Institutiones Administrationis – Journal of Administrative Sciences Vol. 4 (2024) No. 1, 90–102
DOI:10.54201/iajas.v4i1.117

The Conventional Definition of Genocide

Stearns Broadhead*

* Visiting Fellow, Faculty of Philosophy, Vita-Salute San Raffaele University, Milan, Italy. e-mail: stearns.broadhead@uni-graz.at

Abstract

This work comprehensively analyzes the legal definition of genocide. In so doing, it details the material and mental conditions that can lead to an individual's punishment for the commission of the crime of genocide. Further, it addresses some of the difficulties that have arisen when interpreting and applying the legal rule. To this end, this work starts by presenting the basic structure of the crime of genocide, and also the goals of its legal prohibition. It then concentrates on the material element (*actus reus*) of genocide, placing emphasis on two difficulties; namely, the notion of the group, and how to identify the four protected groups. In addition, the conduct prohibited by the Convention is detailed. This work then focuses on the mental element (*mens rea*) of the crime, examining each term from the Convention's formulation separately in order to better assess the concept of specific intent. This work then considers the meaning of article 30 from the ICC Statute. Ultimately, this work details the conventional definition of genocide and reveals some of the main interpretative challenges associated with it.

Keywords

crime of genocide, Genocide Convention, international criminal law, legal theory

Introduction

Anyone interested in finding an answer to the question "what is genocide?" will not be left wanting for responses. The variety of definitions and concomitant approaches to the query underscore not only an abiding concern with the subject matter and its grim history, but also the perceived deficiencies of the prohibition as formulated in international law (see Straus, 2001). The following eschews alternative accounts, and instead comprehensively analyzes the legal definition of genocide. In so doing, it details the material and mental conditions that can lead to an individual's punishment for the commission of the crime of genocide. Further, it identifies some of the main difficulties that have arisen when interpreting and applying the legal rule.

Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide[1] (the Genocide Convention or the Convention) sits at the center of analysis. This instrument was adopted by the United Nations General Assembly on 9 December 1948 and entered into force on 12 January 1951. Even a cursory reading of article II reveals that at least

[1] Convention on the Prevention, and Punishment of Genocide, Doc. No. 78 U.N.T.S. 277, adopted December 9, 1948; entered into force January 12, 1951.

Article is licensed under CC BY 4.0 © 2024 The Author(s)

some of its terms call for clarification. Those of particular concern below include the definition of groups generally, the identification of the four protected groups, as well as the meaning of genocidal intent. Interpretative solutions to these come from four main sources besides the Convention: (1) case law—most notably judgments from the International Criminal Tribunals for Rwanda (ICTR) and for the Former Yugoslavia (ICTY); (2) the International Criminal Court Statute (ICC Statute or Rome Statute) and its Elements of Crimes; (3) the *travaux préparatoires* of the Convention; and, (4) legal scholarship on the subject of genocide.

This work is organized in the following way. Section 1 presents the basic structure of the crime of genocide, and also the goals of its legal prohibition. Section 2 concentrates on the material element (*actus reus*) of genocide. Here, much emphasis is placed on two of the difficulties noted above; namely, the notion of the group, and how to identify the four protected groups. In addition, the conduct prohibited by the Convention is detailed. Section 3 focuses on the mental element (*mens rea*) of the crime. This section handles each term from the Convention's formulation separately in order to better assess the concept of specific intent. In addition, the section considers the meaning of article 30 from the ICC Statute. Section 4 concludes this work.

1 Definition, Structure, and Goals

1.1 Definition of the Crime

Article II of the Convention provides the authoritative formulation of the crime of genocide. It is also the original one in international law.[2] It was later reproduced verbatim in the statutes of the International Criminal Court at article 6, the International Criminal Tribunal for Rwanda (ICTR) at article 2(2), as well as the International Criminal Tribunal for the Former Yugoslavia (ICTY) at article 4(2). In addition, the prohibition is a part of general customary international law and recognized as part of *jus cogens* (Boas et al., 2008, 143–150).[3] Article II reads as follows:

> 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.

[2] As stated in the Report of International Law Commission (1996): "The definition of genocide contained in article II of the Convention … is widely accepted and generally recognized as the authoritative definition of the crime"; Werle, 2005, 190

[3] A brief reminder: (1) International customary law binds all states "except for those that have consistently and openly objected to the formation of a rule from its inception"; (2) *jus cogens* are peremptory norms of international law; no derogation from them is allowed. They "generally comprise fundamental human rights and rules of international humanitarian law, as well as the prohibition of the use of unlawful armed force." Bantekas & Nash, 2003, 3.

