

THE INTERNATIONAL CRIMINAL COURT AND GENOCIDE

In this age more than ever, we recognize that the crime of genocide against one people truly is an assault on us all – a crime against humanity. The establishment of an International Criminal Court will ensure that humanity's response will be swift and will be just.

– former United Nations Secretary General Kofi Annan

In July 1995, an estimated 8,000 Muslim Bosniak men were brutally killed in the region of Srebrenica in Bosnia and Herzegovina, representing the largest mass murder in Europe since World War II. In about 100 days from April 6 through mid-July 1994, between 800,000 and 1,000,000 Tutsi and moderate Hutus were murdered in the Rwandan genocide. Most recently, in Darfur, more than 200,000 people have reportedly been killed and 2.5 million have been driven from their homes and villages since the conflict began in 2003. More than 40 years after the Holocaust and almost a century after the Armenian genocide, these events and others vividly show that the international community must continue to recognize and respond to acts of genocide and other atrocity crimes. Over time, the international community has developed a variety of legal mechanisms to hold the perpetrators of such atrocities accountable for their actions. Despite some early success, continuing atrocities throughout the world and problems of previously created international tribunals created strong pressure for a better way to address genocide. Thus, the punishment of genocide was especially urgent and important to early supporters of the establishment of the International Criminal Court (ICC) and served as an essential motivating force behind its creation. Ultimately, the establishment of the ICC represents a significant advance in ending impunity for perpetrators of genocide and other serious crimes. Through investigations and prosecutions, the Court will not only provide justice to victims and punish perpetrators but also potentially deter the commission of genocide in the future by affirming the rule of law and demonstrating that those responsible for such atrocities will not go unpunished.

Genocide and its Prohibition Under International Law

The term 'genocide' was coined in 1944 by Raphael Lemkin, a Polish Jewish legal scholar, in the book *Axis Rule in Occupied Europe* to describe Nazi campaigns to exterminate the Jews, gypsies, and other ethnic groups during the Holocaust. Genocide is derived from the Greek *genos*, meaning race or tribe, and the Latin *cide*, meaning killing. Lemkin's concept of genocide as an offense against international law eventually gained wide acceptance and recognition within the international community.

Genocide is prohibited under international law by the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which was adopted by the UN General Assembly in 1948 and contains a modified version of Lemkin's definition of genocide. Under the Convention, genocide is defined as certain acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Over 130 countries have ratified the Convention, including the US, which became a party to the Convention in 1988. The Genocide Convention not only prohibits genocide but also obligates countries party to the Convention to prevent and punish acts of genocide committed in war and peacetime. The prohibition on genocide is also considered a peremptory norm, or a fundamental international law standard of state behavior that is very widely accepted among nations. Thus, the prohibition on genocide applies to and binds all states, including those not party to the Genocide Convention. Moreover, such a principle is strengthened as binding





when it is included in a treaty. The Genocide Convention and the Rome Statute have therefore both reinforced the international law standard outlawing genocide.

The Genocide Convention also provides options for states to intervene to stop genocides as they are happening. Under Article 8 of the Convention, any State Party “may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide.” Thus, for example, a State Party to the Convention could call on the UN Security Council to use military force to stop genocide being committed in another country.

This option in recent years became an avenue for the strong and organized reaction to past and present atrocities which has led to the emergence of a collective international “responsibility to protect.” This phrase refers to the idea that if a particular state is unwilling or unable to carry out its responsibility to protect its citizens from genocide, mass murder, and other wide-scale human rights violations, that responsibility must be transferred to the wider international community. This concept encompasses both the right and the responsibility of states to intervene to prevent or stop massive human suffering. Discussion of the concept has frequently mentioned the ICC as one way to carry out this responsibility. At the 2005 World Summit, the UN General Assembly endorsed this principle and pledged “to take collective action ... through the Security Council ... should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” In April 2006, the UN Security Council followed up by adopting Resolution 1674 reaffirming the conclusions of the 2005 World Summit that states have the responsibility to protect populations from genocide as well as other serious crimes. This resolution is considered to commit the Council to take action to protect civilians in armed conflict.

