



A Legal Analysis of the Crime of Genocide in the Statute of the International Criminal Court and the Penal Code of Afghanistan

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Abstract

Genocide is one of the most severe and catastrophic international crimes, for which the international community has envisaged specific measures in international instruments for its prevention and punishment. Article 6 of the Statute of the International Criminal Court and Article 333 of the Penal Code of Afghanistan have criminalized the crime of genocide exclusively against national, ethnic, racial, and religious groups; this has resulted in a legal vacuum regarding the protection of political and social groups and has diminished the preventive effect and efficiency of international criminal justice. The present research was conducted with the aim of providing a legal analysis of the crime of genocide in the Statute of the International Criminal Court and the Penal Code of Afghanistan. Utilizing a descriptive-analytical method and examining legal sources, cases of international criminal tribunals, and the literature of international criminal law, this study analyzes the legal framework of the crime of genocide and identifies its limitations with respect to the Penal Code of Afghanistan. The primary research question is: "To what extent do the definition, constituent elements, and scope of responsibility arising from genocide in the domestic law of Afghanistan align with the standards of international criminal law?" The findings indicate that although the Afghan legislator has generally followed the 1948 Convention and Article 6 of the Statute in the definition and instances of the crime of genocide, ambiguities and challenges persist in certain areas—including determining the scope of protected groups, precisely elucidating the mental element (*mens rea*), and jurisdictional and executive mechanisms—which could jeopardize the realization of the principle of legality of crimes and punishments and the efficiency of the prosecution of the crime of genocide.

Keywords: *Crime of Genocide; The Four Protected Groups; Rome Statute; Penal Code of Afghanistan; Material Elements of the Crime (Actus Reus); International Criminal Law; Criminal Responsibility*

Introduction

In the contemporary era, one of the serious challenges facing the international community is the confrontation with crimes that possess an anti-human nature and target the very foundations of humanity. Among these crimes, genocide is recognized as one of the most horrific and inexcusable acts, committed with the aim of the intentional and systematic destruction of specific human groups. The catastrophic occurrences of genocides in the twentieth century including the Holocaust during World War II, the slaughter of the Tutsis in Rwanda, and the Bosnian genocide prompted the international community to establish international legal mechanisms to prevent the recurrence of such tragedies and to hold the perpetrators accountable. This necessity paved the way for the formation of international criminal law institutions, which ultimately led to the establishment of the International Criminal Court and the drafting of the Rome Statute in 1998. The Rome Statute, which entered into force in 2002, is considered a milestone in the history of international criminal law and has placed four core international crimes under its jurisdiction: genocide, crimes against humanity, war crimes, and the crime of aggression. Within this context, genocide, as a crime with specific characteristics, is independently defined in Article 6 of this instrument. According to this article, genocide consists of the commission of any of certain specified acts such as killing, causing serious bodily or mental harm, imposing incompatible living conditions, preventing births, or the forcible transfer of children with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. This fourfold restriction, although providing a clear legal framework, leaves political and social groups outside the protective domain, thereby creating a legal vacuum and diminishing the preventive effect of international criminal justice. Nevertheless, what distinguishes genocide from other international crimes is the element of "special intent" or *dolus specialis*, which is based on the intention to destroy all or part of a specific human group. Given the importance of protecting victims of genocide and the role of international criminal justice in the prevention and prosecution of these crimes, a legal analysis of the protective scope of groups in the crime of genocide requires a precise examination of the elements of the protective domain of groups and a critique of the fourfold limitation of the Rome Statute.

Considering that the International Criminal Court is the first permanent international authority for the trial of perpetrators of this crime, examining its performance from a legal perspective regarding genocide acquires double importance. This examination also helps clarify the strengths and weaknesses of the international criminal system in confronting genocide and provides solutions to strengthen its efficiency. The necessity of this research lies in the fact that the existing limitation, from both theoretical and practical perspectives, cannot cover all contemporary victims of genocide; therefore, its examination paves the way for presenting solutions for interpretative development and legal reforms to enhance international criminal justice. Previous research has mainly focused on the analysis of the four protected groups and the examination of cases from international criminal tribunals; however, the vacuum resulting from the exclusion of political and social groups has received less attention. By focusing on this vacuum and examining the possibility of the interpretative expansion of the concept of "group," this research endeavors to offer a critical and reformative framework to strengthen the efficiency of international criminal justice.

