

DALLA COMUNITÀ INTERNAZIONALE

BAJRAM UKAJ¹, AVNI PUKA²

The role of the ICC in the interpretation of elements of the crime of genocide and cultural genocide (Kosovo case)³

SUMMARY: 1. General Observations - 2. Elements of genocide as a crime under the jurisdiction of the ICC - 2.1. Cultural Genocide - 3. Prevention of Genocide - 4. Conclusions.

1. General Observations

The establishment of the International Criminal Court (ICC), is rightly observed as historic achievement of international law, in particular of the criminal field. Different from the current *ad hoc* Courts, ICC is established by an international agreement⁴, and it is the first permanent international Court, that aims to replenish countries jurisdiction to adjudicate serious crimes.

However, despite its international personality, the functionality and authority of the ICC is challenged by certain restrictions. In the first place, a condition for the exercise of jurisdiction is the adoption and ratification of its Statute by States, or through special agreements for territories of other States⁵.

The practice shows that the extent of jurisdiction remains a major challenge to the Court⁶ and it affects the self-confidence of the work and the perspective of the ICC, as it is the political contestation of the work of the Court by the African Union (AU)⁷.

¹ Bajram Ukaj is Associate Professor of Criminal Law and Dean of the Law Faculty of the University of Prishtina (Kosovo).

² Avni Puka is Lecturer of Criminal Law at the Law Faculty, University of Pristina. Also PhD candidate in criminal law and procedure at the University of Rome "La Sapienza", Italy.

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⁴ The Statute on establishing the International Criminal Court was signed in Rome on July 17, 1998 and entered into force on July the 1st, 2002 (known as "the Rome Statute").

⁵ Article 4 of the Rome Statute.

⁶ The jurisdiction of ICC has not yet been accepted by some countries, such as the U.S., China, India, etc. In addition a special limitation to the jurisdiction of the Court, is foreseen with Article 16 of the Rome Statute on the suspension of the investigation or prosecution, according to which «*No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions*». This enables that the investigation and that the work of the court is determined by the decisions of the Security Council.

⁷ For more on the attitudes of African countries in relation to the work of the ICC, see also *Perspectives, A Fractious Relationship: Africa and International Criminal Court, Political commentary and ana-*

The ICC is currently handling cases of international crimes, allegedly committed in seven countries such as: Democratic Republic of Congo, Uganda, Central African Republic, Sudan, Kenya, Libya and in Ivory Coast. In addition the Court monitors the situation and the various worldwide developments⁸.

The first decision in the history of the ICC was given on March 14, 2012, in which the Court sentenced to 14 years in prison the former rebel leader in the Democratic Republic of Congo, Mr. Thomas Lubanga Dylio, finding him responsible for the crime of recruiting children under the age of 15 into the armed forces. In the future other decisions are expected regarding other cases pending trial.

While exercising its functions in different countries of the world, the challenge to the ICC remains, the clarification of the many aspects in judging the international crimes. In this regard, the interpretation of the elements of crimes, that are under its jurisdiction, including the crime of genocide, the elements of which in many aspects remain unclear.

In particular, advancement in formal terms is foreseen with Article 9 of the RS, which provides the possibility of proposing amendments to the elements of the crime, which can be adopted by a majority of two thirds of all the members of the Assembly of Member States.

Changes, particularly the amendment of the Statute, is generally seen to be complicated⁹, therefore we consider that it is of an important and of special interest the discussion about the acts that are not included as potential elements of crimes in statute.

2. Elements of genocide as a crime under the jurisdiction of the ICC

When we talk about the crime of genocide, we shall not forget to mention Raphael Lemkin, who first mentioned the term “genocide” in 1944¹⁰. His

lysis from Africa, 2012, 1, *passim*.

⁸ SONG SANG HYUN (President of ICC), *From Punishment to Prevention-Reflections on the Future of International Criminal Justice, The Wallace Wurth Memorial Lecture delivered by President Song at the University of New South Wales, Sydney, Australia, February 14 of 2012*, fully available on www.icc-cpi.int;

⁹ More about amending the Rome Statute see CLARK, *Effecting Amendments to the Rome Statute that may be decided upon at First Review Conference in 2010*, in *International Review of Penal Law*, 80, 2010, 1, 2, p. 65 and ongoing.

