PROBLEMS OF INCREASING STATE RESPONSIBILITY FOR GENOCIDE AND REDUCING THE RISK OF GENOCIDE IN TIMES OF WAR AND CRISIS OF POLITICAL POWER

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Genocide is a crime encompassing five distinct acts listed in Article II of the 1948 Convention, committed with specific "intent". Specific intent may be inferred from circumstantial evidence, including the actions and words of the perpetrator, or from the conduct of others. In the absence of a confession by the accused, this intent may be inferred from the context of his or her commission of other acts directed against the same group. Other factors in establishing this intent may include: the scale of the atrocities; their general nature; their commission in a particular region or country; the fact of deliberate and systematic persecution of the victims because of their membership in a particular group; the existence of a political doctrine that led to the acts in question; repetition of destructive and discriminatory acts; the commission of acts that violate the very basis of the group's existence, etc. However, even if the act itself appears criminal, if it was purely accidental or committed without intent to cause harm or knowledge of the circumstances, the accused cannot be convicted of genocide. In other words, the judicial body has no right to find a person guilty of committing a given crime unless he has a clearly expressed intent.

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One of the important aspects of the issue of international legal responsibility for genocide is the question of whether the 1948 Genocide Convention directly obliges states themselves not to commit genocide? [3]. One cannot but agree with the assertion that genocide as such is particularly horrific because, like sexual violence within the family, it represents an abuse of paternal authority – it represents a violation of the state's fundamental duty to protect its citizens. Today, no one can deny the existence of a norm in customary international law prohibiting states from committing genocide. Today, such a norm not only exists, but is also jus cogens.

Moreover, its violation entails more serious consequences than those that arise for committing other illegal acts. One could argue, as was once attempted, that the 1948 Genocide Convention does not impose an obligation on the contracting states themselves not to commit genocide, but rather limits itself to establishing obligations for the contracting states in criminal matters. In other words, one could proceed from the position that the Genocide Convention is simply a treaty establishing judicial cooperation between the contracting states to ensure the prevention and punishment of the crime of genocide through the adoption of appropriate national legislation, the exercise of criminal jurisdiction, and the extradition of persons allegedly responsible for genocide.

However, in accordance with the position of the International Court of Justice and established practice, the 1948 Genocide Convention not only provides the basis for holding individuals criminally accountable for genocide but can also entail the international responsibility of the state itself. It is well known that the 1948 Genocide Convention was drafted after the Nuremberg Tribunal to give substance to the

famous dictum of that International Military Tribunal, according to which crimes against international law are committed by human beings, not by abstract entities, and that only by punishing individuals who commit such crimes can the provisions of international law be ensured. It was at Nuremberg that, for the first time in history, high-ranking state officials who committed atrocities were brought to trial and held personally accountable, regardless of whether they were acting in an official capacity. It was only natural that the drafters of the Genocide Convention upheld the legacy of Nuremberg and conceived a mechanism that would continue to ensure criminal liability for genocide against anyone, including state officials. To suppress genocide at the international level, they envisioned a criminal court with jurisdiction over this crime. Regarding criminal prosecution at the national level, they were inspired by previous conventions on criminal matters, such as those on counterfeiting, slavery, and trafficking in women and children. Therefore, they obligated the contracting parties to criminalize genocide, as defined by the Convention itself, within their legal systems, punish it if committed on their territory, and extradite such persons to another contracting state.

The key and significant difference between the 1948 Genocide Convention and previous (and most subsequent) international criminal conventions is that it seeks to ensure punishment for criminal acts historically committed by officials acting in accordance with state policy (or, at least, by private individuals who have taken advantage of the state apparatus and its official policies). It is therefore not surprising that the Convention itself, following the jurisprudence of the Nuremberg Tribunal, contains a rule establishing the irrelevance of acts of genocide committed by persons acting in their capacity as public officials. This was a significant achievement, since before World War II, states had only concluded criminal conventions to combat transnational private crimes, such as counterfeiting or trafficking in women and children - crimes committed by private individuals that have a transnational dimension and, as such, threaten the collective interests of states.

