



**Rights for Peace**

Preventing Mass Atrocities with Human Rights



# **DOCUMENTING IDENTITY-BASED VIOLENCE**

A MANUAL FOR THE SUDANESE CONTEXT



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# FORWARD: WHY DISCRIMINATION MATTERS

Hate crimes target individuals based on their race, religion, ethnicity, sexual orientation, gender identity, or other inherent characteristics. When an act of violence is committed against an individual because of their identity, the nature of the violence changes. At one end of the spectrum, a simple assault can become a racist attack. At the other end of the spectrum, a widespread or systematic attack could be classified as genocide.

Hate crimes require specific treatment in law because they represent different and additional harms to the victim, the targeted group, and society in general. Certain groups are specifically discriminated against based on their identity and for this reason, need additional protection.

Addressing violence committed with prejudiced motives is important for several reasons:



**Redress:** Hate crimes are a manifestation of discrimination in society and will impact the victim as well as the targeted group in different and additional ways than regular crimes. This specific impact on victims needs recognition and redress.



**Prevention:** Prosecuting hate crimes sends a strong message that such acts are intolerable in society, providing a deterrent effect.



**Protection:** Hate crimes often aim to intimidate entire communities. Effective prosecution helps protect these communities by affirming their rights and security.



**Social Cohesion:** Addressing hate crimes reinforces societal values of equality, respect, and inclusiveness. It helps maintain social cohesion by condemning actions that seek to divide and harm communities.

In many countries, hate crimes are given special treatment in domestic criminal codes. For instance, in the UK, any crime committed with biased intent against individuals from a protected group can be classified as a hate crime, resulting in an aggravated sentence. Across European countries, governments have committed to reporting hate crime statistics every year to monitor this particular social concern<sup>(1)</sup>. In the United Kingdom, the victim, or any other person, can provide evidence of the biased intent. A hate crime is simply “any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice,” based on disability, race, religion, sexual orientation or transgender identity.

(1) Organisation for Security and Cooperation in Europe (OSCE), Office for Democratic Institutions and Human Rights (ODIHR), <https://hatecrime.osce.org/>.

# PART 1 - INTRODUCTION

## 1. Identity-Based Violations and Crimes

The analysis in this Manual is based on definitions in the International Criminal Court (ICC) Rome Statute, with interpretations from the case law of the ICC and other international criminal courts and tribunals. In terms of forum, the focus is on documentation for criminal prosecutions, such as by the International Criminal Court, domestic prosecutions using the principle of universal jurisdiction, or through a future jurisdiction that might be set up as part of a transitional justice process.

While several international crimes are based on discrimination, in this Manual we will focus on **genocide, incitement to genocide and persecution as a crime against humanity** as these are most relevant to the Sudanese context (2). The relevant provisions are:

- **Genocide:** Article 6 of the ICC Statute.
- **Direct and public incitement to commit genocide:** Article 25(3)(e) of the ICC Statute.
- **Persecution as a Crime Against Humanity:** Article 7 of the ICC Statute.

As can be seen in the Pyramid of Hate below, there are a number of international crimes and human rights violations that address discrimination. The approach is somewhat piecemeal, with different legal instruments protecting different groups in relation to different crimes:

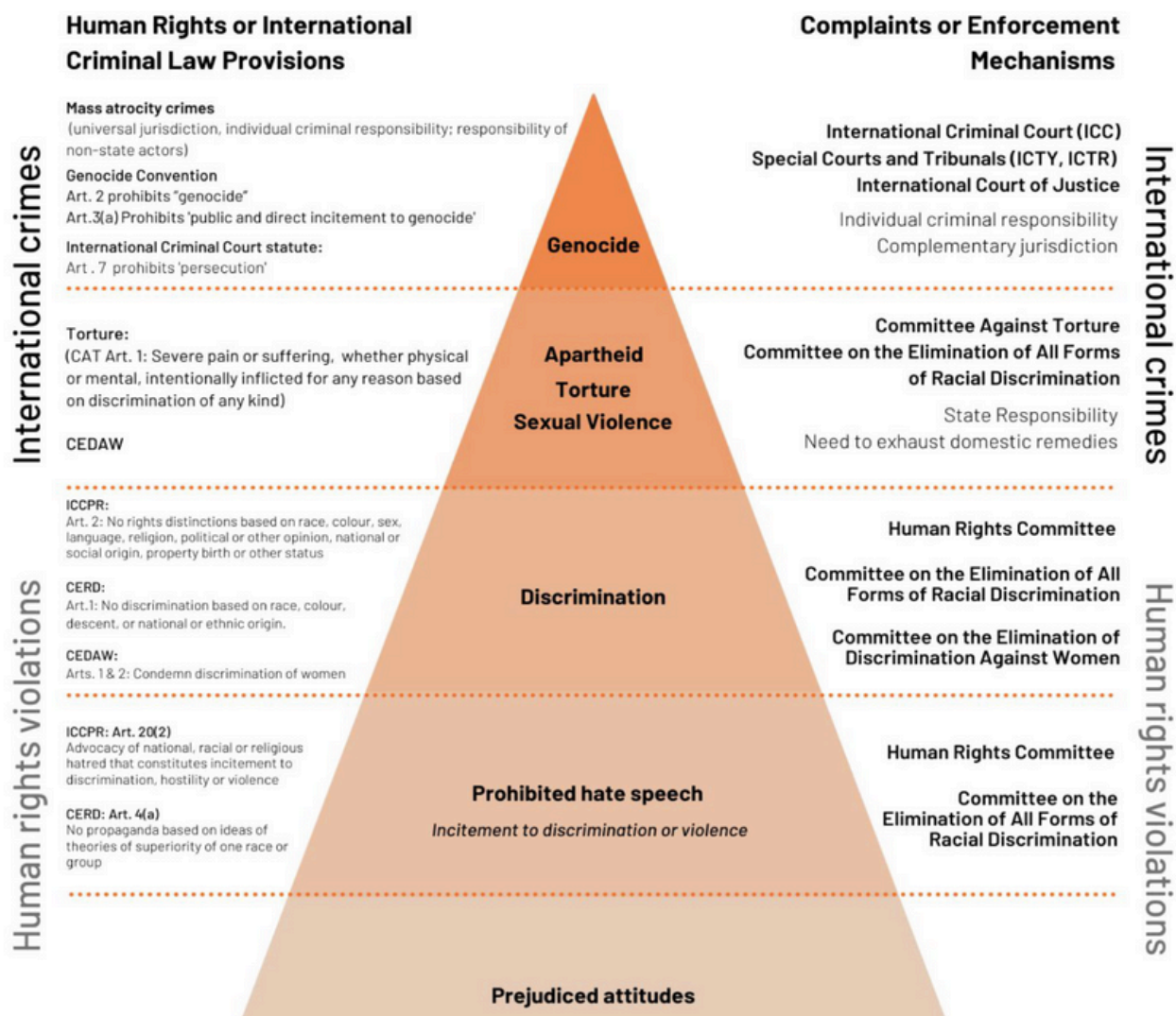
- **Genocide** protects ethnic, national, religious or racial groups,
- **Apartheid** addresses race only,
- **Persecution** as a Crime Against Humanity seeks to protect any identifiable group, including political groups or groups based on gender or other identities,
- **Torture** can be based on discrimination of any kind,
- **Sexual and gender-based violence crimes** can be based on sexual or gender discrimination.

