

20 YEARS AFTER RWANDA: PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

20 ROKOV PO RWANDE: PREDCHÁDZANIE A TRESTANIE TRESTNÉHO ČINU GENOCÍDY

Adam Giertl

Pavol Jozef Šafárik University in Košice, Faculty of Law

ABSTRAKT

Genocída je pojem, ktorý sa dostal do popredia po skončení bojov v 2. svetovej vojny. Poukázal na násilie vykonávané rôznymi ozbrojenými a bezpečnostnými zložkami podriadenými Nemeckej Ríši. Tieto zločiny boli páchané predovšetkým s cieľom vyhladenia určitým skupín obyvateľstva kvôli ich odlišnej etnickej príslušnosti, rase, prípadne náboženskému vyznaniu. Po 2. svetovej vojne sa zločin genocídiu stal trestným na základe medzinárodného práva podľa Dohovoru o predchádzaní a trestaní zločinu Genocídiu. Táto medzinárodná zmluva bola prijatá a uzavretá ako priama reakcia na udalosti vojny. Odytedy sa udialo niekoľko udalostí, ktoré otriasli svedomím ľudstva. Na počiatku 21. storočia po skúsenostiach s ad hoc tribunálmi bol založený Medzinárodný trestný súd (ICC). Príspevok venuje pozornosť tak Dohovoru o predchádzaní a trestaní zločinu genocídiu ako aj štatútom ad hoc tribunálov pre bývalú Juhosláviu a Rwandu a Štatútu Medzinárodného trestného súdu. Príspevok sa zaoberá zločinom genocídiu a jeho stíhaním na medzinárodnom poli v čase 20 výročia genocídy v Rwande a v situácii kedy zúria násilné etnické konflikty v problematických štátoch Afriky – najmä v Južnom Sudáne a Sudánskom regióne Darfúr a medzinárodné spoločenstvo čelí hrozbe opakovania udalostí ktoré šokovali svet v deväťdesiatych rokoch.

ABSTRACT

Genocide is the term that came into prominence just after the conclusion of hostilities of the World War II. It referred to the mass atrocities carried out by various branches of armed and security forces predominantly aligned to the German Reich. Those crimes were mainly committed due to purpose of extermination specified groups of people, due to their distinct ethnicity, race or religious affiliations. Following the World War II, the crime of the genocide became crime punishable under the international law instrument known as the Convention on prevention and punishment of the Crime of Genocide (hereinafter referred to as Genocide Convention). The international treaty had been adopted and concluded as a direct reaction on the events of the war. Since then several events happened that shook the conscience of the mankind. In the beginning of the 21st century after the experience with the ad hoc tribunals to address the most grievous situations, the International Criminal Court was established (hereinafter ICC). The paper mentions the Genocide Convention as well as Statutes of ad hoc tribunals for former Yugoslavia and Rwanda as well as the Rome Statute of the International Criminal Court. The presented paper deals with the crime of the genocide and its prosecution on international plane on 20th anniversary of the Rwandan Genocide, when the violent ethnic conflicts in the problematic states of Africa - South Sudan and Sudanese Darfur region in particular – are raging and the International community is facing the threat of repeating of the history that shocked world in the 1990's. The paper mentions

