

# Contents

<b>1 Towards a Universal Law of International Crimes: General Introduction</b>	<b>1</b>
1.1 What Are International ('Core') Crimes?	1
1.2 A Brief History of International Crimes	2
1.3 The Making of the Law of International Crimes	3
1.4 Towards a Nascent Universal Law of International Core Crimes	4
1.5 Conclusions	5
<b>2 A Short History of the Crime of Genocide</b>	<b>6</b>
2.1 Birth of the Notion of Genocide	6
2.2 Genocide at Nuremberg	6
2.3 Recognition of Genocide as a Crime under International Law: Resolution 96(I) and the Genocide Convention	11
2.4 International Criminal Tribunals and the Advancement of the Law of Genocide	14
<b>3 Genocide under General International Law</b>	<b>16</b>
3.1 Scope of Application—General Considerations	16
3.2 Peace and War	16
3.3 States and Individuals	18
3.3.1 General considerations	18
3.3.2 Conditions of liability	20
3.3.2.1 Different regimes of liability	20
3.3.2.2 Modes of participation and inchoate offences specific to genocide	23
3.3.2.3 Different <i>mens rea</i>	24
3.3.2.4 No additional element of policy	25
3.3.3 No category of individuals excluded	26
3.3.3.1 General application of the prohibition	26
3.3.3.1.1 Status, rank, and position irrelevant	26
3.3.3.1.2 Monarchs	27
3.3.3.1.3 Nationality of perpetrator and victim	31
3.3.3.2 Superior orders	32
3.3.3.2.1 The Convention and customary international law	32
3.3.3.2.2 Article 33 ICC Statute	36
3.4 Temporal and Territorial Framework	38
3.4.1 Temporal scope of application	38
3.4.2 Geographical scope of application	39
3.5 Gravity of the Crime	39
3.6 Normative Status	43
3.6.1 Customary law status	43
3.6.2 <i>Jus cogens</i>	46
3.6.3 <i>Erga omnes</i>	50
3.7 Principles of Interpretation	51
3.7.1 Between strict and humanitarian approaches to interpretation	51
3.7.2 Interpreting the notion of genocide at the ICC	53
3.8 Exclusion from Refugee Status	54

<b>4</b>	<b>Jurisdiction to Investigate and Prosecute Acts of Genocide</b>	<b>56</b>
4.1	Jurisdictions Foreseen by the Convention	56
4.1.1	General considerations	56
4.1.2	Two penal jurisdictions expressly foreseen	56
4.1.3	No exclusion of other penal jurisdictions	57
4.1.4	The International Court of Justice	62
4.2	Universal Jurisdiction	63
<b>5</b>	<b>Duties to Prevent and to Punish Genocide</b>	<b>66</b>
5.1	General Considerations	66
5.1.1	The duties to prevent and punish in the Genocide Convention and under customary international law	66
5.1.1.1	Two distinct duties	66
5.1.1.2	Customary law status of duties	67
5.1.1.3	Timeliness and diligence in fulfilment	69
5.1.1.4	<i>Erga omnes</i> obligations	70
5.1.2	Those bound by the duties	72
5.1.2.1	States but not individuals	72
5.1.2.2	Which states?	72
5.1.2.3	Non-state armed groups	73
5.1.2.3.1	The Convention	73
5.1.2.3.2	Customary international law	73
5.1.2.4	International organizations	77
5.1.2.5	The UN Security Council and the UN General Assembly	78
5.1.2.5.1	The UN Security Council	78
5.1.2.5.2	The UN General Assembly	81
5.1.2.6	Prosecutors	83
5.1.3	Duty to punish under the ICC regime	83
5.2	Duty to Prevent	85
5.2.1	General considerations	85
5.2.1.1	Genocide as precondition	85
5.2.1.2	Who is bound by the obligation to prevent?	87
5.2.1.3	An obligation of means	88
5.2.1.4	Duty to prevent whose actions?	88
5.2.1.5	Geographical scope of application	89
5.2.2	Elements of the duty to prevent	90
5.2.2.1	Punishment no alternative to prevention	90
5.2.2.2	Duty of diligence	90
5.2.2.3	Content of duty	91
5.2.2.3.1	Duty to refrain from contributing to acts of genocide	91
5.2.2.3.2	Duty to adopt <i>all</i> measures	92
5.2.2.3.3	Referring of issue to the UN is insufficient	93
5.2.2.3.4	Duty to stop and suppress	93
5.2.2.3.5	Duty to protect one's population	94
5.2.2.3.6	Unilateral countermeasures	94
5.2.2.3.7	A duty à <i>géometrie variable</i>	95
5.2.2.4	Compliance with the duty	95
5.2.2.5	A right to inaction?	95
5.2.3	Duty to prevent and 'responsibility to protect'	96
5.2.4	Duty to prevent and complicity in genocide	97
5.3	Duty to Punish	98
5.3.1	General considerations	98
5.3.1.1	Genocide as precondition	98

