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MASS ATROCITIES AND CRIMINAL LAW DETERRENCE

SUMMARY

The paper analyses the role of intervention in realization of the responsibility to protect principle. Importance of R2P principle can be found in application of international humanitarian law and law of armed conflict as well as in the implementation of domestic criminal law with ultimate purpose of deterring from mass atrocities and genocides.

Mass atrocities cannot be divided from rational choices of state' elites who consider them as the final solution for their most important problems and cannot be separated from the collective game which also involves victims, other states and international organizations. That game affects cost-benefit analysis of each side.

Keyword: international criminal law, deterrence, deterrence theory, mass attrition.

1. INTRODUCTION

In order to simplify introduction to this complex matter, several presumptions and hypotheses regarding the role of national and international criminal law as well as the international interventions in saving lives and reducing war crimes through prosecution and deterrence are needed.

First, human life and dignity are protected and sacred under the premises of national and international law. Individuals are subject to criminal law at national and international level, because implementation of international criminal law goes beyond the sovereignty and borders of particular state and the status quo in the internal relations when it comes to attrition and mass violations of human rights.

Second, political and organizational thinking as well as the activities of many national and international institutions are different from individual thinking and acting, primarily in estimating the ethical values and its own criminal responsibility when it comes to mass atrocities.

Also, there are the differences between national criminal justice system and international system mainly in process of mediation.

Main hypothesis (H1): There is the a difference between domestic system of criminal justice and international criminal courts not so much in the law in use, but in the mechanism of rule of law and the instruments for efficient prosecution and deterrence.

Auxiliary hypothesis (H2): Is it possible to make a comparison between domestic and international criminal justice mechanism of deterrence for international crimes and mass atrocities based on classical doctrine of deterrence.

Auxiliary hypothesis (H3): Realization of international intervention and application of criminal law requires the active role of international institutions (UN Security Council, International Criminal Courts, diplomacy, military forces for intervention etc.) which are often inert and slow to react when mass atrocities occur.

Question of intervention in situation of mass atrocities involves analyses and assessment of many factors including political consideration and political games, intelligence, international public law, humanitarian law, law of war, criminal law, military tactics, economic aspects of war and intervention, individual and social aspect of criminology and pathologies.

Differences between mass atrocities and general crime (individual, gang, organization and corporate crime) exist in their form and also in the scope and their severity. The states participate

not only in the suppression of crime but with their structure and available instruments – institution and agents, states also plan, encourage, organize, implement and deny collective crimes. In the cases of criminalized and failed states, one cannot talk about state as guarantor of human rights and/or guarantor for mediation and the realization of domestic and international law. In such circumstances, foreign help is needed in protection of elementary human rights and suppression of crimes of states, rebels, crimes of paramilitary forces, and mass violence which often result in mass atrocities.

Interventions with international and regional forces, as well as the interventions of neighboring states open many dilemmas – especially regarding the question of sovereignty and prohibition of interference in the internal affairs.

In addition, one has to bear in mind that the mechanisms of these collective games have on the one side perpetrators who commit mass atrocities, on the other side the international community with R2P principle, and on the third side the victims who have limited or no space and resources for that game. This multi-sided game also involves games and interests of individual states, alliances, non government organizations and public in general.

2. MAIN PART OF ARTICLE

2.1. Differences between war and criminal justice and the role of principle “The responsibility to protect”

Mass atrocity is a similar term to term attrition. Attrition is a military term that represents inflicting losses to enemy in soldier lives as a measure of success in the war. This criterion of success in today's military campaign is obsolete, but still remains one of the pillars that lead to victory. As such, it will be used in this the paper as a synonym for all types of killing in armed conflict, including those permitted and those forbidden by premises of international law. The main goal of the war is to force enemy to surrender or to accept conditions of peace with losses as the cost of war. When killing in war expands to the level that is considered illegal under the rules of international humanitarian and law of war - i.e. when it transforms itself in aggression or

mass atrocities, the war itself becomes criminalized and subject to criminal law and individual criminal responsibility.

On the other side, violence of state under the law of war and humanitarian law is not the criminal violence, and because of that using armed forces and destruction including attrition as a tool of war often covered the realization of many atrocities prohibited by the aforementioned international laws. States also use reprisals and other military and nonmilitary measures to force other states to respect international law in armed conflict.

In criminal cases, criminal investigation, accusation and conviction of criminal courts are slow, require time and resources to resolve criminal act beyond any reasonable doubt. That processes are covered with the procedural norms which make them more efficient and limit any intervention from outside. Law enforcement government agencies are specialized, independent in their job and they also control social relation inside the state through the use of criminal law.¹ On the other side, public in general is passive and nobody can take justice into its hand, although many individuals and groups want to use violence to realize their personal and political goals. In order to prevent or punish such behavior, states have the sovereign right to apply domestic criminal law and to preserve the status quo. Sovereignty gives state and its institutions the right and obligation to apply law, to make internal mediation in favor of human rights and to preserve main political and economical relations. Also, sovereignty of state assumes the realization of obligations signed in international agreements especially the ones related to international law and community.

That obligation also exists during the war. States are responsible for application of domestic and international law in the situation of war and situation of armed conflicts. If state applies such rules, it can be considered as state of rule of law. Not only the states are responsible under international law for applying international humanitarian and law of armed conflict, but individuals are responsible under international criminal law for breach of this law (different

¹ J. Lea Crime, „War and Security: from the criminalisation of war to the militarization of crime control”, 2007, University of Brighton, UK, November 2006 <http://www.bunker8.pwp.blueyonder.co.uk/misc/crimwar.htm> /(17.7.2012)

forms of responsibility: perpetrator, aider, instigator, command responsibility, joint criminal enterprise etc.).

Application of domestic law is not a problem as long as the state and criminal justice system are functioning properly and treat all groups in the society equally, especially in cases of internal armed conflict. In the international armed conflict, states use norms of international law to protect population (civilian, fighters, prisoners of war etc.) of other country. In those circumstances, no intervention from abroad is needed because states and their institutions have full legitimacy in that matter. Still, many states in circumstances of war, internal conflict and situations of emergency, violate some or majority of civil rights. In that situations, politics and justice system often give advantage to the interest of state security instead of protection of civil rights. Courts and ministries of internal affairs then try to accomplish a proper control over the situation on the ground. It should be emphasized though, that all of the aforementioned is possible only in the states with strong institutions and in the situations where no part of the society is seen as an enemy of the state. In such circumstances, one can talk about individual cases but not about politics of systematic breach of law standards.

