Rights for Peace

Preventing Mass Atrocities with Human Rights

A Guide to Hate Violations in International Law

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List of Abbreviations

CAH – Crimes Against Humanity
CAT – Convention Against Torture
CEDAW – Convention on the Elimination of Discrimination against Women
ECCC – Extraordinary Chambers in the Courts of Cambodia
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
HRC – United Nations Human Rights Council
HRCttee – United Nations Human Rights Committee
IACtHR – Inter-American Court of Human Rights
ICC – International Criminal Court
ICCPR – International Covenant on Civil and Political Rights
ICERD – International Convention on the Elimination of Racial Discrimination
ICJ – International Court of Justice
ICTR – International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for former Yugoslavia
ILC – International Law Commission
OSCE – Organisation for Security and Co-operation in Europe
SCSL – Special Court for Sierra Leone
UDHR – Universal Declaration of Human Rights
UN – United Nations
UNHRC – United Nations Human Rights Council

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Preface - From Hate Speech to Genocide

"Genocide is a process, not an event. It did not start with the gas chambers, it started with hate speech."[1]

On eve of the 76th Anniversary of the liberation of Auschwitz, there is now a significant body of research on genocide and how hate narratives can permeate societies and ultimately fuel mass violence. Bigoted views directed towards migrants and diverse types of minority groups, combined with extremist ideologies about identity and superiority, are alarmingly on the increase. These patterns are occurring all over the world, and not just on social media, though it does play a very significant role in amplifying this trend. Communities in fragile States are less resilient to incitement and manipulation by political or other actors using the media, during elections or as a result of the COVID-19 pandemic.

Scholars have found that 'worsening living conditions' can create grounds for heightened group identity. As put by a local activist in a Rights for Peace workshop recently: "*finding you have something in common with someone makes you feel safe and stronger.*" It is natural for people to find comfort in group identities, particularly when these fill the place of exclusion or disenfranchisement. However, when faced with unresolved grievances or stoked by political manipulation, "*difficult life conditions* [can] *give rise to scapegoating and ideologies that identify enemies and lead a group to turn against another.*"[2]

Genocide studies provide several frameworks that seek to set out and analyse the process of dehumanisation that starts with heightened group identity and prejudice; and progresses to scapegoating and demonization that can ultimately lead to mass atrocities and the annihilation of a target group. Dr. Gregory Stanton's '*Ten Stages of Genocide*' enumerate a non-linear process that includes classification, symbolisation, discrimination, dehumanisation, organisation, polarisation, preparation, persecution, extermination and finally denial.[3] Professor Ervin Staub has also elaborated on a 'Continuum of Destruction', also a non-linear progression, that considers stages of separation, stereotyping, superiority, dehumanization, scapegoating and demonization.[4]

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[1] Sheri P. Rosenberg, *Genocide Is a Process, Not an Event*, Genocide Studies and Prevention 7, 1 (April 2012): 16–23.

[2] *See*: Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group*, Cambridge University Press, 1989; and Ervin Staub, *The Origins and Prevention of Genocide Mass Killing and Other Collective Violence*, (1999) Journal of Peace Psychology, 5(4), 303-336; *available at*: https://people.umass.edu/estaub/opcm.pdf.

[3] Gregory H. Stanton, *The Ten Stages of Genocide*, *available at*: https://www.genocidewatch.com/tenstages.

[4] Thomas Vincent Flores, *The Continuum of Violence and Peace: Applying a Contemplative Framework for Turning the Problem into a Solution*, Practicing Matters, March 2012, *available at*: http://practicalmattersjournal.org/2012/03/01/continuum-of-violence-and-peace/.

Introduction

i. Who Is This Guide For?

This guide is designed to support human rights defenders and practitioners interested in monitoring and reporting human rights violations and international crimes that are based on prejudice and hate. From hate speech to genocide, this guide brings a range of legal frameworks relating to hate violations and international crimes into a single volume.

This compilation fills a gap: while 'hate crimes' exist as a concept in many national legal systems, the idea of bias-motivated violations has not translated into international human rights or international criminal law as such. Even though torture, forced disappearances or conflict-related sexual violence might be committed with biased intent towards a target group, as human rights practitioners, we do not tend to think of them in this way. They are generally reported simply as torture, forced disappearances or sexual violence crimes. However, to see and think of these violations through a prism of hate, may help us identify and evidence the patterns, or find interventions to deter or reverse them sooner.

Whilst many provisions exist, these are fragmented across different treaties, resulting in:

- Diverse definitions of protected groups;
- Different levels of intent;
- Diverse mechanisms requiring different notions of legal standing and admissibility;
- Physical acts being reported without being connected to the discriminatory intention or purpose, or to wider patterns of discrimination or dehumanisation.

ii. How to Use This Guide

This guide looks at the main international human rights treaties and related complaints or enforcement mechanisms that provide individual or group protection for hate violations.

These include:

- The 1948 Genocide Convention
- The 1965 International Convention on the Elimination of All forms of Racial Discrimination (ICERD)
- The 1973 Convention on the Crime of Apartheid
- The 1976 International Covenant on Civil and Political Rights (ICCPR)
- The 1979 Convention on Elimination of Discrimination Against Women (CEDAW)
- The 1984 Convention Against Torture (CAT)
- The 1998 International Criminal Court Statute

The guide works its way up through the 'pyramid of hate',[5] beginning with hate speech and progressing upwards through discrimination and then crimes such as torture, apartheid, and finally genocide – the ultimate hate crime.

Each section unpacks salient elements that define the specific hate violation, the scope of the provision(s), jurisdictional issues, major cases and any key rulings to keep in mind which help clarify our understanding of these hate violations and crimes. In addition, the relevant universal mechanisms for reporting or enforcing the protections, prohibitions or punishments of the violations are discussed, with a focus on UN treaty bodies and other universal mechanisms.

[5] Anti-Defamation League, '*Pyramid of Hate*', *available at*: https://www.adl.org/sites/default/files/documents/pyramid-of-hate.pdf.

iii. Executive Summary

Part I focuses on **Hate Speech** and incitement to violence. The State's obligations to protect free speech and deter incitement to violence are set out, outlining a three-part test that identifies when hate speech is no longer lawful. A checklist of criteria for submitting a complaint to the Human Rights Committee is provided. Increasing in gravity from a hate violation to a hate crime that still involves speech, the legal framework around direct and public incitement to genocide is explored, specifying key elements: incitement to genocide must be direct, public and have the special intent requirement.

Part II focuses on **Hate Violations**. It begins with racial discrimination, laying out the relevant law and obligations in the International Covenant on the Elimination of Racial Discrimination (ICERD). It details how to submit an individual complaint to the Committee on the Elimination of Racial Discrimination as well as its Early Warning and Urgent Action Procedure. It then focuses on discrimination and violence against women, outlining the relevant law and obligations in the Convention on the Elimination of Discrimination against Women (CEDAW), providing a checklist for submitting a communication to the CEDAW Committee.

Part III focuses on **Hate Crimes**. Apartheid is covered first, with a focus on the enumerated inhuman acts that constitute it, the intent required, and jurisdiction and enforcement mechanisms. The crime of torture follows, providing a definition under the Convention Against Torture, the objective element of the crime, scope, State obligation and jurisdiction, and how to seek remedies. Other cruel, inhuman or degrading treatment is then similarly outlined. Crimes against Humanity are detailed next, including who can be found accountable, and jurisdictions and mechanisms. Finally, genocide – the ultimate crime of hate-based ideological acts – is outlined. The enumerated acts, the definition of the group, modes of responsibility, and jurisdictions and enforcement mechanisms are all detailed, along with a specific focus on sexual violence as genocide.

iv. Seeing Abuses Through a Prism of Hate

Seeing abuses through a prism of hate allows us to put violations in context and act sooner. When seeking to prevent mass atrocities, it can help to look at violations along the path to genocide. A useful conceptual tool is the Pyramid of Hate developed by the Anti-Defamation League[6] [see image above], which demonstrates that genocide is built upon the acceptance of biased attitudes and behaviours. This lens can help us see how individual incidents fit into wider patterns of discrimination and persecution of protected groups.

[6] *Idem*.

States have the duty to prevent and punish genocide and other mass atrocity crimes. In order to prevent and punish the steps that lead to genocide, it is helpful to consider and connect bias intent with wider violations. This can give us a clear picture of systemic identity-based violence.

For instance, where hate speech, harassment, arrests, beatings, or torture are committed with bias intent against members of a specific group, this puts these violations on a path of persecution and dehumanisation that can lead to genocide. Often, when these violations are reported on the ground, the bias intent is not mentioned. We read of torture or conflict related sexual violence, rather than hate crimes.

It is often already too late when we look back and see the patterns and progression of dehumanisation that has led to mass atrocities. Identifying violence as identity-based early on can trigger risk assessments and early warning frameworks. It can also help stakeholders identify targeted interventions to counter inter communal hate and division, such as strengthening the capacities of local leaders able to speak out, investing in efforts to strengthen social cohesion or addressing root causes.

While social interventions are necessary, publicly holding hate-based violations to account is a key measure in our limited toolbox. Specifically holding up to scrutiny the 'hate-based intent' also reinforces the specific social harm that is being targeted.

v. Preventing and Punishing the Steps to Genocide

At the domestic level, some States provide an aggravated status for 'hate crime'. For instance, the 57 participating States of the Organization for Security and Co-operation in Europe (OSCE), are committed to ensuring an aggravated status for 'hate crimes' in their criminal justice systems. Any crime motivated by bias or prejudice ideology can receive an aggravated sentence when prosecuted and successfully convicted. OSCE participating States are also committed to ensuring dedicated police training and publicly reporting hate crime using disaggregated data by protected groups[7].

The OSCE defines hate crimes as possessing two significant criteria:

- The act must constitute **an offence under criminal law**; and
- The act must have been **motivated by bias**.[8]

[7] OSCE, Hate Crime Reporting, https://hatecrime.osce.org/infocus/2019-hate-crime-data-collection.
[8] OSCE, https://hatecrime.osce.org/what-hate-crime; USA: https://www.justice.gov/hatecrimes/learn-about-hate-crimes/chart.

In the United Kingdom (an OSCE participating State), courts can increase sentences for aggravation for hostility based on religion, race, gender, disability, sexual identity or sexual orientation. Section 145(2) of the Criminal Justice Act 2003 (CJA) provides:

> "*If the offence was racially or religiously aggravated, the court—*
>
> *(a) must treat that fact as an aggravating factor, and*
>
> *(b) must state in open court that the offence was so aggravated.*"[9]

Section 146 of the CJA further provides for the increase in sentences for aggravation related to disability, sexual orientation or transgender identity. Section 146 applies where the court is considering the seriousness of an offence committed in any of the following circumstances:

> *"(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—*
>
> *(i) the sexual orientation (or presumed sexual orientation) of the victim,*
>
> *(ii) a disability (or presumed disability) of the victim, or*
>
> *(iii) the victim being (or being presumed to be) transgender, or*
>
> *(b) that the offence is motivated (wholly or partly)—*
>
> *(i) by hostility towards persons who are of a particular sexual orientation,*
>
> *(ii) by hostility towards persons who have a disability or a particular disability, or*
>
> *(iii) by hostility towards persons who are transgender."*[10]

In such cases, the courts must recognise the aggravating factor, which must be stated in open court. Promoting national hate crime data collection by police forces beyond the OSCE participating States could be an excellent starting point for a UN best practice standard, taking the UN Framework of Analysis of Atrocity Crimes[11] as well as the UN Strategy and Plan of Action on Hate Speech by the Special Adviser on the Prevention of Genocide[12] a step further.

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[9] Criminal Justice Act 2003, Section 146, available at: https://www.legislation.gov.uk/ukpga/2003/44/section/145.
[10] Criminal Justice Act 2003, Section 146, available at: https://www.legislation.gov.uk/ukpga/2003/44/section/146.
[11] UN Framework of Analysis of Atrocity Crimes: A tool for prevention (2014), available at: https://www.un.org/en/genocideprevention/documents/publications-and-resources/Genocide_Framework%20of%20Analysis-English.pdf.
[12] UN Strategy and Plan of Action on Hate Speech (2019), available at: https://www.un.org/en/genocideprevention/hate-speech-strategy.shtml.

In contrast, the notion of an aggravated status for hate crimes or violations motivated by biased intent is not present in international human rights law other than for genocide, which requires a special intent or '*dolus specialis*' of destroying an entire group - thereby constituting 'the crime of all crimes' at the top of the pyramid.[13] There is no coherent approach to preventing the steps that lead to genocide.

Nonetheless, human rights law and the establishment of the UN system itself is deeply inspired by these ideas. Albeit piecemeal, a significant body of international law seeks to eradicate bias motivated acts, starting with the United Nations Charter, which promotes and encourages:

> "*respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.*"[14]

Despite the common links in the UN system to the protection of human rights, with respect to the prevention of genocide and maintenance of peace, both law and policy are fragmented. While this may look like a complicated and incremental development of what otherwise might be a simple idea, it is also the result of a subtle balance between rights, national sovereignty, power and international law.[15]

With increased attention on hate speech and hate crime, for instance resulting from the Black Lives Matter movement, the time may be ripe to explore improving and enhancing legal approaches to prevention. There is no common definition of discrimination or bias, protected groups differ from one Convention to the next, there are no standards on monitoring or reporting hate-based violations at the global level and indeed no common mechanisms that could facilitate this.

Rights for Peace has developed a pyramid, based on the Defamation League's pyramid, that fills in the related human rights or international law mechanisms on the one hand, and enforcement mechanisms on the other, for the hate-based violations and crimes that lead to genocide.

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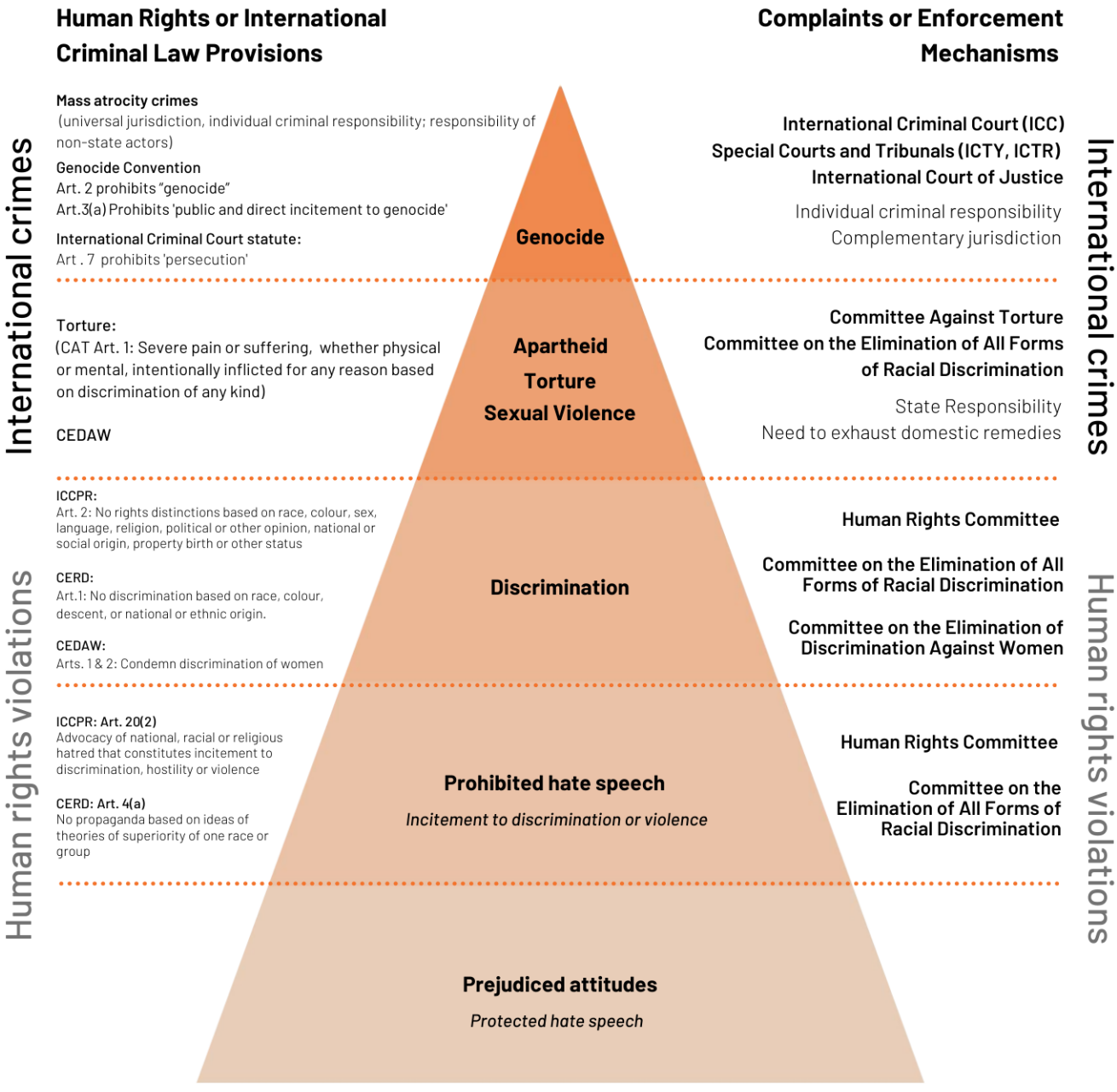
[13] Anti-Defamation League, *Pyramid of Hate*, available at: https://www.adl.org/sites/default/files/documents/pyramid-of-hate.pdf.

