International Courts and the Crime of Genocide

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1 Introduction

The legal configuration of the crime of genocide has its origins in the writings of Raphael Lemkin in 1944.[1] The concept of genocide first appeared in the International Military Tribunal (Nuremberg) Judgement of 30 September and 1 October 1946, referring to the destruction of groups. The definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of "extermination and persecutions on political, racial or religious grounds" and it was intended to cover "the intentional destruction of groups in whole or in substantial part."[2]

On 11 December 1946, during its first ordinary meeting, the United Nations General Assembly (UNGA) unanimously adopted Resolution 96 (I), declaring that "the punishment of the crime of genocide is a matter of international concern" and requested the Economic and Social Council to draw up a draft convention on the crime of genocide. As a result, on 9 December 1948, UNGA Resolution 260A (III) approved the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: the Convention).[3]

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[1] Lemkin 1944, pp. 79–95.
[2] ICTR: Prosecutor v. Clément Kayishema and Obed Ruzindana, ICTR-95-1-T, Trial Chamber, Judgement (21 May 1999), paras 88–89.
[3] Entered into force on 12 January 1951.

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The Convention has been broadly ratified and it is widely accepted as customary international law and, moreover, as a norm of *jus cogens*.[4] Genocide is an international crime that can be committed either by States or by individuals.[5] Article IX of the Convention gives jurisdiction to the International Court of Justice (ICJ) for disputes relating to the responsibility of a State for genocide.[6] Article VI establishes that persons charged with genocide may be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[7] In fact, the crime of genocide is punishable under Articles 2, 4, and 6 of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) Statutes, respectively. These articles repeat verbatim the definition of the crime of genocide provided by Article II of the Convention:

> In the present Convention, 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:
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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.

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[4] ICJ: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement (26 February 2007), para 142, 161 (tracing prior opinions of the ICJ recognizing that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" and "that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)") (quoting ICJ: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Op. (28 May 1951), p. 23, and citing ICJ: Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Judgment (3 February 2006), para 64). For the International Criminal Tribunal for Rwanda, see Kayishema and Ruzindana Trial Judgment, supra n. 2, para 88. For the International Criminal Tribunal for the Former Yugoslavia see, e.g., ICTY: Prosecutor v. Radislav Krstić, IT-98-33-T, Trial Chamber, Judgement (2 August 2001), para 541 (surveying the state of customary international law at the time of the 1995 Srebrenica killings); and ICTY: Prosecutor v. Vujadin Popović et al., IT-05-88-T, Trial Chamber, Judgement (10 June 2010), para 807.

[5] Genocide Convention, supra n. 4, para 179.

[6] The ICJ found that Serbia had neither committed, nor conspired to commit, nor incited the commission of genocide, in violation of its obligations under the Convention. However, the ICJ found that Serbia had violated the obligation to prevent genocide in respect of the genocide that occurred in Srebrenica in July 1995. Ibidem, para 471. The ICJ also has, as a pending case, the application to institute proceedings against Yugoslavia submitted by Croatia on 2 July 1999. See Raimondo 2005, p. 53.

[7] Fifty years after the adoption of the Convention, the first genocide conviction was delivered at the ICTR (Prosecutor v. Jean Kambanda, ICTR 97-23-S, Trial Chamber, Judgement (4 September 1998), para 745). See Ratner 1998, p. 1; Meron 2000, p. 276; and Musungu and Louw 2001, p. 196.

Any of those underlying acts constitute genocide when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. In order to appreciate the commission of genocide, proof of the specific genocidal intent to destroy the targeted group in whole or in part is required in addition to proof of intent to commit the underlying act.[8]

2 The *Mens Rea*

Article II of the Convention defines genocide to mean any of certain "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This intent (or *mens rea*) has been referred to as, for example, special intent, specific intent, *dolus specialis,* particular intent and genocidal intent.[9] This *mens rea* distinguishes the crime of genocide from crimes against humanity, in particular persecution and extermination.[10] Whether there was genocidal intent is assessed based upon "all of the evidence, taken together".[11]

2.1 Intent to Destroy the Targeted Group as Such

The words "as such" underscore that something more than discriminatory intent is required for genocide; there must be intent to destroy, in whole or in part, the

[8] ICTY: Prosecutor v. Radislav Krstić, IT-98-33-A, Appeals Chamber, Judgement (19 April 2004), para 20. See also Genocide Convention, supra n. 4, para 186.