But in the situations when state marks some social, ethnic, and other group in the society as a state enemy and starts with killing their members, treating them as foreigners and enemies, everything becomes more complex. In such cases, government and its institutions do not look at that population the same way as before, do not consider them as their own citizens, and do not apply the same law standards and protection at courts as if it would normally be the case. Instead, the members of that population are seen as a problem that could only be solved with the police, military or paramilitary forces and use of violence including mass atrocities with the sole purpose to hold these groups under control as well as to control their influence in society and state.

That leads to conclusion that criminal justice and other instruments of state are not in the function of protection of human rights, and that one can talk about criminalization of state politics and criminalization of individuals and groups who support such politics. Genocides, war crimes, crimes against humanity and other forms of mass atrocities are choices made by rational perpetrators. Their calculated use of internal and external politics proves to have deadly

consequences for targeted population. Such “final resolution” is a main aim of political, economical and other strategies for complex problems in the state.²

In the international armed conflict, states have ways to force or to influence other side to respect international law and also the instruments to make obvious to members of international community who does and who doesn't respect law as well as to ask help and support from that community - playing in that way a kind of collective game. If heavily equipped with the military force, one state has an opportunity to intensify military operations, to attack broad spaces of other state and to make more destruction on legal targets which will lead to pressure on the enemy government and population to restrain from their activities.

In the internal conflict and especially in the situation where state is criminalized, the target to be destroyed is mainly civil population which hasn't got any or much space for collective game. The civil population relies on the foreign help and some kind of self-defense. In criminalized states, in the situations of civil war, and in failed states cases one cannot talk about criminal justice jurisdiction and mediation. These situations require foreign intervention which will lead to prosecutions at international criminal tribunals like ad-hoc tribunals or mixed criminal tribunal or permanent International Criminal Tribunal. But, it is a long road to that final point, because much time has to pass and many lives have to be lost in order for interventions and prosecutions to occur.

The states operate in the field of collective game at international level with many different interests. Victims become victims when somebody from international community says what happened. Perpetrators are not perpetrators till somebody tells that they are perpetrators. Victims cannot ask for effective protection from violence of state in cases of mass atrocities like persons in national criminal systems can ask and demand protection from violence. International security and public systems are not functioning strictly according to various law procedures and principles but rather on political agenda, political talks and trade.

² M. Krain, „International Intervention and the Severity of Genocides and Politicides”, *International Studies Quarterly*, Published by Blackwell Publishing USA, 49/2005, 365.

Military intervention in these circumstances becomes application of military forces in the function of police action with the purpose to stop the crimes and create conditions for international and national courts to work and to have the last word about these crimes. The courts should, in that matter, ensure that the ones responsible for the crimes face the trial and receive proper sanctions, that the victims are compensated and retaliated to some extent and most importantly to act as a deterrent factor for individuals and other national and international actors including states to refrain from actions which are harmful for international peace and human rights.

“The responsibility to protect”- “R2P” is a principle adopted as the UN’s *2005 World Summit Outcome Document* with the main purpose to prevent international community to ever find itself in situation not to be able to halt genocide and other forms of mass atrocities. This principle is adopted by the UN General Assembly and assumes ³ that the state has the responsibility to protect its own citizens from mass attrition, and if state fails to do it, international community will intervene. If state failed to do that, responsibility lies on other states. “The 2001 report of the International Commission on Intervention and State Sovereignty” formulated the principle of “the responsibility to protect” as a principle that is not focused on the right of others to intervene but on a duty and responsibility of all countries to protect the population at risk. This leads to the question how to decide about such an important issue in the Security Council as well as how to deal with the willingness of some states to act individually.

The responsibility to protect does not create any new legal obligations. But it is an important political tool for shaping the normative grounds for intervention in several aspects. First, for those regimes who might have committed massive crimes or allowed such crimes to occur within their boundaries, it will void a strong argument like the sovereignty of the state which should in other circumstances protect them from international interference. Second, it emphasizes the responsibility to act when the regime is in greater infringement of certain obligations providing a good political moment for the international community's action. If an exclusive reliance on the

³ ABOUT THE RESPONSIBILITY TO PROTECT, PARLIAMENTARY HEARING AT THE UNITED NATIONS, New York, Background document: Session I, 20-21 November, 2008, <http://www.ipu.org/splze/unga08/s1.pdf> (10.08.2012)

UN Security Council to intervene (and stop adequately the mass crimes) fails, the other alternative is to create a new international institution – like NATO that would be able to respond more effectively.

2. Logic and purpose of mass attrition

International laws' basic role is to regulate armed conflicts between states and secondary to influence an internal armed conflict. Differences between civil disorder, rebel, and internal armed conflict are in their dimension. Civil disorders and smaller rebellions fall under premises of domestic criminal law. But, when state forces do not control main part of state territory, and rebel forces do, while using the synchronized military operations, then according to **Article 3. of Geneva convention and Second additional protocol from 1977.**⁴, the aforementioned participants fall under premises of that particular international law. National criminal law defines armed rebellion like an organized action of non-definite number of armed persons who want to realize certain goals with the violence, particularly to attack the security of state, constitutional order, and unity of states.⁵ Rebellions and other forms of political crimes are crimes of political elites and groups who want to become political elites using violence not only for political gains but for economic gains also. Hence, in order to success, rebellious political elites and organizers need to secure continuous financing of conflict and violence. If this really occurs, violence under the rules of national criminal law becomes internal armed conflict and it is possible to use international law instead of domestic criminal law. In these circumstances, legitimacy of government is the key factor. Government has to be recognized from its citizens and from other states in the world. If state respects and protects rights of its citizens through institutions and takes care about their interests, then the government has internal legitimacy. Also, if state respects the premises of international law and rights of other states, then it is fully recognized and accepted in international community like sovereign and independent state. But if state government and its agents perform acts of aggression against their own citizens, then the state loses its legitimacy.⁶

⁴ A.P.V. Rogers, / R. Gatman, D. Rif (ur.), „Građanski rat“, *knjiga Leksikon ratnih zločina*, Samizdat.1999, 143,145

⁵ Criminal law of Federation Bosna and Herzegovina

⁶ Prema: War, <http://plato.stanford.edu/entries/war/>, Stanford Encyclopedia of Philosophy, First published Fri Feb 4, 2000; substantive revision Thu Jul 28, 2005

Political elites make rational choices about political targets and strategies they use as a tool to achieve them. Political crimes often include mass war crimes and other mass atrocities which are used as means to influence the balance of power and money, and to secure survival of their organization and them personally keeping them in that way in power, political game and in life.