[14] United Nations Charter, Article 1, available at: https://www.un.org/en/sections/un-charter/chapter-i/index.html.

[15] See for instance, Frédéric Mégret and Philip Alston, *The United Nations and Human Rights: A Critical Appraisal*, OUP 2020, pp. 47-98.

Hate Violations and Crimes Pyramid



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PART I - Hate Speech and Incitement

1. Hate Speech and Incitement to Violence

Free speech is vital in healthy societies, and communication that is simply offensive is not prohibited. Hate speech only becomes a human rights violation when it poses a threat or risk to others.

- Under Article 20(2) of the International Covenant on Civil and Political Rights (**ICCPR**)[16], "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*"[17]
- Under Article 4 of the International Covenant on the Elimination of All Forms of Racial Discrimination (**ICERD**)[18], State Parties shall "*declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination…*"[19]

1.1 Hate Speech Can Be Any Kind of Communication

There is no consensus or definition of 'hate speech' in human rights law. However, the UN's 2019 Strategy and Action of Plan on Hate Speech defines it as any kind of communication, which can be:

- Speech
- Writing
- Behaviour

that "*attacks or uses pejorative or discriminatory language with reference to a person or a group based on their religion, ethnicity, nationality, race, colour, descent, gender, or other identity factor.*"[20]

1.2 The State Has an Obligation to Prohibit Incitement

Article 20 of the ICCPR prohibits:

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[16] ICCPR, Article 20(2), available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. As of 2020, there are 173 State parties to the ICCPR. For more information, see: https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx.
[17] ICCPR, Article 20(2).
[18] ICERD, available at: https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx.
[19] ICERD, Article 4(a).
[20] UN Strategy and Plan of Action on Hate Speech (2019), available at: https://www.un.org/en/genocideprevention/hate-speech-strategy.shtml.

(1) Any propaganda of war; and
(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[21]

Article 20(2) ICCPR imposes an obligation on States to enact legislation prohibiting "*incitement to discrimination, hostility or violence*"' (hereafter 'incitement'). The article does not require criminal penalties, merely 'an appropriate sanction'.

Likewise, Article 4 of the ICERD requires that States declare the following acts as a punishable offence:

- The dissemination of ideas based on racial superiority or hatred,
- The incitement to racial discrimination or violence against any race or group, and
- The provision of assistance to racist activities.

Article 4 of the ICERD also requires that States declare illegal and prohibit organisations and propaganda activities that promote and incite racial discrimination and that States shall not permit public authorities or institutions to promote or incite racial discrimination.

The Three-Part Test to Protect Free Speech

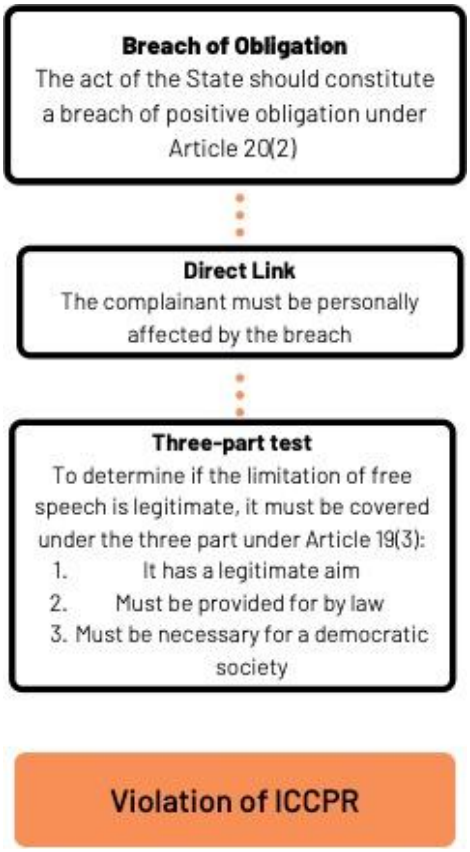
Not all hateful speech is unlawful, nor should it be. A careful test has been elaborated to help separate offensive speech from speech that crosses a line of hate and threat becoming a human rights violation or further still, a criminal offence. Speech that is offensive, even deeply offensive, needs to be lawful as a matter of principle in a free and open society, hence the importance of looking at hate speech in the context of the right to freedom of expression.

Article 19 of the ICCPR protects an individual's right to hold opinions, and protects the right to seek, receive and impart information and ideas. While freedom of expression is fundamental, it is not

[21] Human Rights Committee (HRC), *General Comment 11*, issued 29 July 1983.

absolute. This means that a State may, exceptionally, limit the freedom of expression under Article 19(3) of the ICCPR, provided that the limitation satisfies the following three-part test:

1. The limitation is provided for by law, so any law or regulation must be sufficiently precise to enable individuals to regulate their conduct accordingly;
2. The limitation is in pursuit of a legitimate aim[22], listed exhaustively as: respect for the rights or reputations of others; or the protection of national security or of public order, or of public health or morals; and
3. The limitation is necessary in a democratic society, requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[23]



Any limitation imposed by the State on the right to freedom of expression, including limiting 'hate speech', must conform to the strict requirements of this three-part test.[24]

[22] The legitimate grounds for restricting free speech are set out under Article 19 of the ICCPR, including respect for the reputation of others and public order. The HRC interpreted the term 'others' to mean either persons individually or as a group in its *General Comment 10*, para. 22.
[23] HRC, *General Comment 10*, para. 22.
[24] The HRC elaborated on this three-part test in *General Comment 34*, issued 12 September 2011, available at: https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

Malcolm Ross v. Canada [HRC, 1997]

The author, Ross, worked as a resource teacher for remedial reading. He made several public statements including publishing several books and pamphlets reflecting controversial opinions. Although he contended that these publications were not contrary to Canadian law and that all writings were produced in his own time, parents raised concerns about his teaching. His in-class teaching was monitored. As no action was taken regarding his anti-Jewish views, a complaint was filed with the Human Rights Commission (HRCttee) based on discrimination against Jewish and other minority students.

The HRCttee considered the nature and the effect of the author's statements and concluded that the restrictions imposed on him were justified as they threatened the "*rights and reputations*" of persons of Jewish faith, including their right to have education in the public system free from bias, prejudice or intolerance.

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[1.] *Ross v. Canada*, Communication No. 736/97.

Although public order and national security are legitimate grounds for restricting freedom of expression, the HRC has emphasised that treason and national security laws should remain compatible with the concept of 'necessity' in Article 19(3) of the ICCPR. For instance, government restrictions on statements in support of a labour dispute, or convening a national strike, are not permissible on the grounds of national security.[25]

Restrictions must be deemed to be 'necessary' for the legitimate purpose. For instance, laws that prohibit denial of the Holocaust are argued as being necessary for a legitimate purpose. The test for this established by the Human Rights Committee is whether the end could have been achieved through other means.[26]

> In *Faurisson v. France*, the HRC noted that the *Gayssot Act* was intended to serve the struggle against racism and anti-Semitism and was necessary for that purpose.[27]

1.3 Meeting the Threshold of Incitement

While there is no universally accepted definition of Incitement, international jurisprudence and the Rabat Plan of Action provide useful guidance. In general terms, the speech would need to:

- Be directed against an identifiable group;
- Have a public element; and
- Cause a risk of harm for individuals in the targeted group.

[25] *Jong-Kyu Sohn v. Republic of Korea*, Communication No. 518/1992.
[26] *Ross v. Canada*, Communication No. 736/97; *Ballantyne et al. v. Canada, Communication* No. 359, 385/89.
[27] *Faurisson v. France*, Communication No. 550/93, para. 9.7.

The Rabat Action Plan was adopted by experts as a result of the outcomes of various workshops on the interpretation of Article 19 and 20 of ICCPR, with the final wrap-up expert meeting orgnised in Rabat in October 2012. The experts agreed on a high threshold for any restrictions on freedom of expression and set out a six-part threshold test for the application of Article 20 of ICCPR.

The following six points identified in the Rabat Plan of Action should be considered when assessing whether (hate) speech amounts to a human rights violation:[28]

(a) **Context**: the speech act should be placed within the social and political context prevalent at the time the speech was made and disseminated, as it may have a direct bearing on both intent and/or causation.

(b) **Speaker**: the speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed.

(c) **Intent**: Article 20 of the ICCPR anticipates intent, i.e. negligence and recklessness are not sufficient.

(d) **Content and form**: the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech, or the balance struck between arguments deployed may affect whether the speech amounts to Incitement.

(e) **Extent of the speech act**: extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience.

(f) **Likelihood, including imminence:** the action advocated through incitement speech does not have to be committed for the speech to amount to a crime. However, some degree of risk of harm must be identified. There should be a reasonable probability that the speech would succeed in inciting actual action against the targeted group.

A key element for establishing unlawful hate speech that amounts to a violation of article 20(2) and therefore subject to complaints to the HRC is that **the complainant or victim must be personally affected**. A link between the speech and its impact on the individual must be shown, as in the case of Rabbae that was filed before the HRC.

[28] For the full text of the Rabat Plan of action, including the 6 part test, see UN Human Rights Council, 'The Rabat Plan of Action on the prohibition of advocacy of national, racial, religious hatred that constitutes incitement to discrimination, hostility or violence, dated 11 January 2013, UN A/HRC/22/17/Add.4, https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

Mohamed Rabbae v. Netherlands [HRC, 2017]

Geert Wilders, a Dutch Member of Parliament and founder of extreme right-wing political Party for Freedom, made statements against Muslims in a public interview that was broadcasted to the general public, as well as Twitter:

"*I get sick of Islam in the Netherlands*"; "*no more Islam!*"; "*the borders are closed*".[2]

Mr. Wilders' statements were quite broad and general. They were not directed at the claimants. Between 2006 and 2009 the police had received hundreds of complaints from individuals and organisations relating to offensive statements made by Mr. Wilders directed against 'Muslims', Moroccans and non-Western immigrants. However, no prosecution was ever initiated. A number of citizens with a direct interest in a decision not to prosecute Mr Wilders filed a complaint to the Amsterdam Court of Appeal as his words amounted to incitement to hatred and discrimination on the ground of religion or race under the Dutch Criminal Code. The Court of Appeal subsequently ordered the prosecutor to proceed with a case against Mr. Wilders

Mohamed Rabbae and two others, who were all dual Dutch-Moroccan nationals, joined the criminal proceedings as injured parties (civil parties). They indicated that Mr. Wilders' statements were more than just insulting. They claimed that the statements were "*not directed against Islam as a religion, but against Muslims as human beings*". They argued that the hate speech had affected them personally in their lives, as did the Dutch State's failure to convict Mr. Wilders, which signalled to the public that Mr. Wilders' conduct was not criminal or unlawful and therefore created a permissive environment. They had received threatening messages online in the immediate context of the broadcasts made by Geert Wilders. They filed a claim in the domestic courts asserting that they were from an identifiable group that was affected – namely Muslims. They were able to link the threatening messages they had personally received to the statements made by Geert Wilders: **they were made in the context of his 'hate speech'.**

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[2] *Mohamed Rabbae, A.B.S. and N.A. v. The Netherlands.* Communication No. 2124/2011

By way of contrast to Rabbae, in a case brought to the HRC against Denmark, the complainant also claimed that that the State did nothing to stop hate speech against Muslims. However, the HRC found the case was inadmissible because that the author had failed to demonstrate that he was a 'victim'.[29]

1.4 Freedom of Expression Online

[29] Communication No. 1879/2009, *A.W.P. v. Denmark*, Decision adopted by the HRC at its 109th session (14 October – 1 November 2013).

Owing to the growing presence of social media, the HRCttee recognised that the "*same rights that people have offline must also be protected online*".[30] The HRCttee has also made clear that limitations on electronic forms of communication or expression disseminated over the internet must be justified according to the same criteria as non-electronic or 'offline' communications, as set out above.[31]

The HRC recommended that any demands, requests, and other measures to take down digital content be based on validly enacted law, subject to external and independent oversight. State Parties must also demonstrate a necessary and proportionate means of achieving one or more legitimate aims to limiting freedom of expression under Article 19(3) of the ICCPR.[32]

1.5 Checklist for Making a Complaint Under the ICCPR

Once a violation of Article 20(2) of the ICCPR has been identified, individuals may submit a complaint to the HRC against a member State ICCPR assuming that:

1. The State has ratified both the ICCPR and its First Optional Protocol;[33]
2. The violation is **not being reviewed under another international procedure**;
3. The **Author has exhausted all domestic remedies** (though there is no need to exhaust domestic remedies that are not available, not effective, unduly delayed or that would put the Author or his family in danger);
4. The Author can show that he is a **victim that has been "personally and directly affected"** by the violation (no action can be brought in the general interest of public order);
5. The claim is **sufficiently substantiated** by witness statements, police reports, judicial decisions, photographs etc., evidencing that the victim has been directly affected by the alleged Incitement (although reports from e.g. NGOs may be used to evidence a general violation of rights, such reports are generally not sufficient to show that an individual has been personally affected); and
6. The complaint to the HRC is lodged **not more than five years after the Author has exhausted domestic remedies** (arguably, where no domestic remedies are available, an Author should be able to submit the complaint within five years from the actual violation).

There is also a possibility for States Parties to complain to the treaty body about alleged violations of the treaty by another State Party.[34]

How Useful is it to File a Complaint to the HRC?

[30] Resolution adopted by the General Assembly on 18 December 2013, 68/167.
[31] HRC, *General Comment No. 34* (2011).
[32] Report of the Special Rapporteur on Freedom of Expression, 11 May 2016, A/HRC/32/38, para. 43.
[33] Updated list of States Parties to the ICCPR and other Treaties is available here: https://indicators.ohchr.org/.
[34] ICCPR, Articles 41 and 43.

While the findings of a treaty body such as the HRC are non-binding and of a recommendatory nature, State Parties have in many cases implemented the HRC's recommendations and have granted a remedy to the complainant. For instance, in the case of *Devon Simpson v. Jamaica*,[35] where the HRC found a violation of Articles 7 and 10(1) of the ICCPR, the State implemented the HRC's recommendations of appropriate remedies.

Faurisson v. France [HRC, 1993]

Mr Robert Faurisson, a French author and a literature professor at Sorbonne University, denied the existence of gas chambers for extermination purposes at Auschwitz and in other Nazi concentration camps. In 1990, the French legislature passed the *Gayssot Act*, which made it an offense to contest the existence of the category of CAH. Faurisson contested that the Act restricted his freedom of expression. Emphasising the requirement of intent, the UNHRC upheld the *Gayssot Act* because it intended to serve the struggle against racism and anti-Semitism.

Using General Comment No. 10 to interpret 'others' in paragraph 3(a) and (b) of Article 19, the HRC held that it could relate to the interests of the individual or the community as a whole. As the author's statements read in their entirety strengthened anti-Semitic feelings, the restriction served to respect the feelings of the Jewish community to live free of fear and away from an atmosphere of anti-Semitism. The HRC therefore concludes that the restriction of the author's freedom of expression was permissible under Article 19, paragraph 3 (a), of the ICCPR.

The final consideration for the HRC was whether the restriction of the author's freedom of expression was necessary to achieve a legitimate purpose. In this regard, it noted that the *Gayssot Act* was intended to serve the struggle against racism and anti-Semitism. Further, the State Party characterised the denial as the principle vehicle for anti-Semitism and in the absence of opposing evidence the HRC was satisfied that the restriction was necessary within the meaning of Article 19(3) of the ICCPR.

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3. *Faurisson v. France,* Communication No. 550/93.

Where States do not implement recommendations, the findings can be useful in other ways:

- Recognition by an independent body of State wrongdoing: as a form of satisfaction;
- contribution to establishing the truth;
- Shedding light on the bias motivation behind other human rights violations;
- Uncovering systemic bias in certain countries;
- For advocacy purposes, providing local actors with neutral a neutral assessment;
- Providing foundations for prosecutions of other violations requiring hateful intent.

[35] *Devon Simpson v. Jamaica* 19 March 1996, CCPR/C/73/D/695/1996.

Key Cases

J. R. T. and the W. G. Party v. Canada:The HRC expanded the legal basis for limiting extreme forms of hate speech.

Malcolm Ross v. Canada

Maria Vassilari et al. v. Greece: *One of the first cases brought by an alleged victim of hate speech i.e. racist incitement against the Roma minority community. Ultimately, however, the HRC held the claim in relation to Article 20 (2) to be inadmissible, stating that the facts had been "insufficiently substantiated".*

Faurisson v. France, No. 550/93: *The HRC held that a restriction on the freedom of expression was necessary to combat anti-Semitism. Suggestions by the HRC that the ICCPR may provide a right to a community to live free from fear of discrimination.*

Rabbae, A.B.S. and N.A. v. The Netherlands: *The decision established that Article 20(2) can be invoked by alleged incitement to discrimination victims.*

2. Direct and Public Incitement to Genocide

The Rome Statute of the International Criminal Court (ICC Statute) was adopted in 1998 – fifty years after the 1948 Genocide Convention.[36] It entered into force in 2001 and today includes 123 States Parties. The provisions of the Genocide Convention are replicated verbatim in the Statues of the ICC and the *ad hoc* Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). The ICC Statute finally provides a permanent enforcement mechanism for the crime of genocide.

