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A.K. Adibayeva*

Abylai Khan Kazakh University of International Relations and International Languages, Almaty, Kazakhstan (E-mail: ka_alina84@mail.ru)

About the problem of the formation and development of the «genocide» concept in international legal science and practice

The basic purpose of this article is to analyze the theoretical and practical aspects of the concept of «genocide» as an independent legal category in the context of the universal UN Convention of 1948 and beyond. The author, using also the decisions of specialized international judicial institutions, the doctrinal developments of scientists, and applying, together with them, general scientific and special research methods, formulates appropriate conclusions regarding the historical and modern understanding of the definition of this international socially dangerous act. It is substantiated that genocide, taking into account new forms and methods of its commission, is not only a crime against a person, a certain demographic community and humanity, but also against international law. The main conclusion is that, in view of the fact that law enforcement practice is ahead of the existing norms, the normative content of the definition of genocide and the closely related provisions of the Convention should be objectively interpreted in accordance with existing realities. In conclusion, as a result, attention is drawn to the fact that genocide, both as a concept and as a crime, requires further comprehensive scientific development, including within the framework of the development and systematization of knowledge in certain areas of Kazakhstani law.

Keywords: genocide, UN Convention, term, definition, concept, crime, historical facts, Nuremberg Tribunal, modern understanding, decisions of international tribunals.

Introduction

The conceptual issue encompassing the «genocide» concept in the international law provides more evidence for the topic's importance. This is true because, over time, the special UN Convention on the Prevention and Punishment of the Crime of Genocide of 9th December of 1948, which enshrines this idea, loses its ability to clearly fix the reality of the situation.

It is important to focus on the depth and meaning of this notion before moving on to other aspects of the study of relevant scientific literature.

It's essential to know that widely recognized point is that the term «genocide» originates from the Greek «genos» — «genus», «tribe» and the Latin «caedo» or «caedere» — «I kill», «destroy» or «kill». Simultaneously, claimant of individual specialists who suggest that the etymology of «genocide» goes back not to the Greek «genos», but to the Latin «genesis» — «beginning» [1; 32]. Ambiguous, according to N.V. Moshenskaia, is the second component of the phrase «murder» («caedere») [1; 32]. It is justified under international law to use this unique hybrid word according to the roots of the Greek «genos» and the Latin «caedo» or «caedere», without getting into the substance of the author's opinions, which differ greatly from the commonly recognized genocide's concept. In conformity with the precedent international legal practice, genocide is a massive, «gross violation of human rights; international crime characterized by the elimination of particular national, ethnic, racial, or religious segments of the population or whole peoples for racial, national, religious, or other purposes» [2; 145]. Throughout this sense, specifically refers to the perspective of T.G. Daduani, someone might assert «The establishment of international protection of religious and then ethnic national minorities is linked to the commencement of the process of forming the conceptual and international legal underpinnings of criminal prosecution for the crimes of genocide...» [3; 12]. As E.D. Pankratova, «the criminal intent (dolus specialis) to wipe out an entire ethnic, religious, racial, or other social groups is the essence of genocide» [4; 172]. The idea of genocide based on the unity of the persecuted community of persons argues that it is also «setting up conditions that lead to the mental or physical decline of a population as a whole» [2; 145]. E.D. Pankratova says that genocide provides its name not only to «the worst possible offense that may be committed upon another human being» [4; 16], however, also «an incomprehensible crime committed with the intent of wiping out an entire nation rather than a single person» [4;

* Corresponding author's E-mail: *ka_alina84@mail.ru*

16]. A.N. Trainin in his chosen work «Protection of Peace and Criminal Law» pointed out that «racism is at the root of every genocide» [5; 407]. S.M. Rakhmetov and S.A. Krementsov underline that «to commit genocide is to act in flagrant disregard of universally recognized norms of human decency» [6; 59]. P.S. Romashkin proceeds from reality of defining genocide as «worst possible offense to mankind» [7; 264]. According to K.Zh. Zabikh, genocide is an international crime against human rights and liberties [8; 12]. I.Yu. Belyi also sought to define the substance of the activities that create the stated phenomena in their whole, based on the findings of which «crimes of genocide are not directed towards the enemy army but rather the civilian population» [9]. Similar to the concept of genocide there are the lately popular terms «ethnic cleansing» [2; 145] and «humanitarian tragedy» linked with it, as well as democide, politicide, and territorial genocide.

The truth that «genocide is among the worst awful and criminal expressions of human activity, did not evolve instantaneously, but as a result of all human history, especially in the history of contemporary and recent times», comments V.M. Vartanian [10; 13]. For this reason, it is really worth considering the view of T.E. Sainati, who claims that «acts of genocide inflicted significant losses to humanity within the scope of whole history» and who therefore asserts that «genocide has marked every era of human existence» [11; 174]. Simply put, «the process of the gradual entry of this phrase into everyday life», which includes «crucial moments in humankind's development of an understanding of the concept of «genocide» and the evolution of legal practice around it» [12] demonstrate that «every genocide has a history and is infused with the characteristics of the society in which it occurs» [10; 14].