Responses to Genocide

The international community responds in many ways to reports of genocide. States and intergovernmental organizations may act in various ways against atrocities committed in a particular country. For example, such responses could include official condemnation of the acts of genocide, imposition of diplomatic or economic sanctions on the perpetrating government, or humanitarian intervention. Nongovernmental actors such as human rights groups and grassroots organizations may mobilize campaigns to raise public awareness of mass atrocities in order to build support and pressure for state actors to take action against the perpetrators of such crimes, or to raise funds to support victims. Public and political responses to genocide generally seek to address the immediate needs of victims, to halt or contain the commission of atrocities, and to condemn them.

Separate from these types of responses are legal responses to genocide. Legal responses are aside from politics and public opinion and usually are domestic or international investigations and prosecutions in courts of law. Additionally, alternative justice mechanisms, such as truth commissions, may address criminal behavior. The primary purposes of legal processes are to bring genocidists to justice, provide redress for victims, reinforce international criminal law, and deter future violations.

National legal responses

In many countries, genocide is a criminal offense under domestic law, and its perpetrators can be tried by national courts under certain circumstances. In particular, countries that are party to the Genocide Convention



agree to enact legislation to give effect to the Convention and to provide effective penalties for individuals convicted of the crime of genocide under domestic law. The laws of some countries permit prosecutions of individuals alleged to have committed genocide regardless of where the crime occurred or the nationality of the accused. In other countries, laws limit who may be prosecuted.

For example, under US federal law, perpetrators of genocide may be prosecuted in US courts only where the crime was committed within the US or by a national of the US. In March 2007, the Senate unanimously passed the Genocide Accountability Act, which would broaden US criminal jurisdiction as to permit prosecution for acts of genocide committed abroad by non-US citizens found in the US. This bill has yet to become law and, most recently, was referred to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. In addition to criminal prosecutions, victims of genocide can also seek money damages under the Alien Tort Claims Act (ATCA), which allows non-US citizens to sue for acts committed in violation of international law or treaties. Under the ATCA, US courts can impose civil liability on perpetrators of human rights violations and atrocities, such as genocide, committed abroad even when neither the victim nor the accused has any connection to the US.

International legal responses

There are several types of international judicial mechanisms to hold accountable perpetrators of genocide and other atrocity crimes. The International Court of Justice (ICJ), the primary civil court of the United Nations, can make determinations on the crime of genocide. In particular, State Parties to the Genocide Convention can bring a case before the ICJ alleging that another State Party is responsible for genocide and thus has violated the treaty. The ICJ may make determinations on a state's responsibility for the crime of genocide and order reparations to be made for any breach of obligations under the Genocide Convention. However, it cannot make determinations as to specific individuals' criminal responsibility for such acts nor impose penalties on such individuals.

The *ad hoc* tribunals created by the UN, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), have jurisdiction to prosecute individuals for the crime of genocide. Since the establishments of the ICTY and ICTR, several individuals have been successfully tried and convicted of acts of genocide, such as former Rwandan Prime Minister Jean Kambanda, who pled guilty to genocide and other serious crimes and was sentenced to life imprisonment by the ICTR; Jean-Paul Akayesu, who was also convicted of genocide and sentenced to life imprisonment by the ICTR; and Radislav Krstić, who was convicted by the ICTY for acts of genocide in connection with the Srebrenica massacre. The UN also assisted the government of Cambodia in establishing a special criminal tribunal to try serious crimes, including genocide, committed between 1975 and 1979 during the Khmer Rouge regime. These tribunals, however, may investigate and prosecute acts of genocide only with respect to acts that were committed during a specific conflict or series of events for which such a tribunal was established to address. Thus, these tribunals' prosecutions are limited to their narrow, individual mandates, such as the ICTR's authorization to address crimes committed during the 1994 Rwandan genocide. Despite the relative successes of the *ad hoc* tribunals, continued occurrences of atrocities and concerns about the limitations of the *ad hoc* tribunals galvanized efforts to establish a permanent international judicial body to address genocide and other serious international crimes. These efforts by the international community led to the establishment of the International Criminal Court in 2002.





