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THE HOLODOMOR OF 1932–1933 IN UKRAINE AND ITS QUALIFICATION AS GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (1948)

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The article explores the Holodomor of 1932–1933 and its qualification as a crime of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948).

Currently, there is a lack of research on the legal assessment of the Holodomor that could support its recognition at the international level. Additionally, the legal mechanisms for rehabilitation and compensation for the moral and material damages suffered by the victims of the genocide and their descendants remain insufficiently developed.

In fact, Ukraine finds itself in a situation where it alone bears responsibility for criminal actions against its citizens during the specified periods. At the same time, the Russian Federation, which is the successor to the USSR, is trying to rehabilitate J. Stalin, the main perpetrator of the genocide. This state of affairs raises the question of the legal responsibility of the Russian Federation for the genocide of Ukrainians.

An interesting aspect is the very emergence of the term "genocide" in international law and the legal field as a whole. The first to formulate the concept of "genocide" in jurisprudence was the American scientist of Polish origin, lawyer, Raphael Lemkin (1900–1959). He first addressed this concept from a legal standpoint in the 1930s, examining the Armenian genocide committed by Turkey in 1914. Investigating this crime in order to prevent similar things from happening in the future, the scientist is thinking about how to prevent similar crimes using legal norms. To introduce the concept of such a serious large-scale crime into international law, he tries to describe its characteristic features. In his works, he identifies six types of genocide technologies: political; social; cultural; economic; biological; physical.

The authors sought to analyze the qualification of the Holodomor as a crime of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (of December 9, 1948).

Keywords: Holodomor; genocide, Holodomor-genocide, law, civil society, legal responsibility, elements of a crime, rehabilitation, historical and legal research, legal acts.

Правоторова О. М., Бойко Л. М. Голодомор 1932–33 рр. та його кваліфікація як злочину геноциду у світлі конвенції про запобігання злочину геноциду й покаранні за нього (від 9 грудня 1948 р.)

Стаття присвячена Голодомору 1932–1933 рр. та його кваліфікації як злочину геноциду у світлі Конвенції про запобігання злочину геноциду й покаранні за нього (від 9 грудня 1948 року).

На даний момент відчувається брак досліджень з правовою оцінкою подій Голодомору, яка б сприяла його визнанню на міжнародному рівні, а також недостатньо розроблений правовий механізм реабілітації, відшкодування моральних та матеріальних збитків постраждалим внаслідок геноциду та їх нащадкам. По факту, Україна опинилась в ситуації, коли відповідальність за злочинні дії проти її громадян у вказані періоди, несе лише вона сама. Поряд з цим, російська федерація, котра є спадкоємицею СРСР, намагається

реабілітувати Й. Сталіна – головного винуватця геноциду. Подібний стан речей викликає питання про правову відповідальність РФ за геноцид українців.

Цікавим є саме поява терміну «геноцид» в міжнародному праві та правовому полі в цілому. Першим, хто сформулював поняття «геноцид» в юриспруденції був американський вчений польського походження, юрист, Рафаель Лемкін (1900–1959). До цього поняття він вперше звернувся ще в 30 – х роках ХХ ст., розглядаючи з юридичної точки зору геноцид вірмен, вчинений Туреччиною в 1914 році. Досліджуючи цей злочин заради того, щоб подібні речі не траплялися в майбутньому, вчений замислюється над тим, як за допомогою правових норм запобігти подібним злочинам. Для того, щоб увести поняття такого тяжкого масштабного злочину в міжнародне право, він намагається описати його характерні риси. У своїх працях він виділяє 6 технологій геноциду: політичну; соціальну; культурну; економічну; біологічну; фізичну.

Автори прагнули проаналізувати кваліфікацію Голодомору як злочину геноциду у світлі Конвенції про запобігання злочину геноциду й покаранні за нього (від 9 грудня 1948 року).

Ключові слова: Голодомор, геноцид, Голодомор-геноцид, закон, громадянське суспільство, правова відповідальність, склад злочину, реабілітація, історико-правове дослідження, правові акти.