5.3.1.2	An obligation of means	99
5.3.1.3	Duty to punish whose actions?	99
5.3.1.4	Geographical scope of application	100
5.3.2	Elements of duty to punish	101
5.3.2.1	General considerations	101
5.3.2.2	Duty to adopt the requisite legal framework	101
5.3.2.3	Duty to do no harm	102
5.3.2.4	Duty to investigate and prosecute	103
5.3.2.5	Duty to punish, delegation of competence, and non-surrender agreements	105
5.3.2.5.1	Punishment through others	105
5.3.2.5.2	Non-surrender agreements	105
5.3.2.6	Duty to transfer or extradite suspects	110
5.3.2.6.1	An implied duty to transfer/extradite	110
5.3.2.6.2	Genocide is not a political crime	113
5.3.2.6.3	Where prosecution and extradition are not possible	114
5.3.2.7	Duty to cooperate	115
5.3.2.7.1	Duty to cooperate with the territorial state and with an international penal tribunal	115
5.3.2.7.2	Duty to cooperate with other jurisdictions?	117
5.3.2.7.3	Content of the duty to cooperate	119
5.3.2.8	Duty not to give legal effect to such acts	119
5.3.2.9	Countermeasures and plea of necessity	120
<b>6</b>	<b>Immunities, Amnesties, and Statutes of Limitation</b>	<b>121</b>
6.1	Immunities	121
6.1.1	Immunities under the Convention	121
6.1.2	Immunities under customary law	122
6.1.2.1	Inapplicability of immunities as defence or bar to jurisdiction	122
6.1.2.2	Immunities and judicial cooperation	127
6.1.2.3	Immunities and civil proceedings	127
6.1.3	Immunities and the ICC	128
6.1.3.1	Interplay between Articles 27 and 98 of the Rome Statute	128
6.1.3.2	Waiver of immunities	130
6.2	Amnesties	131
6.2.1	Amnesties and international crimes	131
6.2.1.1	No general exclusion of amnesties for all international crimes	131
6.2.1.2	No acquired rights under international law	135
6.2.1.3	No extra-territorial effect of amnesties	136
6.2.2	Amnesties and genocide	137
6.2.3	Amnesties and the ICC	139
6.3	Statutes of Limitation	142
6.3.1	The Genocide Convention and the customary law exclusion of statutory limitations	142
6.3.2	Statutory limitations and the ICC	151
6.3.3	Statutory limitations and civil actions	152
<b>7</b>	<b>Contextual Element</b>	<b>153</b>
7.1	The Convention and Customary International Law	153
7.1.1	No contextual element	153
7.1.2	No requirement of plan or policy	154
7.2	The ICC Regime	156
7.2.1	The Statute	156