Accordingly, this paper will attempt to analyze the manner of its anticipation and treatment within the Statute of the International Criminal Court, while elucidating the concept and constituent elements of the crime of genocide, and investigating the existing practical and theoretical challenges in this field. It thereby critiques the current limitations and ultimately examines the possibility of interpretative development and the inclusion of political groups.

1. The Concept of Genocide

Genocide is considered one of the most severe and dangerous international crimes, aimed at the total or partial destruction of a specific human group. Within the framework of international criminal law, this crime is realized when certain acts are committed with the intent to destroy, in whole or in part, a

national, ethnical, racial, or religious group (Rome Statute, 1998: 12). Under Article 6 of the Statute of the International Criminal Court, genocide is not limited merely to the physical killing of members of a group; rather, it encompasses other conducts such as causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the group's physical destruction, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group (Statute of the International Criminal Court, Article 6). The concept of genocide was first introduced into international legal literature by Raphael Lemkin, a Polish jurist. In 1944, in his renowned book titled *Axis Rule in Occupied Europe*, he employed this term to describe the destructive policies of the Nazi regime against human groups. Lemkin defined genocide as an "organized effort to destroy a national, ethnical, racial, or religious group," believing that this phenomenon is not merely a collection of sporadic killings but rather a structural and systematic process designed and executed with the aim of destroying the collective identity of a group (Raphael, 1947: 41). From his perspective, genocide includes a set of coordinated actions in political, social, cultural, and economic spheres that ultimately lead to the destruction or serious debilitation of a human group. Etymologically, the term genocide is equivalent to the word "Genocide," which is formed from the combination of two Greek and Latin words: the word "genos" meaning race or group, and the word "cide" meaning killing. This term first entered legal literature in the 1940s and rapidly gained attention in international law discourses. Although some sources indicate that Lemkin had previously proposed the idea of criminalizing the destruction of human groups in 1933, the formal realization of the modern concept of genocide occurred in the 1940s in response to the widespread atrocities of World War II (Ardebili, 1989: 61).

Following the revelation of the Nazi regime's atrocities, the international community felt the necessity of criminalizing this phenomenon more than ever. Although the term "genocide" was not explicitly used in the Charters of the International Military Tribunals at Nuremberg and Tokyo, many acts that were later recognized as the crime of genocide were prosecuted within the framework of crimes against humanity (Mir Mohammad Sadeghi, 2022: 174). The Charter of the International Military Tribunal at Nuremberg envisaged three main categories of crimes: crimes against peace, war crimes, and crimes against humanity. In these tribunals, destructive policies against specific groups were primarily examined and punished under the heading of "persecution" as one of the instances of crimes against humanity (Robertson, 2004: 158). However, the international community gradually concluded that such acts, due to their specific nature and devastating effects, required an independent criminal designation. Consequently, in 1946, the United Nations General Assembly, through a resolution, recognized genocide as a crime under international law and identified it as an act that "the civilized world condemns." This process eventually led to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948. The adoption of this convention is considered a significant step in the development of international criminal law, as it provided a comprehensive and specific definition of the crime of genocide for the first time and committed states to prevent its occurrence and punish the perpetrators.

According to Article II of this Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group (Bahluli, 2020: 44).

