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## **The 1948 Convention on the Prevention and Punishment of the Crime of Genocide**

### **Introduction**

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted and opened for signature and ratification or accession by the United Nations General Assembly in its resolution 260 A (III) of 9 December 1948.

It entered into force some two years later, on 12 January 1951. At present, 152 States are party to the Convention.

The Convention encompasses principles that are included in what is known as general customary international law (i.e. the prohibition of genocide, or the obligation to prevent and punish this act), and is even affirmed as belonging to international jus cogens.



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## **History of the Convention**

The legal term was first coined by the Polish lawyer Raphaël Lemkin in 1944 in his book "Axis Rule in Occupied Europe", partly in response to the Holocaust, but also in response to earlier cases in which he considered that entire nations and ethnic and religious groups had been destroyed". And although it was used in the indictments of the Nuremberg trial, it did not form part of the convictions, in view of the prohibition of the principle of "nullum crimen sine lege".

At the request of the UN Secretary-General, Lemkin, assisted by leading jurists Vespasian Pella and Donnedieu De Fabres, helped prepare the first draft of the Genocide Convention, but the original definition proposed by Raphaël Lemkin and the notion finally agreed by the international community in the Genocide Convention are not identical, although they are similar, especially in relation to the types of groups.

In the event of a violation of the Convention, two areas of responsibility will arise, the international responsibility of the state violating the Convention in breach of its obligations on the one hand, and the international criminal responsibility of the

individuals committing the criminal acts on the other.

## **Definition of Genocide**

So how is genocide defined under the Convention? Genocide is defined in two articles: Article 2, which deals with genocidal conduct, and Article 3, which deals with the ways in which it is committed.

According to Article 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) Intentionally inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Preventing births within the group; e) Forcibly transferring children of the group to another group.

The crime is thus characterised by a special intent (the Genocidal Intent), its targeting of specific groups (the four protected groups) and certain "actus reus" or conduct.

The most difficult element to prove is undoubtedly the so-called genocidal intent, that

special interest in the partial or total destruction of the group as such. The determination of whether or not they belong to the protected group will fall to the actor of the conducts, being groups that are sometimes difficult to distinguish, due to their close relationship to the social and/or cultural concepts that permeate them.

The forms of commission, as we pointed out, are contained in Article 3, which provides that The following shall be punishable (...): a) Genocide, i.e. its commission; b) Association to commit genocide; c) Direct and public incitement to commit genocide; d) Attempt to commit genocide; e) Complicity in genocide.

Four categories of the crime of genocide are therefore punishable, in addition to the actual commission of genocide. One of them, complicity, is virtually implicit in the concept of commission and derives from the general principles of criminal law. In the other three, it is an incomplete crime or the beginning of the execution of a crime; in fact, they are preliminary acts committed even if the genocide itself is not carried out. They enhance the preventive dimension of the Convention.

The most controversial category, "direct and public incitement", is limited by two adjectives, so as to reduce conflicts with the protection of freedom of expression.

## **Obligations of States Parties**

Finally, it should be noted that, being an international treaty, its text is devoted to the definition of a number of obligations to be fulfilled by its States parties. These are:

- i. The obligation not to commit genocide (Article I as interpreted by the ICJ).
- ii. The Obligation to prevent genocide (Article I) which, according to the ICJ, has extraterritorial scope;
- iii. The Obligation to Punish Genocide (Article I);
- iv. The obligation to enact the necessary legislation to give effect to the provisions of the Convention (Article V);
- v. The obligation to ensure that effective penalties are provided for persons found guilty of criminal conduct under the Convention (Article V);
- vi. The obligation to try persons accused of genocide in a competent court of the state in whose territory the act was committed, or by an

international criminal tribunal with accepted jurisdiction (Article VI);

vii. The obligation to grant extradition where there are charges of genocide, in accordance with existing laws and treaties (Article VII), especially in relation to the protection afforded by international human rights law, which prohibits refoulement where there is a real risk of gross violations of human rights in the receiving state.



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