

DOCUMENTATION MANUAL ON THE ELEMENTS OF CORE INTERNATIONAL CRIMES

Legal Memorandum

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Executive Summary

The purpose of this manual is to provide background on core international crimes and the elements of those crimes, and questions relevant to those crimes for documenters to ask during interviews with victims and witnesses. The four categories of core international crimes are genocide, crimes against humanity, war crimes and the crime of aggression. Core international crimes distinguish themselves from any other crime for their gravity, as they violate or threaten international interests and fundamental values protected by general international law. This guide will focus on the analysis of the three core international crimes, namely genocide, crimes against humanity and war crimes, the elements of these crimes and relevant interview questions.

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Introduction

This memorandum is intended to serve as a guide for documenters preparing evidentiary materials for future prosecutions of core international crimes before international criminal tribunals or courts. This memorandum analyzes the elements of each of these crimes that must be proven to establish guilt. Finally, it provides a list of questions for documenters to ask victims and witnesses to collect evidence to support those elements.

In international criminal law, core international crimes are categorized as genocide, crimes against humanity, war crimes and the crime of aggression. With regards to the crime of aggression, the International Criminal Court has jurisdiction on this crime since July 2018.¹ Genocide, crimes against humanity and war crimes have a long tradition of prosecution before international courts and tribunals since the Nuremberg and Tokyo trials.² This memorandum will limit its focus to the analysis of those crimes that have a long history of persecution before international courts and tribunals, namely genocide, crimes against humanity and war crimes.

In international criminal law, for an accused perpetrator to be found guilty and convicted of a given crime, the prosecution must prove specific elements beyond a reasonable doubt.³ While the accused may bear the burden of proving defenses that they raise, the burden of proving the elements of the crime never shifts from the prosecutor to the accused.

¹ Rober Cryer, Darryl Robinson and Sergey Vasiliev, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 297-302 (2019).

² Rober Cryer, Darryl Robinson and Sergey Vasiliev, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 115-43 (2019).

³ *E.g.*, International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, art. 87(A), adopted Feb. 11, 1994, amended July 18, 2015 (50th revision), U.N. Doc. IT/32/Rev.22, *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, art. 87(A), adopted July 5, 1995, amended May 13, 2015 (23rd revision), U.N. Doc. ITR/3/REV.7 (2000), *available at* <https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.

Two separate elements are necessary to prosecute an individual for committing an international crime. These are: (1) the unlawful or criminalized conduct, referred to as “actus reus,” and (2) the intent to engage in wrongdoing or other requisite mental element, called “mens rea.”

“Mens rea” is the mental element of a crime, such as the intent to engage in wrongdoing. The element of intent is key in international criminal law, and usually must be established for each element of a crime.⁴ Because of this requirement, it is always a good idea to ask questions relevant to the identity and mental state of a perpetrator, and any circumstances that may indicate that a perpetrator was committing an act with intent.

With regards to “actus reus,” crimes are broken down into certain elements that must be present for the threshold to be met.

Certain elements are common to all crimes in a particular subset:

- For *genocide*, the victim or victims must belong to a national, ethnic, racial, or religious group, the perpetrator must have intended to destroy that group, in whole or in part, and the act must be one in a larger pattern of similar conduct directed against that group, or conduct that could itself effect such destruction.
- For *crimes against humanity*, the targets of the acts must be a civilian population, the acts must be part of a widespread or systematic attack against this population, and the perpetrator must have intended those acts to be a part of the widespread or systematic attack.
- For *war crimes*, the act or acts must have taken place during an armed conflict, and must have been connected to that armed conflict, and the perpetrator must have been aware of the circumstances establishing the existence of an armed conflict.

The elements of the crimes are sourced directly from the Rome Statute of the International Criminal Court (ICC) which is the founding treaty of the Court. The

⁴ For more on mens rea in international criminal law, see William Schabas, *Mens Rea, Actus Rea and the Role of the State, in Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunal* (2012).

