**GENOCIDE AND CRIME AGAINST HUMANITY**

**Topic -v International Criminal Court, Genocide and crime against humanity**

**BY**

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The assignment sets out the nature, the history and the general structure of the crime of genocide and provides an analysis of the elements of the crime.

# Introduction

One of the ugliest faces of mankind was before the world, when the Nazis committed holocaust of Jews on the orders of Adolf Hitler.[[1]](#footnote-1) Winston Churchill remarked that the world was being faced with a crime without a name.[[2]](#footnote-2) In 1944 the term ‘genocide’ was coined by Raphael Lemkin for the ‘acts of barbarity’ committed against the Jews.[[3]](#footnote-3) Genocide is originated from a Greek word “*genos”* means tribe or race and “*cide”* means killing. The need for punishing these perpetrators of the gravest crimes against mankind led to the creation of the Nuremberg Tribunal. The Tribunal did not define the crime of genocide but made killings and persecution of civilians based on religious, racial and political identities punishable.[[4]](#footnote-4) The instances of genocide were included in the trials but not as a legal term.[[5]](#footnote-5) This led to the UN General Assembly Resolution 96(I) in 1946 to adopt the Convention on the Prevention and Punishment of Genocide of December 9, 1948 (the Genocide Convention), which entered into force on January 12, 1951. The resolution affirmed that the crime of genocide is of international concern. The preamble to the convention states that genocide is a crime under International law and should be condemned by the civilized world. This was based on the logic that genocide has created a huge loss to humanity and therefore international cooperation is required to liberate mankind from it.[[6]](#footnote-6)

The Article II of the Genocide Convention defines the crime of genocide as:[[7]](#footnote-7)

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental 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.”

The following acts are made punishable under the convention as prescribed under Article III.[[8]](#footnote-8)

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

This definition of genocide is also found in the charter of International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) under Article 4[[9]](#footnote-9) and Article 2[[10]](#footnote-10) respectively. On 2nd September, 1998, the ICTR, in *Prosecutor* v. *Akayesu*, rendered the first international conviction ever for genocide and until now the ICTR remains the international criminal jurisdiction with the most elaborate case law on the crime of genocide. Again without any change, Article II of the Genocide Convention was transposed into Article 6 of the ICC Statute.[[11]](#footnote-11)

# Genocide as a Crime under International Law

G.A. resolution 96 (I) categorized genocide as a “crime under international law” and the Genocide Convention reiterates this formulation. As a result of the application of the international rules by the ICTY and the ICTR and the uncontroversial incorporation of the rule into Article 6 of the ICC Statute, it is now beyond question that genocide is a crime under general customary international law.[[12]](#footnote-12) Already in 1951 the ICJ considered the prohibition of genocide as customary in nature.[[13]](#footnote-13) In 1996, the ICJ called the prohibition of genocide as *erga omnes* (towards all).[[14]](#footnote-14) Finally, the ICJ recognized in 2006 that the prohibition of genocide amounts to *jus cogens* (certain fundamental, overriding principles of international law, from which no derogation is ever permitted).[[15]](#footnote-15)

# Relationship to Crimes against Humanity and War Crimes

The relationship between the crimes of genocide and against humanity is one of “reciprocal or bilateral” specialty. The technical difference between genocide and crime against humanity can be explained by the fact that genocide primarily violates the group interests, whereas; crimes against humanity violate individual rights.

A clear demarcation line exists between genocide and war crimes because only the latter category presupposes the existence of an armed conflict. Furthermore, while genocide typically falls within the category of systemic criminality, the same cannot be said for war crimes. This is not to say, however, that genocide may not be committed within the context of an armed conflict. Where the goal of a military campaign is to exterminate civilians on a massive scale the threshold to genocide will be passed where the targeted civilians form (at least a) part of a group protected by the rule against genocide and are targeted as members of the group concerned.[[16]](#footnote-16)

# Material Elements (*actus reus*)

## Perpetrators

The commission of the crime of genocide does not presuppose the holding of a certain position within a State or quasi-State organizational structure. Nor is the crime of genocide a leadership crime as is the crime of aggression. The prohibited acts are even formulated from the perspective of the subordinate perpetrator rather than from that of the controller/director of the overall genocidal plan. Even a member of the targeted group may commit the crime.[[17]](#footnote-17)

## Protected Groups

The list of protected groups (national, ethnic, racial or religious) in the definition of the crime is exhaustive. The general concept of protected group does not include a requirement of a mutual feeling of belonging together; nor needs a protected group to be a minority within a State. Furthermore, the group members need not live within one defined territory. The protected groups as per the definition of the crime are as follows:

### National and Ethical:

It is not required that members of a protected national or ethnic group within the definition of genocide have the nationality of the State in which they live. It is sufficient, and also necessary, that the group of human beings is large in number and continuously lives in the territory of the State concerned.

