CHAPTER 5

THE CORE CRIMES

This chapter discusses in greater detail the specific components of the four so-called "core crimes" of international criminal law. They are sometimes referred to as the "atrocity crimes." The focus is on the relevant provisions of articles 6 through 8*bis* of the Rome Statute, since those are now internationally agreed-upon standards, but reference is also made to the decisions of the *ad hoc* tribunals and others where appropriate for a fuller understanding of the issues.

In each case, the objective or material elements of the crime (the *actus reus*) and the mental elements (the *mens rea*) are described. Where appropriate, reference is also made to the articulation of the specific elements of each of these crimes as set forth in the Elements of Crimes adopted by the Assembly of States Parties under article 9 of the Statute.

I. APPLICABLE LAW

Because it is an international court, the ICC requires specific guidance about what law it should apply in judging the cases before it. Article 21(1) of the Rome Statute contains a hierarchy of applicable law. It provides that the Court *shall* apply (1) "in the first place, the Statute, Elements of Crimes and the Rules of Procedure and Evidence;" (2) "in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict," and (3) "failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

In addition, under article 21(2), the Court *may* apply "principles and rules of law as interpreted in its previous decisions." The Statute rejects the strict reliance on decisional precedent (*stare decisis*), which is a hallmark of traditional Anglo-American common law, but adopts a permissive approach which recognizes implicitly that consistency in the application of the law is especially important in the context of criminal liability.

Finally, article 21(3) states that "the application and interpretation of law must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

II. THE FOUR CORE CRIMES

Article 5 of the Rome Statute limits the Court's substantive jurisdiction "to the most serious crimes of concern to the international community as a whole." More specifically, the Court's jurisdiction *ratione materiae* covers (1) genocide, (2) crimes against humanity, (3) war crimes and (4) the crime of aggression. They are addressed sequentially in articles 6, 7, 8 and (following the 2010 amendments) article 8*bis* of the Statute. Interestingly enough, illicit international drug trafficking was initially regarded by the UN General Assembly (A/RES/44/39, Dec. 4, 1989) as one of the chief reasons for establishing a permanent international criminal court in the first place

but was not included in the list of core crimes in the Rome Statute.

In given instances, one can refer to the OPT's policy paper (*https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf)* to understand how specific charges are formulated.

§ 5–1 GENOCIDE

The term "genocide" is of relatively recent origin. It was formulated by Raphaël Lemkin, a Polish lawyer, to describe the horrific atrocities taking place in Nazi-dominated Europe before and during World War II. The indictment at Nuremberg actually employed the phrase "deliberate and systematic genocide," but, because the term itself had not been included in the London Charter, it was not a distinct crime within the jurisdiction of the International Military Tribunal.

However, the crime was codified shortly afterwards, in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly in UN G.A. Res. 260 A (III), on December 18, 1948. That Convention entered into force on January 12, 1951, and as of the end of 2018 had been ratified or adhered to by 150 States (among the most recent were Benin and Turkmenistan).

Interestingly, in the same year as the Genocide Convention entered into force, the International Court of Justice declared that genocide constituted a violation of customary international law. *See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, (1951) ICJ Rep. 15 at 3. Today, many consider the prohibition against genocide to be the paradigmatic rule of *jus cogens*, binding on all States whether or not they are parties to the Convention. Many States have criminalized genocide under their domestic laws.

Article VI of the Convention provides that persons charged with genocide can be tried either "by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction." It may seem odd to provide that a crime of genocide should, in the first instance, be prosecuted within the domestic judicial system of the country where the genocide occurred, since in many situations that might be the *least likely* place for justice to be rendered. It was, however, entirely consistent with prevailing notions of sovereignty in 1948. By comparison, the second option was distinctly more radical: trial before an international tribunal. No such tribunal was established by the Convention itself, and no international court with jurisdiction over the crime of genocide was created until the two *ad hoc* Tribunals were established by the UN Security Council in 1993 and 1994, respectively.

The first international convictions for genocide were rendered by the ICTR in September 1998 in *Prosecutor v. Akayesu*, ICTR 96–4–T, Judgment (Sept. 2, 1998), and *Prosecutor v. Kambanda*, ICTR 97–23–S, Judgment and Sentence (Sept. 4, 1998). The first genocide conviction in the ICTY came in *Prosecutor v. Krstić*, IT–98–33–A, Judgment (Aug. 2, 2001). Some years later, the ICTY convicted two Bosnian Serb Army officers of genocide in connection with the 1995 Srebrenica massacre in *Prosecutor v. Popović, Beara et al*., IT–05–88, Judgment (June 10, 2010).

1. *Elements of the Crime*

Article 6 of the Rome Statute replicates the definition set forth in the 1948 Convention.

> For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (i) Killing members of the group;
> (ii) Causing serious bodily or mental harm to members of the group;
> (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (iv) Imposing measures intended to prevent births within the group;
> (v) Forcibly transferring children of the group to another group.

Note the three essential elements of the crime of genocide: (A) certain acts must have been committed (B) against a particular type of group (C) with a specific intent to destroy that group "as such" and "in whole or in part." Absence of any one of these three elements will constitute a failure to meet the definition.

A. Genocidal Acts

The list of "genocidal acts" includes five specific categories: (i) killing members of the group, (ii) causing serious bodily or mental harm to members of the group, (iii) deliberately subjecting members of the group to adverse conditions of life calculated to bring about its physical destruction in whole or in part, (iv) imposing measures intended to prevent births within the group, and (v) forcibly transferring children of the group to another group.

i Murder or Killing

For most people, the term "genocide" implies murder on a massive scale aimed at the extinction of entire human groups, such as occurred during the Holocaust during World War II. Clearly, the Statute's definition would encompass that situation. However, it does not actually specify a quantum or a minimum number of victims, or even require that these constitutive acts have been committed as part of a widespread or systematic attack or as part of a general or organized plan. A single act by a "lone genocidal maniac," however unlikely, would be sufficient to entail criminal liability as long as it otherwise fell within the definition and was committed against a specific group with the requisite intent. In this respect, genocide differs markedly from crimes against humanity.

ii. Serious Bodily or Mental Harm

In fact, the definition does not require killing at all. It clearly covers such brutal acts as torture, rape, and non-fatal physical violence causing disfigurement or serious injury to the external or internal organs, if the other requirements are also met. It also extends to serious mental harm as well as the infliction of "conditions of life" calculated to bring about a group's physical destruction in whole or in part.

