**Session 2**

**Core crimes I**

**Genocide and crimes against humanity**

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# **CRYERS – CHAPTER 10: GENOCIDE**

## **Introduction: What is genocide? / what is required for the crime of genocide?**

### ***Definition (general & legal)***

Genocide = a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings (GA Res. 96(1))

* Crime against: individual victims, group and human diversity
* Intent to destroy a group of people
* Crime of crimes
* Jus cogens norm
* Erga omnes obligation

Legal: genocide = a particular subset of atrocities which are committed with the intent to destroy groups

### ***Criticism to the definition***

The definition has been criticized as:

* Being too limited
* There is a wish to attract the mobilizing power of the label
  + Obligation imposed by the Genocide Convention (Article I) to prevent genocide and the possibility (Article VIII) of involving the UN if genocide is committed
* Emotional and political reasons for using the label
* Also: not using the term may seem like a judgement on a victim group’s suffering

Response: if classification is to be meaningful it should be precisely and carefully used, both on legal grounds and on the ground that if the term is stretched, it reduces its capacity to evoke a unique form of devastation; belittling the scale and intensity of unmistakable forms of genocide such as the Holocaust

### ***State responsibility regarding (the prevention of) genocide?***

State responsibility:

* When the conduct constituting the offence is attributable to a state, genocide, like other international crimes, is not only a crime of individual responsibility it also engages state responsibility
* ICJ in Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (BiH v. Serbia & Montenegro): Genocide Convention not only imposes a duty on states to prevent and punish genocide but also an obligation to refrain from genocide (paras. 162–6)
* Obligation of state responsibility under general international law

### ***Real legal definition (Genocide Convention & ICC Rome Statute)***

The standard definition of genocide (Art. II of the Genocide Convention): Any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group.

* Art. 6 RS

### ***Historical development of the concept of genocide***

The identification of genocide as an international crime came as a response to the Holocaust:

* Term coined by Raphael Lemkin (Polish lawyer)
* 1944
* Crime of genocide recognized by General Assembly Resolution 96(1)
* 11/12/1946
* Not a crime within jurisdiction of the Nuremberg Trial
* Genocide Convention (1948)
* Entry into force 12/11/1951
* ICJ AO in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: all prohibitions contained in the Convention constitute customary international law
* 1951
* Ad Hoc Tribunals first international courts trying cases of genocide
* 1993 & 1994
* As per Art. VI Genocide Convention
* First conviction: Akayesu (ICTR, 1998)

### ***Relationship to crimes against humanity***

#### What are the similarities between genocide and crimes against humanity?

Makes sense there are similarities; the Nuremberg defendants were charged with war crimes and crimes against humanity for what now would be prosecuted as genocide:

* No nexus between the crimes and armed conflict
* Art. 1 Genocide Convention
* Can be committed in peace and war times

#### What are the differences between genocide and crimes against humanity?

Genocide, unlike crimes against humanity, requires:

* Intent to destroy the whole or part of a group as necessary element of genocide
* Chief differences
* Interests protected by the law against genocide are narrower
* Object(s)/interest(s) of protection
* Genocide protects: rights of certain groups to survival, and thus human diversity
  + Certain groups
  + Humanity
  + Survival
  + Human diversity
* CAH protects: any identifiable group or collectivity on … grounds from persecution
  + From persecution or discrimination
    - Not elimination
  + Any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender … or other grounds that are universally recognized as impermissible under IL
* Nature of genocide: gravity
* Genocide: no objective requirement of scale
  + But mens rea: intent to destroy a national, ethnic, racial or religious group
    - Subjective mens rea
    - Gravity = intent
    - In the mind of perpetrator
* CAH: connection to a widespread or systematic attack

### ***Issue: what is the issue with the nature / gravity of genocide?***

If the threshold for genocide is only a mental element, without an objective requirement of scale or serious threat, that would raise important questions about the nature of genocide and its status as the crime of crimes

* Could potentially be an isolated individual act as long as intent (albeit unrealistic) to destroy a group
* ICTY Trial Chamber in Jelisić: killings by a single perpetrator (lone individual) are enough
* to establish the material element of the crime of genocide and it is a priori possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated
* para. 100
* Not supported consistently (in academics or law)

### ***How to make sure / assess that genocide objectively / has objective dimensions/elements/nature?***

It is usually assumed, therefore, that several protagonists are involved in the crime of genocide (ICTR TC in Kayishema, para. 94) or, as an exception, that in a general situation of crimes against humanity in which a single perpetrator had the intent to eliminate a group while committing the same atrocities.

This takes shape in two approaches:

1. A contextual element to the actus reus is added: the conduct takes place in the context of ‘a manifest pattern of a similar conduct’ or is of itself able to destroy at least part of the group

* ICC Elements of Crimes, Article 6(b)(4)
* Rules out most of situations of isolated crimes
* Broader pattern of crimes or a concrete threat to the group

1. Regarding intent: there must be an organized and widespread plan to exterminate a group and the perpetrator must act with knowledge that the commission of the individual act would, or would likely to, further the implementation of the plan

### **Conclusion of conclusion**

Genocide, or a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings (GA Res. 96(1)), is also known as the crime of crimes, as it affects not just individuals and a group but also human diversity.

It is a jus cogens norm, erga omnes obligation and recognized as customary international law (ICJ AO in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide).

The conduct is attributable to states (and therefore engages state responsibility), if states fail to prevent or punish genocide and also fails to refrain from genocide (ICJ Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (BiH v. Serbia & Montenegro, paras. 162-6).

Legally speaking, genocide is: Any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group. (Art. II Genocide Convention, Art. 6 RS)

Genocide:

* Does not include a nexus requirement between the crime and armed conflict: can be committed in peace and war times
* Requires an intent to destroy the whole or part of a group
* Interests (& of whom): rights of certain groups to survival human diversity
* Gravity/nature: intent to destroy a national, ethnic, racial or religious group
* Mens rea
* No objective requirement of scale

Because this means that a single act by a single perpetrator (as long as there is genocidal intent) could be considered genocide (which does not really make it worthy of the title crime of crimes) (accepted by ICTY TC Jelisic), the ICC Elements of Crimes has added an objective element or, more specifically, a contextual element to the actus reus: the conduct takes place in the context of a manifest pattern of a similar conduct (broader pattern of crimes) or is of itself able to destroy at least part of the group (concrete threat to the group) (Article 6(b)(4))

## **Protected groups: who are protected by the prohibition of the crime of genocide?**

Under the Genocide Convention only national, ethnic, racial and religious groups are protected:

* Not, for example, social or political groups
* Closed list / exhaustive
* ICC PTC in Al Bashir Arrest Warrant (paras. 134-7)
* At domestic level, states are entitled to use broader definitions without requiring other states to accept them
  + Pinochet case
* No internationally recognized definition of any of the terms
* Four corners approach: the list is exhaustive, but the four groups were not given distinct and different meanings
  + Akayesu, ICTR TC, para. 516
  + Describes a single phenomenon, roughly corresponding to ‘national minorities’ (before WWII)
  + The groups help to define each other
  + Operate more as four corner posts that delimit an area within which a myriad of groups is covered

As is clear from the wording of the different parts of the actus reus of the offence, the acts must be directed at members of the group:

* Difficulties deciding if a person is a member of the group
* Cannot be based solely on subjective approach (based on perceptions); vs. objective (based on factual distinctions)
* Otherwise, the Convention could be used to protect fictitious/imagined national, ethnic, racial or religious groups
* determining whether a group is a protected one should be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators (ICTR TC, Semanza, 2003, para. 317)
* So blend of objective and subjective approaches
* But in Al-Bashir Arrest Warrant Case, majority of the ICC Pre-Trial Chamber did not consider it necessary to explore the subjective or objective approach to the definition of groups (para. 9)
* Cannot be defined negatively
* By identifying persons not sharing the group characteristics of the perpetrations
  + E.g., non-Serbs
* Stakić, ICTY TC, para. 512; ICTY AC, paras. 19–28
* Where a person has mixed identity, if he or she is targeted on the basis of membership of the protected group, the person so targeting them may be guilty of genocide
* Ndindabahizi, ICTR TC, paras. 467–9

## **Material elements: what acts are prohibited?**

It is important to remember that it is not necessary to show that the relevant act assisted in destroying a protected group: what is needed is that it was committed with the intention to destroy the group.