The aforementioned definition was subsequently adopted in various international criminal law instruments. For instance, this same definition has been repeated almost without change in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as in Article 6 of the

Rome Statute of the International Criminal Court. Therefore, it can be stated that the definition provided in the 1948 Convention has gradually become a global standard for identifying the crime of genocide. Despite the importance of this definition, some legal scholars have raised criticisms against it. One of the most significant criticisms is that in the provided definition, only four groups national, ethnical, racial, and religious are protected, and no mention is made of political or social groups (Robo, 2020: 84-89). This is while in many historical cases, these groups have also been the targets of destructive policies. Some researchers believe that this limitation may allow states to exploit the existing vacuum in the legal definition under specific circumstances (Cassese, 2008: 173). Another criticism pertains to the difficulty of proving the mental element (*mens rea*) of this crime. Genocide is a crime whose realization requires the existence of a "specific intent" to destroy a group, and proving such intent is very complex and difficult in practice. In many cases, courts are inevitably compelled to resort to circumstantial and indirect evidence to establish this element, as a direct examination of the mental intentions and motives of the perpetrators is not possible (Ardebili, 1989: 61). Over time, the concept of genocide became established in the international legal system and was recognized as one of the most important international crimes alongside crimes such as crimes against humanity, war crimes, and aggression. In the second half of the twentieth century, this crime was criminalized not only in international law but also in the domestic criminal laws of many countries. Furthermore, various international tribunals, including the ad hoc tribunals for the former Yugoslavia and Rwanda, addressed the conceptual interpretation and development of this crime in numerous cases. The definition of the crime of genocide provided in Article 6 of the 1998 Statute of the International Criminal Court is, in fact, the same definition contained in the 1948 Genocide Convention, which has been repeated in this document with slight formal changes. Many domestic legal systems have also based their legislation on this definition. For example, in the criminal laws of some countries, including the Penal Code of Afghanistan, the definition of the crime of genocide is regulated based on this legal framework (Nedai, 2022: 130–131).

Therefore, the concept of genocide in international criminal law is recognized as a crime committed not only against individuals but against the collective existence of a human group. For this reason, the international community regards it as one of the most dangerous threats against humanity and, by adopting numerous international instruments, has endeavored to prevent its occurrence and to prosecute and punish its perpetrators.

2. The Distinction Between the Crime of Genocide and Other Crimes

A. Distinction Between the Crime of Genocide and Mass Killing

In international criminal law, the distinction between "mass killing" and "genocide" is fundamental, predicated upon the material, mental, and structural elements of the crime. This distinction is elucidated not only in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (in which "mass killing" [Kushtar-e Jam'i] was employed as a translation for genocide) but also in the jurisprudence of the International Criminal Court (ICC) and ad hoc tribunals such as the ICTY and ICTR. The focal point of this distinction is the mental element or "specific intent" (*dolus specialis*) in genocide; specifically, the perpetrator must possess a conscious intent to destroy, in whole or in part, a protected group (national, ethnical, racial, or religious). In contrast, mass killing lacks this purposeful intent and merely signifies the large-scale slaughter of individuals without the necessity of a specific group identity (Didier, 2020: 238). For instance, in the case of *Prosecutor v. Akayesu* (ICTR-96-4-T), the court emphasized that without proving *dolus specialis*, even mass killings cannot be categorized as genocide, thereby distinguishing this element from broader crimes such as crimes against humanity. From the perspective of the material element (*actus reus*), genocide is restricted to five specified acts under Article 2 of the Convention (killing, serious bodily or mental harm, inflicting destructive conditions of life, preventing births, and transferring children), all of which must serve the intent of group destruction. Conversely, mass killing can encompass any form of mass murder, even without the requirement of being organized or occurring within a specific context of peace or war. The ICC's jurisprudence in the *Al-Bashir* case demonstrated that while the widespread or systematic nature of killings are key elements of

crimes against humanity, they are not, in themselves, the defining criteria for genocide [without the specific intent] (Zamani, 2008: 29). Although a conceptual overlap exists where mass killing may serve as a precursor to or an instance of genocide it maintains a distinct legal identity.