As the ICTR Appeals Chamber stated in *Prosecutor v. Seromba*, ICTR 2001–66–A, Judgment (Mar. 12, 2008), para. 46, the "quintessential examples of serious bodily harm" include torture, rape, and "non-fatal physical violence that causes disfigurement or serious injury to the

external or internal organs." Serious mental harm includes "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat" and typically involves rapes or killings. To the same effect, the Trial Chamber in *Prosecutor v. Akayesu*, ICTR 96– 4–T, Judgment (Sept. 2, 1998), para. 731, said that rape and sexual violence can constitute genocide in the same way as any other act and are "one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm."

The ICTY also qualified noted that, although such harm need not be *permanent or irreversible*, it must go "beyond temporary unhappiness, embarrassment or humiliation" and inflict "grave and long-term disadvantage to a person's ability to lead a normal and constructive life." See *Tolimir Zdarko,* ICTY 05-88-2-A, Judgment (Dec. 12, 2012),

iii. Conditions of Life

Various methods can be used to inflict "conditions of life" calculated to bring about a group's physical destruction in whole or in part, including subjecting people to a subsistence diet, systematically expelling them from their homes and reducing essential services below a minimum level necessary to sustain existence. By itself, however, forced displacement or migration from a traditional homeland is not, in most circumstances, likely to meet the standard.

During the conflict in the former Yugoslavia, a widespread policy of forced removal ("ethnic cleansing") was pursued by Serbs in Bosnia and Herzegovina to require Muslims and Croats to leave areas desired by their enemies in order to create a "Greater Serbia." Where it could be established that this was intended as a "slow death," it could qualify as a form of genocide. In several cases, however, the Chambers declined to find individuals guilty of genocide even where there had been a coherent, consistent strategy of ethnic cleansing against Bosnian Muslims and Bosnian Croats through mass forcible displacement.

iv. Preventing Births

Imposing measures intended to prevent births within the group includes such practices as sexual mutilation, enforced sterilization and birth control, forced separation of males and females, and prohibition of marriage. *See Prosecutor v. Tolimir*, IT–05–88/2–T, Judgment (Dec. 12, 2012), para. 743. In *Prosecutor v. Akeyesu*, ICTR 96–4–T, Judgment (Sept. 2, 1998), para. 508, the Trial Chamber noted that rape can also be a means intended to prevent births "when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through trauma, not to procreate." In other words, this provision may apply when the trauma from rape prevents the victim from wanting to bear children, or when the victim is raped so that she will then be considered unworthy of procreation.

One of the first such cases of imposing measures to prevent births was found in the trial of Adolf Eichmann where he was indicted for devising plans to prevent births in the Theresin ghetto with intent to exterminate the Jewish people. *See Attorney General v. Adolf Eichmann,* Criminal Case No. 40/61, District Court of Jerusalem, 36 I.L.R. 5 (1961).

v. Transferring Children

Forcibly transferring children of the group to another group can constitute an act of genocide when the intent is to destroy the group's existence. The assumption underlying this

prohibition is that having been transferred, children lose the cultural identity of the group to which they originally belong. Lawfully transferring children for social or economic reasons, or for their protection, would not fall within the prohibition. *Cf. Prosecutor v. Tolimir*, IT–05– 88/2–T, ICTY Judgment (Dec. 12, 2012), paras. 793–94.

B. The Targeted Group

To constitute genocide, the genocidal acts must have been committed against a "national, ethnical, racial or religious" group. The list is exclusive, meaning that other kinds of groups (such as those defined by their political beliefs or other characteristics) are not included. Many believe that the narrowness of this list (especially its exclusion of groups based on political beliefs or orientation) is one of the definition's major shortcomings.

Moreover, there is no internationally agreed-upon definition of these various groups, and over time the courts and tribunals have articulated differing criteria. The ICTR's Trial Chamber, for example, defined the term "national group" as "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties." *Prosecutor v. Akayesu*, 96–4–T, Judgment (Sept. 2, 1998), para. 512. By comparison, an "ethnic group" is "a group whose members share a common language or culture," while members of a "racial group" share "the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors." *Id.* at paras. 513–514.

A somewhat broader definition was adopted by the ICTR, giving greater weight to self-identification. "An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others). A racial group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common beliefs." *Prosecutor v. Kayishema and Ruzindana*, ICTR 95–1–T, Trial Judgment (May 21, 1999), para. 98.

In *Prosecutor v. Semanza*, ICTR 97–20–T, Judgment (May 15, 2003), para. 317, the ICTR's Trial Chamber stated that 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." Thus, a group might be distinguished according to characteristics, which are deemed essential for including people within that group or by identifying characteristics which exclude individuals from the group. In either case, having (or not having) the relevant characteristic can provide the perpetrators of the crime a basis for stigmatizing individuals on the basis of group identity.

C. Specific Intent

The third basic element of the genocide definition is the requirement of specific intent (*dolus specialis*) to eliminate the targeted group *as such*, whether in whole or in part. It is insufficient for a prosecutor simply to prove that the accused intended to commit one or more of the constitutive acts, or that the acts were in fact directed against members of one of the protected groups. What is also required is proof that the accused actually intended those acts for the purpose of destroying *that* group, *as a group*.

As a legal matter, this requirement of specific intent most clearly distinguishes genocide from "persecution" as a crime against humanity. In the latter, the perpetrator also chooses his

victims because they belong to a specific community and is liable for his acts. But, in the former, even if the purpose is discriminatory, he does not commit genocide if he does not seek to destroy the group as such, in whole or substantial part. Moreover, in distinction to crimes against humanity, the existence of a plan or policy is not a legal requirement of genocide.

It is not necessary to aim at the complete annihilation of a group. The intent can be to destroy at least a substantial part of the protected group within the confines of a limited geographical area. In *Prosecutor v. Krstić*, IT–98–33–T, Judgment (Aug. 2, 2001), the ICTY Trial Chamber convicted General Krstić of genocide for his participation in the extermination of some 8,000 Bosnian Muslim men in Srebrenica in 1995. Krstić's defense lawyers had argued that the Bosnian Muslims of Srebrenica did not constitute a specific national, ethnical, racial or religious group within the meaning of "genocide" and that it was impermissible to create an artificial "group" by limiting its scope to a specific geographical area. However, the Trial Chamber ruled that "[t]he intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes intent to destroy in part the Bosnian Muslim group within the meaning of article 4 and therefore must be qualified as genocide."