It is important to note that as genocide is a crime of *universal jurisdiction* – that is to say all States with enabling legislation have jurisdiction to prosecute genocide in their own courts even where the crimes were committed in foreign territories and or by foreign nationals. There have been a number of successful universal jurisdiction trials in a number of States, such as France, Germany, Switzerland – for instance for cases relating to the Rwandan genocide.[37]

The ICC's legal framework is used to identify the thresholds required for hate speech to amount to direct and public incitement to genocide as it will also largely influence the approach to be used in domestic universal jurisdiction cases.

Article 25(3)(e) of the ICC Statute criminalizes direct and public incitement of others to commit genocide. It is, in substance, identical to Article 3(c) of the Genocide Convention, and Article 4(3)(c) of the Statute of the ICTY (ITCY Statute) and Article 2(3)(c) of the Statute of the ICTR (ICTR Statute).

A person may be found guilty of the crime if they directly and publicly incite genocidal acts and have the intention to directly and publicly incite others to commit genocide.[38] As the intent to incite is taken to presuppose genocidal intent,[39] the act is punishable as an offence in itself and as an inchoate offence (i.e. an offence of preparing for or seeking to commit another offence).[40] The genocidal acts themselves need not have been carried out to constitute incitement.

The elements of direct and public incitement to genocide are cumulative and require the following elements:

- Direct;
- Public;
- Incitement to commit genocide; and
- The special intent requirement for genocide.

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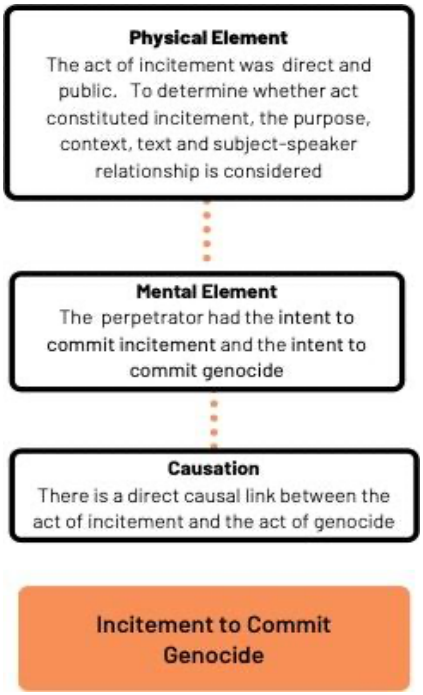
[36] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.
[37] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 20; *Octavien Ngenzi and Tito Barahira v. France (Cour d'Assises de Paris)* [2018]; *Perinçek v. Switzerland*, Communication No. 27510/08.
[38] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement (AC), 14 December 2015, para. 3338.
[39] *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 560.
[40] Inchoate offences are "instances where a substantive offence may not have been completed but nevertheless an offence of a different kind has been committed because of the actions or agreements in preparation for the substantive offence", https://www.cps.gov.uk/legal-guidance/inchoate-offences.

2.1 Direct Incitement



Direct appeal to commit an act of genocide

- For 'direct incitement' the speech must be a direct appeal to commit a genocidal act referred to under Article 3(c) of the Genocide Convention.[41]
- It must be more than a vague or indirect suggestion, and an accused cannot be held accountable for this crime based on hate speech that does not directly call for the commission of genocide.[42]

Considering the form that the "speech" could take to be considered "direct", the ICTR noted that it could consist of:

> "*speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audio-visual communication.*"[43]

A perpetrator can be liable for the "commission" of the crime even when he/she did not physically commit any genocidal acts (killing, causing serious bodily or mental harm, etc.). The question is:

> whether an accused's conduct was "*as much an integral part of the* [crimes] *as were the killings which it enabled.*"

In the cases where the ICTR Appeals Chamber has concluded that an accused's speech or incitement constituted an integral part of the genocidal acts, the accused was present at the crime scene and conducted, supervised, directed, played a leading role, or otherwise fully exercised influence over the physical perpetrators.[44]

How the Speech is Understood by Intended Audiences

In order to determine the speech's true meaning, it may be helpful to examine how it was understood by the intended audience. In the context of Rwanda, it was held that "*the culture and nuances of the Kinyarwanda language should be considered when determining what constitutes direct incitement to commit genocide.*"[45] An important consideration for the ICTR Trial Chamber was whether the

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[41] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement (TC), 24 June 2011, para. 5986.
[42] *Prosecutor v. Juvenal Kajelijeli* Case No. ICTR-98-44A-T, Judgement, 1 December 2003.
[43] *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 559.
[44] *Prosecutor v. Yussuf Munyakazi,* Case No. ICTR-97-36A-A, Appeal Judgement, 28 September 2011, para. 135, 136; *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Appeal Judgement, 12 March 2008, paras. 171, 172; *Sylvestre Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Appeal Judgement, 7 July 2006, paras. 60, 61.
[45] *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Judgement and Sentence, 2 February 2012, para. 1594.

members of the audience to whom the message was directed immediately understood its implication.[46]

It remains open whether a speech containing no explicit appeal to commit genocide, or which appears ambiguous, still constitutes direct incitement to commit genocide in a particular context.[47]

In *Prosecutor v. Šešelj*, it was argued that the speech was delivered to articulate his own political vision and plan for society and should not be seen as incitement to hatred. Analysing the context, the majority held that it could not rule out the reasonable possibility that these speeches were made in the context of conflict and were meant to boost the morale of the troops [rather than genocidal intent]. The speeches were said to reflect an alternative political programme.[48]

Incitement Discourse

As seen in *Nahimana et al. (Media Case),* the ICTR explicitly identified two criteria to determine whether discourse could be categorized as either legitimate expression or criminal advocacy: its purpose and its context.[49] As we have also seen, however, there were two additional criteria implicitly used in formulating its analysis: the specific words and the relationship between speaker and subject.

Context can Inform 'Direct Appeal'

Context is critical in considering whether speech constitutes *direct incitement*.[50] Even when speech contains no explicit appeal to commit genocide, it may still constitute direct incitement to commit genocide in a particular context, so long as the speech is not considered ambiguous within that context. Nuanced or coded language is often used, but is nonetheless very clear in the given context such as:

- "*We must cut down the tall trees*" (Rwanda, relating to the tall Tutsi ethnic minority)
- "*We must clean up the black plastic bags*" (South Kordofan, Sudan, relating to black ethnicity of the local population targeted by the Arab Khartoum elite under Al Bashir).
- "*The de-ratisation that is underway today (in the English-speaking regions) is not yet complete and is yet to reveal more secrets in this matter*"[51] (Cameroon, referring to fumigation and the extermination of pests in relation to the Anglophone population).

[46] *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Trial Chamber Judgement, 11 February 2010.
[47] *Nahimana et al, v. Prosecutor*, Case No. ICTR-99-52-A, Appeals Chamber, 28 November 2007.
[48] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Trial Chamber, 31 March 2016.
[49] *Prosecutor v. Nahimana et al. (Media case),* Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003, paras. 1000–1006, 1022.
[50] *Prosecutor v. Nahimana et al. (Media case),* Case No. ICTR-99-52-A, Appeals Judgement, 28 November 2007.
[51] The 4.39 minute Vision 4 News broadcast (8pm on 27 January 2017) is available on Facebook at: https://www.facebook.com/watch/?v=251902188555083.

- "*If the dogs continue to go to the streets to bite, that is to destroy, they will meet the security forces*[52]*... Everyone should go to their family, village and catch their dogs.*"[53] (Cameroon, referring to Anglophone protestors as dogs).
- "*When the vermin are dead, the German oak will again flourish.*" (Nazi Germany, the Nazis referred to persons of Jewish faith as 'rats' - this quote was the caption to a cartoon published in *Der Stürmer,* a Nazi newspaper.[54] Persons of Jewish faith were also described as parasitic organisms - as leeches, lice, bacteria - and as a virus).[55]

In order to determine the speech's true meaning, it is important to examine how it was understood by the intended audience. The ICTR Trial Chamber held that speech containing no explicit appeal to commit genocide, or which appeared ambiguous, still constituted direct incitement to commit genocide in a particular context.[56]

2.2 Publicity

Communication to a Number of Individuals

To incite 'publicly' means that the call for criminal action is communicated to a number of individuals in a public place or to members of the general public at large, particularly by technological means of mass communication, such as by radio or television.

With particular reference to public incitement to genocide as applied to mass media, the Trial Chamber in *Prosecutor v. Nahimana*[57] highlighted a few considerations:

a. editors and publishers have generally been held responsible for the media they control;
b. the language used and the aim of the discourse;
c. speech must be considered in context to assess potential impact; and
d. it is not necessary to prove that the speech in issue produced a direct impact.

In *Akayesu*, the ICTR held that the public element would be better appreciated with the consideration of two factors: "*the place where the incitement occurred and whether or not assistance was selective or limited.*"[58]

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[52] Defy Hate Now, 'Field Guide Cameroon 2020: Social Media and Conflict' (2020), https://openculture.agency/wp-content/uploads/2020/02/dhn-Cameroon_FG_EN_FINAL_Online_01-Social-Media-Conflict.pdf, p. A5.
[53] Cameroon Postline, 'Yaounde-based Anglophone Elite Fail To Tame Their 'Dogs' (2017), https://cameroonpostline.com/yaounde-based-anglophone-elite-fail-to-tame-their-dogs.
[54] Facing History, "When the Vermin are Dead...," Der Stürmer Antisemitic Cartoon', https://www.facinghistory.org/resource-library/image/when-vermin-are-dead-der-st-rmer-antisemitic-cartoon.
[55] NPR, 'Less Than Human': The Psychology Of Cruelty', https://www.npr.org/2011/03/29/134956180/criminals-see-their-victims-as-less-than-human?t=1607074048589.
[56] *Prosecutor v. Nahimana et al. (Media case),* Case No. ICTR-99-52-T, Appeals Judgement, 28 November 2007.
[57] *Prosecutor v. Nahimana et al. (Media case)*, Case No. ICTR-99-52, Judgement and Sentence, 3 December 2003.
[58] *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 556.

Considering this, the Appeals Chamber at the ICTR found that Barayagwiza's speeches made at roadblocks were not sufficiently public because "*only the individuals manning the roadblocks would have been the recipients of the message and not the general public.*"[59]

2.3 Incitement is a Crime Even if Genocide Does Not Occur

Incitement to genocide is punishable even if the genocide itself does not occur.[60] In the case of *Georges Rutaganda*, the Trial Chamber held (which has since been confirmed in *Juvénal Kajelijeli*):

> *"Instigation is punishable only where it leads to the actual commission of an offence desired by the instigator, except with genocide, where an accused may be held individually criminally liable for incitement to commit genocide under Article 2(3)(c) of the Statute, even where such incitement fails to produce a result."*[61]

Special Genocidal Intent

The mental element in the offence of incitement to genocide is the intent to directly and publicly incite genocide. This presupposes the intent to also commit genocide (i.e. the intent to intent to destroy, in whole or in part, a national, ethnical, racial or religious group).[62] This mental element is a necessary condition to establishing the offence of incitement to genocide.

As the Chamber held in *Prosecutor v. Ruggiu*:

> "*The person who incites to commit genocide must himself have the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.*"[63]

Prosecuting Those Who Aid and Abet in the Incitement to Genocide

Regarding a person that assisted a principal offender in the commission of **incitement** to genocide, if that person "*knew or had reason to know that the principal offender was acting with genocidal*

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[59] Prosecutor v. Nahimana et al. (Media case), Case No. ICTR-99-52-A, Appeals Judgement, 28 November 2007, para. 862.

[60] Case Matrix Network, 'Direct and Public Incitement to Genocide', https://www.casematrixnetwork.org/cmn-knowledge-hub/elements-digest/mol/direct-and-public-incitment-to-genocide/m-1/.

[61] *Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3, Trial Chamber, 6 December 1999.

[62] *Prosecutor v. Nahimana et al. (Media case),* Case No. ICTR-99-52-T, Appeals Judgement, 28 November 2007, para. 677.

[63] *Prosecutor v Ruggiu*, Case No. ICTR-97-32-I, Trial Chamber Judgement, 1 June 2000, para. 14; *see also Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 560; *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Trial Chamber Judgement, 12 September 2006, para. 466.

intent,[that person] *would be an aider and abettor to* [the crime] *even though he did not share the* […] *intent to destroy the group*".[64]

The aider and abettor would possess the necessary intent for incitement to genocide if they were aware that in the ordinary course of events direct and public incitement to commit genocide would occur.[65]

For instance, collaborators at a radio station assisting the speaker could be found guilty of aiding and abetting incitement to genocide if they were simply aware that genocide would ensue, even if they themselves did not intend to destroy the group in whole or in part.

The ICTY has held that genocidal intent "*may, in the absence of direct explicit evidence, be inferred from*" circumstantial evidence.[66]

Complicity in genocide differs from incitement to genocide with regards to the actual occurrence of genocide.[67] In *Musema,* the Trial Chamber found that:

> *"The Chamber notes that complicity can only exist when there is a punishable, principal act committed by someone, the commission of which the accomplice has associated himself with. In this regard, the Chamber notes from the travaux préparatoires of the Genocide Convention that the crime of complicity in genocide was recognised only where genocide had actually been committed. Consequently, the Chamber is of the opinion that in order for an accused to be found guilty of complicity in genocide, it must be proven beyond a reasonable doubt that the crime of genocide has been committed."*[68]

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[64] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 451.
[65] *Prosecutor v. Musema*, Case No. ICTR-96-13, Trial Chamber, 27 December 2000, paras. 181-183.
[66] *Prosecutor v. Jelisić Goran,* Case No. IT-95-10-A, Appeals Judgement, 5 July 2001, para. 47.
[67] *Prosecutor v. Nahimana et al. (Media case),* Case No. ICTR-99-52-T, Appeals Judgement, 28 November 2007, para. 678.
[68] *Prosecutor v. Musema*, Case No. ICTR-96-13, Trial Chamber, 27 December 2000.

Prosecutor v. Nahimana et al. [ICTR, 2007]

In 1992, alongside two others, Nahimana founded a *comite d'initative* and set up a radio company, *Radio Television des Milles Collines S.A.*. He was also the member of a party known as *Mouvement Revolutionairre National pour le Development* (MRND). The radio was said to be a prominent part in the lives of the Rwandan people and it was an increasingly important source of information which people listened to at roadblocks.

A number of broadcasts painted Hutus and Tutsis as opposing clans, descriptions of civilians were given to aid attacks targeting them, and the extermination of Tutsi-led Rwandan Patriotic Front members was celebrated. Threats and calls to violence were also made on air. The prosecution was able to prove that these broadcasts constituted direct and public incitement to commit genocide as they satisfied all the elements: direct, public and with the intention to incite the commission of genocide. Causation was also proved through targeted killings of civilians which had occurred soon after broadcasts giving their descriptions, although actual commission of genocide was itself not required to prove this inchoate offence.

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[4.] *Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T.*

Key Cases

ICTR, *Prosecutor v. Pauline Nyiramasuhuko et al,* Case No. ICTR-98-42

ICTR, *Prosecutor v. Kalijeli,* ICTR-98-44A, Appeal Judgement

ICTR, *Prosecutor v. Yussuf Munyakazi,* Case No. ICTR-97-36A-A, Appeal Judgement

ICTR, *Prosecutor v. Édouard Karemera et al.,* Case No. ICTR-98-44-A, Judgement

ICTR, *Prosecutor v. Nahimana et al. (Media case)*, Case No. ICTR-99-52

ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67

ICTY, *Prosecutor v. Rutaganda,* Case No. ICTR-96-3, Trial Chamber

ICTY, *Prosecutor v. Musema,* Case Bo. ICTR-96-13, Judgement

ICTR, *Prosecutor v. Ruggiu,* Case No. ICTR-97-32, Judgement, 1 June 2000

Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100 20

Octavien Ngenzi and Tito Barahira v. France (Cour d'Assises de Paris) [2018]

Perinçek v. Switzerland, Communication No. 27510/08.

PART II - Hate Violations

3. Racial Discrimination

The International Convention on the Elimination of Racial Discrimination (ICERD) is one of two human rights treaties explicitly dedicated to a particular form of discrimination, in this case racial discrimination. The prohibition of racial discrimination is considered a fundamental norm of international law from which no derogation is allowed. This means that this obligation exists even when states have not explicitly ratified the ICERD and no exemption or exception may be applied.

The treaty body which monitors the implementation of ICERD by its States Parties is called the Committee on the Elimination of Racial Discrimination (CERD). It is made up of a panel of 18 independent experts and meets biannually.