Lombroso Lashia investigated personal characteristics of Paris Commune's leaders and discovered that many of them had abnormal, pathological and criminal features and that also many of them were convicted before Commune. Lombroso found that 11 of them had some anomalies, 6 of them were criminal types and 5 with the characteristics of lunatics. He described them like a "morally insane" people with instinct for destruction, incapability for organization, with aggressive form of crazy ideas and absolute insensitivity and soullessness.⁷

Crimes of political elites are not individual crimes, nor organized or corporative crimes. These are mega crimes that include every known form of organization of crime. In other words, that is crime on the upper level with strong initiative of elites to use every situation to legitimize violence and other activities necessary to support violence. Political elites use rationalization of strong motives and dissatisfaction with the government in order to get support, to make propaganda and to recruit other to commit violence. This crime is different from gang's crime and terrorism because political elites use armed violence, economic control, money flows, and control the events in armed conflict – everything that makes them to behave like a corporation⁸.

How the rebellions and civil disorders will end, depends on characteristics of political system and the power of state institutions.⁹ If state and its institutions have the instruments and strategies to resolve the main problem and satisfy the interests of political elites and groups who are hostile, or have a power to resolve problem with raw force, that is with the security forces and army then the government in focus will survive. Otherwise, governments will face the

⁷ C. Lombroso und R. Laschi : Der Politische Verbrecher und die Revolution Band, I, II, Hamburg, 1892., p. 235, 256-258. according to: B. Ibrahimpašić, *Politički delikt: prilog učenju o krivičnim djelima protiv države*, Veselin Masleša, 1963, 21

⁸ P. Collier, *Economic Causes of Civil Conflict and their Implications for Policy*, Department of Economics, Oxford University, April, 2006, 3

⁹ Allen, S.H, (2008), "The Domestic Political Costs", *Journal of Conflict Resolution*, No. 6, Vol. 52

political instability, violence and there will be no consensus about their future meaning that they will most certainly fall.

If hostile group/s take and occupy the main natural resources, primarily resources susceptible to looting like diamonds or oil, in order to finance themselves, they will continue the conflict. Sustainable financing becomes necessary condition for civil war¹⁰.

In the case of Bosnia and Herzegovina, aggression, rebellion and internal conflict were financed and supported with war and civil material from abroad, looting of individual property and industrial equipment, deforestation, selling the electrical energy from electrical facilities and from emigration. Industrial production and trade with goods produced in the country were not the primary targets for rebels because trade requires peace and secure communications, although it is possible to use some capacities to produce, sell or exchange those goods for weapons, oil or food.

Main political goal of confronted groups and entities is not the stability on the ground. Instead of that, they attack civilians from other groups and make crimes under international law including mass atrocities, genocide, war crimes, crimes against humanity and ethnic cleansing. Realization of that important strategies and goals is extremely cruel and implies great suffering of attacked population. In the short period of time these groups make great damage. International community is aware of it, sometimes even before atrocities are committed, but refuses to do anything to prevent genocide and atrocities. Information from intelligence services of powerful states and neighboring countries, as well as the information from non-governmental organizations including witnesses give more than enough reason for international reaction especially in the phase of enormous killing (genocide and atrocities). The violence is then more than obvious.

In these circumstances, internal judicial mediation and function of state as a guarantor of human rights are virtually non-existent. Contrary, elites and institutions use sovereignty to commit crimes and to endanger the survival of whole or part of population or regional peace. Refugees become a problem for neighboring countries and cause economic and political difficulties that change the balance of population inside of particular states, increasing in that way the risk of

¹⁰ P. Collier, *Economic Causes of Civil Conflict and their Implications for Policy*, Department of Economics, Oxford University, April, 2006, 1

spreading the war to their territories and making the intervention of that states essentially the internal affairs problem.

At the same time, elites who choose genocide and atrocities actually make a rational political choice and calculate the parameters of internal and external situation related with such crimes with full, almost mathematical, precision. Accordingly, they have a clear political and intelligence signals when to start, to continue or to finish genocide and mass atrocities.

Victims of genocide and mass atrocities cannot go to court and ask protection of their elementary rights like it is possible in civil courts. Also, victims are not able to ask protection of police from violence or to use self-defense because they haven't got the capacity to confront regular or paramilitary formations without help from abroad. That is because genocide and other form of atrocities are executed on groups which are marginalized enough with the previous politics and violence. Genocide and mass atrocities are final stage and final solution of elites in command for groups that have no exit or solution at their disposal. To state that the genocide and mass attrition represent operations against alleged rebels makes no sense in a situation where all evidence about their execution exists, because, among other things, it is not possible to commit genocide against equally armed hostile opponent. In that case, the risk of retaliation in the same or similar form (genocide) is very high and unacceptable.

Justice is possible only after genocide or atrocities, after elites have lost the war or have lost the power because of the foreign intervention, resistance of attacked population, and/or replacement of some highly positioned individuals and change in balance of power inside the political elites who committed genocide. During all that time, perpetrators and their elites in the political relations and communications justify or deny the realization of genocide, qualifying the genocide like mere fight against terrorism, rebels or bandits, or stating that killing is done by forces that were not under control, or even that the treatment of endangered population was quite good¹¹.