INTRODUCTION

The term genocide had been unknown to the legal conscience of mankind until the World War II was over. However, as R. Lemkin – inventor of the term – noted, the definition of the genocide is rather new description of the old practice, than a completely new term.¹ By this quote Lemkin meant, that the Crime of Genocide itself was not a new phenomenon, however the World War II and the systematic operations of various agencies of the German Reich aimed to exterminate particular groups of people on the ethnic basis reached the scale never before observed.² The word genocide, consists of two words – Greek *genus* and Latin *caedere*.³ The word genocide and identification of the conduct that we identify under this word came as the reaction on the horrors of the Holocaust. However the German war criminals were not sued and punished for the crime of genocide. Rather they were judged for crimes against humanity, or the war crimes in general.⁴ Nevertheless, the international community made an effort to put the genocide into the international prominence. Legal recognition of the acts of genocide as crime under the international law, came in December 1946. The United Nations General Assembly (hereinafter UNGA) passed resolution no. 96 (I) of December 11th 1946 in which it described the nature of the genocide. The genocide is characterized as a denial of the right of the existence of entire human groups.⁵ The resolution made the question of punishment of the genocide the matter of the international concern and the crime itself is punishable under the international law.⁶ During the preparation and drafting of the resolution several legal problems arose and the debate continues even today about the issues related to this crime. Basically, the problem is whether the provisions regarding genocide shall be interpreted and applied in narrower or broader scope. The following paper addresses the most important documents of the international law that form the legal basis for prosecuting and punishing of the genocide. The first mentioned is the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.⁷ Other addressed documents are the Rome Statute of the International Criminal Court (hereinafter Rome Statute) that is the legal basis for jurisdic-

¹ Raphael Lemkin, is Polish lawyer, who specialized himself in the field of International Criminal Law, since 1930s. After outbreak of the war, he fled from Poland to Sweden and then to the United States, where he, as a Jew, found safe haven. In 1944 he published his work *Axis Rule in Occupied Europe*. In the work he dedicated significant space for commentaries of laws of German Reich and her Axis Allies in Europe. The term Genocide was for the first time introduced in this work. Read more: SCHABAS, W. A.: *Genocide in International Law – crime of crimes*, New York: Cambridge University Press, 2009, pp. 28 – 32.

² Crimes committed by the Nazi regime (and its allies), despite their grievance and scale, were not the first instances of the acts that can be described according to the recent standards as the acts of genocide. Notorious prominence obtained the extermination of the Armenians in Ottoman Empire. The Treaty of Sévres envisaged punishment of atrocities against the Armenians. However, the Treaty had never been ratified. See. SCHABAS, W. A.: *Genocide in International Law – crime of crimes*, op. cit., p. 25 – 26. This event had been recognized by several countries as an acts of the Genocide. The same holds for the Great Famine that hit the Ukraine in 1930s, and it is believed was staged by purpose by the Stalin's regime in the Soviet Union. See List of the states that recognized the Genocide of the Armenians. Available online: http://www.armenian-genocide.org/recognition_countries.html. See as well for a case of Ukraine Famine. Available online: http://www.unitedhumanrights.org/genocide/ukraine_famine.htm.

³ The first one refers to the nation, people, or race. The second one stands for the verb to kill. SCHABAS, W. A.: *Genocide*. In: WOLFRUM, R. (ed.): *The Max Planck Encyclopedia of Public International Law*, Volume IV, Oxford: Oxford University Press, 2012, p. 405.

⁴ As later the International Criminal Tribunal for Rwanda (hereinafter ICTR) stated in *Kambanda* case, the crimes of those people, namely the Holocaust and the Final Solution were constitutive for the Genocide, but they cannot be defined as such, because the crime as we know it, was not defined at the time. *Kambanda*, ICTR T. Ch. I, 4.9.1998, par. 16, cit. in.: CRYER, R. – FRIMAN, H. – ROBINSON, D. – WILMHURST, E.: *An Introduction to International Criminal Law and Procedure*, 2nd Edition, New York: Cambridge University Press, 2010, p. 205.

⁵ The Genocide had been put into the contrast with the act of the homicide (from Latin: *homo* – human being), which is basically the denial of the right to existence and to live of an individual. Thus it was defined that the act as such must be aimed against specific group of people collectively for being regarded as the Genocide. See in: United Nations General Assembly Resolution, UN doc. A/RES/96(I) of December 11th 1946.

⁶ UN doc. A/RES/96(I) of December 11th 1946.

⁷ Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948. Available in United Nations Treaty Series: <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>.

tion of the International Criminal Court⁸ as well as statutes of other international tribunals. The Genocide Convention and later statutes are very different in their nature. The paper starts with the general overview of the Genocide Convention. Then it addresses the statutes of the international criminal tribunal. When the question is asked if the provisions of the Rome Statute are a step forward, principally the answer is to be found whether the Rome Statute allows more effective prosecution and punishment of the crime of the genocide. The subsidiary theoretical question that arises is whether the Rome Statute is somehow complementary with the Genocide Convention, or those two sources of law are of completely different nature, thus independent from each other.