D. Inferred Intent

In some situations, there may actually be direct evidence of genocidal intent in the perpetrator's own oral or written statements. Where such direct evidence is absent, the intent may be inferred from the circumstances of the crime.

As the Trial Chamber stated in *Prosecutor v. Akayesu,* ICTR 96–4–T, Judgment (Sept. 2, 1998), para. 523, "[i]t is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others." In the Chamber's view, it also possible to infer the necessary intent from "other factors, such as 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."

Inferring intent from circumstantial evidence needs to be approached with caution. In *Prosecutor v. Mugenzi and Mugiraneza*, ICTR 99–56–A, Judgment (Feb. 4, 2013), paras. 91–92, the Appeals Chamber overturned a conviction for conspiracy to commit genocide because, in its view, the facts adduced at trial did not demonstrate the requisite *mens rea*, given that there were alternative explanations for the conduct in question. *See also Prosecutor v. Brdanin,* IT–99–36–A, Judgment (Apr. 3, 2007), para. 228, in which the Appeals Chamber applied the standard that "no reasonable trier of fact could have concluded that the inference drawn was the only reasonable inference that could be drawn from the evidence provided." Such drawing of inferences on genocidal intent also took place during the trial of Karadžić, specifically highlighted by the lack of evidence presented by the Prosecutor proving that the accused knew of the killings taking place in Srebrenica. The former President of Sprska declared his intention to appeal his conviction on basis of such 'inference of guilty intent'.

Another instance of inferred intent playing a major part in a genocide conviction is the trial and sentencing of Radovan Karadžić, the President of Sprska in March, 2016. In *Prosecutor v Karadžić* IT-95-5/18, Judgment (March, 24, 2016), the trial court found that the Bosnian Serb forces' crimes in Srebrenica constituted a JCE (Joint Common Enterprise), to which Karadžić contributed contributed. The court noted that as the Supreme Commander of the Army of

Republika Srpska (VRS) Karadžić was the *sole person* with authority to prevent the large scale killing of Bosnian men and upon his unwillingness to so prevent, genocidal intent could be inferred.

2. Note on "Cultural or Political Genocide"

The definition of genocide in the Rome Statute (as well as in the Genocide Convention and under customary international law) only covers acts aimed at the physical or biological destruction of one of the four specified groups (in whole or in part). Some have criticized this limitation and sought to expand the definition to include acts aimed at suppressing or destroying the culture, religion or language of a targeted group, particularly when intended to achieve its forced assimilation rather than physical destruction

In *Prosecutor v. Krstić*, IT–98–33–T, Judgment (Aug. 2, 2001), the ICTY noted that the idea of "cultural genocide" had been considered and expressly rejected during the negotiation of the 1948 Convention. Thus, activities calculated to destroy the distinctive *cultural or sociological* character of a group, the elements that distinguish the group from others, do not fall under the definition of genocide. Neither do efforts to eliminate groups defined solely by their political beliefs or affiliation. Nonetheless, some perceive a trend toward broader interpretation including cultural as well as physical destruction. In particular, *see* the Partially Dissenting Opinion of Judge Shabbuddeen, which was followed in *Prosecutor v. Blagojević*, IT–02–60–T, Judgment (Jan. 17, 2005).

3. Direct and Public Incitement

Uniquely, the Statute (like the Convention) criminalizes "direct and public incitement" to genocide. This form of liability does not apply to other core crimes.

The first convictions for direct and public incitement were rendered by the ICTR, and that tribunal produced a number of seminal decisions in this regard. For example, in *Prosecutor v. Akayesu*, 96–4–T, Judgment (Sept. 2, 1998), para. 559, the Trial Chamber defined the term as "directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, or by any other means of audiovisual communication." *See also Prosecutor v. Nzabonimana*, ICTR 98–44D–T, Judgment (May 31, 2012), para. 1175, convicting the defendant *inter alia* because he had "directly called for the destruction of the Tutsi ethnic group."

The crime lies in the incitement. The prosecution need not show that anyone acted upon the incitement or that it produced any other result. *See Akayesu*, paras. 561–562. The appeals chamber also held that it is of no relevance that any deaths resulted from such incitement. *Nyiramasuhuko et al. (Butare)*, ICTR-98-42, Judgment (Dec., 14, 2015). It can be difficult, however, to distinguish clearly between legitimate political speech (or even propaganda) and criminal incitement, especially since incitement need not be explicit but can be subdued or indirect.

4. Current U.S. Law

The United States ratified the Genocide Convention in 1988 and has implemented its

provisions through federal law. Under 18 U.S.C. § 1091, whoever commits the offense of genocide (defined as in the Convention), whether in time of peace or in time of war, and whoever "directly and publicly incites another" to do so, is subject to prosecution. The statute also covers attempt and conspiracy. However, it only applies when the offense has been committed in whole or in part within the United States, or when the alleged offender is a U.S. national or lawful permanent resident, or a stateless person habitually resident in the United States, or when, after the conduct required for the offense has taken place, the alleged offender is present in the United States, even if that conduct occurred outside the United States. *See* 18 U.S.C. § 1091(e).

The statute also defines the term "ethnic group" to mean "a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage." The term "national group" means "a set of individuals whose identity as such is distinctive in terms of nationality or national origins." "Racial group" means "a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent." "Religious group" means "a set of individuals whose identity as such is distinctive in terms of common religious creed, beliefs, doctrines, practices, or rituals." The term "incites" is defined to mean "urges another to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct." *See* 18 U.S.C. § 1093.

§ 5–2 CRIMES AGAINST HUMANITY

The concept of "crimes against humanity" was first articulated as an international offense in the London Charter. Article 6(c) of that Charter defined the offense to encompass "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 domestic law of the country where perpetrated." A majority of the defendants at Nuremberg were in fact convicted under this heading.

Similar definitions were contained in article 5(c) of the Tokyo Charter of the IMTFE as well as in article 2(11) of the 1954 Draft Code of Offences, although the latter included persecution on "social" grounds and limited the offense to acts "by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities." That draft was never finalized, nor has the international community adopted a multilateral treaty defining the crime, although the International Commission has been considering the topic for the past several years. Crimes against humanity were included, however, in the mandates of the ad hoc Tribunals and in the Rome Statute of the International Criminal Court.

In article 5 of the ICTY Statute, the UN Security Council limited the definition to "crimes when committed in armed conflict, whether international or internal in character" and added imprisonment, torture and rape to the list. By comparison, the ICTR Statute, in article 3, replaced this "armed conflict" nexus with a more general requirement that the specific crimes have to have been "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."

