**Lecture 2**

**Genocide and Crimes Against Humanity**

[HISTORICAL DEVELOPMENT OF CRIMES AGAINST HUMANITY AND GENOCIDE 1](#_Toc161074091)

[Crimes against humanity 1](#_Toc161074092)

[Genocide 1](#_Toc161074093)

[COMPARING GENOCIDE AND CRIMES AGAINST HUMANITY: WHAT ARE THE (REQUIREMENTS FOR) CRIME OF GENOCIDE AND CRIMES AGAINST HUMANITY? 2](#_Toc161074094)

[Group identity 2](#_Toc161074095)

[For genocide 2](#_Toc161074096)

[Contextual or chapeau element 2](#_Toc161074097)

[Genocide 2](#_Toc161074098)

[Crimes against humanity 3](#_Toc161074099)

[Individual conduct (actus reus) 3](#_Toc161074100)

[Mental element (mens rea) 3](#_Toc161074101)

[Who can commit these crimes? 4](#_Toc161074102)

[Persecution and other inhumane acts 4](#_Toc161074103)

[Article 7(1)(h): persecution as a crime against humanity 4](#_Toc161074104)

[Article 7(1)(k) – other inhumane acts of a similar character 4](#_Toc161074105)

[INTRODUCE GUIDING RULE FOR INTERPRETING CRIMES IN THE ROME SATUTE OF THE INTERNATIONAL CRIMINAL COURT: HOW TO INTERPRET THE CRIMES IN THE ROME STATUTE? 5](#_Toc161074106)

[Article 22(2), Rome Statute: Guiding interpretive principle of legality 5](#_Toc161074107)

[DISCUSSION QUESTIONS 5](#_Toc161074108)

# **HISTORICAL DEVELOPMENT OF CRIMES AGAINST HUMANITY AND GENOCIDE**

## **Crimes against humanity**

* 1945: Sir Hersch Lauterpacht’s term to capture mass killing of individuals
* 1945: included in Nuremberg Charter with nexus requirement to armed conflict
* 1946: UNGA Res. 65 affirms Nuremberg crimes and principles
* 1998: Rome Statute removes nexus
* 2019+: Crimes Against Humanity Convention

Jus cogens and erga omnes norm!

## **Genocide**

* 1944: Raphael Lemkin’s term to capture mass killing of groups
* 1946: UNGA Res. 96 affirms genocide is a crime under international law
* 1948: Genocide Convention
* Entered into force in 1951
* Crime also under customary law
* 2007: ICJ rules Convention imposes State duty to prevent, punish & refrain from genocide

Jus cogens and erga omnes norm!

# **COMPARING GENOCIDE AND CRIMES AGAINST HUMANITY: WHAT ARE THE (REQUIREMENTS FOR) CRIME OF GENOCIDE AND CRIMES AGAINST HUMANITY?**

## **Group identity**

|  |  |
| --- | --- |
| Genocide | Crimes against humanity |
| national | any civilian population |
| ethnical | population need only be mainly civilian, not entirely |
| racial |  |
| religious |  |

### *For genocide*

For genocide, identity determined on case-by-case basis:

* May consider objective details and subjective perceptions
* Identity cannot be negatively defined
* E.g., non-Dutch
* Identity need only fall within four corners of national, ethnical, racial or religious, which might overlap

## **Contextual or chapeau element**

|  |  |
| --- | --- |
| Genocide | Crimes against humanity |
| manifest pattern of similar conduct directed against the group | attack |
| no context required if conduct could itself effect such destruction | widespread or systematic attack |
| whole or part of a group | state policy or organizational policy |

Common contextual elements of crime:

* Must be proven for every crime of genocide/crime against humanity
* Elevate these crimes from ‘ordinary’ human rights violations/crimes

### *Genocide*

* Manifest pattern: high threshold
* Must be obvious
* ‘Whole’ group: can be geographically limited but not so much as to lower threshold for what counts as genocide
* ‘part’ of group: must be substantially relative to how whole is defend
* Substantial ‘part’: assessed qualitatively and quantitatively