1.2 Structure of the Crime

A standard distinction between the mental (*mens rea*) and material elements (*actus reus*) of the crime of genocide appears in the above definition (Report of ILC, 1996, 44, para.4.). As a brief refresher of the meaning of these elements is "*actus reus* stands for the wrongful act, and *mens rea* for the criteria of attribution" (Fletcher, 1998, 84). Both of these are necessary for ascriptions of criminal liability.[4] They describe not only what a perpetrator did or caused, but also his or her criminal intent or fault in doing or causing them (Ashworth, 2009, 84). Notice that article II defines conditions under which a principal offender may be held criminally liable for genocide (Schabas, 2009, 176).[5]

A concise restatement of the definition can help to elucidate the preceding: the enumerated acts are punishable as genocide when performed with the intent to destroy in whole or in part a protected group. This captures the basic structure of the crime of genocide, as it underscores the coupling of specific kinds of conduct with a specific form of intent. However, an important point should be made at the outset. Article II does not require that prohibited conduct be part of an overall campaign of organized violence, or adhere to a policy of such (Cassese, 2008, 140–141). This absence is noteworthy because genocide, such as in Rwanda in 1994 and in the Former Yugoslavia in the 1990s, seems practically to necessitate such a plan or organization for its fulfillment. In this respect at least, the substantive formulation goes against not just an intuition that genocide requires collective activity (except in less probable "lone-gunman" scenarios), but also the history of genocidal events.

In the assessment of Antonio Cassese, the coordinated efforts of many persons to achieve a genocidal outcome remain important matters of fact (Cassese, 2008, 140–41). However, they are not provided for or (strictly speaking) required as evidence for the prosecution and punishment of an individual for the crime of genocide. The absence of this in the definition of genocide contrasts with the prohibition of crimes against humanity, where "the context of widespread and systematic attack against any civilian population" explicitly features in the material element. [Rome Statute of the International Criminal Court, 1998, article 7(1)]. In this sense, a person who kills or tortures members of a protected group with genocidal intent, but without a context of organized violence, could potentially meet the requirements of the legal prohibition.[6] Still, prohibited acts such as imposing measures intended to prevent births within a protected group are effectively inconceivable without coordination and planning (Cassese, 2008, 141).[7] As discussed at greater length in Section 3, contexts of systematic and organized violence do figure into assessments of individual guilt; namely, as evidence of a perpetrator's

[4] They are parts of a three-pronged test under international law: (1) Whether the suspect fulfilled the material elements of the crime; (2) committing conduct with "intent and knowledge" (i.e. the mental element); (3) whether excluding circumstances (excuses and justifications) were present (Werle, 2005, 95). In this work, I assume that no excluding conditions are present, and neither detail nor address them.

[5] Article III of the Convention criminalizes other types of contribution (e.g. complicity and conspiracy); this work focuses only on the crime of genocide and the constitutive conditions of guilt of the principal offender for it.

[6] Commentators such as Claus Kress hold that "the [genocidal] intent must be *realistic* and must thus be understood to require *more than a vain hope.*" This would limit the possible instances and plausibility of many lone perpetrator hypothetical scenarios. (Kress, 2006, 472).

[7] The other acts that presuppose such planning are the deliberate infliction of conditions of life calculated to bring about group destruction, and forcible transfer of children from one group to another.

specific intent to destroy a protected group. [Note that the ICC Elements of Crimes, (2013), articles 6(a)–(e) each includes the separate paragraph: "the conduct took place in the context of a manifest pattern of similar conduct" (i.e. a context of collective activity based around and aimed at the fulfillment of a genocidal plan or policy).]

The structure of the crime dictates that conduct, even where specified as having a group as its object, always occurs through attacks on individual members (Werle, 2005, 199). Genocide depersonalizes the victim (Cassese, 2008, 137). In this sense, it is not because of a victim's individuality that he or she is assailed, but rather because he or she is a member of a group selected for destruction. The commentator Nehemiah Robinson captures this idea well when he writes that "groups consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important not *per se* but only as members of the group to which they belong (Robinson, 1960, 58). One illustrative way of framing the preceding is in terms of proximate and ultimate purposes: the individual group member's demise (proximate purpose) facilitates the group's destruction (ultimate purpose). As will become apparent, this point proves relevant to considerations of both the material and mental elements of the crime.