3.1 Definition of Racial Discrimination

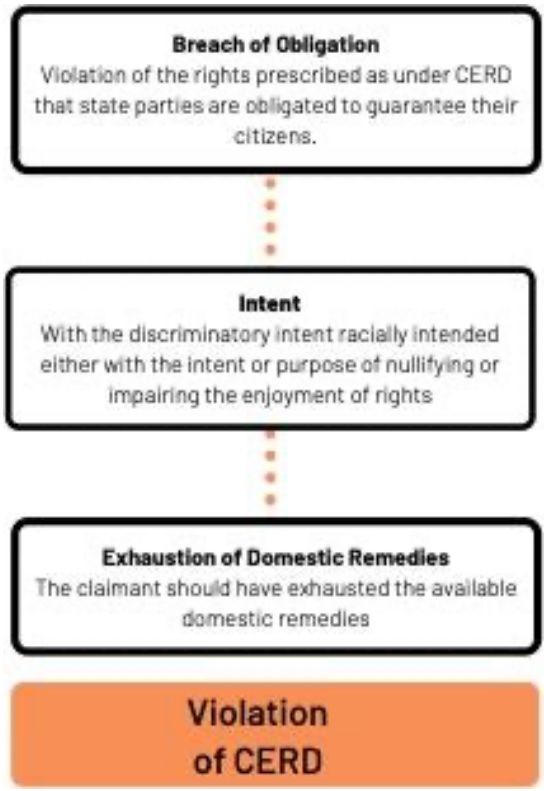
In ICERD, racial discrimination is defined by Article 1(1) and encompasses both direct and indirect discrimination,[69] i.e. not only measures that are explicitly discriminatory, but also those that are discriminatory in fact and effect.[70] The CERD recognised that ICERD explicitly included cases of indirect discrimination even when legislation does not make a direct reference to the alleged victim.[71] The CERD has acknowledged that by definition, indirect discrimination can only be demonstrated circumstantially.[72]

The ICERD also addresses intersectionality, i.e. the cumulative way in which the effects of multiple forms of discrimination combine or intersect especially in the experiences of marginalized individuals or groups, in its recommendations.[73] It considers gender and age to be factors affecting racial discrimination faced by individuals.[74] The ICERD also safeguards an individual's human rights and fundamental freedoms in the political, economic, social and cultural spheres of life.

Article 1(2) of ICERD states that its provisions shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens. For example, in *B.M.S. v. Australia* the CERD found that that legislation favouring citizens did not constitute indirect

[69] ICERD, Article 1.
[70] CERD General Recommendation No. 14 (1993), para. 2; CERD annual report 2009, A/64/18, para. 42, the Philippines (13).
[71] *Ms. L. R. et al v. Slovakia*, Communication No.31/2003, UN Doc. CERD/C/66/D/31/ 2003, para. 10.4.
[72] *Id.*
[73] CERD General Recommendation No. 32 (2009), para. 7.
[74] CERD General Recommendation No. 25 (2000); CERD General Recommendation No. 31, preamble; and in the consideration of State report of Mali in 2002, ref. CERD Annual Report (2002) A/57/18, paras. 404 and 405.

discrimination as it could not be concluded that the system worked to the detriment of a particular race or nationality. [75]



Article 1(3) safeguards State Parties' right to make laws regarding citizenship and naturalisation. However, with regards to issues of xenophobia and other racist practices against non-citizens, CERD issued a General Recommendation clarifying the State Parties' obligations to non-citizens. It stated that differential treatment would constitute discrimination if the criteria for such differentiation, was not applied for a legitimate aim or was not proportional to the achievement of that aim.[76] Moreover, it clarified that Article 1(2) should not be interpreted as reducing the rights and freedoms enjoyed by everyone as granted under the other human rights instruments.

Further, Article 1(4) allows for special measures, namely affirmative action, to be taken for the sole purpose of securing adequate advancement of certain racial and ethnic groups. These measures are considered legitimate on the condition that they "*do not, as a consequence lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*"[77] However, it is important to distinguish special measures from "*unjustifiable preferences*".[78]

3.2 When Differential Treatment is Not Discrimination

In two situations, differential treatment does not constitute discrimination, i.e. (i) where the criteria for such differential treatment, judged against the objectives and purposes of ICERD, are legitimate;[79] or (ii) where the differential treatment amounts to special measures as provided in Article 1(4) ICERD.[80] However, the CERD has emphasised that the principle of non-discrimination is not subject

[75] *B.M.S v. Australia*, Communication No. 8/19976, U.N. Doc. CERD/C/54/D/8/1996.
[76] CERD General Recommendation No. 30 (2004), para. 4.
[77] ICERD, Article 1(4).
[78] CERD General Recommendation No. 32 (2009), para. 7.
[79] For example, in *Sefic v. Denmark*, the CERD concluded that the requirement to speak Danish in order to obtain car insurance was based on reasonable and objective grounds and did not therefore constitute racial discrimination. *Sefic v. Denmark,* Communication No. 32/2003, UN Doc. CERD/C/66/D/32/2003, para. 7.2.
[80] UN Doc. HRI/GEN/1/Rev.7, General Recommendation XIV (1993), *Article 1, paragraph 1 of the Convention,* para. 2. In General Recommendation 14, the CERD held that if the reason fell within the scope of Article 1(4) it could be held to not be discriminatory CERD General Recommendation No. 14 (1993).

to availability of resources,[81] and that no derogations from the principle of non-discrimination are allowed.[82]

3.3 Protected Groups

The definition of discrimination set out in Article 1 of ICERD identifies five grounds or 'protected groups': race, colour, descent, national and ethnic origin. No hierarchy among these groups is indicated and any discrimination against any such group will be addressed comprehensively. Although religion is not included in the provision, the CERD has interpreted race to be a social construct interwoven with religion, ethnicity and beliefs.[83] The CERD also emphasises that this definition relates to those belonging to different races, nationalities, ethnicities and to "*indigenous peoples*".[84] The identification of each member belonging to the group "*shall, if no justification exists to the contrary, be based upon the self-identification by the individuals concerned.*"[85]

The CERD clarified that "*discrimination based on "descent" includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights*".[86]

The CERD also established seven factors to help identify descent-based discrimination:[87]

1. Inability or restricted ability to alter inherited status;
2. Socially enforced restrictions on marriage outside the community;
3. Private and public segregation, i.e. in housing and education, access to public spaces, places of worship and public sources of food and water;
4. Limitation of freedom to renounce inherited occupations or degrading or hazardous work;
5. Subjection to debt bondage;
6. Subjection to dehumanizing discourses referring to pollution or untouchability; and
7. Generalized lack of respect for their human dignity and equality.

3.4 State Party Obligations – the Relevant Law

[81] UN Doc. CERD/C/65/CO/4, para. 16 (Madagascar).
[82] UN Doc. A/57/18, para. 300 (Botswana).
[83] Encyclopaedia of Human Rights, Vol. 1, page 306.
[84] CERD General Recommendation No. 24 (1999), para. 1.
[85] CERD General Recommendation No. 8 (1990).
[86] CERD General Recommendation No. 29 (2002).
[87] CERD General Recommendation No. 29, (2002), page 2.

The ICERD imposes certain obligations on State Parties which centre on measures to eliminate racial discrimination,[88] to eliminate apartheid and racial segregation[89] and to prohibit racial incitement.[90] State Parties are also required to take active steps to promote equality in the enjoyment of rights[91] and to make remedies available for racial discrimination.[92]

Eliminating Racial Discrimination

Article 2 requires State Parties to prohibit and stop racial discrimination by *any* person, group or organisation, without any distinction between public and private actors. State Parties are required not to engage in or sponsor any acts or practices of racial discrimination and to review and nullify laws perpetuating such discrimination.[93] State Parties should take special measures in social, cultural and economic fields to ensure adequate development and protection of disadvantaged groups.[94]

Eliminating Apartheid and Racial Segregation

Article 3 condemns racial segregation and apartheid practices. Although initially interpreted to be exclusively directed at South Africa, the CERD clarified that Article 3 prohibits all forms of racial segregation in all countries including unintended segregation in housing and education.[95] State Parties also have the obligation to eradicate the consequences of such practices undertaken or tolerated by previous Governments.

Racial Incitement or Hate Speech

Article 4 of the ICERD addresses hate speech, i.e. the dissemination of ideas of racial superiority, and of organised activity likely to incite persons to racial violence.[96] It limits the exercise of freedom of expression in such instances "*with due regard to the principle embodied in the Universal Declaration of Human Rights*".

The CERD has repeatedly emphasized the paramount importance of Article 4 and the provision itself makes reference to the abovementioned due regard clause. However, State Parties frequently use the argument of respecting freedom of expression and association to justify non-compliance with

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[88] ICERD, Article 2.
[89] ICERD, Article 3.
[90] ICERD, Article 4.
[91] ICERD, Article 5.
[92] ICERD, Article 6.
[93] ICERD, Article 2(1).
[94] ICERD, Article 2(2); similar provisions to Article 1(4).
[95] CERD General Recommendation No. 19 (1995).
[96] UN Doc. CERD/C/62/CO/9, para. 12 (Slovenia); UN DOC. Hri/gen/1/Rev.7, General Recommendation XV (1993), *Organised Violence Based on Ethinic Origin (Article 4),* para. 2; General Recommendation VII (1985), *Legislation to Eradicate Racial Discrimination (Article 4)*, para. 1.

Article 4 of ICERD.[97] However, General Recommendation 15/1993 clearly states that the provision is compatible with freedom of expression.[98] However, where the speech is of an exceptionally offensive character, it was held not to be protected by a due regard clause.[99]

As per the CERD's General Recommendations and under ICERD Article 4, State Parties must declare the following acts as punishable by law:

- The dissemination of ideas based upon racial superiority or hatred;
- Incitement to racial discrimination;
- Acts of violence, or incitement to such acts against any race or group of persons of another colour or ethnic origin; and
- Provision of any assistance to racist activities, including their financing.[100]

Additionally, organisations' activities and propaganda, which promote and incite racial discrimination, must be declared illegal and be prohibited (Article 4(b)). Belonging to such organisations and participating in such activities are also to be treated as a criminal offence. Article 4(c) states that State Parties shall not permit any public authority or institution (national or local) to promote or incite racial discrimination.

The need to balance freedom of expression with the requirements of the ICERD is even more important in the context of statements made by members of political parties.[101] For the purpose of Article 4 of the ICERD, it does not suffice for State Parties to merely declare acts of racial discrimination punishable on paper.[102] Rather these laws must also be effectively implemented by the competent national tribunals and other State institutions. Moreover, statements made in the context of a political debate do not absolve the State Party from its obligation to investigate whether or not the statements amounted to racial discrimination.[103]

Promoting Equality and Enjoyment of Rights and Freedoms

Article 5 of the ICERD provides a non-exhaustive list of rights that State Parties are obliged to guarantee to everyone, regardless of race, colour or national or ethnic origin. The list includes:

a) The right to equal treatment before the tribunals and all other organs administrating justice;
b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

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[97] ICERD List of State Parties: available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV2&chapter=4&lang=en.
[98] CERD General Recommendation No. 15 (1993).
[99] *Jewish Community of Oslo et al. v. Norway*, Communication no. 30/2003, CERD/C/67/D/30/2003.
[100] CERD General Recommendation No. 1 (1972); CERD General Recommendation No. 7 (1985); and CERD General Recommendation No. 15 (1993).
[101] *Kamal Quereshi v. Denmark*, Communication No. 27/2002, UN Doc. CERD/C/63/D/27/2002, para. 9.
[102] *Mr. Ahmed Farah Jama v. Denmark*, Communication No. 41/2008, CERD/C/75/D/41/2008, para. 7.3.
[103] *Mohammed Hassan Gelle V. Denmark*, Communication No. 34/2004, CERD/C/68/D/34/2004, para. 7.5.

c) A whole series of civil and political rights;
d) A whole series of economic, social and cultural rights; and
e) The right of access to any place or service intended for use by the general public, including those privately owned, such as transport, hotels, restaurants, cafes, theatres and parks.

The CERD has emphasised the importance attached to State obligations to promptly and effectively identify and eradicate any violations of Article 5 of the ICERD.[104] Violations of Article 5 of the ICERD have been found in cases where Roma were expelled from a place of residence on racial grounds.[105] The CERD also considered that both the implementation procedure of such legislation and the decision-making elements directly connected to that implementation must occur in a non-discriminatory manner.[106]

Effective Domestic Remedies

Under Article 6 of the ICERD, States are obliged to assure everyone within their jurisdiction has:

- Effective protection and remedies against any acts of racial discrimination; and
- The right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

At a minimum, Article 6 of the ICERD requires the State Party's legal system to afford a remedy in cases where an act of racial discrimination within the meaning of the ICERD has been made out, whether before a national court or before the CERD.[107] State Parties' maintain their freedom to prosecute criminal offences based on public policy considerations. . Further, the terms of Article 6 of the ICERD do not impose upon State Parties the duty to institute a mechanism of sequential remedies, up to and including the Supreme Court level, in cases alleging racial discrimination.[108]

The CERD has emphasised that mere doubts about the effectiveness of alternative civil remedies do not absolve a petitioner from pursuing them.[109] However, in considering whether a plaintiff exhausted local remedies, the CERD noted that it is a relevant consideration if available civil remedies would not have helped a petitioner achieve the same objectives as criminal proceedings.[110]

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[104] *M.B. v. Denmark*, Communication 20/2000, UN Doc. CERD/C/60/D/20/2000 (2002).
[105] *Ms. L. R. et al v. Slovakia*, Communication No. 31/2003, UN Doc. CERD/C/66/D/31/ 2003, para. 10.4. - violations of 5(e)(iii); *Anna Koptova v.* Slovakia, Communication No. 13/1998, UN Doc. CERD/C/57/D/13/1998, para. 10.1. - violations of Article 5 (d)(i).
[106] *Ms. L. R. et al v. Slovakia*, Communication No. 31/2003, UN Doc. CERD/C/66/D/31/ 2003, para. 10.4.
[107] *Ms. L. R. et al v. Slovakia*, Communication No. 31/2003, UN Doc. CERD/C/66/D/31/ 2003, para. 10.10.
[108] *A. Yilmaz-Dogan v. State of Netherlands*, Communication No. 1/1984, CERD/C/36/D/1/1984 (1988).
[109] *Sarwar Seliman Mostafa* v. *Denmark*, Communication No. 19/2000, CERD/C/59/D/19/2000 (2001), Decision on admissibility of 10 August 2001, para. 7.4.
[110] *Emir Sefic* v. *Denmark*, Communication No. 32/2003, CERD/C/66/D/32/2003 (2005), Opinion of 7 March 2005, para. 6.2.

3.5 Submitting an Individual Communication to CERD

In order for an individual or group to allege violations of their rights under the ICERD by a State through bringing a complaint, termed an 'individual communication', the State Party in question must have made a declaration under Article 14 of the ICERD that they accept the competence of the CERD.

Paragraph 2 of Article 14 of the ICERD stipulates that a State Party may designate a national body which will be competent to receive and consider petitions from individuals and groups of individuals. If these persons claiming to be victims of a violation of their rights set forth in the ICERD have adequately exhausted other available local remedies, they will be able to file a communication to these international bodies.[111] Each individual wanting to be a party to this claim needs to have exhausted domestic remedies.[112] However, it is not within the CERD's mandate to assess the decisions of domestic authorities regarding the appeals procedure in criminal matters.[113]

3.6 Checklist for Submitting a Communication to CERD

Time limits

1. The communication must be filed *within six months* of the final decision by a national authority, i.e. the exhaustion of domestic remedies. If the communication is filed outside of this time limit, the communication will be held inadmissible as per the CERD's Rules of Procedure, except in the case of duly verified exceptional circumstances.[114]

Victim status

2. Complaints may be brought by individuals, but also on behalf of groups of persons. Under Article 14(1) of the ICERD, the claim can only be brought by an entity or individual that can claim 'victim' status. However, the fact that the suit is instituted by a legal person is not an obstacle to admissibility, subject to the relevance and suitability of the organisation's activities and the groups of individuals they represent.[115] Groups representing individuals who identify as victims should provide due authorisation to that effect.[116]

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[111] ICERD, Article 14(7)(a); Rules of Procedure of the CERD, CERD/C/35/Rev.3, 01/01/89, Rule 91.
[112] *POEM and FASM* v. *Denmark*, Communication No. 22/2002, U.N. Doc. CERD/C/62/D/22/2002 (2003), para. 6.3.
[113] *Mr. Ahmed Farah Jama v. Denmark*, Communication No. 41/2008, U.N. Doc. CERD/C/75/D/41/2008 (2009), para. 6.3.
[114] *Dragan Durmic* v. *Serbia and Montenegro*, Communication No. 29/2003, U.N. Doc. CERD/C/68/D/29/2003 (2006), Opinion of 6 March 2006, para. 6.1.
[115] *The Jewish Community of Oslo et al. v. Norway*, Communication No. 30/2003, CERD/C/67/D/30/2003, para. 7.4; *Zentralrat Deutscher Sinti und Roma et al. v. Germany*, Communication No. 38/2006, U.N. Doc. CERD/C/72/D/38/2006, para. 7.2.
[116] *The Documentation and Advisory Centre on Racial Discrimination v. Denmark*, Communication No. 28/2003, U.N. Doc. CERD/C/63/D/28/2003 (2003), Opinion of 26 August 2003, Para. 6.4.

3. **Parallel proceedings** If the same matter is pending before or has been the subject of a decision under another international procedure, it will not be considered an obstacle to the admissibility of the complaint.

Procedure

Timetable

After the complaint has been registered, the State Party has three months to present submissions on its admissibility, and if it has no objection to the admissibility then a submission must be made on the merits. If admissibility is challenged, the complainant will have six weeks to comment on the State Party's observations. After that, the CERD will take a decision on admissibility. If the CERD concludes that the case is admissible, the State Party has three further months to present observations on the merits. The complainant will then have six weeks to comment before the CERD takes a final decision on the merits of the case. Alternatively, if the State Party has no objection to the admissibility of the complaint and presents its submissions solely on the merits, the complainant will also have six weeks to comment before the CERD takes a final merits decision.

