

CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (ICC)

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CRIMES UNDER THE JURISDICTION OF THE IPC

Article 5.

Crimes within the jurisdiction of the Court:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community. The Court shall have jurisdiction, in accordance with this Statute, over the following crimes:

- a) genocide.*
- b) crimes against humanity*
- c) war crimes.*
- d) crime of aggression.*

CONCEPT OF GENOCIDE

Article 6. Genocide

For the purposes 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, such as:

a) killing of group members.

b) serious injury to the physical or mental integrity of the members of a group.

CONCEPT OF GENOCIDE

- c) intentional subjection of a group to conditions of existence calculated to bring about its physical destruction in whole or in part.*
- d) measures to prevent births within the group.*
- e) forcibly transferring children from a group to another group.*

CHARACTERISTICS OF GENOCIDE

It is an international crime that can be committed by both individuals and states.

The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 is a norm of customary international law, widely accepted and recognised by international jurisprudence.

The crime of genocide has special characteristics:

CHARACTERISTICS OF GENOCIDE

- The 'mens rea (**specific intent**)'. 'Dolus specialis or special intent to destroy or genocidal intent'. **Intentional crime.**

'There must be an intent to destroy, in whole or in part, a protected group. Consequently, the ultimate victim of the crime of genocide is the **protected group**'.

(Bou Franch, V. and Castillo Daudi, M. '*International Human Rights Law and International Humanitarian Law*', pp 404-405).

The term 'destroy' means **physical or biological destruction** and excludes attempts to annihilate the cultural or sociological elements of a protected group.

CHARACTERISTICS OF GENOCIDE

- Genocidal intent can be inferred from certain facts or indications:
 1. commission of other culpable acts systematically directed against the same group, regardless of whether these acts were committed by the same person.
 - 2. scale of the atrocities committed.**
 3. implementation in a region or a country.
 - 4. the fact that victims were deliberately and systematically targeted because of their membership of a particular group.**
 5. Repetition of discriminatory and destructive actions.
 6. political doctrine that gave rise to the events referred to above.

The actus rea of genocide

There are five behaviours that constitute the crime of genocide:

1. **killing of group members:** can occur when the death of the victim is caused by omission (e.g., deliberate failure to provide medical help), such as by an act of the accused or of one or more persons for whom the accused is criminally responsible. Also, when the defendant's conduct substantially contributes to the victim's death.

The actus rea of genocide

2. **Serious injury to the physical or mental integrity of members:** refers to an intentional act or injury that causes serious injury to the physical or mental integrity of members of a group identified for destruction.

‘Harm that seriously injures health, causes disfigurement or any serious injury to the senses or internal and external organs.’

(International Tribunal of Rwanda, TPR, *Kayishema and Ruzindama* Judgment, 21.5.1999.)

The actus rea of genocide

The injury must go 'beyond temporary humiliation, embarrassment, or unhappiness' and must inflict 'serious long-term damage to a person's ability to lead a normal and constructive life'. International Tribunal of Yugoslavia, TOPY, *Krstic Judgment*.

The actus rea of genocide

3. Intentional subjection of a group to conditions of existence calculated to bring about its physical destruction, in whole or in part: methods of destruction which do not immediately kill the members of the group, but which ultimately aim at its physical or biological destruction.

Examples: the creation of circumstances that will lead to a slow death, such as lack of adequate housing, clothing, and hygiene, as well as excessive work or physical exertion.

The actus rea of genocide

4. **Measures to prevent births within the group**: sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes, and prohibition of marriages.

The evidence must establish both that the acts were done with the intention of preventing births within the group, and that the ultimate intention was to destroy the group as such, in whole or in part.

The actus rea of genocide

5. **Forcible removal of children from the group to another group**: the jurisprudence establishes that the aim of sanctioning this crime is to sanction the direct act of physical removal by force and to sanction the threats or trauma that would result from the removal (taking away their identity/raising them with other parents). The ICC specifies that the person must be under 18 years of age.

CRIMES AGAINST HUMANITY

Crimes against humanity are committed in peacetime, as well as in wartime.

The general elements of these crimes are described in Article 7(1) of the ICC Statute, requiring that the acts be committed **‘as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack’**.

The attack must be either general or systematic in nature.

