

**Doc. Dr. S Admir Karović, Bosnia and Herzegovina**

**Esmir Kasi - Student of Doctoral Studies of Public Law, Kosovo**

## **INDIVIDUAL CRIMINAL LIABILITY AND RESPONSIBILITY OF THE COUNTRY FOR THE GENOCIDE**

### **SUMMARY:**

In this article, the authors emphasized the complexity of establishing individual criminal responsibility and responsibility of the state for the crime of genocide, which is not a criminal nature, taking into account the restrictive conditions prescribed in the Convention on the Prevention and Punishment of the Crime of Genocide and high standards of proving in the practice of the international judiciary in determining the existence of genocidal intent as a specific subjective element. The objective-subjective concept of the notion of genocide crime still causes numerous dilemmas and debates in scientific-professional circles with regard to different understandings and interpretations of objective elements (actions of execution) and the subjective element (genocidal intentions). Despite the planetary interest of the international community that "the crime of crimes" should nowhere and to nobody never be repeated, a human destruction is unfortunately still a true follower of man even today. It is evident that preventive - repressive responses to crimes of genocide as well as to other international crimes against humanity and values protected by international law are not proportionate, considering that these crimes are repeating in more destructive forms at different times. In accordance with the foregoing, the genocide in Srebrenica and Rwanda at the end of the 20th century is an utter alarm that the international community must take all necessary action to ensure that human evils that are legally formulated or qualified as a genocide have to be prevented and identified in a timely manner, eliminate risky behaviors or factors favoring the onset of genocide.

**Key words:** genocide, genocidal intent, crime, international criminal law.

## I. INDIVIDUAL CRIMINAL LIABILITY<sup>1</sup>

### 1. Genocide: objective - subjective conception of genocide crime

There is no doubt that the crime of genocide is a true follower of a man since his birth to nowadays. In the past, numerous events are evident in various forms of human destruction, or attempt to destroy certain human groups. "It is a crime against all humanity and its consequences are felt not only by a group that is separated for destruction, but whole humanity."<sup>2</sup> Even today, on the international social scene, we have a struggle between human good and evil and I am convinced that this continuous struggle will last as long as there is a human. I am sure that I will not make a mistake if I find that genocide is the peak of human evil, especially considering the extremely negative and unimaginable consequences for the human race. The destructive or exterminate side of human nature is still unexplored, therefore even contemporary science despite evident and extremely powerful progress cannot offer the adequate answers regarding the very nature of human destruction and its etiology.

At the end of the XX century more precisely in July 1995, in the geographically limited area of Srebrenica, in the heart of Europe, the genocide was committed against Bosnian Muslims as a conventionally protected human group by which about 7,500 Srebrenica Muslims were killed by Bosnian Serb forces.<sup>3</sup> "They confiscated personal belongings and documents of all Muslims men they captured, soldiers and civilians, both old and young, and deliberately and methodically killed them solely on the basis of their affiliation."<sup>4</sup> As already emphasized, science has not yet found an adequate answer to the question of what is destroying and destructive in human nature, to the extent that consciously and deliberately attempts to destroy a particular human group as such. The genocide is specific precisely because of the specific genocidal intent<sup>5</sup> that a certain or conventionally protected human group as such be completely or partially destroyed. Therefore, genocidal acts of execution are directed towards the destruction of a particular human group.<sup>6</sup>

In spite of the efforts of modern man and the international community to find an effective and proportionate preventive - protective mechanisms, then affirmation and promotion of basic human rights and freedoms as well as universal human values recognized and supported by a

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<sup>1</sup> Doc.dr.sc Sadmir Karović, Bosna i Hercegovina, e-mail:karovic.s@hotmail.com

<sup>2</sup> Appeal of the Appeals Chamber in the Krstić case (April 2004) para.36

<sup>3</sup> Trial Chamber Judgment in Krstić subject (August 2001) para. 592-593.

<sup>4</sup> Appeal of the Appeals Chamber in the Krstić case (April 2004) para. 37.

