

THE CRIME OF CRIMES: GENOCIDE



The word “genocide” was first coined by Polish lawyer Raphaël Lemkin in 1944 in his book, *Axis Rule, in Occupied Europe*. Genocide was only recognized as a crime under international law in 1946 by the United Nations General Assembly. It was codified as an independent crime in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The Convention has been ratified by 152 states (as of July 2019). The International Court of Justice (ICJ) has repeatedly stated that the Convention embodies principles that are part of general customary international law. This means that whether or not states have ratified [the Genocide Convention](#), they are all bound as a matter of law by the principle that genocide is a crime prohibited under international law. The ICJ has also stated that the prohibition of genocide is a peremptory norm of international law (or *jus cogens*) and consequently, no derogation from it is allowed.

Definition: Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, this includes the mental element, such as criminal intent, knowledge, recklessness or negligence, and any one of the following physical elements:

- Killing members of the group
- Causing serious bodily or mental harm to members of the group
- Deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part
- Imposing measures intended to prevent births within the group

- Forcibly transferring children of the group to another group

The Genocide Convention states in [Article I](#) that the crime of genocide may occur in the context of an armed conflict, international or non-international, but also in the context of a peaceful situation. The latter is less common, but still possible. The same article stipulates the obligation of the contracting parties to prevent and punish the crime of genocide.

The ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to the group.

The intent is the most difficult element to determine. To constitute genocide, there must be a proven intent on the part of perpetrators to physically destroy a national, ethnical, racial or religious group. Cultural destruction does not suffice, nor does an intention to simply disperse a group. It is this special intent, that makes the crime of genocide so unique. In addition, case law has associated intent with the existence of a state or organizational plan or policy – although this is not strictly an element of the crime.

It is also significant that the victims of genocide are targeted deliberately, not indiscriminately, owing to their membership in one of the four groups protected by the Convention.

Any of the following considerations may be used to prove specific intent:

- Speech
- Extent of crimes
- Systematic or patterned behavior
- Elements that suggest hate as the ultimate aim of acts
- Orders or directives
- Proven existence of premeditation
- Large number of victims
- Methodical way of planning
- Behavior of the perpetrators when committing the crimes

Considerations:

Genocide can occur in times of peace and in times of war, just like crimes against humanity, while war crimes occur within the context of an international or non-international armed conflict only. Intent to commit genocide crimes can be determined by the following actions:

- An act or failure to act which results in the destruction of a national, ethnical, racial or religious group
- Attempts to direct or influence public incitement, conspiracy and complicity

Intent must be specific. That is, the intent to destroy must be shown. However, the International Court of Justice held in its decision, 373/ 2007, that it can be deduced that the behavior in question indicates the intent to destroy if it refers to behavior directed against that group or behavior that could in itself lead to the total or partial destruction of the group.

If intent to destroy cannot be proved, war crimes and crimes against humanity may still apply.

Is “cultural genocide” included in the crime of genocide?

Answer: NO

This was [confirmed by the ICTY](#). Although the ICTY determined that systematic crimes against cultural heritage can amount to crimes against

humanity, ”for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects,” it found that such actions did not amount to genocide. It is nonetheless a serious international crime.

The ICJ further confirmed in one of its [reports of judgments, advisory opinions and orders](#), that cultural genocide is not genocide. The Court further held in 2007 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.” Thus, this type of destruction does not satisfy the physical element of the crime.

Gaps and challenges:

1. **The genocide convention has a number of gaps:** The proof of the crime of genocide requires the presence of a special intent and the existence of prior intent to totally or partially destroy a group. Without establishing special intent, the crime of genocide cannot be determined, no matter how terrible the action. Intent is largely based on moral factors which makes it even more difficult to ascertain. In the [Jelusic case](#), the ICTY found that the material factor for the crimes that were committed was available and proven, but could not be considered the crime of genocide because the special intent was not proven. Rather, the crimes could be considered a crime against humanity or a war crime.

2. **The second gap in the Genocide Convention is that it did not define which groups are subject to the crime of genocide.** Rather it stipulated that they fit in certain categories based on their national, racial, ethnic and religious affiliations. For example, the International Tribunal for Rwanda in the [Akayesu case](#) had to define each of the four groups mentioned in Article (2) of the 1948 Convention. This forced the court to determine if the victims (Tutsi), or the moderates (Hutus) who were also victims of violence, fell into the same groups protected by the genocide convention.