Article 7 of the Rome Statute broadened the concept even further, eliminating the ICTY's discriminatory test. Under that article, the term "crime against humanity" means any one of eleven enumerated acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

1. *Elements of the Crime*

As defined in the Rome Statute, the key elements of the crime against humanity are (A) commission of one or more specific acts (physical element) (B) as part of a "widespread or systematic attack" (contextual element) (C) which is directed against "any civilian population" (D) and the perpetrator must know that his or her acts constitute part of the attack (mental element).

A. Specific Acts

The list of enumerated acts constituting crimes against humanity in article 7(1) is long and detailed. It includes murder, extermination (killing as well as other measures calculated to end life, such as deprivation of food), enslavement (including trafficking in persons), deportation or forcible transfer of population (which would encompass "ethnic cleansing"), imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, enforced disappearance of persons, the crime of apartheid, and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Art. 7(1)(a)–(k).

i. Extermination as a Crime Against Humanity

Article 7(2) defines "extermination" to mean "the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."

In *Prosecutor v. Tolimir*, IT–05–88/2–T, Judgment (Dec. 12, 2012), para. 723, the Chamber described this crime as involving "the crime of killing on a large scale together with the intention to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their death." *See also Prosecutor v. Semanza*, ICTR 97–20–T, Judgment (May 15, 2003), para. 340, which differentiated extermination from murder because it is directed against a population rather than individuals. "The material element of extermination is killing that constitutes or is part of a mass killing of members of a civilian population. The scale of the killing required for extermination must be substantial. Responsibility for a single or a limited number of killings is insufficient." *Id.*

More recently, the ICC issued two warrants for the arrest of President Omar Al- Bashir of Sudan for acts of genocide, war crimes and crimes against humanity, including the *extermination* of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups in Sudan. *See Prosecutor v Omar Al-Bashir, ICC-02/05-01/09.*

ii. Persecution as a Crime Against Humanity

By contrast, the "persecution" crime against humanity involves discriminatory acts "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . 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." Rome Statute, art. 7(1)(h). Under art. 7(2)(g), this means "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity

of the group or collectivity."

As the Appeals Chamber noted in *Prosecutor v. Tolimir*, IT–05–88/2–T, Judgment (Dec. 12, 2012), para. 846, this crime is based on an "act or omission that discriminates in fact, which denies or infringes upon a fundamental right laid down in international customary or treaty law, and which was carried out deliberately with the intention to discriminate on grounds of race, religion or political opinion." Not every infringement of rights constitutes persecution. To qualify, it must "constitute a gross or blatant denial of a fundamental right" reaching a particular level of gravity. *Id.* at para. 848. In some cases there can be significant overlap of the persecution element of crimes against humanity with murder, forcible transfer, cruel and inhumane treatment, deportation, sexual assault, etc. In several cases involving the Srebrenica massacre against Bosnian Muslim men and women, the Court relied on evidentiary materials in determining whether the crimes were of the requisite gravity to qualify as persecution under the meaning of the statute.

Clearly, there is some overlap between this provision and the crime of genocide, and in specific circumstances a prosecutor may have the option of charging either.

iii. Gender-Based Acts

Article 7(1)(g) specifies several gender-based crimes, in particular those involving sexual violence ("rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity").

The term "forced pregnancy" is defined as "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law." Art. 7(2)(f). As defined, it does not depend on the perpetrator's involvement in the act of conception; what is required is that the perpetrator knows that the woman is pregnant and that she has been made pregnant forcibly. *See Prosecutor v Dominic Ongwen* ICC-02/04-01/15 (para 99).

Additional criteria are supplied in the Elements of Crimes, which for example describes "enforced sterilization" as applying to situations where the perpetrator has deprived one or more persons of biological reproductive capacity and when such conduct was neither justified by the medical or hospital treatment of the persons concerned nor carried out with their consent. *See* Elements of Crimes, art. 7(1)(g)–5.

iv. Enforced Disappearance

Article 7(2)(i) defines the term "enforced disappearance of persons" to mean the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a 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 the law for a prolonged period of time. This crime may be committed by 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 by refusing to acknowledge the deprivation of freedom or to provide information on the fate or whereabouts of the person with knowledge that such deprivation may well have occurred.

B. Widespread or Systematic Attack

To constitute a crime against humanity, the specific acts described above must have been committed "as part of a widespread or systematic attack" directed against any civilian population. Art. 7(1). In other words, the attack must be characterized by significant size and gravity, for example involving a multiplicity of victims, with measures being carried out collectively, with some degree of organization and following a regular pattern, on the basis of a common policy and involving substantial public or private resources.

In *Prosecutor v. Tolimir*, IT–05–88/2–T, Judgment (Dec. 12, 2012), para. 698, the Trial Chamber said that the term "widespread" refers to the large-scale nature of the attack and the number of victims, while the word "systematic" ' refers to the organized nature of the acts associated with the attack and the improbability of their random occurrence. However, "a single act or limited number of acts can qualify as a crime against humanity provided the act or acts are not isolated or random and that all other elements [of the crime] are met." *Id*. The attack need not be military in nature.

See also Prosecutor v. Kunarac, Kovac and Vukovic, "Appeals Judgement," IT-69-23/IT-96-23-1, 12 June 2002, para. 87 (when establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population).

i. State Action

Some controversy exists over whether this requirement necessarily implies a State-sponsored plan or policy. Article 7(2)(a) of the Rome Statute defines the term "attack directed against any civilian population" to mean "a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of *a State or organizational policy* to commit such attack" (emphasis added).

One reading is that actions by non-State entities would qualify. In this regard, *Prosecutor v. Akayesu*, ICTR 96–4–T, Judgment (Sept. 2, 1998), para. 580, reached much the same conclusion interpreting the ICTR Statute: "The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of 'systematic' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a State. There must however be some kind of preconceived plan or policy." *See also Prosecutor v. Blašić*, IT–95–14–T, Judgment (Mar. 3, 2000), para. 204.

The ICC's Pre-Trial Chamber adopted this view in its decision to approve the Prosecutor's investigation of post-election violence in Kenya. *See Situation in the Republic of Kenya*, ICC–01/09, Decision of March 31, 2010, para. 92 ("organizations not linked to a State may, for purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population").