<sup>5</sup> Trial Chamber Judgment in Krstić case (August 2001) para. 561.

<sup>6</sup> See more details: Judgment of the Appeals Chamber in the Jelisić case (July 2001), para. 46; Trial Chamber Judgment in the Stakić case (July 2003), paras 520-521.

civilized world, human destruction is continually improving and more or less in depending on certain political, economic, social and other conditions and specificities, it forms an integral part of the human life and our everyday life. "In addition to this, today in the area of state responsibility it is considered that the usual rules about genocide are the obligations of erga omnes; that is, laying down obligations for all member states of the international community and at the same time, give each state the right to demand the termination of the crime of genocide"<sup>7</sup> However, genocide as well as other crimes against humanity and values protected by international law are repeated in different periods of human history in an even more destructive and cruel form. Unfortunately, the genocide in Srebrenica (Bosnia and Herzegovina) and Rwanda at the end of the 20th century confirm the presence, continuity and tendency of perfecting the human destruction.

Given the multidisciplinary nature of genocide as a social and legal phenomenon or reality, we recognize in the literature various approaches to defining this crime. However, in the literature of international criminal law there is consensus that genocide is recognizable by specific genocidal intent as a subjective component or subjective element of a crime that makes it special in relation to other crimes against humanity and values protected by international law. Differentiation, criminality and defined genocide crime in relation to other crimes against humanity and values protected by international law is based precisely on its specific element - the genocidal intent of the perpetrator who makes this crime special in destroying or destructive sense. "Genocide today, but also in the past, is not a matter of one space, one local community, one racial, religious or political group or state, one or more nations, but a problem that has affected all nations, states, cultures and civilizations."<sup>8</sup> However, both in the theory and in practice of international criminal law, there are numerous arguments, contradictory opinions and attitudes regarding the perception and determination of genocidal intent with the perpetrator as a cumulatively prescribed element which in each particular case must be satisfied as a necessary condition for a particular crime to be legally formulated or qualified as genocide.

All discussions, and often that scientifically-professional character, regarding the treatment of the notion *genocide*, especially when discussing concrete events from the past, are usually accompanied by strong emotional charge and in a certain way a "fan" or biased approach. Consequently, in this paper, attention will be focused on the exclusive scientific and social definition of the notion of genocide, while appreciating the objectively - subjective conception of the notion of an international criminal offense. Taking into account the determination of the crime of genocide in Article II of the Convention for the Prevention and Punishment of the Crime of the Genocide of 1948<sup>9</sup> and the practice of the international judiciary is primarily the work of an ad hoc tribunal for Rwanda and the former Yugoslavia; thus, it is evident that high

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<sup>7</sup> Antonio Kaseze, *International Criminal Law*, Belgrade Center for Human Rights, Belgrade, 2005, p. 112.

<sup>8</sup> Adib Đozić, *Signs of the Times*, Sarajevo, 2016, Vol. 9, 32.

<sup>9</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the General Assembly of the United Nations on December 9, 1948. Entry into force on 12 January 1951.

standards of proving or determining the existence of genocidal intent in the perpetrator it is about establishing individual criminal responsibility.

## **2. Identification of the existence of genocide - standards of proof**

In international criminal law as well as in the practice of the international judiciary, certain standards of proving or determining the existence of genocide have been established. The complex notion of an international criminal offense consists of two cumulatively prescribed elements; actus reus - an objective element (s) and mens rea - a subjective element. Taking into account the restrictive conditions prescribed by the Convention on the Prevention and Punishment of the Crime of Genocide, it is necessary to have an act of execution on an objective basis, while in a subjective sense it requires the existence of a specific genocidal intent with the perpetrator aimed at the total or partial destruction of a certain (conventional) protected human group. Therefore, the execution action must be directed to only or exclusively defined ie. conventional protected groups (national, ethnic, religious or racial group), which means that criminal protection for other human groups is not prescribed, for example, political, economic, sexual or other human groups.