There are also some violations enumerated in international human rights law that protect against hate speech. These human rights standards prohibit:

- **Advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence** (Article 20(2) of the International Covenant on Civil and Political Rights - ICCPR).
- **Propaganda based on ideas or theories of superiority of one race or group** (Article 4(a) of the Convention on the Elimination of all Forms of Racial Discrimination – CERD).

(2) Rights for Peace (2021), A Guide to Hate Violations in International Law.

# Hate Violations and Crimes Pyramid



## 2. What do we mean by 'documentation'?

Human rights violations or international crimes can be documented for various purposes including research, reporting, advocacy, criminal prosecutions or submitting complaints to human rights bodies. Documentation can involve different activities including (3):

- **Determining** what information is needed.
- **Establishing** a method for acquiring it.
- **Recording** information and storing it in appropriate media (e.g. documents).
- **Collecting** existing documents that contain required information.
- **Organising** documents to make them more accessible.
- **Providing** the documents to users who need the information.

This Manual only focuses on determining what information needs to be documented in relation to Genocide, Incitement to Genocide and Persecution as a Crime Against Humanity. For a holistic guide for civil society organisations on documenting international crimes, see the EuroJust, Genocide Network and International Criminal Court Guidelines: **"Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations"** (4).

## PART 2 - INTERNATIONAL CRIMES

### 3. Genocide

Documenting the crime of genocide involves demonstrating that specific legal elements are met. Article 6 of the International Criminal Court Statute (5) defines genocide as:

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

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

The definition is replicated from the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY, Article 4), the International Criminal Tribunal for Rwanda (ICTR, Article 2), and the Statute of the International Criminal Court (ICC, Article 6).

According to the ICC Elements of Crimes, which 'assist the Court in the interpretation and application of Articles 6, 7 and 8 of the ICC Statute', the elements required are:

1. The perpetrator committed one of the enumerated genocidal acts (a-e).
2. The victims belonged to a national, ethnic, racial or religious group.
3. The perpetrator intended to commit the act(s) to destroy the group in whole or in part (also known as the 'special intent').
4. The conduct took place in the context of a manifest pattern of similar conduct directed against the group or was conduct that could itself affect such destruction.

In addition, there are different types of conduct for which the perpetrator can be held to account (e.g. direct perpetration, aiding and abetting, instigating or conspiracy).

#### 3.1 Genocidal Acts

It must be shown that one of the enumerated acts, was committed, or resulted from an omission by the perpetrator or a subordinate.

(3) HURIDOCS, [What is Documentation?](#) Human Rights and Documentation Series, Volume 2.

(4) International Criminal Court, EuroJust and Genocide Network, 'Guidelines for Civil Society Organisations.' Launched in September 2022. Available at: [https://www.icc-cpi.int/sites/default/files/2022-09/2\\_Eurojust\\_ICC\\_CSOs\\_Guidelines\\_2-EN.pdf](https://www.icc-cpi.int/sites/default/files/2022-09/2_Eurojust_ICC_CSOs_Guidelines_2-EN.pdf).

(5) Convention on the Prevention and Punishment of the Crime of Genocide, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-prevention-and-punishment-crime-genocide>.

## Enumerated acts:

### a) Genocide by killing

- The perpetrator killed one or more persons.
  - The term “killed” is interchangeable with the term “caused death”.
  - Technically genocide can be committed if the perpetrator killed just one person, as long as the intention to kill the group in whole or in part was present at the time of commission. The number of persons targeted, and whether this constitutes a substantial enough part of the group is discussed below.
  - Killing only leaders of the group could amount to genocide if it is shown that they were “selected for the impact that their disappearance would have on the survival of the group as such” (6).