Attending proceedings

The Rules of Procedure (rule 94, paragraph 5) of the CERD, authorise it to invite the complainant (or his/her representative) and State Party representatives to attend the proceedings in order to provide additional information or to answer questions on the merits of the case. However, such instances are exceptional rather than routine and a case will not be prejudiced should the complainant fail to attend in person.

CERD Suggestions and/or recommendations

When the CERD takes a decision, termed an "Opinion", on the merits of a complaint, it often makes suggestions and/or recommendations, even if it has concluded that there has been no violation of the ICERD. These suggestions or recommendations may be general or specific and addressed either to the State Party in question or to all State Parties to the ICERD.

Jewish Community of Oslo et al. v. Norway [CERD, 2003]

In August 2000, a group known as the "Bootboys" organised and participated in a march in commemoration of the Nazi leader Rudolf Heiss, near Oslo. Some 38 people took part in the march and a significant number of them had criminal convictions. The man heading the march, Mr. Sjolie, made a speech at the town square, which contained serious anti-Semitic sentiment and praised Nazi leaders Rudolf Heiss and Adolf Hitler. In the next 12 months, the city was plagued by incidents of violence directed against blacks and political opponents, and there was an increase in Nazi activity. The Norwegian Supreme Court acquitted Mr. Sjolie and found that penalising Nazism would involve prohibiting Nazi organisations, which it considered would go too far and be incompatible with the right to freedom of speech.

The Jewish Community of Oslo approached the CERD and contended that they were the victims of violations of the Articles 4 and 6 of the ICERD, which deal with the right to protection against the dissemination of ideas of racial discrimination and right to fair trial respectively. The claimant succeeded in demonstrating that they had **exhausted domestic remedies** and that they were **'victims'** due to their membership of a group that could potentially be victims.

Considering the case on merits, the CERD considered that the racial superiority or hatred constituted **incitement to racial discrimination**, if not violence. In its view, these comments were not protected by the **'due regard'** clause as they were **manifestly of an offensive character**. Accordingly, it was found that Mr. Sjolie's acquittal by the Supreme Court of Norway gave rise to a violation of Article 4, and consequently of Article 6, of ICERD.

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[5] *The Jewish Community of Oslo et al. v. Norway*, Communication No. 30/2003, CERD/C/67/D/30/2003.

3.7 Early Warning and Urgent Action Procedure

Alongside making individual communications and submitting 'shadow' or 'alternative' NGO reports for a State's ICERD review, civil society can also submit reports to CERD under its Early Warning and Urgent Action Procedures. These procedures allow civil society to submit reports on country situations, bringing to the CERD's attention situations which are at risk of escalating into conflict, or which require immediate attention to prevent or limit the scale or number of serious violations of the ICERD.

The criteria for initiating the Early Warning and Urgent Action Procedures are set out in the guidelines published by the CERD in 2007.[117] Criteria for early warning measures include, amongst others, the presence of a pattern of escalating racial hatred and violence, or racist propaganda or appeals to

[117] Official Records of the General Assembly, Sixty-second Session, Supplement No. 18 (A/62/18), annex III.

racial intolerance by persons, groups or organisations, notably by elected or other officials.[118] Criteria for initiating an urgent procedure include, for example, the presence of a serious, massive or persistent pattern of racial discrimination, or a situation that is serious where there is a risk of further racial discrimination.[119]

If it decides to take action regarding a submission, the CERD can respond by adopting a decision, issuing a statement or sending a letter to a State Party, for example requesting the urgent submission of information on the situation and offering to send a CERD member to assist in implementing international standards. The possible measures that the CERD can take are also set out in the 2007 guidelines.

The Early Warning and Urgent Action Procedure process is entirely confidential and submitting NGOs or civil society groups will not be publicly named or be shared with the State Party concerned.

Key Cases

Ms. L. R. et al v. Slovakia, Communication No.31/2003, UN Doc. CERD/C/66/D/31/2003

B.M.S v. Australia, Communication No. 8/19976, U.N. Doc. CERD/C/54/D/8/1996,

The Jewish Community of Oslo et al. v Norway, Communication No. 30/2003, CERD/C/67/D/30/2003.

Mohammed Hassan Gelle v. Denmark, Communication No. 34/2004, CERD/C/68/D/34/2004

M.B. v. Denmark, Communication 20/2000, UN Doc. CERD/C/60/D/20/2000 (2002).

[118] Committee on the Elimination of Racial Discrimination, Early-Warning Measures and Urgent Procedures https://www.ohchr.org/EN/HRBodies/CERD/Pages/EarlyWarningProcedure.aspx#about.
[119] Ibid.

4. Discrimination and Violence against Women

The Convention on the Elimination of Discrimination against Women (**CEDAW**) requires States to eliminate discrimination against women in all areas and to promote women's equal rights. CEDAW acts as a tool for substantive equality and places obligations on State Parties to recognise differences while affirming equality. Its complaint mechanism, namely the Committee on the Elimination of Discrimination against Women (CEDAW Committee), has proven to be a popular avenue for complaints, with 155 complaints registered since its entry into force.[120]

ICCPR[121] as well as the following regional Conventions all include provisions on discrimination against women:

- American Convention on Human Rights (ACHR),[122]
- the European Convention on Human Rights (ECHR),[123]
- the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Para Convention),[124]
- the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol); and
- the Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention).

4.1 Definitions

Discrimination and violence against women as defined under CEDAW are forms of 'identity-based violence'. However, whether violence against women amount to *hate crimes* is more subtle. Is all violence against women, for instance, domestic violence or rape, always assumed to have a bias intent? Or is a bias or hate intent only present in such extreme circumstances, as acts committed against women indiscriminately by the Incel ('involuntary celibates') movement in the United States of America?[125] Some argue that a bias intent is inherent in the notion of gender-based or sexual violence. Such crimes are generally committed *because of the victims' gender*, just as crimes of a

[120] Statistical Survey, OHCHR website, Committee on the Elimination of Discrimination against Women, available at: https://www.ohchr.org/Documents/HRBodies/CEDAW/StatisticalSurvey.xls
[121] ICCPR, Article 7.
[122] American Convention on Human Rights, Organisation of American States, 22 November 1969 [hereinafter AmCHR].
[123] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.
[124] Convention on the Prevention, Punishment and Eradication of Violence against Women ("Belem do Para Convention").
[125] For a description of the 'Incel' movement, see: https://www.psychologytoday.com/us/blog/minority-report/201804/the-incel-involuntary-celibacy-problem.

sexual nature might be committed against members of the LGBTI community or other minority groups *because of their sexual or other identities.* Nonetheless, violence against women is not routinely classified as hate crime in police reporting in OSCE countries.

Article 1 of CEDAW defines discrimination against women as:

> *"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*[126]

4.2 Obligation of State Parties – the Relevant Law

CEDAW imposes certain obligations on State Parties which centre on measures to eliminate discrimination against women. Article 2 imposes the need to adopt appropriate legislative and other measures and sanctions where appropriate, prohibiting all discrimination against women.[127] This includes an obligation "*to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.*"[128]

Article 5 also requires State Parties to work towards modifying the social and cultural patterns of conduct which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[129] Temporary measures such as affirmative action can be used to achieve this substantive equality.[130]

4.3 Violations of Rights

The **CEDAW Committee** can receive complaints on the basis of violations of the rights guaranteed by the convention. These include:

[126] CEDAW, Article 1.
[127] CEDAW, Article 2(a).
[128] CEDAW, Article 2(f).
[129] CEDAW, Article 5.
[130] CEDAW Committee, General Recommendation No. 25 on Article 4(1) of the CEDAW, A/59/38 (supp), 18 March 2004, para. 22.

Protected Rights of Women under CEDAW

Political rights, such as the right to vote, to hold public office, to participate the formulation of government public policy, to participate in non-governmental organisations and associations;

The opportunity to represent their governments at international level;

The right to acquire, change or retain their nationality;

Equal rights with men with respect to the nationality of their children;

Equality in the field of education, including access to the same curricula, examinations, etc.

Equality in the field of employment, including the right to equal opportunities and pay;

Equality in the field of health, including rights related to family planning;

Equality in rights relating to economic and social life, such as family benefits and access to loans;

The right to participate in sports and cultural life;

Equality before the law in civil matters and legal capacity, for instance to conclude contracts or administer property;

Equality in all matters relating to marriage and family relations.

Women also enjoy protection from being trafficked and of affirmative action or special measures implemented more generally.

The rights thus violated could give rise to filing a complaint before the CEDAW Committee, provided domestic remedies have been exhausted. The rights could arise from the State Parties' obligations under Articles 2 and 5 of CEDAW.

4.4 Violence Against Women

While CEDAW does not include a specific article prohibiting violence against women, this is included within the definition of discrimination.[131] As iterated in General Recommendation 19:

> *"The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts*

[131] CEDAW Committee General Recommendation 19 (1992), Violence against Women; DEDAW, GA Res 48/104, 20 December 1993.

that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence."[132]

Following on from this, CEDAW makes specific recommendations that States should take all appropriate measures to prevent, investigate, punish and provide adequate reparations for all acts of gender-based violence, whether public or private.[133]

Failure to enact criminal law provisions to effectively protect women and girls from physical and sexual abuse[134] and provide equal protection under law to victims of domestic violence and sexual abuse[135] amounts to violations of their rights. Gender bias and rape myths featuring in court proceedings and decision making has also been found to violate protected rights.[136]

The failure of the police and the State to investigate an imminent threat and protect from domestic violence in the first instance can also amount to a violation of protected rights.[137] Ensuring the victim's ongoing safety and taking prompt action to investigate and prosecute domestic violence are also obligations that State Parties must carry out.[138] The CEDAW Committee can also make findings on the intersectionality of discrimination against women and offer protection of their civil rights such as housing rights.[139]

In a landmark decision, the Inter-American Court ruled against Mexico for its failure to investigate and protect women during well-documented disappearances and murders occurring in the State.[140] The violations of rights as guaranteed under Article 1 of the American Convention on Human Rights and Article 7 of the Belem do Para Convention allowed the complainant to approach the court.

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[132] *Idem*.
[133] LSE Centre for Women, Peace and Security, 'General Recommendations' https://blogs.lse.ac.uk/vaw/int/cedaw/general-recommendations/.
[134] *X and Y v. Georgia*, Communication No. 24/2009, UN Doc. CEDAW/C/61/D/24/2009 (2015).
[135] *Angela Gonzalez Carreno v. Spain*, Communication No 47/2012, UN Doc. CEDAW/C/58/D/47/2012 (2014).
[136] *R.P.B. v. The Philippines*, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011 (2014); *V.K. v. Bulgaria*, Communication No. 20/2008, UN Doc. CEDAW/C/49/D/20/2008 (2011); *Karen Tayag Verido v. the Philippines*, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010).
[137] *Angela Gonzalez Carreno v. Spain*, Communication No 47/2012, UN Doc. CEDAW/C/58/D/47/2012 (2014); *Isatou Jallow v. Bulgaria*, Communication No. 32/2011, UN Doc. CEDAW/C/52/D/32/2011 (2012).
[138] *V.P.P. v. Bulgaria*, Communication No. 31/2011, UN Doc. CEDAW/C/53/D/31/2011 (2012).
[139] *Cecilia Kell v. Canada*, Communication No. 19/2008, UN Doc. CEDAW/C/51/D/19/2008 (2012).
[140] *Gonzalez, Monreal and Monarrez* ("Cotton Field") *v. Mexico, Inter-American Court on Human Rights*, Judgement, November 16, 2009, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf.

The Human Rights Committee also recognises rights claims arising from discrimination based on gender and ensures equal rights to men and women under ICCPR. The Committee has recognised the underlying discriminatory purpose of rape on the basis of gender.[141] It notes that rape, particularly gang-rape during armed conflict, is a form of gender-specific violence, aimed, in its form and purpose, at asserting or perpetuating male domination over women.[142]

For the purposes of seeing violence against women through a prism of hate that can lead to mass atrocities, the intersectionality dimension will be particularly important. Women of particular groups have repeatedly been targeted both as *women* and *as members of the specific group* as a means of subjugating or destroying the group. Particular vitriol seems to be reserved for women of discriminated groups. As such, hate speech that identifies and humiliates, dehumanises or demonises women of specific groups should be reported alongside physical violations and crimes to put these into context.

4.5 Checklist for Submitting a Communication to the CEDAW Committee

Articles 2, 3 and 4 of the Optional Protocol to the CEDAW (OP-CEDAW) establish the CEDAW Committee's communications procedures and specify the conditions applicants must meet prior to a case being heard before the CEDAW Committee. These admissibility criteria are:

1. **Exhaustion of domestic remedies**. The CEDAW Committee's communications procedures provide that a complainant should have exhausted all available domestic remedies prior to submitting a complaint, unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief;
2. **Communications must be in written form**;
3. Communications may be submitted by or on behalf of **individuals or groups** of individuals who are:
    a. **Under the jurisdiction of a State Party**, and
    b. **Claiming to be victims of a violation** of any of the rights set forth in the CEDAW by the state concerned; and
4. If submitted on behalf of individuals or groups of individuals, this must be with their consent, unless the author can justify acting on their behalf without such consent.

Conversely, a complaint may be rejected if:

- It is submitted anonymously;

[141] UNHRC "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the right to development" A/HRC/7/3, 15 January 2008.
[142] *Purna Maya v. Nepal*, CCPR/C/119/D/2245/2013, 19 December 2012, para. 12.4.

- The same matter has already been examined by the CEDAW Committee or is being examined by another international investigation procedure;
- It is incompatible with CEDAW's provisions;
- It is manifestly ill-founded or not sufficiently substantiated;
- It is an abuse of the right to submit a communication;
- The violation referred to occurred before OP-CEDAW entered force – unless it continued after that date; or
- The complaint concerns a state not party to OP-CEDAW.

Procedure

Stage 1: Submission and registration of the communication

- The complainant submits a formal communication. Complaints that fail to meet the formal requirements, such as anonymous complaints, those not in writing, and those not concerning a State Party to OP-CEDAW are rejected at this stage.

Stage 2: The admissibility test

- At this stage, the CEDAW Committee determines whether the communication is admissible, under Articles 2, 3 and 4 of the OP-CEDAW, applying discretion regarding the circumstances of the complaint.

Stage 3: The initial review

- If there is a risk of irreversible harm to the victim, the CEDAW Committee can at this point urge the State to take interim measures.
- The CEDAW Committee submits the communication to the State concerned, confidentially.
- The State provides clarification, or explanation, of the alleged violations within six months of receipt of the communication and can provide details of any remedies implemented.

Stage 4: Consideration of the merits

- Once it has received the response of the State, the CEDAW Committee considers the merits of the complaint.

Stage 5: Views, recommendations and follow-up

- If the CEDAW Committee finds that the State has violated the CEDAW, it will make recommendations which it transmits to both the State and the complainant.
- The State provides a written response to the CEDAW Committee within six months, outlining actions taken to implement recommendations.
- The CEDAW Committee may also request the State provide specific follow-up information.

Gonzalez Carreno v. Spain [CEDAW, 2012]

Claudia Gonzalez and two other girls that worked in Ciudad Juarez (Mexico) disappeared after leaving work. Concerned for their safety, the women's families repeatedly contacted the police for help – to no avail. The law enforcement officials dismissed the families' concerns without any serious or effective investigation into the disappearances. A few days later, these women were found murdered in the cotton fields. The bodies of each of the women, which were found alongside five others, displayed evidence of intense physical and psychological torture, mutilation and sexual abuse. It was apparent that they had been abducted and imprisoned for days by their captors before they were finally killed. The investigation conducted by the authorities was also grossly unjust and inconsistent. The mothers of the three women brought this case to the IACtHR (then Commission).

The Prosecutor presented a systematic pattern of violence against women in Mexico. The Court found that the failure of the authorities to provide protection and then subsequently to investigate violated various State obligations prescribed under the ACHR (Articles 1, 4, 5, 7, 8, 19 and 25). The Court also recognised that the disappearance and murders of these girls were perpetrated in the known context of violence against women in Ciudad Juarez. Having reasonably ascertained both the objective and subjective elements of the crime and intent, the Court held Mexico accountable and recommended that it pay reparations to the victims.

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6. *Angela Gonzalez Carreno v. Spain*, Communication No 47/2012, UN Doc. CEDAW/C/58/D/47/2012 (2014).

Key Cases

X and Y v. Georgia, Communication No. 24/2009, UN Doc. CEDAW/C/61/D/24/2009 (2015).

Angela Gonzalez Carreno v. Spain, Communication No. 47/2012, UN Doc. CEDAW/C/58/D/47/2012 (2014).

R.P.B. v. The Philippines, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011 (2014).

Cecilia Kell v. Canada, Communication No. 19/2008, UN Doc. CEDAW/C/51/D/19/2008 (2012).

Gonzalez, Monreal and Monarrez ("Cotton Field") *v. Mexico, Inter-American Court on Human Rights*, Judgement, November 16, 2009.

4.6 Other Fora

Individual complainants can also petition the Regional Human Rights Treaty bodies applicable to their country, if it has accepted the regional bodies' contentious jurisdiction. These are the Inter-American Commission on Human Rights, the European Court of Human Rights, as well as the African Commission on Human and Peoples' Rights, which is mandated to interpret issues related to the application of the Maputo Protocol.

With regards to the IACHR and the ECtHR, both individuals and NGOs of Member States have the right to petition the ECtHR, providing they are the victim of a violation, and the final judgments are legally binding on the State concerned. Similarly, the IACtHR can only decide cases brought against the Member States that have specifically accepted the Court's contentious jurisdiction and those cases must first be processed by the Inter-American Commission on Human Rights.