¹⁰ Raphael Lemkin was a Polish lawyer of Jewish descent. Lemkin used the term “genocide” that is derived from the words “γένος” (Greek: “family”, “tribe” or “race”) and “cide” (Latin: “murder”), in his work *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for*

contribution, is not related only to the use of the term, but in particular in defining this crime and highlighting some acts of genocide, which are not incriminated by international legal acts, *i.e.* cultural genocide, economic genocide...etc.

In addition, his argument that the crime of genocide is not only committed in war, but also in peace, is valid today, and should be a foundation for ICC when judging crimes that occurred during the war in different countries, and those crimes should be analyzed in conjunction with actions taken in time of peace.

Observing outside of the jurisdiction of ICC, the same argument should be applied in the case of crimes committed in Kosovo¹¹, which should not be treated only limited to the period of the years 1998-99.

Kosovo case and the cases of crimes committed in countries around the world, although are not within the jurisdiction of the ICC¹², are important in terms of comparative aspects for qualification of the crimes that are treated by the Court, because the creation of ICC is related to the history of earlier crimes committed in different countries and to international judicial processes developed from World War II onwards.

The Statute provides to ICC the jurisdiction for trial of four most serious crimes against values protected by international law, such as: «*Genocide, Crimes against humanity*» and «*War crimes and the Crime of aggression*»¹³. This paper will only observe the crime of genocide, definition and interpretation of its elements. With emphasis on cultural genocide, that is not included as a punishable act on the statute of the Court.

Actus reus and *mens rea* of the crime of genocide, Article 6 of the Statute of the ICC, provides this definition:

«(...)“*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 injury, members of the group;*
- c) *The deliberate infliction on the group conditions of life calculated to bring*

Redress, Carnegie Endowment for International Peace, Division of International Law, Washington D.C., 1944.

¹¹ In relation to the case of Kosovo, this paper will briefly analyze several actions that have to do with the destruction of the values of Albanian culture in Kosovo.

¹² Article 11 of the Rome Statute provides that the Court has jurisdiction only over crimes committed after the entry into force of the Statute (July the 1st of 2002).

¹³ Article 5 of the Rome Statute, § 1.

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».

This definition of genocide is taken from the Convention on the Prevention and Punishment of Genocide (1948), as defined in Article 2 thereof. However, the divergent solution of the Statute in relation to the Genocide Convention, is about the forms of punishment, it does not accept Article 3 of the Convention, but the provisions of this article are incorporated although not completely, in Article 25 of the Statute, which defines the principle of individual criminal responsibility.

Through this principle, criminal responsibility for the crime of genocide that is under the jurisdiction of the ICC, applies only to natural persons, who are criminally responsible for the committed crime¹⁴.

According to Article 6 of the RS, *mens rea* or mental element of genocide consists on the intent to destroy, in whole or in part a particular targeted group, through the incriminated genocide acts. Mental element of genocide is specifically defined in Article 30, paragraph 1, of the RS, which states «*a person shall be criminally responsible and liable to punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge*». According to this article, «*intent*» exists when a person in relation to conduct, means to engage in that conduct and when about the consequence, means to cause that consequence or is aware that it will occur in the ordinary course of events (paragraph.2, point a and b). While the «*knowledge*» means awareness that a circumstance exists or a consequence will occur in the ordinary course of events (§ 3 of Article 30).

Regarding to the acts of genocide (*actus reus*) defined by Statute, it appears that they can be performed by acting («*killing members of the group; causing serious bodily or mental injury to members of the group; imposing measures intended to prevent births within the group; forcibly transferring of children of the group to another group*») and by not acting («*deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*»).

Notwithstanding, with the incriminating provisions in the Convention and now in Statute, the practice of international Courts (in particular those *ad hoc*) has shown that the interpretation of acts of genocide is quite complicated e.g.:

¹⁴ During the drafting of the Rome Statute, in the first meeting on July 16, 1998, the Chinese delegate has proposed that it is reasonable to envisage the criminal responsibility even for legal persons, while it is recognized in national legislation system.