### b) Genocide by causing serious bodily or mental harm

- The perpetrator caused serious bodily or mental harm to one or more persons.
  - This conduct may include, but is not limited to, acts of torture, rape, sexual violence, or inhuman or degrading treatment.
  - Such harm does not necessarily mean that it must be permanent and irreparable (7).
  -

### c) Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction

- The perpetrator inflicted certain conditions of life upon one or more persons.
  - The term “conditions of life” may include, but is not limited to, subjecting a protected group to a subsistence diet, reducing required medical services below minimum requirements, and withholding sufficient living accommodations (8).

### d) Genocide by imposing measures intended to prevent births

- The perpetrator imposed certain measures upon one or more persons.
  - Such measures may be physical or mental.
  - Such measures may include, but are not limited to, sterilisation, compulsory abortion, segregation of the sexes, rape, and obstacles to marriage (9).

### e) Genocide by forcibly transferring children

- The perpetrator forcibly transferred one or more persons.
  - The term forcibly is not restricted to physical force but may include the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.

((6) ICTY, *Tolimir*, Appeal Judgement, 8 April 2015, para 263.

(7) ICTY, *Tolimir*, Trial Judgement, 12 December 2012, para. 738; also *Krstić*, Trial Judgement, 2 August 2001, para. 513

(8) ICTR, *Akayesu*, Trial Judgement, 2 September 1998, para. 505-06; ICTR, *Rutaganda*, Trial Judgement, 6 December 1999, para. 52; ICTR, *Musema*, Trial Judgement, 27 January 2000, para. 157.



### Sexual violence, torture and ill-treatment as underlying acts of genocide

Sexual violence, torture and ill-treatment are not listed among the enumerated acts. However, these have frequently been charged as acts causing 'serious bodily and mental harm', as was initially set out in the *Akayesu* case in 1998 with regards to rape (10). Rape may similarly constitute a 'measure intended to prevent births' and therefore can be another underlying act that constitutes genocide (11).

## 3.2 Protected Groups

It must be shown that the victim(s) belonged to one of the following protected groups: **national groups, ethnical groups, racial groups, and religious groups.**

### How do we define these groups?

The jurisprudence of the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) provide insights into how we can interpret these groups. It is useful to note that:

- **"An ethnic group is generally defined as a group whose members share a common language or culture,"** (12) or "a group that distinguishes itself as such or a group identified as such by others, including perpetrators of the crimes (13).
- **Political groups** such as "Hutu political opponents" are not a protected group for the purposes of genocide (14).
- **There should be a "positive definition of the group."** The targeted group must be positively defined, and it must be shown that the targeted individuals belong or belong to the group.

### Groups should be defined positively

In the ICTY *Stakic* case, with regard to several distinct groups such as Bosnian Muslims and Bosnian Croats, the Appeals Chamber held that the targeted group could not be defined negatively as targeting "non-Serbs". The group must be a specific group defined positively. (ICTY, *Stakic*, Appeals Judgement para. 20-28).

### Whose perception of the group matters?

The ICTR Trial Chamber in *Rutaganda* found that national, ethnic, racial or religious identity are largely subjective concepts. The perpetrator should have perceived the victims to belong to the targeted group, but the determination of the group could not be based on subjective perceptions alone (15). Other cases further explained that the determination as to whether there is such a group, "must be assessed in light of a particular political, social, historical and cultural context" and membership of the group "must be an objective feature of the society in question" (16).

(9) UN Doc. E/623/Add.2; UN Doc. E/447, p. 26; UN Doc. A/C.6/SR.82.

(10) ICTR, *Akayesu*, Trial Judgment, 2 September 1998, para. 731. (11) See ICTR, *Akayesu*, Trial Judgment, 2 September 1998, paras. 507-08; see also ICTR, *Kayishema and Ruzindana*, Trial Judgment, 21 May 1999, para. 117; ICTR, *Rutaganda*, Trial Judgment, 6 December 1999, para. 53; ICTR, *Musema*, Trial Judgment, 27 January 2000, para. 158.

(12) ICTR, *Akayesu*, Trial Judgment, 2 September 1998, para. 513.

(13) ICTR, *Kayishema*, Trial Judgment, 2 September 1998, para. 98. (14) ICTR, *Nahimana*, Appeals Judgment, para. 496; see also ICTR, *Rutaganda*, Trial Judgment, 6 December 1999, para. 57.

### A “Substantial Part” of the Group

The ICTR *Semanza* and *Bagilishema* cases required that the intention to destroy should target at least “a substantial part of the group” (17). In *Jelusic*, the ICTY Chamber explained that the ‘substantial part’ requirement reflected the Genocide Convention’s concern with the survival of the group (18).

The ‘substantial part’ requirement is supported by the following considerations, none of which are final on their own:

- The numeric size of the targeted part of the group;
- The number of individuals targeted in relation to the overall size of the group; or
- The targeted group’s prominence within the entire group (e.g. if the targeted group is emblematic of the overall group or essential to its survival) (19).