The individual complainant could also approach the UN Human Rights Committee for a violation of their rights under ICCPR. For the complaints mechanism and the procedure to be followed, please see the section under 'Hate Speech and Incitement to Violence'.

Part III. Hate Crimes

5. Apartheid

The **International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)** declared apartheid as a crime against humanity and any crimes resulting from apartheid policies were declared as being in violation of principles of international law.[143] Broadly, it includes similar policies and practices of racial segregation and discrimination.

Apartheid is defined as "*inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.*"[144] Apartheid is also included as a crime against humanity under Article 7 of the ICC Statute. For the purposes of its inclusion there (see Crimes Against Humanity below), the physical acts included can be the same as those for CAH, but "*committed in the context of institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups committed with the intention of maintaining that regime.*"[145]

The ICERD also criminalises apartheid policies of racial segregation and discrimination.[146]

5.1 Inhuman Acts that Constitute Apartheid

The Apartheid Convention enumerates inhuman acts that could constitute the crime of apartheid:[147]

a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
   (i) By murder of members of a racial group or groups;
   (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
   (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

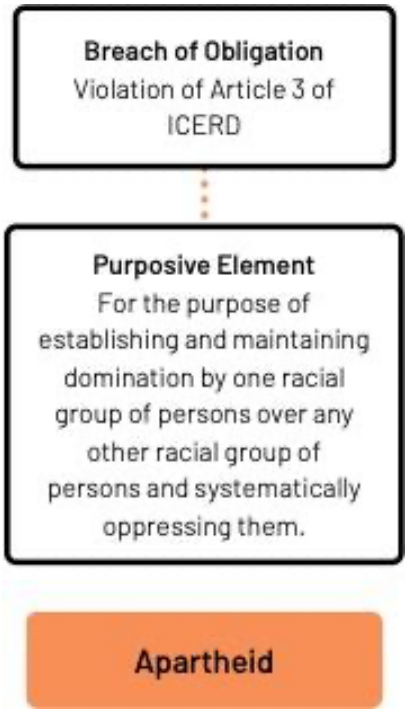
[143] Apartheid Convention, Article I.
[144] Apartheid Convention, Article II.
[145] ICC Statute, Article 7(2)(h).
[146] ICERD, Article 3.
[147] Apartheid Convention Article II.

c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognised trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.



The displaying of the apartheid flag in public was ruled as constituting 'hate speech'. The South Gauteng High Court of South Africa decided that "*gratuitous displays*" of the icon synonymous with the cruel apartheid era racial segregation would only be allowed to be brandished in places of historical significance, or as part of "*artistic or academic*" expression.[148]

5.2 The 'Intent' Required for Apartheid

The perpetrator must commit the acts *"for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically*

[148] *Nelson Mandela Foundation Trust and Anr. v. Afriforum NPC and Ors.* (EQ02/2018) [2019] ZAEQC 2; [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC); 2019 (6) SA 327 (GJ) (21 August 2019).

oppressing them."[149] If the crime is being pursued under the ICC Statute, an additional intent of committing the crimes "*with the intention of maintaining that regime*" must be proven.[150]

A unique feature of this crime is that irrespective of the motive, international criminal responsibility shall apply to individuals, members of organisations and institutions, and representatives of the State whenever they:

a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in Article II of the Apartheid Convention;

b) Directly abet, encourage or co-operate in the commission of the crime of apartheid.

However, the complainants must be able to show a 'sufficiently close connection' between the businesses or organisations in the country of the claim and the human rights abuses by the apartheid government.[151]

5.3 Jurisdiction and Enforcement Mechanisms

The crimes listed under Article II of the Apartheid Convention may be tried by a competent tribunal set up by any State Party to the Apartheid Convention, which may require jurisdiction over the person of the accused, or by an international criminal tribunal with jurisdiction over the State Parties concerned.[152]

The ICC, which can also prosecute apartheid as a crime against humanity having individual criminal responsibility, only has temporal jurisdiction over crimes committed after the ICC Statute came into force in July 2002. It only has territorial and personal jurisdiction over the territories and nationals of States that have ratified the Court's Statute, unless there has been a referral to the ICC Prosecutor by the Security Council acting under Chapter VII of the United Nations Charter (enforcement action).

[149] Apartheid Convention, Article II.
[150] ICC Statute, Article 7.
[151] *In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (2002).
[152] Apartheid Convention, Article V.

Nelson Mandela Foundation v. Afriforum SA Equality Court, 2019

The Old Flag or the Apartheid Flag was a vivid symbol of white supremacy and black disenfranchisement and suppression. The dominant meaning attributable to the Old Flag, both domestically and internationally, is that it is for the majority of the South African population a symbol that immortalises the period of a system of racial segregation, racial oppression through apartheid, and of South Africa as an international pariah state that dehumanised the black population. The Nelson Mandela Foundation Trust and the South African Human Rights Commission sought an order declaring Section 10 of the Equality Act as being "*unconstitutional and invalid to the extent that it restricts the type of expression which may constitute hate speech to 'words only'*". On the other hand, the respondents not only asserted that Section 10 did not extend to such symbols and that displaying the Old Flag is a constitutionally protected expression under Section 16(1) of the Constitution.

The South African Equality Court found that the gratuitous display of the Old Flag was racist, discriminatory and demonstrated a clear intention to be hurtful. It is harmful and incites harm while promoting and propagating hatred against black people in contravention of Section 10(1) of the Equality Act. Although the case did not call on the articles of the Apartheid Convention, given that the act directly abetted, encouraged or cooperated with the idea of such discrimination it would have been said to be in violation of the Apartheid Convention.

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7. *Nelson Mandela Foundation Trust and Anr. v. Afriforum NPC and Ors.* (EQ02/2018) [2019] ZAEQC 2; [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC); 2019 (6) SA 327 (GJ) (21 August 2019).

Key Cases

Nelson Mandela Foundation Trust and Anr. v. Afriforum NPC and Ors. (EQ02/2018) [2019] ZAEQC 2.

In re South African Apartheid Litigation, 238 F. Supp. 2d 1379 (2002).

6. Torture

The prohibition against torture and other cruel, inhuman or degrading of treatment is a norm from which there can be no derogation. Torture is a crime of universal jurisdiction which can be prosecuted by any State regardless of where the crime was committed, it can also be the subject of multiple complaints or prosecutions, such as:

- The Committee Against Torture,
- Regional Human Rights Courts,
- The International Criminal Court,
- Domestic courts on the basis of domestic law and universal jurisdiction.

With particular regard to torture committed as a hate crime, the definition under Article 1 of the Convention Against Torture, Inhuman and Degrading Treatment (CAT) is the most relevant. The ECtHR, the Inter-American Convention to Prevent and Punish Torture, the African Charter on Human and People's Rights[153], and the ICC all provide different definitions and mechanisms.

6.1 Definition

Article 1 of the **CAT** sets out the definition of torture as:

> "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*."[154] (emphasis added).

Acts of torture that are committed or suspected of having been committed on the basis of discrimination thus are serious hate crimes or violence against protected groups.

The physical act that amounts to torture should be for a proscribed purpose. Purposes are listed in Article 1 of CAT, and are interpreted broadly by the ECtHR,[155] although it is important to recognize

[153] Article 5 of the African Charter on Human and Peoples' Rights sets out the general prohibition on torture and is the basis on which other soft-law instruments have been created by the African Commission. These include the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa, adopted in 2002, and extracts from the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines).
[154] CAT, Article 1.
[155] *Denizci and Others v. Cyprus*, ECHR, 2001-V ECtHR. 225, 312-13; *Egmez v. Cyprus*, no. 30873/96, ECHR 2000-XII, 315, 336; A*ksoy v. Turkey,* no. 21987/93 ECHR 68 (1996).

that some regional bodies and standards, including the ACHR, and the ICC with respect to torture as a crime against humanity, do not require a purpose element (though torture as a war crime does).[156]

Some purposes previously recognised as constituting torture are:

- To obtain a confession
- To obtain information
- Corporal punishment
- Revenge
- Persuasion
- Political re-education
- Deterrence
- Coercion
- Sadistic gratification
- Based on discrimination of any kind.

With respect to torture as a hate-crime, the purpose of torture 'on the basis of discrimination of any kind becomes' is particularly relevant. While protected groups are usually based on nationality, ethnicity, race or religion, international jurisprudence and policy has been extended to include gender and sexual orientation.[157]

Elements

The definition as per Article 1 of the CAT has five elements:

The act must cause physical or mental pain or suffering;

The pain or suffering must be severe;

The pain or suffering inflicted should be intentional;

The act should be inflicted for the proscribed purpose; and

The act should be instigated by or with the consent or acquiescence of a public official.

To interpret these elements, they need to be read with the General Comments issued by the Committee Against Torture.

[156] Article 8(2)(a) (ii) of the ICC Statute: War crime of torture.
[157] *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994); CJA Amicus Brief to the ECtHR in *Necati Zontul v. Greece*, ECtHR, 17 April 2012.

The Objective Element of the Crime

The physical acts covered by the CAT include:

- torture, and
- inhumane and degrading treatment.

The ECtHR has distinguished between the two by acknowledging that a 'special stigma' attaches to torture distinguishing it from inhumane and degrading treatment. In addition, to be classified as torture, the treatment must cause "*very serious and cruel suffering*".[158] (emphasis added).

The ECtHR has established that the assessment of the threshold of severity should be done on a case by case basis and take into account the duration of the treatment, the physical and mental impact of the treatment, and the sex, age and state of health of the victim. The suffering caused also acts as the determining factor. Torture is considered to cause "*severe physical or mental pain or suffering*"[159] while inhuman treatment is the infliction of "*great suffering, or serious injury to body or to mental or physical health*".[160] Sexual violence as torture signifies the mental and physical pain suffered and need not be proved separately.[161]

The CAT does not have a list of enumerated acts that satisfy the threshold for torture. Instead, the severity needs to be understood in terms of the suffering and impact on the victim rather than the conduct of the perpetrator. It is widely interpreted that torture under CAT must result from a purposeful act or omission, for example, depriving a detainee of food or medicine purposely. Acts of rape have been prosecuted as torture by international criminal tribunals and now constitute torture under customary international law.[162] Although a single act may amount to torture, the consistent pattern of gross, flagrant and mass violations of human rights must be considered.

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[158] *Ireland v. UK,* (1978), ECHR. (Series A) No. 25, para. 167.
[159] *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 593.
[160] *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 577.
[161] *Prosecutor v. Akayesu,* Case No. ICTR-96-4-A, Appeal Judgement, 1 June 2001; *Purna Maya v. Nepal*, Communication No. 2245/2013, CCPR/C/119/D/2245/2013, 19 December 2012.
[162] *Prosecutor v.Zdravko Mucic et al.,* Case No. IT-96-21-T, Judgement, Trial Chamber, 1998.

6.2 Scope of Violations

While the definition of torture under CAT is the most widely accepted, it is narrow in scope. Definitions offered by regional treaties such as the Inter-American Convention to Prevent and Prohibit Torture and the jurisprudence of the ECtHR provide a wider scope. Since 1984, the definition has expanded to include more than violence during interrogation and has been interpreted to include subjecting victims to humiliation, threat, and seclusion in police stations or prisons to obtain confessions.

6.3 State Obligation and Jurisdiction

The CAT obligates State Parties to ensure its jurisdiction over any persons found within its territories who are alleged to have committed torture, regardless of where the act had been committed or the nationality of the alleged perpetrator. In other words, CAT ensures universal jurisdiction over torture (Article 5). Articles 6-9 lay down the further obligations of State Parties regarding the jurisdiction of the crime of torture.

Not only does CAT guarantee the right not to be tortured, or inhumanely or degradingly treated, it also imposes a duty that is owed towards all persons, regardless of citizenship, on State Parties to prevent the occurrence of these crimes. The failure to prevent torture, or an endorsement or acquiescence of torture by State actors would amount to a violation of CAT.

The Committee Against Torture recognised that indifference or inaction by the State for past acts of torture and ill-treatment can implicitly condone present cases of torture and ill-treatment. The Committee also made it clear that where State officials fail to exercise due diligence to prevent, investigate, prosecute and punish acts of torture or ill-treatment committed by private actors, the State bears responsibility and its officials should be considered as complicit or otherwise responsible.[163] This principle has been applied in cases of gender-based violence, such as homophobic torture, rape, domestic violence, female genital mutilation and trafficking.[164]

6.4 Seeking Remedies

Committee Against Torture

To invoke breaches of rights contained under CAT, State Parties that wish to do so may make a declaration under Article 22 of CAT recognising the competence of the Committee Against Torture.

[163] CAT, General Comment No. 2 (2008).
[164] *Necati Zontul v. Greece,* ECtHR, 17 April 2012.

The Committee Against Torture is made up of a panel of 10 independent experts who meet twice a year to consider complaints from individuals alleging violations of their rights under CAT.

Individual complaints will be rendered inadmissible in the following circumstances:

1. If a procedure has already been instituted using any of the other UN treaty mechanisms or a previous proceeding using the same mechanism.[165]
2. If there has been undue delay in instituting proceedings after the exhaustion of domestic proceedings rendering it unduly difficult for the Committee Against Torture to address the claim.[166]

If the Committee Against Torture finds that a State Party has violated its obligations under CAT, it will forward its decision to the State Party and request for the information on implementation of the recommendation within 90 days. On receipt of this information the Committee Against Torture will decide its follow-up procedure.

ECtHR

If individuals wish to address their complaints in a manner that is binding on State Parties that are, the relevant Regional Human Rights Court may be a more appropriate forum.

For the 47 States that are parties to the ECHR, Article 3 of the ECHR sets out the prohibition of torture, and inhumane and degrading treatment, which has been developed by the European Commission and the ECtHR. Individual complaints can be made under Article 34 of the ECHR, which states that the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols.[167]

The President of the Court has issued guidance on filing a case at the Court, which explains the steps for individual applications under Article 34 of the Convention.[168] Some key criteria are:

- Domestic remedies must be exhausted - failure to appeal a case to all national courts up to and including the State's court of last resort may result in an application being declared inadmissible by the ECtHR[169]
- Six-month time limit - the Court may only deal with a matter which is lodged within six months of the date on which the final domestic decision was taken[170]

[165] CAT, Article 22(5)(a).
[166] CAT, Article 22(5)(b).
[167] ECHR, Article 34.
[168] 'Institution of Proceedings: Individual applications under Article 34 of the Convention', https://www.echr.coe.int/Documents/PD_institution_proceedings_ENG.pdf.
[169] ECHR, Article 35(1).
[170] ECHR, Article 35(1).

- Complaints must be submitted in writing – application forms are available online on the Court's website. Applications may be completed in any official language of a Member State of the Council of Europe. [171]
- Complaints must comply with Rule 47, which sets out the procedure regarding the contents of the individual application.[172]

International Criminal Court

The ICC Statute criminalises torture both as a war crime[173] and as a crime against humanity (though it is understood that no specific purpose needs to be proven as a crime against humanity).[174] Therefore, it can be prosecuted at the ICC during times of armed conflict (both international and non-international) as well as peacetime.

Pursuant to Article 15 of the Rome Statute, any individual, group or organisation can send information on alleged or potential ICC crimes to the Office of the Prosecutor (OTP) of the ICC. These are usually referred to as 'communications'. Once the communication has been made, the OTP analyses it to see if it fits the jurisdiction of the court. If this is met, they then consider if there is an existing situation under investigation or preliminary examination that concerns this issue. If this is not the case, it will be classified as a complaint needing more analysis.

When submitting a communication, it should be borne in mind that the OTP is required to assess and verify a number of legal criteria when conducting its preliminary examination to decide whether there is a reasonable basis to initiate an investigation. These include, amongst others[175]:

- Was the crime committed after 1 July 2002, the date of the entry into force of the Rome Statute?
- Did the crime take place in the territory of a State Party or was committed by a national of a State Party (unless the situation was referred by the UN Security Council)?
- Do they amount to war crimes, crimes against humanity or genocide?
- Are there are no genuine investigations or prosecutions for the same crimes at the national level?
- Would opening an investigation serve the interests of justice and of the victims?

The Statute does not specify the contents of the communication.[176] Senders are advised to submit information in one of the working languages of the ICC – English or French – or, alternatively, in one of the other official languages of the Court: Arabic; Chinese; Russian; and Spanish. The Office may attempt to obtain informal translations of information submitted in any other language.

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[171] ECtHR, 'Apply to the Court', https://www.echr.coe.int/Pages/home.aspx?p=applicants#n1357809352012_pointer.
[172] Rules of Court, ECHR, Rule 47.
[173] ICC Statute, Article 8(2)(a)(ii), Article 8(2)(c)(i).
[174] ICC Statute, Article 7(1)(f).
[175] International Criminal Court, 'Office of the Prosecutor', https://www.icc-cpi.int/about/otp.
[176] Coalition for the International Criminal Court, 'How to file a communication to the ICC-Prosecutor', https://coalitionfortheicc.org/how-file-communication-icc-prosecutor.