In *Prosecutor* v. *Akayesu* the concept of national group was confined to the nationals of a State.[[18]](#footnote-18) In *Prosecutor* v. *Krstic*, the Trial Chamber appears to have based its categorization of the Bosnian Muslims as a national group on the fact of the Bosnian Muslim’s recognition as a “nation” by the Yugoslav Constitution of 1963.[[19]](#footnote-19)

The situations in Rwanda and Sudan (Darfur) have confronted the international community with difficult border-line cases of the concept of ethnic group.[[20]](#footnote-20) In both situations the groups under attack are not characterized by such distinctive features as a language, culture or religion.[[21]](#footnote-21) However, it should be clear that the entity directing the attack cannot by its own perception transform a group of human beings into a group that is protected under the rule against genocide; nor it can be done by the victims of the attack merely on the ground that they perceive themselves as such. Additional objective factors such as the distinct living conditions imposed upon the Rwandan groups by the Belgian colonizers with a lasting effect and the equivalent objective demarcation lines that evolved over time between the “African” and “Arab” tribes in Sudan are required for a group to be called as ‘protected group’.

### Racial

An international definition of this attribute does not exist. During the deliberations within the Sixth Committee some delegates used the word as meaning the same as “ethnical” but a proposal not to specifically mention “racial” based on that understanding did not prevail. Racial groups comprise individuals sharing some hereditary physical traits or characteristics.

### Religious

In the Sixth Committee the inclusion of the category “religious” was controversial, partly because it is possible voluntarily to leave a religious group and partly because religious groups are not as such under threat, but only if they form a national group at the same time.[[22]](#footnote-22) The religious group need not be organized in a specific manner, but it must exist in a lasting and essentially stable manner.

## Prohibited Acts (“Underlying Offences”)

### Killing

Killing means causing the death of another person. Causing the death of one member of a protected group suffices as in the case of killing.

### Causing Serious Bodily or Mental Harm

In *Prosecutor* v. *Kayishema and Ruzindana* the Trial Chamber considered the words “serious bodily harm” as largely self-explanatory but added the useful understanding that what is required is harm that “seriously injures the health, causes disfigurement or causes serious injury to the external, internal organs or senses”.[[23]](#footnote-23) Now if we talk about “serious mental harm”, it has received wide interpretations in international law. In *Prosecutor* v. *Akayesu*, the *ICTR* Trial Chamber included not only the causing of “inhuman suffering”, but appeared to consider degrading treatment and the deprivation of rights as a form of causing serious mental harm.[[24]](#footnote-24) The Trial Chamber also stated that harm inflicted need not be permanent or irremediable.[[25]](#footnote-25)

### Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about its Physical Destruction in Whole or in Part

This prohibited act is distinct from the above two prohibited acts as it may extend beyond one member of the protected group. The word “calculated” may suggest that a mere *intention* of the perpetrator to bring about at least part of the group’s physical destruction suffices. It is preferable, though, to interpret “calculated” in an objective manner to mean “*capable* of bringing about . . .” The precise meaning of “physical destruction” is a matter of controversy. Some suggest that it is equivalent to death, whereas; others suggest that it is equivalent to the dissolution of the group as a social entity. In *Prosecutor* v. *Akayesu*, the ICTR Trial Chamber paved the way towards the preferable interpretation when it held: “that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.”[[26]](#footnote-26)

Some of the examples of the prohibited acts include confining the group members under extremely unhygienic or otherwise inhuman conditions, subjecting them to a subsistence diet, reducing essential medical services available to the group below minimum requirements, or destroying collectively worked fields or harvests, leaving (part of) the group without food. The question that arises is: Does “ethnic cleansing” constitute “inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”? The issue has been succinctly dealt with by the ICTY Trial Chamber in *Prosecutor* v. *Stakic* as follows:

“It does not suffice to deport a group or part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of the group. The expulsion of a group or part of a group does not in itself suffice for genocide.”[[27]](#footnote-27)

This does not however exclude the possibility of a forcible deportation campaign being conducted *under such conditions or accompanied by such measures* that it can be said to be calculated to bring about the physical destruction of at least part of the group. Forcible deportation as such, however, is insufficient.