CRIMES AGAINST HUMANITY

- Murder
- Extermination
- Slavery
- Deportation or forcible transfer of population
- Imprisonment or other severe deprivation of physical liberty
- Torture

CRIMES AGAINST HUMANITY

- Sex crimes: rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or any other form of sexual violence of comparable gravity.
- Persecution of a self-identified group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds universally recognised as unacceptable under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- Enforced disappearance of persons
- Apartheid crime
- Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

CHARACTERISTICS OF CRIMES AGAINST HUMANITY

Widespread - a large-scale, frequent, massive action carried out collectively with considerable severity and directed against a multiplicity of victims.

Systematic - meticulously organised and following a similar pattern of behaviour based on a common policy involving substantial public or private resources.

CRIMES AGAINST HUMANITY

Civilian population

The attack must be directed against a civilian population. The concept of 'civilian population' is not defined in the ICC Statute in relation to these crimes, but this requirement has been interpreted by the TIPY and TIPR.

Members of the civilian population are persons who are not taking an active part in hostilities, including members of armed forces who have laid down their arms and persons who are *hors de combat* due to illness, injury, detention, or any other cause. (TIPR, Akayesu Judgement, cit. P582 and TIPY, Blaskic Judgement, p. 214).

CRIMES AGAINST HUMANITY

Subjective element

The other common element (subjective element) of all crimes against humanity is:

‘The perpetrator knew that the conduct was part of a widespread or systematic attack directed against a civilian population or intended that the conduct was part of such an attack’ (*Elements of Crimes*. ICC).

CRIMES AGAINST HUMANITY

Gravity of the act

The assessment of the gravity of an act or omission is, by its very nature, relative. All factual circumstances must be considered, including the nature of the act or omission, the context in which it occurred, its duration and/or repetition, the physical, mental, and moral effects of the act on the victim, as well as the victim's personal circumstances, including his or her age, sex, and health. The suffering that an act inflicts on the victim need not be long-lasting as long as it is real and severe.

(TIPY International Jurisprudence, Krnojelac Judgment, cit, p.131).

WAR CRIMES

These are dealt with in Clause 8 of the ICC Statute.

Article 8(1) states that the ICC has jurisdiction over war crimes ‘in particular when committed as part of a plan or policy or as part of the large-scale commission of such crimes’. Thus, isolated acts by individual members of the armed forces or, as the case may be, by individual civilians, will not normally be investigated and prosecuted by the ICC.

WAR CRIMES

The first group of war crimes are those that can be committed in international armed conflicts, as defined in the Geneva Conventions of 1949: these are crimes that can be committed both in cases of declared war or any other armed conflict arising between two or more states, and in all cases of total or partial occupation of the territory of a state, even if such occupation is not resisted.

WAR CRIMES

These include: the war crime of wilful killing; torture; inhumane treatment; subjecting to biological experiments; wilfully causing great suffering; destruction and appropriation of property; forcing to serve in enemy forces; denial of a fair trial; unlawful deportation or transfer; unlawful detention; and hostage-taking.

WAR CRIMES

The second group of crimes are those that can be committed in international armed conflicts as defined in the established framework of international law (including Additional Protocol I to the Geneva Conventions), i.e., in addition to the two cases described in the first group, they can also be committed in international armed conflicts in which peoples are fighting against colonial domination and foreign occupation and against racist regimes, in the exercise of peoples' right to self-determination.

WAR CRIMES

These include: directing attacks against the civilian population; directing attacks against personnel or property participating in a peacekeeping or humanitarian assistance mission; incidentally causing death, injury or excessive damage; attacking undefended locations; causing death or injury to a person *hors de combat*; misuse of the white flag; mutilation; treacherous killing or wounding; looting; forcing participation in warlike operations; use of poison or poisoned weapons; use of prohibited gases, liquids, or materials; use of prohibited bullets; rape, sexual slavery; forced sterilisation, and forced prostitution.

WAR CRIMES

The third group of crimes are those that can be committed in armed conflicts that are not of an international character, as defined in Article 3 of the Geneva Conventions, i.e. in an armed conflict that does not involve two or more states.

Crimes established as war crimes: war crimes of murder; mutilation; cruel treatment; torture; outrages upon personal dignity; hostage-taking; and sentencing or execution without a fair trial.

It does not apply to situations of internal tensions and internal unrest, such as riots, sporadic, and isolated acts of violence.