¹¹ Genocide Emergency: Darfur, Sudan By Gregory H. Stanton, 13 September 2004, updated 15 June 2005
The 12 Ways to Deny a Genocide, <http://www.genocidewatch.org/genocide/12waystodenygenocide.html>

The very essence of war and armed conflict is fighting which results in atrocities. Those atrocities are legal under international law because the violence of state cannot be considered as criminal violence as long as the state protects endangered categories of population (civilians, wounded, prisoners of war etc.). Attrition is a military term that describes success of military forces in destroying the enemy's human and other resources. Also, information regarding attrition's casualties becomes important information for enemy to calculate its possibility to win the war. With the growth of attrition victims, it is obvious that the costs of war are rapidly growing for enemy's side and each and every battle sends the message to the enemy to change his strategy – that is to accept peace or to capitulate. The possibility to end war is greater with the greater percent of attrition.¹² Attrition, therefore, has the potential to change status quo.

Perpetrators of genocide and mass killings are willing to change their politics and strategies only under serious pressure of changing external and internal conditions in political and military dynamics of conflict which then threatens their plans for current and future genocides and mass atrocities, the security of their political power as well as their personal security.¹³ In relation to the said, it is possible to talk about influence of some models of intervention on the current and prepared genocides and atrocities and more precisely on their seriousness and duration.

Success of intervention in situation of mass atrocities and genocides includes considering the intentions not only of perpetrators but also the intentions of intervenient that altogether have influence on duration, severity and number of persons killed. Models of intervention are: Impartial Intervention Model, Witness Model, Bystander Model, Balance of Power Model, Threat-Based Model and Intervention Model¹⁴.

Chosen model of intervention and intensity of intervention have impact on the genocide and atrocities only in the short period of time, but in long term other factors influence new and/or repeated genocide and mass atrocities. These factors include: history, type of rule and specificity of state, power of institutions, economics, discrimination, motives, identity, opportunity, natural

¹² Kristopher W. Ramsay, 'Settling It on the Field Battlefield Events and War Termination', Department of Politics Princeton University, *Journal of Conflict Resolution*, Volume 52 Number 6, December 2008 850-879 © 2008 Sage Publications, p.851, 855;

¹³ MATTHEW KRAIN, *International Intervention and the Severity of Genocides and Politicides*, *International Studies Quarterly* (2005) 49, p.365, p.363–387;

¹⁴ MATTHEW KRAIN, *International Intervention and the Severity of Genocides and Politicides*, *International Studies Quarterly* (2005) 49, p.363–387;

resources' ease of looting, emigration, neighboring states, ethnic homogeneity and ethnic diversity etc.

After civil war and mass atrocities occur, there is 40% risk that a new civil war will start over in a year after the previous ended, but with every year that passes - that risk decreases for 1%.

Ethnic diversity makes of rebellions more complex, except in societies where one ethnic group constitutes 45-90% of population and also in the cases of extremely homogenous societies¹⁵.

What international community can do to protect attacked and endangered population? To answer that question, one needs to go back to criminal justice system. The need for activating the international mechanism of criminal justice is signal that internal justice system is not functioning well and has no mechanism to stop the killing. That means that the international criminal courts will be a place where the trials for leaders and other individuals from failed and weak states -responsible for genocides, mass atrocities and other civil war crimes, will be held.

Powerful states like United States of America, Russia, United Kingdom, France, China, and others will not be a subject of jurisdiction because their judicial systems are more than capable to bring the responsible persons to justice and to conduct trials on their own. Furthermore, they have the power to use universal jurisdiction over foreign perpetrators if they want, and other types of jurisdictions and power to initiate and block international intervention and international criminal justice system.

Political character of United Nations' Organization and other international organizations influence type and mechanism of decision about intervention and using the services of international tribunals. Political character implies that decisions are result of trade, compromise, and good will, not the obligatory application of the law on the facts and events how it's usually done in every court, police or criminal justice system. Such political processes take time, and time is crucial for preventing genocide and mass atrocities.

¹⁵ P. Collier, *Economic Causes of Civil Conflict and their Implications for Policy*, Department of Economics, Oxford University, April, 2006,

Planners of Mass Atrocity Response Operations (MARO) give advantage to speed vs. massive scale of intervention in genocide and mass atrocities, because escalation in the number of people killed and delaying of intervention will not help the endangered population and will not be useful for victims. The most important aspect of MARO intervention is to stop the killing. From the diagram it is possible to see that the intervention reaches its maximum at the finishing phase of genocide. That is late, and the goal is to bring the curve of dynamics of intervention to the curve of dynamics of genocide¹⁶.

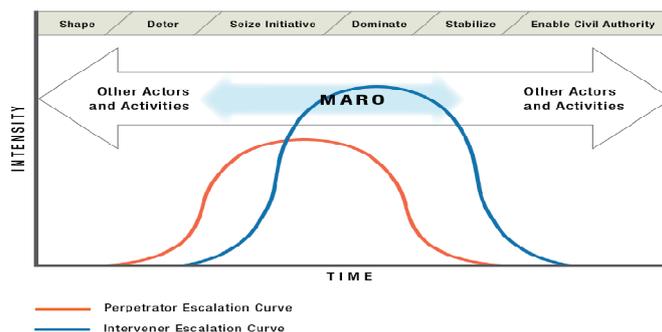


FIGURE 2 MARO scenario escalation curves

Source: *Mass Atrocity Response Operations: A MILITARY PLANNING HANDBOOK*, A Collaborative Effort Between the Carr Center for Human Rights Policy, Harvard Kennedy School and the US Army Peacekeeping and Stability Operations Institute, 2010

Challenging Intervention Model has the most chances for success, that is - to stop the atrocities. Perpetrators of genocide choose genocide and other form of state sponsored killing after they have calculated the parameters of international context and support for their actions and plans without any consequences for them¹⁷. Challenging model of intervention will force perpetrators to change politics and use resources and time to protect themselves from intervention and to give up from genocide and attacked population. Intervention sends a strong message that international context is changed.

