
« *Lawyers for Lawyers* »

CRIS 2008 165-110 EuropeAid/126412/C/ACT/Multi

TRAINING MANUAL ON HUMAN RIGHTS AND HUMAN RIGHTS PROTECTION FOR LAWYERS

FILE N° 14: THE GENOCIDE

➤ ***Applicable law***

International Convention of 9 December 1948 for the prevention and punishment of the crime of genocide + Statutes of the ICTY and ICTR and Statute and Elements of crime of the ICC.

➤ ***Definition***

Crime defined in art. 2 of the Convention (definition provided in the Statutes of the ICC, ICTY and the ICTR : offence committed with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group deemed as such, and consisting of one of the following acts :

1. The murder of members of a group ;
2. Serious harm to the physical and mental integrity of members of the group ;
3. The intentional submission of the group in living condition leading to its total or partial physical destruction ;
4. Measures aimed at impeding births within the group ;
5. The enforced transfer of children from the group to another group.

Under article 3 of the Convention, the following acts shall be punishable:

6. Genocide;
7. Conspiracy to commit genocide;
8. Direct and public incitement to commit genocide;
9. Attempt to commit genocide;
10. Complicity in genocide.



Lawyers for Lawyers

➤ Constituent elements

- **Material element (*actus reus*)**

One of the acts listed in the definition :

- ✓ *Murder*: the victim must be dead, and the intention to kill must exist at the time the murder is committed.
- ✓ *Serious harm to physical or moral integrity*: torture, inhuman and degrading treatment, sexual violence, etc.
- ✓ *Intentional submission of the group in living condition leading to its total or partial physical destruction* ; inhuman living conditions, resulting or not resulting in death (labour camps, etc.). The expression “living conditions” refers to, but without restricting to it, the intentional privation of means which are essential to survival, as food or medical services, or the systematic eviction from accommodation.
- ✓ *Measures aimed at impeding births within the group* : enforced sterilisation, enforced separation of men and women, etc.
- ✓ *Enforced transfer of children from the group to another group*. The persons transferred should be under 18 and the perpetrator knows it or should have to.

- **Intentional element**

This concerns a *criminal intent* : specific intent : intent to destroy a group, whether in whole or in part.

The incriminated act should be part of a series which pursue the objective consisting of destroying a group, whether in whole or in part, or be able to produce itself such destruction.

The individual victims should be targeted as a member of the group.

The destruction of the group corresponds to the objective, but is not required as a result for the act to qualify as genocide.

Proof of the intentional element is provided through the acts and the statements of the accused, as well as those from State bodies, such as, for example, the scale of the atrocities committed, their general nature in any given region or country, or by the fact of deliberately and systematically selecting victims owing to their belonging to a particular group, while excluding members from other groups.

- **A group identified with certain characteristics :**

The group is identified according to one of the criterion listed : national, ethnic, racial or religious.

➤ Development of case-law

Akayesu case-law (*Judgement of 1998*) establishes objective criteria to define each category of group (which are open):

- ✓ National group : group of persons considered as sharing a legal connection based on common citizenship, and linked to reciprocity of rights and duties.
- ✓ Ethnic group : the members of the group share a common language and culture.
- ✓ Racial group : group based on hereditary physical traits, often identified with one geographical region, independently of linguistic, cultural, national or religious factors.

- ✓ Religious group : group whose members belong to the same religion, faith or cult practice.

However, case-law from international criminal courts (*ICTP, Jelisić, Judgment of 1999*) has developed towards a more subjective approach defining the group as a group that stands out as such (auto identification), or a group identified as such by the others, including the perpetrators of the crime (identification by others). The group must be defined positively (*ICTY, Stakić, Appeal Judgment of 2006*).

➤ **Regime**

The prohibition of genocide is a peremptory norm of *jus cogens*. No statutory limitation can be applied to the prosecution of the crime, irrespective of the date of its commission.

➤ **International Court of Justice case-law**

The *Bosnia and Herzegovina v. Serbia and Montenegro* case, Judgment of 26 February 2007, and the *Croatia v. Serbia* case concerning application of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

In the *Bosnia and Herzegovina v. Serbia and Montenegro* case, Bosnia accused the Federal Republic of Yugoslavia, which subsequently became Serbia and Montenegro, of committing a series of violations of the Convention on the Prevention and Punishment of the Crime of Genocide.

The Court deliberates on the meaning and legal significance of Article X of the Convention concerning its competence, in order to determine whether the obligation set forth in said Article concerns only the prevention of genocide and the measures taken by State parties to this end, or includes the prohibition for the State to itself commit acts of genocide. The Court recalls that genocide is an international crime entailing national and international responsibility on the part of individuals and States and concludes that Contracting Parties to the Convention are bound not to commit genocide through the actions of their organs or persons or groups whose acts are attributable to them. The Court then goes on to define those elements constituting the act of genocide in order to clarify the provisions of the Convention.

It insists, firstly, on the element of intent, which requires that the act in question be committed with a specific intent (*dolus specialis*), to destroy the group, in whole or in part, and not simply expel it from the region. It therefore excludes “ethnic cleansing” as such from constituting genocide. The Court specifies that “it is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words ‘as such’ emphasize that intent to destroy the protected group”. In addition, the Court specifies that the intent must be to destroy at least a substantial part of the particular group, that is to say that the part targeted must be significant enough for its destruction to have an impact on the group as a whole. The Court observes that it is widely accepted that the intent to destroy the group within a geographically limited area constitutes genocide. It is not necessary to intend to completely annihilate the group from every corner of the globe. The area of the perpetrator’s activity and control are to be considered.

With regard to material elements, it emphasizes in the light of the drafting history of the Convention that the protected group must be defined positively and not negatively, that is to say by the presence of one of the characteristics listed in Article II of the Convention (national, ethnic, racial or religious) and not by the absence thereof.

While it ruled that genocide had been committed in Srebrenica, the Court found that the international responsibility of Serbia was not incurred for committing genocide or an act linked to genocide (Article III of the Convention).

In order to determine whether or not Serbia failed to satisfy its obligations to prevent and punish the genocide committed in Srebrenica in July 1995, the Court makes several introductory remarks concerning the nature of such obligations, identifying two distinct obligations. It underlines, in particular, that the obligation [to prevent genocide] is one of conduct and not one of result, requiring States to employ all means available to them so as

to prevent or contribute to preventing the genocide. The State's responsibility can be incurred if genocide was effectively committed and if it can be proven that the State in question had the means to act in order to prevent it and manifestly failed to implement them. The Court also ruled that Serbia had failed in its duty to co-operate with the ICTY and therefore violated its obligation to punish the genocide.

The *Croatia v. Serbia* case is currently pending before the Court. The application instituting proceedings was filed by Croatia on 2 July 1999. It accuses the Federal Republic of Yugoslavia, which subsequently became Serbia and Montenegro, of committing a Decision concerning the preliminary objections was handed down on 18 November 2008.

Sources :

-Henri D. BOSLY, Damien VANDERMEERSCH, *Génocide, crimes contre l'humanité et crimes de guerre face à la justice : les juridictions internationales et les tribunaux nationaux*, Bruylant, 2010.

-Web site of Trial Watch : <http://www.trial-ch.org/index.php?id=800&L=5>

Last updated: 1st May 2010