Rome Statute is among the most authoritative sources in international criminal law as it largely reflects customary international law.⁵

In this manual, each crime is accompanied by an introductory paragraph, the elements of the crime, and a list of questions that could help documenters to contextualize the events being documented. This will provide prosecutors at international courts and tribunals with more comprehensive, accurate, and helpful evidence, leading to more efficient and expeditious prosecutions. The questions themselves should only serve as guidance to documenters and are not mandatory or exhaustive. However, it is recommended that documenters generally start with the broadest questions and then gradually narrow the scope of questions asked. For example, documenters should begin by asking a victim or witness, “What happened?” From there, documenters might proceed to ask questions from the list in descending order, but may also customize follow-up questions or skip questions from the list as appropriate. Documenters should also avoid asking leading questions. For example, it is better to ask a victim or witness, “What did you see?” rather than, “Did you see the perpetrator attack someone?” because the former allows the victim or witness to fully explain what they saw or experienced without any assumptions or intervention.

When speaking with victims and witnesses, it is important to be sensitive to their psychosocial needs and understand that discussing these events may be traumatic for them. It is not uncommon for victims and witnesses to give short answers with little detail. If a victim or witness starts to do this, you may consider asking questions relating to another part of the crime or a different crime entirely. This will allow you to document as much information as possible without re-traumatizing the victims or witnesses.

⁵ Rober Cryer, Darryl Robinson and Sergey Vasiliev, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 147 (2019).

Statement of Purpose

The purpose of this manual is to outline the core international crimes, the elements of those crimes, and questions relevant to those crimes for documenters to ask during interviews with survivors and witnesses. This manual is to serve as a guide for documenters preparing evidentiary materials for future prosecutions before international courts and tribunals.

I. **Background**

While this manual is organized around six major reported crimes in armed conflict (i.e., murder, torture, sexual and gender-based violence, displacement, enforced disappearance, and property crimes), three overarching categories of violations establish the basis for international crimes in general: genocide, crimes against humanity, and war crimes. Crimes must fall within at least one of these three categories to become actionable at the International Criminal Court.⁶ For instance, murder would not necessarily be actionable at the International Criminal Court unless it can be shown to be part of a genocide, crime against humanity, or war crime. Accordingly, it is important to ask questions that would clearly establish whether or not these elements are satisfied. Because of this framework, this manual first explains the three overarching categories in Part I before discussing the specific crimes in Part II.

a. **Genocide**

“Genocide” refers to certain acts committed with intent to destroy—in whole or in part—a national, ethnic, racial, or religious group. To establish each crime associated with genocide, the following three elements must be present:

1. The victim(s) belonged to a national, ethnic, racial, or religious group;
2. The perpetrator intended to destroy—in whole or in part—that specific group; and
3. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.⁷

Note that the crime of genocide sets a higher threshold for intent or “mens rea” compared to other international crimes, requiring a specific intent to commit the crime itself, as opposed to merely knowing that the conduct may result in the crime. That is, a perpetrator who kills as genocide must have not only intended to kill, but also intend, through the act of killing, to destroy a specific group of people.

Under article 6 of the Rome Statute, the following five acts can constitute genocide:

⁶ The International Criminal Court (ICC), Rome Statute, ICC, art. 5 (2002), *available at* <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

⁷ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 6(a)-(e) (2013), *available at* <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

- 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.⁸

b. Crimes Against Humanity

“Crimes against humanity” are crimes committed as part of a widespread or systematic attack directed against a civilian population with the knowledge of the attack. To establish each crime associated with crimes against humanity, the following three elements *must* be present:

1. The conduct targeted a civilian population;
2. The conduct was committed as part of a widespread or systematic attack against that population; and
3. The perpetrator knew or intended that the conduct was part of a widespread or systematic attack against a civilian population.