Other forms of interventions have little or no effect on atrocities. Witness Model of intervention is neutral or slightly inclines to victim with the aim to show the perpetrators that attack on the

¹⁶ *Mass Atrocity Response Operations: A MILITARY PLANNING HANDBOOK*, A Collaborative Effort Between the Carr Center for Human Rights Policy, Harvard Kennedy School and the US Army Peacekeeping and Stability Operations Institute, 2010

¹⁷ MATTHEW KRAIN, *International Intervention and the Severity of Genocides and Politicides*, *International Studies Quarterly* (2005) 49, 363–387, p.366;

endangered population will be considered as unacceptable but in the end has no real effect on genocide. Neutral model also has no influence on atrocities because intervenient' goal is not to change situation nor in favor of victims or perpetrators. Balance of Power Model of intervention can be realized in the favor of perpetrators to help them to continue genocide, or in the favor of victim to make the cost of genocide higher. Threat-Based Model of intervention sends strong message in the form of threat to perpetrators that they will face the strong answer.

At first, it looks as if the perpetrators of state sponsored violence calculated (included) these threats in their cost-benefit analysis but in reality they would be doing something quite different. The perpetrators will actually try to change the balance of power on the ground in their favor and start the attacks because they want to send strong message that they are not weak and that they will not tolerate any group directed towards changing the status quo.

Intensity and dynamics of mass atrocities depends mostly on the disproportion of strength and probability of revenge for genocide and mass atrocities which perpetrator commits. If perpetrators expect revenge, they will not execute these crimes.

People from academic circles think that intervention will lead to peace and deterrence, that the international criminal tribunals will bring justice and compensation to victims, as well as the truth for history. That is true if the intervention is executed on time but in other cases that is dangerous illusion. This is because late intervention will bring some kind of peace but mass atrocities are widespread and committed by many perpetrators and they will not be captured and prosecuted on time although justice wants for every criminal to be responsible for his crime, and also to neutralize the effects of genocide on the ground. Most important effect of intervention is to send a message to other leaders, states, movement, and groups that international community will not tolerate killings and atrocities.

It is possible to say that intervention very rarely changes completely the balance of power on the ground (like in Iraq, or Afghanistan). More often, the interventions will stop the killing and make some kind of peace process allowing the stronger side in conflict to keep advantage, changing only top of the political elites who then become the "customers" of international

tribunals (like in Bosnia). Other senior political and military leaders will find positions in new government and institutions because they are not formally accused for international crime. In Ruanda, approximately about 130 000 people were involved in genocide but just 26 or 0.005% of them were trialed and cost of these trials reached 1 000 000 000 \$.¹⁸ That is great potential for new genocide. Contrary to this, the experience from World War II sends another message. “Denazification (German: *Entnazifizierung*) was an Allied initiative to rid German and Austrian society, culture, press, economy, judiciary, and politics of any remnants of the National Socialist (Nazi) ideology. It was carried out specifically by removing those involved from positions of influence and by disbanding or rendering the impotent organizations associated with it. The program of denazification was launched after the end of the Second World War and was solidified by the Potsdam Agreement”¹⁹. But in the third world countries where genocide and mass atrocities are dominant, international community uses members of old elites for peace process.

Like in the case of street gangs, when police legally and sometimes physically destroys gangs and some of their members, more resilient, tougher and more violent gangs and members will replace the empty space. Why? Because, people are everything - as Lombroso stresses in his research. “He used 50 photographs of Paris Communards, applied his method and found that 23 of them had normal physiognomy, 11 of them had some anomalies, 6 were distinctly criminal types, and 5 had the marks of madmen. Relying on Du Camp, Despina and Jules Valle, he found that General Megy is "the murderer of police agents," Eudos "burned palace of the Legion of Honor," Chaudon is a "thief", Benot is "counterfeiter and instigator of Tuileries Palace", Parnet is "repeatedly convicted for fraud and forgery, Chapitel is " repeatedly convicted for theft and other crimes".”²⁰

As a modern example of person involved in mass atrocities, one must mention the name of Charles Taylor. Charles Taylor, the former president of Liberia was accused of the most serious crimes in Liberia. First, he has stolen money from dictator Samuel Doe, and then escaped to

¹⁸ J. KU, J. NZELIBE, „DO INTERNATIONAL CRIMINAL TRIBUNALS DETER OR EXACERBATE HUMANITARIAN ATROCITIES?“, Washington University Law Review, VOLUME 84,4/ 2006, 809.

¹⁹ <http://en.wikipedia.org/wiki/Denazification>

²⁰ C. Lombroso und R. Laschi: *Der Politische Verbrecher und die Revolution* Band, I, II, Hamburg, 1892., p.235, 256-258. According to: B. Ibrahimpasić, *Politički delikt: prilog učenju o krivičnim djelima protiv države*, Veselin Masleša, 1963, 21.

USA where he was arrested by FBI. After that, he escaped again from United States federal prison where he was waiting for extradition. He hid himself in Libyan desert, overthrew the previously existing regime and was involved in civil wars in Liberia, Sierra Leone and Guinea. Individually, he was prone to take great political risk for individual gain and obviously it was not easy to discourage him from it²¹.

What is the real effect of the international intervention and real effect of the threat of processing crimes under international criminal tribunals it is not exactly known. But one can make some estimates using related research.

Persons who are ready to take power under any risk are more likely to commit mass atrocities. One of the rare empirical studies in this field that sheds some light on the fate of those involved in the coups and civil wars, shows the effects of national and international criminal sanctions, extra non-formal sanctions and the effects of culture of impunity. Profile of dictators and persons involved in coups and civil wars are similar to profiles of persons ready to commit mass atrocities. Any national criminal justice system works to protect rights so that investigates the criminal event, finds the suspects, applies measures to protect any further breach of law and gives compensation to the victims.²² Education effects of criminal law produce a strong stigmatization of the perpetrators and effects of deterrence to public in general. Also, court trials have the role to discover some facts that can be used as historical facts about past events but it is not their primary goal. The same role is assigned to international criminal tribunals, with another special role - to act as coercive measure in establishing world peace. Nobody knows the real effects of ICTY, ICTR, or ICC in deterrence of future international crime. This international justice system together with universal jurisdiction of national justice systems should be enough to prevent future mass atrocities.