[9] See for example: ICTR: Prosecutor v. Alfred Musema, ICTR-96-13-A, Trial Chamber, Judgement (27 January 2000), paras 164–167, which refer to specific intent and *dolus specialis* interchangeably; and ICTR: Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Chamber, Judgement (2 September 1998), para 498, which refers to genocidal intent. While the term specific intent was used in ICTY: Prosecutor v. Goran Jelisić, IT-95-10-A, Appeals Chamber, Judgement (5 July 2001), para 45; Krstić Appeal Judgment, supra n. 8, para 134 used the term genocidal intent. The International Law Commission (ILC) refers to specific intent (Report of the International Law Commission on the work of its forty-eighth session, 6 May–26 July 1996, UN Doc. A/51/10, p. 87; hereinafter "Report of the ILC"). The ICJ used mental element, additional intent and specific intent interchangeably. Genocide Convention, supra n. 4, paras 187 and 189.

[10] Kayishema and Ruzindana Trial Judgment, supra n. 2, para 89; ICTY: Prosecutor v. Zoran Kupreškić et al., IT-95-16-T, Trial Chamber, Judgement (14 January 2000), para 636. See Morris and Scharf 1998, p. 167.

[11] ICTY: Prosecutor v. Milomir Stakić, IT-97-24-A, Appeals Chamber, Judgement (22 March 2006), para 55.

protected group[12] "as a separate and distinct entity".[13] The ultimate victim of the crime of genocide is the group.[14]

The term "destroy" in customary international law means physical or biological destruction and excludes attempts to annihilate cultural or sociological elements.[15] According to the ILC, the preparatory work for the Convention clearly shows "that the destruction in question is the material destruction of a group, either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group".[16] However, attacks on cultural and religious property and symbols of the targeted group often occur alongside physical and biological destruction and "may legitimately be considered as evidence of an intent to physically destroy the group".[17]

"By its nature, intent is not usually susceptible to direct proof" because "only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent".[18] In the absence of direct evidence, a perpetrator's genocidal intent may be inferred from relevant facts and circumstances that can lead beyond reasonable doubt to the existence of the intent, provided that it is the only reasonable inference that can be made from the totality of evidence.[19] Genocidal intent may be inferred from certain facts or indicia, including but not limited to: (a) the general context; (b) the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others; (c) the scale of the atrocities committed; (d) their general nature; (e) their execution in a region or a country; (f) the fact that the victims were deliberately and systematically chosen on account of their membership in a particular group; (g) the exclusion, in this regard, of

[12] ICTR: Eliézer Niyitegeka v. Prosecutor, ICTR-96-14-A, Appeals Chamber, Judgement (9 July 2004), para 53; Genocide Convention, supra n. 4, para 187.

[13] ICTY: Prosecutor v. Radoslav Brđanin, IT-99-36-T, Trial Chamber, Judgement (1 September 2004), para 698; ICTY: Prosecutor v. Vidoje Blagojević and Dragan Jokić, IT-02-60-T, Trial Chamber, Judgement (17 January 2005), para 665.

[14] See, e.g., Blagojević and Jokić Trial Judgment, supra n. 13, paras 656, 665; ICTY: Prosecutor v. Milomir Stakić, IT-97-24-T, Trial Chamber, Judgement (31 July 2003), para 521; Akayesu, supra n. 9, paras 485, 521. See also ICTY: Prosecutor v. Goran Jelisić, IT-95-10-T, Trial Chamber, Judgement (14 December 1999), para 108.

[15] Krstić Appeal Judgment, supra n. 8, para 25. See also Genocide Convention, supra n. 4, para 344.

[16] Report of the ILC, supra n. 9, pp. 45–46, para 12.

[17] Krstić Trial Judgment, supra n. 4, para 580. See also Genocide Convention, supra n. 4, para 344.

[18] ICTR: Sylvestre Gacumbitsi v. Prosecutor, ICTR-2001-64-A, Appeals Chamber, Judgement (7 July 2006), para 40. See also ICTR: Prosecutor v. Clément Kayishema and Obed Ruzindana, ICTR-95-1-A, Appeals Chamber, Judgement (1 June 2001), para 159; ICTR: Georges Anderson Nderubumwe Rutaganda v. Prosecutor, ICTR-96-3-A, Appeals Chamber, Judgement (26 May 2003), para 525.