1.3 Goals

Having sketched the basic structure of the crime as it appears in article II, a question about the goals of criminalization arises. The Convention explicitly details two of its own. It aims to oblige signatories to prevent and punish genocide, and it also seeks to facilitate international (judicial) co-operation for genocide's prevention and suppression (Cassese, 2008, 128). The Preamble also declares that "in order to liberate mankind from such an odious scourge [genocide], international co-operation is required". In the first major decision about genocide by an international tribunal, the Trial Chamber of the ICTR declared in its judgment of *Prosecutor v. Akayesu* that "the crime of genocide exists to protect certain groups from extermination or attempted extermination."[8] The court's articulation of this specific goal not only reflects the text of the definition itself, but also the views of both Raphael Lemkin, who coined the term genocide, and the Convention's drafters (Cf. Lemkin, 2008, 79–91; UN General Assembly, 1946; Abtahi et al., 2008, 1505). Although a distinction can be drawn between the Convention's avowed goal and the more specific one of safeguarding the four groups, the respective goals cannot be taken as discontinuous.

2 Material Elements or *actus reus*

The material element of genocide includes the acts detailed in article II: killing; causing serious bodily or mental harm; inflicting conditions calculated to bring about physical destruction; imposing measures to prevent births; forcibly transferring children to another group. The list is set forth as exhaustive; however, conviction for the crime of genocide does not simply mean that a perpetrator performed one of them (Robinson, 1960, 57–64). To qualify as genocide, prohibited conduct must have a national, ethnic, racial, or religious group as its object. Of

[8] *Prosecutor v. Akayesu,* International Criminal Tribunal for Rwanda, case no. IT-96–4-T, Trial Chamber Judgment (September 1998), §469.

course, this is in addition to the fulfillment of the other detailed conditions. The intent to destroy a protected group falls under the mental requirement, but because they are the objects of prohibited conduct groups fit within the material element of the crime as well.

2.1 Protected Groups

Defining groups proves essential for determinations about whether enumerated acts qualify as genocide. This poses problems in that the Convention does not provide a robust, substantive account either of groups generally, or those it specifically designates for protection. In addition, there exist no internationally agreed upon definitions of the groups' attributes (Kress, 2006, 475). The task at hand, then, consists of identifying the characteristics that constitute the group generally, and then identifying the traits of each respective group (Cassese, 2008, 138. calls them "the major problems concerning the objective element of genocide"). This will result in the clarification of the meaning of the terms.

Deliberations about the final text of the Convention indicate that the general notion of groups is based on a common definitional trait: stability.[9] This characteristic emerges from the non-voluntary and inalienable nature of group membership, which is generally determined by birth and comes with no simple exit out.[10] However, the Convention's specification of four groups indicates that not all groups displaying stability may qualify for protection, but rather only those explicitly designated.[11] In this sense, the drafters sought to protect exclusively what they regarded as stable groups. As becomes more apparent in light of classificatory accounts of the four groups' defining traits, this designation of stability or permanence remains a crucial feature for assessing the object of prohibited acts.

Three prominent approaches have been differentially applied by courts in order to determine whether the target of prohibited conduct is to be regarded as a protected group. They are the objective, subjective, and mixed accounts. The first of these, the objective approach, follows from the general idea that designated groups are stable, permanent, and as such display externally fixed characteristics. In this respect, it defines the classes of groups according to "some alleged objective features each group exhibits" (Cassese, 2008, 138).

According to such fixed criteria set out by the Trial Chamber of the ICTR in *Prosecutor v. Akayesu,* a multitude of persons constitutes a national group on the basis of their legal bond of common citizenship or national origin.[12] An ethnic group consists of persons sharing common language or culture.[13] A racial group shares hereditary physical characteristics.[14] Finally, a religious group is a set of persons who have the same religion, denomination, or mode of

[9] Sixth Committee Session, UN Doc. A/C. 6/SR.64, Sixty-Fourth Meeting (1 October 1948) in Abtahi et al., 2008, 1309.

[10] Sixth Committee Session, UN Doc. A/C. 6/SR.64, in Abtahi et al., 2008, 1309.

[11] Notice on this point that the controversial exclusion of political groups from the Convention was advanced on the grounds that they lacked the relevant stability and permanence. A good general starting point for considering this is Andreopoulos, 1994.

[12] *Prosecutor v. Jean-Paul Akayesu, International Criminal Tribunal for Rwanda, case no. IT-96–4-T, Trial Chamber Judgment, 2 September 1998.* §512.

[13] Ibid, §513.

