

SAME GENUS, DIFFERENT INTENT: DISTINGUISHING PERSECUTION AS A CRIME AGAINST HUMANITY FROM GENOCIDE

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Abstract: The crime against humanity of persecution and the crime of genocide share common roots which go way back to Nuremberg, although both have developed differently. The concept of genocide has remained untouched since the adoption of the Genocide Convention in 1948. The same does not hold true for persecution, whose definition and scope under the Rome Statute is reflective of the historical difficulty in identifying this offence as a stand-alone crime. The early stages of both offences represent two circles that intersect, but the specific intent to destroy a victimised group is what makes genocide to fall into an exclusive and convoluted category of crimes. This article aims at evaluating persecution and genocide from a substantive and technical perspective, with a view to examining the conditions under which the two crimes operate. The assessment may help clarify some critical points concerning the applicability of both offences in the context of crimes committed in a systematic and targeted fashion.

Keywords: *Persecution, Genocide, Discriminatory intent, Intent to destroy, Protected groups, Civilian population, Deprivation of fundamental rights.*

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1. Introduction

Recent debates in the field of international law have centred their considerations on the scope and threshold of large-scale offences directed against a particular population.¹ The commission of these crimes is not the result of impromptu acts – they rather consist of a series of action steps which involve planning, coordination and execution based on well-organised schemes. This is usually exercised by individuals who occupy a position of real leadership and power in a state or in an organisation. The orchestration of mass crimes typically singles out a specific victimised group that is deliberately targeted on account of a myriad of motives. The Holocaust was unprecedented in its magnitude and cruelty, yet evil doctrines against civilian populations or groups were not a new phenomenon prior to the Second World War.² A few historical examples were pointed out at the Nuremberg Trials,³ mainly referring to state or governmental policies directed against a certain group or population. An example of this was the discriminatory program implemented in December 1744 in the lands of the Bohemian Crown, where Queen Maria Theresa ordered the expulsion of Jews from Prague.⁴ The expulsion decree compelled the group to leave the city by the end of January 1745 and the rest of Bohemia by the end of June. In view of several protests the decree was remitted in 1748. A more repressive procedure was implemented in Spain in July 1749, when the Spanish authorities, the Monarchy and the Catholic Church authorised and organised the mass imprisonment of Roma, leading to the arrest of almost all Spanish Roma, ranging between 9,000 to 12,000 people.⁵ This was the culmination of two centuries of anti-Roma legislation, which set the social and legal foundation

¹ See, for instance, PILPG Documenting Atrocity Crimes Committed against the Rohingya in Myanmar's Rakhine State: Factual Findings & Legal Analysis Report, December 2018, available [here](#); OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, 31 August 2022, available [here](#); Amnesty International Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity, 1 February 2022, available [here](#).

² See, for instance, Lindsay Moir, 'Crimes against Humanity in Historical Perspective' (2006), 3 New Zealand Yearbook of International Law 101, 101–130; Gugen Petrossian, *Staatenverantwortlichkeit für Völkermord* (Duncker & Humblot 2019), 23–33.

³ See, for instance, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. VI, Nuernberg, October 1946 – April 1949, United States Government Printing Office (Washington 1952), 87–88.

⁴ See generally Aubrey Newman, 'The Expulsion of the Jews from Prague in 1745 and British Foreign Policy' (1968-1969), 22 Transactions & Miscellanies (Jewish Historical Society of England) 30, 30–41.

⁵ Nicolás Jiménez González, 'Roma Resistance in Spain', in Anna Mirga-Kruszelnicka and Jekatyerina Dunajeva (eds.), *Re-thinking Roma Resistance throughout History: Recounting Stories of Strength and Bravery* (Budapest: European Roma Institute for Arts and Culture 2020) 225.

for the execution of the so-called Great Round-Up.⁶ The general imprisonment was presented as an inevitable preliminary step in imposing preventive security measures on a group whose members were indiscriminately considered as socially dangerous, if not as criminals.⁷ This severe policy lasted until 1763 when a general pardon was decreed.

Moreover, in 1840, international concerted action helped to redress an allegation against Jews of Damascus, who were accused of involvement in the disappearance of a monk named Father Thomas and his attendant.⁸ The false allegation was fabricated by the Moslem governor of the city, who subjected the Jews to imprisonment and torture, and by the French consul, deemed as the main promoter of the persecution. Also in Damascus, a group of 5,000 to 10,000 Christians were massacred in July 1860 in the context of an ethno-religious confrontation between Maronites (eastern Catholics connected to the Roman Catholic Church) and Druzes (an offshoot of the Ismaili branch of Shia Islam).⁹ The rationale behind the onslaught appeared to be the Muslim resentment at the rising Western influence and the economic prosperity of the Christians. In 1915, a joint declaration by the French, British and Russian Governments condemned the “massacres” perpetrated by the Ottoman Government against the Armenians.¹⁰ In particular, the declaration speaks of “new crimes of Turkey against humanity and civilisations”, for which members and agents of the Turkish government would be held responsible.¹¹

The above examples demonstrate that mass-scale crimes may show different faces over time, with special emphasis on two that has been said to belong to the same *genus* or class: persecution as a crime against humanity and genocide.¹² The targets of both categories are individuals that belong to a particular group or

⁶ Nicolás Jiménez González, ‘Roma Resistance in Spain’, in Anna Mirga-Kruszelnicka and Jekatyerina Dunajeva (eds.), *Re-thinking Roma Resistance throughout History: Recounting Stories of Strength and Bravery* (Budapest: European Roma Institute for Arts and Culture 2020), 222–223.

⁷ Antonio Gómez Alfaro, ‘The Great “Gypsy” Round-up in Spain’ (Council of Europe: Project Education of Roma Children in Europe 2014) 2.

⁸ See generally Joseph Jacobs and John Forsyth, ‘The Damascus Affair of 1840 and the Jews of America’ (1902) 10 Publications of the American Jewish Historical Society 119, 119–128.

⁹ Alexis Heraclides and Ada Dialla, ‘Intervention in Lebanon and Syria, 1860–61’, in *Humanitarian Intervention in the Long Nineteenth Century: Setting the Precedent* (Manchester University Press 2015) 137.

¹⁰ History of the United Nations War Crimes Commission and the Development of the Laws of War, Compiled by the United Nations War Crimes Commission, London: Published for the United Nations War Crimes Commission by His Majesty’s Stationery Office, 1948, p. 35.

¹¹ History of the United Nations War Crimes Commission and the Development of the Laws of War, Compiled by the United Nations War Crimes Commission, London: Published for the United Nations War Crimes Commission by His Majesty’s Stationery Office, 1948, p. 35.

¹² *The Prosecutor v. Kupreškić et al.* (Trial Judgment) ICTY-95-16-T (14 January 2000), para. 636.

collectivity and who are attacked on account of their membership. While the thrust of the two crimes is the intent to discriminate a particular population or group on diverse grounds, in the case of genocide that intent must be affixed to the intention to destroy, in whole or in part, the targeted collection of people.¹³ The *mens rea* (or mental element) requirement for both offences is considerably high compared to other international crimes, although the threshold for persecution is lower than for genocide. Taking the latter into account, this piece explores the specificity of the intent and its conditions for persecution and genocide under the Rome Statute of the International Criminal Court ('ICC').¹⁴ The approach taken is based on the Elements of Crimes and relevant jurisprudence with a view to providing for a substantive and comprehensive analysis of the mental element of the crimes of persecution and genocide.

2. Historical Development

2.1. Persecution as a Crime against Humanity

The act of persecution as a crime against humanity was first articulated under Article 6(c) of the Charter of the International Military Tribunal at Nuremberg ('IMT').¹⁵ The drafting history of the crimes under the jurisdiction of the Tribunal reveals discrepancies among the delegates that participated in the Committee III (Legal) of the United Nations War Crimes Commission. In particular, divergences originated from the nature and classification of offences.¹⁶ Those who argued for a separate categorisation of crimes against humanity stressed that numerous offences committed during the Second World War could not technically be subsumed under the general heading of war crimes on account of different elements, including nationality, political beliefs, race and religion.¹⁷ This issue would not be clarified until after the signing of the London Agreement of 8 August 1945 and the Charter annexed thereto, which vested the IMT with jurisdiction over "(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war,

¹³ Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press 2003) 106-107 ("As for persecution, the intent of seriously discriminating against members of a particular group is shared by both crimes against and genocide").

¹⁴ Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 3. As of September 2024, 124 States are Parties to the Rome Statute.

¹⁵ Charter of the International Military Tribunal at Nuremberg, London, 8 August 1945, 82 UNTS 279.

¹⁶ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf 1992) 53-68.

¹⁷ History of the United Nations War Crimes Commission and the Development of the Laws of War, 174-176.

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.” In addition, Articles 6 (a) and (b) of the IMT Charter covered crimes against peace and war crimes, respectively.

Although some credit should be given to the Commission’s Legal Committee, the definition of crimes against humanity contemplated by Article 6(c) of the IMT Charter was based on a proposal submitted by Chief US Prosecutor Robert H. Jackson to the International Conference on Military Trials in summer 1945. Professor Hersch Lauterpacht seemed to have been of help on this particular matter,¹⁸ as Prosecutor Jackson himself acknowledged.¹⁹ In particular, the latter insisted on the need to “insert words to make clear that we are reaching persecution, etc. of Jews and others in Germany as well as outside of it, and before as well as after commencement of the war.”²⁰

Article 6(c) of the IMT Charter does not provide for a definition of crimes against humanity, rather it enumerates the offences that amount to such a category. The original version of this provision, adopted on 8 August 1945, was slightly amended on 6 October 1945, which replaced a semicolon between the words “war” and “or” by a comma.²¹ This notwithstanding, the enumeration of crimes against humanity under Article 6(c) implicitly divided the provision into two offences: the “murder-type”, comprising the inhumane acts such as murder, extermination, enslavement and deportation; and the “persecution-type”, covering only those persecutions committed on political, racial or religious grounds.²² The provision contains a jurisdictional restriction that circumscribed the application of any crime contemplated by Article 6(c) to acts committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal”. This limitation thus prevented the IMT from prosecuting crimes against humanity committed before the

¹⁸ See Elihu Lauterpacht, *The Life of Sir Hersch Lauterpacht* (Cambridge University Press 2010) 271-272.

¹⁹ ‘Minutes of Conference Session of August 2, 1945’, in: Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials (Washington: US Government Printing Office 1949), 416.

²⁰ ‘Notes on Proposed Definition of “Crimes”, Submitted by American Delegation, July 31, 1945’, in: Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials (Washington: US Government Printing Office 1949), 394.

²¹ Trial of the Major War Criminals before the International Military Tribunal, Vol. I, Nuremberg, 14 November 1945 – 1 October 1946, Published at Nuremberg, Germany, 1947, 17-18.

²² This view is consistent with the drafting history of the provision, the indictment and relevant jurisprudence. See accordingly History of the United Nations War Crimes Commission and the Development of the Laws of War, 178; Trial of the Major War Criminals before the International Military Tribunal, 65-68; *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997), para. 651.

beginning of the Second World War on 1 September 1939,²³ even if Article 6(c) covered “acts committed against any civilian population, before or during the war”.