[19] ICTR: Ferdinand Nahimana et al. v. Prosecutor, ICTR-99-52-A, Appeals Chamber, Judgement (28 November 2007), para 524.

members of other groups; (h) the political doctrine which gave rise to the acts referred to; (i) the repetition of destructive and discriminatory acts[20]; and (j) the perpetration of acts which violate the very foundation of the group or are considered as such by their perpetrators.[21] Further, proof of the mental state with respect to the commission of the underlying act can serve as evidence from which to draw the further inference that the accused possessed the specific intent to destroy.[22]

The existence of a personal motive must be distinguished from intent and does not preclude a finding of genocidal intent.[23] The reason why an accused sought to destroy the victim group "has no bearing on guilt".[24]

Jurisprudence has held that "the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide" and "it ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving genocidal objective as a legal ingredient of the crime".[25] Hence, the ICTR and ICTY jurisprudence has made it clear that a plan or policy (e.g., a State policy) is not a statutory element of the crime of genocide.[26] Moreover, "the offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack

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[20] Jelisić Appeal Judgment, supra n. 9, para 47. See also ICTY: Prosecutor v. Vidoje Blagojević and Dragan Jokić, IT-02-60-A, Appeals Chamber, Judgement (9 May 2007), para 123 (noting that genocidal intent may be inferred from "evidence of other culpable acts systematically directed against the same group" and therefore "the forcible transfer operation, the separations, and the mistreatment and murders in Bratunac town are relevant considerations in assessing whether the principal perpetrators had genocidal intent"); Krstić Appeal Judgment, supra n. 8, paras 33, 35 (affirming the consideration of other culpable acts systematically directed against the same group, including forcible transfer, and ruling that the scale of the killing in the area of Srebrenica, "combined with the VRS Main Staff's awareness of the detrimental consequences it would have for the Bosnian Muslim community of Srebrenica and with the other actions the Main Staff took to ensure that community's physical demise", permitted the inference that the killing of the Bosnian Muslim men of Srebrenica was done with genocidal intent); ICTR: Mikaeli Muhimana v. Prosecutor, ICTR-95-1B-A, Appeals Chamber, Judgement (21 May 2007), para 31; ICTR: Laurent Semanza v. Prosecutor, ICTR-97-20-A, Appeals Chamber, Judgement (20 May 2005), para 262.

[21] ICTR: Prosecutor v. Callixte Kalimanzira, ICTR-05-88-T, Trial Chamber, Judgement (22 June 2009), para 731; Gacumbitsi, supra n. 4, paras 40–41; ICTR: Prosecutor v. Tharcisse Muvunyi, ICTR-00-55A-T, Trial Chamber, Judgement (11 February 2010), para 29. See Torres Perez and Bou Franch 2004, p. 374.

[22] Krstić Appeal Judgment, supra n. 8, para 20.

[23] Jelisić Appeal Judgment, supra n. 9, para 49. See also Niyitegeka, supra n. 12, paras 52–53; Kayishema and Ruzindana Appeal Judgment, supra n. 18, para 161. See generally ICTY: Prosecutor v. Duško Tadić, IT-94-1-A, Appeals Chamber, Judgement (15 July 1999), paras 268–269, declaring that "personal motives are generally irrelevant in criminal law".

[24] Stakić Appeal Judgment, supra n. 11, para 45.

[25] Jelisić Trial Judgment, supra n. 14, para 100.

[26] Kayishema and Ruzindana Appeal Judgment, supra n. 18, para 138; Jelisić Appeal Judgment, supra n. 9, para 48.

against the civilian population".[27] This is an important difference when compared to crimes against humanity.

International tribunals have noted that Article 6 of the ICC Statute, which defines genocide, does not prescribe the requirement of a "manifest pattern" introduced in the ICC Elements of Crimes.[28] They acknowledged that the language of the ICC Elements of Crimes, in requiring that acts of genocide must be committed in the context of a manifest pattern of similar conduct, implicitly excludes random or isolated acts of genocide.[29] However, "reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite". The Appeals Chamber further clarified that the ICC Elements of Crimes "are not binding rules, but only auxiliary means of interpretation" of the ICC Statute. Finally, it has been clearly established by jurisprudence that the requirement that the prohibited conduct be part of a widespread or systematic attack "was not mandated by customary international law".[30] However, the existence of a plan or policy can be an important factor in inferring genocidal intent. When the acts and conduct of an accused are carried out in accordance with an existing plan or policy to commit genocide they become evidence which is relevant to the accused's knowledge of the plan; such knowledge constitutes further evidence supporting an inference of intent.[31]