I. THE CRIME OF THE GENOCIDE ON THE INTERNATIONAL PLAIN

The International Community recognized the genocide as the crime swiftly after it was firstly introduced (as a term) and described by R. Lemkin. The first step was the adoption of the UN General Assembly Resolution 96 (I) of 1946. What is important about Resolution 96(I) is that it emphasized the internationalization of the prosecution and punishment of genocide. While it deeply shocked the conscience of mankind it must be the matter of the international concern. The normative part of the Resolution declared that the act of the genocide is punishable under the international law, disrespectfully to the person of perpetrator. It means that it is not important whether the Genocide is committed by private individual or representative of the state or even statesman. The recognition of the crime as the crime under the international law is very important. In the light of the Nuremberg Principles that were affirmed by the International Military Tribunal Charter, the crimes against humanity defined as a certain category of acts „whether or not such acts violate domestic law of the country where those acts were perpetrated”. Individuals have obligations under the international law which transcend the national obligations of obedience imposed by individual state.⁹ The resolution meant the first step towards the international legislation in the matter. States that proposed this resolution followed two aims. The genocide shall be the crime under the international law, whether committed in the peacetime or in the time of the war and it should be subject of the universal jurisdiction.¹⁰ It was crucial to make the genocide apart from the war. The prosecution of the Nazi officials as war criminals in Nurnberg Tribunal was based on the fact, that the acts that fell under the term crimes against humanity were committed during the wartime. The explicit wording that would clearly state that the act of the genocide is crime regardless if committed in the peacetime, or in the wartime is missing in this resolution, however it appeared later in the Genocide Convention.¹¹ It is important to mention, that the goal which was pursued by the proponents of the resolution¹² – to establish general jurisdiction for prosecution of the genocide – disappeared during the drafting of the resolution.¹³

II. THE CRIME OF THE GENOCIDE ACCORDING TO THE GENOCIDE CONVENTION

According to the Convention, the crime of the genocide, whether committed during the

⁸ The Rome Statute of the International Criminal Court available online: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

⁹ CASSESE, A.: *Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal*, pp. 3 – 4. Article available online: http://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf.

¹⁰ See supra note 1.

¹¹ Article 1 of Convention on the Prevention and Punishment of the Crime of Genocide. Wording of Convention was adopted by UN General Assembly resolution A/RES/260(III) of December 9th 1948. Available online: <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>.

¹² Cuba, India and Panama.

¹³ SCHABAS, W. A.: Genocide. In: WOLFRUM, R. (ed.): *The Max Planck Encyclopedia*, op. cit. p. 406

peace or the war is regarded as a crime under the terms of the international law. The genocide is often described as an ultimate crime.¹⁴ However, the character of the genocide as the crime of crimes goes hand in hand with its very specific and narrow definition. Eventually the only very specific act can be marked as the genocide. It can be said that this specific feature somehow contributed to the Rwandan tragedy in 1994. It appeared complicated to achieve the consensus within the international community, whether the activities carried out during the Civil war in Rwanda can be classified as the genocide.

The description of the crime as it is given in the Genocide Convention shows very narrow possible scope of application of the provisions aimed to enable prosecution (at least according to the prevailing practice) of the genocide. This is determined by the nature of the interest that shall be protected by law. As it was mentioned above, the act of the genocide has to be targeted against the specific group of people. However not every act of mass atrocities or even mass killing can be described as the genocide. The particular act shall fulfill relatively strict criteria, to be regarded as such. The protected interest is the right of the group to survive, thus to retain its identity. In this place the issue of protected group must be addressed. Not every group can be treated as victim of the genocidal act. Groups protected by the Genocide Convention (as well as by the other international documents) are precisely defined. The Convention comes with enumeration that includes national, ethnic, racial and religious groups exclusively.¹⁵ Neither other groups are mentioned, nor does Convention provide for possibility of broadening the definition. Attempts to encompass social and political groups into the definition failed. It has been suggested that the other groups shall fall into the scope of the definition by virtue of the customary law, or by extensive interpretation of the provisions.¹⁶ However, the specific nature of the international criminal law, precludes extensive interpretation, due to the possible violation of *nullum crimen sine lege* principle.¹⁷

The primary reason of why the social and the political groups were not included into the protection by the Convention, was that the Committee preferred stability and permanence of the group. However, political groups for example are characterized as the dynamic groups, that can change swiftly, while belonging of the individual person to the national or the ethnic group is determined in the moment of the birth.