### Imposing Measures Intended to Prevent Births within the Group

This prohibited act describes the so-called biological variant of genocide aimed at destroying the reproductive capacity of the group. In *Prosecutor* v. *Akayesu*, the Trial Chamber construed the abovementioned terms so as to include “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”[[28]](#footnote-28) The words “intended to” suggest that the mere subjective tendency to prevent births suffices. Yet an interpretation more in line with the overall character of genocide and with the other types of prohibited acts would require that the measures imposed are also objectively capable of preventing births. Also the word “imposing” suggests that the planning stage is over and at least an order has been made. However, it is not necessary that the intended result should have actually been achieved.

### Forcibly Transferring Children of the Group to Another Group

This can be considered as a form of the biological genocide by eliminating the group’s reproductive capacity, as discussed above. A child, as per Article 1 of the U.N. Convention on the Child and *ICC* Elements of Crime, is a person under the age of 18 years. The prohibited act in question is completed if at least one child has been distanced from the group to which it belongs. This result may be achieved by confining the child to a location outside the realm of the group from which it comes; it is not required that the child concerned is introduced into a different group, for example by way of adoption. The ICC Elements of Crimes suggest that the term “forcibly” should “not be restricted to physical force, but may include threat of force or coercion”.

# The Mental Elements (mens rea)

Two distinct mental elements must be satisfied for a conviction for genocide: the *general intent* requirement which pertains to the material elements and the special intent requirement pursuant to which the perpetrator must act with the *special intent* to destroy, in whole or in part, a protected group as such. The essential element of the crime of genocide is the specific intent or ‘*dollus speciallis*’ to destroy a targeted group in whole or in part. The specific intent is to bring the destruction of this target group through a systematic planned attack. The acts that constitute genocide like killing, murder, extermination are done with an underlying intention to bring about the destruction of the group.[[29]](#footnote-29) A person might have an intention to kill, murder, exterminate (*general intent*) but unless such underlying intention (*special intent*) is present to direct all these acts of offences towards commission of genocide, the specific intent cannot be proved. The ICTY in *Jelisic* Case[[30]](#footnote-30) noted that it is the *mens rea* which gives genocide its specialty and distinguishes it from ordinary crime and other crimes against international humanitarian law. The ICTR also in the case of *Akayesu[[31]](#footnote-31)* defines specific intent as constitutive element of the crime of genocide, which demands that the perpetrator clearly seeks to achieve through its acts the offence charged off. Since, it is difficult to prove this specific intention to commit genocide in absence of confessions the intention is inferred from the facts.[[32]](#footnote-32)

The Genocide Convention punishes killing of the members of a group directly or actions leading to such deaths. Deliberate deprivation of means to sustain life and resources needed for survival which ultimately brings destruction of the group like restriction on food, shelter, clean water, widespread torture, rapes also amount to genocide. Prevention of births in the group by forced sterilization, castration etc. also amount to genocide as this leads to extinction of the particular group over a span of time. Therefore, commission of any of these acts under Article II with intention to destroy a national, religious, racial and ethnical group in whole or any part amounts to genocide.[[33]](#footnote-33) The destruction of the group can be aimed at whole or in a particular geographical area or territory; region of a country and a municipality can also be characterized as genocide.[[34]](#footnote-34)

# Obligation under the Convention on the States

The Genocide Convention under Article V places an obligation on the parties to the convention to enact national legislation on genocide in accordance to their respective constitution to give effect to the provisions of the Convention and to effectively punish and attach penalty under domestic jurisdiction on persons guilty of genocide or the associated acts under Article II and III respectively.[[35]](#footnote-35) Article VI provides that the persons charged with genocide shall be tried by a competent tribunal of the State in whose territory the acts were committed and in cases where two contracting parties are involved, by such international penal tribunal to whose jurisdiction both the parties submit themselves.[[36]](#footnote-36)