Regarding consequences and judicial jurisdiction, this distinction impacts the determination of penalties: genocide is a customary crime with absolute universal jurisdiction and holds priority in the Rome Statute (Article 6), whereas mass killing is often prosecuted under the headings of crimes against humanity (Article 7) or war crimes (Article 8) and is not necessarily treated as an independent category (Didier, 2020: 249). Contemporary legal doctrine, such as the works of Schabas in *Genocide in International Law*, emphasizes the necessity of this demarcation to prevent the "conceptual inflation" of international crimes, a concern that remains evident in current ICC litigations (such as those concerning Gaza or Myanmar).

B. Distinction Between the Crime of Genocide, Crimes Against Humanity, and War Crimes

The distinction between the crime of genocide and other core international crimes namely, crimes against humanity and war crimes can be analyzed from the perspective of material and mental elements, the scope of application, conditions of realization, and the normative objectives of international criminal law rules. In contemporary legal literature, this is recognized as one of the most significant conceptual demarcations in international criminal law. The primary distinguishing element of genocide relative to other international crimes is the existence of "specific intent" (*dolus specialis*). This specific intent signifies the conscious will of the perpetrator to physically or biologically destroy a protected group, rather than merely committing violent acts against individuals of that group (Robertson, 2004: 318). For this reason, even if the committed conducts are materially similar to behaviors observed in crimes against humanity or war crimes such as murder, torture, or deportation they cannot be considered genocide without establishing the intent to destroy the group. In contrast, crimes against humanity, as defined in the Statute, involve the commission of a set of inhumane acts including murder, enslavement, forcible deportation, torture, rape, or enforced disappearance committed as part of a "widespread or systematic attack directed against any civilian population," with knowledge of the attack. In this crime, unlike genocide, the existence of an intent to destroy a specific group is not a requirement; rather, what matters is the widespread or organized nature of the attack and its orientation against a civilian population (Mir Mohammad Sadeghi, 2022: 80-84). From this perspective, the mental element of crimes against humanity is less restrictive than that of genocide, which consequently results in a broader scope of application (Tahmasebi, 2016: 128). For instance, in many cases of political suppression or ethnic cleansing, the committed behaviors may fall within the framework of crimes against humanity, even if the perpetrators' objective is not the total destruction of a group.

Furthermore, unlike war crimes, crimes against humanity do not require the existence of an armed conflict and can be realized during peacetime a characteristic that distinguishes them from war crimes. War crimes are, in fact, serious violations of international humanitarian law within the context of armed conflicts, and their normative roots primarily lie in the rules stipulated in the Geneva Conventions and their Additional Protocols (Cassese, 2008: 89-94). Within this framework, acts such as intentional attacks against civilians, inhumane treatment of prisoners of war, unnecessary destruction of property, or the use of prohibited weapons can be considered war crimes. Therefore, the essential condition for the realization of this crime is the existence of an armed conflict whether international or non-international and a behavioral nexus between the committed act and that conflict. Consequently, if the same behaviors occur outside the context of a conflict, they may be prosecutable as crimes against humanity or domestic crimes, but they are not necessarily considered war crimes.

Regarding the normative structure, genocide possesses a specific and somewhat exceptional nature, as its objective is to protect the existence of human groups as collective units, whereas crimes against humanity and war crimes primarily focus on the protection of individuals or civilian populations against severe violations of fundamental rights. In fact, in genocide, the subject of protection is the "group" as a collective entity, and its destruction is regarded as a threat to human diversity and international order.

This very characteristic has made proving genocide in international jurisprudence more difficult than other crimes, as the prosecutor must demonstrate the specific intent to destroy the group in addition to proving the commission of prohibited acts; a task often accomplished through inference from behavioral patterns, official statements, or organized policies of the state or armed groups. For example, the jurisprudence of international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), has played a crucial role in elucidating the conceptual boundaries between genocide and other crimes, demonstrating that even in circumstances where widespread and organized killings occur, the title of genocide can only be applied if the intent to destroy a protected group is established. Conversely, many widespread massacres in contemporary history although catastrophic in terms of intensity and scale have been categorized within the framework of crimes against humanity because their primary objective was not the total destruction of a group in the legal sense.