However, The International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu* ruling departed from this definition. It determined that the Convention was intended to protect any stable and permanent group rather than groups specifically mentioned. However, this position has no broad support neither by case law, nor by state's practice.¹⁸ The expansion of the genocide definition by the domestic legislator is not precluded, however, such approach will have legal effects exclusively within the jurisdiction of the state and its own judiciary.¹⁹ The Convention establishes the duty of parties to adopt measures to prevent and punish the act of the

¹⁴ *Karadžić and Mladić*, ICTY, T. Ch. (transcript of hearing), 27.6.1996, at 15 – 16, cit. in. CRYER, R. – FRIMAN, H. – ROBINSON, D. – WILMHURST, E.: *An Introduction to International Criminal Law and Procedure*, op. cit. p. 207.

¹⁵ Article II, Convention on Prevention and Punishment of the Crime of Genocide. Wording of Convention was adopted by UN General Assembly resolution A/RES/260(III) of December 9th 1948. Available online: <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>.

¹⁶ CRYER, R. – FRIMAN, H. – ROBINSON, D. – WILMHURST, E.: *An Introduction to International Criminal Law and Procedure*, op. cit., pp. 208 – 209.

¹⁷ Indeed, the narrow definition of the Genocide, does not imply the impunity of the mass atrocities, like e.g. those that took place in Cambodia during the 1970s. The acts that do not fall into the definition of the Genocide, is prosecuted as the crimes against humanity, or the war crimes when committed during the armed conflict etc.

¹⁸ CRYER, R. – FRIMAN, H. – ROBINSON, D. – WILMHURST, E.: *An Introduction to International Criminal Law and Procedure*, op. cit., p. 209.

¹⁹ While the Genocide Convention is not the self-executing treaty, it requires the adoption of necessary domestic legislation. Domestic legislation might go beyond the scope defined in the Convention. The Convention itself does not preclude possible expansion of the definition by domestic legislator. As example may serve Ethiopian law which defines as The Genocide acts designed to eliminate political groups and population transfer or dispersion.

genocide. This duty regards only the scope defined by the Convention.²⁰ Despite the duty to prosecute and punish the genocide within national jurisdiction it was no sooner than in 1997, when the courts in Rwanda started hearing genocide cases.²¹

While the Convention enumerates the groups that are to become beneficiaries of legal protection by the legal regime of Convention, the international law, provides no specific definition of these groups.²² In many cases it gives a rise to several problems. In the case of Rwanda, the clear distinction between the groups of Tutsi and Hutu does not exist. Both groups share common language, nationality, race and religious beliefs as well. In this case the distinction could had been made due to official Rwandan classifications where Tutsi were referred as ethnic group, and the obligation of carrying the identification documents, that indicated ethnicity of every citizen. Only by this virtue ICTR found, that the group as such is permanent and falls within the scope of protection of the Convention. It can be observed that the identification of the protected group as well as determining whether the particular individual belongs to the group is the question uneasy to resolve. The group that supposed to be protected by the Convention, has to have some form of objective existence. There are many approaches how to determine somebody's belonging to the specific group, assessing subjective or objective factors. Although it may happen that the group is identified on the basis of the subjective self-perception or the way how the others perceive the group. The reliance on subjective approach may bring problems, however it might be very uneasy to focus on finding the objective criteria in every single case. At the end of the day, for example – racism is not always based on the objective basis. The resolution of outlined problem have to be based on evaluation of every single case. It is clear that objective criteria of culture, language, ethnicity has to be taken into account. However, strict self-limitation of the one who has to make a decision may deprive of protection groups that are perceived as somehow different by perpetrators on the subjective basis.²³

