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THE CRIME OF GENOCIDE

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Abstract

This paper is a comparative analysis of the crime of genocide in relation with other similar crimes, for example, some crimes against the person (homicide, bodily harm, illegal deprivation of liberty), the so-called "terrorist attacks" or crimes against humanity. Such an analysis underlines several shortcomings of the current definition, the first one being that the delimitation of genocide from all these crimes has as unique criterion a subjective element which is variable and impossible to verify, consisting of the wish to destroy a certain group of people. At the same time, the paper brings some possible corrections.

Keywords: *Homicide, Terrorist attack, Crimes against humanity.*

1. Introduction

In compliance with Article III of the Convention on the Prevention and Punishment of Crime of Genocide (UN, 1948), the state parties agreed to punish the following acts: a) genocide[1]; b) conspiracy to commit genocide; c) direct and public incitement to commit genocide; d) attempt to commit genocide; e) complicity to genocide.

Romania ratified this Convention by Decree no. 236/1950, and, by Decree no. 212/1960 the crime of genocide was introduced in the Criminal Code from 1937 (art. 231[2]), and the definition was taken from Article II of the Convention.

In the current Criminal Code (Law no. 286/2009) the crime of genocide is regulated in art.438 Criminal Code in three type-variants and an aggravated one.

In the first type-variant [art. 438 par. (1) Criminal Code], the crime consists of committing, with the aim to destroy, totally or partially, a national ethnic, racial or religious group one of the following acts: a) killing members of the group;

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[1] The word *genocide* comes from the Greek root *génos* (peoples, species) and the suffix *-cide*, which derives from the Latin word (homicide, massacre). This word was circulated by Raphaël Lemkin, who is considered the main author of the Convention on the Prevention and Punishment of the Crime of Genocide.

b) causing serious bodily or mental harm to the 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.

The aggravated variant [art. 438 par. (2) Criminal Code] applies when the acts stipulated in par. (1) are carried out in wartime.

In the second type-variant [art. 438 par. (3) Criminal Code], the crime consists in conspiracy to commit genocide.

In the third type-variant [art. 438 par. (4) Criminal Code], the crime consists in direct and public incitement to commit genocide.

In the previous Criminal Code (from 1968) the crime of genocide was stipulated in art. 357, in two type-variants and an aggravated one. Compared with the previous text, the current text includes a new type-variant [art. 438 par. (4) Criminal Code]. At the same time, the first type-variant [art. 438 par. (1) Criminal Code], was subject to three changes, as follows: the word "community" was replaced by the word "group", which is used in art. 6 from the Statute of the International Criminal Court (ICC Statute); at let. b), the requirement that bodily or mental harm should be serious was waived (as in the new Criminal Code there is no longer the crime of serious bodily harm; this crime was replaced with bodily harm; and at let. c) is stipulated that group destruction may be total or partial.

2. Legal and material object

2.1. Legal object

The crime of genocide protects the right to existence of national, ethnic, racial or religious groups against acts that would lead to their abolition, in part or in full.

As stated in Resolution 96 (I) adopted by the UN General Assembly on 11 December 1946 genocide is a crime against humanity, violating the law of nations and contrary to the spirit and aims of the United Nations[2].

2.2. Material object

The crime of genocide has a material object which consists in the body of the individuals that were killed, harmed or abducted.

3. Subjects

3.1. Active direct subject

In the crime of genocide the active direct subject is not named, meaning that any individual who meets the general conditions required to be liable under the criminal law, may be author.

[2] United Nations General Assembly Resolution, 1946 96 (I), The Crime of Genocide, [Online], Available: http://archive.adl.org/education/curriculum_connections/spring_2005/spring_2005_lesson2_ resolution.htl

However, the dominant opinion in the doctrine is that genocide and the other international crimes *(delicta juris gentium)* are "collective crimes"[3], committed by one group against another and which have a discriminatory dimension, being determined by political, racial or religious reasons.

Another well-known opinion is acknowledged in art. 211-1 from the French Criminal Code, which says that the acts of genocide be carried out based on a prior agreement, on "a concerted plan", which means, basically, that the acts of genocide may be committed only by an organized criminal group[4].