There are three ways to submit information about alleged crimes to the OTP:

1. By post to: International Criminal Court, Office of the Prosecutor, Communications, Post Office Box 19519, 2500 CM The Hague, The Netherlands
2. By email to: otp.informationdesk@icc-cpi.int
3. By fax to: +31 70 515 8555

Necati Zontul v. Greece [ECtHR, 2012]

Necati boarded a boat from Istanbul to Italy with over one hundred other migrants, which was intercepted by the Greek coastguard and towed to the port of Chania in Crete. The migrants were crowded into a disused school in poor conditions of detention, with limited access to food, lavatory facilities and other basic amenities. Necati himself was trapped in the toilets by a coastguard officer who forced him to remove his clothes and then proceeded to rape him with a truncheon. Necati believed that he was targeted due to his homosexuality.

The Greek authorities' internal handling of the investigation of the incident was found to be seriously flawed as they falsified the victim's evidence and recorded rape as a "*slap*" and "*use of psychological violence*". The perpetrator was given a suspended sentence which was commuted to a small fine. The parties prosecuting this crime at the ECtHR were able to prove the requisite elements – that **severe mental or physical harm** was caused by the act and that the pain or suffering was **intentionally inflicted** for the **proscribed purpose** with the **consent** or **acquiescence** of a **public official.**

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8. *Necati Zontul .v Greece,* ECtHR, 17 April 2012

Key Cases

Ireland v. UK, (1978), ECHR. (Series A) No. 25.

Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Appeal Judgement, 2001.

ICTY, *Prosecutor v. Zdravko Mucic et al.,* Case No. IT-96-21-T, Judgement, Trial Chamber, 1998.

Enrique Falcon Rios v. Canada, Communication No. 133/1999, U.N. Doc. CAT/C/33/D/133/1999(2004).

Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

Domestic Courts

As torture is a crime of universal jurisdiction, it can also be prosecuted by domestic courts of countries, which have enabling legislation.

7. Other Cruel, Inhuman or Degrading Treatment

Treating other people as less than human, causing them fear, suffering and humiliation are violations of human rights and can also amount to international crimes. When such violations are committed on the basis of the identity of the victim, they can be significant indications of dehumanisation on the path to genocide.

7.1 Definitions

Article 16 of the CAT obligates State Parties to prevent "*other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture*".[177]

Minimum Threshold for Inhuman Treatment

Inhuman treatment must be "*at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable."*[178]

The preamble to the CAT states that:

> "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*" For an act to be degrading this implies some form of "*gross humiliation*."[179]

An act that lowers a person in rank, position, reputation or character is regarded as degrading treatment if it reaches a certain level of severity.[180] Moreover, the victim should be humiliated not simply by their own conviction but by the execution of the punishment which is imposed upon them.[181] The assessment is relative and depends on "*all the circumstances of the case and, in*

[177] CAT, Article 16.
[178] *The Greek Case*, (1969), Y.B.Eur.Conv. on H.R. 12, page 186.
[179] *The Greek Case*, (1969), Y.B.Eur.Conv. on H.R. 12, page 186.
[180] *Patel et al. v. United Kingdom*, 4430 ECHR 19/70.
[181] *Tyrer v. United Kingdom,* (1978) ECHR. (Series A) No. 26, section 32, 35.

particular, on the nature and context of the punishment itself and the manner and method of its execution".[182]

The question of whether an **intent** to humiliate is required is unclear – and this extends to a purpose requirement that might attach a hateful intent to the violation. A lack of intent will not bar the finding of a violation,[183] it might however affect the quantum of damages.[184]

The early cases such as *Tyrer v. United Kingdom* focussed on the infliction of inhuman and degrading treatment by public officials in situations concerning arrest, detention and interrogation of those in State custody. However, it is now established beyond doubt that the prohibition of inhuman and degrading treatment under those treaties applies to any conduct meeting this threshold, whether committed by a public official or a private actor in any context, and States therefore have a positive obligation to prevent and respond to it.[185]

Tyrer v. UK [ECtHR, 1978]

Mr. Tyrer, age 15, pleaded guilty before the local juvenile court to unlawful assault occasioning actual bodily harm to a senior pupil at his school. The assault, which was committed by the applicant in the company of three other boys, was said to be motivated by the fact that the victim had reported the boys for taking beer into the school, as a result of which they had been subjected to caning. The applicant had then been sentenced on the same day to three strokes of the birch in accordance with the relevant legislation. An appeal to this sentence was dismissed and this punishment was administered to him by the police in the presence of a doctor and his father. The applicant lodged a complaint claiming that the punishment violated Article 3 of the ECHR.

As per the Court, enough suffering had not been inflicted to constitute "torture" or "inhuman punishment". However, the Court did find that the punishment was **"degrading".** The humiliation or debasement involved attained a particular level and was different to the usual element of humiliation that judicial punishment generally entails. It did not lose its degrading character just because it is believed to be an effective deterrent or aid to control crime. It was found to be irrelevant that Tyrer had himself committed a violent crime.

9. *Tyrer v. United Kingdom* (1978) ECHR. (Series A) No. 26.

[182] *Tyrer v. United Kingdom,* (1978) ECHR. (Series A) No. 26, section 30, 31.
[183] *V v. United Kingdom* (1999) ECHR. (Series A). No. 9, section 71; *Peers v. Greece*, Application no. 28524/95, (2001) Judgment of 19 April, section 74.
[184] *Price v. United Kingdom* (2001) ECHR Judgment of 10 July, section 34.
[185] *HLR v. France* (1997), 26 EHRR 29, section 40; *A v. United Kingdom* (1998), 27 EHRR, 611, section 22.

Key Cases

Ireland v. UK, (1978), ECHR. (Series A) No. 25.

Campbell and Cosans v. UK, (1982) ECHR (Series A.), No. 48.

8. Crimes Against Humanity

Crimes Against Humanity (CAH) are **mass crimes committed against civilians.** They can be distinguished from genocide in that they need not target a specific group. Also, importantly, they can be committed during peacetime.[186] While CAH do not contain any specific bias intent in their definition, these widespread and systematic crimes can also be motivated by bias – with the intention of persecuting or repressing groups without necessarily seeking to destroy them in whole or in part, or to persecute political or other groups not included in the definition of genocide.

8.1 Definitions

There are a number of definitions of CAH – and hence current efforts at adopting the International Law Commission's (ILC) Draft Articles on the Prevention and Punishment of Crimes Against Humanity. For ease of reference, we will consider Article 7 of the ICC Statute definition, which sets out 11 acts that can constitute the underlying criminal conduct. In addition to these acts, three common elements must be established:

- The acts must be committed as part of a widespread or systematic attack;
- The acts must be directed against a civilian population; and
- The acts must be committed with knowledge of the attack.

[186] When CAH were included in the Charter of the International Military Tribunal at Nuremberg, CAH required a nexus to armed conflict, most likely to distinguish these acts from widespread and systematic violations committed by colonial powers.

Article 7 of the Rome Statute of the ICC

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

Murder;

Extermination;

Enslavement;

Deportation or forcible transfer of population;

Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

Torture;

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

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

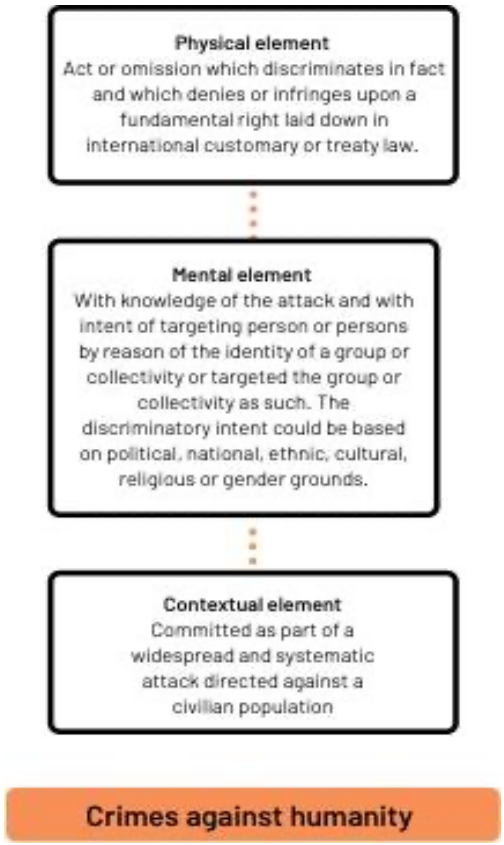
Enforced disappearance of persons;

The crime of apartheid;

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

8.2 Persecution as a Bias Motivated 'Hate' Crime

Where a pattern of bias-motivated hate crimes is concerned, the act of persecution with the requisite element of discriminatory intent could be a possible avenue.



In addition to the elements listed above for a charge of CAH, persecution requires that:

- The perpetrator targeted such person or persons by reason of the identity of a group or collectivity, or targeted the group or collectivity as such; and
- Such targeting was based on political, national, ethnic, cultural, religious or gender grounds as defined in Article 7(3) of the ICC Statute, or other grounds that are universally recognized as impermissible under international law.

Physical Element

The physical element of the crime can be either an act or an omission which is discriminatory and which denies or infringes fundamental human rights.[187] The ICTR understood it as a "*discriminatory form of aggression that destroys the dignity of those in the group under attack.*"[188] Persecution was seen to include "*conditioning*" a population and "*creating a climate of harm*".[189]

Persecution cannot just be a provocation to cause harm, the act itself must be harmful.[190] In this regard, hate speech cannot amount to an act of persecution on its own, but can be considered with other acts.[191]

Acts of rape, extermination, sexual enslavement and other sexual violence can be prosecuted as acts of persecution.[192] A single act could also constitute persecution.[193] With regards to hate speech acts,

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[187] *Prosecutor v. ŠEŠELJ Vojislav,* Case No. MICT-16-99-A, Appeal Judgement, 11 April 2018, para. 159; *Prosecutor v. Popovic et al.,* Case No. IT-05-88-A, Appeal Judgement, 30 January 2015, para. 762.
[188] *Prosecutor v. Nahimana et al. (Media Case),* Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003, para. 1072
[189] Ibid., para. 1073.
[190] Ibid.; *Prosecutor v. Nahimana et al. (Media Case),* Case No. ICTR-99-52-A, Appeals Judgment, 28 November 2007, para. 981.
[191] *Prosecutor v. Nahimana et al. (Media Case),* Case No. ICTR-99-52-A, Appeals Judgment, 28 November 2007, para. 986.
[192] *Prosecutor v. Sainovic et al.,* Case No. IT-05-87-A, Appeal Judgement, 23 January 2014, para. 579; *Prosecutor v. Bagosora et al.,* Case No. ICTR-98-41-A, Appeal Judgement, 14 December 2011, para. 416.
[193] *Prosecutor v. Blaskic Tihomir,* Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 135.

the Appeals Chamber of the ICTY was of the view that it is not necessary to decide whether hate speech incidents that did not incite violence against the members of a group was of a sufficient level of gravity to be considered as a CAH. The Appeals Chamber held that it was not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other CAH: underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that of other CAH.[194] The context in which these underlying acts take place is particularly important for the purpose of assessing their gravity.

Mental Element

The mental element of persecution as a CAH requires knowledge that the act is taking place as part of a widespread or systematic attack against a civilian population.

For persecution in particular, the mental requirement for the crime is that it is carried out deliberately with the intention to discriminate on one of the listed grounds in the ICC Elements of Crimes,[195] specifically "*race, religion, or politics*".[196] It is the "*specific intent to cause injury to a human being because he belongs to a particular community or group*" and there is no requirement in law that the actor possess a "*persecutory intent*" over and above a "*discriminatory intent*".[197] A trial chamber does not need to establish the mental element of the underlying acts, even when such acts also constitute crimes under international law. With respect to the intent, all that is required is establishing that the underlying act was deliberately carried out with discriminatory intent.[198]

When considering whether an accused has the required intent for the crime of persecution, trial chambers can consider "*the general attitude of the alleged perpetrator as demonstrated by his behaviour*".[199]

The use of derogatory language in relation to a particular group – even where such usage is commonplace – is one aspect of an accused's behaviour that may be taken into account, together with other evidence, to determine the existence of discriminatory intent.[200]

However, the criminal responsibility of an aider and abettor does not require the contribution to the crime of persecution to go to the discriminatory nature of this crime.[201] The mental element does require that the perpetrator either meant to severely deprive one or more persons, meant to cause such severe deprivation or was aware that such deprivation would occur in the ordinary course of events.[202]

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[194] *Prosecutor v. ŠEŠELJ Vojislav,* Case No. MICT-16-99-A, Appeal Judgement, 11 April 2018, para. 163.
[195] ICC, Elements of Crimes, Article 7(1)(h).
[196] *Prosecutor v. ŠEŠELJ Vojislav,* Case No. MICT-16-99-A, Appeal Judgement, 11 April 2018, para. 159.
[197] *Prosecutor v. Kordic & Cerkez,* Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 111.
[198] *Prosecutor v. Popovic et al.,* Case No. IT-05-88-A, Appeal Judgement, 30 January 2015, para. 738.
[199] *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005, para. 460.
[200] *Prosecutor v. Popovic et al.,* Case No. IT-05-88-A, Appeal Judgement, 30 January 2015, para. 762.
[201] *Prosecutor v. Popovic et al.,* Case No. IT-05-88-A, Appeal Judgement, 30 January 2015, para. 1812.
[202] ICC Statute, Article 7(1)(h)(9).

8.3 Accountability for Crimes Against Humanity

In principle, both States and individuals can be liable for CAH and the orchestration of an "organisational policy" or widespread and systematic attack.[203] Although not manifestly established, a strong case could be made for non-State entities being held accountable for CAH,[204] provided the following criteria are satisfied:

- Entities should be 'State-like' with the ability to exercise territorial control;
- There should have been an organisational policy – this element requires that the State or organization actively promoted or encouraged such an attack against a civilian population;
- There should be sufficient capacity to commit a widespread and systematic attack – sufficiently organised, material resources; and
- Attacks directed against civilian populations.

8.4 Jurisdiction and Mechanisms

In addition to the ICC Statute, CAH are also included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. In addition, by virtue of the implementing legislation that domesticates provisions of the ICC Statute into national law in many countries, CAH (along with genocide and war crimes) are now frequently crimes that are covered by domestic statutes. The Special Division of the High Court in Uganda and the Special Court in the Central African Republic for instance, also include CAH amongst the crimes within their jurisdiction by virtue of the respective 'ICC Acts' adopted by these States. The applicable definition of the CAH therefore follows that of the ICC Statute in many countries.

The crime can also potentially be prosecuted under the mantle of the ICJ when the Draft Articles on the Prevention and Punishment of Crimes Against Humanity comes into force. The Draft Articles were adopted by the International Law Commission and at the UN General Assembly 2019, providing the basis for a new convention.

Universal jurisdiction can also be asserted with regards to CAH, as many countries include CAH in their statute books, combined with the consensus that CAH constitute customary international law, and even *jus cogens*, and are therefore non-derogable norms.[205]

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[203] *Prosecutor v. Kayishema et al.*, Judgment, Case No. ICTR-95 -r-T, T.CH. II, 21 May 1999, para. 126; Claus Kress, *On the Outer Limits of Crimes Against Humanity: The Concept of Organization Within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*, (2010) 23 LJIL 855.

[204] *Prosecutor v. Brima et al.,* Judgment, Case No. SCSL-o4-16-T, T. Ch., 20 June 2007, at paras. 226, 238; *Prosecutor v. Limaj et al.,* Judgment, Case No. IT-o6-66-T, T Ch., 30 November 2005, at paras. 45-52.

[205] Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 Va. J. Int'l L. 81 (2001-2002).

Prosecutor v. Milan Babic [ICTY, 2004]

Milan Babic, the President of the Serbian Republic of Krajina, was charged with persecution of CAH for ethnically based inflammatory speeches. Prosecution was successful in proving that these speeches had been committed in the context of a widespread and systematic attack as they were made during public events and in the media, adding to the atmosphere of fear and hatred amongst Serbs living in Croatia. It had the effect of convincing them that they would only be safe in a State of their own. The speeches were proved to be discriminatory in fact, i.e. producing difference in results, as it was directly targeted against the non-Serb population and had led to the unleashing of violence against the Croat population and other non-Serbs. The accused himself admitted that this propaganda was one of the ways in which he had contributed to a campaign of persecutions designed to drive non-Serb civilians from towns, villages and settlements in the Republic of Krajina. The requisite elements for persecution – a physical act of persecution, a contextual element of widespread and a systematic attack and the mental element of discriminatory intent – had all been proved beyond a reasonable standard of doubt, and the accused was convicted by the ICTY Trial Chamber.

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[10.] *Prosecutor v. Milan Babic*, Case No. IT-03-72-S, 29 June 2004, Sentencing Judgement.

Key Cases

ICTR, *Prosecutor v. Nahimana et al. (Media Case),* Case No. ICTR-99-52-A, Appeals Judgement, 28 November 2007.

MICT, *Prosecutor v. ŠEŠELJ Vojislav,* Case No. MICT-16-99-A, Appeal Judgement, 11 April 2018.

ICTY, *Prosecutor v. Kordic & Cerkez,* Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004.

ICTY, *Prosecutor v. Popovic et al.,* Case No. IT-05-88-A, Appeal Judgement, 30 January 2015.

9. Genocide

Genocide is the ultimate crime of hate-based ideological acts, defined by its special intent to destroy in whole or in part a protected group. In terms of personal jurisdiction – both States and individuals can be liable for genocide based on the definition set out in the 1948 Genocide Convention, which has been ratified by 152 States and is considered both a fundamental norm from which no exemption is allowed (*jus cogens*),[206] as well as, a duty owed towards all regardless of citizenship (*erga omnes*).[207]

Article 2 of the 1948 Genocide Convention, re-embodied in Article 6 of the ICC Statute,[208] defines the crime and sets out five acts, carried out with the specific intent to destroy in whole or in part a national, religious, racial or ethnic group. Article 4 of the International ICTY and Article 2 of the ICTR similarly define the crime of genocide for their respective purpose.