Under the 1948 Genocide Convention, states are obligated to prevent genocide, whether committed by state officials or others. To argue, as the Court did, that the 1948 Genocide Convention also obligates states themselves not to commit genocide through their organs contradicts the historical legacy of Nuremberg, which inspired its drafters. The purpose of the 1948 Genocide Convention was to uphold, through the threat and imposition of national criminal sanctions, the fundamental values of international law, regardless of whether they were violated by persons acting on behalf of the state. In accordance with the legal tradition established by the Nuremberg Tribunal ("crimes are committed by human beings, not by abstract entities"), states cannot be considered "criminal". However, this is inconsistent with the historical and theoretical foundations of the 1948 Genocide Convention, as this Convention obliges states to prevent and punish genocide and thus constitutes a conventional basis for holding states accountable for genocide. At the same time, it is difficult, if not impossible, to establish the international responsibility of a state for genocide using a legal definition, such as that set out in Article II of the Genocide Convention, which was developed with respect to the criminal responsibility of individuals. The difficulties that arise in determining whether a state has the dolus specialis of genocide, or the debates regarding whether the crime of genocide can only be committed when there is a state policy or campaign of genocide, are symbolic. Nevertheless, it cannot be argued that because the 1948 Genocide Convention is an international criminal law treaty, it has nothing to do with the international responsibility of states for genocide, or that such a form of international state responsibility does not exist at all

The existence of individual criminal responsibility for genocide does not provide grounds for denying the international responsibility of a State for genocide altogether. On the contrary, the concept of individual criminal responsibility for genocide under international law has gradually developed to complement the concept of international State responsibility for genocide. However, even in the absence

of State responsibility for the relevant wrongful act, individuals must be held criminally responsible for genocide.

The obligation of States not to commit genocide can be derived from the obligation to prevent genocide, which is expressly provided for in Article I of the 1948 Genocide Convention. However, it is readily apparent that these two obligations are of different "species". The latter (the obligation to prevent) is clearly an obligation of conduct, "in the sense that a State cannot be obliged, whatever the circumstances, to succeed in preventing the commission of genocide". This obligation requires States to use the means reasonably available to them to prevent genocide to the extent possible. Furthermore, a State violates its obligation of prevention if it fails to act after the commission of a crime has begun or as soon as the State knew or should have known of a serious risk that genocide would be committed. However, if genocide is not committed, the State cannot be held responsible for failing to prevent something that did not actually occur. On the contrary, the first obligation (not to commit genocide) is clearly an obligation of result. This obligation is violated when a public official or other person whose actions are attributable to the State commits an act of genocide or any other act listed in Article III of the 1948 Genocide Convention. This makes no sense in determining whether the State fulfilled its obligation of prevention with respect to those same acts, since logic dictates that the State failed to fulfill its obligation to prevent genocide in which it actively participated.

For the same reason, it does not seem obvious or even logical to argue that the obligation to prevent genocide, being an obligation of conduct, "necessarily implies" an obligation not to commit it. Two distinct sets of obligations are therefore required, each with its own specific content. The police's duty to prevent crimes does not include or imply an obligation not to commit the crimes they are supposed to prevent. Another class of obligations has this scope and content and imposes corresponding prohibitions on individuals, including police officers. It is obviously logical to argue that when rules are imposed on certain actors to prevent the commission of genocide.

The obligation to prevent genocide, set out in Article I of the 1948 Genocide Convention, imposes on contracting states a duty to exercise special care and diligence to prevent the commission of the crime of genocide by any person. In that Convention, the duty to prevent explicitly obliges states parties to do everything possible whenever genocide is committed by anyone, i.e., Regardless of whether the individual acts as a private individual or a public official.

In general, the duty of a modern state to prevent genocide is a moral imperative for its activities and stems from considerations of humanity. The moral obligation underlying this duty can be traced to religious ideas and ancient legal codes and is closely linked to modern political doctrines, such as the duty to protect victims. In international law, the legal basis for preventing genocide is supported by customary international law applicable to the prevention of crimes against humanity and by Article I of the Convention on the Prevention and Punishment of the Crime of Genocide, as states undertake to "prevent and punish" the crime of genocide. The terms of the obligation to prevent genocide in the 1948 Convention were later substantiated by the International Court of Justice.