«*causing serious bodily or mental injury, to group members*», has brought much debate regarding «*mental injury*», whereas, should it be considered as genocide only when mental injury is permanent or even in cases when it is presented as interim.

Based on the decided cases, the legal qualification of facts depends largely on the purpose (*mens rea*) of the perpetrator, rather than on the consequences caused. Furthermore, for the acts foreseen under Article 6, paragraph *c*), «*deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*», and under paragraph *d*) «*imposing measures intended to prevent births within the group*» in practice it is not easy to prove and to qualify as genocide. Also it is not considered very clear the act of «*forcibly transferring of children of the group to another group*», that in the Convention of Genocide, was included as a form of «*replacement*» for cultural genocide¹⁵. Among other issues, it is not determined who is considered a child in these cases or what is the age limit. So far there has been no case of this qualification, and no judgment on this act, neither by *ad hoc* international Tribunals.

Historically, based on the current results of international Courts, it could be concluded that the crime of genocide, has more been object to theoretical observation and to finding the appropriate definition for the protection of state interests, than object to process of practical trial and evidence. On the other hand, as Professor Yehuda Bauer emphasizes, that despite to provided definitions on genocide, the reality is much more complicated, and therefore it is required to change the definitions of answering the real situation¹⁶, and in fact, there have been permanent discussions about the definition of genocide, its elements and the possibility of new incriminations (involving different acts as genocide). Below, we will not analyze legally incriminated acts of genocide, but we will elaborate the “cultural genocide” as an act of destruction of cultural heritage of a national, ethnic, religious or racial group, presenting some of the facts of this nature carried out in Kosovo against the Albanian cultural heritage.

2.1. Cultural Genocide

Despite the *ratione temporis* jurisdiction (Article 11 of the RS) of the ICC

¹⁵ The draft project of the Secretariat for the Convention «*forcible transfer of children of the group to another group*» was considered as a form of cultural genocide.

¹⁶ BAUER, YEHUDA, *Genocide Prevention in Historical Perspective*, in *Politorbis*, 2009, 47, p. 26.

and non-retroactivity of *ratione personae* (Article 24)¹⁷, we consider very important to clarify the elements of the crime of genocide, from the prospective of its punishment and prevention, regarding to cases of genocidal actions committed before the entry into force of the Statute (1 July 2002). An open discussion about the crime of genocide is the question of “cultural genocide”, which because of its nature can be treated as the act of the crime of genocide «*forcibly transferring of children of the group to another group*».

Based on the Lemkin’s determinations, according to whom there are various acts that are directed to destroy the political, economical, cultural and linguistic existence of the group¹⁸, the cultural genocide has been a concern and object to treatment in relation to criminal actions that have taken place in different countries.

“Cultural genocide” as a term is used to describe the intentional destruction of cultural heritage of a nation-people for political, military, religious, ideological or racial reasons¹⁹. In fact, «*the cultural genocide - culturecide, means the action undertaken with the intent to destroy in whole or in part a national cultural being of a nation or ethnic, racial or religious group and or of its cultural institutions, its achievements in field of social and mental development in historical phases, which includes the comprehensive creativity in language, art, literature, science, education, health and all the material and spiritual life of the group*»²⁰.

Nevertheless, it is rated as very harmful act, that affects the substantial destruction of the existence of a nation-people or ethnic, racial or religious group, the “cultural genocide” is not included in the Convention on Prevention and Punishment of the Crime of Genocide (1948), or in the RS as a punishable act that would criminalize these actions and would make them object to treatment under the jurisdiction of the international criminal Courts (ad hoc and ICC) and national Courts (due to possible acceptance in the national legislation).

Indeed, the issue of “cultural genocide” as from the idea of R.Lemkin

¹⁷ Article 11, § 1, of RS, states that «*the Court has jurisdiction only over crimes committed after the entry into force of this statute*». But according to Article 24, § 1 «*No person shall be liable under this Statute for conduct prior to the entry into force of this Statute. In case of changes in the law, applicable law, to the case before a final decision is the law more favorable to the person being investigated, prosecuted or convicted*».