Each genocide usually entails the commission of certain acts that may concurrently be considered crimes against humanity or even war crimes; however, every crime against humanity or war crime is not necessarily genocide. There are also differences regarding temporal and spatial scope; genocide and crimes against humanity can occur in times of peace or war, whereas war crimes are inherently dependent on the conditions of armed conflict (Mir Mohammad Sadeghi, 2022: 90). At the level of international criminal policy, genocide also holds a special status, as the international community regards it not only as a severe violation of human rights but as a threat to global peace and security. For this reason, the obligation of states to prevent and punish it is considered an *erga omnes* obligation in international law.

3. Criteria and Conditions for the Realization of Material Conducts in the Crime of Genocide

Genocide is generally divided into two primary categories: physical genocide and biological genocide. In physical genocide, a human group or a part thereof is eliminated directly through physical destruction. The most significant instances of this type include the killing of group members, causing serious bodily or mental harm, and creating conditions of life that lead to the gradual destruction of the members of the group (Dehim, 2001: 238). Biological genocide refers to a set of measures aimed at preventing the survival and continuity of a human group through biological and demographic methods. In this instance, perpetrators endeavor to weaken or destroy the long-term survival of that group by employing measures that impede reproduction or the continuation of the group's generation (Ibid.). Instances of this type of genocide include the prohibition of marriage among members of a group, the imposition of forced marriage with members of other groups, forced sterilization, and similar actions.

The acts that currently fall within the framework of the crime of genocide were considered instances of crimes against humanity prior to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. Upon the adoption of this convention, genocide was recognized as an independent crime in international law, and today its provisions have become part of customary international law and even a peremptory norm (*jus cogens*). According to this convention, the protected groups comprise four categories: national, ethnical, racial, and religious; this classification is also considered in the examination of the material element of the crime of genocide. Regarding the realization of the material element of the crime of genocide, specific criteria and conditions have been envisaged for its fulfillment.

A) The Individual Nature of Criminal Conducts

The criminal conducts recognized in international law as the material element of genocide possess an individual character rather than a collective one. In other words, for the crime of genocide to be realized, it is not necessary for all criminal conducts—such as the killing of members of the group, causing serious bodily or mental harm, or preventing births—to occur simultaneously (Jafari, 2012: 109). The commission of any one of these acts alone can be sufficient for the realization of the material element of the crime of genocide; although in practice, genocide usually manifests as a set of organized and

widespread conducts. Furthermore, the objective of international law is not that the crime of genocide be considered realized only when the generation of a group has been completely eliminated.

B) Limitation of Criminal Conducts to Five Specific Categories

The criminal conducts constituting the crime of genocide are limited to five specific categories envisaged in Article 333 of the Penal Code. The list of these conducts is considered an "exhaustive list" (*numerus clausus*). In this regard, the legislator has followed the provisions of Article II of the Genocide Convention and Article 6 of the Rome Statute of the International Criminal Court. Although other methods may exist for the total or partial destruction of a social group, the general rules of criminal law necessitate that the material element of the crime of genocide be limited strictly to those five specific conducts.

C) The Concept of Destruction in the Crime of Genocide

The term "destruction" in the crime of genocide refers to the physical and biological destruction of the group, rather than merely cultural destruction (Dehim, 2001: 245). The historical experience of human societies has demonstrated that the destruction or elimination of a social minority group does not occur solely through physical annihilation; rather, it may also be realized through cultural or biological destruction. For instance, compelling the members of a group to abandon their mother tongue and prohibiting its use can be considered a form of cultural destruction. Similarly, creating conditions that lead to the gradual extinction of a group constitutes an instance of the biological destruction of that group. Nevertheless, although the weakening or destruction of the cultural identity of minorities is regarded as a violation of human rights, there is still no full international consensus on regarding it as an international crime. For this reason, the provisions of Article 333 of the Penal Code also indicate that the meaning of destruction within the framework of the crime of genocide primarily concerns physical and biological destruction.