#### ‘Significant part’ requirement met

In the *Krstić* case (ICTY), the Appeals Chamber provided that the Bosnian Muslim population in Srebrenica or the Bosnian Muslims of Eastern Bosnia—a group estimated to comprise roughly 40,000 people—met the ‘substantial part’ requirement. While the number is not considerable when compared with the Bosnian Muslim population as a whole, it occupied a strategic location and was key to the survival of the Bosnian Muslim nation as a whole (20).

#### ‘Significant part’ requirement not met

In the *Sikirica* case (ICTY), the Trial Chamber provided that a relatively small number of killings in concentration camps had not met the ‘substantial part’ requirement of the local Muslim community to threaten the group’s survival. The victims were taxi drivers, schoolteachers, lawyers, pilots, butchers, café owners but not, apparently, community leaders (21). The Trial Chamber observed that “they do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age, and therefore could be called up for military service” (22).

## 3.3 Genocidal Intent (*Mens Rea*)

According to the jurisprudence of the ICTY and ICTR, the intention to be shown is twofold. It must be shown that the perpetrator intentionally committed the enumerated act (e.g. killing, causing serious bodily or mental harm) (23) and also intended to destroy the group, in whole or in part the group as such. The ICC has as yet not made any convictions of genocide. The critical element needed to prove genocide is the **special intent** to destroy, in whole or in part, a protected group. Sometimes there will be ‘direct and explicit’ evidence, however, in many instances, the genocidal intention will need to be inferred from a number of facts.

(15) ICTR, *Rutaganda*, Trial Judgement, 6 December 1999, para. 56-57. (16) ICTR, *Bagilishema*, Trial Judgement, 7 June 2001, para. 65. (17) ICTR, *Jelusic*, Trial Judgment, 19 October 1999, para. 82.

(18) ICTY, *Jelusic*, Trial Judgment paras. 81-83; ICTY, *Mladić*, Appeal Judgement, 8 June 2021 para. 580, referring to, *inter alia*, *Krstić*, Appeal Judgement, 19 April 2004, para. 8.

(19) ICTY, *Krstić*, Trial Judgement, para. 12.

(20) ICTY, *Krstić*, Appeals Judgement, 19 April 2004, paras. 15-16.

(21) By contrast, in *Tolimir*, a majority of the Trial Chamber held that the killing of three community leaders constituted genocide because this imperiled the survival of the group as a whole. See ICTY, *Tolimir*, Trial Judgement, 12 December 2012, para. 782.

(22) ICTY, *Sikirica et al.*, Judgement on Defence Motions to Acquit, 3 Sep. 2001, para. 80.

### a) Direct and Explicit Evidence of Genocidal Intent

In the *Muhimana* case (ICTR), a direct witness testified that Muhimana had expressed his intention to 'hold a meeting' to encourage Hutus to kill the Tutsis. This testimony was held as an example of explicit evidence that directly showed the intent of the accused and was supported by evidence of a specific slaughter of Tutsis. These pieces of evidence together contain explicit statements from the accused, supported by witness statements and direct evidence of violence against a protected group (24).

#### Is there evidence of a plan?

- The existence of a plan or policy is not required for a conviction of genocide. However, evidence of such a plan could be strong evidence of the specific intent requirement (25).
- A policy of ethnic cleansing does not necessarily amount to genocide (26), but again could facilitate proof of the special intent.

### b) Inferring the Intention to Destroy

In the *Krstić* case (ICTY), the Chamber held that "the genocidal intent may be inferred, among other facts, from the evidence of other culpable acts systematically directed against the same group" (27).

#### Four ways of using inferences:

*Jelisić* established that genocidal intent can be inferred from evidence falling into four categories: 1) statements or utterances, 2) the existence of a plan, 3) the scale of the atrocities and 4) systematic targeting of the protected group (28). Together circumstantial evidence can be used to demonstrate genocidal intent, "as long as it is the only reasonable inference from the totality of the evidence" (29).

#### Example of using inferences:

In the case of *Kayishema* (ICTR), the Trial Chamber inferred genocidal intent from evidence of the creation of roadblocks to select and kill the Tutsi population. The existence of a plan is often difficult to prove 'directly and explicitly', but a plan based on genocidal intent can be inferred from such evidence.

## 3.4 Contextual Elements

International jurisprudence has recognized that acts of genocide often occur within a particular context that includes:

- A pattern or plan to commit genocide that can be inferred from the systematic or widespread nature of the acts.

(23) ICTR, *Semanza*, Trial Judgment, 15 May 2003, para. 319. (24) ICTR, *Muhimana*, Appeals Judgement, 21 May 2007, para. 96. (25) ICTY, *Jelisić*, Appeal Judgement, 5 July 2001, para. 48.

(26) ICTR, *Kayishema & Ruzindana*, Appeals Judgement, 4 December 2021, para. 138.

(27) ICTY, *Krstić*, Appeals Judgement, 19 April 2004, para. 33.

(28) ICTY, *Jelisić*, Appeals Judgement, 5 July 2001, para. 47.

(29) ICTR, *Nahimana et al.*, Appeal Judgement, 28 November 2027, para. 524.

## 4 ways of using inferences

### 1) Utterances or Statements to show genocidal intent

Utterances or statements include written and verbal statements made by the accused or people connected to the accused. These can include the use of coded language. Omissions of statements, metaphors and euphemisms are often used to draw inferences about genocidal intent (ICTY, *Jelisić*, Trial Chamber, para. 73.)

### 2) The Existence of a Plan to show genocidal intent: large-scale organization and planning are characteristics of many cases of genocide.