Although all of the underlying crimes are defined by reference to victims in the plural, the ICC Elements of Crimes state that even one victim suffices (mentioning one or more persons in every act, Art. 6), if the relevant act is committed with the necessary intent. This does, though, create issues with respect to Article 6(c), which refers to inflicting conditions of life on the group.

Only acts mentioned in Article II of the Genocide Convention may form the actus reus of genocide (also Article 6, RS):

1. Killing members of the group

* One killing may suffice
* Must be intentional but not necessarily premeditated
  + Stakić, ICTY TC, para. 515
* If there is doubt about the intention to kill, rather than the intention to cause serious harm, it is of course possible to charge the defendant pursuant to article II(b) of the Convention for the conduct that led to the death

1. Causing serious bodily or mental harm to members of the group

* Genocide does not necessarily require / is not confined to causing death
* The harm needs to constitute ‘a grave and log-term disadvantage to a person’s ability to lead a normal and constructive life
  + Krstić, ICTY TC, para. 513
* Acts of sexual violence and rape can constitute genocide
  + Akayesu, ICTR TC, para. 731
  + ICC Elements of Crimes, Art. 6(b), note 3)
* Serious mental harm does mean more than minor or temporary impairment of mental faculties (Semanza ICTR TC, 321), but neither mental nor physical harm need be permanent (Akayesu, ICTR TC, 502)
* Decisions on what is meant by serious bodily or mental harm should be made on a case-by-case basis
  + Kayishema, ICTR AC, para. 110)

1. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

* Compromises methods of destruction whereby the perpetrator does not immediately kill the members of the groups, but which seek to bring about their physical destruction in the end
  + Akayesu, ICTR TC, para. 505
* Conditions of life = including but not necessarily restricted to deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes
  + ICC Elements of Crimes Art. 6(c), note 4
* Not a result-based form of the crime
  + Unlike a) and b)
  + Requires that conditions are ‘calculated’ to achieve the result
  + Stakic, ICTY TC, para. 517
* Includes forced migration of people = ethnic cleansing
  + If and insofar as the objective of a forced migration is ‘only’ to remove a group or part of it from a territory, it differs from that of genocide
    - District Court of Jerusalem in Attorney-General of Israel v. Eichmann
    - Also: Brđanin, ICTY TC II, 1 September 2004, para. 118 jo. 989
    - Stakić, ICTY TC, paras. 519, 557; Stakić, ICTY AC, paras. 46–8.
  + Fact of forced migration alone is not enough for a Court to deduce the special intent of destruction of the group
    - Neither the intent, as a matter of policy, to render an area ‘ethnically homogeneous’, nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is ‘to destroy, in whole or in part’ a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as ‘ethnic cleansing’ may never constitute genocide, if they are such as to be characterized as, for example, ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’, contrary to Article II, paragraph (c), of the Convention ... the term ‘ethnic cleansing’ has no legal significance of its own. That said, it is clear that acts of ‘ethnic cleansing’ may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (dolus specialis) inspiring those acts
    - ICJ, Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), para. 190 (Bosnian Genocide Case)

1. Imposing measures intended to prevent births within the group

* Examples: sexual mutilation, (forced) sterilization, forced birth control, separation of the sexes and prohibition of marriages
  + Akayesu, ICTR Trial Chamber, para. 507
* In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped subsequently refuses to procreate, in the same way that members can be led, through threats or trauma, not to procreate
  + Akayesu, ICTR Trial Chamber, paras. 507-8
  + Deliberate impregnation of a woman (from the protected group) by a man of another group, with the intent to have her give birth to a child who will not belong to its mother’s group (due to patriarchal membership/identity rules)
  + Can also be mental
* Forced impregnation could be part of it
  + But requirements: genocidal intent (intent to prevent births within the group) & measures must be imposed

1. Forcibly transferring children of the group to another group

* Children = those below eighteen
  + ICC Elements of Crimes, Art. 6(e)
* ‘forcibly’ is not restricted to physical force
  + may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.
  + ICC Elements of Crimes, Art. 6(e)
* Not cultural genocide
  + Not within scope of Convention or customary law
    - Krstic, ICTY TC (also AC), para. 580
  + But forcibly transferring children can be close to such a concept

### ***Contextual element: what additional material element does the actus reus of genocide require (by the ICC)***

The ICC Elements of Crimes added another material element, in relation to each prohibited act:

The conduct took place in the context of a manifest pattern of similar conduct directed against the group or was conduct that could itself effect such destruction

* ICC Elements of Crimes, Art. 6(a)-(e), last sub of each of these
* The conduct took place in the context of a manifest pattern of similar conduct directed against the group: the individual accused is acting within a broader context in which others are also committing acts of genocide
* or, of the other perpetrators do not have genocidal intent, they may be committing crimes against humanity, while still in a ‘manifest pattern of similar conduct’
* manifest = the pattern must be a clear one and not one of a few isolated crimes occurring over a period of years
* Or; was conduct that could itself effect such destruction
* Less likely
* Could occur where a group is particularly small or where the accused has access to powerful means of destruction (such as the use of nuclear or biological weapons) with genocidal intent
* No need for a pattern of similar conduct, since the accused is in a position to pose a real threat to a protected group
* Also captures those who had the means to destroy a group but for whatever reason managed to cause only a single death or a few deaths
  + Would be no objective ‘pattern’
* So does not exclude possibility of a ‘lone génocidaire’
* Either pattern of crimes or concrete danger to a group
* Ruling out isolated hate crimes
* Also includes a mental element: knowledge of the circumstances
* Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis
  + ICC Elements of Crimes, Introduction, Art. 6, para. 3
  + recognizes that proving genocidal intent often involves demonstrating the perpetrator's knowledge of the circumstances surrounding their actions. This includes understanding the context in which the genocidal acts are committed, such as the identity of the targeted group, the nature of the acts, and the foreseeable consequences. *(Chat GPT)*

## **Mental elements**

The mental elements of genocide comprise

* The requisite intention to commit the underlying prohibited act (such as killing); and
* The intent special to genocide

The special intent to destroy in whole or in part [a protected group]