The acts of committing the crime of genocide are prescribed alternatively and as it follows:

- a) Killing members of the group,
- b) Causing serious bodily or mental harm to the members of the group,
- c) Deliberately subjecting the group to such conditions of life that should lead to its complete or partial destruction,
- d) Imposing such measures to prevent birth within the group,
- e) Forcibly transferring children from one group to another.<sup>10</sup>

In an objective sense, the acts of committing the crimes of genocide are prescribed alternatively, which in particular means that it is sufficient for the perpetrator to take only one of

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<sup>10</sup> Article II of the Convention for the Prevention and Punishment of the Crime of Genocide of 1948

the five prescribed acts of execution, with the existence of a genocidal intention, to criminalize the crime as genocide. It appears that Article II does not include acts that are nowadays called "ethnic cleansing", ie, forcibly expelling civilians belonging to a particular group from a certain area, village or city.<sup>11</sup> Also, the destruction of cultural and religious property does not constitute genocide,<sup>12</sup> taking into account the restrictive conditions that must be met in each specific case in order to qualify a crime as genocide. Accordingly, genocide is the undertaking of certain destructive activities aimed at the total or partial destruction of a certain conventional protected human group as such. One of the fundamental problems in determining whether a particular crime can be formulated as a genocide is the relationship between this crime and other crimes, or crimes against humanity and values protected by international law (crime against peace, crime against humanity, war crimes) and the complexity of differentiations with given that the execution actions in these crimes coincide for example *murdering*. On the other hand, determining the existence of a genocidal intent with the perpetrator is extremely complex and demanding due to the fact that it is very difficult to gather direct or indirect evidence that beyond reasonable doubt confirms the existence of this subjective element (written directives, orders, minutes and other documents, then confession of the suspect or, defendant, etc.). Taking into account the above, the lack and difficulty in gathering direct evidences, determining the existence of genocide is most often determined indirectly or bypassing.

In front of the 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, in the Krstić, Jelisić, Sikirica, and Nikolic cases, indirect evidence has been identified, on the basis of which it can be concluded that there is a genocidal intention:

1. General context;
2. The commission of other criminal offenses systematically directed against the same group;
3. Number of committed crimes;
4. Systematic targeting of civilians due to their membership of a protected group;
5. Repetition of destructive and discriminatory acts;
6. The breadth and prevalence of crimes committed;
7. A general political doctrine from which the existence of genocidal intent can be established;
8. The extent of accomplishment or attempted destruction;

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<sup>11</sup> Antonio Kaseze, Same Work, p. 113.

<sup>12</sup> Trial Chamber Judgment in Krstić (August 2001) para. 580.

9. Methodology in planning the killing;
10. Systematic killing and removal of corpses;
11. Discriminatory character of the work (destruction or attacks on property, cultures, religious objects and other symbols belonging to group members);
12. Discriminatory intent of the accused,
13. Genocidal plan or policy.<sup>13</sup>

Therefore, if in each concrete case the restrictive conditions of an objectively - subjective nature are not satisfied that includes existence of an act of execution and genocidal intent with the perpetrator, then the crime cannot be qualified as a genocide, but as another international crime, most often as a crime against humanity. By analyzing Article II of the Convention for the Punishment and Prevention of the Crime of Genocide of 1948 and the practice of the international judiciary, it is evident that two cumulatively prescribed elements must be met:

1. Objective element - action of execution;
2. Subjective element - the genocidal intention of the perpetrator.

In the light of the foregoing, a specific genocidal intention must be directed to the destruction of a "substantial part" of the Conventionally Protected Human Groups. However, one of the crucial problems in determining the existence of a genocide crime in practical terms is the determination of the significance, ie, quantitative components of the crime, or how and in what way to establish a "significant part" of the protected group; since the Convention on the Prevention and Punishment of Crimes of Genocide as well as the practice of the ad hoc tribunal did not precisely prescribe which part of the protected human group should be considered significant. Therefore, there are no prescribed or certain exact statistical statisticians who determine a "significant part" of the conventional protected human group, so that in each particular case of case-law, it is appreciated whether a part of the protected human group according to which the act of execution is committed is "a significant part". This essentially important question of determining the determination of the size of target part of the group was considered in the Brđanin,<sup>14</sup> Jelisić,<sup>15</sup> Sikirica,<sup>16</sup> Krstić<sup>17</sup> cases.