In dissenting from that decision, ICC Judge Hans-Peter Kaul rejected the Chamber's broad view, arguing that article 7(2)(a) should be read only to encompass "organizational policies" of State-like entities and not non-State actors such as "groups of organized crime, a mob, groups of (armed) civilians or criminal gangs groups . . . [or] violence-prone groups of persons formed on an *ad hoc* basis." Dissenting Opinion, para. 52. This more restrictive interpretation, he said, focuses the attention of the Court on circumstances where the State adopts or promotes a policy of attacking the civilian population, which is in his view when the greatest atrocities have occurred.

ii. Armed Conflict

As defined in the Rome Statute, crimes against humanity do not require a connection to an armed conflict (whether internal or international).

That was not always true. In article 6(c) of the London Charter, a distinction was made between one class of crimes against humanity committed "before or during the war" and a second group (persecutions on political, racial, or religious grounds) that had been committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal"—meaning war crimes or an unlawful war of aggression. This bifurcation reflected a reluctance to hold individuals internationally responsible for acts taken by a government within its own territory with regard to its own citizens, since under then-prevailing notions of sovereignty such matters were considered "internal" and not appropriately regulated by international law unless they occurred during an armed conflict or military occupation.

The "armed conflict" nexus requirement did not long survive. It was eliminated from Allied Control Council Law No. 10 (1945). It was also omitted from the ILC Draft Code of Offences against the Peace and Security of Mankind (1954). It was included, however, in article 5 of the ICTY Statute, which limited the Tribunal's jurisdiction over crimes against humanity to those "committed in armed conflict, whether international or internal in character, and directed against any civilian population." No such requirement was included in the case of the ICTR, and none was incorporated into the Rome Statute.

C. Civilian Population

Crimes against humanity are considered "collective crimes" in the sense that they must be directed against a civilian population rather than only against individual victims. In this context, "civilian" means non-combatants. The phrase "directed against" means that the civilian population must be the primary object of the attack.

It is not necessary for the entire population of the relevant geographical entity to have been targeted. As the ICTY Appeals Chamber has said, "it is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population,' rather than against a limited and randomly selected number of individuals." *Prosecutor v. Kunarac*, IT–96–23 and 96–23/1–A, Judgment (June 12, 2002), para. 90.

In order to determine whether the attack was directed against civilians, the court said following indicia must be considered: "the means and methods employed during the attack, the status of the victims, their number, the discriminatory character of the attack, the nature of the crimes committed during the attack, the resistance to the assailants at the time, as well as the extent to which the attacking forces may be said to have complied or attempted to comply with the precautionary requirements of the laws of war." See *Prosecutor v. Prlic et al*, IT-04-74-T, Judgment (TC) (May 29, 2013).

2. Mens Rea and Knowledge

Unlike genocide, specific intent is not required for a crime against humanity. However, in addition to the ordinary intent (*mens rea*) to commit the specific acts in question, the perpetrator must also have "knowledge" of the "widespread or systematic" attack of which those acts are a

part. An individual who is not aware that his or her acts are part of a widespread or systematic attack on a civilian population may be guilty of a serious crime, such as murder, perhaps even of war crimes, but cannot be convicted of crimes against humanity.

It is not necessary for the perpetrator to share in the purpose or goals of the larger attack. The ICTY Appeals Chamber has said that the accused's motives are irrelevant, and it does not matter whether the accused intended his acts to be directed against the targeted population or merely against his particular victim. Rather, it is the attack, and not the acts of the accused, which must be directed against the targeted population. The perpetrator only needs to have knowledge of the wider context in which his acts occur. *Prosecutor v. Kunarac*, IT–96–23 and 96–23/1–A, Judgment (June 21, 2002), para.103.

In *Prosecutor v. Tolimir,* IT–05–88/2–T, Judgment (Dec. 12, 2012), para. 700, the ICTY Trial Chamber said that "the motives of the accused are irrelevant. A crime against humanity can be committed for purely personal reasons and it is not necessary for the accused to share in the purpose or goal behind the attack." However, in *Prosecutor v. Kayishema and Ruzindana*, ICTR 95–1–T, Judgment (May 21, 1999), paras. 133–34, the ICTR Trial Chamber said: "The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof."

Note, however, that "persecution" as a crime against humanity under art. 7(1)(h) of the Statute *does* require a discriminatory intent (in addition to the "knowledge" element). *See also Prosecutor v. Lukić*, IT–98–32/1–A, Judgment (Dec. 12, 2012), para. 458–59 (calling persecution as a crime against humanity a "specific intent" crime).

3. Crimes Against Humanity Distinguished From Genocide

Like genocide, crimes against humanity may be prosecuted whether committed in peace time or during an armed conflict. Genocide can be committed by State or non-State actors; the same is true for crimes against humanity, although the "widespread and systematic attack" must be "pursuant to or in furtherance of a State or organizational policy." For ICC purposes, it remains disputed whether policies of non-State actors will qualify.

Where genocide must be targeted against "a particular social, ethnical, racial or religious group," crimes against humanity need only affect a "civilian population." The term "civilian" excludes armed forces and certain kinds of militias, but the population need not be exclusively civilian; it will qualify if it is predominantly civilian. *See Prosecutor v. Tolimir*, IT–05–88/2–T, Judgment (Dec. 12, 2012), paras. 695–96.

While genocide must aim at the destruction of the group in whole or in part, a crime against humanity need only be part of a "widespread or systematic attack." Unlike genocide, crimes against humanity do not require "specific intent," only an intent to commit the particular act in question and "knowledge" of the broader context in which it takes place.

§ 5–3 WAR CRIMES

Broadly conceived, "war crimes" are violations of the specialized laws and customs of war applicable in armed conflict. Article 8 of the Rome Statute contains a lengthy and detailed list of "war crimes" that can be prosecuted before the International Criminal Court. In order to understand

these provisions properly, some background is necessary.

i. *Law of Armed Conflict*

For centuries, international lawyers have used the term "law of war" to cover two distinct areas: (i) the law relating to the decision to use force (*jus ad bellum*, or when it was lawful or unlawful to go to war) and (ii) the law governing the actual conduct of hostilities (*jus in bello*, or the specific rules relating how armed conflict had to be conducted).

Following World War II, the UN Charter prohibited the use of force in international relations *unless* authorized by the UN Security Council or in self-defense against an armed attack. These new provisions replaced the older ideas of just and unjust war.