D) The Collective Nature of Victims

The victims in the crime of genocide possess a group status rather than merely an individual status. In other words, the members of a social group must have been targeted due to their membership in that group. In cases where an attack against individuals is carried out solely for personal reasons and their group identity played no role in the commission of the crime even if those individuals happened to be members of a specific group the crime of genocide is not realized (Kittichaisaree, 2008: 307).

E) The Limitation of Protected Groups

The protected social groups in the crime of genocide are limited to four specific categories: national, ethnical, racial, and religious groups. Some jurists and judges believe that the scope of these groups should not be restricted to these four categories, and any social group that possesses a stable nature and in which membership is formed regardless of the individual's will (through birth) should be included under protection. Nevertheless, according to the explicit text of Article 333 of the Penal Code, the list of protected groups is exhaustive (*numerus clausus*) and only includes the aforementioned four groups. This approach is also consistent with the provisions of the Genocide Convention and the Rome Statute.

Within this framework, a national group refers to a collection of individuals who belong to a specific nation-state and enjoy common citizenship rights. An ethnic group includes individuals who share a common language, culture, customs, and historical background. A racial group is defined as a group possessing a common lineage and hereditary origin. Finally, a religious group is one whose members adhere to common religious beliefs and perform their religious rituals in a specific manner. While some legal scholars argue that any social group with a stable nature where membership is largely outside the individual's will and based on birth could be the subject of protection against the crime of genocide, under the existing regulations of international criminal law, the scope of this protection remains limited to the four aforementioned groups (Ardebili, 1989: 73–77).

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4. The Material Element (Actus Reus) of the Crime of Genocide**

A) Killing Members of the Group

Intentional killing is considered the most violent criminal conduct and a common element among the four core international crimes, each addressed under specific conditions and requirements. Within the framework of the crime of genocide, the realization of the material element through the killing of members of a group is not contingent upon the existence of a prior plan or program; nor is a multiplicity of victims a prerequisite for the realization of the crime. This stands in contrast to certain other international crimes, such as crimes against humanity, where the commission of murder is often examined within the context of a pre-designed policy or program. From a quantitative perspective, contrary to the literal appearance of the phrase "killing members of the group," the realization of this criminal conduct

does not necessarily require the death of a large number of individuals. Even the killing of a single individual belonging to the target group may be provided that the specific intent to destroy the group in whole or in part is established and accompanied by other instances of the material element, such as causing serious bodily or mental harm to group members or the forcible transfer of children to another group be categorized as an instance of genocide, even if the act was committed without prior planning.

Nevertheless, in cases where the number of victims is limited, proving the specific mental element of this crime, namely the intent to destroy the group in whole or in part, will face serious difficulties. Consequently, in practice, establishing the crime of genocide is often feasible only under circumstances where the killings are committed on a widespread scale or are at least accompanied by a set of other criminal actions that collectively facilitate the destruction of all or part of the target group. Although the realization of the crime of genocide is not dependent on the ultimate outcome that is, the actual destruction of the group relying on the killing of a limited number of individuals (especially a single person) to prove this crime, while not theoretically impossible, would be extremely difficult in practice. In such a scenario, the establishment of the crime is often conceivable only through an explicit confession by the perpetrator, free from any pressure or coercion, which is highly rare in practice (Nedai, 2022: 135).

B) Causing Serious Bodily or Mental Harm to Members of the Group

The term "causing serious bodily or mental harm" refers to the commission of violent and inhumane acts against the physical or psychological integrity of members of a group; conducts which, although not necessarily resulting in death, leave destructive and harmful effects on the physical or mental health of the victims. Such acts, either alone or alongside other criminal deeds stipulated for this crime, may serve the objective of destroying all or part of the target group. Practical examples of this type of harm can be observed in the bitter and inhumane experiences of certain societies during the crises of recent decades. These instances include systematic torture, widespread forced displacement and relocation of group members, as well as extensive rape and sexual violence. Such acts occurred during the Balkan and Rwanda crises, and the International Criminal Tribunals for the former Yugoslavia and Rwanda recognized them as instances of causing serious bodily or mental harm within the framework of the crime of genocide (Danesh, 2010: 129).