In the international law doctrine there is also the opinion that, like in the case of the other international crimes, genocide may be committed only by individuals who are leading a state (heads of states, governmental officials) or by leaders of groups or organizations who took the power. This opinion is explicitly expressed in some UN communications[5] and clearly comes out of the disposition from art. 7 § 2, let. a) of the ICC Statute. Making reference to the requirement that crimes against humanity should be committed within a generalized and systematic attack, this Statute stipulates that the attack has to take place "while enforcing or supporting the political view of a state or organization".

3.2. Passive subject

The crime of genocide has both a principal passive subject as well as a secondary passive subject.

The principal passive subject is the victim-group, subject to acts of genocide, which can be any national, ethnic, racial or religious group.

By "national group" we understand a nation, a human community based on the unity of language and consciousness (group member have a common history and culture). There is the opinion[6] according to which the word nation does not coincide with the word peoples, which is broader and refers to all the citizens of a state, including neutralized people. But, this distinction does not appear in the international documents where the concepts of nation and peoples are considered synonyms.

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[3] Bussy Florent, The crime against humanity, a critical study, Témoigner, Auschwitz Foundation International Quarterly, No 115/2013 (§ 8), [Online] Available: https://temoigner.revues.org/528.

[4] French Criminal Code, Book II ("Felonies and misdemeanours against persons"), Title I ("Crimes against humanity and against persons"), Subtitle I ("Crimes ahainst persons"), Chapter I ("Genocide"), [Online], Available: https:// www.legifrance.gouv.fr/ affichCodeArticle.do?cidTexte=LEGITEXT000
006070719&idArticle=LEGIARTI000006417532&dateTexte=&categorieLien=cid

[5] Nations Unies, La prévention du génocide, [Online], Available: http://www.un. org/fr/pre ventgenocide/rwanda/about/bgpreventgenocide.shtml

[6] Del Vecchio, G., Lessons on juridical philosophy, Europa Nova, Publishing House, 1995, p. 275.

"Ethnic group" means a human community based on ethnic unity (a tribe, a family), respectively a community made up of individuals who are related and have a common descent.

"Racial group" means a group of people who have the same basic biological and anthropological characteristics (skin colour, hair colour etc.).

"Religious group" means a group of people who share and practice the same religion.

Secondary passive subject is the person killed, injured etc.

4. The first type-variant

4.1. Objective element

In the first type-variant [art. 438 par. (1) Criminal Code], the objective element is accomplished in five different alternative ways, namely: a) killing the members of the group; b) causing serious bodily or mental harm to the 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.

"Killing" (letter a) means the act which causes death. Although the law does not specify, the jurisprudence unanimously believes that killing is a crime (homicide) only if two conditions are met: 1) the offender caused the death of another person (this requirement is deduced from the fact that the law distinguishes between homicide and suicide); 2) the author has acted unlawfully, without any right,(the act is not an offense, if the author was entitled or obliged to kill – for example, in the case of self-defence, or soldiers fighting to defend the country etc.).

Unfortunately, the doctrine does not provide a clear answer on the question of knowing what is meant by causal act for the death of a person. On the one hand, it argues that the crime of murder always has a material object, which consists of the victim's body – thus, the act is considered causal only if the offender acted, directly or indirectly, on the victim's body, when his act was the physical cause of death of the victim. On the other hand, the doctrine argues that the author is responsible for the victim's death, whenever his action constituted a sine qua non condition of the result (the theory of the equivalence of conditions) – which means, on the contrary, that it is not necessary for the author to have acted on the victim's body, either directly (by hitting, strangulation etc.) or indirectly (through the use of a trained animal, a poisoned food etc.), as it is sufficient that his act can be considered a legal cause of the victim's death.

In the absence of a common point of view, the jurisprudence promotes the most diverse solutions. However, most courts have adopted the theory of equivalence of conditions, whereby they retain the existence of an offense of

homicide both when the act consisted of physical violence, provided this was the cause of natural death of the victim and when the act can only be considered a legal cause of the victim's death.

More specifically, they believe that there is a legal cause of the result (death of the victim) in two sets of cases: 1) when the act consisted of physical violence which led the victim to commit suicide or to behave dangerously so that to lose the life (for example, when under threat of rape, the victim decided to commit suicide; or when, under threat of death, the victim tried to save himself/herself, climbing a wall, where he/she fell from, resulting in death); 2) when the author exposed the victim to an external and predictable threat (*e.g.* after raping the victim, the author has abandoned her on the field, unconscious, in winter and the victim died due to frost; or after robbing the victim, the author abandoned him/her, unconscious, at night time, in the middle of a road where the victim was hit and killed by a truck, that was driving regular).