The idea that some legal rules regulate the means and methods by which armed force is used during hostilities and that violations of those rules can be punished remains important. Over time, this second area came to be referred to as "Hague Law," because its main principles were contained in conventions concluded in The Hague in 1899 and 1907. Additional treaties were concluded over the following decades regulating, for example, the use of such weapons as poisonous gases and bacteriological methods of warfare. More recent international agreements have covered such means and methods of warfare as chemical weapons and landmines.

Following World War II, new protections were adopted in the four Geneva Conventions of 1949: (I) for the Amelioration of the Condition of the Wounded and Sick In Armed Forces in the Field, (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, (III) Relative to the Treatment of Prisoners of War, and (IV) Relative to the Protection of Civilians in Time of War. These treaties apply primarily in "international armed conflicts." In 1977, two additional Protocols to these Conventions were adopted: (I) Relating to the Protection of Victims of International Armed Conflicts and (II) Relating to the Protection of Victims of Non-International Armed Conflict. The primary focus of these protocols was the protection of civilians and those out of the fight (*hors de combat*). Together, these conventions and protocols came to be called the "Geneva Law."

2. International Humanitarian Law

Because "Hague Law" focused primarily on the actual use of force, it was sometimes described as the law of armed conflict (or LOAC). "Geneva Law" focused on protecting those no longer in the fight and was sometimes referred to as "international humanitarian law" (or IHL). Today, the distinctions are mostly of historical relevance, and the two terms are used interchangeably. Other distinctions are more important.

3. Armed Conflict

A key feature of international humanitarian law is that it applies only in connection with armed conflicts. The Geneva Conventions do not contain a definition of "armed conflict" but one has been crafted by the ICTY (in part, because its jurisdiction depends on it). In *Prosecutor v. Boškoski and Tarčulovski*, IT–04–82–A, Judgment (May 19, 2010), para. 21, the Appellate Chamber said that armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."

4. International vs. Non-International Armed Conflict

The Geneva Conventions did introduce an important distinction between "international armed conflicts" and "armed conflicts not of an international character." While it is not always easy to tell one from the other, in general an international armed conflict is one in which two or more States are formally engaged in combat with each other, while a non-international armed conflict is typically "internal," that is, one occurring in the territory of one State. In recent years, however, armed conflicts with international terrorist groups have been characterized as non-international even though hostilities may be conducted in more than one country, because the conflict is not between States.

The difference is important, since the four 1949 Geneva Conventions and the first additional Protocol apply primarily to situations of "declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them." By contrast, more limited protections apply in the case "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."

5. Common Article 3

Common Article 3 of the Geneva Conventions (called "common" because it appears in all four Conventions) obligates States Parties to provide at least a minimum of humanitarian protection to victims of armed conflicts, including in particular "persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause." Textually, the protection afforded by Common Article 3 is limited in two particular respects. First, it only applies to a certain category of internal hostilities (those occurring on the territory of one of the High Contracting Parties). Second, it only protects certain categories of victims of war (civilians or individuals who are taking no active part in the hostilities, because for example they are wounded or held prisoner).

In *Prosecutor v. Tolimir*, IT–05–88/2–T, Judgment (Dec. 12, 2012), para. 683, the Appeals Chamber held that Common Article 3 applies in all armed conflicts, international and non-international alike, but there must be a "nexus" between the armed conflict and the crime in question. That connection need not have been causal but has to have played a "substantial part in the perpetrator's ability to commit the crime."

6. War Crimes vs. Grave Breaches

Not every violation of the 1949 Geneva Conventions amounts to a war crime. Among those that do, certain violations of these Conventions constitute more serious offenses and are termed "grave breaches." The four Conventions each define the term "grave breach" by reference to specific offenses, including among others willful killing, torture or inhumane treatment, willfully causing great suffering or serious injury, and taking of hostages. Grave breaches only arise when committed in international armed conflicts, and the victims of grave breaches must be persons specifically protected by a Geneva Convention such as a prisoner of war or a soldier who, due to wounds, is no longer capable of fighting. A State Party is obligated to bring those who commit grave breaches before its national courts or to hand them over to another State Party.

7. Laws and Customs of War

Finally, not all the rules relevant to armed combat were contained in the Hague, Geneva or other conventions. Over time, a body of principles developed, known as the "laws and customs of war," which were held to apply to all States and all combatants, no matter whether the conflict was internal or international. The heart of this body of rules is found in four fundamental principles.

A. Distinction

In order to ensure respect for and the protection of the civilian population and civilian objects, the parties to an armed conflict must distinguish between the civilian population and combatants, and between civilian objects and military objectives. They must direct their operations only against military objectives. Combatants can be uniformed military personnel, members of a government-organized militia or a non-State armed group, or a civilian directly participating in hostilities. Military objectives can include military bases, equipment or supplies, as well as any object that, by virtue of its nature, location, purpose or use, makes an effective contribution to military action and whose destruction, capture or neutralization offers a definite military advantage. Within these broad categories, any intended target must be a combatant or military objective.

B. Proportionality

When attacking military objectives, combatants must take measures to avoid or minimize collateral civilian damage and refrain from attacks that would cause incidental loss of civilian life, injury to civilians or damage to civilian objects that would be excessive in relation to the anticipated concrete and direct military advantage of the attack.

C. Military Necessity

This principle limits the measures not forbidden by international law to legitimate military objectives whose engagement offers a definite military advantage. The use of military force must not exceed the level necessary to achieve the military goal.

D. Unnecessary Suffering

The use of armed force must avoid subjecting an opponent to superfluous injury or unnecessary suffering beyond that necessary to bring about the opponent's prompt submission. It should include precautions to spare the civilian population before and during an attack.

From the perspective of international criminal law, it is important to recognize that an individual's criminal responsibility depends of the legality of his or her particular acts, not on the overall lawfulness of the broader conflict or whether the State was entitled to use force under international law. Put differently, a war crime remains a war crime, whether committed during an armed conflict resulting from a lawful use of force or one that violates international law. *See, e.g.*, *Prosecutor v. Boškoski and Tarčulovski*, IT–04–82–A, Judgment (May 19, 2010), para. 51.

8. The Court's Jurisdiction

Article 8(1) of the Rome Statute states that the Court has jurisdiction "in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes." This provision reflects a compromise between those who wanted the Court to have jurisdiction "only" when war crimes are part of a broad plan or large-scale commission of offenses, and those who wanted no jurisdictional threshold at all. The "in particular" language presumptively limits the Court's jurisdiction but gives the Court leeway to act if circumstances mandate, even without evidence of either a plan or the large scale commission of war crimes.