Every criminal justice system has final purpose to suppress crime with sanctions. At the same time, it has a function of preventing of crime through deterrence. To explain this, one needs to better understand one of the main criminal law doctrines - theory of deterrence. The purpose of

²¹ J. KU, J. NZELIBE, „DO INTERNATIONAL CRIMINAL TRIBUNALS DETER OR EXACERBATE HUMANITARIAN ATROCITIES?“, Washington University Law Review, VOLUME 84,4/ 2006, 810.

²² J.Christoph, M. Safferling, “Can Criminal Prosecution be the Answer to massive Human Rights Violations?”, GERMAN LAW JOURNAL 1/ 05, No. 12, 1479.

punishment is the main purpose of entire criminal law. First purpose of criminal law sanctions is to prevent offenders to repeat offences, socialization, with higher goal of achieving the general prevention through deterrence.

The essence of the theory of deterrence is based on the philosophy that the consequences and benefits of criminal acts cancel each other out. Also, this philosophy is based on principle that all people must know the difference between good and bad and also to be aware that the consequences in the form of criminal sanctions would follow the crime. Crime is the expression of free will, which includes the knowledge about what is forbidden, with taking into account all benefits and costs of the crime. When the costs of crime are higher than benefits, the crime will not be committed. The theory of deterrence was created between the 9th and 14th century, in the ages of feudalism in England, when this theory had the purpose of keeping the peasants far away from rebellion and maintaining the status-quo²³. For deterrence, people must to know what is forbidden and what is allowed and what kind of sanction will follow certain behaviors.

The modern theory of deterrence is based on: free will of the perpetrator, necessary visibility of the crime in public, efficiency of detection and prosecution, as well as on the system of criminal sanctions and their implementation dominantly in the form of prison. This theory hasn't got the purpose to explain crime but to prevent it.

Cesare Beccaria developed and improved theory of deterrence. Neoclassical theory sees human beings like hedonists who will choose not to commit crime if the pain is bigger than benefit of crime²⁴. Punishing the perpetrators of crime will be enough to scare other people not to commit crime. Critics of this theory claim that deterrence includes knowledge of criminal law and assumes that every person is reasoning consistently and steady taking into account the long-term consequences, ignoring the effect of shortsightedness, impulsivity, and they do not include the limitations of person' thinking due to mental deficiencies . That is not true. The hate crimes, crimes with the strong influence of drugs, alcohol, and crimes committed under strong influence

²³ M. Summerfield, Evolution of Deterrence Crime Theory, May 18, 2006
<http://voices.yahoo.com/evolution-deterrence-crime-theory-37965.html> , (15.05.2012)

²⁴ M. Summerfield, Evolution of Deterrence Crime Theory, May 18, 2006 <http://voices.yahoo.com/evolution-deterrence-crime-theory-37965.html> , (15.05.2012)

of other people and groups cannot be suppressed with measures mentioned in this theory, because this theory assumes that people are rational.

In cases where the perpetrator acts in circumstances of high emotion or in cases of crimes of passion "statutory requirement to do something" does not work. Can the experience of the national system of deterrence be successfully transferred to the international system of criminal law with the dominant "hate crimes" covered by different ideologies, fanaticism, religious fundamentalism, committed by the people who see themselves as ones being above the law²⁵, coming from countries that sponsor attrition through military, police, intelligence services, creating in that way ideal conditions for the crime and at the same time covering the works and traces of the perpetrators, which acts not only encouraging to perpetrators, but gives them plenty of opportunities to be rewarded and find the ways to benefit from the crime. In the national criminal law system, there are two aspects that are connected with the prevention of crime. One is that the perpetrators can be physically disabled from committing offenses with using different types of physical and security obstacles, and the other is the threat of criminal sanction. The introduction of physical barriers and security, affects the perpetrator in a way that controls his fear and its ability to commit crime and obstructs the realization of offences significantly with increasing the risk of perpetrator to be discovered, arrested or even hurt. In this case, one can talk about situational deterrence. The fear from formal criminal sanctions has deterrence effect, but fear from revenge of victim or from obstacles is related with situational deterrence.

Deterrence as a doctrine in the criminal law, and situational crime prevention have several things in common, first, the rational choices made by the perpetrator and second, the fear. Because fear is the basis of deterrence, the doctrine is aimed at a threat of punishment, what is generally presented to the public, including the potential perpetrators and acts as a strategic threat. Unlike general deterrence, situational deterrence increases the individual fear in specific circumstances – namely the irrational - uncontrollable fear. Doctrinal fear is viewed as rational risk, while the situational deterrence' fear represents an emotion. Regardless of the limitations of these two theories, one can conclude that theories in focus show that individual's experience, stimulation or tendency of accepting high-risk, (influences) help perpetrators to control their fear in a way

²⁵ See: José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, YALE JOURNAL OF INTERNATIONAL LAW, 1999, 365., according to: *J.Christoph, M. Safferling*, "Can Criminal Prosecution be the Answer to massive Human Rights Violations?", GERMAN LAW JOURNAL 1/ 05, No. 12, 1483.

that they rationalize and neutralize the deterrence effect, exactly the same way someone manages to skip technical obstacles that impede a criminal offense. "The theory of deterrence is much broader concept than punishment and deterrence and involves basic principles of intimidation: 1) legal sanctions, 2) informal sanctions - revenge of the damaged persons, 3) situational measures adopted mostly by potential victims."²⁶ Majority of offenders try to control the variables of crime like a reaction and defense of victim or target, to control own survival variables like time exposed, use of weapon and acting in the group what influences their courage.

Doctrinal deterrence theory depends on certainty and severity of punishment. Many studies indicate that the probability of punishment has a greater effect on the crime rate than severity of punishment. Nevertheless, severity without the first component – that is without probability, can have eroding effect on deterrence²⁷. Besides formal sanctions, one has to take into account the informal sanctions because sometimes, effects of informal sanctions can be more terrifying than formal (high level of victims' violent revenge).

Discussion about the effects and purposes of punishing the perpetrators of mass and systematic violations of human rights arises from the general purpose of punishment with focus on the retribution and deterrence, while other purposes of punishment are left aside.

