

# **THE INTERNATIONAL CRIMINAL COURT: Fundamental principles concerning the elements of genocide**

This paper is the first of a series of short papers to be issued concerning the proposals on elements of crimes and the rules of procedure and evidence for the first session of the Preparatory Commission for the International Criminal Court (16 to 26 February 1999) at the United Nations Headquarters in New York. Article 9 (1) of the Rome Statute of the International Criminal Court, adopted at a diplomatic conference on 17 July 1998, provides that “[e]lements of crimes shall assist the Court in the interpretation and application of articles 6 [genocide], 7 [crimes against humanity] and 8 [war crimes]” and be adopted by a two-thirds majority of the Assembly of States Parties. The Preparatory Commission is charged under Resolution F of the Final Act of the diplomatic conference with preparing a draft of the elements of crimes for consideration and adoption by the Assembly of States Parties. Article 21 (a) of the Statute provides that “[t]he Court shall apply . . . (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence”, which makes it essential that the elements be drafted with great care to ensure that the intent of the Statute not be undermined.

Government proposals were made available only a few days before the first session or during the session, thus making it difficult to prepare extensive comments. Therefore, this paper simply addresses some general principles which the Preparatory Commission should consider in preparing the draft elements of crimes. Amnesty International intends to prepare more extensive comments on the elements of crimes and on rules of procedure and evidence for the Preparatory Commission at a later date.

## **Fundamental principles concerning elements of crimes**

1. As so many delegations have already recognized, all elements of crimes must be fully consistent with the requirements of the Statute in order to protect the Statute’s integrity.

2. All elements of crimes must be fully consistent with other international law, taking into account the jurisprudence of international and national courts.

3. Each element of a crime should clarify what must be proved, but not increase the difficulties for the Prosecutor in proving guilt beyond reasonable doubt in accordance with the requirements of a fair trial. One important criterion is to ask whether a prosecutor conducting trials in the tribunals set up under Control Council Law No. 10 or in the International Criminal Tribunals for the former Yugoslavia or Rwanda or in national courts acting in accordance with international requirements for a fair trial using the proposed elements would have been able to secure convictions of the accused for genocide, crimes against humanity or war crimes.

### **Elements of the crime of genocide**

With respect to the crime of genocide, there is an adequate and well-tested definition in Article 6 of the Statute, which - like the equivalent articles in the Yugoslavia and Rwanda Statutes - reproduces the text of the Convention for the Prevention and Punishment of the Crime of Genocide. The provisions of these statutes have been successfully used in the prosecution of persons charged with genocide. Therefore, it appears that there is no need to spell out the elements of genocide.

However, to the extent that it is believed that there may be some value in drafting a provision setting forth with greater specificity the elements of the crime of genocide under the Statute to “assist the Court in the interpretation and application of article[] 6”, those elements should be fully consistent with certain principles.

1. There is no requirement that the accused had to have committed an act in conscious furtherance of a plan or a widespread or systematic policy or practice aimed at destroying, “in whole or in part”, a protected group. The definition of genocide in the Statute already includes clear indication of the intent and knowledge required to prove that a person has committed genocide.

2. The definition of genocide applies to subordinates who carry out the order as well as those who plan or order the genocide, even though the subordinate may not have the same level of knowledge as the planner or superior. As the International Law Commission has explained in its comment concerning the crime of genocide in Article 17 of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind:

“The definition of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals belonging to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from the obvious. For example, a soldier who is ordered to go from house to house and kill only persons who are members of a particular group cannot be unaware of the irrelevance of the identity of the victims and the significance of their membership in a particular group. He cannot be unaware of the relevance of the destructive effect of this criminal conduct on the group itself. Thus the necessary degree of knowledge and intent may be inferred from the nature of the order to commit the prohibited acts of destruction against individuals who belong to particular group

and are therefore singled out as the immediate victims of the massive criminal conduct.” (Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996, 51U.N. G.A.O.R. Supp. (No. 10), U.N. Doc. A/51/10 (1996), p.90).

3. There is no requirement that the accused have intended to destroy the whole of a group in a particular geographic region or that the aim must be the destruction of a substantial part of that group. It is sufficient to impose criminal responsibility for genocide if the accused aimed to destroy a large number of the group in a particular community. Article 6 expressly requires that the acts be committed with the “intent to destroy, in whole or in part,” a protected group.

4. There is no requirement in prosecutions under Article 6 (c) or (d) for the act to lead to a particular result. There is no requirement in a prosecution under Article 6 (c) for committing genocide by “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” that these conditions led to the destruction of the group in whole or in part. Similarly, there is not requirement in a prosecution under Article 6 (d) for committing genocide by “[i]mposing measures intended to prevent births within the group” that the accused have succeeded in preventing births. Moreover, there is no requirement that the measures have been imposed forcibly.

5. There is no requirement in a prosecution under Article 6 for committing genocide by “[f]orcibly transferring children of the group to another group” that the children were under the age of 15. The definition of a child in international law generally uses the definition of a person under the age of 18, such as Article 1 of the Convention on the Rights of the Child. Any lesser age limit would be inconsistent with the Convention for the Prevention and Punishment of the Crime of Genocide.

6. There is no requirement in a prosecution for committing genocide by “[f]orcibly transferring children of the group to another group” that the children were transferred from the children’s lawful residence. Any such requirement would not only be contrary to the Convention for the Prevention and Punishment of the Crime of Genocide, but also exclude transfers of children born in prison or in concentration camps and children whose parents were not in a location which was considered lawful, such as immigrants whose papers were not in order or person who were evicted from housing for non-payment of rent.

The above principles are only some of the essential elements of the crime of genocide and Amnesty International intends to develop these elements further, as necessary, for the Preparatory Commission. Government and non-governmental

delegations may find the following publications useful in the discussion of elements of crimes: Amnesty International, *The international criminal court - Making the right choices: Part I - Defining the crimes and permissible defences and initiating a prosecution*, January 1997 (AI Index: IOR 40/01/99); Machtheld Boot, Rodney Dixon & Christopher Keith Hall, *Article 7 - Crimes against Humanity*, in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden, Germany: Nomos Verlagsgesellschaft Otto Triffterer ed. 1999); and William Schabas, *Article 6 - Genocide*, in the same publication. Copies of the first publication were made available to all government and non-governmental organization delegations at the Preparatory Committee in 1997 and at the diplomatic conference in Rome in 1998. Copies of the second and third publications are being distributed to all government and non-governmental organization delegations at the first session of the Preparatory Commission.