The domestic prosecution of perpetrators of genocide has become the subject of International interest and not merely matters of national significance. Failures to enact national legislations on genocide have international impact. In April 1999, the Rwandan Mayor Fulgence Niyonteze could not be held liable for genocide when he was tried in Swiss courts as Switzerland did not recognize ‘genocide’ as a separate offence and had no national laws or legislations punishing the acts of genocide.[[37]](#footnote-37)

Many states like United States have a domestic legislation or law for genocide. Under Chapter 50 A of the US Code Section 1091 defines the offence of genocide. The provision is applicable on persons committing genocide within the United States or on the nationals of the United States committing such offences elsewhere. Countries like Australia, Switzerland, and Bangladesh also have special Act implementing the ratified Convention of Genocide in their domestic laws.

India ratified the Genocide Convention on August 27, 1959. The International Court of Justice (ICJ) in its Advisory Opinion on the *Reservations to the Genocide Convention* Case[[38]](#footnote-38), 1951 has ruled that the “principles underlying the Convention are principles which are recognized by the civilized nations as binding on the states, even without any treaty or conventional obligations”. The crimes like genocide, crimes against humanity and war crimes have become part of the general international law. The ICJ in the *Barcelona Traction* Case[[39]](#footnote-39), 1970 stated that “by their very nature, the outlawing of genocide, aggression, slavery and racial discrimination are concerns of all states”. All states have a legal interest in their protection and their prevention is therefore obligation against the entire world i.e. *erga omnes*.[[40]](#footnote-40) Prof. V. S. Mani in his article on *Needed, a Law on Genocide[[41]](#footnote-41)* states that India is bound by the general principles of International law and by its obligation as under the Genocide Convention to enact a national legislation on genocide. He draws four reasons as to why it has become absolutely important to enact a domestic law on genocide drawing a parallel analogy as to the reason for enacting laws on terrorism. He states that India as a member of the United Nations had a legal obligation to enact a specific law on terrorism, in accordance with the resolutions of the U.N. Security Council adopted in 2001. Second, terrorism as a special category of crime required a special law to deal with. Third, only a special enactment could have a deterrent effect on terrorism. Fourth, such a law was necessary to protect the territorial integrity and moral fabric of the country. For the same reasons a law to protect and prevent genocide should be immediately enacted in India. Firstly, as India is a party to the Genocide Convention and is bound by the obligation to prevent and punish genocide. Secondly, as per the obligations under the Convention India has a duty to enact necessary legislation to give effect to the provisions of the Convention and to provide for penalties to the persons guilty of genocide. Thirdly, it has a duty to punish the perpetrators of genocide by creation of competent tribunals.[[42]](#footnote-42)

Inspite of ratifying the Convention in 1959 India has till date not enacted any law on genocide. It has failed to fulfill its obligation under Article 51(c) of the Indian Constitution which “fosters respect for international law and treaty obligations”. The non-self-executing treaties are to be made part of the domestic law by enacting laws by the national legislatures to meet the treaty obligation which India has failed to meet in respect of the Genocide Convention.

This failure implies that there can be no prosecution in domestic courts of India of any person accused of committing genocide, as Indian law does not recognizes genocide as an offence. Therefore, persons accused of perpetrating genocide in India or Indian citizen committing genocide abroad cannot be tried by the national courts under the Convention. India not being a signatory to International Criminal Court also protects such perpetrators of genocide residing within its territory from the jurisdiction of the ICC. Therefore, the only remedy which could be obtained is by filing a case in some other country which recognizes universal jurisdiction over crimes of genocide. Like cases regarding 1984 and 2002 communal riots being filed in USA to be recognized as crime of genocide.[[43]](#footnote-43)

# Conclusion

The first ever genocide judgment, in the case of *Akayesu* before the ICTR, attempted to define the national, racial, ethnical and religious groups in a primarily objective manner. Following criticism, the ICTR, ICTY, as well as the ICC departed from an objective determination of the protected groups under the Genocide Convention. Instead, they increasingly rely on a subjective approach, with an emphasis on the perpetrator’s perception of the victim group. Thus, the definition of the four protected groups depends on perception i.e. a subjective element that is difficult to establish and to verify. The perpetrator’s perception of the targeted group becomes a matter of proof. It has, however, to be recalled that the Genocide Convention protects four exhaustive groups only. The subjective approach should therefore not lead to a broadening of the protected categories. Instead, a reliance on the perpetrator’s stigmatization because of perceived – or even real – national, ethnical, religious or racial characteristics of the victim group is the right way to go.