* Distinguishes it from other crimes
* Kambanda, ICTR TC, para. 16; Kayishema, ICTR TC, para. 91
* Intent (special intent):
* Ordinary members of a group or organization (the rank and file) may also be genocidaires, provided they have the requisite intent
  + Not just those who lead and plan a campaign
  + Unlike crime of aggression
  + Kayishema, ICTR AC, para. 170
* More stringent than ‘normal’ intent in criminal law (as in Article 30 of ICC Statute)
  + Art. 30 is relevant to underlying acts and to some other forms of liability in relation to genocide
* Proof of special intent
  + In times of armed conflict, difficult to assess whether crimes are committed with genocidal intent or with intent of winning the war
  + Direct evidence difficult to find
  + May be deduced from
    - Circumstantial evidence
      * Including actions and words of perpetrator
      * Seromba, ICTR TC: the one with the priest and bulldozer church
    - Behavior of others
      * Apparent intentions of others could provide indirect evidence of perpetrator’s own intentions when he agreed with those to undertake criminal plans
      * Stakic, ICTY AC, para. 40
    - the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups
      * Akayesu, ICTR TC, para. 523
  + All evidence must be taken together when determining intent since, looking at each piece individually rather than cumulatively as the Trial Camber did, obscured the proper inquiry
    - Stakic, ICTY AC, para. 55
* Intention vs. knowledge
  + Difficulty intent: acquittal for lack of evidence of special intent or squeezing ambiguous fact patterns into the specific intent paradigm
  + Solution: knowledge-based approach
    - In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part
    - More like Article 30 of the ICC Statute
    - But different from purpose-based approach used by Tribunals and ICC
  + Distinguishes between collective intent and individual intent
    - Collective: manifests in an overall genocidal plan or campaign
    - Individual: need only involve knowledge of the plan on the part of the individual perpetrator together with foresight or recklessness as to the occurrence of the planned destruction
    - Would recognize the different roles of individuals involved in a collective act of genocide
    - Not accepted by Tribunals, each individual participator must have the necessary intent
      * Krstic, ICTR AC, para. 549
      * But in practice: accessorial modes of liability, such as aiding and abetting, can allow conviction of persons as an accessory to genocide if they have knowledge of the genocide
        + Krstic, ICTR AC, paras. 133-4
  + Prosecutors who are not sure of being able to prove special intent are likely to charge lesser modes of liability rather than genocide as a principal perpetrator
* To destroy
* Genocidal intent is eliminatory
* Destruction = physical or biological
  + But means of causing destruction of the group may be by acts short of causing death of individuals
  + Other forms of destruction, like social assimilation of a group into another or attacks on cultural characteristics which give a group its identity, do not constitute genocide if not related to physical or biological destruction of the group
    - But acts of ethnic cleansing (and cultural genocide) may be significant evidence towards establishing the intent to destroy
  + Krstic, ICTR TC, para. 580; ICJ, Bosnian Genocide case, para. 344
* In whole or in part
* Intent to destroy the protected group in whole or in part
* Geographical scope
  + ICJ: it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area (Bosnian Genocide case, para. 199)
* ‘part’ of a group
  + Intention must be to target at least a substantial part of the group
    - Kayishema, ICTR TC, para. 96
    - ICJ, Bosnian Genocide case, para. 198
    - ‘Substantial’ part:
      * the part targeted must be significant enough to have an impact on the group as a whole
        + ICJ, Bosnian Genocide case, para. 198
      * the prominence of the targeted individuals within the group as well as the number targeted (in absolute and relative terms) could be relevant
        + Both quantitative and qualitative criteria should be considered
        + Krstic, ICTY AC, para 12: If a specific part of a group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial
  + In Krstic: Bosnian Muslims constituted the protected group and Bosnian Muslims of Srebrenica or Bosnian Muslims of Eastern Bosnia constitute a part of the protected group (ICTY TC, para. 560)
    - Fate of Srebrenica Muslims was considered emblematic of that of all Bosnian Muslims
* As such
* Must be an intent to destroy the group, or part of it, ‘as such’
* Compromise: no explicit reference to motive but ‘as such’
  + Not all negotiators attached the need for motive to these words
  + But discriminatory nature of genocide seems to require a motive
    - The victims are singled out not by reason of their individual identity but because of their membership of a national, ethnic, racial or religious group
      * Niyitegeka, ICTR AC, para. 53
    - Decisions by the ad hoc Tribunals have sometimes used the language of motive, referring the need for the accused to ‘seek’ or ‘aim at’ the destruction of the group (See e.g. Jelisić, ICTY AC, 5 July 2001, para. 46; Rutaganda, ICTR AC, 26 May 2003, para. 524)
  + Sometimes Tribunals do distinguish between motive and genocidal intent
    - personal motivation (such as a wish to profit financially from genocide) is not relevant but having discriminatory purpose for the crime is intrinsic to special intent
    - Krstić, ICTY TC, para. 545; Stakić, ICTY AC, para. 45; Jelisić, ICTY AC, para. 49
  + in cases where a set of facts and their consequences may have different explanations, a consideration of motive may be relevant in assessing intent, even though it will not itself be decisive
* So basically discriminatory purpose should be there: victims targeted not by reason of their individual identity but because of their membership of a national, ethnic, racial or religious group

## **Other modes or acts of participation**

The ‘other acts’ of participation in genocide are listed in Article III of the Genocide Convention:

1. Genocide;
2. Conspiracy to commit genocide
3. Direct and public incitement to commit genocide;
4. Attempt to commit genocide;
5. Complicity in genocide.

Although the Statutes of the ad hoc Tribunals also included these other acts, the ICC relies on the general principles of law in Part 3 of its Statute, which apply to all the crimes within jurisdiction of the Court, for all these forms of liability

* Only includes incitement to genocide: Art. 25(3)(e) of ICC Statute
* Omission of conspiracy has left a gap, although the Statute’s provision on contribution to a common purpose may largely fill it
* Art. 25(3)(d)

# **CRYERS – CHAPTER 11: CRIMES AGAINST HUMANITY**

## **Introduction: what is the crime of crimes against humanity?**

A crime against humanity involves the commission of certain inhumane acts, such as murder, torture or rape, in a certain context: they must be part of a widespread or systematic attack directed against a civilian population

* This context elevates crimes that might otherwise fall exclusively under national jurisdiction to crimes of concern to the international community as a whole
* Individual may be liable if he or she commits one or more inhumane acts within that broader context
* Not required that individual be a ringleader or architect of the broader campaign

Historical development

* 1915: reference in joint declaration by France, Great Britain and Russia, responding to massacre of Armenians by Turkey
* Denounced crimes against humanity and civilization
* Warned of personal accountability
* 1945: Nuremberg Charter (Charter of the International Military Tribunal)
* Art. 6(c): crimes against humanity = murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated
* Because classic definition of war crimes did not include crimes committed by a government against its own citizens
* 1993 & 1994: Creation ICTY and ICTR + Statutes
* ICTY Statute, Article 5: ‘when committed in armed conflict, whether international or internal in character, and directed against any civilian population’
  + Tribunal interpreted this threshold as requiring a ‘widespread or systematic attack’
    - Tadić, ICTY TC, para. 644; Tadić, ICTY AC, para. 248
* ICTR Statute, Article 3: when committed as part of a widespread of systematic attack against any civilian population on national, political, ethnic, racial or religious grounds’
* Difference regarding the required contextual threshold:
  + ICTY Statute requires armed conflict
  + ICTR Statute requires discriminatory
* 1998: ICC Statute
* Article 7: when committed as part of a widespread or systematic attack directed against any civilian population
* Requires state or organizational policy
* Sane list as previous instruments + additions
  + Forced transfer of population, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, enforced disappearance and crime of apartheid
* Art. 7(2) contains supplementary definitions