2.2 The Targeted Groups

Genocide was "originally conceived as the destruction of a race, tribe, nation, or other group with a particular positive identity; not as the destruction of various people lacking a distinct identity".[32] The Convention's definition of the group adopts the understanding that genocide is the destruction of distinct human groups with particular identities, such as "persons of a common national origin" or "any religious community united by a single spiritual ideal".[33] A group is defined by "particular positive characteristics—national, ethnical, racial or religious[34]—and

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[27] Krstić Appeal Judgment, supra n. 8, para 223.

[28] The last element of the crime of genocide reads: "The conduct took place in the context of a manifest pattern of similar conduct directed against that group (…)"; Elements of Crimes, Doc. ICC-ASP/1/3 (part II-B), adopted on 9 September 2002.

[29] Popović et al. Trial Judgment, supra n. 4, para 829.

[30] Krstić Appeal Judgment, supra n. 8, para 224.

[31] Popović et al. Trial Judgment, supra n. 4, para 830.

[32] Stakić Appeal Judgment, supra n. 11, para 21.

[33] Ibidem, paras 22, 24 (analyzing the drafting history of the Convention and quoting the interpretation of the Genocide Convention's protections in the UN Economic and Social Council's 1978 Genocide Study, paras 59, 78).

[34] International jurisprudence accepts a combined subjective–objective approach for the identification of the targeted groups. An objective definition can be found, e.g., in Akayesu, supra n. 9, paras 512–515. A subjective approach (holding that the victim is perceived by the

not the lack of them". A negatively defined group—for example all "non-Serbs" in a particular region—thus does not meet the definition.[35]

The drafters of the Convention also devoted close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The ICJ spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of "the very existence of certain human groups".[36] Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include, within the Convention, political groups[37] and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established characteristics.[38]

2.3 Substantiality of Part of the Targeted Group

To establish specific genocidal intent, it is not necessary to prove that the perpetrator intended to achieve the complete annihilation of a group throughout the world,[39] but, at least, to destroy a substantial part thereof.[40] Indeed, if a group is targeted "in part", the portion targeted must be a substantial part of the group[41] because it "must be significant enough to have an impact on the group as a whole".[42]

(Footnote 34 continued)
perpetrator of the crime as belonging to the group targeted for destruction) was defended, for instance, in ICTR: Prosecutor v. Georges Anderson Nderubumwe Rutaganda, ICTR-96-3-T, Trial Chamber, Judgement (6 December 1999), para 56. See Bou Franch 2005, pp. 145–150.

[35] Stakić Appeal Judgment, supra n. 11, paras 19–21, 28; Genocide Convention, supra n. 4, paras 193 and 196.

[36] Reservations to the Genocide Convention, supra n. 4, p. 23.

[37] For a different view, see Van Schaak 1997, p. 2259.

[38] Genocide Convention, supra n. 4, para 194.

[39] Kayishema and Ruzindana Trial Judgment, supra n. 2, para 95.

[40] ICTR: Prosecutor v. Laurent Semanza, ICTR-97-20-T, Trial Chamber, Judgement (15 May 2003), para 316.

[41] Akayesu, supra n. 9, paras 496–499; ICTR: Prosecutor v. Juvénal Kajelijeli, ICTR-98-44A-T, Trial Chamber, Judgement (1 December 2003), para 809; ICTR: Prosecutor v. Jean de Dieu Kamuhanda, ICTR-95-54A-T, Trial Chamber, Judgement (22 January 2004), para 628. The ICTR, in Semanza, supra n. 40, para 316, held: "Although there is no numeric threshold of victims necessary to establish genocide, the Prosecutor must prove beyond a reasonable doubt that the perpetrator acted with the intent to destroy the group as such, in whole or in part. The intention to destroy must be, at least, to destroy a substantial part of the Group".

[42] Krstić Appeal Judgment, supra n. 8, para 8. According to the ICJ: "In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to a have an impact on the group as a whole" (Genocide Convention, supra n. 4, para 198).