Genocide is one of the heinous crimes against human being under international law. Genocide is a crime on a different scale to all other crimes against humanity and implies an intention to completely exterminate the chosen group. Genocide is therefore both the gravest and the greatest of the crimes against humanity. In the same way as in a case of homicide the natural right of the individual to exist is implied, so in the case of genocide as a crime, the principle which evolved that any national, racial or religious group has a natural right to exist is clearly evident. Attempts to eliminate such groups violate this right to exist under international law and to develop within the international community. Genocide is a conspiracy aimed at the total destruction of a group and thus requires a concerted plan of action. The instigators and initiators of a genocide are cool-minded theorists first and barbarians only second. The specificity of genocide does not arise from the extent of the killings, nor their savagery or resulting infamy, but solely from the intention: the destruction of a group. So, it can be concluded that strict action and laws should be made against genocide under international law and the punishment should be deterrent.

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   2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

   (a) killing members of the group;

   (b) causing serious bodily or mental 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.

   3. The following acts shall be punishable:

   (a) genocide;

   (b) conspiracy to commit genocide;

   (c) direct and public incitement to commit genocide;

   (d) attempt to commit genocide;

   (e) complicity in genocide.” [↑](#footnote-ref-9)
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    2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

    (a) Killing members of the group;

    (b) Causing serious bodily or mental 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;

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    3. The following acts shall be punishable:

    (a) Genocide;

    (b) Conspiracy to commit genocide;

    (c) Direct and public incitement to commit genocide;

    (d) Attempt to commit genocide;

    (e) Complicity in genocide.” [↑](#footnote-ref-10)
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    (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.” [↑](#footnote-ref-11)
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28. *Supra* note 18 at para 507. [↑](#footnote-ref-28)
29. G. H. Stanton, *The Eight Stages of Genocide:* Stanton has formulated eight stages of genocide in order to infer the specific intent behind genocide. These eights stages in an increasing order are: Classification, Symbolisation, Dehumanisation, Organisation, Polarisation, Preparation, Extermination and Denial: *available at:* http://www.genocidewatch.org/genocide/8stagesofgenocide.htmlw (last visited on April 4, 2018). [↑](#footnote-ref-29)
30. IT-95-10. [↑](#footnote-ref-30)
31. ICTR-96-4-T. [↑](#footnote-ref-31)
32. *Ibid.* [↑](#footnote-ref-32)
33. “What Is Genocide?”, Genocide Watch, *available at*: http://www.genocidewatch.org/genocide/whatisit.html (last visited on May 6, 2018). [↑](#footnote-ref-33)
34. *Supra* note 19. [↑](#footnote-ref-34)
35. *Supra* note 7 at A. 5: “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3”. [↑](#footnote-ref-35)
36. *Id.* at A. 6: “Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”. [↑](#footnote-ref-36)
37. “Implementing the Genocide Convention in Domestic Law”, Prevent Genocide International (Human rights advocacy group working for prevention of genocide), *available at*: http://preventgenocide.org/law/domestic/index.htm#asia-pacific (last visited on May 6, 2018). [↑](#footnote-ref-37)
38. 1951 I.C.J. 15. [↑](#footnote-ref-38)
39. *Belgium* v. *Spain*, 1970 I.C.J. 3. [↑](#footnote-ref-39)
40. Prof. V.S Mani, “Needed, a law on genocide”, The Hindu, (April 10, 2002), *available at:* http://www.thehindu.com/2002/04/10/stories/2002041000251000.htm (last visited on May 6, 2018). [↑](#footnote-ref-40)
41. *Ibid.* [↑](#footnote-ref-41)
42. *Ibid.* [↑](#footnote-ref-42)
43. “US refuses to declare 1984 riots in India as genocide”, PTI, *available at:* http://www.ndtv.com/article/india/us-refuses-to-declare-1984-riots-in-india-asgenocide-349116 (last visited on May 6, 2018). [↑](#footnote-ref-43)