Relationship / differences with other crimes:

* War crimes
* Frequently overlap

1. Crimes against humanity may occur even in the absence of armed conflict
2. Crimes against humanity require a context of widespread or systematic commission, whereas war crimes do not
   * A single isolated incident can constitute a war crime
3. Law of crimes against humanity protects victims regardless of their nationality or affiliation, whereas war crimes law primarily focus on protecting ‘enemy’ nationals or persons affiliated with the other party to the conflict
   * War crimes law originally based on reciprocal promises between parties to a conflict
4. Law of crimes against humanity concerns actions directed primarily against civilian populations, whereas war crimes law regulates conduct even on the battlefield and against military objectives

* International dimension of crimes against humanity arises from the attack on a civilian population
* International dimension of war crimes arises from the armed conflict
* Together, penalize atrocities committed during armed conflict or committed on a widespread or systematic basis
* Isolated crimes occurring in the absence of armed conflict governed by national criminal law and human rights law
* Genocide
* Genocide initially regarded as a particularly odious form of crime against humanity
  + With intent to destroy group
* Over time definitions have evolved and now pose different requirements (see Introduction Chapter 10, above)

## **Common elements (contextual threshold): What is the contextual threshold for a listed act to be a crime against humanity??**

As already noted, the contemporary definition of a crime against humanity entails the commission of a listed inhumane act, in a certain context: the listed act must be committed as part of a ‘widespread or systematic attack directed against a civilian population’

Aspects not required:

* No nexus to armed conflict
* Nuremberg and Tokyo Charters did require a connection to war crimes or to aggression, in effect requiring some nexus to armed conflict & ICTY Statute
* Today, seems well settled that a nexus to armed conflict is not required
* ICTY jurisprudence itself: requirement is a deviation from customary law
  + Tadić, ICTY TC, para. 627; Tadić, ICTY AC, paras. 282–8
* No requirement of discriminatory animus
* Unlike ICTR Statute: national, ethnic, racial or religious grounds
* ICC Statute: no discrimination requirement
* ICTR Appeals Chamber in Akayesu: the restriction in the ICTR Statute is not customary law and restricts only that Tribunal (paras. 461-9)
  + So not customary
  + except for the specific crime of prosecution

As already noted, the contemporary definition of a crime against humanity entails the commission of a listed inhumane act, in a certain context: the listed act must be committed as part of a ‘widespread or systematic attack directed against a civilian population’

* widespread or systematic
* test is disjunctive (*= lacking connection*): only needs to satisfy one or the other threshold
* An ‘attack directed against a civilian population’ necessarily entails at least some modest degree of scale and organization
  + ICC Statute, Art. 7(2)(a)
  + ICTY Haradinaj et al. TC, para. 122
  + So while the threshold of widespread or systematic is disjunctive, the ‘attack’ requires at least some minimal dimension of each
* Widespread = the large-scale nature of the attack and the number of victims
  + Tadić, ICTY TC, para. 206; Al Bashir Arrest Warrant, ICC PTC, para. 81
  + Must be decided on the facts; no specific numerical limit set
  + Typically refers to the cumulative effect of numerous inhumane acts, but could also be satisfied by a singular act of exceptional magnitude
    - Blaškić, ICTY TC, para. 206; ILC Draft Code, 94–5
* Systematic generally requires: the hallmark is a high degree of organization and features such as patterns, continuous commission, use of resources, planning and political objectives are important factors
  + in Akayesu, ICTR TC: (1) thoroughly organized; (2) following a regular pattern; (3) on the basis of a common policy; and (4) involving substantial public or private resources (para. 580)
  + In Blaskic, ICTY TC: reference to four factors: (1) a plan or objective; (2) large-scale or continuous commission of linked crimes; (3) significant resources; and (4) implication of high-level authorities (para. 203)
  + Most recent: organized nature of the acts of violence and the improbability of their random occurrence
    - Karadžić, ICTY TC, para. 477; Al Bashir Arrest Warrant, ICC PTC, para. 81; Taylor, SCSL (Special Court for Sierra Leone) TC, para. 511
    - Improbability of random occurrence arguably should not only be an aspect of the systematic test, but should already be inherent in the concept of an attack
      * Otherwise widespread but random crime would constitute a crime against humanity
* Attack
* Not in the same sense as in the law of war crimes
* Need not involve the use of armed force and can encompass mistreatment of the civilian population
  + ICC Elements of Crimes, Crimes Against Humanity Introduction, para. 3
  + Akayesu, ICTR TC, para. 581; Taylor, SCSL TC, para. 506
* Refers to the broader course of conduct involving prohibited acts, of which the acts of the accused form part
  + ICC Statute, Art. 7(2)(a); Tadić, ICTY TC, para. 644; Akayesu, ICTR TC, para. 205
* Attack = a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack
  + ICC Statute, Art. 7(2)(a)
  + Must be at least:
    - some minimal level of scale (‘multiple’ acts); and
    - some minimal level of collectivity (the ‘policy’ element)
    - excludes truly isolated crimes (multiple) and truly unconnected crimes (policy)
  + There must be at least multiple acts or multiple victims to warrant the label ‘attack directed against a civilian population’
    - ICC Statute, Art. 7(2)(a); Kunarac et al., ICTY TC, para. 415; Krnojelac, ICTY TC, para. 54.
    - Acts may be all of the same type or of different types
      * Kayishema, ICTR TC II, 21 May 1999, para. 122
    - The multiple acts requirement applies to the attack, not the actions of the accused
      * It suffices that the accused commit a single act within the context of an attack
  + Difference multiple and widespread: ‘Multiple’ is a low threshold and ‘widespread’ is higher
  + Policy
    - Controversial:
      * what links different acts together so that they constitute an attack?
      * Some authorities reject requirement of policy
    - Crime, even on a widespread basis does not by itself constitute a crime against humanity
      * For example, a crime wave or anarchy following a natural disaster
    - The requirement of an underlying governmental or organizational policy that directs, instigates or encourages the crimes indicates that random acts of individuals are not sufficient:
      * some thread of connection between acts is needed so that they can collectively be described as an attack against a civilian population
      * Made explicit by indicating that there must be an underlying governmental or organizational policy that directs, instigates or encourages the crimes
    - Article 7(2)(a) RS does define attack in a way to include a policy element
      * Based on Tadic: policy = a low threshold which can be inferred from the manner in which the acts occur (ICTY TC, paras. 653-5)
      * Need not be that of a government and could also be that of an organization
    - The main indicators of customary law are divided
      * ICC RS: included
        + But also ICC Statute Art. 10: definitions shall not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute
      * Tribunal jurisprudence rejects the policy element
        + Kunarac, ICTY AC, para. 98
    - Not applying a policy element: unconnected random acts cannot constitute an ‘attack’
      * Tribunal jurisprudence often asserts that unconnected random acts are excluded, but does not seem to have any legal element that actually performs this function
      * In the absence of some such clarification, a literal and mechanistic application of Tribunal definitions would encompass widespread but random crimes of individuals, which would be overbroad
      * Although Tribunal jurisprudence overtly rejects a policy element, it may indirectly re-inject something similar with its requirements to examine whether an ‘identifiable population’ was ‘targeted’ or was a ‘primary object’, all of which imply some direction or coordination from some source
    - Applying a policy element: a modest threshold that simply excludes random action
      * Need not be formally adopted, nor expressly declared, nor even stated clearly and precisely
        + Tadić, ICTY TC, para. 653; Blaškić, ICTY TC, paras. 204–5; Bemba Gombo, ICC PTC, para. 81; Katanga and Ngudjolo, ICC PTC, para. 396
        + More a meaning like ‘a course of action adopted as advantageous or expedient rather than a formal or official strategy
      * May be satisfied by inference form the manner in which the acts occur: showing improbability of random occurrence is sufficient
        + Tadić, ICTY TC, para. 653; Blaškić, ICTY TC, para. 204; Bemba Gombo, ICC PTC, para. 81
      * Not required to show action by a State or organization; satisfied by explicit or implicit approval or endorsement or clear encouragement of fits clearly within a general policy
        + Kupreškić, ICTY TC, paras. 554–5
        + Inaction designed to encourage crimes would also suffice

