

INTERROGATING THE DYNAMICS OF LAW AND TRANSFORMATION – QUESTIONING THE LAW OF GENOCIDE

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OUTLINE:

A)

- Origins and development of the notion/ crime of genocide
- Elements of genocide in jurisprudence of international criminal courts

B)

- Disputable issues and practical challenges—Croatian perspective
 - a) Ethnic cleansing as genocide?
 - b) State responsibility?

Map of Croatia



Vukovar, November 1991



Dubrovnik, March 2012

Vukovar, November 1991



Dubrovnik, March 2012

Vukovar, November 1991



ORIGINS AND DEVELOPMENT OF THE CRIME OF GENOCIDE:

- Lemkin, “*Axis Rule in Occupied Europe*”, 1944., *genos + occidere*
- 1946. UN General Assembly Resolution 96(I)
- 1948. Convention on the Prevention and Punishment of the Crime of Genocide
- Art. 4. ICTY Statute, Art. 2. ICTR Statute, Art. 6. Rome Statute of the ICC

Art. 2. GENOCIDE CONVENTION

“ In the present Convention, genocide means any of the following acts committed **with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:**

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

ELEMENTS OF GENOCIDE:

GENOCIDAL ACTS

- *actus reus*
- *mens rea*

PROTECTED GROUPS

- national, ethnical, racial or religious

GENOCIDAL INTENT

- intent
- to destroy
- in whole or in part
- a group as such

GENOCIDAL ACTS

a) “killing members of the group”

■ One or more victims?

- a) Use of plural in the crime definition (*killing members of the group, causing harm to...members..., inflicting on the group conditions of life...*)
- a) Elements of Crimes, describing each genocidal act specify “one or more persons”, and the same view is shared by *ad hoc* tribunals (e.g. Akayesu TC judgment, para. 521., Krstić TC judgment, para. 685)

b) “causing serious bodily or mental harm to members of the group”

- “acts of bodily or mental torture, inhuman or degrading treatment, rape, sexual violence, and persecution” (para. 51 TC Rutaganda)
- Need not entail permanent or irremediable harm, but must result in grave and long term disadvantage to a person’s ability to lead a normal and constructive life
- “In some circumstances, forcible transfer can be an underlying act that causes serious bodily or mental harm” (Popović et al. TC para. 813)

c) “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”

- Methods of slow death
- Deliberate deprivation of resources indispensable for survival, such as food and medical services, or systematic expulsion from homes (EOC, art. 6)
- Rape, excessive work, physical exertion (Kayishema&Ruzindana, TC, para. 115-116)
- Encircling civilians of the protected group in villages/towns, shelling those areas, cutting off all supplies, destruction of historical, religious and cultural property?

d) “imposing measures intended to prevent births within the group”

- sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females and prohibition of marriages (Rutaganda, TC, par. 53)
- Not only physical but also mental measures
- Forced expulsion?
- “the physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction” (Krstić, AC, para. 28)

e) “ Forcibly transferring children of the group to another group”

- Not only direct acts of forcible physical transfer, but also any acts of threats or trauma which would lead to forcible transfer
- What is meant by ‘children’? – children under 18? Under 15? Only newborns?
- Form of cultural genocide? Biological genocide – consequences for the future viability of a group?

PROTECTED GROUPS

- **National** (“a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties”)
- **Ethnical** (“a group whose members share a common language or culture”)
- **Racial** (“a group based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.”)
- **Religious** (“a group whose members share the same religion, denomination or mode of worship.”)
- *Akayesu*, par. 516. – “permanent and stable groups”
- Objective or subjective approach

GENOCIDAL INTENT

- *Dolus specialis* – intent to destroy a group (*purpose*)
- Destruction – “Despite recent developments, customary international law limits the definition of genocide to those acts seeking the **physical or biological** destruction of all or part of the group” (Krstić, para. 580.)

GENOCIDAL INTENT

- PARTIAL DESTRUCTION :
 - a) A part of the group that has an impact on a group as a whole (the intent, thus, basically to destroy the entire group)
 - b) Substantial part - numerical
 - c) Significant part – qualitative approach
 - d) Geographically limited part of the group (local genocide)

Manjača concentration camp, August 1992.