Under article 7 of the Rome Statute, the following ten acts can constitute a crime against humanity:

- 1) Murder;
- 2) Extermination;
- 3) Enslavement;
- 4) Deportation or forcible transfer of population;
- 5) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- 6) Torture;
- 7) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- 8) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any of these acts or any crime within the jurisdiction of the Court;

⁸ The International Criminal Court (ICC), Rome Statute, ICC, art. 6 (2002), available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

- 9) Enforced disappearance of persons;
- 10) The crime of apartheid;
- 11) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁹

c. War Crimes

A war crime is a serious violation of the laws and customs applicable in armed conflict. The laws and customs applicable in armed conflict form a body of public international law called international humanitarian law.¹⁰ War crimes are found in the key treaties of international humanitarian law, the four Geneva Conventions for the Protection of War Victims of August 12, 1949, the Additional Protocols, the 1907 Hague Regulations, as well as customary international law.¹¹ To establish each crime associated with war crimes, the following four elements *must* be present:

1. The victim or object affected by the crime is protected under the Geneva Conventions of 1949;¹²
2. There exists an armed conflict;¹³
3. The conduct prescribed is committed in the context of and associated with an armed conflict;¹⁴
4. The perpetrator is aware of factual circumstances that established the existence of an armed conflict;¹⁵

⁹ The International Criminal Court (ICC), Rome Statute, ICC, art. 7 (2002), available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

¹⁰ Rober Cryer, Darryl Robinson and Sergey Vasiliev, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 259-69 (2019).

¹¹ Rober Cryer, Darryl Robinson and Sergey Vasiliev, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 263 (2019).

¹² The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 8(2)(a)-I (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

¹³ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 8(2)(a)-I (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>; Rober Cryer, Darryl Robinson and Sergey Vasiliev, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 269-75 (2019).

¹⁴ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 8(2)(a)-I (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>; Rober Cryer, Darryl Robinson and Sergey Vasiliev, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 274-75 (2019).

¹⁵ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 8(2)(a)-I (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

To satisfy the first element of being protected by the Geneva Convention of 1949, the victims must not be taking an active part in the hostilities.¹⁶ This includes civilians, armed forces who have laid down their arms, and those out of combat due to sickness, wounds, or detention.¹⁷ When civilians or other individuals otherwise taking no active part in hostilities begin directly participating in hostilities, they lose the protections contained in the Geneva Conventions as they pertain to war crimes.¹⁸

Under article 8 of the Statute, the following acts constitute war crimes:

- 1) Grave breaches of the Geneva Conventions of August 1949:
 - i) Wilful killing;
 - ii) Torture or inhumane treatment, including biological experiments;
 - iii) Wilfully causing great suffering, or serious injury to body or health;
 - iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - vi) Wilfully depriving a prisoner of war or other protected person of the right of fair and regular trial;
 - vii) Unlawful deportation or transfer or unlawful confinement;
 - viii) Taking of hostages.

- 2) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law;

- 3) Serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the prescribed acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, in the case of an armed conflict not of an international character;

¹⁶ International Committee of the Red Cross, *Protected persons under IHL*, (Oct. 29, 2010), available at <https://www.icrc.org/en/document/persons-protected-ihl>.

¹⁷ International Committee of the Red Cross, *Protected persons under IHL*, (Oct. 29, 2010), available at <https://www.icrc.org/en/document/persons-protected-ihl>.

¹⁸ International Committee of the Red Cross Casebook, *Direct participation in hostilities*, available at <https://casebook.icrc.org/glossary/direct-participation-hostilities>.

4) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.¹⁹

II. Six Major International Crimes in Armed Conflict

For each crime reported by a witness or victim, documenters should seek to identify the corresponding violation under international criminal law. This guide will analyse six major categories of international crimes that are often reported in the context of armed conflicts: (a) murder, (b) torture, (c) sexual and gender-based violence, (d) displacement, (e) enforced disappearance, and (f) property crimes. This section will discuss how crimes under these categories may be prosecuted under genocide, crimes against humanity and war crimes. The definitions of these crimes will be primarily drawn from the Rome Statute and other international law treaties and caselaw.

Some of the facts reported may correspond to more than one of these six crimes. Moreover, there are several other international crimes that may also be relevant depending on the facts reported. For instance, there is overlap between the major crime of torture, and the two international crimes of mutilation and cruel treatment. In order to account for this, this manual lists the related crimes underneath each major crime.

a. Murder (or “Killing”)

Killing is when a perpetrator directly or indirectly causes the death of a person or persons. The perpetrator must have known that their actions would result in death or inflict serious injury, and have acted with “reckless disregard for human life.” The intent to kill may be shown when the perpetrator’s behavior evinces an awareness that death would occur in the ordinary course of events.²⁰ The difference between murder as genocide, a crime against humanity, or a war crime centers on the context in which the murder is committed.²¹

Killing members of the group | *as Genocide*

¹⁹ The International Criminal Court (ICC), Rome Statute, ICC, art. 8 (2002), *available at* <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

²⁰ *See* Prosecutor v. Delalic et al. IT-96-21-T, Nov. 16, 1998, para. 877.

