

## PRIMERS FOR INTERNATIONAL ACCOUNTABILITY IN ASIA: 'GENOCIDE'

### What Is The 'Crime Of Genocide'?

Genocide is one of the crimes [recognised](#) and punishable under international law. Other international crimes include war crimes and [crimes against humanity](#). The term 'genocide' [was coined in 1944](#) by Polish lawyer Raphael Lemkin against the backdrop of the Holocaust.

In general, 'genocide' occurs where the accused person targets a 'protected' group (or groups) with the motivation to cause irreparable harm to that group. The intent of the accused person matters most in deciding whether genocide took place.

In treaty law, the crime of genocide is defined in the [Genocide Convention](#) as one of the at least five acts done "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". These acts include: (1) killing members of the group; (2) inflicting serious bodily and mental harm to the members of the group; (3) deliberate infliction of conditions of life calculated to bring about group's destruction; (4) forcible birth control; and (5) forcible transfer of children.

[Several countries in Asia](#) have signed or acceded to the *Genocide Convention* meaning that they have agreed to obligations under international law to: (1) take measures to prevent genocide and (2) enact domestic laws to punish perpetrators of genocide. States such as [Vietnam](#), [Bangladesh](#), and the [Philippines](#) have all taken measures to incorporate the crime of genocide into domestic legislation.

The *Genocide Convention* definition of genocide was also incorporated into the [Rome Statute](#) of the International Criminal Court (ICC) and the law establishing the [International Criminal Tribunal for the former Yugoslavia](#), the [International Criminal Tribunal for Rwanda](#), and the [Extraordinary Chambers in the Courts of Cambodia](#) amongst other international tribunals.

### How Is 'Genocide' Different From Other International Crimes?

The crime of genocide can take place in either peace or armed conflict. This makes it different from war crimes, which can only take place where an armed conflict exists.

Further, the crime of genocide is distinct from [crimes against humanity](#) because the identity or the affiliation of the victims matters, as well as the intention of the perpetrator. According to the *Rome Statute*, an act that constitutes a crime against humanity will be directed predominantly against a civilian population and be 'widespread' or 'systematic' i.e., the *nature* of the act matters. In contrast regarding genocide, it is the *collective identity* of the victims that matters. Therefore, an act that constitutes genocide may or may not be widespread and systematic—although these factors may help establish 'genocidal intent'—but the act must be against a specific protected group.

### What Is A 'Protected Group'?

A 'protected group' refers to the four distinct groups referred to in the *Genocide Convention*. They are considered 'protected' because attacks against people *because of* their affiliation or membership to these groups is prohibited and may amount to genocide. The four distinct groups are: (1) nationality, (2) ethnicity, (3) race, and (4) religion.

The *Genocide Convention* does not require that a protected group be a minority within a State; likewise, the members do not need to live within one territory to be considered a protected group.

The list of protected groups is exhaustive. This means that attacks against a group, for example, for political beliefs *alone* does not constitute genocide—although the attacks themselves may amount to crimes against humanity. While crimes against a particular group may be colloquially referred to as 'cultural' or 'linguistic'

genocide, this is not yet recognised in international law. However, it may fall within the genocide definition if the identity of such a cultural or linguistic group relates to any of the four protected groups mentioned above.

## What Is Needed By A Court To Convict Someone Of The Crime Of Genocide?

The crime of genocide requires “the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”. This means a court must be convinced beyond a reasonable doubt that the accused held ‘specific intent’ to ‘destroy’ a protected group—in other words, the act was done with the objective to decimate the group. This may make genocide harder to prove than other international crimes because it is more specific.

The phrase ‘to destroy’ within the *Genocide Convention* means physical and biological destruction of the protected groups. While cultural or linguistic attacks in itself may not be considered ‘destruction’, they may amount to evidence of physical destruction of the group. The perpetrator does not need to attack the *entire* group for it to be proven that the attack was undertaken with the ‘intent to destroy’.

## Who Can Be Tried For The Crime Of Genocide?

Individuals can be tried for genocide at the ICC, in other international criminal tribunals, or in domestic courts that have incorporated genocide as a crime in their domestic law.

Individuals can be found criminally responsible where they engage in the physical attacks themselves, or where they may be complicit, conspire, attempt, direct, or publicly incite the commission of genocide.

Moreover, civilian or military leaders can also be held criminally responsible for the crime of genocide—regardless of whether they committed the crime themselves. This is the case where the leader knew or had reason to know that their subordinates were about to commit or had committed genocide and that the subordinates possessed the requisite specific intent. The leaders do not have to share that intent—if they do not act to prevent or punish those responsible, they themselves can be held responsible through the legal concept of ‘command and superior responsibility’.

## Can States Be Held Responsible for Genocide?

While individuals—and not States—can alone be *tried* for the crime of genocide, States can still be held responsible for violating their obligations under international law. States can pursue legal proceedings against other States at the International Court of Justice (ICJ) for this reason.

In the [Armed Activities Case](#), the ICJ found that the prohibition against genocide amounts to customary international law. This means that a State is prohibited in international law from engaging in genocide *regardless* of whether it has signed the *Genocide Convention*. Further, the ICJ recognised in the [Genocide Convention Case](#) that a State’s obligation to *prevent* genocide is ‘*jus cogens*’—or an obligation under international law that is so important that there can be no reasonable deviation from upholding.

In short, States are under obligation to not commit, and to prevent the commission of genocide.

Further, the ICJ can grant ‘provisional measures’—or interim relief—where there is an immediate risk to the subject matter of the case. In January 2021, the ICJ passed a [unanimous decision](#) granting provisional measures against Myanmar. The Republic of Gambia previously [instituted proceedings](#) against Myanmar at the ICJ alleging that Myanmar’s ‘clearance operations’ against the Rohingya since 2016 violated Myanmar’s obligations under the *Genocide Convention*. The ICJ measures included, but were not limited to, preventing genocidal acts within Myanmar’s territory, and preserving evidence of any previous potentially genocidal acts.

Granting of such measures does not mean the particular State is found to be responsible for genocide. However, such measures are important because any legal case regarding matters as complex as genocide can take many years to complete and the protected group or groups could still be at risk.