Previous parts briefly dealt with the problem of protected group identification. The following paragraph addresses the question of prohibited conduct (*actus reus*) and the psychological aspect of a crime – intent (*mens rea* – “guilty mind”), that is especially important, when assessing whether particular act falls within the definition of the genocide. The crime of the genocide might be committed by several acts. As it was mentioned above, primarily protected interest of the Genocide Convention is the existence of the group itself. In the first place, the crime of the genocide may be committed by killing the member of the group. Other acts however are not excluded from the definition of the Genocide, if they are capable of endangering the existence of the targeted group.²⁴ Several questions may rise from the definition that may cause specific problems with the interpretation. The nature of the act of killing however im-

²⁰ If domestic legislator expands the Genocide definition, this definition cannot be invoked against the other state.

²¹ SCHABAS, W. A.: Genocide, in: WOLFRUM, R. (ed.): *The Max Planck Encyclopedia*, op. cit. p. 407

²² International Criminal Tribunal for Rwanda (hereinafter ICTR) in the *Akayesu* case put into its decision the definition of the respective groups. The National group is described as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties. Racial group on the other hand is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factor. Members of the ethnic group share common language and culture and a religion group includes denomination or mode of worship or a group sharing of common beliefs.

²³ In respect of this statement the situation of Rwandan Genocide has to be recalled. In the internal conflict, the enemy groups (esp. Hutu) regarded someone as Tutsi mostly on subjective basis, while the significant distinctive features were not present. Similarly it holds for situation in Bosnia, where three distinct groups are sharing one territory. However, ethnic or linguistic distinctions are marginal, the distinctive features are mainly religion and cultural heritage.

²⁴ Killing, indeed the most serious act that may constitute the crime of genocide is not the only way, that envisaged by the Convention. The description of crime includes causing serious bodily or mental harm to members of group, deliberately inflicting conditions of life that are intentionally calculated to cause a physical destruction of the group itself. Measures implemented to prevent the births of children and transferring children from the targeted group to another group shall also be prosecuted as the acts of genocide. See: Article 2 of Convention on the Prevention and Punishment of the Crime of Genocide.

plies that it can be committed only against individual, however this individual has to be distinguished from other individuals by belonging to some specific group as was mentioned above. It can be said, that the same holds for the other acts that can be regarded as the act of genocide. The question is not clearly resolved in the question of perpetrator. Can the individual act (for example the killing) of an individual against another individual be considered as the genocide, or at least as attempt of the genocide?²⁵ The answer is not so obvious, due to the silence of the Convention regarding the act of genocide itself. However it is discussed later that the answer can be found in practice of international courts.

The specific genocidal intent must be present, when perpetrator is committing the genocide. The Convention provides, that act shall be committed with an intent to destroy in the whole or in part a specific group (Article II of the Genocide Convention). It means that the intent and the target are of very high importance in terms of genocide convention. This is, however the cause of many obstacles that may when the need to classify particular conduct as the genocide appears. It is questionable who has to bear responsibility for committing the act of the genocide. While the aspect of genocidal plan is not inherent in the crime description in the Genocide Convention, it is accepted that such a plan may be present, and thus form the essential part of the commission of the genocide and can be subsumed under the conspiracy to commit genocide. However, conspiracy to commit genocide is act specifically listed among the acts that are punishable under the terms of the Convention. The punishability of the Genocide and conspiracy to Genocide are however anchored separately in the Convention. That may lead to assumption, that no complex conspiracy (comparable to the extermination effort carried out by the authorities of the German Reich during World War II) is necessary for punishability of specific act as the genocide.²⁶ In the *Krstić* case the International Criminal Tribunal for the former Yugoslavia (hereinafter referred to as ICTY) upheld the individual responsibility of single perpetrator of the genocide. Indeed, the act moved by genocidal intent must be significant enough to impact the group as whole.²⁷