²¹ Mark Klamburg, COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 112, n. 116 (2017), *available at* <https://www.legal-tools.org/doc/aa0e2b/pdf>.

Murder is listed as the crime of “killing members of the group” under article 6 of the Rome Statute.

The Rome Statute identifies the following four elements as relevant to a finding of murder as genocide:

1. The perpetrator killed one or more persons;
2. Such person or persons belonged to a particular national, ethnic, racial, or religious group;
3. The perpetrator intended to destroy, in whole or in part, that national, ethnic, racial, or religious group; and
4. The act took place in the context of a pattern of similar conduct directed against the same group, or was conduct that could itself effect such destruction.²²

Murder | *as a Crime Against Humanity*

Murder is listed as one of the acts constituting a crime against humanity under article 7 of the Rome Statute.

The Rome Statute identifies the following three elements as relevant to a finding of murder as a crime against humanity:

1. The perpetrator killed one or more persons;
2. The killing was committed as part of a widespread or systematic attack directed against a civilian population; and
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.²³

Murder | *as a War Crime*

Murder is categorized under the “war crime of murder” under article 8 of the Rome Statute.

The Rome Statute identifies the following five elements as relevant to a finding of murder as a war crime:

²² The International Criminal Court (ICC), *Elements of Crimes*, ICC, art 6(a), (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

²³ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 7(1)(a), (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

1. The perpetrator killed one or more persons;
2. Such person or persons were either *hors de combat* (i.e., a member of an armed group who has laid down their weapons or is defenseless due to sickness, wounds, detention or other reason)²⁴, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities;
3. The perpetrator was aware of the factual circumstances that established the victim's status;
4. The conduct took place in the context of and was associated with an armed conflict not of an international character; and
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁵

Questions:

1. What happened? When and where did it happen? Who was the perpetrator?
2. What were the perpetrator(s) wearing? What language(s) were they speaking? What weapon(s) were they carrying? How many perpetrators were there? Do you know which faction the perpetrator(s) belonged to?
3. How many people were killed? Were they killed at once or over a period of time?
4. Did you witness the killing(s)? How do you know how the killing(s) occurred?
5. Where is the body? Is it in a private or mass grave? Was it cremated?

Other International Crimes Related to Murder

International crimes with similar or shared elements:

- Extermination | *Crimes Against Humanity*
- Wilful Killing | *War Crime*
- The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees for fair trial under . . . general international law | *Other*
- Killing or wounding treacherously a combatant adversary | *Other*

²⁴ International Committee of the Red Cross, Rule 47, *Attacks Against Persons Hors de Combat*, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule47.

²⁵ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 8(2)(c)(i)-1 (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

b. Torture

Torture is the intentional infliction of severe physical or mental pain and suffering upon a victim. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.²⁶

There is no universal consensus on whether the crime of torture require the act to be done for an intended purpose. Under the Rome Statute of the ICC, torture as a crime against humanity does not require an intended purpose,²⁷ whereas torture as a war crime requires the act be executed for a particular prohibited purpose.²⁸ In contrast, the ICTY and ICTR have both held that torture must be executed for a particular purpose, as does the United Nations Convention Against Torture (UNCAT).²⁹

Likewise, there is a divergence on whether the perpetrator of the act must be a state official to constitute the international crime of torture. The UNCAT requires that the act be “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.” In contrast, ICTY has held that “the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.”³⁰ The Rome Statute again distinguishes between torture as a crime against humanity and torture as a war crime, and requires the perpetrator to be a state official for the act of torture to constitute a war crime, but not for it to constitute a crime against humanity.

Ultimately, whether or not the crime of torture will require an intended purpose and involvement of a state official will depend on how a Court chooses to interpret the crime.