Statement of the Problem. Back on November 28, 2006, the Verkhovna Rada of Ukraine adopted the law "On the Holodomor of 1932–1933 in Ukraine," which recognizes its events as genocide of the Ukrainian people. Historians have collected a huge number of documents evidencing the repressions and other criminal actions carried out by the Soviet authorities, which resulted in the deaths of millions of Ukrainians during the Holodomors of 1921–1923, 1928–1929, 1932–1934, and 1946–1947. However, at present, there is a lack of research on the legal assessment of the events of the Holodomor, which would contribute to its recognition at the international level, as well as an insufficiently developed legal mechanism for rehabilitation and compensation for moral and material damages to victims of the genocide and their descendants. In fact, Ukraine finds itself in a situation where it alone bears responsibility for criminal actions against its citizens during the specified periods. Additionally, the Russian Federation, as the successor to the USSR, continues attempts to rehabilitate J. Stalin, the primary perpetrator of the genocide. This state of affairs raises the question of the legal responsibility of the Russian Federation for the genocide of Ukrainians.

It should be noted that the relatively widespread use of interdisciplinary methods by researchers in studying the Holodomor is objectively due to a number of factors.

Firstly, it is about the logic and patterns of the progress of social knowledge, which is characterized by a tendency towards generalization, synthesis of achievements from various social sciences, and specific historical and legal disciplines.

Secondly, the Holodomor genocide was complex and systemic. According to the plan of the Bolshevik leadership, it was supposed to radically transform all the key aspects of the Ukrainian peasantry's life and ultimately turn it into a cog in a communist utopia.

Analysis of recent research and publications. The issues of historical and legal research of the terrible tragedy of the Ukrainian people, the Holodomor of 1932–1933, as a whole and its qualification as a crime of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948) have been addressed by many scholars, both Ukrainian and foreign. Notably, J. Bruski, L. Vovchuk, S. Vodotyka, A. Graziosi, V. Danylenko, James Mace, O. Dudorov, S. Kornovenko, N. Kuzovov, V. Marochko, M. Melnyk and many others, who have contributed to this research.

The purpose of the article is to conduct a historical and legal study of the terrible tragedy of the Ukrainian people, the Holodomor of 1932–1933, and its qualification as a

crime of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948).

Presentation of the main material. In the context of the full-scale invasion of the Russian Federation against Ukraine and the actual genocidal war, as well as the acceleration of globalization, when Ukraine is actively focusing on integration with the world and European community, there is a need to increase attention to rethinking historical memory, but with regard to the Holodomor, maximum efforts should be made so that this terrible event is not forgotten and correctly interpreted and the correct attitude towards it is formulated, as well as to the systematic destruction of Ukrainian identity in their studies, both by the scientific community and the public, and therefore, the need for theoretical and methodological studies of these processes.

The first to formulate the concept of "genocide" in jurisprudence was the American scholar of Polish origin, lawyer Raphael Lemkin (1900–1959). He first turned to this concept in the 1930s, considering the Armenian genocide committed by Turkey in 1914 from a legal point of view. Investigating this crime to prevent similar things from happening in the future, he ponders how to avoid such crimes through legal norms. To introduce the concept of such a serious, large-scale crime into international law, he tries to describe its characteristic features. Personal life experience played a crucial role: Raphael Lemkin came from a Jewish family and could not ignore the rise of anti-semitism in the early 20th century, which manifested itself in the terrible Jewish pogroms in Poland, where his family came from, and throughout Europe, including Ukraine. Perhaps that is why he was very sensitive to the tragedy of the Armenian people. But Raphael Lemkin also had his own sad experience and, developing the theoretical foundations of the concept, he composed it of two parts. The first part he called the "crime of barbarity". By the "crime of barbarity", Raphael Lemkin meant the direct extermination of people, the mass killing of a large group. But the concept of "barbarism" seemed to him insufficient to describe this crime as a whole, in all its manifestations, as it happened with the Armenians in Turkey and the Jewish communities in Europe. Then Raphael Lemkin singles out such a concept as "vandalism."

In his research, the lawyer could not ignore the fate of Ukraine, which fell under Soviet imperial rule, because Raphael Lemkin received his law degree at Lviv University and understood the situation in Ukraine in 1932–1933. That is why he draws attention to the second component – "vandalism". By the term "vandalism", he refers to the destruction of a people's culture. Indeed, the persecution of the intelligentsia, the clergy, and the mass destruction of language – all this leads to the death of national diversity, impoverishment, and the irreparable loss of part of human civilization.