Other aspect that exceeds the scope of the Convention is the question of so called cultural genocide or the ethnic cleansing. R. Lemkin suggested during the drafting of the UN General Assembly resolution that the cultural genocide should be encompassed in the definition of the crime of the genocide. The basic argument for this is that the loss of the identity of the members of particular group and the loss of awareness of belonging to such a group leads eventually to the disappearance of a group as such. Such an event is the consequence, which the legal measures enabling prosecution of the genocide should have prevented. Ethnic cleansing and so called cultural genocide are not regarded as the genocide. ICTY trial chamber upheld the limitation of the genocide to the material annihilation of the group, although it stated that where there is physical or biological destruction, there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group. These attacks may be considered as evidence of an intent to physically destroy the group.²⁸

III. THE INTERNATIONAL CRIMINAL COURTS STATUTES

When regarding the usage of the definition of a genocide, as it was set by the Convention,

²⁵ The attempt of genocide is punishable along with the conspiracy to commit genocide, direct and public incitement to commit the genocide and complicity in suicide. *Ibid.*

²⁶ This was proven in the case of *Krstić* that was resolved by the ICTY. It was stated that the genocide had been committed in Srebrenica, however no generalized campaign of genocide during the conflict. See: BIGI, J.: *Krstić Case*. In: WOLFRUM, R. (ed.a): *The Max Planck Encyclopedia of Public International Law*, Volume VI, Oxford: Oxford University Press, pp. 612 – 614.

²⁷ *Ibid.* par. 16, p. 614.

²⁸ 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, par. 344.

it must be said, that the formulation of definition in 1948 was a remarkable success. Despite the events of 1990s and creation of several international criminal courts, the definition of the genocide as a crime had not changed since the adoption of the Convention. Its wording is literally the same in the Statute of the International Criminal Tribunal for the former Yugoslavia, Statute of the International Tribunal for Rwanda (ICTR) and Statute of the International Criminal Court. However, enumeration of punishable acts is omitted in the Rome Statute. But the legal basis of the genocide crime is retained regardless the source of law. It has to be mentioned however, that the Convention and Statutes are by definition different sources of law, with different legal consequences. While the Convention is purely the source of substantial law, imposing duties upon states, the Statutes are the sources of law of a different kind. While the Convention may be regarded recently as the source of law that encompasses the norms of *jus cogens*, it is rather a tool for international law, purpose of which is to establish international legal standard of prosecution of such a crime within the national jurisdictions. It imposes the duty upon the states to prevent and eventually punish the specific criminal act. The Convention itself cannot serve as a self-executing treaty. For purposes of criminal prosecution it is not applicable. The Convention itself stresses the importance and need of appropriate sanctions for the genocide (Article V of the Convention on Prevention and Punishment of the Crime of Genocide).

The Convention mentioned the possibility of establishment of the international tribunal (Article VI of the Convention). Indeed, in the time of adoption there already had been experience with the existence of the international criminal tribunal. It is clear however, that despite the quick emergence of the term genocide into the common knowledge, this had not been defined in the time of setting up of the Nurnberg and Tokyo tribunal. In 1946 it was not possible to prosecute the crime at those tribunals, however it is clear that the drafters of the Genocide Convention envisaged the possibility of emergence of the international tribunal that would be capable to carry out the prosecution of the genocide. However, it was no sooner than in early 1990s the special tribunals emerged with jurisdiction and capabilities to prosecute the genocide, under international jurisdiction. However, these *ad hoc* tribunals cannot be regarded as the international courts according to the Article 6 of the Genocide Convention.²⁹ Firstly the legal basis of their existence is not the Genocide Convention and on the other hand, their jurisdiction is wider and is not limited to the prosecution of the genocide exclusively and their competence encompasses prosecution of other crimes as well. They were established as a reaction to the specific situations in the particular regions, rather than to prosecute the genocide itself. However it must be stated, that such a limitation would hamper their effort due to narrow definition of the act of the genocide.³⁰ The ICTY was established by the UN Security Council Resolution, which did not recall the provisions of the Genocide Convention and the same holds for ICTR.³¹ Both tribunals were established by the UN Security Council acting under Chapter VII. However both Statutes bring no special approach to the genocide as the Rome Statute does. The Statute of ICTY presents an example of the special tribunal with jurisdiction limited both in terms of *ratione loci* as well as *ratione temporis*. Territorial jurisdiction is limited to the territory of the former Socialist Federal Republic of Yugoslavia (SFRY).³² The temporal jurisdiction of the ICTY exists in respect of the crimes committed

²⁹ Article 6 states that persons charged with the genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

³⁰ Special tribunals were to prosecute and punish inter alia grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity.

