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# On the constituting elements of genocide in periods of social transformation

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## Abstract

Genocide is an international crime that seriously endangers the peace and security of mankind, which was established in the Convention on the Prevention and Punishment of the Crime of Genocide after the Second World War. After the end of World War II, the United Nations General Assembly adopted resolution 96(I) on punishing genocide and the Convention on the Prevention and Punishment of Genocide, the official story is declared genocide is an international crime. In the decades after World War II, genocide of the same nature as the genocide of Jewish people in World War II is still happening. Based on international conventions and international criminal justice practice, this paper combines theory with practice, analyzes the origin, development, concept and crime constitution of genocide, and compares it with other international crimes. This paper discusses the legal issues of jurisdiction, prevention and punishment of genocide in the period of social transformation, in order that the international community can better understand and recognize genocide as a serious international crime, and better study, prevent and combat genocide in international criminal law theory and international judicial practice.

**Keywords:** Social transformation period; The crime of genocide; Elements of crime

## 1. Introduction

Genocide is an international crime that seriously endangers the mild and safety of human beings, because it infringes on the common interests of all mankind. In 1994, a genocide occurred in Rwanda, Africa, which shocked the whole world. Afterwards, the UN Security Council established the International Criminal Tribunal for Rwanda (hereinafter referred to as "Rwanda Tribunal") through Resolution 955 to try genocide [1]. Now, more than twenty years have passed, and we live in a more complicated world. Although the theory of "genocide" has been perfected, the times are changing and genocide will happen from time to time. Therefore, the theoretical study of "genocide" will remain an eternal topic in the international community.

Genocide has existed since ancient times. In the savage and uncivilized times, tribes and countries often take the elimination of all enemy populations as a sign of victory. In today's globalization, genocide has not disappeared, but has a growing trend [2-3]: In the

decades after World War II, genocide occurred in Sudan, Ethiopia, Rwanda, Burundi, Congo and Uganda due to political, religious, national and ethnic reasons. In Europe, from 1991 to 1993, about 650,000 Serbs in the former Yugoslavia were killed by Croatian armed militants; From 1998 to 2001, about 10,000 Albanians in Kosovo were massacred by Yugoslav army, and Cambodia's Khmer Rouge, Cyprus and other countries and regions all staged one tragedy after another [4].

In this paper, from the perspective of the historical development of genocide, by means of comparative study, we will study the relevant provisions and interpretations of genocide in current international conventions and judicial practice, and also study the mode of bringing genocide into domestic legislation in Germany, Belgium and other countries. Finally, the author thinks that in the social transformation period, as a multi-ethnic country and a country that is improving its legal system, it is necessary for China to pay more attention to the crime of genocide. To this, the author puts forward his own suggestions.

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## 2. Historical development and present situation of genocide

### 2.1. The origin and historical development of genocide

#### 2.1.1. Sources of the crime of genocide

Genocide has a long history. It is said that genocide has existed since conflicts and wars between clans or tribes in the early stage of human society. Genocide infringes on the common interests of all mankind and is an international crime that severely endangering human peace and security. Genocide is an act that expropriate human rights to exist and directly run counter to the principles of international humanitarian law. However, the term "genocide" was officially recognized by law for the first time during the Nuremberg court trial after World War II. Although genocide is not one of the specific crimes in Nuremberg and Tokyo trials, it has actually been included in crimes against humanity.

Genocide was formally proposed as an international crime and confirmed by law in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. After a long period of theoretical research and practical exploration, the international community has initially formed a theoretical system and practical model for preventing and punishing genocide. However, from the perspective of development and prevention, genocide still exists for a long time in the world.