By preceding interpretations of genocide, it could definitely stated that this term is not only exceptional (particular), but also complicated in its legal character. Based on this circumstance, the purpose of this article is to explore how the genocide’s meaning is used in science and legal practice not as a legal category, but as a criterion for the political and ethical assessment of widespread cases of violence against various demographic groups of individuals. Consequently, the key issue is to find out to what extent «genocide» is the topic of global community involvement.

Materials and methods

The article uses the developments of modern scientists and experts, in particular, such as N.V. Moshenskaia, T.G. Daduani, E.D. Pankratova, T.E. Sainati, R. Lemkin, H. Singh, S.C. Grover, A. Rachovitsa, International Court of Justice, Nuremberg Military Tribunal, and International Criminal Tribunals for Rwanda and the Former Yugoslavia decisions. Inside this framework of said examination of the concept «genocide» within 1948 United Nations Convention framework, and with help of all the above sources, the scientific and normative content of this international crime is revealed and conclusions are drawn regarding the prospects for its broad interpretation. To assure the consideration of the selected issue, the author utilized such research approaches as analysis and synthesis, comparison, structural-functional and formal-logical procedures.

Results

Following the idea of scientific and practical consistency established with regard to law of nations, the suggested essay will first attempt to trace the development of «genocide» definition across time.

Thus, «instances that included hallmarks of the modern definition of genocide» [10] are known throughout «global history since the globe’s inception until the middle of the XX century», as I.Yu. Belyi puts it. For example, «it is sufficient to recall a few, such as the complete destruction of Jewish newborns in Ancient Egypt, the mass slaughter of the occupants of Carthage by Roman History, the Crusades (that included it against tribal groups of the north Slavic peoples), colonial Christian missionaries' treatment of native peoples (the American Indians, the Boers, and so on and so forth» [10].

As instance, «all civilians, including children and women of reproductive age, were to be executed by the Vendée, the soldiers which crushed the monarchist revolt, during the French Revolution» [13], which accords with the current concept of genocide.

As history shows, however, colonial governments frequently implemented policies with the express intent of perpetrating genocide.

M. Andriukhin, in this regard, in his scholarly work devoted to the study of genocide, separate focus was mostly on the notion that marketing was a major factor in the massacre of Negro slavery continuously repeated the wholesale killing of millions of Indians [14; 12]. Great Britain stands out «especially» in this regard, as it is still blamed for the deaths of many Indians, Boers, Malaysians, and Sudanese, and as Germa-

ny is widely held responsible for the annihilation of the Guerrero tribe (modern Namibia). At the end of 20th century, in 1985, the United Nations officially designated the attempted annihilation of Namibia's indigenous population as the first act of genocide. Moreover, Indian groups and a number of historians contend that such an act of genocide has been performed out against the native population of the American continent, as the amount of Indian Americans plummeted from 12 million in 1500 to 237 thousand in 1900 (this theory was first put forward by historian Richard Drinnon (Richard Drinnon), who published a study in 1972 called The American Indian: The First Victim [13]. There is no difficulty to highlight the genocide of Australian aborigines in the era from 1788 to the 19th century, organized and carried out by European colonialists. As noted in their collaborative work by K. Vrtanesyan and A. Palyan, dedicated to crimes of genocide throughout the history of mankind (2009), «indigenous Australians are fighting the Australian government to recognize genocide, but without success» [15].

In the 19th century, American scientists I.C. Nott and R. Gliddon published a joint work titled «Types of mankind» in which they advanced an anti-scientific thesis by confirming their deep conviction in the obviously objective inequality of races on the basis of falsified data on the physical characteristics of various nations (peoples). They claimed that «as if the inherent inequality between human beings and other species, including the innate differences between plants and animals, were an immutable natural law» [16; 79]. D. Fisk in the book «American Political Ideas» puts up the notion of the necessity to achieve the USA's world dominion, and in his opinion, will be greater than the control of the old Roman Empire [14;13].

The Polish (later American) lawyer and professor Rafael Lemkin (Lemke) has coined the word «genocide» in legal scholarship (Rafael or Rafae Lemcine). Both from the beginning and throughout his later efforts, in his writings and speeches, he established the necessity for legal protection not just of people, but also of their communities. In October 1933, he advocated to employ legal measures to preserve these integral communities of people from acts intended at their annihilation on the occasion of Unification of International Criminal Law at the Fifth International Conference [19; 790]. At the same time, R. Lemkin provided evidence in his report (better known under the French title «Les actes constituent un danger general (intere tatique) consideres comme delities des droit des gens») for the need for a unique international treaty — a convention establishing appropriate punishment for perpetrators of the aforementioned acts and designed to prevent and repress them.