C) Imposition of Incompatible Conditions of Life

The imposition of incompatible (unsuitable) conditions of life is also among the conducts that fall within the scope of the material element (*actus reus*) of the crime of genocide. These types of actions usually stem from deep-seated ethnical, racial, or religious prejudices and hatreds, and are implemented with the aim of gradually weakening the physical and mental capacity of the members of a group, and ultimately their destruction. For the first time, some of these acts were identified as instances of genocide in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY). In cases concerning Karadžić and Mladić, this tribunal identified actions such as the imposition of inhumane conditions on detainees in detention centers and prisons, the enforcement of severe dietary and hygienic restrictions in collective housing camps, and the shelling of protected residential areas as conducts that lead to the attrition of the physical and mental strength of group members, thereby falling within the framework of the material element of genocide (Danesh, 2010: 130).

D) Measures Intended to Prevent Births Within the Group

Another instance of the material element of the crime of genocide is the adoption of measures intended to prevent births within a group. Actions such as the mutilation of or injury to male reproductive organs, forced sterilization of women or men, the imposition of mandatory birth control policies, the segregation of the sexes, and the prohibition of marriage among group members are among the conducts that can fall within this framework. Should any of these acts be committed against members of one of the protected groups and be accompanied by the intent to prevent the continuity of that group's generation and ultimately its total or partial destruction it can be considered an instance of genocide. Nevertheless, these

measures often acquire their full significance alongside other criminal acts stipulated in genocide regulations, and their collective implementation can eventually lead to the destruction of all or part of the target group; though in some cases, the intensity and scale of such measures alone may possess similarly destructive effects (Pourbafarani, 2014: 218–219).

E) Forcible Transfer of Children of One Group to Another Group

The forcible transfer of children from one group to another is also considered a significant instance of the material element of the crime of genocide. The realization of this conduct is provable when children belonging to one of the protected groups are deliberately and forcibly transferred to another group with the aim of destroying all or part of that group. Additionally, the perpetrator must have committed such an act with the knowledge that the transferred individuals are under the age of eighteen. This transfer usually occurs in alignment with a set of other criminal measures which, together, can lead to the gradual destruction of the target group; although in some cases, the scale and intensity of the transfer itself may alone result in such an outcome. From a legal perspective, the realization of forcible transfer does not necessarily require the application of physical force or direct coercion; rather, it is sufficient that the transfer was carried out against the will or without the consent of the group members. Furthermore, from a quantitative standpoint, the realization of this criminal conduct is not contingent upon the transfer of a large number of children; even the transfer of a single child if accompanied by other instances of the conducts provided in this article can provide the grounds for establishing the crime of genocide (Nedai, 2022: 136).

5. Other Instances of the Crime of Genocide in the Statute of the International Criminal Court

In light of the prohibited acts stipulated in Article 6, the crime of genocide can be divided into physical crimes and biological crimes.

A) Physical Crimes

Within the framework of physical crimes, the first three paragraphs of Article 6 of the Statute can be included, which comprise: Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

What is noteworthy within the framework of physical injuries is that the bodily or mental harm must be of such severity, or the conditions of life must be so unsuitable, that they constitute at least a threat of the total or partial destruction of the physical or mental capacity of the group members (Bigzadeh, n.d.: 80).