The obligation to prevent genocide was most clearly expressed in the 2007 International Court of Justice decision in Bosnia and Herzegovina v. Serbia and Montenegro. In this case, the International Court held that genocide is of universal concern because genocide anywhere constitutes a threat to the security of all and must never be tolerated. The obligation to prevent genocide was recognized as having normative status. The Court specified that states are obliged "to use all means reasonably available to them to prevent genocide as far as possible" (paragraph 430) [5].

It is important to note that preventive actions can only be those permitted by international law. Therefore, the obligation to prevent genocide or crimes against humanity is not and cannot be used as an independent basis for the use of force.

The obligation to prevent genocide and crimes against humanity concerns the duty to make well-founded decisions and publicly explain what actions will be taken in situations of

atrocity crimes. In a sense, such prevention is closely intertwined with the ability to influence the perpetrators of genocide to stop the actual commission of genocide and can be interpreted as the "ability to prevent" the commission of crimes against humanity and genocide.

Many comparative case studies, and especially empirical research, find that non-democratic regimes are correlated with a higher risk of genocide. Moreover, one of B.Harff's six risk factors is autocracy [4, p. 57].

But such findings are a subject of debate among scholars. For example, many cases of genocide and mass killings used in empirical studies focus on the post -World War II period. There is substantial evidence that some democratic states committed or tolerated mass killings in the past, for example, against indigenous peoples. Such cases that occurred in earlier centuries or before World War II would not be part of the sample of modern empirical genocide studies. Moreover, new empirical research is beginning to recognize that it may not be the regime type per se, but rather the political regime transition, that is most important for understanding the risk of genocide.

For example, Charles Anderton, based on his analysis of data on nearly 200 countries for the period 1956–2006, points to a link between regime type and the risk of genocide [1]. His research findings indicate that, controlling for other factors, authoritarian regimes have a higher risk of genocide than democratic countries, and so-called "intermediate" political regimes have the highest risk. A frequently cited goal in international relations is to help states transition from autocracy to democracy. However, such transformations first undergo a transitional phase, during which the risk of genocide increases before ultimately declining in the democratic zone. Consequently, pushing states from autocracy to democracy may initially increase the risk of genocide.

Another important contribution of researchers to the study of genocide is the consideration of the goals of the perpetrators of genocide and the idea that their choice to commit genocide can be "rational". The word "rational" does not mean "reasonable". In the social sciences, a rational decision is one in which a decision maker weighs the expected costs and benefits of various possible actions and chooses the action that achieves the greatest possible net benefit. A rational decision implies that the person has a motive in making their choice and is trying to achieve some goal. The choice may be horrific (e.g., murder, genocide), but if the choice is made deliberately to achieve a goal, it is rational in this sense. One of the primary motives for genocide and mass killing, emphasized by scholars, is the strategic use of campaigns to kill civilians to increase or maintain political power and/or territorial control when faced with threats from domestic enemies. For example, a political elite in a weakened regime may believe that killing civilians will weaken a rebel group dependent on civilian support, compel civilians to join the state to protect their lives, and/or compel other groups within the state to support the political elite more strongly (e.g., by receiving compensation in the form of looted property from those designated as outgroups).

Finally, it is important to note the connection between war and mass atrocities. Virtually all genocides and mass killings occur in the context of war, but the outbreak of war does not necessarily presuppose the commission of genocide against groups protected by the 1948 Convention during its active phase. There have been many wars in which mass atrocities against civilians did not occur.

Moreover, almost all empirical studies of genocide risk that include war as a risk assessment variable find a positive correlation between war and the risk of genocide during wartime. This is because war typically challenges the political power of the ruling elite. In many wars, especially civil wars, if the political elite loses, it loses its political power and becomes subject to criminal repression. Consequently, war can pose an existential threat to the political elite. In extreme cases of existential threat, some political leaders will do almost anything to maintain their power, including committing atrocities against civilians.