WAR CRIMES

The fourth group of war crimes are those that may be committed in armed conflicts that are not of an international character as defined within the framework of international law (including Additional Protocol II to the Geneva Conventions), i.e. those that may be committed in armed conflicts taking place on the territory of a state, where there is a protracted armed conflict between governmental authorities and organised armed groups or between such groups.

WAR CRIMES

These include: directing attacks against the civilian population; directing attacks against property or persons using the distinctive emblems of the Geneva Conventions; directing attacks against personnel or property participating in a peacekeeping or humanitarian assistance mission; looting; rape; sexual slavery; forced prostitution; forced pregnancy; forced sterilisation; sexual violence; using, recruiting or enlisting children; displacing civilians; treacherous killing or wounding; mutilation; subjecting to medical or scientific experimentation.

CRIME OF AGGRESSION

treason

Article 8a. Crime of aggression.

- For the purposes of this Statute, a person commits a 'crime of aggression' when, being in a position effectively to exercise control over or to direct the political or military action of a state, **that person plans, prepares, initiates or executes an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.**
- 2. For the purposes of paragraph 1, 'act of aggression' means the **use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.** In accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, any of the following acts, whether or not there is a declaration of war, shall be characterized as an act of aggression:
 - (a) **The invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, even temporary, resulting from such invasion or attack, or any annexation, by the use of force, of the territory of another state or part thereof.**
 - (b) **The bombardment by the armed forces of a state of the territory of another state, or the use of any weapons by a state against the territory of another state.**
 - (c) **The blockade of the ports or coasts of a state by the armed forces of another state.**

CRIME OF AGGRESSION

Article 8a. Crime of aggression

- (d) Attack by the armed forces of a state against the land, naval, or air forces of another state, or against its merchant or air fleet.
- (e) The use of the armed forces of a state, which are on the territory of another state with the agreement of the receiving state, in violation of the conditions set out in the agreement or any prolongation of their presence on such territory after the termination of the agreement.
- (f) The action of a state which allows its territory, which it has placed at the disposal of another state, to be used by that other state to perpetrate an act of aggression against a third state.
- (g) The dispatch by or on behalf of a state of armed bands, irregular groups, or mercenaries to carry out acts of armed force against another state of such gravity as to be comparable to the acts listed above, or their substantial participation in such acts.
- Added by the Instrument of Ratification of the Amendments concerning the crime of aggression adopted in Kampala on 10 and 11 June 2010. [Ref. BOE-A-2014-13411](#).
- **Text added, published on 24/12/2014, in force as of 25/09/2015.**

PENALTIES

A convicted person may receive a sentence of imprisonment for up to 30 years or life imprisonment 'when justified by the extreme seriousness of the crime and the personal circumstances of the convicted person'.

In addition to imprisonment, the ICC may impose a fine or confiscation of property, proceeds, and assets derived directly or indirectly from the crime, without prejudice to bona fide third parties (Art. 77 of the ICC Statute).

EPI VERDICTS

- The ICC, to date (2016), has heard 23 cases, some involving multiple defendants.
- All investigated cases of crimes were in African countries except Georgia: Democratic Republic of Congo, Central African Republic, Uganda, Sudan (Darfur), Kenya, Libya, Ivory Coast and Mali.
- Preliminary investigations are being carried out in: Colombia, Ukraine, Palestine, Nigeria, Iraq, Guinea, Gabon, Burundi, Afghanistan.

EPI VERDICTS

Final ICC convictions:

1. Thomas Lubanga (Democratic Republic of Congo or DRC): sentenced to 14 years imprisonment for war crimes (essentially enlisting and conscripting children to participate in fighting).
2. Germain Katanga (DRC): sentenced to 12 years in prison (massacre of civilians in Boro village). Not directly involved in massacre but provided weapons and machetes.
3. Jean Pierre Bemba (Vice-President of the DRC): sentenced to 18 years imprisonment (massacre of civilians in the Central African Republic).

BIBLIOGRAPHY

- Bou Franch, V. and Castillo Daudi, M. '*Derecho Internacional de los Derechos Humanos y Derecho Internacional Humanitario*', pp 404-405. Tirant Monographs 930. Valencia 2014.
- Vanyo Vicedo, Raquel: El Horizonte 1325 en Derecho Internacional. Cartografía del Postconflicto con perspectiva de género. Editorial Aranzadi. 2016.
- Rome Statute of the International Criminal Court. United Nations 1998.