The enumerated acts are:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group; and
- Forcibly transferring children of the group to another group. [209]

9.1 "They Are Not One of Us": What is a Group?

International criminal jurisprudence indicates that genocide has to be against one of the listed groups, based on 'nationality, ethnicity, race or religion'.[210] Nonetheless, groups can apparently not be defined negatively – as "others", for example "non-Serbs".[211] The group must be defined positively in relation to a group that is objectively recognisable within the given context. For instance, a linguistic grouping which may be based on ethno-national lines such as the 'Anglophones' in Cameroon, most likely would fall within this category.

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[206] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Application no. 65542/12, ICJ, para. 158; Jus cogens are "*the principles which form the norms of international law that cannot be set aside.*"

[207] *Bosnia and Herzegovina v. Serbia and Montenegro*, Application on the Convention to Prevent and Prosecute Genocide, 2007 I.C.J. 191, para. 31; Peter Bekker et al., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [1997] 91(1) American Journal of International Law 121, 123; *Erga omnes* are "*the rights or obligations owed towards all.*"

[208] ICC Statute, Article 6.

[209] United Nations Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948, 12 January 1951) 78 UNTS 277, Article II [hereafter Genocide Convention].

[210] Genocide Convention, Article 2.

[211] *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, p. 20-28.

9.2 Whose Perception of Group Identity Matters?

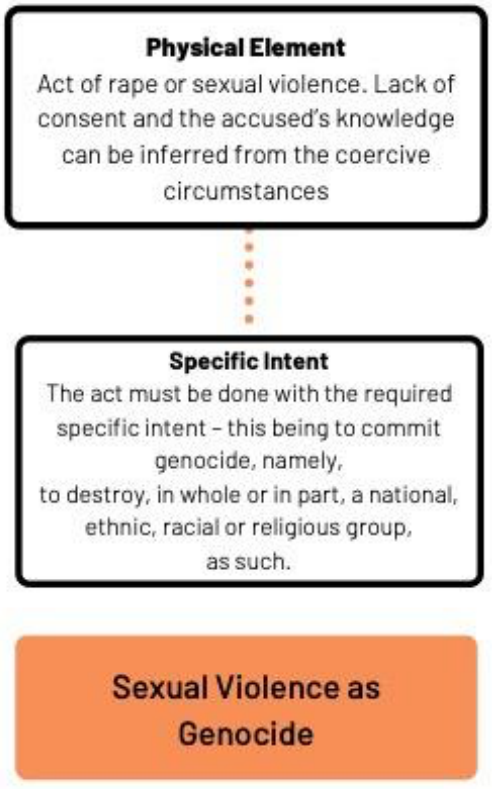
While case law at national levels varies – with UK guidelines allowing quite a broad subjective approach to what constitutes 'group' identity based on the victims' perception[212] – the trend in international criminal law jurisprudence is slightly more restrictive, focusing on "*whether a group* […] *ought to be assessed* […] *by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators.*"[213] Thus, defining a target group cannot be just objective, it must be assessed in light of a particular political, social, historical or cultural context. Whether a person is a member of the target group, would not be up to the victim but should be able to be shown objectively.

'Ethnic cleansing' and Extreme Persecution Amount to Genocide

The ICTR Trial Chamber recognised that "*when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.*"[214] "Ethnic cleansing" also possesses similarities to genocidal policy.[215]

9.3 Sexual Violence as Genocide

Sexual violence can amount to genocide and can constitute an attack against the victim as well as the group. Although rape and other forms of sexual violence are not listed acts under the Genocide Convention, the ICTY and the ICTR have reasoned that acts of rape and other forms of sexual violence constituted genocide in the same way, as long as they were committed with the required specific intent – this being to commit genocide, namely, to destroy, in whole or in part, a national, ethnic, racial or religious group, as such."[216]



[212] College of Policing (2014), Hate Crime Operational Guidance, available at: http://library.college.police.uk/docs/college-of-policing/Hate-Crime-Operational-Guidance.pdf.
[213] *The Prosecutor v. Laurent Semanza,* Case No. ICTR-97-20-T, 15 May 2003, Trial Judgment, para. 317.
[214] *Prosecutor v. Kupreskic et al.,* Case No. IT-95-16, 14 January 2000, Judgement, para. 636.
[215] *Prosecutor v. Krstić,* Case No. IT-98-33-T, Judgement, 2 August 2001.
[216] *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, 2 September 1998, para. 731; *Prosecutor v. Kunarac et al.,* Case No. IT-96-23 & it-96-23/1-A, 12 June 2002.

9.4 Required Acts for Sexual Violence as Genocide

Conflict related sexual violence under the Statutes of the international criminal tribunals is not a free-standing crime but must be charged as an act of war, genocide, or crime against humanity.[217] It has come to be perceived as a powerful weapon of war, used to intimidate, subjugate and break the fibre and morale of the 'other': the enemy.[218]

Rape, sexual slavery, forced pregnancy and other forms of sexual violence that constitute the infliction of 'serious bodily and mental harm' on victims are now accepted as falling under the definition of genocide,[219] as long as the perpetrator acts with the specific intent to destroy, in whole or in part, a particular group, targeted as such.[220] Support for this is found in the *Musema* and *Akayesu* cases, where the ICTR Trial Chamber seminally convicted the accused of genocide based in part on charges of rape.[221] The ICC Elements of Crimes also recognize rape, sexual enslavement,[222] and other sexual crimes as constituting genocide by causing serious bodily or mental harm as under Article 6(b).[223]

The ICC Statute independently enumerates a range of sexual and reproductive crimes relating specifically to women and gender.[224] It defines forced pregnancy as "*the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.*"[225]

Sexual violence against men may need extra efforts to uncover as the social stigma surrounding such violence is pervasive in all cultures. As the documentation of sexual violence crimes has improved in recent years, it has come to light that sexual violence against men and boys is highly prevalent in mass atrocity contexts, with mutilation of genital organs a common phenomenon. Sexual violence against men has also been examined and prosecuted by the ICTY[226] and sexual assault is usually treated as a broader crime.[227]

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[217] ICTR Statute, Article 4.
[218] ICTY, Landmark Cases, available at*:* https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases.
[219] *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, 2 September 1998, Judgment, para. 731; *Prosecutor v. Karemera and Ngirumpatse,* Case No. ICTR-98-44-A, 11 January 2004, para. 1667.
[220] *Prosecutor v. Akayesu,* Case No. ICTR 96-4-T, 2 September 1998, Judgment, para. 731; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 8.
[221] *Prosecutor v. Musema,* Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 200, para. 158.
[222] *Prosecutor v. Kunarac et al.,* Case No. IT-96-23 & it-96-23/1-A, 12 June 2002.
[223] Finalized Draft Text of the Elements of Crimes, Preparatory Comm'n for the Int'l Crim. Ct., U.N. Doc. PCNICC/2000/I/Add.2 (2000), Article 6.
[224] ICC Statute, Article 7(2)(c).
[225] ICC Statute, Article 7(2)(f).
[226] *Prosecutor v. Duško Tadić,* Case No. IT-94-1; ICTY, *Prosecutor v. Češić,* Case No. IT-95-10/1; *Prosecutor v. Mucić et al.*, Case No. IT-96-21*; Prosecutor v. Todorović*, Case No. IT-95-9/1*; Prosecutor v. Simić*, Case No. IT-95-9.
[227] *Prosecutor v. Karemera and Ngirumpatse,* Case No. ICTR-98-44-A, 11 January 2004, para. 611; *See Prosecutor v. Emmanuel Rukundo,* Case No. ICTR-2001-70-T, Trial Judgment, 27 February 2009., para. 380; See also *Prosecutor v. Kunarac et al.,* Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgment, 12 June 2002, para. 150.

9.5 Coercive Environment Replaces Notions of Consent

In the context of mass atrocities, rape is defined as "*a physical invasion of a sexual nature under circumstances which are coercive*" [emphasis added]. Sexual violence is similarly defined as "*any act of a sexual nature* […] *under circumstances which are coercive.*" [228]

As a result of progressive case law at the international tribunals, lack of consent is now immaterial in the international criminal law context, recognising the violent and oppressive context in which rapes take place during genocide, CAH or armed conflict.[229] It is not a separate element and the lack of consent and the accused's knowledge thereof can be inferred from the coercive circumstances.[230] Moreover, rape was considered a form of aggression and the ICTR Appeals Chamber held that central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.[231]

The related provisions of the ICC Statute also do not contain consent, grasping that such circumstances constitute coercion, such that consent is irrelevant and hence legally absent as an element.[232] Although consent and formal corroboration might be rendered irrelevant in legal terms, a tacit social burden of proof in sexual assault cases seem to have survived, particularly in the ICTY.[233] In *Furundzija* and *Semanza*,[234] a more restrictive, mechanical approach was taken and in *Kunarac, Kovac* and *Vukovic,* the element of consent was also read in.

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[228] *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, 2 September 1998, Judgment, para. 598.
[229] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR 455* (Intersentia 2005).
[230] *Gacumbitsi v. Prosecutor,* Case No. ICTR 2001-64-A, Appeals Chamber Judgement, 7 July 2006, para. 155-57; *Prosecutor v. Kunarac,* Case No. IT-96-23/1-A, Appeals Chamber Judgement, 12 June 2002, para. 151-57; *Prosecutor v. ĐORĐEVIĆ Vlastimir,* Case No. IT-05-87/1-A, Appeals Judgement, 27 January 2014, para. 852; *Prosecutor v. Milutinovic et al*., Trial Judgement (vol. 1), 26 February 2009, para. 200.
[231] *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, 2 September 1998, para. 597.
[232] ICC Statute, Article 7, para. 1(g)-(h); ICC, Elements of Crimes, Articles 7(1)(g)-1, 7(1)(g)-3, ICC-ASP/1/3 (Sept. 9, 2002).
[233] *Prosecutor v. Tadic,* Case No. IT-94-1, 25 June 1996, Decision on the Prosecution's Motion to Withdraw Counts 2 through 4 of the Indictment Without Prejudice, para. 27; *Prosecutor v. Niyitegeka,* ICTR 96-14-T, Judgement, 16 May 2003, para. 301-02; *Prosecutor v. Muvunyi,* Case No. ICTR 00-55A-T, Judgement, 12 September 2006, para. 531.
[234] *Prosecutor v. Semanza*, Case No. ICTR 97-20-T, Judgment, 15 May 2003, para, 344: "*the nonconsensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator*".

Prosecutor v. Akayesu [ICTR, 1998]

In the aftermath of the Rwandan genocide, Jean-Paul Akayesu was charged with the commission of genocide by rape and sexual violence. He was said to have consented to or ordered the rape and sexual violence committed against Tutsi women by the Interahamwe (the Hutu paramilitary organization who were the main perpetrators of the genocide). Orders given at the time were considered to imply that such violence was intended to result in the physical and psychological destruction of Tutsi women, their families and their communities. The prosecution was therefore able to prove the commission of rape (the physical element) and the specific intent of genocide. Moreover, given the coercive nature of the circumstances, consent was not considered to be a requirement and the "central elements of rape 'could not be captured by the mechanical description of body parts' [Note –this is the language used by the ICTR in that case para 687]. As all the requisite elements were proven, Akayesu was convicted for rape as genocide.

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11. *Prosecutor v. Akayesu,* Case No. ICTR 96-4-T, 2 September 1998.

Key Cases

ICTR, *Prosecutor v. Akayesu,* Case No. ICTR 96-4-T, Judgment, 2 September 1998.

ICTR, *Prosecutor v. Karemera and Ngirumpatse,* Case No. ICTR-98-44-A, 11 January 2004.

ICTR, *Prosecutor v. Musema,* Judgement and Sentence, ICTR-96-13-T.

ICTY, *Prosecutor v. Kunarac,* Case No. IT-96-23/1-A, Appeals Chamber Judgement.

9.6 Modes of Responsibility

Even if an accused has not committed genocide himself, his responsibility may be established through planning, aiding and abetting, instigating, ordering, committing, joint criminal enterprise, superior/command responsibility, co-perpetration, indirect perpetration, or indirect co-perpetration.[235] The ICC also recognises the direct and public incitement of genocide,[236]attempt and abandonment.[237]

[235] ICTR, Article 6(1); ICTY, Article 7(1).
[236] ICC Statute, Article 25(3)(e).
[237] ICC Statute, Article 25(3)(f).

Where a person is accused of having committed genocide through one of the modes of responsibility pursuant to Article 6(1)/7(1) of the ICC Statute, the Prosecutor must establish that the accused's acts or omissions substantially contributed to the commission of acts of genocide. Alternatively, the acts or the omissions of the appellants themselves should be said to constitute an instigation to the commission of genocide.[238]

Under the ICC Statute, Article 25(3)(e) specifically attributes individual criminal responsibility to a person who directly and publicly incites another to commit genocide.[239] The criminal codes of the Socialist Federal Republic of Former Yugoslavia, Croatia and Bosnia and Herzegovina, among others, also held individuals criminally responsible for incitement.[240]

The individuals could also be held to have superior responsibility under Article 6(3)/7(3), as was held in *Prosecutor v. Nahimana.*[241]

9.7 Jurisdictions and Enforcement Mechanisms

Both States and individuals can be liable for genocide. Moreover, genocide is a crime of **universal jurisdiction**. Therefore, domestic courts as well as courts of international standing can prosecute acts of genocide.

International Court of Justice (ICJ)

According to Article IX of the Genocide Convention, the ICJ is the body responsible for addressing disputes concerning the interpretation, application and fulfilment of the Genocide Convention.

The liability of States for the commission of genocide was established in the case of *Bosnia v. Serbia* on the basis of the Genocide Convention before the ICJ.[242] These liabilities arose from their failure to prevent the commission of genocide and not from any active involvement.

More recently, the ICJ applied the Genocide Convention in *The Gambia v. Myanmar,* a case brought by The Gambia on the basis of the *erga omnes* ('duty owed to all') obligations found in the Genocide

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[238] *Prosecutor v. Nahimana et al. (Media case),* Case No. ICTR-99-52-A, Appeals Judgement, 28 November 2007, para. 595.
[239] ICC Statute, Article 25(3)(e).
[240] Official Gazette of Croatia „Narodne Novine" No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06, 110/07, 152/08, Article 37(2); 2006 Serbian Criminal Code, Article 34(2); SFRY Criminal Code, Official Gazette of the SFRY No. 44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90, Article 23; BiH Criminal Code, BiH Official Gazette No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, consolidated version, *available at* www.sudbih.gov.ba., Article 30.
[241] *Prosecutor v. Nahimana et al. (Media case),* Case No. ICTR-99-52-A, Appeals Judgement, 28 November 2007, para. 777.
[242] *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 2007 I.C.J. 191.

Convention. While the case is still being heard, the ICJ confirmed the *erga onmes* obligation of States to prevent genocide, including by acts of those controlled by the military.[243]

The State was also ordered to prevent the destruction and ensure the preservation of evidence. The ICJ can also require States to report on its progress of implementing such orders.

International Criminal Court (ICC)

Article 5 of the ICC Statute grants the ICC jurisdiction in respect of four crimes, including the crime of genocide. As mentioned in 2.4, to satisfy the temporal jurisdiction of the Court the crime in question should have been committed after July 1, 2002. Further, the ICC can only prosecute if the principle of complementarity has been considered, meaning that the ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.[244] It should also satisfy itself in relation to the following two criteria:

- The crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or
- The crimes were referred to the ICC Prosecutor by the United Nations Security Council (UNSC) pursuant to a resolution adopted under chapter VII of the UN charter.

International Criminal Tribunal for the former Yugoslavia (ICTY)

Pursuant to Article 1 of the ICTY Statute, the Tribunal has jurisdiction over persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Setting out these serious violations, Article 4(1) of the ICTY Statute grants the Tribunal the power to prosecute persons committing genocide and those committing any other crimes as enumerated under paragraph 3, such as incitement to commit genocide.

International Criminal Tribunal for Rwanda (ICTR)

Article 1 of the ICTR Statute considers the competence of the court and grants the ICTR jurisdiction over "*the serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994.*" Article 2(1) grants the tribunal the power to prosecute persons committing genocide and those committing any other crimes enumerated under Article 2(3), such as incitement to commit genocide.

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[243] *The Gambia v. Myanmar,* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, 23 January 2020, para. 86(3).
[244] ICC Statute, Article 17 and Article 53.

Extraordinary Chambers in the Courts of Cambodia (ECCC)

Article 4 of the Law on the Establishment of the ECCC gives the ECCC the power to prosecute "*all suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.*" However, the provision does not include 'incitement to commit genocide' as one of the punishable acts under Article 5(3).

Domestic Courts

Based on the complementarity principle of the ICC Statute[245] and the universal jurisdiction of the crime of genocide, domestic courts also have the power to prosecute acts of genocide. A notable example of this is *Attorney General v. Adolf Eichmann*, where the District Court of Israel heard the case.[246]

[245] ICC Statute, Article 17(1)(d) and preamble, para. 4.
[246] *Attorney General v. Adolf Eichmann*, Criminal Case No. 40/61, District Court of Jerusalem.