Crimes against humanity were detailed in Count Four of the indictment, which was connected to the formulation and execution of “a common plan or conspiracy” set forth in Count One. This enterprise involved *inter alia* “the murder and persecution of all who were suspected of being hostile to the Nazi Party and all who were or who were suspected of being opposed to the common plan”.²⁴ The indictment focused notably on the suffering of the Jewish population, which was “systematically persecuted since 1933”, a state policy that was “redoubled” after the commencement of the war.²⁵ In this respect, the Judgment paid considerable attention to the selective persecutory campaign against the Jews,²⁶ characterised by a “consistent and systematic inhumanity on the greatest scale”.²⁷ The anti-Jewish measures implemented by the National Socialist government covered different aspects of daily life, including the passing of discriminatory legislation, inflammatory speeches and public declarations as well as restrictions on professions and family life, all of them “directed towards the complete exclusion of Jews from German life.”²⁸ The events of November 1938 marked a turning point in view of the “[p]ogroms [that] were organised, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men.”²⁹ Since then, the antisemitic state policy intensified its severe and repressive efforts and gradually widened its scope to develop the initial marginalisation of Jews into a coordinated and effective program of extermination.³⁰

²³ The Tribunal clarified that “[t]o constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. *The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crime against Humanity within the meaning of the Charter*” (emphasis added). Trial of the Major War Criminals before the International Military Tribunal, Vol. I, Nuremberg, 14 November 1945 – 1 October 1946, Published at Nuremberg, Germany, 1947, 254.

²⁴ Trial of the Major War Criminals before the International Military Tribunal, 65.

²⁵ Trial of the Major War Criminals before the International Military Tribunal, 66-67.

²⁶ Trial of the Major War Criminals before the International Military Tribunal, 247-253.

²⁷ Trial of the Major War Criminals before the International Military Tribunal, 247.

²⁸ Trial of the Major War Criminals before the International Military Tribunal, 248.

²⁹ Trial of the Major War Criminals before the International Military Tribunal, 248.

³⁰ Trial of the Major War Criminals before the International Military Tribunal, 249.

2.2. Genocide as a Crime under International Law

Genocide did not fall into the categories of the crimes covered by the IMT Charter since it was not legally codified until late 1948.³¹ The Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') provides for the authoritative definition of the offence,³² whose wording draws influence from Raphael Lemkin's works. The Polish legal scholar coined the term in Chapter IX (on 'Genocide') of his book *Axis Rule in Occupied Europe*,³³ even though he came a long way before framing such a concept in 1943. As described in his memoirs, Lemkin developed an early interest in group-based persecution.³⁴ He closely followed the trial against Soghomon Tehlirian, a young Armenian accused of murdering Mehmed Talaat, the former grand Vizier of the Ottoman Empire,³⁵ in the streets of Berlin in 1921. The motivation behind the assassination was Talaat's prominent role in the Armenian genocide. Lemkin supported Tehlirian as he could not understand how someone who had inflicted suffering on thousands of Armenians was escaping justice.³⁶ This was the subject of a conversation with professor Stanislaw Starzynski,³⁷ who employed the following metaphor to explain the actual practice of nation's sovereignty at the time: "There was no law under which he [Talaat] could be arrested...Consider the case of a farmer who owns a flock of chickens. He kills them, and this is his business. If you interfere, you are trespassing." Lemkin was shocked: "But the Armenians are not chickens."³⁸

³¹ However, there is a reference to genocide in Count Three - War Crimes of the indictment. See Trial of the Major War Criminals before the International Military Tribunal, 43-44 ("[the defendants] conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others").

³² UN, *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by UN GA, Res. 260A(III), 9 December 1948, A/RES/260A(III), 78 UNTS 277, in force 12 January 1951 [Genocide Convention]. As of September 2024, 153 States are Parties to the Convention.

³³ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government and Proposals for Redress* (Carnegie Endowment for International Peace 1944), 79-95.

³⁴ Donna-Lee Frieze, *Totally Unofficial: The Autobiography of Raphael Lemkin* (Yale University Press 2013), 1.

³⁵ See more in Rolf Hosfeld, *Guren Petrossian: „Der Prozess gegen Soghomon Tehlirian, Deutschland 1919–1921“*, in: Groenewold/ Ignor / Koch (Hrsg.), *Lexikon der Politischen Strafprozesse*, <https://www.lexikon-der-politischen-strafprozesse.de/glossar/tehlirian-soghomon>, last accessed on 12.01.2024.

³⁶ Guren Petrossian, *Ein Strafverfahren als Ausgangspunkt der Entwicklung des Völkermordsbegriffes*, JoJZG 3, 2020, p. 96.

³⁷ Vladimir Vardanyan, *The Armenian Genocide and Its Influence on the Development of the Rafael Lemkin's Concept* in: *Agnieszka Bieńczyk-Missala* (Hrsg.), *Civilians in Contemporary Armed Conflict*, 2017, p. 249.

³⁸ Herbert Yahraes, *He Gave a Name to the World's Most Horrible Crime*. In *Collier's*, 3 March 1951, p. 28.

In the spring of 1933, Lemkin drafted a report proposing new international rules to prohibit ‘barbarity’ and ‘vandalism’,³⁹ two terms originally attributed to professor Vespasian V. Pella.⁴⁰ Lemkin expected to present his report in October of the same year at the Fifth Conference for the Unification of Penal Law, held in Madrid. The purpose of such conference was threefold: to discuss the problem of crimes creating danger for several states, to identify which crimes could be included in this category, and to ponder which offences could be considered as international.⁴¹ Lemkin’s report defined ‘barbarity’ as “acts carried out against undefended civilian populations. Massacres, pogroms, collective cruelties against women and children, the treatment of humans in a way that humiliates their dignity.”⁴² For its part, the crime of vandalism consisted of “the evil destruction of works of art and culture”.⁴³ Both offences represent a Lemkin’s early stage of thinking on the protection of human groups,⁴⁴ a process that would culminate in the formulation of ‘genocide’ ten years later. This neologism found its roots in ancient Greek –‘genos’, or γένος, meaning generally, race, beings, including clan, house, family and also tribe–, and Latin –‘cide’, from the verb caedere, meaning murder.⁴⁵

A couple of months after the IMT handed down its Judgment, the General Assembly of the United Nations adopted Resolution 96(I), on ‘The Crime of Genocide’.⁴⁶ The resolution formally recognises genocide as “a denial of the right of existence of entire human groups [...]; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form

³⁹ Raphael Lemkin, *Terrorisme, Rapport spécial*, V Conferencia Internacional para la Unificación del Derecho Penal, Madrid, Octubre 1933 (República Española), Imprenta de Galo Sáez, 1933. See also William Korey, *An Epitaph for Raphael Lemkin* (Jacob Blaustein Institute for the Advancement of Human Rights 2002) 9 et seq.

⁴⁰ William Schabas, *Genocide in International Law. The Crime of Crimes*, 2nd Ed. (Cambridge University Press 2009), 30.

⁴¹ Donna-Lee Frieze, *Totally Unofficial: The Autobiography of Raphael Lemkin* (Yale University Press 2013) 22.

⁴² Raphael Lemkin, *Terrorisme, Rapport spécial*, V Conferencia Internacional para la Unificación del Derecho Penal, Madrid, Octubre 1933 (República Española), Imprenta de Galo Sáez, 1933, 15-16 (translation by the author).

⁴³ Raphael Lemkin, *Terrorisme, Rapport spécial*, V Conferencia Internacional para la Unificación del Derecho Penal, Madrid, Octubre 1933 (República Española), Imprenta de Galo Sáez, 1933, 15 (translation by the author).

⁴⁴ See also Raphael Lemkin, *Akte der Barbarei und des Vandalismus als delicta iuris gentium*, in: *Internationales Anwaltsblatt*, Vol. 19, No. 6, 1933, 117-119; *Les Actes Constituant un Danger Général (Interetatique) considérés comme délits de droit des gens*, Rapport spécial présenté à la V-me Conférence pour l’Unification du Droit Pénal à Madrid (14-20.X.1933) (explications additionnelles), Éditions A. Pédone – Librairie de la Cour d’appel et de l’ordre des Avocats, Paris – 13, Rue Soufflot, 1934, 1-8.

⁴⁵ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government and Proposals for Redress* (Carnegie Endowment for International Peace 1944) 79.

⁴⁶ UN GA, Res. 96 (I), 11.12.1946, A/RES/96(I).

of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.” This bears the signature of Lemkin,⁴⁷ or, at least, it mirrors the language used in his publications.⁴⁸ In addition to stating that “the punishment of the crime of genocide is a matter of international concern”, Resolution 96(I) also affirms that “genocide is a crime under international law which the civilized world condemns”. This constituted the starting point for the legal codification of genocide as an international crime. Since its entry into force in 1951, the Genocide Convention has not only attained customary status,⁴⁹ but it is also a norm of *jus cogens*,⁵⁰ and articulates *erga omnes* obligations.⁵¹

3. Persecution under the Rome Statute of the International Criminal Court

As of September 2024, there is still no international treaty specifically dedicated to a Convention on the Prevention and Punishment of Crimes against Humanity.⁵² The first attempt to codify a definition of persecution as a crime against humanity into a binding international instrument was under the Rome Statute of the ICC, whose provisions aimed at reflecting existing customary law at the time of their drafting.⁵³ In this respect, Article 7(1)(h) confers the ICC with jurisdiction over the crime insofar as persecution takes place “against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as

⁴⁷ Daniel Pedreira, *An Instrument of Peace* (Bloomsbury Publishing 2020) 64; Markus Beham, *Atrocity Labelling, From Crimes Against Humanity to Genocide Studies* (Bloomsbury Publishing 2022) 27.

⁴⁸ Dirk Moses, ‘Lemkin, Culture and the Concept of Genocide’ in Donald Bloxham and Dirk Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford University Press 2010) 37.

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para. 161.

⁵⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

⁵¹ *Case concerning the Barcelona Traction, Light, and Power Company, Ltd (Belgium v. Spain)* (Judgment) [1970] ICJ Rep 3, para. 34.

⁵² See generally Mahmoud C. Bassiouni, ‘Crimes against Humanity: The Case for a Specialised Convention’ (2010) 9 Washington Universal Global Studies Law Review 575, 575-593; Leila N. Sadat, ‘A Contextual and Historical Analysis of the International Law Commission’s 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity’ (2018) 16 Journal of International Criminal Justice 683, 683-704; Charles C. Jalloh, ‘The International Law Commission’s First Draft Convention on Crimes against Humanity: Codification, Progressive Development, or Both?’ (2020) 52 Case Western Reserve Journal of International Law 331, 331-405.

⁵³ UN GA ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ (13 September 1996), Vol. I, Proceedings of the Preparatory Committee during March–April and August 1996, in UNGAOR, A/51/22, para. 54.

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”. The basis for jurisdiction is complemented by the definition of the crime offered by Article 7(2)(g), which confines its meaning to “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.