¹⁸ SCHABAS, *Genocide in International Law: The Crimes of Crimes*, Cambridge University Press, 2000, p. 218

¹⁹ Entire definition on www.jughaculturalgenocide.blogspot.com.

²⁰ UKAJ, *Approximation of Material and Spiritual Values of Culture (cultural genocide - culturecide)*, “Law”, Pristina, p. 33 ss.

(1933)²¹, and on his compelling arguments and insistence that «*national, ethnical, racial or religious group, can not continue to exist if it does not maintain its spiritual and moral unity*»²², which to the day remains object of ongoing debate.

Important to mention that during the drafting of the Genocide Convention, there have been many discussions for and against the inclusion of cultural genocide, as one of the forms of genocide, but in the end the majority of states have opposed it, with reasons such as: the protection of cultural heritage can be regulated with the legislation for human rights, that is a very broad term and would be a problem with interpretation in certain situations, but obviously the opposition was mainly due to fears about the domestic policies of some countries on minority groups²³.

In fact, the first draft of the Genocide Convention (1947), prepared by the Secretary General, and the second draft (1948) prepared by the *Ad Hoc* Committee on Genocide, contained provisions that explicitly defined “cultural genocide”,²⁴ provisions, which included any intentional act performed with the aim of destructing of a language, religion and culture of the group, such as the prohibition of the use of language of the group in private communication or in schools, printing and distribution of publications in the language of the group, and destruction or prohibition of the use of libraries, museums, schools, historical monuments, worship places or other group institutions.

Despite of the exclusion from the Convention and the Rome Statute, “cultural genocide” remains a serious challenge of the international justice on judging and preventing the crime of genocide. Prof. Ben Kerman stresses that the cultural genocide - destruction of the culture of the people, it is not the main element of the crime of genocide, but it is the fundamental element on its prevention, because effective prevention of genocide requires early intervention to protect destruction of cultural genocide before physical genocide hap-

²¹ For more see also: DELANTY, KUMAR, *The Sage Handbook of Nations and nationalism*, London, 2006, p. 326.

²² See: UN Doc. E/447, p. 27.

²³ For more on the reasons on rejecting by the countries the inclusion of “*cultural genocide*” in the Genocide Convention, see SCHABAS, *Genocide in International Law, The Crimes of Crimes*, cit., p.179 and following.

²⁴ First draft of the Genocide Convention, Prepared by the UN Secretariat, May 1947 (UN Doc.E/447) Genocide Convention and Second Draft Prepared by the *Ad Hoc* Committee of the Economic and Social Council (ECOSOC) meeting Between April 5, 1948 and May 10, 1948 (UN Doc. E/AC.25/SR.1 to 28). While “cultural genocide” is not included in the Genocide Convention and the Rome Statute, the protection of cultural heritage is treated rather as a matter of human rights and regarding this matter there are a number of international documents issued.

pens (killing)²⁵. On the other side, when assessing cases of destruction of cultural heritage, in different countries of the world, with ethnic, religious or racial motifs, it is concluded that the “cultural genocide” should be treated with special attention by international justice.

The facts collected in Kosovo constitute a typical case of destruction of the culture of a nation-people (the Albanian culture in Kosovo). In the following paragraphs, briefly are presented some of facts of genocide against Albanian cultural heritage in Kosovo, committed by the Serbian regime during times of peace and war.

The heritage of Kosovo represents a mosaic of cultures between different socio-historical periods, varied and determined from historical, social, economical, religious and cultural circumstances. All this artistic heritage values belong to the types, styles and different characters, creators and bearers of which were mainly indigenous inhabitants, Albanians, but also of ethnicities that as rulers or conquerors were settled in this area. This diversity, which was part of the mosaic of the history of the Albanian people, pretended mobile and stationary monuments, from the prehistoric ancient (pagan) period, the late antiquity, the middle Ages (Christian, catholic and orthodox) and new-age period (especially Christian and Muslim)²⁶.