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<sup>13</sup> Sadmir Karović: Complexity of determining the existence of genocidal intent, Proceedings of the Law Faculty in Split, year. 51, 1/2014, p. 126.

<sup>14</sup> Trial Chamber Judgment in Brđanin (September 2004) para. 967.

<sup>15</sup> Judgment of the Trial Chamber in the Jelisić case (December 1999) para. 89.

<sup>16</sup> Presuda Pretresnog vijeća u predmetu Sikirica i dr. (septembar 2001) par. 80-82.

<sup>17</sup> Verdict of the Appeals Chamber in the Krstić case (April 2004) par. 15.

## **RESPONSIBILITY OF THE COUNTRIES FOR THE CRIME OF GENOCIDE<sup>18</sup>**

When we talk about Genocide, there is no doubt about whether this is the most serious crime that international law knows today. Likewise, there is no dilemma whether this is the most severe type of crime in relation to other crimes against humanity. There are rare cases that some legal theorists use the term "Crime of Crimes", "Crime without mercy" to determine this phenomenon; in order to point out the seriousness of the intentions of the perpetrator of this act, as well as the devastating consequences that affect all mankind. It is really about one abominable intention of those persons who are ready to do such crimes because the perpetrators of this crime do not make any selection when choosing a victim. From their point of view, it is absolutely irrelevant the fact that their criminal activity is directed towards an adult person or whether a victim is the minor. Their actions are equally focused on both the male and female population, equally with respect to military personnel, but also towards the civilian population. The only thing that is considered relevant is "membership", i.e. belonging to a particular group that is inherently different from others whether it's religious, national, racial, ethnic, or any other difference. In this regard, potential victims are all human beings, who due to different properties belong to a particular group for which there are tendencies of its destruction. It should be noted that categories such as "Crime" and "Grace" cannot exist together under any circumstances. One always excludes the other. In the case of Genocide apart from the fact that there is no grace, every aspect of human behavior of the perpetrator towards the victim disappears. In the Genocide, it is clearly pointed out that the aim of the criminal intent is to partially or completely destroy one group, due to their specific characteristics. However, this is not just a matter of mere extermination; the way in which criminals take actions among other things, their goal is also humiliating the victim in order to create a feeling of worthlessness or less value in relation to the perpetrator. The victim even if she is not deprived of her life, she loses the will to continue her life, (This can be clearly seen in cases of mass rape of women, where perpetrators use inhuman treatment of women and their mass rape as a legitimate aim, especially during war. Due to such "savagely" and inhuman treatment of the victim, there comes a sense of less value, and there were not rare cases of losing the will to continue life and commit suicide).

The specificity of the Genocide as an International Criminal Offense is also reflected in the fact that the perpetrator apart from killing every human being because of its belonging, but also undertakes measures aimed at preventing their reproduction. That is, extending their kind of preventing birth within that group. In the Convention on the Prevention and Punishment of the Genocide from 1948 determines which acts are considered as genocide, and for that reason it is very useful to look at Article 2 of this international instrument:

### Article II

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<sup>18</sup> Esmir Kasi Student of Doctoral Studies of Public Law esmir.89@hotmail.com

For the purpose of this Convention genocide is considered any of the offenses committed in the event of the total or partial destruction of a national, ethnic, racial or religious group as such:

- a) The killing of members of the group;*
- b) Serious violation of the physical or mental integrity of members of the group;*
- c) Deliberately subjecting the group to living conditions that should lead to its complete or partial destruction;*
- d) Measures aimed at preventing birth within the group;*
- e) Forced transfer of children from one group to another.<sup>19</sup>*