The elements that characterise persecution under the Rome Statute are mainly drawn from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’),⁵⁴ particularly from *Tadić*.⁵⁵ Article 5 of the ICTY Statute specifies a list of offences that are considered crimes against humanity, “when committed in armed conflict, whether international or internal in character, and directed against any civilian population”. The opening paragraph is followed by nine enlisted acts, including “(h) persecutions on political, racial and religious grounds”. The war-nexus requisite for crimes against humanity is similar to that of Article 6(c) of the IMT Charter, although Article 5 does not require a connection with any other crime contemplated by the ICTY Statute. This nexus to an armed conflict, either of international or non-international in character, is no longer necessary for a crime against humanity to be prosecuted at the ICC.⁵⁶ In addition, for an offence to qualify as a crime against humanity under Article 5 of the ICTY Statute must be “directed against any civilian population”, a jurisdictional threshold found also in Article 6(c) of the IMT Charter and Article 7(1) of the Rome Statute, the latter requiring the prohibited act be committed “as part of a widespread or systematic attack”, “with knowledge of the attack” on the part of the perpetrator.

3.1. A widespread or systematic attack directed against a civilian population

The Rome Statute and the Elements of Crimes require that a “widespread or systematic attack [is] directed against a civilian population”,⁵⁷ in either times of war or peace. The perpetrated act is defined as “a course of conduct involving the

⁵⁴ Statute of the International Criminal Tribunal for the Former Yugoslavia, established by UN SC Res. 827 (25 May 1993) S/RES/827.

⁵⁵ *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997), para. 697.

⁵⁶ Darryl Robinson, ‘The Context of Crimes against Humanity’, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 62–80; Kai Ambos, ‘Article 7(1)’, in Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos 2022) 145.

⁵⁷ Rome Statute, Art. 7(1); sub-para. (5) of Elements of Crimes for Art. 7(1)(h) – Crime against humanity of persecution.

multiple commission of acts referred to in [Article 7(1)] against any civilian population, pursuant to or in furtherance of a state or organisational policy to commit such attack”.⁵⁸ This does not necessarily equate with a military operation or a military attack.⁵⁹ The terms ‘widespread’ and ‘systematic’ should be understood disjunctively in the sense that a single, isolated or random act would remain out of the scope of applicability prescribed by the Rome Statute.⁶⁰ The attack must thus be either widespread or systematic.⁶¹ While ‘widespread’ has been described as referring to “the large-scale nature of the attack and the number of targeted persons”,⁶² ‘systematic’ relates to the “organised nature of the acts of

⁵⁸ Rome Statute, Art. 7(2)(a).

⁵⁹ Para. (3) of the Introduction to the Elements of Crimes for Art. 7 – Crimes against humanity (“The acts need not constitute a military attack”). See also *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-10-Corr, Pre-T Ch II (31 March 2010), para. 80.

⁶⁰ See *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997), paras. 646–648; *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T, T Ch I (2 September 1998), para. 579. See also *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgment) ICTR-95-1-T, T Ch II (21 May 1999), para. 123; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (Trial Judgment) ICTR-96-3-T, T Ch I (6 December 1999), paras. 67–68; *The Prosecutor v. Alfred Musema* (Trial Judgment) ICTR-96-13-T, T Ch I (27 January 2000), paras. 202–203; *The Prosecutor v. Tihomir Blaškić* (Trial Judgment) ICTY-IT-95-14-T (3 March 2000), para. 207; *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment) ICTY-96-23-T & IT-96-23/1-T (22 February 2001), para. 427; *The Prosecutor v. Dario Kordić and Mario Čerkez* (Trial Judgment) ICTY-IT-95/14/2-T (26 February 2001), para. 178; *The Prosecutor v. Ignace Bagilishema* (Trial Judgment) ICTR-95-1A-T, T Ch I (7 June 2001), paras. 77–78; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) ICC-01/04-01/07, Pre-T Ch I (30 September 2008), para. 412; *The Prosecutor v. Jean-Pierre Bemba Gombo* (Trial Judgment) ICC-01/05-01/08, T Ch III (21 March 2016), para. 65.

⁶¹ *The Prosecutor v. Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/05-01/08, Pre-T Ch II (15 June 2009), para. 82 (“The Chamber considers that if it finds the attack to be widespread, it needs not consider whether the attack was also systematic”). See also Kai Ambos, ‘Article 7(1)’, in Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article A Commentary*, 4th Ed. (C.H. BECK/Hart/Nomos 2022) 147.

⁶² *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-al-Rahman* (Decision on the Prosecution Application under Article 58(7) of the Statute) ICC-02/05-01/07-1-Corr, Pre-T Ch I (27 April 2007), para. 62; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) ICC-01/04-01/07, Pre-T Ch I (30 September 2008), para. 394; *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest) ICC-02/05-01/09, Pre-T Ch I (4 March 2009), para. 81; *Bemba Gombo Decision Pursuant to Article 61(7)(a) and (b)*, para. 83; *The Prosecutor v. Callixte Mbarushimana* (Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana) ICC-01/04-01/10, Pre-T Ch I (28 September 2010), para. 24; *The Prosecutor v. Laurent Koudou Gbagbo* (Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo) ICC-02/11-01/11-9-Red, Pre-T Ch III (30 November 2011), para. 49; *The Prosecutor v. Germain Katanga* (Trial Judgment) ICC-01/04-01/07, T Ch II (7 March 2014), para. 1123; *The Prosecutor v. Laurent Gbagbo* (Decision on the confirmation of charges against Laurent Gbagbo) ICC-02/11-01/11-656-Red, Pre-T Ch I (12 June 2014), para. 222.

violence and the improbability of their random occurrence”.⁶³ This qualifier, in the view of the Court, can “often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis”.⁶⁴

Furthermore, a widespread or systematic act requires ‘knowledge of the attack’,⁶⁵ which means that, while not necessarily responsible for the central attack against the civilian population, the perpetrator must at least be aware of the larger context in which the attack was taking place.⁶⁶ This does not require detailed knowledge of the attack or share the purpose of it.⁶⁷ The knowledge requisite is also a common element to all offences contemplated by the Elements of Crimes in respect of Article 7, demanding that “[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population”.⁶⁸

⁶³ *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment) ICTY-96-23-T & IT-96-23/1-T (22 February 2001), para. 429. See also *The Prosecutor v. Tihomir Blaškić* (Trial Judgment) ICTY-IT-95-14-T (3 March 2000), para. 203.

⁶⁴ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-10-Corr, Pre-T Ch II (31 March 2010), para. 96; *Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’*, ICC-02/11-14-Corr, Pre-T Ch III (15 November 2011), para. 54; *Gbagbo Decision on the Prosecutor’s Application Pursuant to Article 58*, para. 49. See also *The Prosecutor v. Germain Katanga* (Trial Judgment) ICC-01/04-01/07, T Ch II (7 March 2014), para. 1123; *The Prosecutor v. Laurent Gbagbo* (Decision on the confirmation of charges against Laurent Gbagbo) ICC-02/11-01/11-656-Red, Pre-T Ch I (12 June 2014), para. 223; *The Prosecutor v. Bosco Ntaganda* (Trial Judgment) ICC-01/04-02/06, T Ch VI (8 July 2019), para. 692; *The Prosecutor v. Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15-1762-Red, T Ch IX (4 February 2021), para. 2682.

⁶⁵ Rome Statute, Art. 7(1).

⁶⁶ *The Prosecutor v. Duško Tadić* (Trial Judgment) ICTY-IT-94-1-T (7 May 1997), para. 659; *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeal Judgment) ICTY-IT-96-23 & IT-96-23/1-A (12 June 2002), paras. 102–103; *The Prosecutor v. Tihomir Blaškić* (Appeal Judgment) ICTY-IT-95-14-A (29 July 2004), para. 124; *The Prosecutor v. Dario Kordić and Mario Čerkez* (Appeal Judgment) ICTY-IT-95/14/2-A (17 December 2004), para. 99; *The Prosecutor v. Zdravko Tolimir* (Trial Judgment) ICTY-05-88/2-T (12 December 2012), para. 700; *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgment) ICTR-95-1-T, T Ch II (21 May 1999), para. 134; *The Prosecutor v. Alfred Musema* (Trial Judgment) ICTR-96-13-T, T Ch I (27 January 2000), para. 206; *The Prosecutor v. Ignace Bagilishema* (Trial Judgment) ICTR-95-1A-T, T Ch I (7 June 2001), para. 94; *The Prosecutor v. Laurent Semanza* (Trial Judgment) ICTR-97-20-T, T Ch III (15 May 2003), para. 332; *The Prosecutor v. Juvénal Kajelijeli* (Trial Judgment) ICTR-98-44A-T, T Ch II (1 December 2003), para. 880; *The Prosecutor v. Yussuf Muniyaki* (Trial Judgment) ICTR-97-36A-T, T Ch I (5 July 2010), para. 504.

⁶⁷ *The Prosecutor v. Radovan Karadžić* (Trial Judgment) ICTY-IT-95-5/18-T (24 March 2016), para. 479; *The Prosecutor v. Ratko Mladić* (Trial Judgment) ICTY-IT-09-92-T (22 November 2017), para. 3029. See also Kai Ambos, *Treatise on International Criminal Law. Vol. II: The Crimes and Sentencing* (Oxford University Press 2014) 78.

⁶⁸ Ambos clarifies that the knowledge requisite stipulated by Art. 7 and the Elements of Crimes “constitutes an additional mental element to be distinguished from the general *mens rea* requirement of Art. 30.” Kai Ambos, ‘Article 7(1)’, in Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos 2022) 167.

In addition, the widespread or systematic act must be expressed through an ‘attack directed against any civilian population’, an expression that, under Article 7(2)(a) of the Rome Statute, demands “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 organisational policy to commit such attack”. In this regard, the term ‘directed against’ has been interpreted as requiring that civilians constitute the intended primary target of the attack, rather than incidental victims.⁶⁹ Regarding ‘any civilian population’, the qualifier ‘any’ indicates that ‘civilian population’ should be understood expansively,⁷⁰ including non-combatants or “no-longer” combatants.⁷¹ This term extends therefore protection to “all civilians”,⁷² including civilians of the same nationality as the perpetrator, stateless persons and those of a different nationality.⁷³ For its part, ‘population’ refers to the collective nature of the crime as an attack upon multiple victims,⁷⁴ whose scope seems to allude to more than a limited group of individuals.⁷⁵

⁶⁹ *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment) ICTY-96-23-T & IT-96-23/1-T (22 February 2001), para. 421; *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-10-Corr, Pre-T Ch II (31 March 2010), para. 82; *Bemba Gombo Decision Pursuant to Article 61(7)(a) and (b)*, para. 76; *The Prosecutor v. Germain Katanga* (Trial Judgment) ICC-01/04-01/07, T Ch II (7 March 2014), para. 1104; *The Prosecutor v. Jean-Pierre Bemba Gombo* (Trial Judgment) ICC-01/05-01/08, T Ch III (21 March 2016), para. 154.

⁷⁰ *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997), para. 643; *The Prosecutor v. Mile Mrkšić et al.* (Trial Judgment) ICTY-95-13/1-T (27 September 2007), para. 442; *The Prosecutor v. Kupreškić et al.* (Trial Judgment) ICTY-95-16-T (14 January 2000), para. 547; *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgment) ICTR-95-1-T, T Ch II (21 May 1999), para. 127.