ICC Elements of Crimes, note 6

* + - * Some ICC decisions have imbued the policy element with new and stringent requirements, like ‘thoroughly organized’
        + Contradictive with the law (basically means ‘systematic’)
    - Interpretation of ‘State or organization’
      * In Situation in Kenya, ICC PTC was divided
        + Majority broad approach: factor-based test that would include any organization capable of directing mass crimes (most accepted ICC’s jurisprudence)

Bemba Gombo, ICC PTC, para. 81; Katanga and Ngudjolo, ICC PTC, para. 396; Situation in Côte d’Ivoire, ICC PTC

In line with ordinary meaning of term ‘organization’ + purpose of policy element, which is to exlucde random acts of individuals acting on their own initiative

* + - * + Judge Kaul: organization must be state-like
* Any civilian population
* Any: not only protects enemy nations also covers crimes by a States against its own citizens
  + Central innovations of crimes against humanity
  + Nationality or affiliation of the victim is irrelevant
* Civilian: non-combatants rather than combatants
* Population: indicates that a larger body of victims is visualized and that simple or isolated acts against individuals fall outside the scope of the concept
  + Implies crimes of a collective nature but does not require that the entire population be targeted
    - Tadić, ICTY TC, para. 644; Kunarac et al., ICTY TC, para. 425
* Population need only be ‘predominantly civilian in nature’; the presence of certain non-civilians in their midst does not change the character of the population
  + Tadić, ICTY TC, para. 638
  + Crimes against military personnel, outside of combat situations, can be included if they are part of a broader attack directed at civilains
    - Tolimir, ICTY AC, paras. 141–2
  + Not required that each individual victim is civilian
    - Martić, ICTY AC, para. 307; Mrskić, ICTY AC, paras. 30–3
* Former combatants, such as prisoners-of-war included?
  + The term civilian is the antonym of combatants, so yes
    - Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780(1992), para. 78
    - Civilian includes all those no longer taking part in hostilities at the time the crimes were committed
      * Including former combatants who had laid down arms or who had been placed hors de combat (wounded or detained)
      * Early Tribunal decisions: Akayesu, ICTR TC, para. 582; Tadić, ICTY TC, para. 643; Kordić and Čerkez, ICTY TC, para. 180; Blaškić, ICTY TC, para. 214
      * Current members of armed force or organization remain combatants even when he or she in that moment is not in combat or armed
        + Blaškić, ICTYAC, para. 114
    - Civilian as functional term: simply to exclude military actions against legitimate military objectives in accordance with IHL
  + Civilian as defined in Article 50 of AP I, excluding POW’s and hors de combat
    - Martić, ICTY AC, paras. 296–302; Katanga, ICC TC, para. 1102
    - Not good
      * Principle of distinction does not support this: a deliberate targeting of POW is also prohibited
      * Mass extermination and torture of POWs would not be a crime against humanity
      * Contradicts post-WWII jurisprudence, which addressed crimes against humanity against military personnel

The individual accused: Link between the accused and the attack

* 1) He/she committed a prohibited act; 2) the act objectively falls within the broader attack; and 3) the accused was aware of this broader context
* Tadić, ICTY AC, para. 271
* To determine if an act is ‘part of’ an attack, one may consider its characteristic, aims, nature or consequence
  + Semanza, ICTR TC, para. 326
* Crime may be committed several months after, or several kilometers away from the main attack, and still, if sufficiently connected, be part of the attack
  + Krnojelac, ICTY TC, para. 127
* Only the attack, not the acts of the individual accused, need to be widespread or systematic
* Kunarac, ICTY AC , para. 96; Blaškić, ICTY AC, para. 101
* A single act by the accused may constitute a crime against humanity if:
* It forms part of the attack
  + Kunarac, ICTY AC, para. 96; Blaškić, ICTY AC, para. 101
* The act may in itself constitute the attack, if it is of great magnitude, for example, the use of a biological weapon against a civilian population
  + Blaškić, ICTY TC, para. 206
* The accused: need not be an architect of the attack, need not be involved in the formation of any policy, and need not be affiliated with any State or organization nor even share in the ideological goals of the attack, so long as there is a nexus between the conduct of the defendant and the attack
* Acts of the accused need not be of the same type as other acts committed during the attack
* For example, if an organization launches a killing campaign, and a person commits sexual violence in the execution of that campaign, the person is guilty of the crime against humanity of sexual violence

Awareness of context

* In addition to the requisite mental elements for the particular offences
* Must be aware of the broader context in which his actions occur, namely, the attack directed against a civilian population
* Tadić, ICTY AC, para. 248; Kupreškić et al., ICTY TC, para. 134
* It is the context of widespread or systematic attack against a civilian population that makes an act a crime against humanity so knowledge of this context is necessary in order to make one culpable for a crime against humanity as opposed to an ordinary crime or a war crime
  + Tadić, ICTY TC, para. 656; Kupreškić et al., ICTY TC, para. 138; Semanza, ICTR TC, para. 332
* Tribunal: awareness, willful blindness, or knowingly taking the risk that one’s act is part of an attack will suffice
* Tadić, ICTY TC, para. 657; Kunarac et al., ICTY AC, para. 102; Blaškić, ICTY TC, para. 251; Krnojelac, ICTY TC, para. 59; Sainović, ICTY AC, paras. 267–71
* ICC Elements of Crimes suggest that mental element required for ‘contextual elements’ is modest: Not required that the perpetrator had detailed knowledge of the attack or its characteristics or of the policy
* ICC Elements of Crimes, ‘Crimes Against Humanity Introduction’, para. 2
* Bemba Gombo, ICC PTC, para. 88
* But ICC approach is yet to be determined
* Knowledge may be inferred from the relevant facts and circumstances
* ICC Elements of Crimes, ‘General Introduction’, para. 3
* In most circumstances, the existence of a widespread of systematic attack would be notorious and knowledge could not credibly be denied
* Perpetrator need not share in the purpose or goals of the overall attack
* Kunarac et al., ICTY AC, para. 103
* Related to knowledge of context, not motive
* Tadić, ICTY AC, paras. 271–2
* Out of personal opportunistic reasons still crimes against humanity

## **Prohibited acts**

The prohibited acts = the crimes carried out by perpetrators within that broader context