[14] Ibid, §514.

worship.[15] This approach most faithfully adheres to the views of the Convention's drafters, but its reliance on what have been called outmoded standards has contributed to the adoption of other approaches by courts.[16]

The subjective account does not identify the respective groups according to fixed external characteristics, but rather with what Gerhard Werle calls "social ascription processes" (Werle, 2005, 195). These include designations made by perpetrators about whether their victims were group members, as well as the self-perceptions of putative members themselves. This subjective construct of groups, then, assesses whether persons were treated as though they belonged to a group, or if they viewed themselves as belonging to such a group (Cassese, 2008, 139). The subjective account faces its own challenges. At least in its pure form, this approach has been claimed to "circumvent the drafters' decision to confine protection to *certain* groups," and convert "the crime of genocide into an unspecific crime of group destruction based on a discriminatory motive" (Kress, 2006, 474).

As evidenced by case law and legal scholarship, there is a growing tendency towards the classification of groups according to a mixed standard. In this sense, both objective traits and subjective ascriptions are used to identify the four groups. This development is not entirely new, since some of the earliest judgments of the ICTR adopted this sort of perspective.[17] As described by the Report of the International Commission of Inquiry on Darfur (hereinafter Darfur Report), the mixed account allows for a classification of the four groups in which "the subjective test may usefully supplement and develop, or at least elaborate upon, the standard laid down in the 1948 Convention and the corresponding rules on genocide" (Report of the International Commission of Inquiry on Darfur, 2004, para. 500.)

The admixture of criteria addresses limitations and challenges arising from classifications based either on exclusively objective or exclusively subjective standards. As the Darfur Report indicates, social ascription processes can supplement objective analysis. By virtue of the Convention's specification of the four protected groups, even if wanting in substantive depth, as well as the underlying conception of groups as stable entities, the subjective construct cannot legally supplant the objective approach (Kress, 2006, 475; Kress, 2007, 623). This does not, however, exclude the possibility of considering additional complex social factors in order to arrive at a more nuanced definition of the four protected groups.

2.2 Prohibited Acts

Below the acts prohibited by article II are detailed in accordance with the text itself, and the definitions provided by the Trial Chamber in the *Akayesu* judgment. This court's descriptions have informed and guided subsequent rulings, and as such provide a useful definitional standard

---

[15] Ibid, §515.

[16] Report of the International Commission of Inquiry on Darfur, (2004), para. 494: "This terminology is criticized for referring to notions such as 'race', which are now universally regarded as outmoded or even fallacious. Nevertheless, the principle of interpretation of international rules whereby one should give such rules their maximum effect (principle of effectiveness, also expressed by the Latin maxim *ut res magis valeat quam pereat*) suggests that the rules on genocide should be construed in such a manner as to give them their maximum legal effects [thus, some objective criteria are necessary]."

[17] As noted by Werle (2005), judgments adhering to this type of combined standard include: *Prosecutor v. Musema,* (27 January 2000); *Prosecutor v. Bagilishema* (7 June 2001); *Prosecutor v. Semanza* (15 May 2003).

(Boas et al., 2008, 177).[18] The interpretative difficulties apparent when exacting the meaning of groups do not appear when defining the acts themselves. However, determining whether certain conduct matches article II's proscriptions ultimately depends on the case by case analysis of facts by courts. This does not preclude setting out the court-provided definitions of the sorts of acts that conform to article II's list (Robinson, 1960, 64). In a more schematic form than above, the following presents these more general statements about the acts proscribed.

(A) Killing members of the group

This is often conceived of as the ultimate genocidal act (Gellately & Kiernan, 2003, 15–16). As defined by the Trial Chamber in *Prosecutor v. Akayesu* killing "is homicide committed with the intent to cause death."[19] The ICTY Trial Chamber in its Prosecutor v. Jelisic judgment summarizes the three legal ingredients of the act in this way: "the victim is dead, as a result of an act of the accused, committed with the intention to cause death."[20]

(B) Causing serious bodily or mental harm to members of the group

The *Akayesu* Judgment declared that "causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable."[21] This has remained an abiding standard applied in subsequent cases about genocide.[22] As detailed in the Trial Chamber of the ICTY's *Krstić* decision, while the harm need not be permanent and irremediable, it must go "beyond temporary unhappiness, embarrassment or humiliation . . . [and] results in grave and long-term disadvantage to a person's ability to lead a normal and constructive life."[23] Acts indicative of this degree of harm include inhuman treatment, torture, rape, and deportation.