While there is no consensus on what constitutes a plan, written communication and oral statements have been considered 'strong evidence' of specific intent. Evidence is often highly circumstantial and varies from context to context, but the ICTR points out that an incomplete or inefficient genocidal plan is still a plan (ICTR, *Kayishema*, Trial Judgement, para. 309.)

**Krstić killings were planned:** The Trial Chamber found that: "Evidence presented in this case has shown that the killings were planned: the number and nature of the forces involved, the standardised coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military-aged men." (ICTY, *Krstić*, Trial Judgement, 2 August 2001, para. 572).

### 3) The Scale of Atrocities to show genocidal intent

The number of victims is frequently taken into account as an indicator of genocidal intent. In many cases, the number of victims highlights the rationale behind the acts, providing admissible and clear evidence of intent to destroy the protected group. However, numbers on their own are not sufficient to determine the scale of atrocities.

### 4) Systematic Targeting of the Protected Group to show genocidal intent

Examples of evidence include:

- the weapons or methodology used,
- discriminatory targeting of group members,
- the scale and nature of crimes committed.
- evidence of systematic and selective choice of victims. (ICTR, *Kayishema*, Trial Judgement, supra note 53, para. 593.)
- political doctrine, where systematic plans are documented
- strategic military considerations, including military rationale (ICTY, *Krstić*, Trial Judgement, supra note 54, para. 26.)

- Even initial acts of genocide in an emerging pattern fall within such context (30).
- The scale and systematic nature of the acts can help demonstrate genocidal intent.

### 3.5 Types of Conduct

There are different ways that an individual can be held to account for genocide. These are:

- **Direct and physical perpetration:** In *Gatcumbitsi*, the ICTR Appeals Chamber held that an accused who was present at the scene of a genocidal massacre, personally and closely supervised it, and participated in it by separating those to be killed on the basis of ethnicity, can be convicted of “committing genocide through direct and physical perpetration even if he did not personally kill anyone himself”. In *Seromba*, the Appeals Chamber found that it is sufficient that the accused’s acts were “as much an integral part of the genocide as were the killings which they enabled” in that he fully exercised influence over those who committed the act, they accepted his authority and followed his directions, and as such he “became a principal perpetrator in the crime itself” (31).
- **Conspiracy to commit genocide:** “is to be defined as an agreement between two or more persons to commit the crime of genocide”. It only requires proof of an actual or implied agreement to commit genocide. With conspiracy, it is not necessary to prove that a genocide did in fact occur. The reason for this is that “in view of the serious nature of the crime of genocide, the mere agreement to commit genocide should be punishable, even if no preparatory act has taken place”. According to the Appeals Chamber in *Nahimana*, a conspiracy can be inferred on the basis of a concerted or coordinated action of a group of individuals provided that a conspiracy is the only reasonable conclusion that can be drawn from the evidence (32).
- **Instigating genocide:** A perpetrator may be found to have instigated genocide where he substantially contributed to the commission of acts of genocide.
- **Aiding and abetting genocide:** A perpetrator may be found to have facilitated, aided or abetted the commission or attempted commission of genocide by an individual or by a group of persons acting with a common purpose, including by providing the means for its commission, with either, a) the intent to further the criminal purpose of the group or b) if he had knowledge of the intention of the group (33).

(30) *Elements of Crimes*, International Criminal Court, art. 6, Introduction (2011).

(31) ICTR, *Seromba*, Appeals Judgement, 12 March 2008, para. 171-172.


(32) ICTR, *Nahimana*, Appeals Judgement, 30 January 2015, para. 897.

(33) For this mode of liability, the genocidal intent (*mens rea*) requirement is not applicable. See ICTY, *Krstić*, Appeals Judgement, 19 April 2004, paras. 135-144.

### Genocide Case: Akayesu case (ICTR, 1998)

In the aftermath of the Rwandan genocide, Jean-Paul Akayesu, bourgemestre of Taba commune, in the Gitarama prefecture, was charged with genocide. Due to the widespread sexual violence committed as part of the genocide, charges of genocide by rape and sexual violence were added to the case. In addition to ordering killings, Akayesu was said to have consented to or ordered rape and sexual violence committed against Tutsi women by the Interahamwe (the Hutu paramilitary who were the main perpetrators of the genocide). The orders he gave 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. It must be noted that, given the coercive nature of the circumstances, showing lack of consent is not a requirement for a conviction of rape in international criminal law. Akayesu was convicted on a number of counts, including for rape as genocide, setting an important precedent in international law.