⁷¹ *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997), para. 638; *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T, T Ch I (2 September 1998), para. 582; *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgment) ICTR-95-1-T, T Ch II (21 May 1999), para. 128; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (Trial Judgment) ICTR-96-3-T, T Ch I (6 December 1999), para. 72; *The Prosecutor v. Goran Jelisić* (Trial Judgment) ICTY-95-10-T, T Ch (14 December 1999), para. 54; *The Prosecutor v. Alfred Musema* (Trial Judgment) ICTR-96-13-T, T Ch I (27 January 2000), para. 207; *The Prosecutor v. Tihomir Blaškić* (Trial Judgment) ICTY-IT-95-14-T (3 March 2000), para. 214; *The Prosecutor v. Ignace Bagilishema* (Trial Judgment) ICTR-95-1A-T, T Ch I (7 June 2001), para. 79; *Prosecutor v. Milorad Krnojelac* (Trial Judgment) ICTY-IT-97-25-T, T Ch II (15 March 2002), para. 56; *The Prosecutor v. Stanislav Galić* (Trial Judgment) ICTY-IT-98-29-T, T Ch I (5 December 2003), para. 143.

⁷² Darryl Robinson, ‘Defining ‘Crimes against Humanity’ at the Rome Conference’ (1999), 93 *American Journal of International Law* 43, 51.

⁷³ *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997), para. 635.

⁷⁴ *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997), para. 644.

⁷⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/05-01/08, Pre-T Ch II (15 June 2009), para. 77; *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-10-Corr, Pre-T Ch II (31 March 2010), para. 81; *The Prosecutor v. Germain*

Moreover, the policy element included in the closing of the provision requires that the prohibited acts under Article 7 are linked to a state or to an organisation or a group,⁷⁶ which aims at committing an attack against a civilian population.⁷⁷ Neither the formal adoption or announcement of such a program by the state or organisation nor its concrete details are demanded by the ICC.⁷⁸ This requirement is distinct from the systematic character of an attack and should not be conflated.⁷⁹

3.2. The identifiable group or collectivity

The Elements of Crimes clarify that the reference to “any identifiable group or collectivity” in Article 7(1)(h) means that the perpetrator must deprive “one or more persons of fundamental rights”,⁸⁰ “by reason of the identity of a group or collectivity or targeted the group or collectivity as such”.⁸¹ The Rome Statute does not say what is to be understood by ‘group’ and by ‘collectivity’, but the word ‘identifiable’ seems to imply a subjective notion, either based on objective criteria or in the mind of the perpetrator.⁸² In contrast to the crime of genocide,⁸³ not all the

Katanga (Trial Judgment) ICC-01/04-01/07, T Ch II (7 March 2014), para. 1105; *The Prosecutor v. Jean-Pierre Bemba Gombo* (Trial Judgment) ICC-01/05-01/08, T Ch III (21 March 2016), para. 154.

⁷⁶ ‘Draft Code of Crimes against the Peace and Security of Mankind’, in Yearbook of the International Law Commission, 1996, vol. II, Part Two, 47 (“A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group”).

⁷⁷ *The Prosecutor v. Germain Katanga* (Trial Judgment) ICC-01/04-01/07, T Ch II (7 March 2014), para. 1113; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Judgment) ICC-01/12-01/18, T Ch X (26 June 2024), para. 1108.

⁷⁸ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) ICC-01/04-01/07, Pre-T Ch I (30 September 2008), para. 396; *The Prosecutor v. Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/05-01/08, Pre-T Ch II (15 June 2009), para. 81; *The Prosecutor v. Germain Katanga* (Trial Judgment) ICC-01/04-01/07, T Ch II (7 March 2014), paras. 1109–1110; *The Prosecutor v. Jean-Pierre Bemba Gombo* (Trial Judgment) ICC-01/05-01/08, T Ch III (21 March 2016), para. 160. See also *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997), para. 653; *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T, T Ch I (2 September 1998), para. 580.

⁷⁹ *The Prosecutor v. Germain Katanga* (Trial Judgment) ICC-01/04-01/07, T Ch II (7 March 2014), paras. 1101, 1112; *Gbagbo Decision on the confirmation of charges*, paras. 208, 216.

⁸⁰ See sub-para. (1) of Elements of Crimes for Art. 7(1)(h) – Crime against humanity of persecution.

⁸¹ See sub-para. (2) of Elements of Crimes for Art. 7(1)(h) – Crime against humanity of persecution; Rome Statute, Art. 7(2)(g).

⁸² Joseph Powderly and Niamh Hayes, ‘Article 7(1)(h): Persecution’, in Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article A Commentary*, 4th Ed. (C.H. BECK/Hart/Nomos 2022) 224. See also Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd Ed. (Oxford University Press 2014) 373; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* (Trial Judgment) ICTY-IT-02-60-T, T Ch I (17 January 2005), para. 583; *The Prosecutor v. KAINING Guek Eav alias Duch* (Appeal Judgment) 001/18-07-2007/ECCC/SC (3 February 2012), para. 272.

⁸³ See sub-para. (2) of Elements of Crimes for Art. 6 – Genocide (“Such person or persons belonged to a particular national, ethnical, racial or religious group”).

victims of the crime of persecution are required to be members, sympathisers, allies of, or in any other way related to, the protected group.⁸⁴ In this regard, it is plausible to argue that the term ‘identifiable’ is broad enough so as to cover “groups defined by exclusion”, that is, individuals who have been rejected or stigmatised by the perpetrator for allegedly belonging to a distinct group or collectivity.⁸⁵

Furthermore, Article 7(1)(h) specifies that the motives of the targeting must rely on “political, racial, national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized as impermissible under international law”. The language of the Rome Statute therefore expands the grounds for persecution as compared to the three listed bases stipulated by the ICTY Statute, being the former partially based on those conferred by the introductory paragraph of Article 3 of the Statute for the International Criminal Tribunal for Rwanda (‘ICTR Statute’).⁸⁶ The discriminatory intent “is an indispensable legal ingredient” of the crime of persecution,⁸⁷ thus constituting the only act covered by Article 7 which “expressly” requires such an intent on the part of the perpetrator.⁸⁸ As a result, the discriminatory motive ends up becoming an accompanying and necessary component of persecution when the latter is directed towards an individual on the

⁸⁴ *The Prosecutor v. Bosco Ntaganda* (Trial Judgment) ICC-01/04-02/06, T Ch VI (8 July 2019), para. 1011; *The Prosecutor v. Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15-1762-Red, T Ch IX (4 February 2021), para. 2736.

⁸⁵ *The Prosecutor v. Goran Jelisić* (Trial Judgment) ICTY-95-10-T, T Ch (14 December 1999), para. 71. See also *The Prosecutor v. Bosco Ntaganda* (Trial Judgment) ICC-01/04-02/06, T Ch VI (8 July 2019), para. 1009; *Le Procureur c. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud) ICC-01/12-01/18, Ch Pré I (13 novembre 2019), para. 707; *The Prosecutor v. Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15-1762-Red, T Ch IX (4 February 2021), para. 2735; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Judgment) ICC-01/12-01/18, T Ch X (26 June 2024), para. 1206. See also Gurgen Petrossian, ‘Persecution as Crime against Humanity in the Context of the Nagorno-Karabakh Conflict’ (2025), *Jimel*, 16 with further references.

⁸⁶ Statute for the International Criminal Tribunal for Rwanda, established by UN SC Res 955 (8 November 1994) S/RES/955. The opening of Art. 3 of the ICTR Statute, on crimes against humanity, reads as follows: “The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”.

⁸⁷ *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-A (15 July 1999), para. 305. See also *The Prosecutor v. Kupreškić et al.* (Trial Judgment) ICTY-95-16-T (14 January 2000), paras. 633-634.

⁸⁸ *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-A (15 July 1999), para. 305; *The Prosecutor v. Jean-Paul Akayesu* (Appeal Judgment) ICTR-96-4-A (1 June 2001), para. 467; *The Prosecutor v. Laurent Semanza* (Trial Judgment) ICTR-97-20-T, T Ch III (15 May 2003), para. 332. See also Joseph Powderly and Niamh Hayes, ‘Article 7(1)(h): Persecution’, in Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article A Commentary*, 4th Ed. (C.H. BECK/Hart/Nomos 2022) 224 (“the requirement of discriminatory intent is unique to the crime of persecution”).

basis of his/her membership in a certain group, or targeting a group or collectivity as such on prohibited grounds.⁸⁹ This may be inferred from the general behaviour of the perpetrator and the circumstances surrounding the commission of the crime.⁹⁰

3.3. The connection requirement

The scope of persecution is restricted by the second half of Article 7(1)(h), which charges the offence to be committed in connection with any act referred to in Article 7(1) of the Rome Statute or any crime within the jurisdiction of the Court.⁹¹ This condition has been regarded as controversial,⁹² but does not emerge as an entirely new element. Similar terms were found under the IMT Charter in relation to crimes against peace and war crimes (not in connection with another crime against humanity),⁹³ the Tokyo Charter,⁹⁴ and Principle VI of the Nürnberg Principles.⁹⁵ Conversely, such requisite was neither covered by the Control Council Law No. 10,⁹⁶ the ICTY Statute nor the ICTR Statute.

⁸⁹ See sub-para. (3) of Elements of Crimes for Art. 7(1)(h) – Crime against humanity of persecution. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09, Pre-T Ch I (4 March 2009), para. 141 ("persecutory intent consisting of the intent to discriminate on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, against the members of a group, by reason of the identity of the group").

⁹⁰ *The Prosecutor v. Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15-1762-Red, T Ch IX (4 February 2021), para. 2739; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Judgment) ICC-01/12-01/18, T Ch X (26 June 2024), para. 1212.

⁹¹ See sub-para. (4) of Elements of Crimes for Art. 7(1)(h) – Crime against humanity of persecution.

⁹² Pablo Gavira Díaz, *The Liability for Attacks against Immovable Cultural Objects in International Criminal Law* (Nomos 2022) 361–362.

⁹³ The IMT had jurisdiction over crimes against humanity, "namely, 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 domestic law of the country where perpetrated" (emphasis added). IMT Charter, Art. 6(c).

⁹⁴ The Tribunal was conferred with jurisdiction over crimes against humanity, "namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial 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. Leaders' organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any or the foregoing crimes are responsible for all 'acts performed by any person in execution of such plan'" (emphasis added). See Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, TIAS No. 1589, Art 5(c).

⁹⁵ 'Formulation of the Nürnberg Principles', in Yearbook of the International Law Commission, 1950, vol. II, 377 (c. Crimes against humanity).

⁹⁶ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, 31 January 1946, 50–55.