The debate is polarized between influences of deterrence and retribution as the dominant purpose of punishment. Victims give importance to retribution while governments and academics give priority to deterrence. One has to bear in mind though that retribution is a prerequisite for deterrence. Politicians accuse the victims that put at risk the institutions of democracy, seeking retribution at any cost. This debate still does not question the ultimate purpose of judicial protection of human rights, and that is to neutralize the violence. Although in practice neutralizing violence is due to the activity of ending violence with military intervention, which is a prerequisite for judicial activity and punishment - judicial neutralization with formal sanctions. The national system of criminal justice uses police forces to isolate, imprison, accuse, convict

²⁶ M. Cusson, *SITUATIONAL DETERRENCE: FEAR DURING THE CRIMINAL EVENT*, School of Criminology and International Center for Comparative Criminology, University of Montreal, 57.http://www.popcenter.org/library/crimeprevention/volume_01/03cusson.pdf,

²⁷ V. Wright, *Deterrence in Criminal Justice, Evaluating Certainty vs. Severity of Punishment*, The Sentencing, Washington, D.C., November, 2010, www.sentencingproject.org

and realize the prison sentence and death penalty. But international community as system of states and organizations disables perpetrators to commit international crimes mostly with the diplomatic and military means, using international law, and at the ending phase by the court trials for individuals using international criminal law.

Neutralization of most responsible individuals for mass atrocities occurs in the broader context of neutralization of their military power on the ground like in Nurnberg and Tokyo. For that neutralization, military forces of one state, group of states or forces of UN need legitimacy. Normally, police actions require legal - courts' authorization. Theoretically, legitimacy for intervention can be given by international judicial institutions like in national systems, but in international relations they are weak and subsidiary tool in implementation of global politics in UN and world. Besides, today the effects of deterrence of international trials are not known.

There are no many important studies about persons who commit some of mass atrocities because practice of trials in front of international tribunals is relatively new. One of studies that satisfies this purpose shows the group of the dictators and coup provokers. These persons are the closest to person accused for mass atrocities. They have the same profile and both groups face the high risk of existing sanctions in their countries. The risk of penalizing dictators and coup plotters exists during the preparation, performing acts and after the failed attacks. Even during their time of rule, these categories are exposed to judicial or extrajudicial executions, imprisonment and extremely harsh prison conditions and sometimes their fate is never entirely resolved. Looking at the current system of sanctions in the countries of origin – system of sanctions offered by international criminal tribunals, including the ICC, looks like a weak substitute, rather than complementary system by severe sanctions. If one considers the certainty of sanctions imposed, it turns out that it is less likely that someone is going to be accused by international tribunal than by the domestic courts. Wiseman noted that out of 485 individuals who have become African leaders before 1991, staggering 59.4% had experienced an unfortunate ending directly linked to their political destiny²⁸. Process of mass atrocities' neutralization is related with the theory of war. That theory is divided into three parts: 1) the jus ad bellum, which is the law that covers the

²⁸ J. KU, J. NZELIBE, „DO INTERNATIONAL CRIMINAL TRIBUNALS DETER OR EXACERBATE HUMANITARIAN ATROCITIES?“, Washington University Law Review, VOLUME 84,4/ 2006, 800, 801,803,807,809

war in its beginning, 2) jus in bello, which encompasses the law applicable in the war, and 3) jus post bellum – the law which covers the right of establishing peace, signing the peace agreement and also a completion phases of the war.²⁹ Since the political leaders are responsible for the use of military force, they are also responsible for applying the law of jus ad bellum on crimes against peace. For a just war six principles must be met cumulatively. Aggression can be directed against two types of basic rights: rights of state and rights of its own citizens. Rights of the State are rights for political sovereignty and territorial integrity. Citizens' rights are implemented by the government or through the rights granted from State. If the state or government implements rights in full interest of their citizens, then the state or government has the internal legitimacy, which among other thing includes the right of that state to decide to go to war. If that is not the case, government is not legitimate. International law provides a set of criteria for evaluating the legitimacy of government. Legitimacy is assessed through the recognition of the government by its citizens and the international community if the state does not threaten the rights of other countries in the international community, or violates the rights of its citizens. This is crucial for concepts of internal conflict and civil war. Aggression can therefore be committed across and within the borders. Right intention, proper authority and public declaration, last resort, probability of success on the outcome of the situation and proportionality of all evil and the righteous purposes of war are the remaining conditions³⁰. The same conditions can be used to assess the legitimacy of foreign military interventions, in accordance with R2P principle.

"Although the idea of establishing an international doctrine of humanitarian intervention is generally accepted, normative principles of" responsibility to protect " are under development. Political rather than a legal concept, the responsibility to protect has focused on state responsibility towards its population and the responsibility of the international community when the state fails to fulfill itself. "³¹

Under conventional understanding of warfare, state is responsible for order in the territory controlled by that state, but new forms of warfare like the combination of rebel and terrorist operations destroy the unity of the community, law, order, economic stability, and generate new

²⁹War, <http://plato.stanford.edu/entries/war/>, Stanford Encyclopedia of Philosophy, First published Fri Feb 4, 2000; substantive revision Thu Jul 28, 2005

³⁰ War, <http://plato.stanford.edu/entries/war/>, Stanford Encyclopedia of Philosophy, First published Fri Feb 4, 2000; substantive revision Thu Jul 28, 2005

³¹ M. C. Waxman, *Intervention to Stop Genocide and Mass Atrocities International Norms and U.S. Policy*, Council Special Report No. 49, The Council on Foreign Relations (CFR), 2009, 10

criminogenic effects of war and limit the classical state functions of protecting internal and international law and order. War became a vehicle for the realization of such crimes - like in Yugoslavia.³²

Mass atrocities under international law are obvious as well as their perpetrators, but international criminal policy is notably different than the one that is carried out within the national criminal judicature, because there are no instruments for judicial protection of human rights, especially the victims. In that case, one is talking about countries that are not able to protect victims because they fall into category of weak or failed states or they are unwilling to protect victims because they and their agents are involved in such crimes. Assessment of whether a crime of genocidal scale or mass attrition is committed does not depend mostly on the claims of the victim or on the denial of the party which committed them. It usually depends on the assessment of third-intervention party of whom depend lives of vulnerable populations. These are mainly the institutions of the most powerful countries, of the UN and the Security Council, as well as other governmental and non-governmental organizations.