³¹ Compare: UN doc. S/RES/827 of 25 May 1993. International Criminal Tribunal for Rwanda established by resolution UN doc. S/RES/955 of 8 November 1994.

³² The territory recently encompasses territories of sovereign states of Bosnia and Herzegovina, Croatia, Kosovo, Macedonia (Former Yugoslav Republic of Macedonia - FYROM), Montenegro, Serbia and Slovenia.

after 1 January 1991. Same holds for the ICTR jurisdiction is limited strictly to events in Rwanda in 1994. As the international treaty, The Rome Statute is also an independent document. Thus the Article 6 of the Genocide Convention remains nowadays complete anachronism.³³ The main difference of *ad hoc* tribunals and the International Criminal Court can be observed in respect of their jurisdiction. While the jurisdiction of the ICC in relation to the prosecution of the genocide (see Article 5, of the Rome Statute) is general, the jurisdiction of special tribunals is precisely limited in terms of *ratione loci* and *ratione temporis*. The word general in previous sentence, however does not imply that ICC possesses the universal jurisdiction, which is excluded by the principle of complementarity with regard to the national criminal proceedings. That means the ICC will investigate and prosecute cases, which national organs and courts are unwilling or unable to investigate and prosecute.³⁴ That means that the activity of ICC is limited. It recognizes the primacy of the national jurisdiction and reaffirms state sovereignty. Its activity is thus limited to the highest common denominator that states could agree upon after taking into account concerns of certain states.³⁵

The Rome Statute is multilateral treaty and as such it is in force in relation to the states that ratified it. According to Article 12, state which becomes a party to this Statute thereby accepts the jurisdiction of the Court. The ICC shall exercise its jurisdiction if, the conduct in question occurred on the territory of the party to the Statute, or the conduct had been committed by the national of the state that is a party to the Statute.³⁶ However, ICC has jurisdiction in respect of the crimes that were committed after the entry of the Statute into force (limitation of the jurisdiction *ratione temporis*). However the Statute itself brought somehow different approach to the prosecution of the genocide in terms of punishable acts. The forms of commission of the crime are put under single provision that is applicable in the general, thus not only to the crime of genocide, but to the crimes against humanity, war crimes and crime of aggression as well.³⁷

IV. CONCLUSION: IS THE ROME STATUTE A STEP FORWARD?

It has to be pointed out, that due to several abovementioned reasons the Rome Statute means no significant improvement in respect to prosecution of the genocide. While Genocide Convention established international legal standard of the genocide prosecution, that might be proved by pointing out implementations of its definition by later instruments of the international criminal law, it did not provide for the general jurisdiction. While *ad hoc* tribunals were intended as the reaction of international community to the gravest situations of the first half of 1990s and they are extraordinary organs. Moreover legal instruments that are legal basis for their existence did not exceed the scope of the Genocide Convention.

The Rome Statute established different kind of the court. It is not *ad hoc* tribunal, but it is intended to serve as the permanent court, that shall investigate and prosecute the worst crimes that cause international concern. However, as it was stated, the ICC is not the court with universal jurisdiction. The practice of ICC in respect to genocide is up to date limited to one pending case of Sudanese president Omar Al-Bashir, who is accused of the responsibility as

³³ SCHABAS, W. A.: Genocide. In: WOLFRUM, R. (ed.): *The Max Planck Encyclopedia*, op. cit. p. 407.