## Potential Evidence to Document Genocide

 <p><b>Genocidal Acts</b></p>	<ul style="list-style-type: none"> <li>• Forensic evidence from mass graves or crime scenes.</li> <li>• Open-source geolocation of burn sites, geolocated videos of attacks displaying acts being committed, or conduct that indicates a common plan.</li> <li>• Witness testimonies describing the acts and their impact on the group, or describing the words or conduct of those involved.</li> <li>• Documents, testimony, and expert testimony linking the perpetrator with the acts, showing:           <ul style="list-style-type: none"> <li>◦ the chain of command;</li> <li>◦ the role of the accused in planning or executing the genocidal acts, including the perpetrators' vicinity to the commission of the acts.</li> </ul> </li> </ul>
<p><b>Victims Belonged to a Protected Group</b></p>	<ul style="list-style-type: none"> <li>• Expert analysis on the identity of the targeted group.</li> <li>• Documents or testimony showing that the victims belonged to the targeted group.</li> <li>• Communications, video, or testimonies that show that the perpetrator intended to target members of the group.</li> </ul>
<p><b>Genocidal Intent</b></p>	<ul style="list-style-type: none"> <li>• Documents, testimonies, communications, videos that might describe the words or conduct of those involved, showing:           <ul style="list-style-type: none"> <li>◦ knowledge of the acts and an intention to contribute to them;</li> <li>◦ the role of the accused in planning or executing the genocidal acts;</li> <li>◦ the existence of a plan;</li> <li>◦ the chain of command.</li> </ul> </li> <li>• Evidence of a systematic pattern of violence against the targeted group.</li> <li>• Evidence of a significant scale of atrocities against the group to infer intent.</li> </ul>
<p><b>Context Element</b></p>	<ul style="list-style-type: none"> <li>• Documents or communications showing plans or orders to commit genocidal acts.</li> <li>• The historical background of the conflict showing growing animosity towards the targeted group.</li> <li>• Patterns of similar acts against the group.</li> <li>• Government policies or statements promoting the destruction of the group.</li> </ul>

## 4. Incitement to Genocide

Article 25 of the ICC Statute provides for individual criminal responsibility for direct and public incitement to commit genocide (34).

- 25(3) *In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*
  - (e) *in respect of the crime of genocide, directly and publicly incites others to commit genocide.*

Direct and public incitement to commit genocide is an inchoate offence. This means that the act is an offence in itself whether or not genocidal acts are actually committed: “it is not necessary to prove that the incitement was successful, or that it produced the result expected by the perpetrator” (35), “incitement is a crime regardless of whether it has the intended effect” (36).

### The elements needed for direct and public incitement are:

1. The perpetrator directly and publicly incited others to commit genocide
2. The perpetrator incited, with the intention to destroy the group in whole or in part
3. The conduct took place in the context of a manifest pattern of similar conduct directed against the group or was conduct that could itself affect such destruction.

### Hate Speech vs. Incitement to Genocide

In the *Nahimana* case (ICTR), the Appeals Chamber considered the difference between hate speech and incitement to genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit one of the enumerated acts (killing, inflicting bodily harm, etc.) with the intention to destroy the group. It must be more than a mere vague or indirect suggestion. Direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but the incitement must be direct and public incitement to commit genocide (ICTR, *Nahimana et. al* para 692).

### *Nahimana et al* case (Media Trial, ICTR)

In 1992, alongside two others, Nahimana set up the radio company, Radio Television des Mille Collines (RTLM). He was also the member of a party known as Mouvement Revolutionnaire 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.

(34) Direct and public incitement to commit genocide was provided for in Article 4(3) of the ICTY Statute and Article 2(3) of the ICTR Statute. (35) ICTR, *Akayesu*, Trial Judgement, 2 September 1998, para. 562.

(36) ICTR, *Nahimana et. al.*, Trial Judgement, 3 December 2003, para. 1029.

## 4.1 Direct and Public Incitement

**a) “Direct”:** The incitement must be explicit and unequivocal (37). It should clearly call for the commission of genocide. The language used must be specific enough to provoke immediate action. The act consists of “directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings or through the sale or dissemination of ... printed matter ... or other means of audiovisual communication” (38).

- **“A direct appeal to commit genocide”.** For ‘direct incitement’ the speech must be a direct appeal to commit a genocidal act. It must be more than a vague or indirect suggestion. An accused cannot be held accountable for this crime based on hate speech that does not directly call for the commission of genocide” (39).
- **How the speech is understood by the intended audience.** Often ambiguous or coded language is used in hate speech or to incite genocide, for this reason: “it may be helpful to examine how a speech was understood by its intended audience in order to determine its true message” (40).

**b) “Public”:** The incitement must be made in a public forum, accessible to a wide audience. This includes speeches, media broadcasts, publications, and other forms of communication that reach the public, such as through social media. To satisfy the notion of “public”, the act is “characterised by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television” (41).

Regarding public incitement to genocide as applied to mass media, the Chamber in the Media Trial (*Nahimana et. al*) highlighted that:

- Editors and publishers are generally held responsible for the media they control,
- The language used and the aim of the discourse is relevant,
- The speech must be considered in context to assess potential impact,
- It is not necessary to prove that the speech produced a direct impact.

## 4.2 Acts of Incitement

The perpetrator must have engaged in conduct that constitutes direct and public incitement to commit genocide. This could involve making speeches, distributing propaganda, or any other actions that directly encourage others to commit acts of genocide (42).

The perpetrator can be liable for the commission of the crime of direct and public incitement to genocide even when he or 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.”

(37) The fulfilment of this requirement may depend on the cultural and linguistic context of the setting at issue. See ICTR, *Nahimana et. al.*, Appeals Judgement, 28 November 2007, para. 700.

(38) ICTR, *Akayesu*, Trial Judgement, 2 September 1998, para. 559.

(39) ICTR, *Kajelijeli*, Trial Judgement, 1 December 2003, para. 852.

(40) ICTR, *Nahimana et. al.*, Appeals Judgement, 28 November 2007, paras 698-700.

(41) ICTR, *Niyitegeka*, Trial Judgement, 16 May 2003, para 431.



Similarly, a perpetrator can be liable for the commission of the crime of direct and public incitement to genocide even if genocide is not, in fact, incited (43). The act of incitement is considered to be committed as soon as the act in question is uttered, published, or otherwise distributed, although the effects of such acts may extend in time (44). In the cases where the ICTR Appeals Chamber concluded that the accused's speech or incitement constituted an integral part of the genocidal acts, the accused was present at the crime scene.