The numeric size of the part of the group which is targeted, evaluated in absolute terms and relative to the overall group size, "is the necessary and important starting point" in assessing whether the part targeted is substantial enough, but is "not in all cases the ending point of the inquiry". Other considerations that are "neither exhaustive nor dispositive" include the prominence within the group of the targeted part, whether the targeted part of the group "is emblematic of the overall group, or is essential to its survival" and the area of the malefactors' activity and control and limitations on the possible extent of their reach. Which factors are applicable, and their relative weight, will vary depending on the circumstances of the case.[43]

3 The *Actus Reus*

3.1 Killing Members of the Group

The ICTR has defined "killing" as "homicide committed with intent to cause death".[44] For the ICTY, the elements of killing are: the death of the victim, the causation of the death of the victim by the accused and the *mens rea* of the perpetrator.[45]

Killing may occur where the death of the victim is caused by an omission as well as by an act of the accused or of one or more persons for whom the accused is criminally responsible.[46] Killing may be established where the accused's conduct contributes substantially to the death of the victim.[47] The *mens rea* for killing may take the form of an intention to kill,[48] or an intention to cause serious bodily harm which the accused should reasonably have known might lead to death.[49]

To establish the death of the victim, the Prosecution need not prove that the body of the dead person has been recovered. It may instead establish a victim's

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[43] Krstić Appeal Judgment, supra n. 8, paras 12–14.

[44] Musema Trial Judgment, supra n. 9, para 155; ICTR: Prosecutor v. Athanase Seromba, ICTR-2001-66-I, Trial Chamber, Judgement (13 December 2006), para 317.

[45] ICTY: Prosecutor v. Dario Kordić and Mario Čerkez, IT-95-14/2-A, Appeals Chamber, Judgement (17 December 2004), para 37; ICTY: Prosecutor v. Miroslav Kvočka et al., IT-98-30/1-A, Appeals Chamber, Judgement (28 February 2005), para 261.

[46] Ibidem, para 260; ICTY: Prosecutor v. Stanislav Galić, IT-98-29-A, Appeals Chamber, Judgement (30 November 2006), para 149. For example, killing may result from the wilful omission to provide medical care. Kvočka et al. Appeal Judgment, supra n. 45, para 270.

[47] Brđanin Trial Judgment, supra n. 13, para 382; ICTY: Prosecutor v. Zdravko Mucić et al., IT-96-21-T, Trial Chamber, Judgement (16 November 1998), para 424.

[48] ICTY: Prosecutor v. Zdravko Mucić et al., IT-96-21-A, Appeals Chamber, Judgement (20 February 2001), para 423; Kordić and Čerkez Appeal Judgment, supra n. 45, para 37; Kvočka et al. Appeal Judgment, supra n. 45, para 261.

[49] Ibidem, para 261.

death by circumstantial evidence, provided that the only reasonable inference that can be drawn is that the victim is dead.[50]

3.2 Causing Serious Bodily or Mental Harm to Members of the Group

Article II.b refers to an intentional act or omission that causes "serious bodily or mental harm" to members of the targeted group. Acts in Article II.b, similarly to Article II.a, require proof of a result.[51] This phrase may be construed to include "harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses".[52] The harm must go "beyond temporary unhappiness, embarrassment or humiliation" and inflict "grave and long-term disadvantage to a person's ability to lead a normal and constructive life".[53] The harm need not be "permanent and irremediable" to meet the standard of constituting serious harm.[54] "Serious mental harm" entails more than minor or temporary impairment to mental faculties.[55] Moreover, "to support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part."[56] The determination of what constitutes serious harm depends on the circumstances.[57] The harm must be inflicted intentionally to meet the *mens rea* requisite for the underlying offence.[58]

Examples of acts causing serious bodily or mental harm include "torture, inhumane or degrading treatment, sexual violence including rape, interrogations

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[50] Ibidem, para 260.

[51] Brđanin Trial Judgement, supra n. 13, para 688; Stakić Trial Judgment, supra n. 14, para 514.

[52] Kayishema and Ruzindana Trial Judgment, supra n. 2, para 109.

[53] Krstić Trial Judgment, supra n. 4, para 513; see also Blagojević and Jokić Trial Judgment, supra n. 13, para 645.

[54] Krstić Trial Judgment, supra n. 4, para 513; see also Akayesu, supra n. 9, para 502; Kayishema and Ruzindana Trial Judgment, supra n. 2, para 108; ICTR: Prosecutor v. Ignace Bagilishema, ICTR-95-1A-T, Trial Chamber, Judgement (7 June 2001), para 59; Kamuhanda Trial Judgement, supra n. 41, para 634; ICTR: Prosecutor v. André Ntagerura et al., ICTR-99-46-T, Trial Chamber, Judgement (25 February 2004), para 664; Muvunyi Trial Judgement, supra n. 21, para 487; Stakić Trial Judgment, supra n. 14, para 516.

