



The Crime of Genocide

- **The phenomenon of genocide**

- History of the crime

Genocide is an old phenomenon in the history of mankind but particularly marked the 20th century. The term “genocide” was coined by **Raphael Lemkin** during World War II to describe the crimes committed against the Jews by the Nazis. The word is formed from the Greek *genos*, for race, and the Latin *caedere*, for killing. In reaction to the genocide carried out by the Nazis, the U.N. General Assembly adopted the **Convention on the Prevention and Punishment of the Crime of Genocide** (Genocide Convention) in 1948. Article II of the Convention marked the first time the crime was formulated in an international legal instrument. The wording of the crime was adopted verbatim into Art. 4 (2) of the ICTY Statute and Art. 2 (2) of the ICTR Statute. The same applies to Art. 6 of the ICC Statute. Today, the **substance of Art. II of the Genocide Convention is part of customary international law and *jus cogens*.**

- Structure of the crime

Conduct is punishable as genocide if it aims **to destroy in whole or part a national, ethnic, racial or religious group**. Genocide can be committed both in the context of a (non)-international armed conflict or in peace time.

- Protected rights

The criminalization of genocide seeks to protect certain groups’ right to exist, including the **physical** but also the **social** existence of the group. Whether it additionally protects the individual rights of the members of the group is subject to dispute.

- **Material elements**

- Protected groups

Only groups constituted through “national,” “ethnic,” “racial,” or “religious” characteristics are protected under the definition of the crime. This list is **conclusive**.

- Criteria for group classification

It is disputed whether to take an **objective, subjective** or mixed **objective-subjective** approach in determining what constitutes a group. The International Tribunals have come to differing conclusions. The starting point for determining group characteristics should be the



ascriptions of group members as well as outsiders; in particular, perpetrators usually define the victim group themselves. However, the principle of legality must be respected.

- **National groups**

The element that connects a national group, above all, is shared nationality. Additional elements to consider are a common history, customs, culture and language. Typical examples of national groups are national minorities.

- **Ethnic groups**

An ethnic group is distinguished in particular by a specific cultural tradition, and common history. The members of the group speak the same language, have the same customs and traditions and share a common way of life. The group can often be found in a specific geographic area.

- **Racial groups**

Racial groups are usually characterized by their same inherited, visible physical traits, such as skin color or physical stature. The concept is not unproblematic, given its abusive usage.

- **Religious groups**

The members of a religious group are of the same faith, believe in the same spiritual paradigm, and share a common spiritual idea or similar forms of religious practice.

- **Other groups**

Other groups, such as political, social or economic groups, are **not protected** under the genocide definition as they constantly change their composition and thus do not possess the required stability.

➤ Individual acts

The targets of attack are always individual members of the protected group. Even where the definition requires conduct against the “group,” this conduct is conveyed through attacks on one individual group member.

- **Killing (Art. 6 [a] of the ICC Statute)**

The perpetrator must have caused the death of at least one member of the group.

- **Causing serious bodily or mental harm (Art. 6 [b] of the ICC Statute)**

The perpetrator must have caused serious bodily or mental harm to at least one member of the group. This can encompass (psychological) torture, mutilation or other serious damage. It is not required that the harm is permanent or irreversible; a merely temporary physical or mental impairment, however, is not sufficient.

- **Inflicting destructive conditions of life (Art. 6 [c] of the ICC Statute)**

The perpetrator must have inflicted conditions of life on a group that are calculated to bring about its physical destruction, in whole or in part. The provision prohibits so-called slow death measures, that is, conduct that does not kill immediately but that can (and is intended



to) bring about the death of group members over the long term. Possible conduct includes forced labor, deportation, imprisonment in concentration camps, and withholding necessities, such as food, clothing, shelter or medical care.

- **Imposing measures to prevent births (Art. 6 [d] of the ICC Statute)**

This prohibition encompasses the imposition of measures aimed at preventing births within the group and thereby targeting its continued biological existence, such as sterilization, forced birth control, prohibitions on marriage, segregation of the sexes, and rape if it causes the victim to decide not to reproduce because of the trauma suffered.

- **Forcibly transferring children of the group to another group (Art. 6 [e] of the ICC Statute)**

This provision seeks to prevent children from being torn from their group and thus estranged from it. It encompasses the permanent transfer of children, that is, members of the group under 18 years of age, not only by physical but also by psychological force.

➤ Destruction of the group required?

Even an isolated individual, acting with specific intent can, through his individual conduct, be guilty of the crime of genocide. It is not required that the group be partially or wholly destroyed.

• **Mental Element**

Normally, the material elements of the crime must be committed with intent and knowledge, although lower standards of proof may apply to certain kinds of genocidal acts, e.g., killing. In addition, the perpetrator must act with the specific intent to destroy a protected group as such in whole or in part.

Gerhard Werle, *Principles of International Criminal Law* (2005) Part Three; Payam Akhavan, The Crime of Genocide in the ICTR Jurisprudence, 3 *Journal of International Criminal Justice* (2005), pp. 989 – 1006 or Guénaél Mettraux, *International Crimes and the ad hoc Tribunals* (2005), Chapters 14.1 and 14.2.