Rafael Lemkin, a famous Polish Jewish international jurist, adopt the word "genocide" first in his book "The Rule of the Axis Powers after Occupation of Europe: The Law of Occupation, the Government's Analysis and Compensation Suggestions" [5]. On December 11, 1946, the United Nations General Assembly used solve 96 (1), which pointed out that "genocide is a commit a crime in international law condemned by civilized society", and the concept of genocide has been acknowledged by the international society. In the trial of Nazi war criminals after World War II, the charge of "genocide" was not explicitly used in the Charter of Nuremberg International Military Tribunal and the Charter of Far East International Military Tribunal. However, genocide has been punished as an integration war crimes and crimes against human beings. Although the court is a special trial for war criminals, the execution time of genocide is limited before or during the war. On December 9, 1948, the United Nations General Assembly formulated and adopted the Convention on the Prevention and Punishment of the

Crime of Genocide (hereinafter referred to as the Genocide Convention), which officially recognized genocide as an independent international crime. Both the Statute of the International Tribunal for the Former Yugoslavia in 1993 and the Statute of the International Tribunal for Rwanda in 1994 clearly stipulate the crime of genocide.

#### 2.1.2. The development of genocide

After the Second World War, the international community began to punish genocide. As mentioned above, first of all, in the Charter of European International Military Court signed by the United States, the Soviet Union, Britain and France in London on August 8, 1945 and the Charter of Far East International Military Court signed by the Supreme Command of Far East Allied Forces on January 19, 1946, the extermination of any civilian was stipulated in the commit a crime opposition human beings among the jurisdiction of the court, and in fact, it was tried and punished.

On December 11, 1946, the United Nations General Assembly use solve 96 (I) on the punishment of genocide. The resolution pointed out: "Just as murder denies the right to alive of humanity, genocide denies the right to live of the entire human group. This rejection of the interest to exist shocked the conscience of human beings, caused mighty waste to mankind, the culture and other dedicate representative by these human beings organize, and completely violated ethical laws and the mind and purpose of the United Nations." The resolution also requires the UN Economic and Social Council to study this issue and draw up a draft usual practice on genocide, that would be yield to the UN General Assembly for deliberation. On December 9, 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide.

The Genocide Convention is an international usual practice to take precautions against and penalize genocide. After its entry into force, it has played an momentous role in combating genocide in the international community. In 1951, the International Court of Justice pointed out in its report views on the exceptions to the Convention (Bosnia and Herzegovina v. Serbia): "The principles contained in the Convention are acknowledged by enlightened country as the norms that constrain the behavior of the state, even countries without obligations under the Convention are no exception." Some scholars of international law even think that genocide is considered one of the commit a crime adjust by inter-

national compulsory law [7]. Since the entry into force of the Genocide Convention, the international society made a decision great advance in exhausted genocide. Two international tribunals, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, have also tried genocide, and the perpetrators of genocide have been justly punished.

In 1996, the International Law Commission of the United Nations put to used the Draft Code of Crimes against Peace and Human Security. Article 17 lists genocide as one of the serious international commit a crime and ranks behind the commit a crime of invasion [8]. In 1998, the United Nations Diplomatic Conference in Rome adopted the Rome Statute of the International Criminal Court (hereinafter referred to as the Rome Statute), which came into effect on July 1, 2002. Genocide has become one of the four international crimes below the jurisdiction of the International Criminal Court. As mentioned above, the International Court of Justice pointed out in the circumstance of "Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide" in 1951 that the principles stipulated in the Convention on the Prevention and Punishment of the Crime of Genocide also have influence non-parties to the Convention [9]. Genocide is extremely harmful and has become an international crime of widespread concern to the international society and the United Nations, and the international community will continue its struggle against genocide.

## **2.2. The status quo of genocide in today's international society**

At present, it is even more regrettable that a large number of facts show that genocide of the same nature as the genocide of Jewish people in World War II is still happening. For example, Sudan (1956-1972), Ethiopia (1954-1974, 1974-1985, 1994-2000), Rwanda (1959-1963, 1994), Burundi, Congo, Uganda in Africa, these countries due to politics, religion, nationality, race, At the same time in Asia: from 1945 to 1978, about 100,000 people in Myanmar were massacred by the then government for racial, political and religious reasons; Another example is Europe. From 1991 to 1993, about 650,000 Serbs in the former Yugoslavia were killed by Croatian armed militants; From the above data, we can see that the contemporary genocide is still quite serious, which always threatens people's lives and world peace.