³⁴ Article 17, par. 1 of the Rome Statute, KAUL, H.-P.: International Criminal Court. In: WOLFRUM, R. (ed.): *The Max Planck Encyclopedia of Public International Law*, Volume V, Oxford: Oxford University Press, 2012, par. 39, p. 672 – 673.

³⁵ *Ibid.* p. 673.

³⁶ The ICC may exercise its jurisdiction only if the requirements of the Article 13 of the Rome Statute were fulfilled. The situation in question (alleged crime) had been referred to the Prosecutor by State Party or by the UN Security Council (while acting under Chapter VII of the UN Charter), or Prosecutor had initiated an investigation of the crime according to Article 15.

³⁷ The Rome Statute established competence of the Court to prosecute mentioned crimes exclusively. Article 5 of the Rome Statute.

indirect co-perpetrator of the acts of Genocide in the Darfur region.³⁸ When talking about Statute itself we must uphold that in terms of the genocide it remains on the position of its predecessors. Moreover, with abandoning the nexus between the crimes against humanity and the state of war, the crime of genocide partially lost its prominence. It is mainly due complications caused by its narrow scope and specifics that has to be met by a particular act. Indeed, the term genocide is not outdated, and it still can be used to refer to the crimes of extraordinary gravity.

KEY WORDS

The Crime of Genocide, International Criminal Law, International Criminal Courts, Rwanda, Convention on Prevention and Punishment of the Crime of Genocide.

KLÚČOVÉ SLOVÁ

Zločin genocídie, Medzinárodné trestné právo, Medzinárodné trestné súdy, Rwanda, Dohovor o predchádzaní a trestaní trestného činu genocídie.

BIBLIOGRAPHY

1. SCHABAS, W. A.: *Genocide in International Law – crime of crimes*, New York: Cambridge University Press, 2009, 741 p., ISBN 978-0-521-71900-1.
2. SCHABAS, W. A.: Genocide. In: WOLFRUM, R. (ed.): *The Max Planck Encyclopedia of Public International Law*, Volume IV, Oxford: Oxford University Press, 2012, pp. 405 – 414, ISBN 978-0-19-929168-7.
3. CRYER, R. – FRIMAN, H. – ROBINSON, D. – WILMHURST, E.: *An Introduction to International Criminal Law and Procedure*, 2nd Edition, New York: Cambridge University Press, 2010, 618 p., ISBN 978-0-521-13581-8.
4. CASSESE, A.: *Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal*, Article available online: http://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf.
5. WERLE, G.: *Principles of International Criminal Law*, 2nd edition, The Hague: T.M.C. Asser Press, 2009, 633 p., ISBN 978-90-6704-276-5.
6. KAUL, H.-P.: International Criminal Court. In: WOLFRUM, R. (ed.): *The Max Planck Encyclopedia of Public International Law*, Volume V, Oxford: Oxford University Press, 2012, 667 – 688 pp., ISBN 978-0-521-13581-8.
7. BIGI, J.: *Krstić Case*. In: WOLFRUM, R. (ed.): *The Max Planck Encyclopedia of Public International Law*, Volume VI, Oxford University Press, Oxford, 2012, 612 – 614 pp., ISBN 978-0-521-13581-8.
8. Convention on prevention and punishment of the Crime of Genocide, annex of the UN General Assembly resolution A/RES/260(III) of December 9th 1948.
9. 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. Available online: <http://www.icj-cij.org/docket/files/91/13685.pdf>.
10. United Nations General Assembly Resolution UN doc. A/RES/96(I) of December 11th 1946.
11. United Nations Security Council Resolution, UN doc. S/RES/827 of May 25th 1993.
12. United Nations Security Council Resolution UN doc. S/RES/955 of November 8th 1994.

³⁸ See online: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx.

13. Statute of International Criminal Court (the Rome Statute), available online:
http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

CONTACT DETAILS OF AUTHOR**Mgr. Adam Giertl**

Assistant teacher, Department of European Law and International Law
Pavol Jozef Šafárik University in Košice, Faculty of Law
Kováčska 26
040 23 Košice
Slovak Republic
adam.giertl@upjs.sk