We emphasize the research of R. Lemkin, who wrote that "genocide does not necessarily mean the immediate destruction" of protected groups but rather "a coordinated plan of different actions aiming at the destruction of essential foundations of the life" of such groups with the goal of their extermination, and with planned objectives such as the "disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence" of the groups, along with the "destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups" [1, p. 24].

Ukrainian history knows of no more large-scale and terrible crime committed by the authorities against their own people than the Holodomor of 1932–1933. It was the most tragic period in the history of Ukraine, and the result of the brutal actions of the authorities was the murder of millions of peasants who were tormented by hunger. This crime is recognized as genocide since it was provoked by a targeted artificial famine carried

out by the Soviet authorities, the purpose of which was to ensure total control of state bodies over all segments of the population [2, p. 13].

It is emphasized that with the rise of totalitarianism (including the one that led to the Holodomor of 1932–1933), personal life, morality, and daily routines also became integral components of the absolute control exercised by party bodies. The basic principles of party life extended to marital and family relations, regulating them in the future. During the same period, the traditional principles of family law were formed, becoming the basis for the creation of the Soviet family model [3, p. 27].

In the doctrine and practice of international law, it is generally accepted that in order to qualify criminal acts as genocide, it is necessary to prove the existence of the elements of the crime: object, objective party, subject, and subjective party.

The legal assessment of genocide under the criminal legislation of Ukraine is given primarily in the Criminal Code of Ukraine [7].

Article 442. Genocide (Criminal Code of Ukraine)

1. Genocide, that is a willfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grievous bodily injuries on them, creation of life conditions aimed at total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another.

2. Public incitement to genocide, and also production of any materials inciting to genocide for the purpose of distribution, or distribution of such materials.

The direct object of genocide under the 1948 Convention [10] is the destruction, in whole or in part, of any historically existing national, ethnic, racial or religious group. The victims of this crime can only be members of the groups targeted by the perpetrators.

A national group (nations) is characterized by common territories, economic ties, language, and peculiarities of life, culture and spirituality. Therefore, for the legal assessment of the recognition of the Holodomor as a crime of genocide, it is necessary to establish a specific intent to destroy a particular social group and to prove that this intent applied to that specific national group.

Accordingly, Article 1 of the Law of Ukraine “On the Holodomor of 1932–1933 in Ukraine” states that “the Holodomor of 1932–1933 in Ukraine is genocide of the Ukrainian people.” So, it would be logical to ask the question: Who is “the Ukrainian people” as a national group? And now we will try to answer this question.

According to the Declaration on State Sovereignty of Ukraine of July 16, 1990 (Chapter 2 of the People's Power): “Citizens of the Republic of all nationalities constitute the people of Ukraine.”

The Constitution of Ukraine of June 28, 1996, in its preamble states that the Verkhovna Rada of Ukraine acts on behalf of the Ukrainian people – citizens of Ukraine of all nationalities. Therefore, the lack of an official interpretation of the basic concept of “national group” creates inconsistencies in the interpretation and use of this term in the Law on the Holodomor.

In addition, it is necessary to define at the legislative level the relationship between the concepts of “people of Ukraine”, “national group”, and “Ukrainian nation”.

According to the definition of the International Criminal Tribunal for Rwanda, a “national group” should be understood as “an association of people who have a stable legal bond, such as a single citizenship and, accordingly, certain rights and obligations” [8].

At the same time, the development of the concepts of society, people, and nation should occur in the context of exclusively value-based aspects of human existence, ethnic, cultural, linguistic, and religious identity.

In a broad sense, a nation is a political association of people that has formed historically under the influence of various factors (economic or cultural) on a common territory. The corresponding modern Ukrainian nation is polyethnic in nature.

From an objective perspective, the crime of genocide manifests itself in the following forms (genocidal acts):

- 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 [8, p. 43].