On March 5, 1993, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia, which was the first international tribunal responsible for prosecuting

crimes in agreement with international law after the establishment of the Nuremberg Tribunal and the Tokyo Tribunal after the Second World War. It was specifically responsible for trying those reliable for acute run counter to of international human beings law, including genocide, firm in the precursory Yugoslavia since 1991 [10]; On November 8, 1994, the UN Security Council established the International Criminal Tribunal for Rwanda to deal with genocide and other atrocities in Rwanda, It deals with people reliable for genocide and other run counter to of international humanistic law determined in the field of Rwanda and Rwandese civil dependable for genocide and other such atrocities determined in adjacent countries between 1 January 1994 and 31 December 1994 (genocide Crimes against humanity and violations of the Geneva Conventions and their Additional Protocol II) [11].

The treaty between the United Nations and the Royal Government of Cambodia on Prosecution of Crimes Committed during the Period of Democratic Kampuchea in accordance with Cambodian Law was signed in Phnom Penh on June 6, 2003. According to Article 32 of the Agreement, the Agreement entered into force on April 29, 2005. A special court will be formed to try the genocide of Khmer Rouge in Cambodia [12].

On July 17, 1998, the Diplomatic Conference of Plenipotentiaries of the International Criminal Court established by the United Nations adopted the Rome Statute of the International Criminal Court (hereinafter referred to as the Rome Statute), and officially established the International Permanent Criminal Court on July 1, 2002. On March 11, 2003, 18 judges of the International Criminal Court were sworn in, specializing in four international criminal cases, including genocide.

## **3. Constitutive elements of genocide**

The concept of crime is the basis of crime constitution. Different legal systems and countries have different understandings of the constitution and elements of crime. According to the general theory of crime constitution, crime constitution refers to the organic unity of all objective and subjective elements necessary to determine the social harmfulness and degree of a specific act. The establishment of any kind of crime must have four elements, namely, the object of crime, the objective aspect of crime, the subject and the subjective aspect of crime.

### **3.1. The object infringed by this crime**

The object of international crime refers to the

common interests of the international community, which are protected by the international criminal legal norms or the international community and infringed by international criminal acts [13].

Specific to regard genocide as a crime, it seeks to protect the right of existence of specific groups [14]. Therefore, in Resolution 96(1) of 1946, the United Nations General Assembly clear genocide as "denying the right to exist of various complete human groups, just like killing people denies the right to life of personal human beings" [15]. Therefore, one of the biggest differences between this crime and other international crimes is that this crime protects not only the individual's right to life, but also the existence right of a certain group or group. Destroying or destroying the whole leadership of a certain group can be equivalent to genocide [16]. This is the values and peace and security order shared by the international society [17].

However, the similarity of human beings is not only manifested in good qualities, but also in bad qualities [18]. Because this crime protects the existence right of a certain group or group, genocide must occur among different countries, races, nationalities, religions and political groups. Examples are as follows:

- (1) Where genocide has occurred, the perpetrators and victims of crimes mostly belong to different races or ethnic groups. The genocide in Rwanda is one of the cases-the genocide convention was applied for the first time.
- (2) Between the same race or nation. Subjects with different beliefs or political views often act as perpetrators and victims of crimes respectively. As early as 1829, the peace treaty signed between Russia and the Ottoman Empire contained provisions to protect Catholic minorities. The ongoing religious conflicts between Sunnis and Shiites in the Middle East and the political persecution in South America are also examples.
- (3) A more complicated example is the genocide in the former Yugoslavia. In the field of the predecessor's Yugoslavia, almost all racial groups in the former Yugoslavia are Slavs, and there is no difference between races and races. As for ethnic groups and religions, they are often changing factors in history. Crimes in this area run through crimes among people of different nationalities, races, religious beliefs and different political tendencies. In the former Yugoslavia, Serbia became the first country to be

considered in violation of the Convention. In the circumstances of Bosnia and Herzegovina. Serbia and Montenegro, the International Court of justice delivered its judgment on February 26, 2007, and the court found that Serbia was directly complex in the get some action of genocide in the Bosnian war. As a kind of emotion based on exchange, resentment itself contains the impulse to seek "redress".