The ‘connection requirement’ was the result of a compromise,⁹⁷ and responded to the scepticism of some delegations at the preparatory commission of the ICC which were concerned about the possibility that any discriminatory practices could be characterised as crimes against humanity.⁹⁸ For this reason, for a persecutory act to fall under the scope of Article 7(1)(h), the Rome Statute demands a connection or link between the offence, that is taking place on a widespread or systematic basis against any civilian population, and any of the prohibited acts listed elsewhere in paragraph 1,⁹⁹ which are the kind of acts that typically come along in the course of a persecution campaign.¹⁰⁰ Neither the Rome Statute nor the Elements of Crimes require that connected acts under Article 7(1) meet the contextual elements for crimes against humanity.¹⁰¹

Moreover, the Elements of Crimes clarify that “no additional mental element is necessary for this element other than that inherent in element 6 [the knowledge of the attack element]”.¹⁰² With regards to the connection between persecution and another crime within the jurisdiction of the Court (e.g. war crimes or genocide), the

⁹⁷ Kai Ambos and Steffen Wirth, ‘The current law of crimes against humanity: An analysis of UNTAET Regulation 15/2000’ (2002) 13 Criminal Law Forum 1, 71.

⁹⁸ Darryl Robinson, ‘Defining ‘Crimes against Humanity’ at the Rome Conference’ (1999) 93 American Journal of International Law 43, 53. See also Herman von Hebel and Darryl Robinson, ‘Crimes within the Jurisdiction of the Court’, in Roy S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute* (Kluwer Law International 1999) 101; Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd Ed. (Oxford University Press 2014) 376–377; Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd Ed. (Cambridge University Press 2010) 260; Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 70.

⁹⁹ See also *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, ICC-01/17-X, Pre-T Ch III (9 November 2017), para. 131; *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, paras. 668 and 672; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Judgment) ICC-01/12-01/18, T Ch X (26 June 2024), para. 1208.

¹⁰⁰ Darryl Robinson, ‘Defining ‘Crimes against Humanity’ at the Rome Conference’ (1999) 93 American Journal of International Law 43, 55; Mohamed E. Badar, ‘From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity’ (2004) 5 San Diego International Law Journal 73, 127; Yaron Gottlieb, ‘Criminalising Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC’ (2005) 23 Penn State International Law Review 857, 875, fn 85; Mahmoud C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 405; Kai Ambos, *Treatise on International Criminal Law. Vol. II: The Crimes and Sentencing* (Oxford University Press 2014), 106; Pauline Martini, Joe Holt and Maud Sarliève, ‘Mass Deforestation as a Crime against Humanity?’ (2023) 72 The International and Comparative Law Quarterly 1013, 1033.

¹⁰¹ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Judgment) ICC-01/12-01/18, T Ch X (26 June 2024), para. 1208 (Judge Akane dissenting).

¹⁰² See sub-para. (4), fn 22 of Elements of Crimes for Art. 7(1)(h) – Crime against humanity of persecution.

latter crime must satisfy all the necessary elements in order for the persecutory act to constitute a crime against humanity.

3.4. An intentional and severe deprivation of fundamental rights

The persecutory conduct punished under Article 7(1)(h) must involve an “intentional and severe deprivation of fundamental rights contrary to international law”, as stipulated by Article 7(2)(g) of the Rome Statute and sub-paragraph (1) of the Elements of Crimes for Article 7(1)(h). The Court has confirmed that such infringement may affect a wide range of basic rights, including “the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment, the right not to be subjected to arbitrary detention, the right to freedom of expression, the right to freedom of assembly and association, freedom of movement, the right to private property, the right not to be held in slavery or servitude, and the right to education.”¹⁰³ It becomes thus apparent that for an act to qualify as persecution under the Rome Statute need not necessarily constitute an offence listed in Article 7(1).

The ‘intentional’ requisite specified in the opening of Article 7(2)(g) draws from *Tadić*, in which the Trial Chamber stated that “what is necessary [for an act to constitute persecution] is some form of discrimination that is *intended* to be and results in an infringement of an individual’s fundamental rights.”¹⁰⁴ In addition, the intentional deprivation of fundamental rights needs to reach a ‘severe’ level of gravity.¹⁰⁵ This qualifier does not relate to the character of the persecutory act as such, but to the character of the infringement of fundamental rights that is inherent to the discriminatory requisite.¹⁰⁶ The same chamber in *Tadić* clarified that “[i]t is

¹⁰³ *The Prosecutor v. Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15-1762-Red, T Ch IX (4 February 2021), para. 2733; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Judgment) ICC-01/12-01/18, T Ch X (26 June 2024), para. 1201. See also ‘Draft Code of Crimes against the Peace and Security of Mankind’, in Yearbook of the International Law Commission, 1991, vol. II, Part Two, 103–104 (Article 21. Systematic or mass violations of human rights); ‘Draft Code of Crimes against the Peace and Security of Mankind’, in Yearbook of the International Law Commission, 1996, vol. II, Part Two, 47–50 (Article 18. Crimes against humanity).

¹⁰⁴ Emphasis added. *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997), para. 697.

¹⁰⁵ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Judgment) ICC-01/12-01/18, T Ch X (26 June 2024), para. 1203.

¹⁰⁶ Joseph Powderly and Niamh Hayes, ‘Article 7(1)(h): Persecution’, in Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article A Commentary*, 4th Ed. (C.H. BECK/Hart/Nomos 2022) 294.

the violation of the right to equality *in some serious fashion* that infringes on the enjoyment of a basic or fundamental right that constitutes persecution”.¹⁰⁷

4. Genocide under the Rome Statute of the International Criminal Court

Article 6 of the Rome Statute defines the crime of genocide by reproducing the text of Article II of the Genocide Convention. This limits the scope of the term to “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; [and] (e) Forcibly transferring children of the group to another group.” It becomes apparent that the opening paragraph is the central part of this provision. This contains the specific intent of the crime (“committed with intent to destroy”), the threshold (“in whole or in part”), and the targets of genocide (“a national, ethnical, racial or religious group, as such”).

4.1. A national, ethnical, racial or religious group, as such

‘Group’ is the most repeated term in Article 6, becoming as a result the thrust of the provision. However, neither the Genocide Convention nor the Rome Statute shed light on its meaning. This is unsurprising in view of the lack of consensus in the early drafts of the Convention and in the subsequent debates on the categories of protected groups.¹⁰⁸ In the realms of sociology and anthropology, the notion of group refers to a collection of individuals characterised by both subjective and objective traits and sharing common features.¹⁰⁹ Available jurisprudence has

¹⁰⁷ Emphasis added. *The Prosecutor v. Dusko Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997), para. 697. See also *The Prosecutor v. Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15-1762-Red, T Ch IX (4 February 2021), para. 2733; *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, para. 132; *The Prosecutor v. Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06, Pre-T Ch II (9 June 2014), para. 58; *Le Procureur c. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud), ICC-01/12-01/18, Ch Pré I (13 novembre 2019), para. 664; *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19, Pre-T Ch III (14 November 2019), para. 101.

¹⁰⁸ William Schabas, *Genocide in International Law. The Crime of Crimes*, 2nd Ed. (Cambridge University Press 2009) 121.

¹⁰⁹ Rajendra Kumar Sharma, *Fundamentals of Sociology* (Atlantic Publishers & Distributors (P) Limited 1996) 123-124.

determined on a case-by-case basis the particular characteristics of each of the protected groups,¹¹⁰ which is to be assessed in the light of “a particular political, social and cultural context”.¹¹¹ This has to be also formulated in “positive” terms insofar as each human group is distinct and possesses “particular identities”.¹¹² A group “is [thus] defined by particular positive characteristics –national, ethnical, racial or religious– and not the lack of them.”¹¹³ A negative definition of a group, e.g. non-Serbs in a particular region, does not therefore meet the aforementioned criteria.¹¹⁴

¹¹⁰ *The Prosecutor v. Radislav Krstić* (Trial Judgment) ICTY-98-33-T, T Ch (2 August 2001), paras. 555-556, finding that “[t]he preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as ‘national minorities’, rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention” (para. 556); *The Prosecutor v. Radoslav Brđanin* (Trial Judgment) ICTY-99-36-T, T Ch II (1 September 2004), para. 682. See also *The Prosecutor v. Radovan Karadžić* (Trial Judgment) ICTY-95-5/18-T, T Ch (24 March 2016), para. 541; *The Prosecutor v. Vujadin Popović et al.* (Trial Judgment) ICTY-05-88-T, T Ch II (10 June 2010), para. 809; *The Prosecutor v. Zdravko Tolimir* (Trial Judgment) ICTY-05-88/2-T (12 December 2012), para. 735; *The Prosecutor v. Goran Jelisić* (Trial Judgment) ICTY-95-10-T, T Ch (14 December 1999), para. 70; *The Prosecutor v. Laurent Semanza* (Trial Judgment) ICTR-97-20-T, T Ch III (15 May 2003), para. 317; *The Prosecutor v. Juvénal Kajelijeli* (Trial Judgment) ICTR-98-44A-T, T Ch II (1 December 2003), para. 811; *The Prosecutor v. Tharcisse Muvunyi* (Trial Judgment) ICTR-2000-55A-T, T Ch II (12 September 2006), para. 484.

¹¹¹ *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (Trial Judgment) ICTR-96-3-T, T Ch I (6 December 1999), para. 56; *The Prosecutor v. Radislav Krstić* (Trial Judgment) ICTY-98-33-T, T Ch (2 August 2001), para. 557.

¹¹² *The Prosecutor v. Milomir Stakić* (Appeal Judgment) ICTY-97-24-A, App Ch II (22 March 2006), paras. 20 et seq.

¹¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para. 193. See also *The Prosecutor v. Milomir Stakić* (Appeal Judgment) ICTY-97-24-A, App Ch II (22 March 2006), para. 21; *The Prosecutor v. Vujadin Popović et al.* (Trial Judgment) ICTY-05-88-T, T Ch II (10 June 2010), para. 809; *The Prosecutor v. Radovan Karadžić* (Trial Judgment) ICTY-95-5/18-T, T Ch (24 March 2016), para. 541; *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest) ICC-02/05-01/09, Pre-T Ch I (4 March 2009), para. 135.

¹¹⁴ *The Prosecutor v. Milomir Stakić* (Appeal Judgment) ICTY-97-24-A, App Ch II (22 March 2006), paras. 19-20, 28. See also *The Prosecutor v. Vujadin Popović et al.* (Trial Judgment) ICTY-05-88-T, T Ch II (10 June 2010), para. 809. Thus, the Appeals Chamber rejects what the Trial Chamber in *Jelisić* called as “negative approach”, that “consists of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.” *The Prosecutor v. Goran Jelisić* (Trial Judgment) ICTY-95-10-T, T Ch (14 December 1999), paras 70-71. Also, Kreß argues that this “subjective approach by negation” constitutes an “obvious departure from the wording and purpose of the Genocide Convention”. Claus Kreß, ‘The Crime of Genocide Under International Law’ (2006) 6 International Criminal Law Review 461, 474. See also William Schabas, *Genocide in International Law. The Crime of Crimes*, 2nd Ed. (Cambridge University Press 2009) 131-132.

The fact that the jurisprudence has determined that a group is defined “as such” (i.e. targeting the group through its members) is not only in consonance with the Genocide Convention, whose purpose includes *inter alia* the safeguarding of “the very existence of certain human groups”,¹¹⁵ but also with Lemkin’s understanding of the crime.¹¹⁶ This has, however, sparked controversy within literature, particularly on the protected legal interest of genocide. Does the foundation of the crime aim at safeguarding the individual interests of all members of a protected group,¹¹⁷ or it transcends to a more collective and protective character of human groups?¹¹⁸ Reason suggests that the latter is the correct view, thus being the individual approach by all means an indirect consequence of it.¹¹⁹ This argument is reinforced by the description of genocide reached by Resolution 96(I), which alludes to “a denial of existence of entire human groups”, as the targets of the crime.