* Has evolved the decades
* For each of the crimes, the normal mental element applies
* Where no specific observations are made to the contrary
* Relevant conduct must be committed intentionally and with knowledge of the relevant circumstances
  + ICC Statute, Art. 30
* Sufficient that perpetrator was aware of the underlying facts that satisfy the element
  + ICC Statute, Art. 32(2); ICC Elements of Crimes, ‘General Introduction’, para. 4
  + Not required that the perpetrator personally considered the conduct inhumane or severe (legal/normative requirements)

The list:

1. Murder

* = unlawfully and intentionally causing the death of a human being
  + ICC Elements of Crimes, Art. 7(1)(a); Akayesu, ICTR TC, para. 589; Jelisić, ICTY TC, para. 35; Kupreškić et al., ICTY TC, paras. 560–1
* Mental element: perpetrator intends to kill or intends to inflict grievous bodily harm likely to cause death and is reckless as to whether death ensues
  + Čelebići, ICTY TC, para. 439; Akayesu, ICTR TC, para. 589; Kordić and Čerkez, ICTY TC, para. 236
  + Unclear whether ICC will adopt this approach
    - Different wording Article 30 of the ICC Statute
* Conduct element of murder (crime against humanity) and willful killing (war crime) is the same
  + Contextual element is difference

1. Extermination

* = killing on a large scale
* Extermination involves killing by the accused within a context of mass killing
  + ICC Elements of Crimes, Art. 7(1)(b); Kayishema and Ruzindana, ICTR TC, para. 147
* Difference murder and extermination:
  + Extermination requires a surrounding circumstance of mass killing
    - Murder can occur on the basis of a single killing, committed in the context of a widespread or systematic attack based on the other crimes
    - Perpetrator need not carry out the mass killing personally
      * Only needs to know of the context of mass killing
  + Extermination expressly includes indirect means of causing death
    - Article 7(2)(b) of the ICC Statute expressly includes ‘inflicting conditions of life … calculated to bring about the destruction of part of a population’,
    - Accused need not be personally responsible for a substantial number of deaths
      * A single killing is sufficient provided that the accused is aware of the necessary context of mass killing
        + Stakić, ICTY AC, paras. 260–1
        + ICC Elements of Crimes, Art. 7(1)(b), Element 1
* Difference extermination and crime of genocide
  + Requisite special intent for the crime of genocide
  + Genocide can only be committed where there is an intent to target one of four groups (national, ethnical, racial or religious)

1. Enslavement

* = exercising the powers attaching to the right of ownership over one or more persons
  + From the 1926 Slavery Convention
  + ICC Statute, Art. 7(2)(c)
* May take various forms
  + The traditional concept of chattel slavery
    - The treatment of persons as chattels, as in the slave trade
    - Includes the capture, acquisition exchange, transport or disposal of persons with intent to reduce them to slavery or to sell or exchange them
      * Slavery Convention, Art. 1(2); ICC Elements of Crimes (includes: such transactions as ‘purchasing, selling, lending or bartering’)
  + Reducing a person to a servile status
    - ICC Elements of Crimes
    - Includes practices of debt bondage, serfdom, forced marriage and child exploitation
      * ICC Elements of Crimes, note 11
  + Human trafficking
    - ICC Statute, Art. 7(2)(c)
  + Forced labor
    - ICC Elements of Crimes, note 11
    - Forced or compulsory labor with recognized exception of military and national service, normal civic obligations, hard labor as lawful punishment for crime, and certain forms of labor for prisoners-of-war
      * Geneva Convention III
    - Also possible: several overcrowded conditions, deplorable sanitation, insufficient food, locked doors, frequent beatings, psychological abuse and brutal living conditions rendering it impossible for detainees to consent to work and their labor is force
      * Krnojeiac, ICTY TC, paras. 193–5
  + Other activities, like control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour
    - ICTY AC, Kunarac, para. 119
    - Functional approach: victims kept in abandoned house, raped and assaulted when soldiers returned; at some point they were given the keys but they had nowhere to go or hide, so still enslavement

1. Deportation or forcible transfer

* = forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law
  + ICC Statute, Art. 7(2)(d); Stakic, ICTY AC, para. 278
  + Frequently seen, especially in contexts of ethnic cleansing
* Difference deportation and forcible transfer
  + Deportation = displacement across a border
  + Forcible transfer = internal displacement
  + ILC Draft Code 1996, 100; Stakić, ICTY AC, para. 300
* Must be forced in order to be crime against humanity
  + ICC Statute, Art. 7(2)(d); Krstić, ICTY, para. 528; Krnojelac, ICTY TC, para. 475
  + Does not require actual physical force, but may also include the threat or force or coercion, psychological oppression or other means of rendering displacement involuntary
    - ICC Elements of Crimes, Art. 7(1)(d); Stakić, ICTY AC, 22 March 2006, para. 281; Krnojelac, ICTY TC II, 15 March 2002, para. 475; Kunarac et al., ICTY TC II, 22 February 2001, para. 129
  + If a group flees of its own genuine volition, for example to escape a conflict zone, that would not be forced displacement
  + If a group flees to escape deliberate violence prosecution, they would not be exercising a genuine choice
    - Krstić, ICTY TC, para. 530
* Must be unlawful under international law
  + Deportation of aliens not lawfully present in the territory is an established practice of States

1. Imprisonment (or other severe deprivation of physical liberty)

* Imprisonment = detention in prison-like conditions and also other serious forms of confinement
  + ICC Statute added: or other severe deprivation of physical liberty to ensure that situations such as house arrest were included
* Must be arbitrary
  + Imprisonment without due process of law
    - Kordić and Čerkez, ICTY TC, para. 302; Krnojelac, ICTY TC, para. 113
  + Deprivation in violation of fundamental rules of international law
    - ICC Statute, Art. 7(1)(e)
  + Does not mean that a minor procedural defect would expose all involved to international prosecution; significant failings are required
    - Gravity of the conduct must be such to violate fundamental rules of international law
      * ICC Elements of Crimes, Art. 7(1)(e), Element 2
  + If no legal basis can be called upon to justify the initial deprivation of liberty
    - Tribunal jurisprudence: Krnojelac, ICTY TC, para. 114
    - Even where the initial detention was justified, imprisonment will become arbitrary if the legal basis ceases to apply and the person remains imprisoned
  + (1) absence of any legal basis for the deprivation of liberty; (2) deprivation of liberty resulting from exercise of specified rights and freedoms (that is to say, political prisoners); and (3) when the total or partial non-observance of the intentional human rights norms relating to the right to a fair trial … is of such a gravity as to give the deprivation of imprisonment an arbitrary character’
    - UN Working Group on Arbitrary Detention, para. 8
    - Caution human rights standards, not ICL, so application no legal basis