In spite of the fact that genocide is a work that achieves its peak during the war, it does not in any way mean that it cannot be done during peace because events from history are pointing to this.<sup>20</sup> His emergence does not necessarily require the existence of a state of war. Whether it will be executed depends on the intent of the perpetrator; therefore, if there is an intention and when actions are taken that are characteristic of this act we can talk about the genocide. Throughout history, it can be clearly seen that there is a significant number of genocides committed during peacetime. Especially when it comes to Balkan occasions, we cannot avoid pointing out the genocide that happened in the Shahovici, which is known as the seventh Genocide on the Bosniaks.<sup>21</sup> We have pointed out that genocide is a crime of International law, one of the hardest that is directed towards humanity specific to the intention of its perpetrator to partially or completely destroy the members of a particular group. These facts clearly lead to the conclusion that it cannot be classified in that group as a result of natural disasters, but that this is an act of human action. Therefore, the question of responsibility for this crime is quite justified.

Thus, we can talk about Individual Responsibility, (responsibility of the individual) and the responsibility of the country. When it comes to the responsibility of an individual there are no special disagreements. The States Parties to the Convention have undertaken to take all necessary measures to prevent genocide, as well as to punish all those who attempt or possibly commit this internationally prohibited offense. When it comes to state responsibility itself, there are already many things that are the subject of discussion. It is certainly easier for the state (if it is forced to accept responsibility for genocide), that responsibility is individual. It refers to those persons under its jurisdiction and accordingly those persons are then sanctioned because a possible court verdict confirming the responsibility of the state for Genocide; such judgment

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<sup>19</sup> Article II of the Convention for the Prevention and Punishment of the Crime of Genocide of 1948

<sup>20</sup> Article I of the Convention on the Prevention and Punishment of the Crime of Genocide 1948 The Contracting Parties confirm that genocide, regardless of whether it was committed during peace or war, is a crime under international law and that it undertakes to prevent it and punish it.

<sup>21</sup> <https://hamdocamo.wordpress.com/2012/10/01/10-genocide-over-the-Bosnians>



produces many acts that are in no way favorable to one of the contracting parties that accepted the obligations of the Convention, and later it was established that violated it themselves.

Article 1 is one of the few that predicts the responsibility of states; it is certainly limited and secondary. It refers to the prevention and punishment of those who committed genocide, but it also indicates that if the state is obliged to do everything to prevent someone from committing genocide, it is also obliged to support itself from those actions that would lead to its creation.

#### Article I

*The Contracting Parties confirm that genocide, regardless of whether it was committed during peace or war, is a crime under international law and that it undertakes to prevent it and punish it.*<sup>22</sup>

In Article 9, the state responsibility for genocide which is also primary is much clearer, as well as the possibility of initiating proceedings before international institutions, Bosnia and Herzegovina has just invoked this article when instituting proceedings before the International Court of Justice against the then Federal Yugoslavia later in the union of the states of Serbia and Montenegro. This was the first case in the world that the International Court of Justice decided on the merits of determining the responsibility of states for genocide, so this verdict is of great importance in the part of the state's responsibility.

#### Article 9

*Disputes between the Parties in respect of the interpretation, application and enforcement of this Convention, including disputes relating to the liability of a State for genocide or any other work enumerated in Article III, shall be brought before the International Court of Justice on the request of one of the parties to conflict.*<sup>23</sup>

Article I of the Convention contains two theses: The first is the affirmation that genocide constitutes a crime under international law. This affirmation should be read in conjunction with a declaration that genocide constitutes a crime under international law, which was unanimously adopted two years earlier by the General Assembly in Resolution 96 (I), which is mentioned in the Preamble to the Convention.<sup>24</sup>

This affirmation confirms the requirements of customary international law: "The Convention's sources show that the intention of the United Nations was to condemn and punish genocide as a "crime against international law", including the denial of the right to the existence of entire groups of people, denial that violates the conscience of mankind and leads to large the

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<sup>22</sup> Article I of the Convention for the Prevention and Punishment of the Crime of Genocide of 1948