The statistics presented here demonstrate that «having basically appeared in legal scholarship», the term «genocide» entered legal practice shortly following World War I [10; 19]. As a criminally prosecuted, socially hazardous behavior, it nevertheless did not get complete consolidation at that time in any normative legal actions or judicial rulings. By the way, even today, when the European Parliament and roughly 40 global governments officially recognize the truth of the Armenian genocide, the UN has not reached its judgment on this topic yet. However, genocide continued even after World War I ended. Thus, in 1932-33 due to the mistake of the Goloshchekin administration in the USSR, specifically in Russian Federation, Republic of Belarus, Republic of Kazakhstan and Ukraine, a horrible famine broke out. In Ukraine, it is officially identified by the word «Holodomor», as a consequence of which from 2 million to 7 million people perished. According to several reports, up to 3 million people became victims of starvation in Kazakhstan. But unlike the Verkhovna Rada of Ukraine, which recognizes the Holodomor as an genocide crime, authorities of Kazakhstan, in order to avoid confrontation and deterioration of bilateral relations with Russia, silently keep silent about this fact, without giving it an appropriate legal assessment.

The Plan Ost (Generalplan Ost), which was put into place during the years 1939-1944, deserves more specific discussion within the context of Second World War. Nazi plan to «liberate life space» (the so-called «Lebensraum») for Germans and other «Germanic peoples» at the cost of the «Aryan», «Eastern European», and «Slavic» inhabitants' Eastern Europe land and the Soviets' occupied land [15]. The populations of China, the Philippines, Korea, and other Southeast Asian countries were systematically wiped out between 1930 and 1945 (one needs only to think back to the massacres in Nanjing (China), the Sun Ching operation in Singapore, and the destruction of Manila to understand this).

A great influence on the formation of racist ideology in Germany was exerted by the German philosopher F. Nietzsche, who, declaring the «choosiness» of the Aryans, openly called on them to enslave other peoples; preached the need to establish a terrorist dictatorship of the caste of «appointed world rulers» [14; 10]. War, in his view, was as necessary for the state as slavery was for society [17; 176]. Theologian A. Stöcker, well recognized as a supporter of the anti-Semitism theory in Germany, and contributed significantly to the German fascism ideology [14; 11]. Over time, Adolf Hitler's anti-human ideas came to be shaped primarily by the worldviews and appeals of the two preachers of the all-encompassing war, enslave-

ment, and racism, the two aforementioned followers of National Socialism. In «Mein Kampf», he said, «The Germans need to keep in mind the superiority of the Aryan race and do everything they can keep things as pure as possible among their own people» [18; 24].

Legally, the word «genocide» came only in 1944, when R. Lemkin released his classic monograph «Axis Rule in Occupied Europe» in Washington, D.C. a US citizen and an employee of the military department of this state. In this work, in particular, in section IX entitled «Genocide», which consists of the subdivisions «Genocide — a new concept for the destruction of nations», «Technique of genocide in various: political, social, cultural, physical, etc.) areas», «Recommendations for the future (prohibition of genocide in war and in time of peace, international control), he provides documentary evidence of murders and other crimes that took place throughout the territory occupied by the Nazis, and also, for example, justifies the need for a new designation to qualify their actions against attitude towards «inferior races» [19; 790-795]. The crime was described by him as follows: «Whenever we talk of genocide, we're referring to the systematic extermination of a people group or a nation. Genocide, in the broad sense, does not always mean the swift extinction of a nation; rather, it is an orchestrated strategy of multiple actions aiming at eradicating the primary foundations of existence for certain communities. Culture, language, national pride, religion, economic viability, individual safety, personal freedom, health, and even the very lives of people who identify with these groups are all targets of this technique. Genocide is committed against an entire national group, and victims are targeted not as individuals but solely because of their membership in that group» [20; 121].

The very first official mention of the term «genocide» took place following the conclusion of the World War II and has an association with the post-war International Military Tribunal in Nuremberg, proposed by the USSR on November 2, 1942 in the Decree of the Presidium of the Supreme Council and established in accordance with the Declaration of Responsibility Hitlerites for the atrocities committed, the Moscow Conference Agreement of 30th of October, 1943, between the United States, Great Britain, the Soviet Union, and the Provisional Government of the French Republic was signed in London on 8th of August, 1945. It provided the administration for the European Axis countries with a fair and swift conviction and punishment of the principal war criminals.

24 fascist leaders had a charge of «killings, slavery, and exiles of civilians for political, racial, or religious grounds are all examples of crimes against humanity» [2; 509] in accordance of the so-called «Principles of the Nuremberg Tribunal», and they were Agreement's fundamental core of the 8th of August, 1945. In fact, the Court examined 22 cases through November 20, 1945 to October 1, 1946, which included illegal international crimes or conspiracies to do such socially destructive acts.