Investigation and Prosecution of Genocide by the ICC

The International Criminal Court is the first permanent international court that can try individuals for the crime of genocide as well as other serious international crimes. Its establishment represents the realization of the kind of international court envisioned over 50 years ago in the Genocide Convention to try perpetrators of acts of genocide. Under the Rome Statute, its founding treaty, the Court may prosecute individuals who bear criminal responsibility for acts of genocide committed after July 1, 2002 only when states are unwilling or unable to prosecute these crimes themselves. The Court has jurisdiction to investigate and prosecute individuals for genocide when the crime is committed in the territory or by a national of State Party to the Court or of a state which has accepted the jurisdiction of the Court. The ICC may also investigate and prosecute individuals for genocide when a particular situation is referred to the Court by the UN Security Council, such as in the case of Darfur. Thus, the Court has a broader mandate than that of the individual *ad hoc* tribunals to address and prosecute the crime of genocide because its jurisdiction is not limited to one single conflict or period of time.

Under this mandate, States Parties or the UN Security Council can refer situations to the ICC for consideration as potential cases to be pursued by the Court. Also, individuals, non-governmental organizations and other sources may submit evidence to the Office of the Prosecutor, which can initiate investigations of situations and potential cases with the approval of a pre-trial panel of judges. Moreover, the ICC is authorized to initiate investigations and prosecutions into alleged crimes even in ongoing conflicts. By contrast, specialized international tribunals, such as the ICTR, were established to address atrocities after the fact. Thus, under certain circumstances, the ICC may potentially help suppress the commission of genocidal acts in on-going crises by deterring their existing perpetrators through threats of prosecution, or by removing key perpetrators through execution of arrest warrants. In the long term, the threat of ICC prosecutions will potentially prevent future atrocities by deterring prospective perpetrators.

Determining when genocide has occurred

The Court and its Prosecutor must often contend with differences in the public perception and the legal requirements of genocide. These differences primarily relate to three elements of the legal definition of the crime: the nature of acts qualifying as genocide, the requirement of special intent, and conditions related to the identity of the victims. The term genocide is frequently used in public discourse to describe mass atrocities committed against particular groups of people. However, determining whether genocide has actually occurred is often a point of contention and debate, as demonstrated for example by international responses to the Darfur situation. The US government, several political leaders, non-governmental organizations, the media, and others have labeled the events taking place in Darfur as genocide. In addition to public condemnations, the US government has imposed economic and legal sanctions on the government of Sudan for its role in the perpetration of crimes that, according to the US, amount to genocide. Others have agreed that grave atrocity crimes have occurred in Darfur on a massive scale but have avoided using the term genocide to describe the situation in Darfur or expressly rejected such a characterization. For instance, in 2004, the Chair of the African Union's Peace and Security Council declared that "abuses are taking place. There is mass suffering, but it is not genocide." Additionally, in May 2006, the International Commission of Inquiry on Darfur, which was mandated by the UN Security Council to investigate and assess crimes being committed in the region, concluded that "the Government of the Sudan has not pursued a policy of genocide ... [though] international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no



less serious and heinous than genocide.” The gravity of the Commission’s findings led the Security Council to refer the Darfur situation to the ICC and authorize the Court to investigate and prosecute individuals most responsible for atrocities committed in Darfur. However, the Commission’s conclusions were nevertheless met with much criticism and disappointment by those who believed that there was sufficient evidence of genocide in Darfur.