B) Biological Crimes

Within the framework of biological crimes, the final two paragraphs of Article 6 of the Statute can be included, which encompass measures intended to prevent births within a group and the forcible transfer of children of the group to another group. Regarding the first part namely, taking measures to prevent births within a group it appears that these consist of measures with a coercive or punitive nature, and it is this very aspect that acts as a deterrent for group members from appropriate reproduction within their own group. Therefore, these measures do not include actions taken within the framework of voluntary family planning programs or state assistance. Regarding the forcible transfer of children from one group to another, it must be stated that this act entails devastating consequences for the existence of a group. Naturally, this transfer does not include adults, as such an act regarding them may be raised within the framework of crimes against humanity (Bigzadeh, n.d.: 80-81). In conclusion, it must be stated that what is of paramount importance is that, according to Article 6 of the Statute of the International Criminal Court, it is not necessary for the final result namely, the total or partial destruction of a national, racial, ethnical, or religious group to be achieved for the crime of genocide to be realized. Rather, it is sufficient for the perpetrator to commit one of the acts listed in this article with the intent to destroy, in whole or in

part, a specific group for the crime of genocide to be fulfilled. Furthermore, it appears that should the International Criminal Court encounter ambiguities in the implementation of Article 6 of its Statute, it may refer to the provisions of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. In the present century, the 21st century, numerous cases of genocide and widespread violence against ethnic and religious groups have been reported.

Conclusion

In conclusion, the legal analysis of the crime of genocide in the Statute of the International Criminal Court and the Penal Code of Afghanistan emphasizes a relative convergence between international criminal law and the Afghan domestic penal system, although structural and interpretative challenges persist. The Rome Statute (1998), through its comprehensive definition of genocide in Article 6 which is a direct adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide - has elucidated the material elements (the five acts of killing, serious harm, destructive conditions of life, preventing births, and forcible transfer of children) and the mental element (*dolus specialis* or the specific intent to destroy, in whole or in part, national, ethnical, racial, or religious groups) as the substantive pillars of the crime. This framework, characterized by the principle of absolute criminalization and the ICC's universal jurisdiction, provides an objective standard for prosecution and adjudication that operates beyond national borders. Conversely, Articles 332 and 333 of the Afghan Penal Code (enacted in 2017) demonstrate a manifest effort to align with Afghanistan's international obligations including its informal alignment with the ICC Statute via UN resolutions by enumerating acts identical to those in the 1948 Convention. The domestic legislator has adhered to the principle of proportionality between crime and punishment by prescribing severe penalties (death or life imprisonment) and affirming the non-compoundable nature of the crime. Nonetheless, apparent deficiencies in the interpretation of the "specific intent" element which lacks precise elucidation in domestic law and the restriction of protected groups to the four categories of the Convention without explicit reference to cultural or gender-based groups, reveal an incomplete adaptation. Furthermore, the absence of effective enforcement mechanisms, such as specialized prosecution offices or judicial cooperation with the ICC, undermines the implementation of domestic regulations, particularly in a context like Afghanistan, which grapples with ethnic and sectarian crises. Research findings indicate that while the Afghan Penal Code conforms formally to international law, in substantive and executive dimensions, interpretative ambiguities and legislative lacunae threaten the principle of legality (*nullum crimen, nulla poena sine lege*). These inconsistencies not only diminish the efficacy of genocide prosecution but also distort the accountability of perpetrators before the international community. For instance, in incidents such as the chain attacks on the Hazara minority, the lack of a documented mental element in judicial rulings has hindered the establishment of the crime of genocide, resulting in the substitution of lesser charges.

Therefore, it is recommended that the Afghan legislator clarify the mental element by citing ICC doctrine (such as the rulings in the Rwanda and Srebrenica cases), expand the protected groups, and envisage specialized international criminal courts by amending the relevant articles. Simultaneously, judges and prosecutors should be required to engage in comparative interpretation based on the principle of effective interpretation in the law of treaties to realize domestic compliance with the Rome Statute. Training judges regarding the mental elements of the crime and strengthening cooperation with the ICC through bilateral agreements are the next practical steps. Ultimately, this research emphasizes the necessity of transitioning from legislative passivity to an active criminal approach; an approach that not only condemns genocide as *supremum malum* but also guarantees sustainable peace and transitional justice in Afghanistan. Achieving this will establish Afghanistan as a responsible member of the international criminal community and prevent the recurrence of historical tragedies.

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