Therefore, «in Nuremberg Tribunal Charter two kinds of crimes against humanity were acknowledged, specifically, paragraph «c» of Article 6», as stated by E.D. Pankratova [4; 24]. «If the first category is connected with the acts of inhumanity (including but not limited to mass expulsions, slavery, killing, and genocide, committed against civilian populations in anticipation of or during armed conflict)», «and the second one has to do with human persecution as a whole» [4; 20, 24]. According to the research of another scientist A.N. Trainin, the second type of crimes is comprised of «crimes motivated by race, religion, or politics...» [21; 24-25], which means in need to specify a victim of such offences, it is vitally important to specify the characteristics of the group that ends up being the victim of these crimes. This is something needs to be considered [21; 24-25]. Therefore, it may be concluded that «the Charter of the Nuremberg Tribunal established the indicators and qualities that comprise the basis of components of genocide without naming the crimes by name» [4; 20, 21] and, as was pointed out by V.A. Marukhian, «acknowledged that people who have committed «crimes against humanity» are also war criminals, regardless of whether or not such acts violated domestic law of the country in which they were done, or the laws and traditions of war» [22; 28]. The most important factor, however, according to S.A. Akhmetova, for the first time, globally unlawful activities performed in times of war by Nazi Germany were designated as «crimes against international law» [23; 3].

According to I.I. Lukashuk and A.V. Naumov, the categorization of genocide stated in Article 6 of the Nuremberg Tribunal's Charter places it in the crimes against humanity category that is the most similar to it [24]. Nevertheless, I.Yu. Belyi asserts that «in that it must have certain features that set it apart on both the objective (the level of repression against specific groups) and the subjective levels (the reasons behind the crime)» [25; 139-141]. V.A. Batyr adds to the perspectives that have been presented with «while its commission may coincide with the conduct of hostilities, its goal (aimed at the physical annihilation of exactly individual ethnic, national, and religious groups) distinguishes it from war crimes and allows it to be carried out even in times of peace» [26; 32].

United Nations Charter, adopted and then entered into legal force on October 24, 1945, undoubtedly was the first of legal ways to combat genocide in all of its forms. The UN Charter legally fixed the creation of a new world order mechanism after the end of the Second World War. The founding act of UN, nevertheless, in Article 1 describes «equality before the law and protection of fundamental liberties for all people, regardless of ethnicity, sexual orientation, or religious affiliation...» [27; 12]. It is done without using the term «genocide». Furthermore, the UN also made recommendations for the nondiscriminatory use of inalienable rights and liberties in Articles 13, 55 and 76 [27; 15, 23, 28].

At the time of adopting the Resolution 96 (1) of the General Assembly on December 11, 1946, on the avoidance and punishment of the crime of genocide, this was introductory occurrence of the «genocide» expression in any international legal instrument. The General Assembly, one of the six primary entities that make up the organization, approved this resolution throughout first session's last half. The resolution [14; 34] emphasizes the Member States' adherence to the values of Nuremberg's International Military Tribunal which were embodied in court and set forth herein in Charter. Rejecting fundamental moral principles like the right to life is shocking to the conscience, results in massive losses for mankind as a whole, disengages such people from culture and other fields, and goes against the values, principles, and charter of the United Nations [28; 140]. Efforts to counter it merit worldwide discussion [7; 266].

Moreover, under this resolution, ECOSOC was mandated by the UN GA to begin work on a draft special universal Convention about genocide crimes, thus bring it to the next session for discussion. A little over nine months later, on November 21, 1947, the General Assembly reaffirmed its own Resolution of December 11, 1946 and adopted another one (180 (11), in which it «called on ECOSOC to hasten the writing of a treaty to prevent genocide» [29; 160], while reiterating that both states and individuals are responsible for genocide as an international crime [10, 32], yet simultaneously taking into consideration the convention's draft on the crime of genocide «taking into account the results of the Nuremberg Trials, the General Assembly determined that time is now to draw up a treaty along these lines to structure and streamline the rules against the ruthless crime of genocide throughout the world», writes H. Singh in his work that was specially commemorating the Genocide Convention's sixty-year commemoration [30]. Thus, Singh's work was written in honor of that.

There was no clear mention of genocide anywhere, not in the Charters, not in the judgements delivered to the International Military Tribunals at Nuremberg or Tokyo, and not even in the Charters themselves. In Articles II and III of the Convention, that was ratified on December 9, 1948, the legal concept of genocide and a discrete list of sorts of participation in this particular socially destructive crime were finally established. The following is valid according to Article II:

«For the purposes of this Convention, genocide means the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

a) killing members of such a group;

b) causing serious bodily or mental harm to members of such a group;

c) deliberately creating for any group such living conditions as are calculated for its total or partial physical destruction;

d) measures designed to prevent childbearing among such a group;

f) forcible transfer of children from one human group to another» [31; 99].

«With regard to criminal sanctions,

a) genocide itself is criminally punishable, but also Convention's Article III, Section 1 furthers even further.

b) conspiracy to commit genocide;

c) direct and public incitement to commit genocide;

d) attempted genocide;

f) complicity in genocide» [3; 20].

