the active formation in the post-war period of the field of international human rights protection, institutions for the prevention of mass violations of human rights. Thus, international legal responsibility for the crime of genocide was enshrined, and in 1948 the Convention was adopted.

Another feature of international law of the twentieth century is that there was a significant expansion of the range of relations that have become subject to international legal regulation.

The most important aspects of international legal regulation in the second half of the twentieth century, most of which have been expressed in the relevant imperative principles of international law, include, in particular:

• Adoption of the principle of human rights protection (Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966, International Covenant on Economic Social and Cultural Rights 1966, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950).

• Prohibition of genocide, apartheid, and other crimes against humanity (the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the UN Declaration on the Elimination of All Forms of Racial Discrimination 1963, the UN International Convention on the Suppression of the Crime of Apartheid 1976).

• Demand for a peaceful settlement of international disputes and prohibition of the planning and waging of an aggressive war.

• Prohibition of weapons of mass destruction (1968 Treaty on the Non-Proliferation of Nuclear Weapons, 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, etc.).

References

1. Lemkin R. Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress. – Washington, D.C.: Carnegie Endowment for International Peace, 1944.
2. Lemkin R. Speech: Soviet Genocide in the Ukraine, 1953. E-resource: file:///C:/Users/HP/Desktop/LEMKIN-UN-SPEECH-FULL%E2%80%93Holodomor_PartIV_Friesens.pdf
3. Lauterpacht H. *International Law and Human Rights.* - London, 1950.
4. Lauterpacht H. International Law. Volume 1: The General Works, Cambridge. At the University Press. 1970.
5. Grayson A.K. Assyrian Rulers of the Third and Second Millenia BC (to 1115 BC). The Royal Inscriptions of Mesopotamia. – University of Toronto Press. Toronto. Buffalo. London, 1987.
6. Bühler G. Excerpt from The Laws of Manu: Translated with Extracts from Seven Commentaries. – Forgotten books, 2018.
7. Ancient Near Eastern Texts relating to the Old Testament. Edited by James B. Pritchard. Second Edition. Princeton. New Jersey. Princeton University Press. 1955.
8. Kemp B.J. Imperialism and Empire in New Kingdom Egypt // Imperialism in the Ancient World. – Cambridge University Press, 1978.
9. The Ancient Classics Collection: The Art of War & Tao Te Ching. – John Wiley and Sons Ltd, 2015.
10. Gordon Gregory S. The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law // The Hidden Histories of War Crimes Trials. – Ed. by Kevin Heller and Gerry Simpson. – Oxford University Press, 2013.
11. Vittoria Franciscus de. De Indis et de Iure Belli Relectiones. – Nys E. (ed.). – New York: Oceana Publications for Carnegie Institution, 1964 (reprint of 1696 edition).
12. Grotius H. De Jure Belli ac Pacis. Translation // The Classics of International Law (ed. By James B. Scott). Volume two. – Oxford: At the Clarendon Press, London: Humphrey Milford, 1925.