Srebrenica Massacre

ICTY controversially defined:

* The ‘whole’ as Bosnian Muslims
* The ‘part’ as 7,000-8,000 Bosnian Muslim men in Srebrenica

### *Crimes against humanity*

* Attack: low threshold meaning multiple acts against civilian population
* Armed force not required
* Widespread: large scale
* Systematic: highly coordinated
* Policy: need not be formal or express inaction suggesting endorsement enough
* Improbable that acts are random
  + Has to be a thread connecting them
* Organization: need not be State-like

## **Individual conduct (actus reus)**

|  |  |
| --- | --- |
| Genocide | Crimes against humanity |
| killing | murder |
| serious bodily or mental harm | extermination |
| conditions of life | enslavement |
| imposing measures to prevent births within the group | deportation or forcible transfer |
| forcibly transferring children of the group to another group | imprisonment or other severe deprivation of liberty |
|  | torture |
|  | rape etc. or any other sexual violence of comparable gravity |
|  | persecution |
|  | enforced disappearance |
|  | apartheid |
|  | other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body/mental/physical health |

## **Mental element (mens rea)**

|  |  |
| --- | --- |
| Genocide | Crimes against humanity |
| intend to commit prohibited act(s) + special intent to destroy group in whole or in part | intend to commit prohibited act(s) |
| only physical/biological destruction | with knowledge of the attack and its consequences (attack acts can be different from prohibited act)  not clear if ICC will accept lower mens rea like ad hoc tribunals (e.g., willful blindness or knowingly taking risk that act part of attack) |
| direct evidence of special intent may not be available | not required to know all about the attack in detail (e.g., plan/policy) |
| special intent has been deduced by circumstantial evidence (controversial) | knowledge can be deduced by circumstantial evidence (likely that attack well-known so knowledge cannot be credibly denied) |
| motive not expressly required (as such) | motive not required (personal reasons can differ) |

## **Who can commit these crimes?**

|  |  |
| --- | --- |
| Genocide | Crimes against humanity |
| anyone, not just leaders | anyone, not just leaders |
| but conduct must be consistent with intent to destroy a group in whole or in part (Seromba judgment, ICTR) (implied scale requirement) | single act suffices if occurs with intent and knowledge of attack |

Example: Rev. Athanase Seromba

* At the time of the genocide, Seromba was the priest in charge of a Catholic parish at Nyange in the Kibuye province of western Rwanda
* He was convicted of committing genocide due to his providing of key and necessary approval for the bulldozing of his church, where 1,500–2,000 Tutsis were taking refuge, with the intent to not only kill large numbers of people, but specifically to destroy the Tutsis as an ethnic group

## **Persecution and other inhumane acts**

### *Article 7(1)(h): persecution as a crime against humanity*

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

Conduct

1. Severe deprivation of fundamental rights (gravity)
2. Discrimination on prohibited grounds (list open)
3. Conduct connected to other conduct listed in article 7(1), Rome Statute, or other crimes in ICC’s jurisdiction

Mental element:

* Intend to discriminate

### *Article 7(1)(k) – other inhumane acts of a similar character*

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

* Other inhumane acts of a similar character
* Acts prohibited under customary international law

# **INTRODUCE GUIDING RULE FOR INTERPRETING CRIMES IN THE ROME SATUTE OF THE INTERNATIONAL CRIMINAL COURT: HOW TO INTERPRET THE CRIMES IN THE ROME STATUTE?**

## **Article 22(2), Rome Statute: Guiding interpretive principle of legality**

Art. 22(2), RS: The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being

investigated, prosecuted or convicted

# **DISCUSSION QUESTIONS**

1. If you were the Prosecutor at the International Criminal Court, would you charge the perpetrators of atrocities against the Rohingya with crimes against humanity or genocide? Explain your decision based solely on the definitions of these crimes. Be specific.
2. If you were the Prosecutor at the International Criminal Court, would you charge the perpetrators of atrocities against the Yazidis with crimes against humanity or genocide? Explain your decision based solely on the definitions of these crimes. Be specific.