Article 8(2) provides an extensive list of offenses (including nearly sixty separate provisions) divided between those occurring in international armed conflicts and those taking place in armed conflicts not of an international character.

9. International Armed Conflicts

With respect to international armed conflicts, article 8(2)(a) covers "grave breaches" of the Geneva Conventions such as willful killing, torture and hostage taking, and 8(2)(b) lists some 26 "other serious violations of the laws and customs applicable in international armed conflict," including (among many others) "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the overall environment."

10. Non-International Armed Conflicts

With respect to non-international armed conflicts, article 8(c) covers violations of Common Article 3 including acts of violence to life and person, outrages upon personal dignity, taking of hostages, and "the passing of sentences and the carrying out of executions without previous judgment [sic] pronounced by a regularly constituted court, affording all judicial guarantees which as generally recognized as indispensable." Under article 8(2)(d), however, this provision does *not* apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."

Article 8(2)(e) details a list of 12 other "serious violations of the laws and customs applicable in armed conflicts not of an international character," including "intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities." Here again, the Rome Statute provides that this provision does *not* apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

11. The Belgian Amendment

At the 2010 Review Conference in Kampala, a proposal by Belgium was accepted to add to Article 8(2)(e) the following three crimes in the context of non-international armed conflicts (they are already included in the crimes in article 8(1) applicable to international armed conflicts): (i) employing poison or poisoned weapons; (ii) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and (iii) employing bullets which expand or flatten

easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

12. Other Amendments

In December 2017, the ICC adopted several other amendments to article 8 of the Rome statute whereby it prohibited or regulated weapons: (a) which use microbial or other biological agents or toxins, (b) the primary effect of which is to injure by fragments which in the human body escape detection by X-rays, and (c) which are blinding laser weapons.

12. Distinction between War Crimes, Crimes Against Humanity and Genocide

Clearly, there can be some overlap between war crimes, genocide and crimes against humanity. For example, the mass killing of civilians during an armed conflict might constitute a war crime, an act of genocide, or a crime against humanity, depending on the specific circumstances.

Unlike genocide, however, war crimes are not limited to specific groups and do not require specific intent. Unlike crimes against humanity, war crimes need not be part of a widespread or systematic attack on a civilian population nor do they require a governmental element or common plan; a single isolated incident can constitute a war crime. Unlike either of the others, however, war crimes can only be committed during (or be connected to) an armed conflict. Like the others, they can be committed by combatants and civilians alike. Finally, the term "war crime" has different meanings in different contexts (consider the variations, for example, between the Statutes of the ICTY, the ICTR and the ICC).

13. U.S. Law

Enacted in 1996 and codified at 18 U.S.C. § 2441, the War Crimes Act imposes criminal penalties on U.S. nationals and members of the U.S. armed forces who commit (among other offenses) grave breaches of the Geneva Conventions (or grave breaches of Common Article 3 during non-international armed conflicts).

Additionally, the updated Department of Defense law of war Manual serves as a supplement which helps one understand the US view on the law of war. It is especially helpful in light of the fact that the United States has ratified neither the Rome statute nor the Additional Protocol I to the Geneva conventions and several points of contention concerning the US understanding of the Law of Armed Conflict can only find resolution in the law of war manual published by the Department of Defense.

§ 5–4 THE CRIME OF AGGRESSION

What has come to be called the crime of aggression was formerly covered under the term "crime against the peace." That is how article 6(a) of the London Charter, for example, characterized the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

At Nuremberg, the IMT emphasized that "[t]o initiate a war of aggression . . . is not only

an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole crime of aggression." Opinion and Judgment of the International Military Tribunal at Nuremberg (1946). The "common plan or conspiracy" charged in the indictment covered twenty-six years from the formation of the Nazi Party in 1919 to the war's end in 1945. In fact, the IMT disregarded the conspiracy allegations and considered only the "common plan to prepare, initiate, and wage aggressive war."

In 1974, the UN General Assembly adopted (by consensus) a resolution defining an act of aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." UN G.A. Res. 3314 (XXIX), Dec. 14, 1974, art. 1. Article 3 of that resolution listed a number of specific examples of acts of aggression, including *inter alia* the invasion or attack by the armed forces of a State of the territory of another State; any military occupation, however temporary, resulting from such invasion or attack; bombardment or blockade of another State; and the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.

Article 2 of the resolution stated that "the first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression." However, it also acknowledged that the Security Council could conclude that a determination that an act of aggression has been committed "would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."

With this resolution as background, there was broad agreement during the negotiation of the Rome Statute that aggression should be included within the core crimes. No consensus could be reached, however, on how exactly to define that crime or what role the Security Council should have in determining when it had taken place. As a consequence, the Statute left the issue open, providing only in article 5(2) that the crime could be prosecuted once a definition had been adopted and the Statute amended accordingly.

That goal was accomplished at the Review Conference held in Kampala in July 2010, and the crime is now defined in a new article 8*bis* of the Rome Statute. The effective implementation of this provision was deferred until 2017, when a two-thirds majority of States Parties to the Statute gave its approval. After the required year's delay, Article 8*bis* came into force in December 2018. Under Article 15*bis*(4), however, the Court may exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, "unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar."

1. Elements of the Crime

The term "crime of aggression" is defined in article 8*bis*(1) as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

A. Act of Aggression

The "crime of aggression" must be predicated on an "act of aggression." That term is defined in article 8*bis* (2): "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." Note, however, that not everything that qualifies as an "act of aggression" will constitute a prosecutable crime of aggression.

The following acts will qualify as "an act of aggression:"

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involved therein.

B. State Action

These acts must have been committed by a State (most of them by the armed forces of a State) and directed against another State. It appears, therefore, that the definition would not apply to non-State actors such as insurgents or terrorists, or to actions by State authorities against their own citizens.

C. Leadership and Control

The accused must have (i) planned, prepared, initiated or executed the relevant act of aggression and (ii) must have been in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

Thus, lower-level officials or members of the military would presumably not be covered by article 8*bis.* The scope of application of the "crime of aggression" was additionally qualified by an amendment to article 25 of the Statute, adding a new paragraph 3 *bis* providing that "[i]n respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State." *See* RC/9/11 of June 11, 2010, Annex I, para. 5 (*bis*).