However, we should mention that these are not the only cases when the act appears as a legal cause of the victim's death. In addition, there are two other series of such cases, which, unfortunately, in most legal systems, are not included in the group of offenses against life, but are provided separately (in other groups of offenses), namely: 1) when the offender fails to help the victim in danger of death; 2) when the offender prevents saving the victim who is in danger of death.

Nonetheless, discussions are continuing on these issues, and in some doctrines (German, Italian, etc.) there is already the prevailing opinion that the crime of homicide can be committed both by omission (especially when the author has the legal or conventional obligation to intervene to save the victim – for example, if the paramedics fail to provide first aid for the injured or the swimming instructor fails to jump and save a student from drowning) and by preventing rescue measures (*e.g.* the author locks the victim in the house which is under fire or hinders the emergency call, in case of an accident).

By "bodily or mental harm" (letter b) we mean, according to the Romanian legislation (art. 194 Criminal Code, named "bodily harm"), an act of battery or other violence that caused any of the following consequences: a) disability; b) injuries or damage to health which needed more than 90 days of medical care; c) aesthetic severe and permanent injury; d) abortion; e) endangering a person's life.

Like in the case of result which consists in the victim's death, the result of bodily harm can be caused not only by physical violence, but also psychological violence (e.g. the author scares the victim, causing imbalance and hitting him/her against a hard body) or by exposing the victim to an external and predictable threat (*e.g.* the author digs a hole in the road and leaves it unmarked at night, thus causing the fall and serious injury of a person).

The phrase "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" (letter c) raises discussions.

This phrase has basically the same meaning as the term extermination, which, according to Article 7 § 2 let. b) ICC Statute describes the intentional act to impose conditions of life like deprivation of access to food and medicines, with the aim of involving the destruction of the group. But the document entitled Elements of Crimes[7] notes that by extermination one can understand massacre (slaughter) of the group members – which means that the facts of inflicting on the group conditions of life calculated destructive merges totally with facts of homicide and therefore, their separate provision is unjustified.

Providing them separately would be justified only in one case, namely whether we would proceed to distinguish not only between words but meanings, meaning by "killing" strictly those facts that appear as physical causes of the result (death of the victim). In this case (and only this) the terms mentioned may be used to describe the other acts that occur as legal causes of the result.

But, even in such circumstances, it is doubtful to punish as genocide the acts of inflicting on the group destructive conditions of life. If such an act is committed while the victims at the disposal of the author (authors), being seized or imprisoned, most likely, the courts will consider the existence of the crime of torture in its aggravated form (torture that resulted in the death of the victim) – due to the reason that the facts overlap both in objective and subjective terms, as long as they both involve a reason for discrimination (on any grounds: race, ethnicity etc.). And, if the victims had freedom of movement, most likely, nobody will be punished, considering that it comes from a lack of diligence on the part of the authorities, namely an act of negligence, incompatible with the purpose of physical destruction, considered to be specific to the crime of genocide.

Therefore, the only solution remains, finally, that of abandoning what is provided in Art. 438 par. (1) let. c) of the Criminal Code, as considered unnecessary.

By "imposing measures to prevent births within the group" (letter d) we mean the adoption of mandatory decisions (provisions) under which victims are subjected to castration or sterilization operations or abortion.

In this way genocide does no longer consists in acts of self-infliction, but in incitement, respectively an urge (order), official or unofficial, addressed to other people to subject members of the victim group to certain operations (removal of glands or sexual organs, tubal ligation etc.), which, being carried out without the consent of the subjects, fall under criminal law as acts of illegal deprivation of liberty, bodily harm and, ultimately, "acts of torture"[8].

Since the text refers to imposing measures to prevent births, we must stress that those carrying out such measures cannot defend themselves, claiming that they were threatened with punishments or other reprisals – this because the crimes

[7] Elements of Crimes, [Online], Available: https:// www.icc-cpi.int/ NR/ rdonlyres/ 336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ ElementsOfCrimesEng.pdf.