Subsequent to the assumption of the Convention on the Prevention and Punishment of the Crime of Genocide, one of the earliest charges of genocide addressed intentional crimes committed against black people in USA. In this respect, «In December 1951, the Congress on Human Rights (a body responsible to the United Nations that was abolished in 1956) filed a petition to the United Nations detailing the numerous attempts made on African American life between 1945 and 1951» [32]. The accusation that this Convention's distribution has directly violated for the first time was leveled against Serbia. «During the fighting that took place on Croatian territory between 1991 and 1995, Croatia filed a complaint against Serbia with International Court of Justice on July 1999, alleging Serbia of genocide during that time period». In January of

2010, Serbia presented a counterclaim, during which time it gathered proof of the Serbian population genocide at the hands of Croatian government and military personnel [32]. Contrastingly, «on February 3, 2015, the International Court of Justice dismissed both parties' claims» [32].

Therefore, this was the first court case in which the legal definitions of genocide crime were employed, and serious violations of Article 3 of the 1949 Geneva Conventions for the Protection of War Victims and Additional Protocol II were taken into account. At first, occurrence, the norms of the Convention were applied in relation to the citizens of Rwanda. Experts look at the case «Prosecutor v. Jean-Paul Akaezu» that occurred in 1977 in relation to these norms. Rwanda Trial Chamber of the International Criminal Tribunal held the proceedings on the 9th of January 1997 and continuing until the 2nd of September 1998, when a ruling was rendered. The Chamber undertook a thorough inquiry into all of the pertinent circumstances of the conflict so that it could give clear answers to the following two questions: (125 pieces of documentary evidence were submitted as part of the case). Two issues remain about the events of 1994 in Rwanda: 1) was the fighting considered as international conflict between the Rwandan Armed Forces (RAF) and 2) were the killings that took place in Rwanda and on the territory of neighboring nations between January 1 and December 31 genocide? [33].

In this regard, researchers who have specially devoted their work to the analysis of these issues emphasize that «the Trial Chamber of the ICTR (International Criminal Tribunal for Rwanda) principally relied on the terms of the 1948 Genocide Convention while determining whether or not these atrocities qualified as genocide» [3; 20].

Another court case, but one that has already been considered by the International Tribunal Trial Chamber for former Yugoslavia has a relation to the 1948 Convention on Genocide - «The Prosecutor v. Popovich and Others» — has revealed and proven the guilt of two individuals in committing the crime of genocide. These individuals are V. Popovich and L. Biara, and the case used 315 testimonies and more than 5,000 pieces of physical evidence that The Trial Chamber took into consideration two different types of so-called «joint criminal activity». One socially harmful conduct was committed with the intent eradicating the adult male inhabitants of Bosnian Muslims, and another was a forceful evacuation of the Muslim population of Srebrenica and Zepa [3; 21]. The Trial Chamber determined that the two categories of «joint criminal action» should be prosecuted concurrently. «The Judicial Chamber found that there were inevitable evidences of massacres of internees and forceful transfer of the civilian population based on the most salient parts of the occurrences» [3; 21].

It is necessary to mention other similar subsidiary bodies in addition to the international criminal justice bodies that were mentioned above. Specifically, «internationalized» national courts, whose jurisdiction includes providing justice in cases involving international crimes in the presence of foreign judges as well as other participants in criminal proceedings [34; 339]; and mixed (hybrid) courts in Kosovo (these are the war crimes departments of the Court of Bosnia and Herzegovina and for the prosecution of genocide crimes committed while Democratic Kampuchea was in existence, the Extraordinary Chambers in the Cambodian Courts). As a part of the so-called «pseudo-international criminal justice system», we should not neglect the Iraqi Special Tribunal. Article 1 of the Charter (Statute) states that the Iraqi Special Tribunal has jurisdiction over crimes of genocide, crimes against humanity, war crimes, and other crimes against humanity [35]. The Rome Statute of the International Criminal Court, as a result of signing of 17th of July, 1998, enables the Court to function and to have exclusive authority over the crime of genocide [36; 9]. According to S.C. Grover, the process of establishing and running all of the aforementioned institutions demonstrates that the prosecution of genocide at the state level is typically not possible. As a result of this, large-scale manifestations of this crime are typically (or frequently) associated with the actions of high-ranking officials (for instance, these are acts of genocide in the former Yugoslavia and in Rwanda) [37; 95]. According to A. Papamichel and H. Partis-Jennings [38; 92], the inquisition and indictment of genocide will therefore be carried out by specifically constituted mechanisms in these types of cases. It's hard to believe that a state that planned to be an accomplice in the commission of genocide would hold itself accountable for this crime, as one more Western scientist, J. Leach, puts it so eloquently: «How could a state which meant to be a partner in genocide come out in this manner?» [39; 12]. The result of these facts, A. Rachovitsa concludes that the components of the crime of genocide must conform to international norms. It is vital to guarantee no contradictions in the event that an individual is brought to international criminal responsibility [40; 37].

Taking into mind the fact that genocide can be perpetrated though if there isn't an ongoing armed battle, academics I.I. Lukashuk and A.V. Naumov heed the findings that are most relevant: «Consequently, geno-

cide was separated from war crimes and crimes against humanity in the Statutes of the Tribunals for the Former Yugoslavia and Rwanda and the Statute of the International Criminal Court» [41; 123].