(C) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

In the *Akayesu* judgment, the Trial Chamber offered an interpretation of acts conforming to this description as "methods of destruction by which the perpetrator does not immediately kill the

---

[18] Cf. *Prosecutor v. Krstić,* International Criminal Tribunal for the Former Yugoslavia, case no. IT-98-33-T, Trial Chamber Judgment, (2 August 2001), §§508-13.

[19] *Prosecutor v. Jean-Paul Akayesu,* International Criminal Tribunal for Rwanda, case no. IT-96–4-T, Trial Chamber Judgment, 2 September 1998. §501.

[20] *Prosecutor v. Jelisic,* International Criminal Tribunal for the Former Yugoslavia, case no. IT-95-10-T, Trial Chamber Judgment (14 December 1999), para.35. Note that the ICC *Elements of Crimes,* ICC-ASP/1/3, article 6(a) declares necessary conditions: "(1) The perpetrator killed one or more persons; (2) Such person or persons belonged to a particular national, ethnical, racial or religious group; (3) The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; (4) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."

[21] *Prosecutor v. Jelisic,* International Criminal Tribunal for the Former Yugoslavia, case no. IT-95-10-T, Judgment, Trial Chamber Judgment, 14 December 1999. §502.

[22] Cassese, 133.

[23] *Prosecutor v. Krsitć,* International Criminal Tribunal for the Former Yugoslavia, case no. IT-98-33-T, Trial Chamber Judgment, 2 August 2001. §513.

members of the group, but which, ultimately, seek their physical destruction."[24] The specification of 'deliberately' reinforces the point that perpetrator's conduct is consciously used as a means for a protected group's physical destruction. Examples of such conduct have been offered by courts. The ICTR Trial Chamber wrote in the *Prosecutor v. Kayishema* that proscribed acts of this sort can include "the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part" (quoted in Schabas, 2009, 190–191).

(D) Imposing measures intended to prevent births within the group
Acts inhibiting a protected group's reproductive capacities would fall within the ambit of this paragraph. While the text indicates that measures are intended, this specification does not attach additional or independent mental requirements. As described in the judgment of *Prosecutor v. Akayesu,* such measures "should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.[25]

(E) Forcibly transferring children of the group to another group
One interpretation of both the seriousness and the reason for this paragraph's inclusion in the Convention comes from the International Law Commission, which stated that "the forcible transfer of children would have particularly serious consequences for the future viability of a group as such" (Report of International Law Commission, 1996, 46). However, some have debated including this as a punishable act (Amir, 2008, 44; Schabas, 2009, 201; Kourtis, 2023, 1–22; van Krieken, 2004, 136; Grover, 2013). Nevertheless, this act requires that the person or persons forcibly transferred were part of a protected group; they were children (i.e. under eighteen years old); and, the transfer itself was from one group to another group [International Criminal Court, 2013, article 6(e)].

3 Mental Elements or *mens rea*

The primary clause from article II of the Convention describing the *mens rea* of genocide bears repeating: "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." This delimits the scope of the requirement as that of special intent *(dolus specialis).* The more recent codification of mental elements—intent and knowledge—provided by the ICC Statute applies in conjunction with the special or specific intent standard. The task at hand not only necessitates presenting the requirements set forth in the ICC Statute, but also special intent and the terms 'destroy' and 'in part.' Also, the term 'as such' will be briefly reconsidered. By exacting the meaning of these terms, the standard of *mens rea* becomes apparent. In keeping with a distinction set out early on, this lays bare the criteria of attribution or fault for the perpetrator's conduct.

[24] *Prosecutor v. Jean-Paul Akayesu,* International Criminal Tribunal for Rwanda, case no. IT-96–4-T, Trial Chamber Judgment, 2 September 1998., §505.

[25] *Prosecutor v. Jean-Paul Akayesu,* International Criminal Tribunal for Rwanda, case no. IT-96–4-T, Trial Chamber Judgment, 2 September 1998., §507.

3.1 ICC Statute – Intent and Knowledge

Genocide is among the four crimes over which the ICC has jurisdiction. As such, the Statute's definition of the required mental elements of crimes applies not only to genocide, but also crimes against humanity, war crimes, and (eventually) crimes of aggression. Although the Convention's definition of genocide appears word for word in the ICC Statute, the codification of the mental element at article 30 helps to elaborate the earlier instrument's conception of genocidal intent. This complements the specific intent requirement, and explicates the requisite intent for underlying conduct.

The two components of article 30's requirement are intent and knowledge. As the Statute declares, a person has intent when "(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." The Statute defines knowledge as an "awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly." As is evident, both intent and knowledge are required for international crimes; furthermore, article 30 allows for the application of more specified *mens rea* requirements to the respective crimes covered by the ICC Statute (Werle, 2005, 95, 103–106).