The disagreement over whether genocide has occurred in Darfur illustrates the frequent differences in public and legal understanding of genocide. In particular, the public reaction to the findings of Commission of Inquiry on Darfur that no genocide had occurred in Sudan highlights the common disconnect between the term ‘genocide’ as used in public discourse and the legal definition of genocide used by courts such as the ICC. People commonly think of genocide as the mass murder or extermination of civilian populations belonging to a particular group. However, the legal definition of the crime of genocide, especially with respect to the requirements necessary to prosecute an individual in a criminal trial, is more complex. In order to determine whether genocide has occurred, judges, such as those at the ICC, must apply such a definition to a defendant’s conduct and judge that conduct against specific criteria. Additionally, courts may potentially impose severe punishments for violations of the law. Thus, legal assessments of genocide require rigorous standards of proof and a uniform approach guided by the applicable law, which in the case of the ICC is the Rome Statute.

The Legal Definition of the Crime of Genocide

The definition of genocide used by the ICC appears in Article 6 of the Rome Statute and adopts the definition provided in the Genocide Convention:

For the purpose of this Statute, “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.

Under the legal definition used by the ICC, several specific elements must be satisfied in order to trigger individual criminal responsibility for the crime of genocide. The ICC Prosecutor has the burden of proving the guilt of the accused by presenting evidence as to satisfy all of these elements, and the Court must be convinced of the guilt of the accused beyond reasonable doubt in order to convict. Thus, convicting specific individuals of genocide is not always straightforward even when there is strong evidence of mass murder or even a genocide committed by the state or other group.

Genocidal acts. The international law definition of genocide includes several different types of prohibited acts. Although genocide is often thought of in terms of mass killings or extermination, other criminal acts besides murder can legally be genocide. For example, under 6(b) of the definition, conduct causing serious bodily or mental harm, such as torture, rape, sexual violence, or inhuman or degrading treatment, may amount to genocide. Additionally, under 6(c) of the definition, deliberate deprivation of resources indispensable for





survival, such as food or medical services, or systematic expulsion from homes may also qualify as genocide. Whatever the act, however, it must be within a discernable pattern of similar conduct directed against a particular group of people with the specific intent to destroy that group, or be conduct that could itself result in such destruction.

Under the Rome Statute, an individual can be held responsible for the crime of genocide if he:

- physically carries out the act himself;
- orders, solicits, or induces the commission of genocide which then in fact occurs or is attempted;
- aids, abets or otherwise assists with the commission of the crime or its attempted commission; or
- directly and publicly incites others to commit genocide.

Thus, the Court may prosecute not only the individuals who actually commit the criminal acts but also those, regardless of their official status, who plan or order the commission of genocide.

Special intent. Under the legal definition of genocide, the perpetrators must commit the criminal acts with the specific “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” The inclusion of “in whole or part” refers to the fact that a perpetrator need not intend to destroy the entire group but only a substantial portion of it. In legal terms, only if the perpetrators act with this special intent may their criminal behavior qualify as genocide. It is this genocidal intent requirement that distinguishes genocide from ordinary domestic crimes and other serious international crimes and makes the crime of genocide often more difficult to prove than other international crimes. However, genocidal intent need not be proven by explicit evidence alone. The Court may infer such intent from the conduct and circumstances of the attack. In particular, intent may be inferred from the general context, the perpetration of other culpable acts systematically directed against the same group, the overall scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destruction and discriminatory acts. However, obtaining the necessary evidence to prove a perpetrator’s intent can be difficult.

Genocidal intent is distinct from the concept of motive, or a particular reason that might induce a person to commit particular crimes. In the legal analysis of genocide, a perpetrator’s underlying motives for committing atrocities, such as revenge or financial gain or territorial control, is not the issue in question but instead the focus is on whether or not the perpetrator targeted persons belonging to a protected group with the specific intention of destroying the group as such.

Protected groups. To qualify as genocide under the legal definition, the criminal acts must be committed against a set of people who are considered to belong to a distinct national, ethnical, racial, or religious group. The victims must belong to one of these four protected groups and be targeted by the perpetrators because of their membership in that group, which the perpetrators seek to destroy in whole or in part.