Discussion

In wide official circles along with the field of research conducted by scientists in the humanities, such as historians, lawyers, sociologists, political scientists, psychologists and philosophers, as well as genocide scholars themselves, the meaning of the word «genocide» is still becoming the subject of heated discussions and disputes. In particular, if T.E. Sainati believes that «Although the five actions enumerated in Article II of the Convention are the only ones for which genocide is defined, additional acts may be done with the same goal in mind» [11; 178], and therefore, in her opinion, there is a narrow contractual definition of genocide, then a number of experts, on the contrary, based on that the facts of a broad interpretation of this crime have been established by expanding the concept of «protect [42; 233]. According to an article written by Yu.V. Chernovitskaia, the definition of genocide is included in the Convention, — firstly, «does not include either «politicide» — the destruction of political groups and social classes (for example, alleged communists regime in Indonesia under the Suharto), either, nor what is known as a «self-genocide,» in which a group's top or the majority of its members who all or almost share distinguishing national or ethnic characteristics are destroyed, [43; 165]; second, « the Convention's categorization of groupings into distinct kinds seems like a red herring» [43; 165]; or «one may argue that the choice to restrict the term to «national, ethnic, racial, or religious groupings» is arbitrary» [43; 165]; third, «the Convention's categorization of different kinds of organizations is inconsistent» [43; 165]; fourth, as specified by V.M. Vartanian, «the Convention's definition, which included an indication of intent, was especially difficult» [10; 34]. The reason is that it was argued to be overly narrow in its application of international law prohibiting genocide. Nevertheless, it is important to note that some states' governments, along the connivance of which acts of genocide were carried out (for instance, not only the governments of Turkey, Croatia and other states — allies of Nazi Germany during the WW II, in addition to the above two court proceedings involving the governments of ex-Yugoslavia and Rwanda), have tried (and are trying) to avoid punitive measures, such as criminal penalties and financial compensation for the victims. Many current legal experts on the 1948 Convention against Genocide, however, feel that if genocide is not characterized by a stringent criterion of purpose, it will be difficult to distinguish it from other forms of state support for mass killing. All of them are in agreement on this point. U.N.'s Commission on International Law once stated that the crime of genocide can be committed even if the intended goal of the extermination of the group is not carried out. Instead, any of the actions specified in Art. II of the Convention that are committed with the goal of eradicating the group of people who are protected in whole or in part will suffice [44].

S. Dmitrievskii is of the mind where «some people may find the following statements to be incongruous: First, not all instances of mass killing constitute genocide, and second, not all acts of even negligible significance in terms of the number of victims and local violence rule out the presence of genocide» [45]. In the opinion of the same writer, «it's true that genocide and mass murder are two quite different things; the conduct of mass murder is only one of several possible signs of genocide, but it's by far the most salient» [45]. Meanwhile, «It is certainly true that genocide and mass murder are not the same thing at all, and this is correct». E.D. Pankratova is of the same opinion, and he comes to the same conclusion, which is that «in defining the corpus delicti of the crime of genocide, the element of mass character cannot be acknowledged as decisive» [4; 54], given that the commission of any of the crimes listed in the 1948 Convention constitutes the completion of such a corpus delicti, if the perpetrator has the desire to annihilate a racial group, N.I. Kostenko holds a distinct viewpoint, which diverges from that of the authors cited above. He asserts that «similar to how several perpetrators aren't required, multiple victims aren't necessitated» [46; 134].

It is necessary to pay attention to the following circumstance in the context of the issue that is being considered because it is occurring more frequently: states and the international community as a whole must deal with the proliferation of political, social, economic, and other forms «in some way or another involved in what can be qualified as genocide» of power throughout the world. [43; 166] (we remind you that they can be ethnic cleansing, humanitarian tragedies, etc.). According to Yu.V. Chernovitskaia's PhD thesis [47; 34], «the tendency to change direct genocide into indirect genocide is an increasingly hazardous element of the current stage of the evolution of human civilization». M. Hefter has a view where «one person is never the target of a genocide; rather, it is perpetrated against an entire race» [48; 274]. The writers of the Russian encyclopedic work named «Globalistics» that should be brought to light «the scale of genocide is increasing» [49; 163] more lately. Based on these facts, it is possible to draw the conclusion that a hazardous circum-

stance is developing, one in which «genocide can evolve into a war of all against all, turn into self-genocide of mankind» [43; 166]. The former President of frmenia S. Sargsyan specifically noted while speaking at the global socio-political forum «Against the crime of genocide», which was held on April 22, 2015 in Yerevan, one of the reasons for the repetition of genocides and crimes against humanity and the international community's failure to show consistency, unity, and determination to recognize and condemn genocides that had been committed, as well as to exclude the emergence of an environment conducive to the commission. The 103rd plenary session of the 69th UN session of the main deliberative body, the resolution was accepted on the basis of consensus, and it was endorsed by 80 different governments that are United Nations members. Because the General Assembly passed the Genocide Convention on that very day in 1948 as the day on which the resolution will be approved, that day was chosen as the date on which the resolution will be passed. It was made available for signatures beginning on December 11 of that year.