7.2.2	The <i>Elements of Crimes</i>	157
7.2.3	Contextual element and <i>mens rea</i>	159
<b>8</b>	<b>Special Genocidal Intent/<i>Dolus Specialis</i></b>	<b>161</b>
8.1	General Considerations	161
8.1.1	Special intent as a characteristic feature of genocide	161
8.1.2	Meaning and content	165
8.1.3	Lowered <i>mens rea</i> standard for certain forms of participation	167
8.1.4	Premeditation not required	169
8.1.5	Motives	169
8.2	Intent 'To Destroy'	171
8.2.1	Destruction as an element of <i>mens rea</i>	171
8.2.1.1	Destruction must be intended; it does not need to have occurred	171
8.2.1.2	Destruction of the group and killing of victims not the same	172
8.2.1.3	Intent to destroy not limited to civilians	172
8.2.2	Intended <i>physical</i> or <i>biological</i> destruction	173
8.2.2.1	Destruction <i>versus</i> discrimination, dissolution, and displacement	175
8.3	In Whole or In Part	178
8.3.1	Alternative objects—a group as a whole or a part thereof	178
8.3.2	'In whole'	179
8.3.2.1	A sufficiently distinct and cohesive group	179
8.3.2.2	Importance of identifying the group as a whole	180
8.3.3	'In part'	180
8.3.3.1	Meaning	180
8.3.3.1.1	A 'substantial' part of a group	180
8.3.3.1.2	Substantial part <i>versus</i> significant part	185
8.3.3.1.3	'In part' and actual victimization	185
8.3.3.2	Relevant evidential factors	186
8.3.3.2.1	Number of victims	186
8.3.3.2.2	Other factors	187
8.3.3.2.3	Case-by-case assessment	191
8.3.3.3	Geographically circumscribed group of individuals	192
8.3.3.4	Targeting of multiple groups	194
8.4	A National, Ethnic, Racial, or Religious Group	195
8.4.1	The group as protected interest	195
8.4.2	Existence and composition	197
8.4.2.1	General considerations	197
8.4.2.2	Objective and subjective factors	198
8.4.2.3	Subjective considerations	199
8.4.2.4	No necessary legal assessment from the perpetrator	200
8.4.2.5	Form and structure of the group	201
8.4.2.6	Targeting based on membership in protected group	201
8.4.3	Positive definition of protected group	202
8.4.4	National, ethnic, racial, or religious character of group	204
8.4.4.1	General considerations	204
8.4.4.1.1	From 'national minorities' to national, ethnical, racial, and religious groups	204
8.4.4.1.2	Overlapping character of protected groups	205
8.4.4.1.3	Context-specific determination of character of the group	207
8.4.4.1.4	'Auto-genocide'	208

8.4.4.2 National	209
8.4.4.3 Ethnic(al)	210
8.4.4.4 Racial	212
8.4.4.5 Religious	212
8.4.4.6 Exhaustiveness of the list of protected groups?	214
8.4.4.6.1 The Convention and customary law	214
8.4.4.6.2 'Stable and permanent' groups	214
8.4.4.6.3 Groups not covered	215
8.4.4.6.4 Domestic regimes	217
8.5 'As Such'	218
8.5.1 A protected group beyond the immediate victim	218
8.5.2 Individual victims targeted because of membership in a protected group	219
8.5.2.1 Membership as reason for targeting	219
8.5.2.2 Randomness in targeting	221
8.5.2.3 Crimes committed against non-members	222
<b>9 Establishing Genocidal Intent</b>	<b>223</b>
9.1 Evidential Challenges	223
9.2 Standard of Proof and Drawing of Inferences	224
9.3 Holistic Approach to Assessment of Evidence	226
9.3.1 Evidence to be considered as a whole and in context	226
9.3.2 Nature and quality of the evidence	227
9.3.3 Genocidal intent and reasoned opinion	228
9.4 Basis for Inference and Relevant Evidential Factors	228
9.4.1 General considerations	228
9.4.2 Evidence of conduct and statements of the accused	237
9.4.3 Genocidal intent of third parties	241
9.4.4 Motives and inference of special intent	243
9.4.5 Method used	245
9.4.6 Initial steps in a genocidal process	245
9.4.7 Other contextual factors	246
9.4.7.1 Scale and number of crimes committed	246
9.4.7.2 Unrealistic goals	248
9.4.7.3 Attacks on cultural and religious objects	248
9.4.7.4 Acts of forcible displacement	249
9.4.7.5 Discriminatory acts	250
9.4.7.6 Plan or policy to commit crimes	250
9.4.7.7 Commission of genocidal acts	251
9.4.7.8 Mental disorder	251
9.4.7.9 'Good deeds'	251
<b>10 Punishable Acts</b>	<b>253</b>
10.1 General Observations	253
10.1.1 Five categories of punishable acts	253
10.1.2 Gravity and potential effect on the group	254
10.1.3 Element of intentionality	254
10.2 Killing Members of the Group	255
10.2.1 <i>Actus reus</i>	255
10.2.1.1 Definition	255
10.2.1.2 Overlap with other genocidal crimes	256
10.2.2 <i>Mens rea</i>	257
10.3 Causing Serious Bodily or Mental Harm to Members of the Group	259
10.3.1 <i>Actus reus</i>	259