Map of B&H



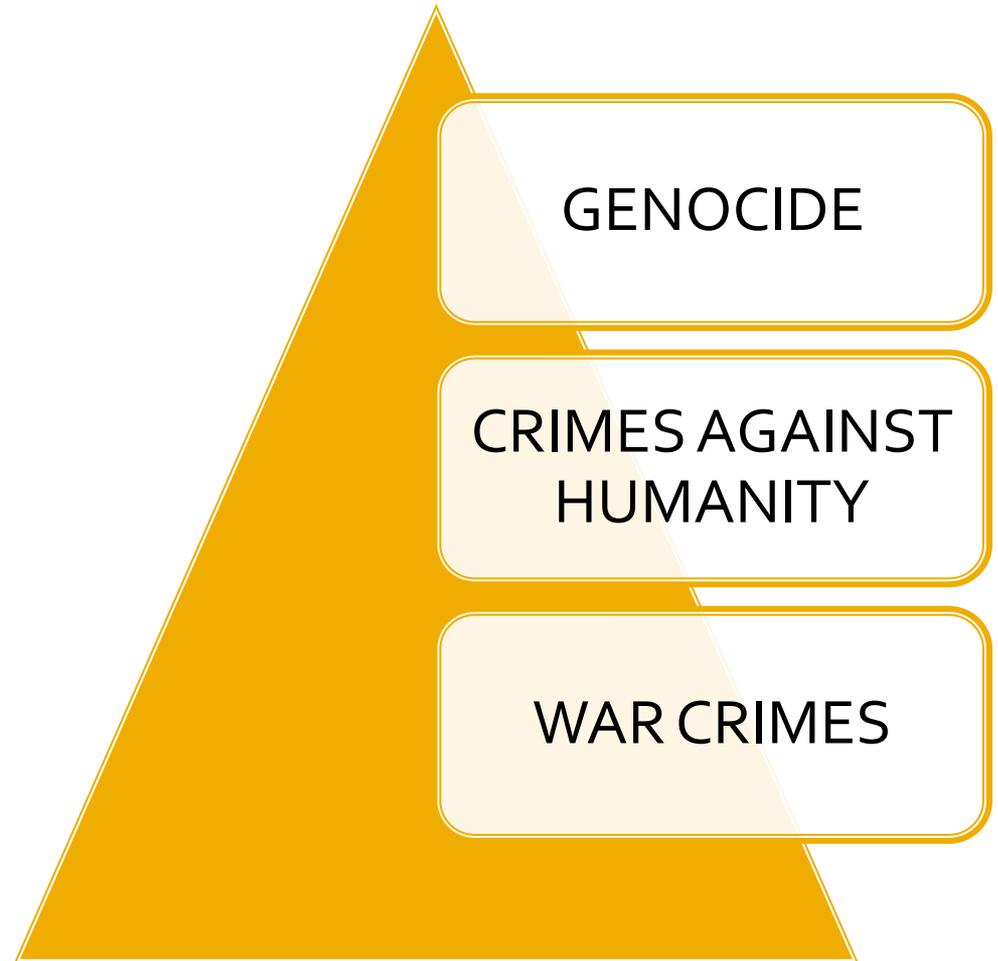
Kamenica (Srebrenica) – mass grave



Dubrovnik, March 2012

The case of Croatia: Was it genocide and why does it matter?

- Crime of all Crimes?!
- Stigma of Conviction
- Demands of Justice
(Victims)
- Jurisdiction of the ICJ



Art. 156. of Croatian Criminal Code

- Intent to destroy - in whole or in part
- national, ethnic, racial or religious group
- genocidal act:
 - Killing members of such group
 - Serious bodily injury or physical or mental harm
 - **Forcible displacement of population**
 - Conditions of life calculated to bring about physical destruction of the group
 - Measures intended to prevent births within the group
 - Forcible transfer of the children of the group to another group

Ethnic Cleansing or Genocide?

“ whether a particular operation described as ‘ethnic cleansing’ amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such.”

(par. 190. ICJ Bosnian Judgment)

Para. 373. ICJ Bosnian Judgment

- "...the specific intent to destroy the group in whole or in part has to be convincingly shown by reference to **particular circumstances**, **unless a general plan** to that end can be convincingly demonstrated to exist; and for a **pattern of conduct** to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent."

ICJ: Croatia v. Serbia

- 1) Reliance on **individual criminal responsibility** / specific intent (of the persons whose acts are attributable to a State):
 - a) ICTY
 - b) Local (Croatian) courts?

- 2) **Genocidal intent of higher authorities** – overall pattern of acts?

Q & A:

Thank you for your attention!