It should be noted that acts of mutual killing, physical or psychological harm, sexual aggression, forced relocation of children, adoption of measures to prevent fertility, and social extermination among groups of the same country, race, nation, religion and politics cannot constitute genocide. This is also the unique feature of this crime compared with other international crimes, especially crimes against humanity.

Therefore, genocide must protect the existence of a certain country, race, nation, religion and political group, which is the premise and requirement of establishing this crime.

### 3.2. The objective aspect of genocide

Objectively, genocide is an act that violates international conventions, customary international law and other normative international legal documents, causing serious consequences ("consequences" are not an essential element of this kind of crime).

According to Article 6 of the Statute, the objective act of genocide implies five specific acts: killing; Acts that cause serious physical or mental harm; Deliberately destroying life in a certain living condition; Enforcement measures are intended to prevent fertility; Forced transfer of children. These acts are based on "deliberately destroying a certain national, ethnic, racial or religious group in whole or in part". If the act targets the entire leadership of a certain group, it can amount to intentional genocide. In practice, such leaders include political or administrative leaders, religious leaders, academics and intellectuals, business leaders and other people, whose extermination behavior can generally show the degree of extermination of a certain group, because these people represent or decide the fate of a certain group. Therefore, an action intended to destruction the structure of a sociology by destroying the leadership and other important components of a certain group can also be regarded as an act of genocide.

In addition to each of the above-mentioned criminal acts, the "Elements of Crimes" also set up a

common element for the listed genocides, that is, "the act occurred when a series of similar acts were obviously taken against the group, or the act itself was enough to cause such annihilation". In other words, the "Elements of Crimes" further expand the interpretation of the ways of genocide on the base of the regulations of the Statute, aiming at preventing new or possible behavior patterns. In a sense, this expanded interpretation amended the content of the Genocide Convention and extended the legislative spirit of the Statute.

The working group on the define of commit a crime of the Preparatory Committee of the International Criminal Court believes that in order to clarify the purpose of the Statute, the meaning of some terms in genocide should be further explained. For example, it believes that "deliberately destroying a group in whole or in part" means deliberately destroying many people in a group; The explanation of "elements of crime" emphasizes once again that the object of this crime should be one or more people who are quantum of a specific national, ethnic, racial or religious group. Among them, children who are forcibly transferred refer to people under the age of 18, and the actor knows or should know that these people are under the age of 18.

### 3.3. Subject of genocide

The subject of crime refers to the person who commits the crime. There are controversies about the subject scope of international crimes in international criminal law. Some scholars think that the subject of international crimes can only be natural persons, while another scholar thinks that it is not limited to this. For example, countries and legal persons can also become subjects of international crimes. As for genocide is related, the subject of genocide is mainly a natural person, any person with criminal responsibility who has subjective and objective elements of the crime, but the author thinks that the state is also one of the subjects. Rome Statute limits the subject of genocide to natural persons based on the principle of personal criminal duty, and it limits all subjects of international crimes under its jurisdiction to natural persons. This is because as a abiding international criminal court, the jurisdiction of the International Criminal Court needs the consent of the state. Obviously, if the International Criminal Court has criminal jurisdiction over all countries, it is difficult to obtain the consent of the state to become a party and accept its jurisdiction over international crimes. Moreover, the fourth paragraph of Article 4 of the Rome Statute itself apparently stipulates that "any

regulations of this Statute on personal criminal duty should not influence the duty of the state in agreement with international law."

In fact, in the process of studying international criminal law and international crimes, organizations or groups should become the subject of such serious crimes against humanity. Although the country cannot be subject to specific criminal punishment, under some special circumstances, the possibility of the country becoming the subject of international crimes cannot be completely ruled out. As an entity, a country can become a criminal subject under certain circumstances. Literature [19] holds that "serious international crimes that greatly imperil the ordinary gain of the international society and undermine the normal order of the international community are mainly committed by the state, not by individuals. ... The criminal ability of the country and the harm caused by its criminal activities are unmatched by individuals. " The author agrees with this statement, so this paper holds that the subject of genocide includes natural person and state. Since the Nuremberg trial did not directly apply the crime of genocide, in fact, the state has not yet become the defendant of genocide in any court. However, the sanctions against the leaders who committed genocide can be said to show the punishment of the organizations that committed genocide to a great extent. This shows that the state can not be ruled out as the subject of genocide.