D. Character, Gravity and Scale

The act of aggression, by its character, gravity, and scale, must have constituted a manifest violation of the Charter of the United Nations. At Kampala, the Assembly of States Parties adopted a resolution stating that "aggression is the most serious and dangerous form of the illegal use of force" and accordingly that "a determination whether an act of aggression has been committee requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations. *See* RC/9/11 of June 11, 2010, Annex III, para. 6. In a second resolution, the ASP agreed that "in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a 'manifest' determination. No one component can be significant enough to satisfy the manifest standard by itself." *See* RC/9/11 of June 11, 2010, Annex III, para 7.

E. Mens Rea

The perpetrator of the crime of aggression must have been aware of the factual circumstances that established the manifest violation of the Charter of the United Nation and that established that such a use of armed force was inconsistent with the UN Charter. Under article 30(3), "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

2. Conditions of Jurisdiction

In addition, the Court's jurisdiction over the crime of aggression is subject to several significant limitations. It will not be able to exercise jurisdiction over (i) acts committed on the territory or by the nationals of a non-State Party or (ii) crimes of aggression committed by nationals of one State Party if that State has "opted out" in advance under article 15*bis* (4). There is no expiration date on the right to "opt out," although States are required to reconsider such declarations within three years of lodging them.

Moreover, different provisions were adopted with respect to how the Court's jurisdiction could be "triggered" in cases of (A) Security Council referral, (B), investigations initiated by the Prosecutor *proprio motu* and (C) referral by States Parties. Security Council referrals and investigations initiated *proprio motu* are discussed below.

A. Security Council Referrals

A major issue at Kampala concerned the role to be played by the UN Security Council in determining when aggression has taken place. Under the UN Charter the Security Council has primary responsibility for the maintenance of international peace and security. Article 39 of the Charter gives the Council the power to determine when a threat to or breach of the peace or act of aggression has occurred.

The amendments to the Rome Statute acknowledge the Security Council's role in this regard. They provide that the Security Council may refer a case to the Court under its Chapter VII authority and the Court will have jurisdiction under article 13(b), but they also specify that the

Court will not necessarily be bound by the Security Council's determination that an act of aggression has taken place. Under art. 15*ter* (4), "a determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute." Under art. 13(b), the ICC is empowered to exercise jurisdiction over situations referred by the Security Council without regard to whether the specific State concerned has accepted the Court's jurisdiction in this regard.

B. Investigations Proprio Motu

In the absence of a referral by a State Party, the Prosecutor can initiate an investigation into crimes of aggression but only if, six months after having been notified, the Security Council has taken no action and if the Pretrial Chamber authorizes the investigation. *See* art. 15*bis* (6) and (7). The Security Council can, of course, act under article 16 to defer the investigation for a year (and that decision is renewable).

Under these amendments, the Court will not be able to consider alleged crimes of aggression by nationals of a State Party against a non-State Party except in cases referred by the UN Security Council, even though paradoxically it does have jurisdiction over war crimes and crimes against humanity in the same situation. Neither will it be able to adjudicate acts of aggression by nationals of a non-State Party against a State Party, although it would have jurisdiction over war crimes, crimes against humanity and genocide occurring on the latter's territory. In RC/9/11 of June 11, 2010, Annex III, para. 2, the Kampala Conference adopted an "understanding" that the Court shall have jurisdiction over Security Council referrals of the crime of aggression "irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard."

3. Complementarity

To date, only a few States have criminalized the act of aggression in their domestic law, and adoption of the amendments does not impose any obligation on States Parties to the Statute to do so. As a practical matter, however, failure to harmonize their domestic laws with the Statute might deprive States Parties of the ability to invoke the principles of complementarity and admissibility by contending that they are "willing and able" to conduct such prosecutions.

4. Prosecuting The Crime of Aggression:

In the absence of any specific cases or rulings, one can only speculate about the challenges that will likely arise with respect to future prosecutions under Article 8*bis*. Some find the definition (and its jurisdictional prerequisites) to be less that clear, and wonder about its application in given circumstances, including for example situations involving external military assistance to groups seeking to exercise their right to self-determination, the use of force in anticipatory or pre-emptive self-defense, humanitarian intervention to protect one's nationals or predicated on the evolving doctrine of "responsibility to protect – to name only few possible circumstances. Some have speculated about the possibility of retroactive application through UNSC referral.

FURTHER READING

Nasour Koursami, THE 'CONTEXTUAL ELEMENTS' OF THE CRIME OF GENOCIDE (TM Asser 2018); Robert Dubler and Matthew Kalyk, CRIMES AGAINST HUMANITY IN THE 21ST CENTURY: LAW, PRACTICE AND THREATS TO INTERNATIONAL PEACE AND SECURITY (Martinus Nijhoff 2018); Matthias Cernusca, A COMPARATIVE APPROACH TO NORMATIVE ELEMENTS IN THE DEFINITION OF INTERNATIONAL CRIMES (Cernusa 2018); Geiß, Zimmerman and Haumer, HUMANIZING THE LAWS OF WAR (Cambridge 2017); Claus Kreß and Stefan Barriga, THE CRIME OF AGGRESSION: A COMMENTARY (Cambridge 2016); Gary Solis, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR (Cambridge 2016); Amy Randall, GENOCIDE AND GENDER IN THE TWENTIETH CENTURY (Bloomsbury 2015); Christian Tams and Lars Berster, CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE: A COMMENTARY (Hart 2014); Nikola Hajdin, UNDERSTANDING AGGRESSION: LEGAL STATUS AND INDIVIDUAL CRIMINAL RESPONSIBILITY BEFORE THE 2010 KAMPALA CONFERENCE (SwePub 2015); Carrie McDougall, THE CRIME OF AGGRESSION UNDER THE ROME STATUTE (Cambridge 2013).

See also Sean Murphy, "The International Law Commission's Proposal for a Convention on the Prevention and Punishment of Crimes Against Humanity," 50 Case W. Res. J. Int'l L. 249 (2018); Leila Sadat, "A New Global Treaty on Crimes Against Humanity," and Jérémie Gilbert, "Perspectives on Cultural Genocide: From Criminal Law to Cultural Diversity," both in deGuzman and Amann, ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS (Oxford 2018); Talita de Souza Dias, "The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-Discussed Problem, 16 J. Int'l Crim. Justice 65 (2018); Bing Jia Bing, "The Crime of Aggression as Custom and the Mechanisms for Determining Acts of Aggression," 109 Am. J. Int'l L. 569 (2015).