The idea that the United Nations' regulations on Genocide Convention from 1948 have also become customary legal standards has finally taken form at this point and have finally taken shape. According to its Advisory Opinion, the International Court of Justice agreed, that «the Convention's fundamental principles are those that all developed nations agree must be followed, notwithstanding the absence of any formal legal obligation to do so» [51; 33]. Conventional concepts of international law now have the status of customary international law which is given by the Secretary-General of the United Nations, which was then confirmed by the Security Council [52] and the judgments of the International Criminal Tribunals for the Former Yugoslavia [53] and Rwanda [33]. Permissive rules of jus cogens have now been included to this list [51; 23]. International treaties cannot overrule peremptory standards of jus cogens or, even more so, by national law [54; 98]. This means that «the most exclusive and perhaps the Convention’s strongest side is the non-admission of derogations from its provisions and the need of governments to abide by international obligations enshrined in it» (the non-admission of derogations as a result of the Convention's provisions and the nations' responsibility to adhere that enshrined in it) [30]. An authority on the Convention named F. Shonfeld described it as a «cult, basic legal accord» [55] that «beyond the scope of partisan blather» [55]. In the absence of it, the same International Criminal Tribunals would not exist for the former Yugoslavia and Rwanda, whereas the International Criminal Court could not operate either [56]. This is according to the objective evaluation that was conducted by S. Power. As was emphasized earlier, «not doing such acts is a duty to the international community» [57; 188]. This is because «obligations not to commit such actions are also in the nature of a special category of responsibilities to the global community as one» According to the writings of a few authorities on the subject, «a breach of a commitment by one state can be held accountable by the other states erga omnes» [57; 188].

In the meantime, the two court cases that were cited earlier as examples not only make it possible to clarify the position on some important conceptual aspects related to genocide according to its broadest interpretation, but they also clearly indicate that without the 1948 Genocide Convention, «improbable that the International Criminal Tribunals for the Former Yugoslavia and Rwanda would have ever come into existence» [58; 20]. This is because the cases make it possible to clarify the position on some important conceptual aspects related to the common notion of the genocide crime. Furthermore, the choices taken by the courts in these two instances make it feasible to clarify the position on a number of significant conceptual factors relating to the overall meaning of the term. One of them is that the individual cases of genocide that have been reviewed in accordance with the international criminal courts that have been discussed and played a key influence in the creation and understanding of the primary components that make up this crime.

Equally important in determining the international legal nature of genocide as a criminal and punishable act is, in addition, the fact of that «in addition to being the primary treaty source of international criminal law, the Geneva Conventions of 1948 should be regarded as the primary treaty source of international humanitarian law in its protection of human rights and freedoms» [8; 20]. This is because the Convention, along with all other existing universal international legal instruments in the field of protection. In a general sense, the genocide crime, the fight or opposition to which is regulated by the Convention, is violating the United Nations Charter, the International Law Declaration on Principles, the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and punishment, the Convention on the Rights of the Child, the Convention on the Supplementary Convention on the Elimination of All Form

The Convention on the Prevention and Punishment of the Crime of Genocide, which took place in 1948, is the primary source for identifying the elements of this crime.

On July 1, 1949, Ethiopia was the first state to officially join the United Nations by submitting an instrument of elevation to the Secretary-General of UN. Convention officially went into effect on January 12, 2015, making this day the 65th anniversary of the event. At this time, 150 states are in bound by the treaty. Dominica is the most recent nation to become a signatory to the Convention. However, even governments that have not yet given their final approval are required to apply and follow the law in its entirety. We'd like to remind you that the International Court of Justice declared this agreement to be customary international law in an Advisory Opinion on May 28, 1951, and all states are bound by that opinion. On May 3, 1993, UN Secretary-General Ban Ki-moon issued a report stating that the International Criminal Tribunal for the former Yugoslavia is part of customary international law (S/25704). As a result of additional review, the Security Council adopted resolution 827 on May 25, 1993, endorsing this report. Separate rulings from the International Court of Justice (like aforementioned scenario: Serbia and Montenegro vs. Bosnia and Herzegovina) and special tribunals have both affirmed that the 1948 Convention's rules have become common law. That is one of ways where the 1948 Convention has been ratified as customary law. In the second scenario, we are also able to discuss the verdict that the International Criminal Tribunal for the Former Yugoslavia shown in the case known as «Prosecutor v. Furundzjia» (1998).

Conclusion

As a result of the research that was conducted, it is possible to conclude that the entire process that was planned for developing, discussing, adopting, and introducing into legal force the concept of «genocide» under the special UN Convention of 1948 has been completed. As a result of the analysis that was carried out, one may draw this conclusion. Scientists and other members of the international community have come to the conclusion that genocide is a serious, cruel crime that is criminal under international law, regardless of whether a country belongs to the United Nations or not.