We fully agree with S. Markova's right view, that the most important type of social memory is the nation's memory of its past. It sublimates into everyone's memory of their past, lineage, parents, and childhood. The brain forces us to process the traumatic events of our generation to live a quality life and develop our country. An important step on this path was the adoption of the Law of Ukraine "On the Holodomor of 1932–1933 in Ukraine" (2006), Article 2 of which stipulates that "public denial of the Holodomor of 1932–1933 in Ukraine is recognized as an insult to the memory of millions of Holodomor victims, a humiliation of the dignity of the Ukrainian people and is unlawful." Currently, a number of countries around the world have recognized the Holodomor as an act of genocide against Ukrainians [4, p. 3].

In the Law "On the Holodomor of 1932–1933 in Ukraine", the subjective aspect of the crime is characterized by direct intent "Holodomor is an act of genocide of the Ukrainian people, as the consequence of deliberate actions of the totalitarian repressive Stalinist regime aimed at the mass destruction of part of the Ukrainian and other peoples of the former USSR" [9].

In this regard, it should be emphasized that the 1948 Convention does not require a formal document confirming the intent to commit genocide; it only requires proof of such intent.

The subjects of the crime, according to the 1948 Convention, can be any person, regardless of whether they are constitutionally responsible rulers, officials or private individuals.

The Genocide Law uses only the concept of "actions of the totalitarian repressive Stalinist regime," so the circle of criminals will still be legally established in each specific case. Criminal liability applies exclusively to individuals. Considering the time of the crime related to the Holodomor of 1932–1933, it can be concluded that those responsible would now be approximately one hundred years old. Therefore, due to their age, it can be stated that there is effectively no subject of the crime.

The essence of all terror (when perpetrated by the state) or terrorism (when carried out by an individual or a non-state organization – these concepts must be distinguished) is the same: a destructive impact (up to physical annihilation) directed at an individual or a specific minority group, with the aim of intimidating the majority in order to achieve the desired behavior from the majority. When we become convinced that food deprivation is aimed at the entire population to impose a desired behavior, then we are faced with something more than terror by hunger. It is something for which there is still no name. Therefore, the author's self-designation – "crushing blow" – has to be used. [5, p. 169–170, 6].

In our opinion, first of all, it is necessary to distinguish between the following concepts: Holodomor as a legal fact and Holodomor as genocide (elements of a crime). If Ukraine advocates for establishing historical truth and ensuring the international community honors the memory of millions of Ukrainians, then undoubtedly, more work needs to be done in this direction. The key is that state policy should focus on establishing the truth of that time, rather than being politicized. Greater access to criminal case materials, together with collaboration between lawyers and historians, will aid in this process.

The question is that the 1948 Convention cannot be applied to the crime of the Holodomor of 1932–1933, since it occurred before 1951 – the date of ratification of the Convention.

Article VI of the Convention states that persons accused of genocide or other acts enumerated in Article III shall be tried by a competent court of the State in whose territory the act was committed or by such international criminal court as may have jurisdiction over the Parties to this Convention which have accepted the jurisdiction of such a court.

According to Article 11 of the Rome Statute of the International Criminal Court, jurisdiction is provided for “*ratione temporis*”, namely: “The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute” [11].

At the same time, the Rome Statute warns against attempts to narrow the 1948 Convention, as Article 10 of the Rome Statute states: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute” [11].

Conclusions. Considering Article 29 of the Rome Statute, which states that the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations, it can be concluded that the 1948 Convention can be applied to the crime of the Holodomor of 1932–1933. This crime falls under the jurisdiction of this Court, provided the amendments to Ukrainian legislation discussed above are made, and, of course, with the ratification of the Rome Statute of the International Criminal Court.

Regarding the introduction of criminal liability for denying the Holodomor, we support the position of scientists M.I. Melnyk and O.O. Dudorov, that the historical and political assessment of the Holodomor, if made in a correct form, cannot be regarded as actions aimed at inciting hatred or hurting people's feelings, if these expressions are value judgments or factual statements; reliability of information.

It is appropriate to recall the practice of the European Court of Human Rights, namely the case of *Lingens v. Austria*. It is necessary to distinguish between facts and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a critical statement is impossible to enforce and violates the freedom to hold one's own opinion, which is a fundamental part of the right protected by Article 10 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.” This position fully corresponds to Ukrainian legislation and judicial practice. On the contrary, society should be maximally involved in discussing this legal fact in order to establish the truth and the rule of law.

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