3. **Non-inclusion of political groups in the agreement:** Although political groups are liable to be victims of crimes approaching genocide, the lack of agreement on the status of these groups means systematic crimes committed against political

groups are not considered genocide. This lack of definition leaves a serious gap in the convention and is inconsistent with the spirit and objectives of this document. Numerous genocide-like crimes have been committed against political groups, but cannot be classified or tried as genocide crimes. Nearly a million people were killed in Cambodia by the (Khmer Rouge) between the years 1975-1985, or nearly 40% of the population, but these crimes against Cambodians were not considered genocide because the targeted group of victims was political and not covered by the convention.

The International Criminal Tribunal for Rwanda also ruled out some genocide crimes because the victims were a political group. After defining the four groups, the court reached a strange conclusion, as it considered that the (Tutsi) in Rwanda constitute a fixed and defined group and fell within the parameters of having a fixed national, racial, ethnic and religious identity. However, moderate Hutu who were also killed by the Hutu genocidaires were considered to be merely a political group.

History of the prosecution of genocide:

- In 1998 the International Criminal Tribunal for Rwanda issued the world's first conviction for the crime of genocide. As part of the [Akayesu case](#), the accused was convicted for his involvement in and oversight of acts of genocide and crimes against humanity while serving as mayor of the Rwandan town of Tapa. The ICTR subsequently convicted 61 individuals, most of whom were convicted for genocide.
 - In 2007, the [International Criminal Tribunal for the former Yugoslavia \(ICTY\)](#) passed legally binding verdicts against 17 people indicted for genocide and crimes committed in Srebrenica since 1993. You can learn more [here](#).
 - On 26 February 2007 the ICJ presented its [judgment](#), in which it confirmed the ICTY judgment that the Srebrenica massacre was genocide.
 - On October 19, 2005, Mr. Munyaneza, a Rwandan national, was arrested in Toronto for alleged activities relating to the Rwandan genocide in 1994. A Canadian court charged Mr. Munyaneza with two counts of genocide, two counts of crimes against humanity, and three counts of war crimes, pursuant to the Crimes Against Humanity and War Crimes Act.
- Following a rogatory commission held in Kigali, Rwanda, and a trial before the Superior Court of Quebec, Mr. Munyaneza was convicted on May 22, 2009, of all seven counts of war crimes, crimes against humanity, and genocide. In October 2009, he was sentenced to life imprisonment without parole for 25 years. Mr. Munyaneza's appeals of his conviction and sentence were dismissed by the Quebec Court of Appeal on May 7, 2014. On August 5, 2014, Mr. Munyaneza filed an application for leave to appeal to the Supreme Court of Canada, which was dismissed on December 18, 2014.
- On 4 March 2009, the ICC, issued the first arrest warrant for [Omar Hassan Ahmad Al Bashir](#). A second warrant was later issued on 12 July 2010. Omar was accused of serious international crimes as well as three counts of genocide: by killing, by causing serious bodily or mental harm, and by deliberately imposing conditions of life on each target group meant to bring about the group's physical destruction. These crimes were allegedly committed between 2003 and 2008 in Darfur, Sudan.
 - In 2019 a Brussels court found a former Rwandan official [guilty of genocide](#) after hearing of his role in the 1994 Rwandan massacres.
 - In 2022 a French court [sentenced a former senior Rwandan official](#) 20 years after finding him guilty of complicity in the African nation's genocide.
 - From 2021 - 2023, at the national level, the Higher Regional Court of Hamburg utilized its authority under Germany's universal jurisdiction laws to convict a number of former ISIS members. This included the following individuals:
 - German ISIS member Jalda A. was convicted of aiding and abetting genocide as well as of crimes against humanity and war crimes for the enslavement and abuse of a young Yazidi woman. The defendant was sentenced to five years and six months in prison.

- Nadine K. was charged as an accessory to genocide, war crimes, and crimes against humanity. It alleges that she and her husband stored and moved weapons for ISIS and that they enslaved a Yazidi woman in 2016, who was repeatedly raped by Nadine K's partner.
- Taha A.-J. was convicted of genocide, crimes against humanity and war crimes following his enslavement and abuse of Yazidis in Fallujah, Iraq and sentenced the defendant to life imprisonment. His wife, "Jennifer W.", was sentenced in a separate trial to 10 years in prison for her own involvement in the crimes against Reda and her mother.