[8] Rassat, M.-L., Droit pénal spécial. Infractions des et contre les particuliers, Dalloz, Paris, 2006, p. 347.

under international law, as genocide, the scope of incidence of cases that removes guilt was severely restricted. In this regard, we remind you that under Article 31 § 1 let. d) ICC Statute the constraint may exempt from liability only if they are the result of a death threat or a serious, ongoing or imminent infliction on own or another physical integrity. Or, we can recall that the prohibition of torture is absolute and that under Article 2 § 2 of the Convention against torture and other punishments or cruel, inhuman or degrading (UN, 1984), one cannot invoke superior orders or of a public authority to justify torture.

By "forcibly transferring children belonging to a group to another group" (letter e) we mean kidnapping, forcible taking from the group they belong to, of persons who are under 18, and obliging them to live in another group. In this way genocide consists in acts of illegal deprivation of liberty committed against minors belonging to the same national, ethnic group etc. We are not interested if the transfer is carried out at once or in stages[9].

Because these five facts are provided as alternative ways, there will be one crime of genocide, even if the author commits all these facts.

4.2. Issues related to the objective element

In connection with these five facts there are still unclear number of issues which require a common approach, given the obligation of States Parties to harmonize their legislation (this obligation is even mentioned in the Preamble of the Rome Statute, which states that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes, the international Criminal Court's jurisdiction being complementary to national jurisdictions).

A. The first question is to know whether genocide is a simple or complex crime.

It is difficult to give a categorical response to this question, as long as the notion of complex crime does not have the same meaning in all doctrines: in some doctrines (*e.g.* the French one), it is considered that a crime is complex when its objective element comprises a plurality of material acts, identical or different[10]; in other doctrines (Italian, Romanian etc.), it is considered that a crime is complex when its content includes, as a constituent or as an aggravating circumstance, an act which is itself a crime (such a definition is enshrined in Article 84 of the Italian Criminal Code and Article 35 of the Romanian Criminal Code).

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[9] Stănoiu, R.M., Genocide, in "Theoretical Explanations on Romanian Criminal Code'' by V. Dongoroz et all, Special Part, vol. IV, Romanian Academy Publishing House, Bucharest, 1972, p. 931; Antoniu, G., Genocide, in "Criminal Law Code, commented and annotated" by T. Vasiliu et all, Special Part, vol. II, Scientific and Encyclopaedic Publishing House, Bucharest, 1977, p. 542.

[10] Desportes, F., Le Gunehec, F., Droit pénal général, Economica, Paris, 2006, p. 416; Bouloc, B. Droit pénal général, Dalloz, Paris, 2005, p. 213.

The difficulty, however, also has another cause, namely that relevant international texts were designed to prevent the formulation of a categorical answer, even when the notion of complex crime would have the same acceptation everywhere.

If the notion of complex offense would be used exclusively with the first acceptation, the above mentioned difficulty would remain because the document entitled Elements of Crimes. On the one hand, this document establishes that any of the five acts (ways) can have only one victim – which would lead to the conclusion that genocide is a simple crime, wherein the objective element consists of a single material act. On the other hand, this document introduces a new requirement (which is not listed in Article 6 of the ICC Statute), namely that the act is part of a series of analogue objective events – which would lead to the conclusion that genocide is, on the contrary a complex crime, wherein the objective element consists of a plurality of material acts, identical or different. However, this latter conclusion may also be challenged, noting that the explanation given to the phrase "within a" (p. 2), the same document alleges that the series must be preceded by "initial acts". Or, besides the fact that those "initial acts" are not described (stipulated) anywhere, which rejects the principle of legality *(nullum crimen sine lege),* one can observe that since the text does not specify, it means that the series may be limited to the act as such (homicide, harm etc.) and to an act of moral preparation (an arrangement, a plan etc.) and, in such circumstances, we cannot talk of a plurality of material acts.

If the notion of complex crime would be used exclusively with its second acceptation, the above mentioned difficulty would remain, because of the definition itself (Article 6 of ICC Statute). Because the facts described in the definition are not all provided as stand-alone crimes, genocide can be characterized as a complex crime only in the first two ways (letters a and b) – because only in these ways the text allows to conclude that genocide absorbs, where appropriate, an offense of homicide (Art. 188 of the Criminal Code), first degree murder (Art. 189 of the Criminal Code.) or bodily harm (Art. 194 of the Criminal Code). On the other hand, in the other three ways (letters c, d, e) the text rather describes some modus operandi (inflicting on the group destructive conditions of life) or some particular cases of bodily harm and/or illegal deprivation of liberty (preventing births, forced transfer of children) – which leads to the conclusion that in these ways, genocide is, on the contrary, a simple crime.