It should be noted that the state's own "policy of oppression" against groups protected by the 1948 Genocide Convention prior to the onset of an "active phase of ethnic (national) conflict" has never been considered as an independent part of genocide studies. However,

the content of these "policy of oppression" is central to the study of genocide prevention. Actions against ethnic and national groups prior to the onset of conflict are recognized as signposts on the path to the physical destruction of these groups. Identifying these actions against specific groups that fall outside the scope of human rights norms and then preventing their expansion by the government are vital parts of their prevention [2, p. 83].

According to Professor Martin Shaw, the alternative to war today lies in Western governments and global institutions acting consistently on the premise that political problems, including those of armed conflict, should be resolved, to the extent possible, without resorting to military means. Where military means are used to protect civilians from violence, they should be limited and restricted to what is necessary for that purpose [9, p. 85].

Western governments and the UN must pursue policies based on these norms. This, of course, requires much greater investment in the development of global institutions, mechanisms and institutions for conflict resolution, and the creation of a global institutional framework.

Based on an analysis of genocidal acts in the 20th century, Martin Shaw identifies the following six elements that contribute to the emergence of conditions conducive to genocide:

1) Changing international relations stimulate nationalist policies among the ruling elite. The weakening of old methods of governance fuels nationalism, which in turn generates conflicts in which "other" national groups become "enemies" and are subject to expulsion or repression. The general nature of this process means that even liberal democratic and communist leaders, whose policies were not explicitly nationalist, thought in terms of the equation of nation and territory. Great powers supported, intervened, and attempted to manage these conflicts through international institutions and law.

2) International armed conflict plays a central role in the rise to power of radical nationalists, for whom forced expulsion is an acceptable means of solving the "problems" of the population. International war and conflict often contribute to the radicalization of domestic politics, bringing more radical nationalists to power.

3) International war radicalizes nationalist population policies, providing opportunities for deportation and mass murder. Throughout the period, it was international war that primarily facilitated "solutions" that were previously politically impossible. War provides the opportunity for territorial expansion, fuels movements toward population expulsion, and facilitates the implementation of increasingly lethal policies.

4) Genocidal expulsions were conditioned by international armed conflict in that they were responses to enemy military campaigns that created real and imagined security problems in which minorities were seen as complicit; also in that they were sometimes constrained by these campaigns.

5) Genocidal expulsions can be seen in part as international "countergenocide", i.e., a response by a "military victor" to enemy genocide.

6) The development of international law and politics after wars, although aimed at establishing peaceful relations between nations and states, sometimes stimulates or at least allows genocidal conflict [9, p. 85].

In this regard, we believe it is necessary to focus on developing specific recommendations that would deprive or limit, under threat of severe punishment in the future, the resort to such a policy of maintaining one's power and would ensure the conditions for avoiding a humanitarian catastrophe during the transaction of power in the relevant state.

According to the theory of responsibility, a state's international responsibility arises when it commits acts such as renunciation of international treaties, violation of the sovereignty of another state's territory, damage to the property or territory of another state, violence with the use of arms against another state, harm to diplomatic representatives of other countries, etc. - that is, when certain conduct (actions or omissions) are attributed to it as such. With regard to human rights violations, state responsibility is essentially realized through the legal prosecution of perpetrators and the provision of compensation or reparation to victims of human rights violations for the actions of those

who committed such violations, regardless of their official position or status [7, pp. 33-34].

In this regard, it is also very important to take measures to restore violated human rights on the part of business, which can be done by holding enterprises (corporations) and businessmen civilly and criminally liable, as well as by taking special measures against them (for example, inclusion in sanctions lists) [6, p. 809].

One also cannot but agree with the position of the authors, who assert that the responsibility of persons who committed genocide does not exclude the possibility of imputing the corresponding acts to the state and the subsequent international legal responsibility of such a state [8, p. 952].

The principle of State responsibility and the principle of individual criminal responsibility are now recognized principles in international law.

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