[55] Kayishema and Ruzindana Trial Judgment, supra n. 2, para 110.

[56] ICTR: Prosecutor v. Athanase Seromba, ICTR-2001-66-A, Appeals Chamber, Judgement (12 March 2008), para 46. See also ICTY: Prosecutor v. Momčilo Krajišnik, IT-00-39-T, Trial Chamber, Judgement (27 September 2006), para 862.

[57] Blagojević and Jokić Trial Judgment, supra n. 13, para 646; Krstić Trial Judgment, supra n. 4, para 513.

[58] Kayishema and Ruzindana Trial Judgment, supra n. 2, para 112; ICTR: Muvunyi Trial Judgement, supra n. 21, para 487; Brđanin Trial Judgement, supra n. 13, para 690; Blagojević and Jokić Trial Judgment, supra n. 13, para 645.

combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial, or religious group".[59]

The ICTY Appeals Chamber has held that forcible transfer "does not constitute in and of itself a genocidal act".[60] However, in some circumstances a forcible transfer can be an underlying act that causes serious bodily or mental harm, in particular if the forcible transfer operation was attended by such circumstances as to lead to the death of the whole or part of the displaced population.[61]

3.3 Deliberately Inflicting on the Group Conditions of Life Calculated to Bring About Its Physical Destruction in Whole or in Part

Article II.c covers methods of destruction that "do not immediately kill the members of the group, but, which, ultimately, seek their physical destruction".[62] The methods of destruction covered by Article II.c are those seeking a group's physical or biological destruction.[63] In contrast to the underlying acts in Articles II.a and II.b, which require proof of a result, this provision does not require proof that a result was attained.[64]

Examples of methods of destruction frequently mentioned in ICTR Trial Judgements include denying medical services and "the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or

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[59] Musema Trial Judgment, supra n. 9, para 156; Brđanin Trial Judgement, supra n. 13, para 690; Krajišnik Trial Judgement, supra n. 56, para 859. See also Genocide Convention, supra n. 4, para 319, finding that systematic "massive mistreatment, [including] beatings, rape and torture causing serious bodily and mental harm during the [Bosnian] conflict and, in particular, in the detention camps" fulfil the material element of Article II.b of the Convention.

[60] Krstić Appeal Judgment, supra n. 8, para 33; see also Blagojević and Jokić Trial Judgment, supra n. 20, para 123. The ICJ has held that neither the intent to render an area ethnically homogenous nor operations to implement the policy "can as such be designated as genocide: the intent that characterizes genocide is to 'destroy, in whole or in part', a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group". Genocide Convention, supra n. 4, para 190.

[61] Blagojević and Jokić Trial Judgment, supra n. 13, paras 650, 654.

[62] Akayesu, supra n. 9, para 505; Rutaganda Trial Judgment, supra n. 34, para 52; Musema Trial Judgment, supra n. 9, para 157.

[63] Krstić Trial Judgment, supra n. 4, para 580. The ICJ ruled that "the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group" (Genocide Convention, supra n. 4, para 344).

[64] Brđanin Trial Judgement, supra n. 13, para 691, 905; Stakić Trial Judgment, supra n. 14, para 517.

excessive work or physical exertion".[65] For the ICTY, the conditions are: "cruel or inhuman treatment, including torture, physical and psychological abuse, and sexual violence; inhumane living conditions, namely failure to provide adequate accommodation, shelter, food, water, medical care, or hygienic sanitation facilities; and forced labour".[66] "Systematic expulsion from homes" has also been cited as a potential means of inflicting conditions of life calculated to bring about destruction.[67]

Absent direct evidence of whether "conditions of life" imposed on the targeted group were calculated to bring about its physical destruction, Trial Chambers have "focused on the objective probability of these conditions leading to the physical destruction of the group in part" and assessed factors like the nature of the conditions imposed, the length of time that members of the group were subjected to them and characteristics of the targeted group like vulnerability.[68]

The *mens rea* standard for the underlying offence of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" is explicitly specified by the adjective "deliberately".[69]

3.4 Imposing Measures Intended to Prevent Births Within the Group

Trial Judgements have held that measures intended to prevent births should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes, and the prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. Further, measures intended to prevent births within the group may be physical, but can also be mental.[70]

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[65] See, e.g., Kayishema and Ruzindana Trial Judgment, supra n. 2, paras 115–116; Musema Trial Judgment, supra n. 9, para 157.