1. Torture

* Customary law and jus cogens
  + Čelebići, ICTY TC, para. 454
* = intentional infliction of severe pain or suffering, whether physical or mental, upon a person
  + Convention Against Torture (CAT), Art. 1
  + Accepted as core definition for torture as a crime against humanity or war crime
* Open questions
  + Official capacity (state actor or not)
    - CAT: pain or suffering be inflicted by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity (Art. 1)
    - ICL: individuals are accountable for crimes and applies to everyone whether or not affiliated with a state
      * Kunarac et al., ICTY TC, paras. 387–91
      * ICC Statute, Art. 7(2)(e) and ICC Elements of Crimes (Art. ?)
        + but see Art. 7(2)(a) which appears to require some sort of linkage between a State or organization and the attack as a whole, albeit not the particular crimes of the accused
  + Purpose
    - CAT and tribunal jurisprudence: requires a specific purpose
      * Such as obtaining from him or a third person information or a confession, pushing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coerce him or a third person, or for any reason based on discrimination of any kind
        + ICC Statute, Art. 7(2)(e)
      * Defining feature of torture
        + Akayesu, ICTR TC, paras. 593–5
        + Distinguishes it from inhuman treatment
    - ICC: no inclusion of a purpose element
      * Art. 7, ICC Statute
      * Difference torture and inhuman treatment is severity
        + torture requires very serious and cruel suffering
      * but. ICC Elements of Crimes adopted the purpose requirement with respect to the war crime of torture but not with respect to crime against humanity of torture
  + Custody or control
    - ICC Statute: adds a requirement that the victim be in the custody or control of the perpetrator
      * Not onerous since torture entails such custody or control, as practical matter
      * Various explanations have been offered for this addition, including establishing a link of power or control given the deletion of a link to a public official, or excluding the use of force against military objectives during armed conflict
    - Tribunal jurisprudence: rape can constitute a form of torture
      * Akayesu, ICTR TC, para. 597; Kunarac et al., ICTYAC, para. 150; Semanza, ICTR TC, para. 482; Čelebići, ICTY TC, para. 495

1. Rape and other forms of sexual violence

* ICC Statute including: rape, sexual slavery, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
  + ICC Statute, Art. 7(1)(g)
* Definitions apply to both crimes against humanity and war crimes
* Rape
  + Physical invasion of a sexual nature
    - Conduct element
    - the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body
      * ICC Elements of Crimes, Art. 7(1)(g) – 1, Element 1
      * Gender neutral
  + The presence of coercive circumstances or the absence of consent (depending on authorities)
    - Early tribunal jurisprudence + ICC Elements of Crimes: coercive circumstances
      * The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent
        + ICC Elements of Crimes, Art. 7(1)(g) – 1, Element 2
    - More recent Tribunal jurisprudence: lack of consent
      * Analysed various legal systems and concluded that the correct element was lack of consent of the victim
      * Force may be relevant in providing clear evidence of non-consent, but force is not an element per se of rape
      * Kunarac et al., ICTY AC, para. 129 (also TC)
    - Which one
      * Non-consent reflects national legal systems and the underlying principle of sexual autonomy better
      * In circumstances of mass sexual coercion, an inquiry into consent is decontextualized and unreal
        + War crimes and crimes against humanity of sexual violence are almost invariably committed in coercive circumstances where consent or reasonable belief in consent is simply not a credible possibility
        + Where such circumstances are shown, inquiry into consent should not be necessary

Katanga, ICC TC, para. 965

* + - On either approach, it is desirable to adopt procedural and evidentiary rules to limit how the issue of consent may be raised, in order to prevent harassment of witnesses and spurious lines of questioning
* Sexual slavery
  + Difference enslavement
    - Particularly serious form of enslavement
    - First element: identical
      * ICC Elements of Crimes, Art. 7(1)(g)–2, Element 1
    - Additional: perpetrator caused the victim to engage in one or more acts of a sexual nature
      * ICC Elements of Crimes, Art. 7(1)(g) – 2, Element 2
  + Used to be enforced prostitution: problematic in that it obscures the violence involved and in that it degrades the victim
* Enforced prostitution
  + = (1) causing one or more persons to engage in one or more acts of a sexual nature; (2) by force or by threat of force (or under coercive circumstances, as noted above in the discussion of rape); and (3) the perpetrator of another person obtained with the acts of a sexual nature
    - ICC Elements of Crimes, Art. 7(1)(g) – 3, Element 1 & 2
  + To create some distinction from sexual slavery and the ordinary meaning of prostitution
  + In absence of anticipated advantage, the relevant conduct could still be prosecuted as sexual slavery or sexual violence
* Forced pregnancy
  + = (1) unlawful confinement; (2) of a woman forcibly made pregnant; and (3) with the intent of affecting the ethnic composition of a population or carrying out other grave violations of international law
    - ICC Statute, Art. 7(2)(f)
    - Reference to grave violations of international law
      * Examples: biological experiments
  + Does not affect domestic jurisdictions’ right to abortion
    - This definition shall not in any way be interpreted as affecting national laws relating to pregnancy
      * Article 7(2)(f), Rome Statute
* Enforced sterilization
  + Requires that: (1) the perpetrator deprived one or more persons of biological reproductive capacity; and (2) the conduct was neither justified by the medical or hospital treatment of the persons nor carried out with their genuine consent
    - ICC Elements of Crimes, Art. 7(1)(g) – 5, Elements 1 and 2
    - Genuine consent: excludes consent obtained by deception
      * ICC Elements of Crimes, note 55
* Other sexual violence
  + ICC Statute: other sexual violence of comparable gravity
  + The following elements: (1) the perpetrator committed an act of a sexual nature against one or more persons or caused one or more persons to engage in an act of a sexual nature (2) by force or threat or coercion (like coercive circumstances in context of rape) and (3) the gravity of the conduct was comparable to the other offences in Article 7(1)(g)
    - ICC Elements of Crimes, Art. 7(1)(g) – 6, Elements 1 and 2
  + UN Special Rapporteur observed that sexual violence includes: any violence, physical or psychological, carried out by sexual means or targeting sexuality
    - Covers both physical and psychological attacks directed at a person’s sexual characteristics, such as forcing a person to strip naked in public, mutilating a person’s genitals or slicing off a woman’s breasts
    - Also characterizes situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner
    - Paras. 21-2

1. Persecution

* Involves the intentional and severe deprivation of fundamental rights, against an identifiable group or collectivity on prohibited discriminatory grounds
  + Discriminatory grounds
    - ICC Statute prohibited: political, racial, national, ethnic, cultural, religious or gender grounds
    - Open-ended list
      * Other grounds that are universally recognized as impermissible under international law
        + Universal indicates that threshold required to read in additional grounds is a high one
  + Severe deprivation of fundamental rights
    - Test requires: (1) a gross or blatant denial (2) on discriminatory grounds (3) of a fundamental right, laid down in international customary or treaty law; and (4) reaching the same level of gravity as other crimes against humanity
      * Tribunal jurisprudence: Kupreškić et al., ICTY TC II, 14 January 2000, para. 621
    - Compatible with ICC definition, which refers to intentional and severe deprivation of fundamental rights on specific discriminatory grounds
    - Somewhat open test
  + Gravity or severity
    - Tribunal jurisprudence: persecution requires a gravity comparable to other crimes against humanity
      * Kupreškić et al., ICTY TC, paras. 619 and 621; Kvočka et al., ICTY TC, para. 185; Ruggiu, ICTR TC, para. 21
    - In the ICC definition, this requirement may be subsumed in the requirements of ‘severe’ deprivation
* Connection to other acts
  + Additional requirement in ICC Statute:
    - Persecution must be committed in connection with (a) any crime within the jurisdiction of the Court; or (b) any other act listed in Article 7(1)
  + Added to ensure at least a context of more recognized forms of criminality instead of any practices of discrimination giving rise to international prosecutions
  + Not in Tribunal jurisprudence
  + Should not pose a significant obstacle for legitimate prosecutions of persecution
    - Since it is satisfied by a linkage to even one other recognized act (a killing or other inhumane act), which would except to find in any situation warranting international prosecution
* Mental element
  + Requires a particular intent to target a person or group on prohibited grounds of discrimination
    - ICC Elements of Crimes, Art. 7(1)(h), Element 3
    - In addition to the normal mental element relating to the conduct and the broader context
  + Intent to discriminate is required, not simply a knowledge that one is acting in a discriminatory way
    - Krnojelac, ICTY TC, para. 435; Kordić and Čerkez, ICTY TC, para. 212
* Relationship to other crimes: difference discriminatory intent for persecution and genocide
  + Genocide: intent is more specific
    - Must be intent to destroy a national, ethnical, racial or religious group as such
    - Can only be based on the listed acts
      * see, for example, Article 6 of the ICC Statute) whereas the conduct potentially amounting to prosecution is broader
  + Crimes against humanity: can constitute persecution if the additional aggravating element of discriminatory intent is present
* Examples of persecutory acts
  + The already listed acts in the definition of crimes against humanity, when committed with discriminatory intent
    - Kupreškić et al., ICTY TC, paras. 593–607
  + Other conduct that severely deprives political, civic, economic or social rights
    - Examples: passing of discriminatory laws, restriction of movement and seclusion in ghettos, the exclusion of members of an ethnic or religious group from aspects of social, political and economic life, including exclusion from professions, business, educational institutions, public service and inter-marriage
      * Kupreškić et al., ICTY TC, paras. 608-15
  + Overt violence
    - Examples: burning of homes and terrorization
    - Krstić, ICTY TC, para. 537
  + Hate speech and calls to violence that contribute to acts of violence and in a broader context of persecution
    - Nahimana et al., ICTR AC, paras. 986–8
  + Attacks on property (sometimes, when discriminatory intent)
    - Blaškić, ICTY TC, para. 233