With respect to genocide, committing prohibited acts requires a feature additional to both the general criminal intent to engage in conduct and cause its consequences, as well the knowledge of such consequences and circumstances. Even if acting with knowledge of a broader plan of systematic violence, an individual's commission of an enumerated act must be performed with the specific intent to destroy a protected group (Werle, 207).[26] While knowledge and intent as detailed in article 30 of the ICC Statute clearly have relevance to determinations about a perpetrator's mindset, the differentiating aspect of the *mens rea* requirement for genocide is its specific intent component.

3.2 Specific Intent

The ICTR Trial Chamber wrote in the *Akayesu* judgment: "Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged."[27] Put another way, to be convicted of genocide a perpetrator must act against victims on the basis of their group membership, and have the purpose to destroy the group itself (Report of International Law Commission, 1996, 44; Greenawalt, 1999, 2264; Schabas, 2009, 257; Robinson, 1960, 58–60; Vest, 2007, 783). To see what makes specific intention distinct, consider again that an individual's intention to kill a victim with knowledge that his or her act will result in such a consequence (general criminal intent) does not by itself meet the *mens rea* requirement for genocide. The additional, distinguishing component is that in committing the act a perpetrator does so with the purpose to destroy the protected group, of which the individual or multiple victims are members.

In light of the above, the three basic components of genocide's intent requirement as

[26] William Schabas notes that "case law has tended to emphasize intent rather than knowledge, probably because the word 'intent' actually appears in the definition of the crime" (Schabas, 2009, 242).

[27] *Prosecutor v. Jean-Paul Akayesu,* International Criminal Tribunal for Rwanda, case no. IT-96–4-T, Trial Chamber Judgment, 2 September 1998., §498.

identified by William Schabas become clearer. First, there is the intent to destroy the group. Second, this intent is for the group to be destroyed in whole or in part. Finally, the group a perpetrator intends to destroy in whole or in part must be one of the four designated by the Convention (Schabas, 2009, 270). This depiction amplifies the specificity and strength of the requirement: all three aspects are present in the mind of the perpetrator.

Section one of this work noted the lack of explicit reference to a genocidal plan or policy in the definition of genocide. The context and circumstances of organized and systematic violence nevertheless can establish genocidal intent. The difficulty of determining whether a perpetrator acted with specific intent to destroy a group underpins the importance of contextual factors.[28] As the Trial Chamber in the Akayesu decision wrote, "it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others." Evidence of specific intent, then, could appear not only in the form of perpetrators' confession, but from the surrounding context of violence.

3.2.1 'Destroy'

As the Trial Chamber Judgment of *Prosecutor v. Krstić* states, "international law limits the definition of genocide to those acts seeking the physical and biological destruction of all or part of the group."[29] Remember that 'destroy' is a feature of the *mens rea* of genocide (i.e. with intent to destroy a protected group). As should be clear from the above analysis, demonstrating specific intent requires (as a necessary condition) proof of the perpetrator's intention for destruction of the group in this relevant sense.

Despite more expansive notions of genocidal destruction in earlier draft versions, the Convention's drafters eventually included only physically and biologically destructive conduct in the definition.[30] Physical destruction refers to the material eradication of a group and its members. Biological destruction is annihilation through restriction of reproductive capabilities. In this, it can be a less immediate form of destruction. These respective qualifiers can be related to the material acts themselves. Whereas killing, causing serious bodily or mental harm, and inflicting conditions of life calculated to bring about physical destruction fit most clearly into the first type, the imposition of measures intended to prevent births and the forcible transfer of children fall into the category of biological destruction.

Although the prohibited acts of genocide reflect the two sorts of destruction, this should not be taken to mean that in killing a group member, for example, a perpetrator necessarily intends the group's eradication. The material element of genocide proscribes acts of physical and biological destruction; however, to be convicted of genocide a perpetrator's purpose must be the destruction of a protected group. As discussed above, underlying conduct performed

[28] *Prosecutor v. Jean-Paul Akayesu,* International Criminal Tribunal for Rwanda, case no. IT-96–4-T, Trial Chamber Judgment, 2 September 1998., §523.

[29] *Prosecutor v. Krstić,* International Criminal Tribunal for the Former Yugoslavia, case no. IT-98-33-T, Trial Chamber Judgment, 2 August 2001. §580.