The collective approach towards genocide, in the view of the jurisprudence, “requires a positive identification of the group”,¹²⁰ which presents “well-

¹¹⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23. See also UN GA, Res. 96(I), 11.12.1946, A/RES/96(I) (“[g]enocide is a denial of the right of existence of entire groups”); *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest) ICC-02/05-01/09, Pre-T Ch I (4 March 2009), para. 114 (“[the purpose of genocide] is to destroy in whole or in part the existence of a specific group or people”).

¹¹⁶ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government and Proposals for Redress* (Carnegie Endowment for International Peace 1944) 79.

¹¹⁷ Stefan Kirsch, ‘The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct’, in Christoph Safferling and Eckart Conze (eds.), *The Genocide Convention sixty years after its adoption* (TMC Asser Press 2010) 147 et seq with further references.

¹¹⁸ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para. 161; Gerhard Werle, Florian Jeßberger, *Völkerstrafrecht*, 2016, p. 373.

¹¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* Provisional Measures (Order) [2020] ICJ Rep 3, para. 52.

¹²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para. 194. Similarly, the ICTY came to the same conclusion, stating that the term ‘as such’ “shows that the offence requires intent to destroy a collection of people who have a particular group identity. Yet when a person targets individuals because they lack a particular national, ethnical, racial, or religious characteristic, the intent is not to destroy particular groups with particular identities as such, but simply to destroy individuals because they lack certain national, ethnical, racial or religious characteristics.” *The Prosecutor v. Milomir Stakić* (Appeal Judgment) ICTY-97-24-A, App Ch II (22 March 2006), para. 20. See also *The Prosecutor v. Ratko Mladić* (Trial Judgment) ICTY-09-92-T, T Ch I (22 November 2017), para. 3436; *The Prosecutor v. Radovan Karadžić* (Trial Judgment) ICTY-95-5/18-T, T Ch (24 March 2016), para. 551; *The Prosecutor v. NUON Chea and KHIEU Samphan* (Case 002/02 Judgment) 002/19-09-2007/ECCC/TC, T Ch (16 November 2018), para. 798.

established, some said immutable, characteristics”.¹²¹ The crime must be as a result directed at “stable” groups, as opposed to those which are of “mobile” character, namely political or economic groups.¹²² While membership to the former is determined by birth, one joins dynamic or changing groups through individual voluntary commitment.¹²³ It has been said that this vision supports the exclusion of both political groups and cultural genocide from the final version of the Genocide Convention.¹²⁴

4.2. In whole or in part

The crime of genocide is conditioned upon the intent to destroy a group, regardless of the factual destruction of the latter in whole or in part. The *chapeau* of Resolution 96(I) states that many instances of genocide “have occurred when racial, religious, political or other groups have been destroyed, entirely or in part”. Article 6 of the Rome Statute reads similarly, declaring that acts of genocide must be committed with the intent to destroy, “in whole or in part”, a protected group. The drafting history of the Genocide Convention does not offer guidance on the matter.

Sub-paragraphs (a), (b) and (e) of Article 6 relate to acts imposed against members of a protected group, while sub-paragraphs (c) and (d) refer to measures which do not necessarily and directly concern individuals. The question of whether the death of an individual could qualify as a genocide was brought out by the preparatory works of the Convention, which supported the interpretation of an

¹²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para. 194. For a general definition of the four-listed groups, see *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T, Tr Ch I (2 September 1998), paras. 512-515. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest) ICC-02/05-01/09, Pre-T Ch I (4 March 2009), para. 135.

¹²² *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T, T Ch I (2 September 1998), para. 511; *The Prosecutor v. Alfred Musema* (Trial Judgment) ICTR-96-13-T, T Ch I (27 January 2000), para. 16.

¹²³ See David Nersessian, *Genocide and political groups*. 2010, p. 107; Agnieszka Szpak, *National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals*, *European Journal of International Law*, 2012 23/1, p. 155; Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd Ed. (Oxford University Press 2014) 295.

¹²⁴ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para. 194; *The Prosecutor v. Milomir Stakić* (Appeal Judgment) ICTY-97-24-A, App Ch II (22 March 2006), paras. 23-24.

individual genocide.¹²⁵ As a matter of fact, the wording of sub-paragraphs (a) and (b) appear to permit an individual genocide,¹²⁶ provided that the person is targeted based on his/her membership in a protected group. In practice, and despite the explicit language of such provisions, an isolated act resulting in the death of a member of a protected group would hardly fall under sub-paragraph (a) of Article 6. The argument of an individual genocide seems to be sustained insofar as the attack against the victim is part of a series of similar acts aiming at the destruction of the group to which that individual belonged.¹²⁷ The same applies to sub-paragraphs (b) and (e) if they are aimed at the same end.¹²⁸

Article 6 singles out people with national, ethnic, racial or religious characteristics as the target of the perpetrator, whose ultimate aim is the destruction of the group “in whole or in part” to which that people belong. This provision does not therefore require that a group must be destroyed in its entirety. It has been said that the partial destruction of a group suggests a series of homicidal actions “with a connecting aim”, i.e. directed against persons with specific characteristics.¹²⁹ In respect of the number of victims, there seems to be consensus that the intent to destroy must extend to at least a “substantial” part of a protected group,¹³⁰ whose

¹²⁵ Doc A/C.6/224 & Corr. 1, reprinted in Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, Vol. II (Martinus Nijhoff Publishers 2008) 1978. However, it was decided “not to state that view in [the Committee’s] report to the Economic and Social Council in order that the Council, and later the General Assembly, should be free to give any interpretation they deemed desirable [...]”. See the statement by the Venezuelan delegate in Doc. A/C.6/SR.81, reprinted in Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, Vol. II (Martinus Nijhoff Publishers 2008) 1479.

¹²⁶ See Pablo Gavira Díaz, ‘The Physical, Biological and Cultural Dimensions of Genocide: An Expansive Interpretation of the Crime?’ (2022) 21 *Journal on Ethnopolitics and Minority Issues in Europe* 111, 123–124.

¹²⁷ See also *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgment) ICTR-95-1-T, T Ch II (21 May 1999), para. 94; *The Prosecutor v. Goran Jelisić* (Trial Judgment) ICTY-95-10-T, T Ch (14 December 1999), paras. 100–101.

¹²⁸ Nehemiah Robinson, *The Genocide Convention: Its Origins and Interpretation* (Institute of Jewish Affairs: World Jewish Congress 1949) 17; William Schabas, *Genocide in International Law. The Crime of Crimes*, 2nd Ed. (Cambridge University Press 2009) 179; Florian Jessberger, ‘The Definition and the Elements of the Crime of Genocide’, in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009) 94; Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd Ed. (Oxford University Press 2014) 309.

¹²⁹ Nehemiah Robinson, *The Genocide Convention: Its Origins and Interpretation* (Institute of Jewish Affairs: World Jewish Congress 1949) 17.

¹³⁰ Nehemiah Robinson, *The Genocide Convention: Its Origins and Interpretation* (Institute of Jewish Affairs: World Jewish Congress 1949) 17–18; Leo Kuper, *Genocide* (Yale University Press 1981) 32 (“‘substantial’ or an ‘appreciable’ number of victims”); Christoph Safferling, ‘The Special Intent Requirement in the Crime of Genocide’, in Christoph Safferling and Eckart Conze (eds.), *The Genocide Convention sixty years after its adoption* (TMC Asser Press 2010) 177; ‘Draft Code of Crimes against the Peace and Security of Mankind’, in *Yearbook of the International Law Commission*, 1996, vol. II, Part Two, 45, para. 8. See also, for example, *The Prosecutor v. Goran*

scope must be assessed on a case-by-case basis.¹³¹ This includes an evaluation on whether the part of the targeted group is “significant enough to have an impact on the group as a whole”.¹³² The “area of the perpetrator’s activity and control” is also a factor to be considered insofar as genocide may be found to have been committed where the intent is to destroy the group “within a geographically limited area”.¹³³ In addition, the importance of the targeted part in relation to the overall size of the entire group is a relevant criterion to determine whether it qualifies as substantial within the meaning of Article 6.¹³⁴

Jelišić (Trial Judgment) ICTY-95-10-T, T Ch (14 December 1999), para. 82; *The Prosecutor v. Duško Sikirica, Damir Došen and Dragan Kolundžija* (Judgment on Defence Motions to Acquit) ICTY-95-8-T, T Ch (3 September 2001), para. 65; *The Prosecutor v. Ignace Bagilishema* (Trial Judgment) ICTR-95-1A-T, T Ch I (7 June 2001), para. 64; *The Prosecutor v. Laurent Semanza* (Trial Judgment) ICTR-97-20-T, T Ch III (15 May 2003), para. 316; *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgment) ICTR-95-1-T, T Ch II (21 May 1999), paras. 96 et seq.; *The Prosecutor v. Radislav Krstić* (Trial Judgment) ICTY-98-33-T, T Ch (2 August 2001), para. 634; *The Prosecutor v. Radislav Krstić* (Appeal Judgment) ICTY-98-33-A, App Ch (19 April 2004), paras. 12–14; *The Prosecutor v. Radoslav Brđanin* (Trial Judgment) ICTY-99-36-T, T Ch II (1 September 2004), paras. 702–703; *The Prosecutor v. Jean de Dieu Kamuhanda* (Trial Judgment) ICTR-95-54A-T, T Ch II (22 January 2004), para. 628; *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest) ICC-02/05-01/09, Pre-T Ch I (4 March 2009), para. 146.

¹³¹ Nehemiah Robinson, *The Genocide Convention: Its Origins and Interpretation* (Institute of Jewish Affairs: World Jewish Congress 1949) 18. See also *The Prosecutor v. Ignace Bagilishema* (Trial Judgment) ICTR-95-1A-T, T Ch I (7 June 2001), para. 65; *The Prosecutor v. Laurent Semanza* (Trial Judgment) ICTR-97-20-T, T Ch III (15 May 2003), para. 317; *The Prosecutor v. Radoslav Brđanin* (Trial Judgment) ICTY-99-36-T, T Ch II (1 September 2004), para. 684; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* (Trial Judgment) ICTY-IT-02-60-T, T Ch I (17 January 2005), para. 667; *The Prosecutor v. Tharcisse Muvunyi* (Trial Judgment) ICTR-2000-55A-T, T Ch II (12 September 2006), para. 484; *The Prosecutor v. Radovan Karadžić* (Trial Judgment) ICTY-95-5/18-T, T Ch (24 March 2016), para. 541.

¹³² *The Prosecutor v. Radislav Krstić* (Appeal Judgment) ICTY-98-33-A, App Ch (19 April 2004), para. 8; *The Prosecutor v. Vujadin Popović et al.* (Trial Judgment) ICTY-05-88-T, T Ch II (10 June 2010), paras. 831-832; *The Prosecutor v. Zdravko Tolimir* (Trial Judgment) ICTY-05-88/2-T (12 December 2012), para. 749; *The Prosecutor v. Radovan Karadžić* (Trial Judgment) ICTY-95-5/18-T, T Ch (24 March 2016), para. 555. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para. 198; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* Provisional Measures (Order of 26 January 2024) [2024] ICJ Rep 1, para. 45.