### 3.4. Constitute the subjective aspect of this crime

Genocide is a subjective and vicious intentional crime, which need not only commonly knowledge but also especial knowledge. Commonly knowledge only require testify the appear of criminal acts, and does not require proof of ulteriorly malice and objective. Especial knowledge, on the other hand, requires proof that the perpetrator explicitly pursued the result of genocide. According to the International Law Commission, the specific knowledge of genocide is "the obvious feature of this specific crime in international law." That is to say, if a person doesn't know what kind of criminal results will be produced, he usually won't commit such crimes, and he can't commit such crimes because of mistakes or neglect. Generally speaking, genocide is an organized or planned crime, rather than an instant crime. The perpetrator must be more or less aware of a certain plan to commit genocide or the inevitable trend of development, but he does not have to participate in the process of formulating the plan.

In the situation of plot to commit a crime, normal

the criminals of the crime has no especial knowledge, he is only the performer of a policy or order, but it is his excellent leader who has a distinct criminal intention. The superior leader has a especial and well known criminal intention, but does not definitely commit criminal acts. How will these two type of criminals be handle? There is still controversy in international practice. According to the International Criminal Tribunal for Rwanda, because the especial criminals do not have especial and knowing intentions, they can only be collusive in especial crimes (such as murder), and impossible regarded as collusion in genocide. Another point of visual angle is that genocide is a especially acute crime, and as long as the especial criminals have general knowledge, they should also be regarded as complicity in genocide. The superior leader must know the nature and severity of the crimes firm or be on the point of determined by his subordinates, and take reasonable and effective preventive measures against this crime. If he can't prevent the crimes from happening, the leader will be responsible for the consequences. His knowledge of the crime and his omission can be used as evidence of his criminal intent.

#### **4. Countermeasures against genocide in the period of social transformation**

Crime prevention is better than crime punishment [20]. On the premise of exploring the characteristics of the crime of genocide and analyzing its causes at all levels, the author believes that the comprehensive response mode should be chosen to focus on prevention and supplemented by international judicial relief.

##### **4.1. While the international community respects the sovereignty of all countries, it also establishes a common early warning mechanism**

(1) Members of the international community should respect the sovereignty of each country, which is the most important way to eliminate external interference and the inevitable requirement of sovereignty.

Grotius, who is known as the father of international law, thinks that sovereignty is the supreme sovereignty of a country, and sovereign behavior is not restricted by any other power, nor is it subordinate to anyone else [21]. Sovereignty is the guarantee of human rights. Without respect for sovereignty, there is no real guarantee of individual human rights. And avoiding genocide is one of the most basic human rights guarantees. A country is the most direct and effective protection subject for all

groups living within its sovereignty. After all, internal cause is the fundamental way to solve problems. All groups living in these areas can truly understand the problems and contradictions, and express their demands more clearly. Only when there is no external interference can different interest groups solve disputes fairly and in an appropriate way. The final solution is more enforceable, which naturally avoids the possibility of genocide as an extreme way to solve the problem when the power is seriously unbalanced.

(2) A common early warning system should be established

Preventing genocide is our common responsibility [22]. The tragedies in Rwanda and Balkan region in 1990s have proved in the worst way that countries and the international community should take more measures to prevent genocide. For this problem, we can set up a common early warning system to solve it.

The model can be that all countries jointly set up a mechanism to collect regional information at risk of genocide. When this mechanism determines that the risk of genocide in a specific situation has increased to a certain extent, the early warning gives a warning. Corresponding actions to prevent genocide should be proposed and implemented immediately.