<sup>23</sup> Article IX of the Convention for the Prevention and Punishment of the Crime of Genocide of 1948

<sup>24</sup> Article I

loss of humanity, which is the opposite of both moral law and the spirit and goals of the United Nations.<sup>25</sup>

The first consequence of such a concept is that the principles underlying the Convention are principles recognized by civilized nations as binding on states, even without any conventional obligation. The second consequence is the universal character of condemning genocide as well as the cooperation necessary in order to free mankind from such terrible monsters'.<sup>26</sup>

The objectives of such a Convention must also be considered. The convention was apparently adopted for purely human<sup>27</sup> and civilization reasons. It's hard to imagine a convention that could have such a dual character to a greater extent because its goal is; on the one hand, to protect only the existence of certain groups of people, and on the other to confirm and accept the elementary principles of morality."<sup>28</sup> As to the other theses predicted in Article I of the Convention, it refers to the obligation of the parties to prevent and punish the crime of genocide, especially in the context of the obligation of prevention. In this connection according to the International Court of Justice, "there are significantly more characteristics of such a commitment. The usual meaning of the word 'commitment' is to give a formal promise, committing, binding or giving oath or promise, accepting some obligation. This is a word that is regularly used in contracts that determine the obligations of the contracting parties (see, for example, the International Covenant on Civil and Political Rights.<sup>29</sup>

*According to the Applicant,<sup>30</sup> the "State that committed the genocide did not fulfill its obligation to prevent it"*

Regarding the obligation to prevent, in accordance with Article I, the violation of that obligation according to the Applicant is "established" - it can be said "injected" – by the fact that the Respondent itself is responsible for the committed genocide; ... the state that commits genocide failed to fulfill its obligation to prevent it. "<sup>31</sup>

Regarding territorial restrictions and whether there are any of such cases in the case of Member States' obligation to prevent and punish genocide, paragraph 153 of the judgment of the International Court of Justice in the proceedings BOSNIA AND HERZEGOVINA AGAINST

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<sup>25</sup> Resolution 96 (I) of the General Assembly of 11 December 1946

<sup>26</sup> Preamble to the Convention.

<sup>27</sup> In the English version of the text of the Judgment, the term "humanitarian" is used, and in the French "humain". The term "humanitarian" is probably a failure of a technical nature.

<sup>28</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, International Court of Justice, Reports 1951, page 23. 161 paras.

<sup>29</sup> International Covenant on Civil and Political Rights December 16, 1966, in particular Article 2, paragraph 1, and Article 3

<sup>30</sup> 155 para. Judgment of the International Court of Justice - Bosnia and Herzegovina's claim.

<sup>31</sup> Kurziv from the original

SERBIA AND MONTENEGRO, 26 February 2007, is of paramount importance that refers to the reasoning of one of the preliminary objections lodged by the respondent.

The issue of the principle of the already adjudicated legal matter of the 1996 Judgment concerns territorial restrictions; if any, in relation to the obligation of States Parties to prevent and punish genocide. In the explanation of one of the preliminary objections, the respondent party<sup>32</sup> argued that it did not have jurisdiction over the Claimant's territory in the relevant time period. In the last sentence of the reasons for rejecting such an argument, the Court states the following: **"The Court notes that the obligation of each State to prevent and punish the crime of genocide is not territorially restricted by the Convention".**<sup>33</sup>

Article 9 represented the very basis for instituting proceedings before the International Court of Justice by Bosnia and Herzegovina because it was a dispute aimed at establishing state responsibility, which through its leadership and authorities took certain actions that resulted in a brutal violation of the of the Convention. The actions taken were contrary to Article 9 which explicitly imposes immediate responsibility for the failure of the Parties in not committing genocide or providing assistance in its execution.