This material and spiritual culture heritage of Kosovo, Albanians inherited from the distant and near pasts, incorporates in itself: the historical past of the Albanian nation-people in Kosovo; the traces of pre-urban and urbane fortified Illyrian-Albanian localities; architectural complexes of Albanian towers and houses, and other buildings of religious worship, education, health, science, art, etc.²⁷

Crimes against material and spiritual culture of Albanians in Kosovo by Serbian occupying power, in peace time were committed, hidden under the guise of “realization” of urban and spatial plans in the territory of Kosovo.

Under this hidden method, direct result of "implementing" Serbian laws, the Serbian occupation authorities: destroyed many important cultural, architectural, historical, religious and national objects, in the whole territory of Kosovo; destroyed many Illyrian-Albanian archaeological sites; desecrated, dam-

²⁵ For more information see: KIERNAN, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur*, Yale University Press, New Haven and London, 2007.

²⁶ DRANCOLLI, *Destruction of Albanian cultural monuments in Kosovo*, in *Research Challenges of War Crimes in Kosovo 1998-1999 (Summaries from the International Conference, organized by the Institute for Research of Crimes of War, on 16 December 2011 in Pristina)* Pristina, 2013, p. 184, 185.

²⁷ UKAJ, *Approximation of Material and Spiritual Values of Culture (cultural genocide - culturecide)*, cit., p. 100.

aged and destructed many sculpture monuments of eminent personalities of culture, science and art of the Albanian nation-people, changed the names of streets and institutions; destructed books and manuscripts, etc. and other perfidious and public acts, with the aim of vanishing of the traces of Kosovo Albanian culture²⁸.

These actions were taking place in unprecedented scale, particularly in 1998-99 during the war in Kosovo, where many important cultural buildings suffered, such as: The building of the Albanian League of Prizren, The tower (kulla) of Peja League, old bazaars (in Gjakova, Peje and Vushtrri), old towers (in the region of Dukagjin, many mosques were destructed, etc.). Taking the documentation and exhibits from museums was a special form of destruction of the Albanian culture in Kosovo²⁹.

As a result of facts arising from Kosovo and in many places in the world, against the cultural heritage and certain groups, we consider that the ICC when judging crimes under its jurisdiction, shall take in to the consideration actions committed against cultural heritage, because the destruction of a group culture can not be separated from other crimes that are under its formal jurisdiction. On the other side, the practice has shown that in most cases the destruction of the cultural values of a group is motivated the intention to destruct the identity and existence of the group. However, non-inclusion of "cultural genocide" in the SR, legally prevents direct investigations, this as a result of determination that the prosecutors must prove the facts linked with the formal elements of the crime, of genocide in this case.

Accordingly, the "cultural genocide" or acts of destruction of the culture of a group, shall be "related" closely to the trials of the crimes by the ICC³⁰ and regardless of whether it is not included as punishable act, should at least be part of the ICC prevention policy.

3. Prevention of Genocide

Genocide, is considered as the most serious crime as "crime of crimes", and

²⁸ *Ibid*, p. 103.

²⁹ For more about the destruction of monuments and Albanian heritage in Kosovo, see UKAJ, *Approximation of Material and Spiritual Values of Culture (cultural genocide - culturecide)*, cit., *passim*; DRANCOLLI, *Destruction of Albanian cultural monuments in Kosovo*, cit., *passim*; DRANCOLLI, *Destruction of Albanian heritage in Kosovo*, KMLDNJ, Pristina, 2007; BAJGORA, *Serbian Barbarism Against Islamic Monuments in Kosovo (February '98 - June '99)*, Pristina, 2001.

³⁰ The International Tribunal for crimes in the former Yugoslavia, in the case of Srebrenica has performed such action.

continuously is discussed about its punishment, but less about its prevention. Today, the focus is increasingly on finding practical ways to prevent genocide. An important step in this direction was made in 2004, with the appointment of the Special Adviser by the Secretary-General of the United Nations (UN)³¹, primary responsibilities of who are: a) to collect existing information, in particular within the United Nations system, on massive and serious violations of human rights and international humanitarian law on the basis of ethnicity and race, which if not prevented or halted, might lead to genocide; b) to act as an early warning mechanism for the Secretary-General, and through him to the Security Council, bringing attention to possible situations that may result in genocide; c) to make recommendations to the Security Council through the Secretary-General on actions to prevent or stop genocide; d) to liaise with the UN system activities to prevent genocide and work to increase the capacity of United Nations to analyze and manage information about genocide or related crimes³².