However, we may notice that, in principle, the crime of genocide is a complex crime, regardless of the significance attributed to the notion of complex crime.

However, it would be desirable that the doctrine clarify the content of this notion (in our opinion it is possible to merge the two views on the notion of

complex crime, bringing corrections to each of them) and, at the same time, reformulate the definition of the crime of genocide so that the text should make better reference to the conditions of this crime, mainly the fact that genocide absorbs, finally, several identical or different crimes.

B. The second issue is to know what the specific of the crime of genocide is, which the element gives individuality to this crime, making it different from both the absorbed crime (homicide, bodily harm etc.) and the other similar crimes.

On this issue, the unanimous answer given by the doctrine is that the specificity of genocide lies in the existence of a "special dol"[11], which implies that the author (authors) act with a particular, well-defined purpose, namely to destroy, in whole or in part, a national, ethnical, racial or religious group.

However, in our case, we have great reservations about such an answer.

The main objection is that the distinction between a crime and another cannot rely on a volatile and uncertain element, as any subjective element is (purpose, motive etc.). To respect the principle of legality *(nullum crimen sine lege certa)*, it is imperative that the distinction between a crime and another be based on objective, stable and verifiable elements. Or, the purpose is, rather a subjective, unstable and non-verifiable element which can only be deduced, taking into account objective circumstances of the act – for example, in the case of genocide, the purpose is deduced from two alternative circumstances explicitly stated in the Elements of Crimes, namely: either from the fact that the act is part of a series of analogue, objective events; or from the fact that the act has, in itself, the ability to cause mass casualties (which means that the author uses the means of mass destruction: bombs, grenades, automatic weapons, chemical or biological weapons etc.).

But in relation to such circumstances, it is impossible to distinguish between genocide, homicide, a terrorist attack or other crimes against humanity.

For example, in relation with such circumstances we cannot distinguish between genocide, which is a crime against humanity and serial killings, which is a crime against the person – this because from the perspective of the group the victims belong to any act of killing is equivalent with its total destruction and the risk of its total destruction proportionally grows with the number of victims. As a result, if the author has continued to kill, it can be assumed with sufficient reason, that he acted with intent to destroy the group itself.

Or, in relation with such circumstances, we cannot distinguish between genocide (Art. 438 Criminal Code), which is a crime against humanity and bombing a community (Art. 402 of the Criminal Code), which is a crime against the state. Theoretically, this distinction is based on the different purpose of the act: in the case of genocide the purpose would be to destroy a human group; in the case of an attack the purpose of the crime would be to destabilize state structures.

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[11] Olivier de Frouville, Droit international pénal, éditions A. Pedone, 2012 – Extrait de l'ouvrage, p. 87, [Online], Available: http://www.pedone.info/dipenal/partie2.pdf.

However, basically, we find that in both cases the purpose is deducted from the same two circumstances, namely either from the circumstance that the act is part of a series of objective and analogue events or from the fact that the act has, in itself, the ability to cause large numbers of casualties. Or, the mere fact that from the same circumstance we can draw two different purposes proves quite clearly, we think, that only in abstract theory, the mentioned distinction is based on a different purpose; in reality, such a distinction is based on other unclear and arbitrarily set of criteria.

However, it is not enough to notice that the purpose cannot serve as a distinction criterion between genocide and other similar crimes.

Moreover, we have to notice that the confusion related to the crimes against humanity, including genocide, is amplified the existence of the so-called "attacks/terrorist attacks", which seem to be an intermediary category of violent crimes, situated between crimes against person and crimes against humanity, and which are usually included in the group of crimes against the state, being considered that their purpose would be to hinder or prevent the exercise of the state power by generating panic.

We have already shown that the distinction between these three categories of crimes is difficult or even impossible. Therefore, in this context, we limit ourselves to observe that provision related to terrorist attacks as standalone crimes is unjustified.