- A ***national group*** refers to a set of individuals whose identity is defined by a common country of nationality or national origin.
- An ***ethnic group*** is a set of individuals whose identity is defined by common cultural traditions, language or heritage.



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- A **racial group** refers to a set of individuals whose identity is defined by physical characteristics.
- A **religious group** is a set of individuals whose identity is defined by common religious creeds, beliefs, doctrines, practices, or rituals.

To determine whether a set of victims falls within one of the four categories of protected groups, the Court considers whether the targeted group is a stable and permanent group, constituted in a permanent fashion and membership in which is determined by birth, or whether the set of persons are perceived and in fact treated as belonging to one of the protected groups and such persons consider themselves as belonging to one of such groups.

Crimes Other Than Genocide

Criminal conduct that does not fall within the legal definition of genocide may still fall within other categories of international crimes within the Court's jurisdiction, such as crimes against humanity or war crimes. For instance, the legal definition of genocide excludes other types of groups, such as political or social groups. However, crimes committed against such groups that would otherwise meet the criteria for genocide can likely be prosecuted as crimes against humanity or war crimes, and thus still potentially be subject to prosecution by the ICC. Crimes against humanity refer to certain acts committed as part of a widespread or systematic attack directed against a civilian population, including acts such as extermination, forcible transfer of populations, and persecution against any identifiable group such as a political, racial, national, ethnic, or cultural group. War crimes include such acts as intentionally directing attacks against civilian populations and murder. Neither war crimes nor crimes against humanity require the special intent that is necessary to prove the crime of genocide, thus these crimes are often easier than genocide to prove in court even though they may be just as grave as genocide.

Although the ICC Prosecutor has thus far not charged any anyone with genocide in Darfur, the Prosecutor has initiated proceedings against two individuals for other crimes committed there. Specifically, on May 2, 2007, ICC Pre-Trial Chamber I issued arrest warrants for Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of Sudan and current Minister of State of Humanitarian Affairs, and Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb), a Janjaweed militia leader. Together, these individuals are charged with 51 counts of war crimes and crimes against humanity, including murder, rape, torture, and persecution.

Thus, even if there is insufficient evidence to prove genocide, perpetrators of mass atrocities can nevertheless be held accountable for their actions. Moreover, although genocide is often referred to as "the crime of crimes," there is no hierarchy of international crimes. Undoubtedly, a special stigma attaches to the crime of genocide, in part due to international response to the atrocities committed during the Holocaust and in Rwanda. However, in some circumstances crimes against humanity and large scale war crimes may be just as heinous as genocide and bear a similar stigma and sentence for conviction. Thus while genocide was a major motive behind its creation, the ICC can and will prosecute other atrocities, regardless of what label is used to describe them.





Conclusion

In the wake of the Srebrenica massacre and the Rwandan genocide, calls for a more effective mechanism to address genocide and other atrocities created crucial momentum for the establishment of the ICC. The Court is the latest in a succession of accountability mechanisms implemented by the international community to combat impunity for serious international crimes. The Court can investigate and prosecute cases of genocide, and by bringing perpetrators to justice, the Court can also deter and prevent the reoccurrence of such atrocities in the future. The legal definition of genocide used by the Court adopts the definition that was originally endorsed by the international community in the Genocide Convention in 1948. This legal definition of genocide frequently differs from the general public's understanding of the term genocide as the mass extermination of a group of people because of their particular group identity. In contrast, the legal assessment of genocide requires that the accused not only commit the prohibited acts but additionally that he commit those criminal acts with the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group. This additional determination of intent makes the crime of genocide often difficult to prove in a court of law such as the ICC. However, even if there is insufficient evidence to prove genocide, mass atrocities can be prosecuted by the Court as other serious international crimes such as war crimes or crimes against humanity. Thus, the perpetrators of serious crimes can still be held legally accountable for their actions.

*Researched and drafted by Amitis Khojasteh
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