### 4.3 Special Intent (*Dolus Specialis*)

The individual must have the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such. This is the highest level of intent and is unique to the crime of genocide, and also applies to individuals accused of incitement to genocide.

### 4.4 Contextual Element

#### Existence of a “genocidal campaign”

While the incitement itself does not require that genocide has already taken place, it typically occurs within a context where there is a real and substantial risk of genocide being committed. This context helps establish the gravity and potential impact of the incitement. Factors to be considered include:

- The link to the commission of Genocide (though not required for the crime of incitement itself, it contextualizes the severity);
- The potential for Genocide: The incitement must create a clear and present danger that genocide will be committed. It is not necessary to prove that genocide occurred, but rather that the incitement had the potential to lead to such acts.

## Potential Evidence to Document Incitement to Genocide

<b>Direct and Public Incitement</b>	<ul style="list-style-type: none"> <li>• Recordings, transcripts, or witness testimonies of public speeches, broadcasts, writings, or other forms of communication where incitement occurred (45).</li> <li>• Publicly available social media posts and other online speech where incitement occurred.</li> </ul>
<b>Special Intent</b>	<ul style="list-style-type: none"> <li>• Statements or actions by the individual that demonstrate a clear intent to incite others to commit genocide. This can include private communications, prior conduct, or affiliations with groups promoting genocidal ideologies.</li> </ul>
<b>Contextual Element</b>	<ul style="list-style-type: none"> <li>• Information about the sociopolitical environment, tensions between groups, and any ongoing conflicts that indicate the risk of genocide.</li> <li>• Testimony from experts in international law, genocide studies, and communication to interpret the incitement's impact and the intent behind it.</li> </ul>

(42) ICTR, *Akayesu*, Trial Judgement, 2 September 1998, para. 559.

(43) *Ibid.* paras. 561-62.

(44) ICTR, *Nahimana et. al.*, Trial Judgement, 3 December 2003, para. 1017.

(45) ICTR, *Akayesu* Trial Judgement, *op.cit* para. 559.

## 5. Persecution as a Crime Against Humanity

Persecution was particularly used to prosecute campaigns of ethnic cleansing that occurred in parts of Bosnia. It has been defined as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. Article 7(1)(h) of the ICC Rome Statute defines persecution as follows:

- *7(1) the following act (persecution) when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*
  - *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;*
- *And Article 7(2)(g) defines persecution as follows:*
  - *“Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.*

### **The ICC elements of persecution as a crime against humanity are:**

1. The perpetrator severely deprived, contrary to international law, one or more persons of their fundamental rights.
2. The perpetrator targeted such persons by reason of the identity of the group or collectivity.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender, or other recognised grounds.
4. The conduct was committed in connection with any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

## 5.1 Underlying acts severely deprive fundamental rights

The underlying acts (or omissions) must severely deprive the fundamental rights of one or more persons. The word ‘severe’ does not refer to the character of the underlying persecutory act (or omission) itself, but to the nature of the deprivation of fundamental rights (46). It could be a single act that constitutes persecution (47), or several acts taken together.

The act cannot just be a provocation to cause harm, the act itself must be harmful (48).

### As regards the gravity of the underlying persecutory act:

“the acts underlying the crime of persecution, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecution of gravity equal to the crimes” against humanity (49) such as murder, enslavement, rape or torture (50).

### To assess gravity, the context is of particular importance:

“the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity” (ICTR, *Nahimana*, Appeals Judgement, para. 987). In the *Tadić* case, the Trial Chamber gave examples of acts including incitement to murder and extermination, economic deprivation, plunder of property, discriminatory judicial and legal practices, restrictions placed on family life, exclusion from certain professions, restrictions placed on rights to citizenship and the creation of ghettos (51).

#### Hate Speech as an underlying act?

The Trial Chamber in *Ruggiu* defined the crime of persecution as “a gross or blatant denial of a fundamental right reaching the same level of gravity...” It went on to say “It is evident that hate speech targeting the population on the basis of ethnicity ... reaches this level of gravity...”.

On Appeal, the Chamber was “not satisfied that hate speech alone can amount to a violation of the right to life, freedom and physical integrity ... other persons need to intervene before such violations can occur: a speech cannot in itself, directly kill members of a group”. The Appeals Chamber found that **the hate speeches were accompanied by incitement to genocide, so “as a whole and in their context” were “of a gravity equivalent to other crimes against humanity”**. (ICTR, *Nahimana*, Appeal Judgement, para 986).

(46) In *Tadić*, persecution was defined as “the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basis or fundamental right” and can range from “killing to a limitation on the type of professions open to the targeted group”. ICTY, *Tadić*, Trial Judgement, 7 May 1997, paras. 694, 697, and 704.

(47) ICTY, *Blaskić*, Trial Judgement, 29 July 2004, para. 135.

(48) ICTR, *Nahimana* et. al. (Media Case), Appeals Judgement, 28 November 2007, para. 981.

(49) ICTY, *Kronjelac*, Appeals Judgement, 17 September 2003, para. 199, reiterated in *Blaskić*.

(50) ICTY, *Blaskić*, Trial Judgement, 29 July 2004, para. 135.

(51) ICTY, *Tadić*, Trial Judgement, 7 May 1997, paras. 704-710.