In this respect, several arguments may be invoked, such as: the fact that the main focus of numerous international conventions relating to preventing and combating terrorism was to develop judicial cooperation among states and to ensure more effective protection of persons against violence and not that of establishing a new group of crimes; the fact that the word "terrorism" does not designate a physical act, but refers to a quasi-general effect of violence, namely to intimidate, to inflict fear – which explains why, despite the efforts (there were formulated more than 100 definitions of these crimes), so far, there is no universally accepted definition of the alleged "terrorist crimes"; the fact that violence can occur at any level and in any field (as proven by the numerous classifications of terrorism: individual terrorism, organized terrorism, state terrorism, political terrorism, economic terrorism, cyber terrorism etc.) – which confirms that the ancient view that all crimes can be summarized into two categories: crimes committed by fraud and violent crimes *(aut vi aut fraude delinquitur)*.

Finally, against the provision of crimes of terrorist attacks, one can argue that, unlike fraud, violence acts can be committed only against an individual or group of individuals, and not against the state or another legal body (the legal entity cannot be hit, poisoned etc.) - therefore, we repeat, that does not justify the existence of a third group of crimes of violence, situated midway between crimes against the person and crimes against humanity.

C. The third issue is to know whether and how the provision related to genocide as separate from other crimes against humanity is justified.

The answer to this question depends on the answer to another prior question, namely to know what are the similarities and differences between the crime of genocide and the other crimes against humanity.

But this preliminary issue is difficult to clarify because of a lack of rigour of the texts.

It would be logically that genocide and the other crimes against humanity have in common the fact they are all crimes of violence, of great seriousness, committed by a group against another group and, for this reason, they always cause a large number of victims. Since we assume that genocide is the most serious crime against humanity, it would be logic that the name "genocide" make reference to, as the very etymology of the word indicates, crimes against life, which are the most serious crimes of violence.

In fact, however, it appears that the five acts described in article 6 from ICC Statute ("The Crime of Genocide") are found, explicitly or implicitly, in Article 7 from ICC Statute ("Crimes against humanity") – which leads, from the very beginning, the idea that genocide is confused with the crimes against humanity.

However, this idea could be challenged, showing that the distinction between genocide and the crimes against humanity remains possible, if we consider the essential requirements and, more specifically, that in the case of genocide, the text (article 6 ICC Statute) stipulates that the act be committed in order to destroy a particular national, ethnic, etc. group, while in the case of crimes against humanity, the text (article 7 ICC Statute) stipulates that the acts be committed as part of a widespread or systematic attack directed against any civilian population.

We have already pointed out, against this idea, that the purpose cannot be a criterion for distinguishing between a crime and another. But to fully answer, we must note that acts of genocide are also committed "as part of a widespread or systematic attack". The definite proof, in this regard, is the fact that the purpose to destroy a group, which would be specific to genocide, is deducted, as shown in the Elements of Crimes, either from the fact that the act is part of a analogue of objective analogous events, or from the fact that the act is, in itself, the ability to cause large numbers of victims. Or, if we consider that acts of genocide are, essentially, acts of violence, we can easily understand that committing such acts in series or against a large number of people equals a widespread or systematic attack.

However, to justify the distinction between genocide and other crimes against humanity, some authors[12] tried to base this distinction on grounds of the passive

[12] Crişu-Ciocîntă, A., Crimes against Humanity (Comments), in „New Criminal Code. Comments on articles" by T. Toader et all, Hamangiu Publishing House, Bucharest, 2014, p. 655; Gorunescu, M., Crimes against Humanity (Comments), in "New Criminal Code, commented" by V. Dobrinoiu et all, vol. II, Special Part, Universul Juridic Publishing House, Bucharest, 2012. p. 1210.

subject of the crime, noticing that in the crime of genocide, the principal passive subject is "a national, ethnical, racial or religious group", while in other crimes against humanity, the principal passive subject is the "civilian population" respectively all the persons that are not involved in fighting or other military missions, and who enjoy international protection under the Geneva Conventions and additional protocols.

Therefore, it is necessary to notice that the passive subject cannot serve as a criterion for distinction between genocide and crimes against humanity. As it becomes evident, at a closer look, the so-called "civilian population" which is not a distinct passive subject but is part of a particular national, ethnic, racial or religious group – which means that we cannot exclude the existence of crime genocide, because the victims are only civilians (non-combatants).

The distinction between genocide and other crimes against humanity is also problematic. The relevant texts do not establish any objective and verifiable criteria to allow this distinction, and, under these conditions, they do not take into consideration, once again, both the principle of legality *(lex certa),* and the right to non-discrimination.

