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## **INDIVIDUAL AND STATE RESPONSIBILITY FOR THE ACT OF GENOCIDE**

Not every act of mass killing constitutes genocide.

Genocide is the notion created by the theory of law. It was first used by Rafał Lemkin, a lawyer of a Polish-Jewish origin, who emigrated to the US at the beginning of the World War II.<sup>1</sup> This theoretical notion became the term of law in the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>2</sup>

To be qualified as genocide a crime should be perpetrated with the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

In various internal regulations, such as the Polish one, mass killing is treated as genocide also if a group of victims was determined by the political criteria or because its members represent the special worldview (compare art. 118 of the Polish Criminal Code of 1997).

These additional criteria, existing in the Polish criminal legislature, have their historical source in the position of the Soviet Union during preparatory works to the convention on genocide. The representatives of the Soviet Union, already during work on the convention, suggested adoption of a criterion of a political character of a group, justifying treatment of mass killing of its members as genocide. Supposedly, the reason was killing by Germans during the war, on the Soviet territory, these members of the Red Army who were identified as political officers (people's commissioners<sup>3</sup>). They were shot on the spot just like the soldiers qualified as Jews, and not taken into captivity like the rest. This, obviously, was a political criterion.

As far as a criterion of a specific worldview existing in a Polish legislature is concerned, it is difficult to relate to the intention of the legislator. In a Polish judicature this criterion has never been used. Supposedly, it could be applied to the cases of mass killing of the members of a group defined by professing no religion.

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<sup>1</sup>R. Lemkin, *Axis Rule in Occupied Europe*, 1944.

<sup>2</sup> Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948, entry into force 12 January 1951.

<sup>3</sup> S. Datner, *Zbrodnie Wehrmachtu na jeńcach wojennych w II wojnie światowej*, Warszawa 1961, s. 100 – 102.

According to definition used in the Convention a crime of genocide may be committed by the act of:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

The act may have a form of:

- Genocide (itself);
- Conspiracy to commit genocide;
- Direct and public incitement to commit genocide;
- Attempt to commit genocide;
- Complicity in genocide.

The term ‘genocide’ occurred in an indictment<sup>1</sup> but it did not occur in the judgment of the International Military Tribunal in the Nuremberg Trial.<sup>2</sup> The Constitution of the International Military Tribunal in its Part II (Jurisdiction and General Principles) defines crimes coming within the jurisdiction of the Tribunal, for which there shall be **individual responsibility**. These are the following crimes:

1. crimes against peace;
2. war crimes;
3. crimes against humanity.

The definition of the third group was, namely: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions of political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The fourth crime was conspiracy. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. Even the participation in conspiracy constituted only the individual responsibility of persons.

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<sup>1</sup> Indictment. Count Three – war crimes. VIII (A) “They conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.”

<sup>2</sup> The trial of the major Nazi Germany war criminals held between 20 November 1945 and 1 October 1946

The London Agreement (August 8<sup>th</sup> 1945) in its article 1 stated that the war criminals whose offenses have no particular geographical location may be accused individually or in their capacity as members of the organizations or groups or in both capacities.

The indictment was brought against persons and groups of persons (institutions) such as follows:

- Reich Cabinet (die Reichsregierung)<sup>1</sup>;
- Leadership Corps of the Nazi Party (das Korps der Politischen Leiter der Nationalsozialistischen Deutschen Arbeiterpartei)<sup>2</sup>;
- SS<sup>3</sup> and SD<sup>4</sup>;
- Gestapo<sup>5</sup>;
- SA<sup>6</sup>;
- General Staff and High Command of the German Armed Forces<sup>7</sup>.

The indictment of the defined groups exercising power in Germany during the war period should be considered as a first step towards state responsibility (non-individual one) although the aim of the applied construction was to enable to subsequently bring the persons belonging to the groups considered as criminal, due to their affiliation to the criminal group, to a trial before a criminal court.

The liability rules established at Nuremberg in relation to the crimes against humanity, from among which a crime of genocide was distinguished, are applied until now, not only in the internal law of the states but also by the contemporarily functioning international criminal courts, namely:

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<sup>1</sup> Members of ordinary cabinet after 30 January 1933, members of the Council of Ministers for the Defense of the Reich, Members of the Secret Cabinet Council.

<sup>2</sup> Political leaders of any grade or rank e.g. the leaders of the various functional offices of the Party as well as the territorial leaders.

<sup>3</sup> The entire corps of the SS and all offices, departments, services, agencies, formations, organizations and groups of which it was at any time comprised or which were at any time integrated in it.

<sup>4</sup> Sicherheitsdienst des Reichsfuehrers-SS

<sup>5</sup> Geheime Staatspolizei – any headquarters, departments etc existing after 30 January 1933.

<sup>6</sup> Die Sturmabteilungen der NSDAP under the immediate jurisdiction of the Fuehrer.

<sup>7</sup> The individuals who between February 1938 and May 1945 were the highest commanders of the Wehrmacht, the Army, the Navy and the Air Forces of Germany.

International Criminal Court<sup>1</sup>, International Criminal Tribunal for the Former Yugoslavia<sup>2</sup>, International Criminal Tribunal for Rwanda<sup>3</sup>, Extraordinary Chambers in the Court of Cambodia<sup>4</sup>.

In the jurisprudence of these courts there are many examples of the interpretation of the terms connected with genocide. The ICTY formulated a relevant thesis<sup>5</sup> that a group may be defined negatively by defining victims as persons not belonging to the group to which the perpetrators of the felony claim their affiliation, justified by the possession of the specific national, ethnical, racial or religious features (e.g. Bosnian Serb). A group defined by exclusion (everyone who is not a Bosnian Serb) is also protected by the Convention.