10.3.1.1	Definition	259
10.3.1.2	Serious harm	259
10.3.1.2.1	‘Physical or mental’	259
10.3.1.2.2	‘Serious’	260
10.3.1.3	Categories of qualifiable acts	263
10.3.2	<i>Mens rea</i>	269
10.4	Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part	269
10.4.1	<i>Actus reus</i>	269
10.4.1.1	Definition	269
10.4.1.2	No requirement of result	270
10.4.1.3	‘Calculated’ to bring about physical destruction	271
10.4.1.4	Categories of qualifiable acts	271
10.4.1.5	Conditions of life and other genocidal offences	276
10.4.2	<i>Mens rea</i>	277
10.5	Imposing Measures Intended to Prevent Births within the Group	279
10.5.1	<i>Actus reus</i>	279
10.5.1.1	Definition	279
10.5.1.2	Type of relevant underlying conduct	280
10.5.1.3	Evaluating the measures	281
10.5.1.4	Measures intended to prevent birth and other genocidal acts	281
10.5.2	<i>Mens rea</i>	281
10.6	Forcibly Transferring Children of the Group to Another Group	282
10.6.1	<i>Actus reus</i>	282
10.6.1.1	Underlying act	282
10.6.1.2	Nature of the act—cultural genocide in disguise?	283
10.6.1.3	Age of the victim—who are ‘children’?	284
10.6.2	<i>Mens rea</i>	285
10.7	Exhaustive Character of the List?	285
11	<b>Genocide, Other Genocidal Acts, and Modes of Participation</b>	288
11.1	General Considerations	288
11.1.1	Range of prohibited conduct	288
11.1.2	Categories of potential perpetrators	289
11.1.3	Manner, form, and method of commission and culpable contribution	291
11.2	Genocide	292
11.2.1	Genocide as ‘the crime of crimes’	292
11.2.2	Elements of genocide	293
11.3	Conspiracy to Commit Genocide	295
11.3.1	General considerations	295
11.3.2	<i>Raison d’être</i>	296
11.3.3	An inchoate and continuing offence	297
11.3.3.1	An inchoate offence	297
11.3.3.2	A continuing offence	299
11.3.4	Definition of the offence	300
11.3.4.1	Elements	300
11.3.4.2	<i>Actus reus</i>	301
11.3.4.2.1	Agreement to commit genocide	301
11.3.4.2.2	Joining in the conspiracy	303
11.3.4.2.3	Proving the agreement	303
11.3.4.3	<i>Mens rea</i>	307
11.3.5	Conspiracy to commit genocide and genocide	307
11.3.6	Conspiracy to commit genocide and the ICC Statute	309