A reform of the relevant texts cannot be limited to establishing a clear criterion for distinguishing between genocide and other crimes against humanity. In addition, it has to establish the community elements (similarities), under which, crimes against humanity, including genocide, can be distinguished from crimes against persons or other crimes of violence.

Therefore, in our opinion, two other measures are required.

Firstly, it would be necessary that genocide and other crimes against humanity be redefined, so that they consist not only in the commission but also in the participation, in any form (co-authorship, instigation or complicity) to committing serious crimes of violence - which shows clearly that, unlike the crimes against the person, which can be committed by a single individual, crimes against humanity, including genocide, can be committed only by a group of individuals.

Secondly, it would be necessary to set a threshold, respectively a minimum number of victims, strictly necessary for the existence of a crime of genocide or other crimes against humanity. Securing such a threshold, whether it would be numerical or percentage, would facilitate the distinction between crimes against humanity and other crimes of violence and at the same time would ensure prompt action of the international community to end the conflict (it is well known the fact that, because of late intervention of the international community, Rwandan genocide victims numbered over 800,000).

4.3. Immediate effect and causality relation

Since genocide is a complex crime it presents both a main and a secondary effect.

The main immediate effect consists in a state of danger to the existence of a national, ethnical, racial or religious group.

The secondary immediate effect coincides with the immediate effect of the absorbed crime.

The causality relation has to be proved only when the absorbed crime is an effect crime (homicide, bodily harm).

4.4. Subjective element

Currently, the main idea in the doctrine is that genocide is committed only with direct intention, characterised by the aim to destroy, in whole or in part, a national, ethnic, racial or religious group.

We do not share this opinion. In our opinion, it is less important if the author acted with direct intention (special dol), pursuing the destruction of the group, or with indirect intention (possible dol), accepting the destruction of the group if it leads to personal advantages (occupying a territory, access to natural assets etc.). What is important is only that the author acted consciously and voluntarily, acknowledging that their act endangers the existence of the group.

5. Other variants

5.1. Aggravated variant

According to art. 438 par. (2) Criminal Code, genocide is severely punished (only with life imprisonment) if the acts stipulated in par. (1) are committed in wartime.

According to art. 185 Criminal Code, wartime means not only the period of war but also the period of conscription, which means that the aggravated variant applies only if the acts of genocide are committed between the starting and the ending of the conscription period.

But the existence of this aggravated variant is not justified. In this sense, we can make several observations.

First, we see that the aggravation of the sentence is meaningless, since genocide is the most serious crime against humanity that can be punished with the most severe punishment (life imprisonment), regardless of whether committed in time of peace or wartime.

Secondly, we may notice that the acts of genocide are always amid major conflicts between two or more groups of people so that it is at least wrong to distinguish between genocide committed in peacetime and a genocide committed in wartime.

Thirdly we notice that with such a distinction, it is claimed, mainly, that the genocide committed in peacetime would be less serious than genocide committed in wartime, which is an absurdity. The real seriousness of the genocide acts cannot be determined based on whether or not an official statement on the state of war was made, but must be determined in relation to other criteria, completely different, such as: the modus operandi and the means of committing the crime, the

consequences, the number of victims, the degree of culpability of the author (authors) etc.

Finally, we may notice that with such a distinction, it is also claimed that the state of war would allow the author (authors) to escape, which is another absurdity, because, as the jurisprudence of international criminal courts proves, acts of genocide are often committed by representatives of the authorities themselves, declaring war in order to justify genocide.

Thus, we may give up on this variant, as meaningless.

5.2. Type variants stipulated in art. 438 par. (3) and (4) Criminal Code

According to the dispositions of art. 438 par. (3) and (4) Criminal Code, it is considered genocide and conspiracy to commit a crime, as well as direct and public incitement to commit genocide.

These dispositions are questionable, even at first sight, taking into consideration that they require that different acts than those under art. 6 ICC Statute, and with less seriousness, are called genocide.

At a closer look it becomes evident that these dispositions are not justifiable.

It is not justifiable the existence of a text to incriminate conspiracy to committing genocide since the action to set up a criminal group (art. 367 Criminal Code) stipulates that any agreement to commit a crime is punishable.

It is not justifiable, either, the existence of a text to incriminate public instigation to commit genocide since the crime of public instigation (art. 368 Criminal Code) stipulates that any act of public incitement to committing a crime is punishable.