1. Enforced disappearance

* = arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of law for a prolonged period of time
  + ICC Statute, Art. 7(2)(i)
* Various ways in which an individual may be liable for this crime
  + By (a) arresting, detaining or abducting a person, with knowledge that a refusal to acknowledge or give information would be likely to follow in the ordinary course of events; or (b) refusing to acknowledge the deprivation of freedom or to provide information on the fate or whereabouts, with knowledge that such deprivation had occurred
    - ICC Elements of Crimes (?)
  + Addition of political organization consistent with fundamental proposition that crimes against humanity may be committed by non-state actors
* Essence: friends and families of the direct victims do not know whether the persons concerned are alive or dead
  + Families of the direct victims are also special victims of this crime

1. Apartheid

* = inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized racial regime of systematic oppression and domination by one racial group over any other racial group and committed with the intention of maintaining that regime
  + Article 7(2)(h), ICC Statute
  + Express recognition of the crime of apartheid where inhumane acts are committed in the context of an institutionalized racial regime of systematic oppression and domination
* Of ‘similar character’ to other inhumane acts naturally covers acts of identical character
  + ICC Elements of Crimes, Art. 7(1)(j), Element 2
  + Murder, torture, arbitrary imprisonment and persecution are clearly included

1. Other inhumane acts

* Necessary because: however much care were taken in establishing all the various forms of infliction, one would never be able to catch up with the imagination of future tortures who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes
  + Blaškić, ICTY TC, para. 237
* Threshold requirements: inhumane acts (1) be of a similar character to other prohibited acts; and (2) that they cause great suffering or serious injury to body or to mental or physical health
  + ICC Statute, Art. 7(1)(k)
* The accused must intent to inflict serious bodily or mental harm
  + ICC Elements of Crimes, Art. 7(1)(k); Blaškić, ICTY TC, para. 243
  + Not requires that the accused considered his or her actions ‘inhumane’, sufficient that the accused was aware of the factual circumstances what established the character of the act
    - ICC Elements of Crimes, Art. 7(1)(k), Element 3; Čelebići, ICTY TC, para. 543
* Acts included:
  + For Tribunals: forced disappearance, sexual violence, forced prostitution and forced transfer of populations
    - Not included in Statutes, unlike ICC Statute
  + Other acts: mutilation, severe bodily harm, beatings, serious physical and mental injury, inhumane or degrading treatment falling short of the definition of torture, imposing inhumane conditions in concentration camps, forced nudity and forced marriage
  + Forced marriage
    - SCSL: women and girls which are abducted and forced to serve as ‘bush wives’
      * Brina, Kamara and Kanu, SCSL AC, para. 195
    - ICC Ongwen case
  + Being forced to watch family members being killed or mutilated
    - Kenyatta, ICC PTC, paras. 267–80, 428

# **BBC NEWS (YOUTUBE) – MYANMAR ROHINGYA: ARMY ‘MUST FACE GENOCIDE CHARGES’**

UN human rights investigators say military leaders in Myanmar should be investigated for genocide, war crimes, and crimes against humanity - and have called for them to be referred to the International Criminal Court. In an unprecedented move, the investigators named 6 top generals, including the Commander in Chief of the armed forces, and his deputy. UN investigators interviewed hundreds of victims and found evidence of murder, rape, and torture against the Rohingya predominately in Myanmar's Rakhine state. More than seven-hundred-thousand of them have fled into Bangladesh. But Myanmar's UN representative rejected the report, describing it as one-sided. Our Myanmar correspondent Nick Beake sent this report from Cox's Bazaar in Bangladesh

* Brutalities: killing, rape, forced migration/deportation and arson
* Murdered: made men stand and women and children squat and opened fire and killed the men
* Took women inside the house and set the house on fire
* Forced hundreds of thousands to flee across the border
* Genocide
* Even if tried, justice is done too late: those who have been slaughtered cannot be brought back
* But Spokesperson: it is not just about justice for victims, but also deterring future activity
  + If you allow this to grow without any kind of sanction, every army in the world will think they can do this
* Criticisms of army but also civilian government
* Incl. Aung San Suu Kyi
* Accused of failing to use her moral authority to prevent the violence
* by ignoring the plight of the Rohingya, her government made it easier for her crimes to be carried out
* Myanmar rejected UN report
* Flawed and one-sided
* Army claimed it was only clearing out militants; claim rejected by UN

Bringing commander-in-chief and comrades to court not easy

# **EURONEWS (YOUTUBE) – ISIL COMMITTING GENOCIDE AGAINST YAZIDIS (UN)**

The so-called Islamic State (ISIL or ISIS) is committing 'genocide' against Yazidis in Syria and Iraq, according to UN investigators. "ISIS abuse of Yazidi men, women and children amounts to genocide, crimes against humanity and war crimes. The genocide is ongoing. From the day of the attack on Sinjar until today," said Paulo Pinheiro, of the Independent International Commission of Inquiry for Syria.

Genocide committed by ISIL against Yazidis in Syria and Iraq.

Ruling of UN investigators who are calling for prosecution by the ICC

UN says ISIL or ISIS is seeking to destroy the Yazidi people through killings, slavery and other crimes

ISIL’s abuse of Yazidi men, women and children amounts to genocide, crimes against humanity and war crimes

Genocide is ongoing: ISIS permanently sought to erase Yazidis through killing, sexual slavery, enslavement, torture and inhumane and degrading treatment and forceable transfer, causing serious bodily and mental harm.

Yazidi community around 400,000

UN: no other religious group present in ISIL controlled areas have been subject to the destruction the Yazidis have suffered

# **LEGAL REGULATIONS**

Rome Statute: Articles 6, 7, 9 and 21

Elements of Crimes: Articles 6 & 7