¹³³ *The Prosecutor v. Radislav Krstić* (Appeal Judgment) ICTY-98-33-A, App Ch (19 April 2004), para. 13; *The Prosecutor v. Radovan Karadžić* (Trial Judgment) ICTY-95-5/18-T, T Ch (24 March 2016), para. 555. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para. 199.

¹³⁴ *The Prosecutor v. Radislav Krstić* (Appeal Judgment) ICTY-98-33-A, App Ch (19 April 2004), para. 12; *The Prosecutor v. Sylvestre Gacumbitsi* (Appeal Judgment) ICTR-2001-64-A, App Ch (7 July 2006), para. 40; *The Prosecutor v. Radovan Karadžić* (Trial Judgment) ICTY-95-5/18-T, T Ch (24 March 2016), para. 555. See also *Application of the Convention on the Prevention and*

4.3. Committed with (specific) intent to destroy

In addition to the five genocidal acts or *actus reus*, and besides the intent and knowledge related to the material elements of the crime under Article 30 of the Rome Statute, Article 6 requires the establishment of the mental elements or *mens rea* for an act to qualify as genocide.¹³⁵ The meaning of intent is what makes this crime distinct from any other serious offences under international law,¹³⁶ since it relates to an exact description, namely “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. In this regard, the specific intent to destroy a protected group (also known as special intent or *dolus specialis*) is part of the mental element of the crime,¹³⁷ and complements the general intent requirement (*dolus generalis*) which relates to the material elements of the individual genocidal act.¹³⁸ While the latter pertains to the opening of Article 6 (“genocide means any of the following acts”) as well as to the listed prohibited acts (sub-paragraphs (a) to (e)), the *dolus specialis* consists of the “intent to destroy, in whole or in part, [the protected] group, as such”.¹³⁹ Genocide thus has two layers of *mens rea*,¹⁴⁰ which must be clearly distinguished.

Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits) [2007] ICJ Rep 43, para. 200.

¹³⁵ Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs: World Jewish Congress 1960) 58; Kai Ambos, *Treatise on International Criminal Law. Vol. II: The Crimes and Sentencing* (Oxford University Press 2014) 18. See also *The Prosecutor v. Radislav Krstić* (Appeal Judgment) ICTY-98-33-A, App Ch (19 April 2004), para. 134; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para. 187.

¹³⁶ Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd Ed. (Cambridge University Press 2010) 205. See also *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T, T Ch I (2 September 1998), para. 498; *The Prosecutor v. Jean Kambanda* (Trial Judgment) ICTR 97-23-S, T Ch I (4 September 1998), para. 16; *The Prosecutor v. Goran Jelisić* (Trial Judgment) ICTY-95-10-T, T Ch (14 December 1999), para. 66.

¹³⁷ *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T, T Ch I (2 September 1998), para. 517.

¹³⁸ Florian Jessberger, ‘The Definition and the Elements of the Crime of Genocide’, in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009) 105; Kai Ambos, ‘What does ‘intent to destroy’ in genocide mean?’ (2009) 91 *International Review of the Red Cross* 833, 835; Christoph Safferling, ‘The Special Intent Requirement in the Crime of Genocide’, in Christoph Safferling and Eckart Conze (eds.), *The Genocide Convention sixty years after its adoption* (TMC Asser Press 2010) 170.

¹³⁹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest) ICC-02/05-01/09, Pre-T Ch I (4 March 2009), paras. 138-139.

¹⁴⁰ Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law: Cases & Commentary* (Oxford University Press 2011) 201. See also Kai Ambos, ‘What does ‘intent to destroy’ in genocide mean?’ (2009) 91 *International Review of the Red Cross* 833, 834; Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge University Press 2012) 43.

Furthermore, the Elements of Crimes for Article 6 of the Rome Statute require than act of genocide “took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”. The contextual element has been said to be a controversial one,¹⁴¹ as it shifts the starting point of the *dolus specialis* from ‘intent’ to ‘knowledge’ of the plan or policy.¹⁴² This has been described as a ‘knowledge-based approach’ of the subjective elements of genocide,¹⁴³ which rests on the premise that the concept of ‘intent’ is not circumscribed to a purely volitional or ‘purpose-based’ standard.¹⁴⁴ The latter is characterised by a goal-oriented reading: the perpetrator seeks to destroy the targeted group in whole or in part as a separate and distinct entity; and it reflects the majority view taken by the *ad hoc* tribunals.¹⁴⁵

¹⁴¹ See Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd Ed. (Cambridge University Press 2010) 218-219. See also William Schabas, *Genocide in International Law. The Crime of Crimes*, 2nd Ed. (Cambridge University Press 2009), 245-248. See also *The Prosecutor v. Radislav Krstić* (Appeal Judgment) ICTY-98-33-A, App Ch (19 April 2004), para. 224; *The Prosecutor v. Vujadin Popović et al.* (Trial Judgment) ICTY-05-88-T, T Ch II (10 June 2010), para. 829; *The Prosecutor v. Vujadin Popović et al.* (Appeal Judgment) ICTY-05-88-A, App Ch (30 January 2015), paras. 430-431.

¹⁴² William Schabas, *An Introduction to the International Criminal Court*, 4th Ed. (Cambridge University Press 2011) 103-104. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest) ICC-02/05-01/09, Pre-T Ch I (4 March 2009), para. 139, fn 154 (“direct perpetrators and mid-level commanders can be held responsible as principals to the crime of genocide even if they act without the *dolus specialis*/specific intent to destroy in whole or in part the targeted group. [A]s long as those senior political and/or military leaders who planned and set into motion a genocidal campaign act with the requisite *dolus specialis*/ulterior intent, those others below them, who pass on instructions and/or physically implement such a genocidal campaign, will commit genocide as long as they are aware that the ultimate purpose of such a campaign is to destroy in whole or in part the targeted group.”)

¹⁴³ See Alexander Greenawalt, ‘Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation’ (1999) 99 Columbia Law Review 2259, 2288; Claus Kreß, ‘The Darfur Report and Genocidal Intent’ (2005) 3 Journal of International Criminal Justice 578, 565–573; Claus Kreß, ‘The Crime of Genocide Under International Law’ (2006) 6 International Criminal Law Review 461, 492–497; Claus Kreß, ‘The International Court of Justice and the Elements of the Crimes of Genocide’ (2007) 18 European Journal of International Law 619, 625–627.

¹⁴⁴ Kai Ambos, ‘What does ‘intent to destroy’ in genocide mean?’ (2009) 91 International Review of the Red Cross 833, 842.

¹⁴⁵ See *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T, T Ch I (2 September 1998), para. 498; *The Prosecutor v. Ignace Bagilishema* (Trial Judgment) ICTR-95-1A-T, T Ch I (7 June 2001), para. 62; *The Prosecutor v. Alfred Musema* (Trial Judgment) ICTR-96-13-T, T Ch I (27 January 2000), para. 164; *The Prosecutor v. Radislav Krstić* (Trial Judgment) ICTY-98-33-T, T Ch (2 August 2001), para. 571; *The Prosecutor v. Duško Sikirica, Damir Došen and Dragan Kolundžija* (Judgment on Defence Motions to Acquit) ICTY-95-8-T, T Ch (3 September 2001), para. 59, fn 165; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* (Trial Judgment) ICTY-02-60-T, T Ch I (17 January 2005), para. 656; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (Trial Judgment) ICTR-96-3-T, T Ch I (6 December 1999), para. 59; *The Prosecutor v. Goran Jelisić* (Appeal Judgment) ICTY-95-10-A, App Ch (5 July 2001), para. 46; *The Prosecutor v. Milomir Stakić* (Trial Judgment) ICTY-IT-97-24-T, T Ch II (31 July 2003), para. 520; *The Prosecutor v. Radoslav Brđanin* (Trial Judgment) ICTY-99-36-T, T Ch II (1 September 2004), para. 695. See also

Moreover, the specific intent must be aimed at the destruction of a protected group under Article 6, although proof of result is not required. The term ‘destroy’ is neither defined by the Genocide Convention nor by the Rome Statute, but it has been understood as strictly covering “the material destruction of a group either by physical or by biological means”.¹⁴⁶ This approach has found support in available jurisprudence,¹⁴⁷ and appears to be the prevalent, though contested,¹⁴⁸ view.¹⁴⁹

5. A Specific Intent to Discriminate versus a Specific Intent to Destroy

The definitions of genocide and crimes against humanity overlap to a certain extent in respect of the objective (or material) elements of the offences,¹⁵⁰ although the scope of the former neither requires that the act takes place as part of a widespread or systematic attack nor that the latter is directed against a civilian population. With regard to the subjective (or mental) elements, the two layers of *mens rea* (*dolus*

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits) [2007] ICJ Rep 43, paras. 186-189; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3, paras. 132-148; ‘Draft Code of Crimes against the Peace and Security of Mankind’, in Yearbook of the International Law Commission, 1996, vol. II, Part Two, 45, para. 7.

¹⁴⁶ ‘Draft Code of Crimes against the Peace and Security of Mankind’, in Yearbook of the International Law Commission, 1996, vol. II, Part Two, 45-46, para. 12.

¹⁴⁷ *The Prosecutor v. Radislav Krstić* (Trial Judgment) ICTY-98-33-T, T Ch (2 August 2001), para. 580; *The Prosecutor v. Laurent Semanza* (Trial Judgment) ICTR-97-20-T, T Ch III (15 May 2003), para. 315; *The Prosecutor v. Juvénal Kajelijeli* (Trial Judgment) ICTR-98-44A-T, T Ch II (1 December 2003), para. 808; *The Prosecutor v. Radislav Krstić* (Appeal Judgment) ICTY-98-33-A, App Ch (19 April 2004), para. 25; *The Prosecutor v. Slobodan Milošević* (Decision on Motion for Judgment of Acquittal) ICTY-IT-02-54-T, T Ch (16 June 2004), para. 124; *The Prosecutor v. Radoslav Brđanin* (Trial Judgment) ICTY-99-36-T, T Ch II (1 September 2004), para. 694; *The Prosecutor v. Vujadin Popović et al.* (Trial Judgment) ICTY-05-88-T, T Ch II (10 June 2010), para. 822; *The Prosecutor v. Radovan Karadžić* (Trial Judgment) ICTY-95-5/18-T, T Ch (24 March 2016), para. 553.

¹⁴⁸ *The Prosecutor v. Momčilo Krajišnik* (Trial Judgment) ICTY-IT-00-39-T, T Ch I (27 September 2006), para. 854 and accompanying fn 1701; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* (Trial Judgment) ICTY-IT-02-60-T, T Ch I (17 January 2005), para. 666. See also Christoph Safferling, ‘The Special Intent Requirement in the Crime of Genocide’, in Christoph Safferling and Eckart Conze (eds.), *The Genocide Convention sixty years after its adoption* (TMC Asser Press 2010) 174-176; Ambos, *Treatise on International Criminal Law. Vol. II: The Crimes and Sentencing* (Oxford University Press 2014) 38-40; Pablo Gavira Díaz, ‘The Physical, Biological and Cultural Dimensions of Genocide: An Expansive Interpretation of the Crime?’ (2022) 21 Journal on Ethnopolitics and Minority Issues in Europe 111, 129.