These texts are not only useless, but even dangerous, since they offer a bad example, which may inspire their continuous multiplication, until we reach the completely absurd situation where a crime of public incitement or criminal conspiracy is annexed to each intended crime.

Apparently, the introduction of these texts was an obligation following from the ratification of the Convention to Prevent and Punish Genocide (UN 1948) and from the fact that, Article III imposes on the state parties to punish not only the acts of genocide but the related ones as well, among which we notice these two (conspiracy to commit genocide, direct and public incitement).

Therefore, we have to emphasize that article III of the above mentioned Convention cannot be used as an argument to justify the existence of the texts in art. 438 par. (3) and (4) Criminal Code. As is known, the international texts do not establish incriminations and therefore they need not be reproduced *ad litteram* in domestic legislations. Assuming the obligation to punish certain acts, each state assumes the obligation to ensure that, under its national law, those acts are crimes and are punishable, regardless of the title. Only in the event that, after verification, it is noticed that national law does not incriminate these acts, either explicitly or implicitly, it would become necessary to introduce one or more new

incriminations. But even then, the state should not be limited to reproduce the names and descriptions of those acts, as they appear in conventions; on the contrary, the state must undertake a transposition, an adaptation of international texts, so as to meet the rigors of criminal science and also to integrate naturally into the national legislation.

Since the Romanian law already incriminates by default, both conspiracy to commit genocide and public incitement to genocide, one had to notice that this law meets the requirements of Article III, letter b) and c) of the Convention, and any addition is superfluous.

6. Attempt

Attempted genocide is punishable under art. 445 Criminal Code and art. III, letter d) from the Convention to Prevent and Punish Genocide.

However, we must notice that the attempted genocide is possible only in one case, namely when the act is trying to destroy a human group by using bombs, lethal gas or other means of mass destruction.

In other cases the attempted genocide is not possible.

In this regard, it should be noted that genocide is a dual complexity crime: in addition to always absorbing another crime (murder, bodily harm, illegal deprivation of liberty), genocide typically involves a plurality of acts (crimes). In other words, in most cases, genocide absorbs a series of homogeneous or heterogeneous crimes. Besides the fact that some of the absorbed crimes cannot be attempted (*e.g.* attempt is not possible in continue crimes, such as illegal deprivation of liberty), we can see that there is no attempt in the case of plurality of crimes.

7. Conclusions

Relatively recent (1948), the crime of genocide is the most serious crime against humanity, which endangers the existence of a wholly human groups.

But unfortunately, the development of this incrimination was done somewhat hastily, without sufficiently taking into account the requirements of the principle of legality or other requirements of criminal science, therefore, it has several shortcomings.

Firstly, although it started from the premise that genocide is a complex crime, however, in defining this crime, any of the acceptation attributed to the concept by the criminal science as being a complex offense, has not been observed. As a result, the current definition prevent from formulating a definite answer to the question as to whether the crime of genocide absorbs another crime, and the question of whether the crime of genocide involves a plurality of acts (crimes).

Secondly, the distinction between the crime of genocide and other similar crimes was based on a subjective element, uncertain and unverifiable, alleging that

the specific of genocide is the purpose to destroying a national, ethnic, racial or religious group. Or, in relation with this element (purpose), it is impossible to distinguish between the crime of genocide and crimes against persons (homicide, bodily harm or unlawful deprivation of liberty), a terrorist attack or other crimes against humanity.

Thirdly, international documents describe genocide as a crime against humanity, but, the definitions of these crimes do not justify such a description, as they do not envisage any element related to community (similarity), according to which crimes against humanity, including genocide, make a distinct group. These definitions underline, at the most, another error, namely that genocide is mistaken with other crimes against humanity.

Therefore, in our opinion, in order to eliminate these shortcomings, more measures should be adopted, namely:

- crimes against humanity, including genocide, should be defined as participatory acts, in any form (co-author, incitement, complicity) to committing serious crimes against the person;
- to delimitate the acts (crimes) which have the objective element of the genocide from the acts (crimes) which have the objective element of the other crimes against humanity;
- to establish the minimum number of victims, absolutely necessary to claim the existence of a crime against humanity, including genocide;
- to limit the use of "terrorist attacks" to the area of criminal procedural law, being further used, exclusively to delimitate the cases that need international judiciary cooperation.