These competences, to a special authority have created the possibility of intervention in the early stages in order to prevent genocidal acts or similar practices, as are the actions of destruction of monuments and cultural values, intending to destructing of a particular national, ethnical, racial or religious group. We consider that this does not preclude, but instead opens the debate on the replenishment and clarification of the formal elements of the crime of genocide.

In various international forums that address the topic of prevention of genocide, it is concluded that the use of military force remains a challenging problem³³. Therefore, taking into account the inherent challenges and limitations of military interventions, it is crucial to develop political and diplomatic means to intervene, for consistent monitoring, in order to intervene on time and with non-military measures to prevent genocide³⁴.

In addition to the Special Adviser of the UN Secretary-General, in order to

³¹ For first time in 2004 the former UN Secretary General Kofi Annan has appointed the special advisor for the Prevention of Genocide. Mr. Annan, on 12 July 2004, addressed a letter to the President of the Security Council. In the annex to this letter specified the responsibilities of the Special Adviser.

³² *Ibid.*

³³ Such an approach was also part of the conclusions of the 3rd International Forum entitled "*Prevention of Genocide*", held on 4-6 April 2011 in Bern, Switzerland, where the authors of this study participated the event.

³⁴ The use of force, in accordance with international law, is consistently limited as a last resort, but cannot be excluded in fact the military option becomes necessary when other measures do not give effect to a particular case. In the case of Kosovo, NATO military intervention was needed, to stop crimes against humanity, genocide and ethnic cleansing against Albanians.

prevent genocide, the role of international mechanisms can be very large and divers, in particular the role of the ICC. It is rightly held that the ICC today is considered an added value in the field of prevention of genocide, as a permanent international Court, which could deliver a clear message to potential offenders anywhere in the world. In this regard, it is very important the communication between the ICC with various countries and other international mechanisms with the aim to prevent the genocide.

The role of the ICC in preventing genocide and acts against the culture of the group, among others could be:

- a) Efficient trial of those responsible for the crime of genocide and other acts against cultural identity of the group;
- b) Consistent tracking and monitoring of countries that present a potential risk for committing crimes;
- c) More efficient cooperation with countries that have ratified the Statute;
- d) Cooperation with other countries, based on special agreements that may be achieved;
- e) Cooperation with non-state actors - with international and regional organizations in order to obtain information;
- f) Analysis of the early warning reports obtained from various sources and their verification, aiming timely intervention. In this regard, the role of the ICC prosecutors is very important, they may act in an early phase, by initiating of the investigation “*motu proprio*”, when it is suspected that crimes could be committed, in countries that are under the jurisdiction of the ICC³⁵; and
- g) Encouraging member countries and other countries, that beside cooperation with ICC, to create internal mechanisms to prevent genocide and other crimes.

4. Conclusions

Acts of the crime of genocide, the interpretation of elements of crime, trial and its prevention, still remain a challenge of international justice. The ICC as a Court having jurisdiction to try genocide has a very important role as an international authority with permanent nature.

The proceedings of the ICC in relation to the crime of genocide are challenged by several factors.

³⁵ Article 15, § 1, of RS states: «*The prosecutor may initiate investigations “proprio motu” on the basis of information on crimes within the jurisdiction of the Court.*». In addition Article 53 of the RS foresees the conditions of initiating the investigation.

Firstly, the scope of jurisdiction of the Court remains a challenge, in contrast authority and confidence of the ICC is undermined. Secondly, international cooperation between countries that facilitate the work of the ICC, and especially the creation of national mechanisms to prevent genocide remain essential. Thirdly, a remaining challenge to the ICC is the interpretation of the elements of genocide, and in particular the treatment of genocidal acts against cultural heritage of a particular national, ethnical, racial or religious group.