¹⁴⁹ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para. 344; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3, para. 136. See also *The Prosecutor v. NUON Chea and KHIEU Samphan* (Case 002/02 Judgment) 002/19-09-2007/ECCC/TC, T Ch (16 November 2018), para. 800.

¹⁵⁰ Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press 2003) 106; William Schabas, ‘Genocide’, in Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article A Commentary*, 4th Ed. (C.H. BECK/Hart/Nomos 2022) 133.

generalis and *dolus specialis*) demanded by the crime of genocide do not apply to crimes against humanity. The Rome Statute requires that the perpetrator acts with knowledge of the attack in relation to the contextual element,¹⁵¹ and with general (and discriminatory) intent with regards to the *actus reus* of persecution.¹⁵² The discriminatory intent on the part of the perpetrator is essential for the conduct to be labelled as persecutory and it shall take place on the prohibited grounds stipulated by Article 7(1)(h).¹⁵³ In this regard, the threshold is higher in the case of genocide since the latter does require that the identity of the protected group overlaps with the intent of the perpetrator. The same does not hold true for persecution,¹⁵⁴ whose threshold is considerably lower as it serves to circumscribe the scope of the crime to cases where connected underlying acts are committed simultaneously.¹⁵⁵

The commission of crimes against humanity is characterised by a mass scale and systematic criminal enterprise that derives into policies that include *inter alia* oppression, coercion, repression, harassment, murder, extermination and other mistreatments. The *modus operandi* of the crime of persecution typically consists of a severe and repressive program directed against a certain civilian population. It can be committed either in one act or in a series of acts.¹⁵⁶ This policy, which need not be physical,¹⁵⁷ must have been designed with the objective of degrading the targeted victims to such an extent that their fundamental freedoms are systematically denied, being the discriminatory intent of the perpetrator the thrust of such intolerable plan or policy. Without discrimination, the offence cannot

¹⁵¹ Rome Statute, Art. 7(1).

¹⁵² Rome Statute, Art. 30.

¹⁵³ *The Prosecutor v. Kupreškić et al.* (Trial Judgment) ICTY-95-16-T (14 January 2000), para. 633 (“the mental element of persecution consists of discriminatory intent on the grounds provided in the Statute”).

¹⁵⁴ Joseph Powderly and Niamh Hayes, ‘Article 7(1)(h): Persecution’, in Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article A Commentary*, 4th Ed. (C.H. BECK/Hart/Nomos 2022) 226.

¹⁵⁵ Kai Ambos, *Treatise on International Criminal Law. Vol. II: The Crimes and Sentencing* (Oxford University Press 2014) 105.

¹⁵⁶ *The Prosecutor v. Kupreškić et al.* (Trial Judgment) ICTY-95-16-T (14 January 2000), para. 624; *The Prosecutor v. Milorad Krnojelac* (Trial Judgment) ICTY-IT-97-25-T, T Ch II (15 March 2002), para. 433; *The Prosecutor v. Vasiljević* (Appeal Judgment) ICTY-IT-98-32-A, App Ch (25 February 2004), para. 113; *The Prosecutor v. Tihomir Blaškić* (Appeal Judgment) ICTY-IT-95-14-A (29 July 2004), para. 135; *The Prosecutor v. KAING Guek Eav alias Duch* (Appeal Judgment) 001/18-07-2007/ECCC/SC (3 February 2012), para. 258; *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, ICC-01/17-X, Pre-T Ch III (9 November 2017), para. 130; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Judgment) ICC-01/12-01/18, T Ch X (26 June 2024), para. 1204.

¹⁵⁷ *The Prosecutor v. Blagoje Simić et al.* (Trial Judgment) ICTY-IT-95-9-T, T Ch II (17 October 2003), para. 58. See also *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Judgment) ICC-01/12-01/18, T Ch X (26 June 2024), para. 1202.

qualify as persecution.¹⁵⁸ Without a widespread and large-scale campaign or doctrine designed to make life intolerable for a certain civilian population, the offence could hardly be deemed as a crime against humanity of persecution.¹⁵⁹

While discrimination is a necessary element for the crime of persecution to be labelled as such, what makes genocide legally distinct from any other core international crime is the (specific) intent to destroy.¹⁶⁰ As discussed, the initiating stages of the crimes may converge as both typically involve a certain doctrine or program designed to violently execute a criminal plan on a substantial scale. While persecutory measures are committed on severe and intentional discriminatory grounds against a certain civilian population, based on political, economic, religious, ethnic or any other prohibited motive; a genocidal program consists of accomplishing deliberate measures (regardless of the eventual result) to bring about a protected human group, namely of religious, ethnical, racial or national character.¹⁶¹ The validation and implementation of a genocidal plan do not necessarily need to coincide in time – the two phases may be spaced several weeks or months apart, being the Final Solution an illustrative example of this.¹⁶²

A practical illustration highlights the distinction between genocide and crimes against humanity (persecution):

a group of people sharing same characteristics (ethnicity, nationality and religion) is under siege, with opposing forces blocking all exits from the city, depriving the population of food and medicine. While no deaths have occurred, the situation raises questions about how such actions should be classified.

Acts like deliberately inflicting conditions of life calculated to bring about a group's physical destruction (e.g., starvation) could qualify under Article 6(c) of the Rome Statute. However, without evidence of deaths or clear intent to destroy

¹⁵⁸ *The Prosecutor v. Milan Milutinović et al.* (Trial Judgment) ICTY-IT-05-87-T, T Ch (26 February 2009), para. 176 (“persecution requires intent to discriminate on [prohibited] grounds”).

¹⁵⁹ ‘Draft Code of Crimes against the Peace and Security of Mankind’, in Yearbook of the International Law Commission, 1991, vol. II, Part Two, 104, para. 9.

¹⁶⁰ William Schabas, ‘Genocide’, in Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article A Commentary*, 4th Ed. (C.H. BECK/Hart/Nomos 2022) 121.

¹⁶¹ *The Prosecutor v. Goran Jelisić* (Trial Judgment) ICTY-95-10-T, T Ch (14 December 1999), para. 79 (“[genocide] differs from the crime of persecution in which the perpetrator chooses his victims because they belong to a specific community but does not necessarily seek to destroy the community as such”).

¹⁶² Florent Brayard, ‘From Persecution to Genocide: The Evolution of the Nazi Anti-Jewish Policy (1938-1942)’ in Ben Kiernan, Wendy Lower, Norman Naimark and Scott Straus (eds.), *Volume III. Genocide in the Contemporary Era, 1914-2020* (Cambridge University Press 2023) 229 (“before June 1942 there is no indication for how long the programme was to be conducted. This term was not established until after Heydrich’s assassination”).

the group, it would be challenging to meet the threshold for genocide in this scenario. By contrast, such acts could constitute crimes against humanity (persecution) under Article 7(1)(h) of the Rome Statute. Importantly, persecution does not require evidence of intent to destroy or actual deaths, making it a more appropriate classification for this example. This distinction underscores how genocide and persecution diverge in their legal requirements, particularly concerning the levels of intent and harm needed to meet their respective thresholds. If deaths begin to occur during the siege, the legal classification becomes more complex. Such acts could qualify as **genocide** under **Article 6(c)** of the Rome Statute if the perpetrators act with specific intent to destroy, in whole or in part, a protected group. Evidence of this intent could be inferred from the systematic nature of the siege, widespread fatalities, or explicit policies targeting the group for destruction.

Persecution can escalate into genocide when the intent to physically destroy a targeted group becomes explicit. Initially, persecution involves systemic discrimination and marginalization, such as laws restricting access to public services, forced relocations, and economic isolation. These actions aim to degrade and oppress the group but stop short of destruction. However, the situation can evolve when the government or perpetrators move from oppression to the intentional extermination of the group. This transition is marked by mass killings, state-sanctioned violence, and the destruction of cultural identity. Forced relocations and death marches may result in widespread fatalities. The key factor in this escalation is the specific intent (*dolus specialis*) to destroy the group, whether in whole or in part. This shift from persecution to genocide signifies a deliberate effort to eliminate the targeted group rather than merely subjugate them.

Both persecution and genocide may ultimately achieve the same goal, i.e. the extermination of peoples, but the specific intent to deliberately accomplish such a general pattern of elimination and suppression on the part of the genocidaire is not found within the scope of persecution.¹⁶³ Having said that, acts amounting to genocide (sub-paragraphs (a) to (e) of Article 6 of the Rome Statute) which lack the specific intent, could be subsumed under Article 7(1)(h),¹⁶⁴ provided that the Elements of Crimes are met.

¹⁶³ *The Prosecutor v. Kupreškić et al.* (Trial Judgment) ICTY-95-16-T (14 January 2000), para. 636 (“genocide is an extreme and most inhuman form of persecution”).

¹⁶⁴ See also ‘Draft Code of Crimes against the Peace and Security of Mankind’, in Yearbook of the International Law Commission, 1996, vol. II, Part Two, 48–49, para. 11; Hans-Peter Kaul, ‘The International Criminal Court and the Crime of Genocide’, in Christoph Safferling and Eckart Conze (eds.), *The Genocide Convention sixty years after its adoption* (TMC Asser Press 2010) 197–198.

6. Conclusion

In the light of the above, a few features are common to the crime against humanity of persecution and the crime of genocide. The notion of civilian population as the targets of any crime against humanity is broader than the (positive) characterisation of groups under the law of genocide. Both crimes encompass severe violations of fundamental aspects of human dignity, which are typically executed in a large-scale fashion within the context of a massive deprivation of rights or as part of a broad campaign. A closer look at the early stages of genocide and crimes against humanity reveals that isolated events of atrocities and offenses (whether committed by private individuals or by governmental authority) are excluded from the scope of both crimes, thus requiring the involvement of a certain enterprise or approved procedure. The language of the Rome Statute does not explicitly require that the perpetrator maintains control over the target population, but the context in which the two offences typically operate appears to implicitly call for such a condition.

Furthermore, the profile of the perpetrator usually adopts the form of individuals who occupy a position of real leadership and power in a state or in an organisation, or those who benefit from the complicity, connivance, or at least the toleration or acquiescence of the authorities. A close cooperation on the highest level thus appears to be an integral component of the criminal policy. Whereas the eventual outcome of the offence may be the same (killing members of a certain group in the context of a campaign) in respect of the material elements, the mental elements for each crime neither intersect nor intertwine. The apparent overlap in the underlying offence (e.g. murder) reaches a stand-alone characterisation in the case of genocide when the specific intent to destroy comes into play. This requisite is not reflected in the crime of persecution, which additionally introduces a jurisdictional restriction or ‘connection requirement’ demanding the participation of at least another offence within the jurisdiction of the ICC.

Conflict of Interests

The authors declare no ethical issues or conflicts of interest in this research.

Ethical Standards

The authors affirm this research did not involve human subjects.

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