Effective neutralization should start before violence becomes massive and that means that international community must act with various measures and intensity towards many people individually and to them as a group or state, because they represent a joint criminal enterprise. Neutralization becomes a problem because states are not willing to interfere with other states' internal affairs and the same applies for international organizations who try to avoid responsibility until the killings become obvious. These countries and organizations suggest that the best solution is in the form of negotiations. Following the mass atrocities and international intervention, international community decides to criminally accuse - prosecute some of many perpetrators especially the ones that stand out, thinking that this will be enough to deter others from committing the international crimes again in the future. But this could be dangerous illusion, because deterrence effect cannot be produced without neutralization of all perpetrators in present and in the future. Not even one criminal justice system in the world can absolutely

³² J. Lea Crime, „War and Security: from the criminalisation of war to the militarisation of crime control”,

eliminate the criminal activity, but with the increasing of its work efficiency, grows the deterrence effect. Without that, one cannot hope that criminal activity will disappear³³.

Planers and perpetrators of mass atrocities, in order to commit such crimes, use decentralized decision making process and decentralized organization and because of that it is a mistake to think that neutralization of one or few political or military leaders will lead to prevention of crimes in future. Usually, after factual amnesty, the future could bring more violence because perpetrators of mass atrocities have experience in the crime, they are involved in formal or non formal organizational structures in new political, military, criminal, paramilitary, economic and other activities which will be or could be used again cheaply, that is at low cost, in the armed conflict.

This is mostly because the country in which the atrocities occurred remains unstable for a long time, with no clear picture of its future or strong leaders, with all the pre-conflict and post-conflict divisions.

On the other hand, Statute of the ICC factually limits jurisdiction of the Tribunal to the most serious crimes which concern the international community, what leads to limiting the effects of justice, because many cases will not be prosecuted before national or international courts, and many victims will not get retribution or moral satisfaction.³⁴

In the national criminal systems, deterrence doesn't work quite as theory predicts. In order to illustrate this one study about effects of deterrence will be used. Theoretically, efficient deterrence in national systems exist when: perpetrator understands consequences from criminal law for his specific choice, he/she has no obstacles in the process of rational choice, and perpetrator acts with his cost – benefit analysis in accordance with the law, completely realizing the possible outcomes of the situation³⁵.

When one talks about perpetrators' understanding of law, studies have shown that generally people are not familiar with law and they are prone to give advantage to their

³³ G. Gallón, *DETERRENCE: A DIFFICULT CHALLENGE FOR THE INTERNATIONAL CRIMINAL COURT*, The Kellogg Institute for International Studies, 2000, 3.4 <http://kellogg.nd.edu/publications/workingpapers/WPS/275.pdf>

³⁴ G. Gallón, *DETERRENCE: A DIFFICULT CHALLENGE FOR THE INTERNATIONAL CRIMINAL COURT*, The Kellogg Institute for International Studies, 2000

³⁵ P. H. ROBINSON, J. M. DARLE, Does Criminal Law Deter? A Behavioural Science Investigation, Oxford Journal of Legal Studies, Vol. 24, 2/2004, pp. 173-205,

own intuition instead of strict norms of law. In the situation of mass atrocities, perpetrators understand law but try to find weaknesses and loopholes in international law and institutions, to question or deny the statistics, and to attack the motivation of those who speak the truth.

Individual crime is under influence of character and personal characteristics of perpetrator and that influence his decision making process. Individuals can be under influence of alcohol, drugs, mental problems, and existence of group and that strongly pushes individual or group to commit crime. Such people seriously underestimate the risk of being caught and overestimate own capabilities.³⁶ People who commit international crimes underestimate the risk of national and international formal and non formal sanctions not because they don't understand law and not because they have a distorted picture of culture of impunity but because of individual characteristics of perpetrators and groups decision making and acting, motivated with hatred and with possibilities of making material and political gains from crime which are often overestimated.

Bentam suggests that the probability of punishment, timeliness and total amount of penalty-seriousness of punishment make deterrence effect.

Probability of punishment has more effect than seriousness. Probability and timeliness of punishment in situation of mass atrocities are limited because international tribunals have no instrument for efficient processing of perpetrators except foreign intervention or dramatic inside change of regime which is highly unlikely. They underestimate seriousness of punishment because they see gain rather than punishment. Gain is also determined with its amount, its probability and with time needed in order to get it.

Complicated and politicized processes in UN Security council, with strong signals from abroad to finish things fast, reduces the likelihood of preventing the mass atrocities and genocides. Group decision making with the strong culture of hate inside of criminalized state irresistibly leads to atrocities and at the same time blocks individual space for thinking and acting about the consequences of crimes. If, at the same time, the targeted population is deprived from ability of self-defense then the severity and probability of atrocities will be at their maximum.

³⁶ P. H. ROBINSON, J. M. DARLE, Does Criminal Law Deter? A Behavioural Science Investigation, Oxford Journal of Legal Studies, Vol. 24, 2/2004, pp. 173-205, 180.

3.CONCLUSION

The paper analysis the effects of existing national and international criminal punishment systems, views of deterrence theory as a part of criminal law, discusses the internal conflict and rebellion, shows the criminal profiles of perpetrators of mass attrition and insurgency in function to explain the mechanism of deterrence of that crime in realization of R2P principle.

The role of the criminal justice system in controlling the conduct during the war in particular countries depends on strong institutions. Stable democracies with strong institutions are able to guarantee the all citizens are equally protected by domestic criminal law and enemy country's citizens by international law – at the time of war. On the other hand, failed or criminalized states with weak criminal justice systems do not apply the same rules for each and every individual and group in society. Instead, parts of their own population – civilians are seen and treated as external enemies. In such way, political and military elites implement through mass attrition their policies and strategies which can be considered as crime by international law. The perpetrators of mass killings are willing to change their politics only under serious pressure in political and military dynamics of conflict which threatens their plans and their personal security and political power. The article discusses also the model of foreign interventions and their effects on current and future atrocities.

The article shows also how individual and social pathologies influence decision making process and how deterrence theory explains that in the light of criminal law and military intervention.

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