##### **4.2. International mechanism for the prevention and punishment of genocide**

Genocide is an international crime, even with transnational factors in many cases [23]. In some cases, genocide is carried out by the state or by some organizations or individuals. These characteristics can be seen in the extermination of Jews by German fascists in World War II and the ethnic policies in the former Yugoslavia and Rwanda.

Many issues related to genocide have not been apparently declare the current legal norms. For instance, the object of genocide, that is, the object protected by the Genocide Convention, and the concepts of nation, race, race and religious groups are not clear and there is no definite definition [24]. On the one hand, the definitions of these concepts need to be further clarified for better identification; on the other hand, as mentioned above, these four groups are an exhaustive list, and other groups such as "political groups" are not included in the safeguard groups in the Convention, so it is difficult to protect other groups that need protection. Therefore, the scope of objects protected by the Convention needs to be further expanded. It is even possible to formulate new conventions on important issues, such as jurisdiction.

The UN Security Council also has important influence. The jurisdiction of the International Criminal Court should be restricted by the Security Council, which can propose or instruct the International Criminal Court to accept cases. Cases that have been handled by the Security Council can no longer be accepted by the International Criminal Court. If the complaint is an act of aggression, it should be characterized by the advanced nature of the Security Council. Acting under Chapter VII of the Charter of the United Nations, the Security Council submits to the Prosecutor a situation showing that one or more crimes have been committed. Knowable that the international mechanism within the framework of the United Nations has an important role and influence on the take precautions against and penalize of genocide.

#### 4.3. State obligation to punish genocide

On the basis of Article 1 of the Genocide Convention, the state is the subject who undertakes the obligation to prevent and control genocide. When a country "knows or should usually know that there is a risk of genocide", it has the volunteer to take precautions against and take corresponding measures in time. There are two ways for the domestic application of international criminal law, namely, direct (applicable) mode and indirect (applicable) mode, in which the indirect (applicable) mode refers to the explicit stipulation and concretization of international criminal law norms in domestic criminal law through legislation, which requires attention to two aspects, one is the localization of international criminal law, and the other is the cooperation between countries on criminal issues.

Besides the basic conviction, the jurisdiction and prosecution of genocide and judicial cooperation among countries are also very important. Although the International Criminal Court has been set up with special jurisdiction over genocide and other serious crimes in the international scope, the Rome Statute clearly points out that it only has supplementary jurisdiction over these crimes, and emphasizes that all countries have the obligation to exercise jurisdiction over those who commit international crimes in their own countries. At the same time, criminal judicial cooperation among countries is an important way to combat serious international crimes [25]. In view of different crimes, such as piracy and human trafficking, many bilateral and multilateral treaties have been signed between countries to deal with relevant judicial matters, including arresting criminal suspects, extradition, cross-border evidence collection,

execution of judgments, etc. With the cooperation of various countries, the process of combating genocide can be greatly promoted.

Rwanda Tribunal has invested a lot of manpower and material resources for more than 20 years since its establishment, but there are still a large number of war criminals fleeing overseas. At this speed, it may take decades to complete the trial. However, if the relevant countries have closer judicial cooperation, this situation may be improved. It can be seen that all countries need to take the responsibility of fighting genocide actively and play their role in the international community.

#### 5. Conclusion

Genocide is a crime with a long history, but it was not until the Second World War that the international community formally adopted an international convention to establish it as an international crime. After World War II, genocide did not disappear, and had a great impact on the international community. Like other international crimes, genocide has the commonness of international crimes, but it should be distinguished from transnational crimes. At the same time, there are some differences between genocide and crimes against humanity, war crimes and aggression under the jurisdiction of the International Criminal Court, in terms of elements of crimes, time of committing crimes and jurisdiction. Although the Genocide Convention and subsequent treaties, including the Rome Statute, have clearly defined individuals as the subject of the crime of genocide, countries, organizations and groups have not been included in the scope of the subject of the crime. In this regard, the author argues that it is possible and necessary for the state, organizations and groups to become the criminal subjects of genocide. The inclusion of countries, organizations and groups in the jurisdiction is also conducive to increasing the deterrence of the crime of genocide and strengthening the protection of the crime.

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