[30] Draft Convention on the Crime of Genocide, Secretariat Draft, E/447(28 March 1947), article 1 (3)(a-e) included cultural destruction in addition to biological and physical sorts; this exclusive focus also departs from the conception of genocide that Raphael Lemkin advanced, which included cultural, economic, and other forms of destruction.

with general criminal intent may be prosecuted, but genocide requires that an individual not only cause harm against a group member, but that he or she did so in order to destroy the group. The preceding summarizes the meaning of specific intent, but perhaps more importantly it underscores the essential role that destruction plays in it. To summarize intent to destroy in case law – including ICTR judgments including and after *Akayesu,* as well as ICTY rulings on *Jelisic, Krstić, Sikirica, Blagojevic,* and *Brdjanin,* respectively – "'intent to destroy' means a special or specific intent which, in essence, expresses the volitional element in its most intensive form and is purpose-based" as originally suggested in Akayesu (Ambos, 2009, 838).

3.2.2 'In part'

The words 'in part' qualify the specific intent for the physical or biological destruction of the group. Claus Kress writes that these "words make it plain that the intention need not be 'the complete annihilation of a group from every corner of the globe'" (Kress, 2006, 489). Even with this condition established, the scope of the destructive intent is not immediately apparent (May, 2010, Ch. 6). The most consistently applied and accepted standard is that of substantiality (Kress, 2006, 490). It construes 'in part' as a substantial portion of the protected group (i.e. 'with intent to destroy in whole or in *substantial* part'). This qualification of substantiality indicates an additional delineative component of genocidal intent.

Two primary interpretations of the term substantial have been applied. They are the quantitative and qualitative approaches. In accordance with the ICTY Trial Chamber in the *Jelisic* judgment, either of these standards may be used.[31] The quantitative perspective describes substantial as a large number of group members.[32] Although courts have been generally unwilling to set such limits, this approach necessitates a minimum numerical threshold in order to delineate between a substantial and an insufficient amount of victims (Kress, 2006, 490). The qualitative approach builds on the notion that certain group members are of greater significance for the continued existence of the group. On this interpretation, the loss of group elites could suffice to meet the threshold of 'in part' because of their (putative) importance to the group (Schabas, 2009, 275). It is, then, the member's qualitative impact on the group that results in satisfying the standard.

3.2.3 'As such'

This term was outlined in the preceding, but the meaning of 'as such' bears repeating as it pertains to the object of destructive intent – the group. Here, we can recall Robinson's words: "individuals are important not *per se* but only as members of the group to which they belong" (Robinson, 1960, 56). In this regard, 'as such' refers to the specific intent to destroy the protected group. Although it will be persons within a group that are the victims of genocide, it is the destruction of the group not the member's individuality that constitutes the definitive component of this crime (Werle, 2005, 208).

---

[31] *Prosecutor v. Jelisic,* International Criminal Tribunal for the Former Yugoslavia, case no. IT-95-10-T, Judgment, Trial Chamber Judgment, 14 December 1999. para. 82.

[32] *Prosecutor v. Jelisic,* ibid; Robinson, 1960, 63: "The intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if these persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial."

4 Conclusion

Here, we might step back and consider again what results from having detailed all of these features of genocide. First and most evidently, the standard distinction between material and mental elements provided a framework for identifying both the meaning and intricacies of each required component of the legal prohibition. In this, both the acts and intent that constitute conditions of criminal liability for genocide were defined. Elaboration of these elements in accordance with case law, later international instruments, and legal scholarship provided substantive insights into the meaning and interpretation of the crime's constituent terms. Three issues were given special attention because of their complexity and also lack of definitional clarification in article II. They were the general notion of groups, the related matter of identifying the four protected ones, and the meaning of genocidal intent.

In light of the identification of the elements of the crime, it is possible to offer a more expansive, annotated restatement of its definition: genocide is the intentional physical or biological destruction, by means of prohibited conduct, of an entire or substantial part of a national, ethnic, racial, or religious group as such. The perpetrator of the crime, then, must have not only committed one of the proscribed destructive acts against a member of a protected group, but done so with the purpose of destroying the entire or a substantial part of the group. This captures the meaning of the crime and underscores the conditions of liability. Of course, whether the legal definition is the most appropriate one is another matter.

References

Abtahi, H., & Webb, P. (Eds.) (2008). *The Genocide Convention: The Travaux Préparatoires.* (Vol. 1.) Martinus Nijhoff.