[66] Krajišnik Trial Judgement, supra n. 56, para 859; Stakić Trial Judgment, supra n. 14, paras 517–518; Brđanin Trial Judgement, supra n. 13, para 691.

[67] Akayesu, supra n. 9, para 506; Stakić Trial Judgment, supra n. 14, para 517; Brđanin Trial Judgement, supra n. 13, para 691.

[68] Akayesu, supra n. 9, para 505; Kayishema and Ruzindana Trial Judgment, supra n. 2, paras 115, 548; Brđanin Trial Judgement, supra n. 13, para 906. The ICTY held that "living conditions, which may be inadequate by any number of standards, may nevertheless be adequate for the survival of the group" (Krajišnik Trial Judgement, supra n. 56, para 863).

[69] See Genocide Convention, supra n. 4, para 186: "Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words 'deliberately' and 'intended' (…). The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts".

[70] Akayesu, supra n. 9, paras 508–509; Rutaganda Trial Judgment, supra n. 34, para 53.

To amount to a genocidal act, the evidence must establish that the acts were carried out with intent to prevent births within the group and ultimately to destroy the group as such, in whole or in part.[71]

3.5 Forcibly Transferring Children of the Group to Another Group

With respect to forcibly transferring children of the group to another group, the Trial Chambers have speculated that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.[72] The ICC Elements of Crimes specify that the person or persons transferred must be under the age of 18 years.

4 Final Considerations

During the first half century after the adoption of the Genocide Convention, no international tribunal decided a case of genocide. During those years, genocide was, at best, a crime reserved for domestic tribunals, as was the case in Eichmann Jerusalem District Court Judgement. However, in the last twelve years three international tribunals (ICTR, ICTY and ICJ) have dealt in extensive detail with genocide, the crime of crimes, establishing a well-settled jurisprudence on its different constituent elements. It seems worth noting that the Achilles' heel of this jurisprudence concerns the definition of the last two types of the *actus reus* of the crime of genocide, where international jurisprudence is highly speculative as there has been no single case of these types.

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[71] Genocide Convention, supra n. 4, paras 355–356, 361. In response to the Applicant's claims, including that "forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practiced when various municipalities were occupied by the Serb forces (…) in all probability entailed a decline in birth rate of the group, given the lack of physical contact over many months", and that "rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility", the ICJ found that no evidence was provided as to "enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II(d) of the Convention".

[72] Akayesu, supra n. 9, para 509. See Fernandez-Pacheco 2011, pp. 76–77.

References

Bou Franch V (2005) El crimen de genocidio según el Tribunal Internacional Penal para Ruanda. Anuario Hispano-Luso-Americano de Derecho Internacional 14:133–158

Fernandez-Pacheco C (2011) El Genocidio en el Derecho Penal Internacional. Tirant lo Blanch, Valencia

Lemkin R (1944) Axis rule in occupied Europe. Carnegie Foundation for International Peace, Washington

Meron T (2000) Evolution of substantive international criminal law through specialized international criminal tribunals and the International Criminal Court. In: Proceedings of the American Society of International Law, pp 276–286

Morris V, Scharf MP (1998) The International Criminal Tribunal for Rwanda. Transnational Publishers Inc., Ardsley

Musungu SF, Louw L (2001) The pursuit of justice in post-genocide Rwanda: an evaluation of international and domestic legal responses. East Afr J Peace Hum Rights 7:196–214

Raimondo F (2005) Corte Internacional de Justicia, derecho internacional humanitario y crimen internacional de genocidio. Editores del Puerto, Buenos Aires

Ratner S (1998) The Genocide Convention after fifty years: contemporary strategies for combating a crime against humanity. Proceedings of the American Society of International Law, pp 1–13

Torres Perez M, Bou Franch V (2004) La contribución del Tribunal Internacional Penal para Ruanda a la configuración jurídica de los crímenes internacionales. Tirant lo Blanch, Valencia

Van Schaak B (1997) The crime of political genocide: repairing the genocide convention's blind spot. Yale Law J 106(7):2259–2291