## 5.2 Persons are targeted by reason of their membership in the group

Individuals must be targeted “by reason of” their membership in the group, which incorporates a discrimination in fact. Discernibility allows for some measure of diversity between members of a group (52). The targeted group or collectivity must be distinguishable based on political, racial, national, ethnic, cultural, religious, gender, or other grounds universally recognized under international law.

## 5.3 Discriminatory grounds

The perpetrator must have committed the acts on discriminatory grounds, such as on the basis of race, religion or politics, with the intention to discriminate against the identified group. This intent must be proven to show that the acts were not merely incidental but were aimed at the specific group because of their identity.

- It must be shown that the perpetrator had the specific intent to commit the persecutory act and that the act was committed with persecutory intent;
- There is no need to show ‘persecutory’ intent over and above ‘discriminatory intent’ (53).

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 (54).

## 5.4 The conduct was committed in connection with other crimes within the jurisdiction of the Court

According to the ICC Elements of Crimes, acts of persecution should be connected to other crimes against humanity.

Persecution should not be considered in isolation but must be linked to other inhumane acts such as murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, enforced disappearance, or other similar actions. This is a difficult and controversial requirement that has not been specifically considered by the ICC yet and was not required for the ICTY and ICTR.

(52) ICTR, *Ntaganda*, Trial Judgement, 8 July 2009, para. 1013-1014.

(53) ICTY, *Kordic & Cerkez*, Appeal Judgment, 17 December 2004, para. 111.

(54) ICTY, *Popovic et al.*, Appeal Judgement, 30 January 2015, para 762.

## 5.5 The conduct was committed as part of a widespread or systematic attack directed against a civilian population

It must be shown that the acts of persecution were part of a widespread or systematic attack directed against a civilian population. This means the persecution must not be isolated incidents but part of a larger pattern of conduct.

## 5.6 Knowledge of the widespread or systematic attack

The acts must have been carried out with knowledge of the broader widespread or systematic attack on the civilian population (55). This does not require knowledge of the entire attack in all its detail (56). Knowledge can be actual or constructed, it can be implied from the circumstances and examined objectively. This implies that the acts were committed in connection to a plan or policy, rather than being sporadic or random acts of violence.

### **Tadić case (ICTY, 1997)**

The case addressed ethnic cleansing in Bosnia. Dusko Tadic, a Bosnian Serb, was found guilty of multiple counts of persecution based on discriminatory acts in the context of an intended, systematic attack against Bosnian Muslims. These acts included restrictions on citizenship and family life, incitement to murder and extermination, plunder of property, and economic deprivation and discrimination. The chamber emphasized that persecution can take numerous forms and does not necessarily require a physical element so long as discrimination and the depravity of fundamental rights are present. The acts presented in the case demonstrated the discriminatory intent of the accused through contextual evidence and documentary evidence of the deprivation of fundamental rights. (ICTY, *Tadić* case, Trial Judgement 7 May 1997).

## Potential Evidence to Document Persecution

### Underlying Acts

- **Physical and Forensic Evidence:** Gather physical evidence, including forensic reports, medical records, and any other tangible proof of the underlying acts.
- Open-source geolocation of burn sites, geolocated videos that show the widespread or systematic nature of attacks committed against a civilian population
- **Victim and Witness Testimony:** Collect detailed statements from victims and witnesses. Ensure these accounts are recorded accurately, with attention to dates, locations, and descriptions of the **discriminatory** acts.

(55) ICTY, *Tadić*, Trial Judgement, 7 May 1997, para. 656.

(56) ICTY, *Kunarac*, Trial Judgement, 22 February 2001, para 419.

<p><b>Discriminatory Intent</b></p>	<ul style="list-style-type: none"> <li>• <b>Documentary Evidence:</b> official documents, communications, decrees, or orders that indicate the discriminatory policy or intent against the targeted group. This can include records, propaganda materials, and other relevant documents.</li> <li>• <b>Expert Analysis:</b> Obtain expert analysis, including reports from historians, sociologists, and linguistic or legal experts, to provide context around derogatory terms or language, and to substantiate claims of discriminatory intent and the systematic nature of the attacks.</li> </ul>
<p><b>Contextual Evidence</b></p>	<ul style="list-style-type: none"> <li>• Documentation of the broader context in which the persecution occurred. This could include political speeches, media reports, and other forms of public communication that illustrate the environment of discrimination and hostility.</li> </ul>

## Annex: UN Human Rights Treaties Ratified by Sudan

Treaty	Ratified	How to Access
International Covenant on Civil and Political Rights (ICCPR)	Ratified ICCPR in 1986	Sudan has NOT ratified the Optional Protocol (Complaints Mechanism)
International Covenant on Elimination of All forms of Racial Discrimination	Ratified CERD in 1977	n/a
Convention Against Torture	Ratified CAT in 2021	Sudan has NOT ratified the Optional Protocol (Complaints Mechanism)
Convention on the Rights of the Child	Ratified CRC in 2009	Individuals can submit complaints. Sudan has ratified the Optional Protocol (Complaints Mechanism)
International Convention for the Protection of all Persons from Enforced Disappearance	Ratified CPPED in 2021	n/a
Convention on the Rights of Persons with Disabilities	Ratified CRPD in 2009	Sudan has ratified the Optional Protocol (Complaints Mechanism)





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[info@rightsforpeace.org](mailto:info@rightsforpeace.org)  
UK Registered Charity  
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