11.4	Direct and Public Incitement to Commit Genocide	311
11.4.1	Nature of the offence	311
11.4.1.1	An inchoate offence	311
11.4.1.2	No continuing offence	313
11.4.1.3	Gravity of the offence	314
11.4.2	Elements	315
11.4.2.1	General definition	315
11.4.2.2	Incitement	315
11.4.2.2.1	Context-specific assessment	315
11.4.2.2.2	Incitement <i>versus</i> hate speech and propaganda	316
11.4.2.2.3	Forms of incitement	319
11.4.2.3	'Direct'	320
11.4.2.3.1	Definition	320
11.4.2.3.2	Relevant factors and considerations	322
11.4.2.4	'Public'	323
11.4.2.4.1	Definition	323
11.4.2.4.2	Relevant factors and considerations	325
11.4.2.5	<i>Mens rea</i>	327
11.4.3	Direct and public incitement, genocide, instigating genocide, and persecution	328
11.4.3.1	Incitement and genocide	328
11.4.3.2	Incitement and instigation	328
11.4.3.3	Incitement and persecution	329
11.4.4	ICC regime	330
11.5	Attempt to Commit Genocide	330
11.5.1	Attempt under international criminal law	330
11.5.2	Attempt to commit genocide—elements and definition	333
11.5.2.1	The Convention and customary international law	333
11.5.2.2	ICC law	334
11.6	Complicity in Genocide	336
11.6.1	General considerations	336
11.6.2	Elements	339
11.6.2.1	Definition and reach	339
11.6.2.2	An act of genocide as a prerequisite	340
11.6.2.3	<i>Actus reus</i>	341
11.6.2.4	<i>Mens rea</i>	343
11.6.3	Complicity in genocide and genocide	346
11.7	Other Forms of Criminal Participation	347
11.7.1	General considerations	347
11.7.2	Other forms of culpable involvement in genocide	348
11.7.2.1	Committing	348
11.7.2.2	Planning	351
11.7.2.2.1	General elements	351
11.7.2.2.2	Planning genocide	351
11.7.2.3	Ordering	352
11.7.2.3.1	General elements	352
11.7.2.3.2	Ordering genocide	353
11.7.2.4	Instigating	354
11.7.2.4.1	General elements	354
11.7.2.4.2	Instigating genocide	357
11.7.2.5	Aiding and abetting	360
11.7.2.5.1	General elements	360
11.7.2.5.2	Aiding and abetting genocide	364

11.7.2.6	Command responsibility	370
11.7.2.6.1	General elements	370
11.7.2.6.2	Command responsibility and genocide	373
11.7.2.7	Joint criminal enterprise and co-perpetration	376
11.7.2.7.1	General elements	376
11.7.2.7.2	Joint criminal enterprise and genocide	377
11.7.2.8	The ICC regime of liability for acts of genocide	381
11.7.2.8.1	No genocide-specific regime of liability	381
11.7.2.8.2	Deviations from customary international law	383
11.7.2.8.3	The various statutory modes of liability	384
11.7.2.8.4	The issue of the <i>mens rea</i>	385
<b>12</b>	<b>Genocide and Other International Crimes</b>	<b>389</b>
12.1	Genocide in a Nutshell	389
12.2	Genocide and War Crimes	390
12.2.1	Common and overlapping elements	390
12.2.2	Differences	391
12.2.2.1	Different origins and scope of application	391
12.2.2.2	Different aims and protected interests	392
12.2.2.3	Different material elements	392
12.2.2.3.1	Armed conflict and nexus therewith	392
12.2.2.3.2	Genocidal intent	393
12.2.2.3.3	Potential victims	393
12.2.2.4	Gravity	395
12.2.2.5	Other normative differences	395
12.2.2.5.1	Duty to punish	395
12.2.2.5.2	Duty to prevent	397
12.2.2.5.3	Amnesties	397
12.3	Genocide and Crimes against Humanity	398
12.3.1	Common features	398
12.3.2	Differences	400
12.3.2.1	Different <i>mens rea</i> and relevance of groups	400
12.3.2.2	Range of underlying crimes	401
12.3.2.3	Widespread or systematic attack	402
12.3.2.4	Protected individuals	404
12.3.2.5	Specific inchoate offences for genocide	404
12.3.2.6	Policy element	405
12.3.2.7	Gravity	405
12.3.2.8	Other normative differences	406
12.3.3	Genocide and persecution	407
12.3.3.1	Same <i>genus</i>	407
12.3.3.2	Different <i>mens rea</i>	408
12.3.3.3	Different <i>actus reus</i>	411
12.3.3.4	Relative gravity of underlying acts	411
12.3.3.5	Factual overlap	412
12.3.4	Genocide and extermination	413
12.3.4.1	Common features	413
12.3.4.2	Differences	413
12.3.5	Genocide and enforced sterilization	416



12.3.6 Genocide, forcible transfer/deportation, and 'ethnic cleansing'	417
12.3.6.1 The notion of 'ethnic cleansing'	417
12.3.6.2 Intent to forcibly displace not the same as intent to destroy	419
12.3.6.3 Evidential overlap	419
12.4 Genocide and Aggression	420
12.5 Genocide and Terrorism	421
 <i>Bibliography</i>	 423
<i>Index</i>	449