According to her representative the complainant claims that "this dispute relates to state responsibility; our goal is to establish the responsibility of the state that through its leadership and authorities committed the most brutal violations of one of the most sacred instruments of international law." The complainant stated that buy his opinion the Genocide Convention "created a universal and contractually based concept of state responsibility" and "with the fact that this case is about a state responsibility for genocide". In this respect, the complainant relies on Article 9 of the Convention, which states, "Explicitly implies direct responsibility to the states in order to not commit genocide or to provide assistance in its commission".<sup>34</sup>

We have already stated in the previous section that when it comes to the responsibility of states, there are numerous discussions and disagreements regarding the interpretation of the Convention itself. This can also be clearly seen in the proceedings before the International Court of Justice in a submission by the Federal Republic of Yugoslavia, where it is interpreted in a way that "the Genocide Convention does not withdraw the responsibility of the states for the acts of genocide as such" The respondent party argues that: "The Genocide Convention does not entail the responsibility of States for the acts of genocide as such. The obligations of the Convention relate to the 'prevention and punishment of the crimes of genocide' when such a crime is committed by individuals; the provisions of Articles V and VI (relating to the execution and adoption of clear legal measures) ... are very clear on this issue. "The respondent party submits that the Court does not have jurisdiction *ratione materiae* pursuant to Article IX and continues:

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<sup>32</sup> Federal Yugoslavia, later the Union of Serbia and Montenegro.

<sup>33</sup> Convention, paragraph 153. The 1996 Court's decision on the territorial scope of the Convention International Court of Justice, Reports 1996 (II), page 616, paragraph 31

<sup>34</sup> Decision of the International Court of Justice of 1996 on the territorial scope of the Convention, paragraph 155

"These provisions (Articles I, V, VI and IX) do not withdraw the responsibility of one of the Contracting Parties as such for acts of genocide, but only the responsibility for disabling or the impunity of the acts of genocide committed by individuals within its territory or ... its control."<sup>35</sup>

It is of utmost importance for the state's responsibility to prove the link between the person who committed the genocide and the state itself, or whether actions taken by that person can be attributed to the state itself.

As a subsidiary argument, the Respondent also states: "In order for a State to be responsible under the Genocide Convention, the facts must first be established. Since genocide constitutes a crime, this can only be determined in accordance with the rules of criminal law, according to which individual responsibility is the first condition to be met. The state can only be held responsible if there is beyond any doubt the existence of genocide. In addition, it must be shown that the person who committed the genocide may include the responsibility of the state ..."<sup>36</sup>

In addition, the respondent put forward what it called "alternative arguments relating solely to State responsibility for the violation of Articles II and III". These arguments put into question the necessary conditions in particular, the condition of intent and condition of attribution. The Advisor of the Respondent while presenting these arguments; reiterated the basic conclusions that "the Convention does not in any way suggest that the State itself can commit genocide".<sup>37</sup> Is it of paramount importance and the Court's opinion that the parties under the Convention are obliged not to commit genocide themselves?

The Court further considered whether the parties under the Convention were obliged not to commit genocide themselves. It should be noted; however, that such an obligation is not explicitly contained in the provisions of the Convention itself. Therefore, the applicant alleges that such an obligation arises from Article IX, which gives the Court jurisdiction over disputes "including disputes concerning the responsibility of a State for genocide or any other offense listed in detail in Article III". Since Article IX is essentially a provision on jurisdiction, the Court considers that it is first necessary to determine whether the essential obligation of States to refrain from committing genocide may be derived from other provisions of the Convention. According to Article I, the Contracting States have the obligation to prevent the execution of any such offense that qualifies as "a crime under international law". This article does not require expressis verbis that the states themselves refrain from committing genocide. By the Court's view, the given objective of the Convention and the purpose of Article I is to prohibit States from committing genocide. Such a prohibition stems from:

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<sup>35</sup> In the opinion of the respondent, the exclusive remedy for such a failure would be a declaratory judgment. See paragraph 156

<sup>36</sup> Paragraph 157

<sup>37</sup> Paragraph 158

- Firstly, from the fact that this article places genocide in a "crime against international law": by accepting such a qualification, member states are logically committed not to commit such a qualified act.
- Secondly, this follows from the clear obligation to prevent the commission of acts of genocide. Such an obligation imposes on the States Parties, inter alia to use all the options at their disposal; in the circumstances to be specified more specifically later in this Judgment, to prevent persons or groups not directly under their authority to commit acts of genocide or any other offense as expressly referred to in Article III.