Furthermore, it emerged that Article II of the Convention on the Prevention of the Crime of Genocide, as well as the other aspects of that instrument, have not yet been fully resolved. This circumstance lends credence to the notion that, despite a sufficient degree of scientific development of legal, as well as political and historical aspects, the term in question still requires a comprehensive and interdisciplinary understanding. This is notably relevant when considering current kinds of criminal behavior that operate outside the Convention.

It is of the utmost significance that the «genocide» term by itself was finally formed as a legal category precisely in the 1948 Convention. This reaffirms the objective necessity to combat it and apply appropriate criminal responsibility measures in the framework of the construction and continuing development of a universal jurisdictional system, which is one of the most crucial components of the 1948 Convention.

However, one of most key take away from this is that the statutes and decisions of the Nuremberg and Tokyo Tribunals laid the legal groundwork for the future creation and adoption of a unique international treaty that would directly allow for the prosecution and punishment of those responsible for genocide. This is the main conclusion that can be drawn from this. Taking into account the events of the Second World War, we may conclude that a substantial step was taken toward the prevention and full regulatory exposure of the nature of genocide as a punishable crime.

In regardless of the reality that in the decisions of the Nuremberg International Military Tribunal, it was not possible to identify a definition of «genocide» and to provide a correlation, or rather to determine the general and the particular, between war crimes and crimes against humanity, it is possible to differentiate between these socially dangerous acts in the modern world. This possibility is not only more real in view of the international and special tribunals (courts), but it also becomes more real in light of the international crime.

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А.К. Адибаева

«Геноцид» түсінігінің халықаралық-құқықтық ғылым мен тәжірибеде қалыптасуы мен дамуы туралы мәселеге қатысты

Мақаланың негізгі мақсаты — БҰҰ-ның 1948 жылғы және одан кейінгі әмбебап Конвенциясының қолданылуы контексінде тәуелсіз құқықтық категория ретіндегі «геноцид» ұғымының теориялық және практикалық аспектілерін талдау. Автор сонымен қатар мамандандырылған халықаралық сот мекемелерінің шешімдерін, ғалымдардың доктриналық әзірлемелерін қолдана отырып және олармен бірге жалпы ғылыми және арнайы зерттеу әдістерін пайдаланып, осы халықаралық әлеуметтік қауіпті әрекеттің анықтамасын тарихи және заманауи түсінуге қатысты тиісті қорытындыларды тұжырымдайды. Геноцид, оны жасаудың жаңа нысандары мен тәсілдерін басшылыққа ала отырып, адамға, белгілі бір демографиялық қауымдастыққа және адамзатқа қана қарсы емес, сондай-ақ халықаралық құқыққа қарсы қылмыс болып табылатыны да дәлелденген. Бұл тұрғыда негізгі қорытындының мәні құқықтық қолдану тәжірибесінің қолданыстағы нормалардан озық болып қалыптасқан үрдісін ескере отырып, геноцид анықтамасы мен онымен тығыз байланысты Конвенция ережелерінің шындық болмыстарға сәйкес объективті талқыланылуы қажеттілігінде болып отыр. Қорытындылай келгенде, геноцид термин ретінде де, қылмыс ретінде де ары қарай кешенді ғылыми зерттеуді, оның ішінде қазақстандық құқықтың жекелеген салаларындағы білімдерді тұжырымдау және жүйелендіру шеңберінде талап ететініне назар аударылған.

Кілт сөздер: геноцид, БҰҰ Конвенциясы, термин, анықтама, түсінік, қылмыс, тарихи фактілер, Нюрнберг трибуналы, заманауи түсініктеме, халықаралық трибуналдардың шешімдері.

А.К. Адибаева

К вопросу о становлении и развитии понятия «геноцид» в международно-правовой науке и практике

Базовой целью настоящей статьи является анализ теоретических и практических аспектов понятия «геноцид» как самостоятельной юридической категории в контексте действия универсальной Конвенции ООН 1948 г. и не только. Автор, используя также решения специализированных международных судебных учреждений, доктринальные разработки ученых и применяя вкупе с ними общенаучные и специальные методы исследования, формулирует соответствующие выводы относительно исторического и современного понимания дефиниции этого международного общественно опасного деяния. Обосновано, что геноцид, с учетом новых форм и способов его совершения, представляет собой не только преступление против человека, определенной демографической общности и человечества, но и против международного права. Основной вывод при этом заключается в том, что, ввиду опережения правоприменительной практикой действующих норм нормативное содержание определения геноцида и тесно связанных с ним положений Конвенции, должны объективно толковаться в соответствии с существующими реалиями. В заключение как итог обращено внимание и на то, что геноцид и как термин, и как преступление требует дальнейшей комплексной научной разработанности, в том числе в рамках выработки и систематизации знаний в отдельных отраслях казахстанского права.

Ключевые слова: геноцид, Конвенция ООН, термин, определение, понятие, преступление, исторические факты, Нюрнбергский трибунал, современное понимание, решения международных трибуналов.

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