Genocide (as a crime committed by an individual) is now commonly recognized as international crime (*delictum iuris gentium*), which because of its international importance must be punished and punishable through international cooperation (universal repression principle). The defendant should be liable not only before the court of the country where the crime was committed but also before the court of the country where he or she is apprehended, in case of escape.

The definition of genocide in the Rome Statute and in the statutes of other contemporary international criminal courts is exactly the same as the definition contained in the Genocide Convention.

The responsibility of the States in which the policy of genocide took place is independent from the responsibility of individuals.

The state responsibility for grave breaches of the international law may be enforced on the basis of the UN Charter.

First possible measures taken by the international community towards a state on whose territory the acts of mass murder are committed is to bring a case before the **International Court of Justice** which may deliver an advisory opinion in regard of the occurrence of the politics of genocide in an accused country. The Security Council of the United Nations Organization may ask for such opinion or a state where the case

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<sup>1</sup> Established by multilateral treaty (Rome Statute), entered into force 1 July 2002

<sup>2</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), established 1993 (Security Council Resolution 827).

<sup>3</sup> ICTR established 1994 (Security Council Resolution 955).

<sup>4</sup> ECCC established by the agreement between the Cambodian government and the United Nations in 2003.

<sup>5</sup> A judgement delivered in the case regarding Goran Jelusic.

happened may submit the petition to International Court of Justice with such an accusation.<sup>1</sup>

A legal basis for such type of action is the Charter of the United Nations which in its art. 2 (6) allows taking actions also towards states which are not members of the UN.

The International Court of Justice, after declaring a violation of the international law, may impose on a state an obligation to pay damages (art. 36 Statute of the International Court of Justice).

A second instrument is a possibility to take up a humanitarian intervention against the will of a state committing on its territory acts of genocide (or other grave breaches of international law). Art. 41 and 42 of the UN Charter constitute a legal basis to take up a **humanitarian intervention**.

The third possible measure is called **Responsibility to Protect**. This has three pillars approach:

Pillar one stresses that the State itself has the primary responsibility to protect the population from genocide, war crimes, ethnic cleansing and crimes against humanity; pillar two addresses the commitment of the international community to provide assistance to State to protect their population from genocide, war crimes etc; pillar three focuses on the responsibility of international community to take timely and decisive action to prevent and halt genocide, ethnic cleansing, war crimes and the crimes against humanity when a State is manifestly failing to protect its population.

A state which committed acts of genocide or other international crimes may voluntarily or under constraint (e.g. in an act ending an armed conflict) make an **obligation to pay damages** to the victims (descendants of the victims) or to the state on whose territory such felonies took place.<sup>2</sup>

Finally, it is worth mentioning that there has been only one single case in history when a state had to bear real consequences for genocide organized

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<sup>1</sup> E.g. In 1999 the Republic of Croatia instituted the proceeding before the International Court of Justice against the Federal Republic of Yugoslavia for violation of Genocide Convention in Knin region, Slavonia and Dalmatia. In February 2007 International Court of Justice rendered the judgment in case Bosnia and Herzegovina v. Serbia and Montenegro. The court found that Serbia violated the obligation under the Genocide convention to prevent genocide in Srebrenica in July 1995. The verdict was that “Serbia shall immediately take effective steps to ensure full compliance with its obligations under the Genocide Convention to punish acts of genocide (...) and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the Former Yugoslavia and to co-operate fully with the Tribunal.”

<sup>2</sup> E.g. In 1952 in Luxembourg Israel concluded a bilateral agreement with the Federal Republic of Germany regarding payment of the individual damages to the victims of the racial repressions or to their descendants.

on a state level. Namely, the end of the World War II terminated the existence of the German statehood by means of putting the German territory under the authority of the victorious powers and the Allied Control Council of Germany. It was a real punishment for the international crimes, including crimes of genocide, applied by means of force.

Shall we be satisfied with such state of affairs? It seems that the international community achieved success in the area of enforcing the individual responsibility for the crime of genocide. However, the possibility of enforcing the state responsibility is still extremely difficult.

Such cases as a slaughter of the Armenians in Turkey with over a million of victims (1915 – 1917), hunger in Ukraine (Holodomor) with a 14 million estimated number of victims (1932-1933), a case of a slaughter of over 10 thousand Polish officers in Katyń (1940 ), although admitted by Russia, still haven't brought any punishment of the perpetrators.

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## **TOMN IN CRISIS**

### **THE SPIRIT OF TOWN**

Bytom is one of the oldest towns in Poland . It received city rights in the 13<sup>th</sup> century, so it is over 750 years old. Its architecture is beautiful, and the culture is really rich. Bytom is situated in Silesia, the largest mining region in Poland. Its coal mining cultural heritage is diverse, and its traditions have lasted for over a few generations. In 1945 the city was transferred to Poland after the Potsdam Conference. At that time its German population was largely deported and replaced with inhabitants of eastern provinces annexed by the Soviets. They were mostly inhabitants of Lvov, a city with a well-integrated community, famous for its special atmosphere of kindness, cheerfulness, an open attitude to others, and also great traditions and achievements in culture and science. Thus Bytom witnessed the encounter of two communities – Silesians, who felt a very strong connection to this land, who are also a community of kind people and ready to help those in need (towns with mining industry know the meaning of hard work and crisis situations related to mining, they are ready to support one another), and the inhabitants of Lvov, who, even though did not have any mining traditions, possessed a similar mentality and ability to live in a local community; they also appreciated its value. In this way, despite the difficult historical circumstances, the both groups