It would be paradoxical for states that were obliged to prevent the execution of genocide from persons over whom they have a certain influence, to the extent that they are in their power, it is not forbidden for them to commit such acts themselves through their organs or persons over whom they have such a close control that their behavior can be attributed to that State in accordance with international law. In the shortest, the obligation to prevent genocide necessarily implies a ban on the execution of genocide.<sup>38</sup>

## CONCLUSION

It is not disputed that genocide as the most serious crime against humanity and values protected by international law is an integral part of the destructive side of human history, despite the efforts of the civilized world to prevent this crime in a timely manner. Unfortunately, all the efforts after the Second World War that genocide should never repeat, and the adoption of the Convention on the Prevention and Punishment of the Crime of the Genocide of 1948, at the end of the 20th century there were two genocides - the genocide in Rwanda and the genocide in Srebrenica (Bosnia and Herzegovina). The practice of the international judiciary in its work, acting in concrete criminal cases, has established appropriate standards of proof of the existence of genocide. In this context, it is necessary to emphasize the differentiation between the individual responsibility of individuals that is the criminal nature and responsibility of the state for genocide, which is not a criminal nature. Taking into account highly established standards of proving and establishing the existence of genocide crimes, it is evident that in each specific case, two elements of an objective and subjective nature must be satisfied. An objective plan requires the establishment of an act of execution, at least one of the five acts of execution specified in article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, while the subjective plan requires the existence of a specific genocidal intent with the perpetrator. The existence of a genocidal intent of the perpetrator refers to the existence of a specific and special intention to completely or partially destroy a conventionally-protected human group (national, ethnic, religious or racial group). In this paper the standards of proof, that are the restrictive conditions that must be satisfied in each particular case, are specified and

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<sup>38</sup> Paragraph 166

analyzed, so that the crime can be formulated or qualified as a genocide. In establishing individual criminal responsibility, examples from the practice of the international judiciary, primarily the ad hoc tribunal for the former Yugoslavia and the International Court of Justice, were used to determine the responsibility of the state to prevent the commission of the crime of genocide. The complexity of proving and determining the existence of crimes of genocide, regardless of whether it is the individual criminal responsibility of individuals or the state's responsibility, primarily refers to the lack of direct evidence confirming the existence of a genocidal intent with the perpetrator (lack of recognition of the suspect or accused, lack of written documents, minutes, activity plans, orders, etc.). Precisely because of the lack of direct evidence in practice, the existence of a genocidal intent with the perpetrator is performed or proven through indirect indicators.

In line with the above, we can conclude that genocide as "crime against crimes" is most often referred in the literature of international criminal law, legal and social reality, and it is a phenomenon that favors special attention of the public primarily because of its destructive nature and exceptionally negative consequences for the human race. Also, the obligation of States relating to the prevention of the commission of the genocide crime is the ultimate alarm about finding concrete preventive and protective mechanisms of a practical nature in order to identify and eliminate all risky behaviors that can "turn into" this crime. In this regard, we consider it extremely necessary to intensify research focused on the area of criminal etiology in order to identify the causes that lead to genocide and create the developing of an effective prevention and protection strategy. The preventive - protective function of contemporary international criminal law must be recognizable at the operational or executive level, which obliges all states to undertake all the necessary preventive activities as to prevent this crime from occurring in the future.

Experience shows that behind the genocide is usually the state that directly or indirectly supports, organizes, plans, or participates in the implementation of crimes in practical terms. The genocide in Rwanda and the genocide in Srebrenica (Bosnia and Herzegovina) imply a planetary obligation for the international community and the whole civilized world to critically review existing preventive and protective mechanisms and to see realistic preventive and protective capacities, as this crime would not be repeated in the future.

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