Ambos, K. (2009). What does 'intent to destroy' in genocide mean? *International Review of the Red Cross,* 91(876), 833–858. https://doi.org/10.1017/S1816383110000056

Andreopoulos, G. J. (Ed.) (1994). *Genocide: Conceptual and Historical Dimensions.* Penn University Press.

Amir, R. (2018). *Twentieth Century Forcible Child Transfers: Probing the Boundaries of the Genocide Convention.* Lexington Books.

Ashworth, A. (2009). *Principles of Criminal Law* (6th ed.). Oxford University Press.

Bantekas, I., & Nash, S. (2003). *International Criminal Law* (2nd ed.). Cavendish.

Boas, G., Bischoff, J. L., & Reid, N. (2008). *Elements of Crimes under International Law* (Vol. II). Cambridge University Press. https://doi.org/10.1017/CBO9780511576003

Cassese, A. (2008). *International Criminal Law* (2nd ed.). Oxford University Press.

Convention on the Prevention, and Punishment of Genocide, Doc. No. 78 U.N.T.S. 277, adopted December 9, 1948; entered into force January 12, 1951.

Fletcher, G. P. (1998). *Basic Concepts of Criminal Law.* Oxford University Press.

Gellately, R., & Kiernan, B. (2003). The Study of Mass Murder and Genocide. In Gellately, R., & Kiernan, B. (Eds.). *The Specter of Genocide: Mass Murder in Historical Perspective* (pp. 3–26). Cambridge University Press. https://doi.org/10.1017/CBO9780511819674.001

Greenawalt, A. K. A. (1999). Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation. *Columbia Law Review,* 99, 2259–2294. Online: https://ssrn.com/abstract=1517995

Grover, S. V. (2013). *Humanity's Children ICC Jurisprudence and the Failure to Address the Genocidal Forcible Transfer of Children.* Springer. https://doi.org/10.1007/978-3-642-32501-4

International Criminal Court. (2013). *Elements of Crimes.* Online: https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf

Kourtis, D. A. (2023). The Greek Civil War and Genocide by Forcible Transfer of Children, *Journal of Genocide Research.* 1–22. https://doi.org/10.1080/14623528.2023.2203924

Kress, C. (2006). The Crime of Genocide Under International Law. *International Criminal Law Review,* 6, 461–502. https://doi.org/10.1163/157181206778992287

Kress, C. (2007). The International Court of Justice and the Elements of the Crime of Genocide. *European Journal of International Law,* 18(4), 619–629. https://doi.org/10.1093/ejil/chm039

Lemkin, R. (2008). *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (2nd ed.). Lawbook Exchange.

May, L. (2010). *Genocide: A Normative Account.* Cambridge University Press. https://doi.org/10.1017/CBO9780511807428

Report of the International Commission of Inquiry on Darfur to the Secretary-General. Pursuant to Security Council resolution 1564. (2004). Online: https://www2.ohchr.org/english/darfur.htm

Report of International Law Commission, 48th Session, UN Doc. A/51/10. (1996). Online: https://legal.un.org/ilc/documentation/english/reports/a_51_10.pdf

Robinson, N. (1960). *The Genocide Convention:* A Commentary. Institute of Jewish Affairs.

Rome Statute of the International Criminal Court. Doc. No. A/CONF.183/9. (1998, July 17). Online: https://shorturl.at/ymKtL

Schabas, W. (2009). *Genocide in International Law: The Crime of Crimes* (2nd ed.). Cambridge University Press. https://doi.org/10.1017/CBO9780511575556

Statute of the International Criminal Tribunal for Rwanda. UN Doc. S/RES/955 (1994). Online: https://legal.un.org/avl/pdf/ha/ictr_EF.pdf

Statute of the International Criminal Tribunal for the Former Yugoslavia. UN Doc. S/RES/827 (1993). Online: https://shorturl.at/GmnWi

Straus, S. (2001). Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide. *Journal of Genocide Research* 3(3), 349–375. https://doi.org/10.1080/14623520120097189

UN General Assembly. (1946). *The Crime of Genocide.* A/RES/96 (I), UN General Assembly, 11 December 1946. Online: https://www.refworld.org/legal/resolution/unga/1946/en/27712

van Krieken, R. (2004). Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation. *Oceania,* 75(2), 125–151. https://doi.org/10.1002/j.1834-4461.2004.tb02873.x

Vest, H. (2007). A Structure-Based Concept of Genocidal Intent. *Journal of International Criminal Justice,* 5, 781–797. https://doi.org/10.1093/jicj/mqm036

Werle, G. (2005). *Principles of International Criminal Law.* T.M.C Asser.