Courts consider the duration of the suffering, what type of violence was committed, the condition the victim is in after the violence, and the victim’s age to assess whether the acts or omissions inflicted severe enough pain or suffering to constitute torture.³¹ Acts may include beatings, electric shocks, forcing victims to

²⁶ Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, article 1, para. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (1984).

²⁷ International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 7(1)(f), (2013).

²⁸ International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 8(2)(a)(ii)-1, (2013).

²⁹ See Prosecutor v. Kunarac et al., Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, Feb. 22, 2001, para. 497(iii); Prosecutor v. Karadžić, IT-95-5/IT-18-T, Judgment, Mar. 24, 2016, para 506; Prosecutor v. Akayesu, ICTR-96-21-T, Judgment, Sep. 2, 1998, para. 594; Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, article 1, para. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (1984).

³⁰ Prosecutor v. Kunarac et al., Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, February 22, 2001, para. 496.

³¹ Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, June 12, 2007, para. 75.

watch executions of others, rape, forcing victims to bury the bodies of their neighbors and friends, or burning victims, among other acts.³²

Torture | *as a Crime Against Humanity*

Torture is listed as one of the acts constituting a crime against humanity under article 7 of the Rome Statute.

The Rome Statute identifies the following five elements as relevant to a finding of torture as a crime against humanity:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
2. Such person(s) were in the custody or under the control of the perpetrator;
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions;
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
5. 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.³³

Torture | *as a War Crime*

Torture is categorized under the crime of “Torture or inhuman treatment, including biological experiments” under article 8 of the Rome Statute.

The Rome Statute identifies the following six elements as relevant to a finding of torture as a war crime:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind;
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949;

³² Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, June 12, 2007, para. 76.

³³ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art 7(1)(f), (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

4. The perpetrator was aware of the factual circumstances that established that protected status;
5. The conduct took place in the context of and was associated with an international armed conflict; and
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.³⁴

Questions:

1. What happened? When and where did it happen? Who were the perpetrator(s)?
2. What were the perpetrator(s) wearing? What language(s) were they speaking? What weapon(s) were they carrying? How many perpetrator(s) were there? Do you know the faction to which the perpetrator(s) belonged?
3. Can you describe the physical or mental pain you felt?
4. What happened after the pain was inflicted? In what condition was the victim after the pain was inflicted?
5. Were you held somewhere without your consent, unable to leave, or in the control of the perpetrator(s)? Where were you?
6. Could you have left if you wanted to?
7. Did you attempt to escape? What happened?
8. Why did the perpetrator(s) inflict pain on you? How do you know?
9. Before suffering your injury, were you arrested or detained? What happened? What were the charges against you?
10. Was there any medical reason for inflicting the pain on you?

Other International Crimes Related to Torture

International crimes with similar or shared elements:

- Mutilation | *War Crimes*
- Cruel Treatment | *War Crimes*
- Violence to life and person | *War Crimes*
- Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault | *War Crimes*

³⁴ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 8(2)(a)(ii)-1 (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law | *Crimes Against Humanity*

International crimes that torture could give rise to:

- Causing serious bodily or mental harm to members of the group | *Genocide*
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part | *Genocide*
- Imposing measures intended to prevent births within the group | *Genocide*

c. Sex and Gender-Based Violence (SGBV)

There are a range of international crimes that fall under the umbrella of SGBV.

Rape has been defined in some domestic legal systems as non-consensual intercourse, including the insertion of objects or the use of bodily openings not considered to be intrinsically sexual.³⁵ More recently, the ICC has defined rape as “penetration, however slight, of any part of the victim’s body with a sexual organ, or of the anal or genital opening of the victim with any object or other part of the body.”³⁶ To constitute rape, the penetration must occur by force, by threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.³⁷ What determines whether rape is an act of genocide, a crime against humanity, or a war crime is the context in which it is committed.

Other forms of sexual violence include sexual slavery, enforced prostitution, enforced marriage, forced pregnancy, enforced sterilization, molestation, and mutilation.

Acts of rape or any other form of sexual violence | *as Genocide*

Rape and other forms of sexual violence are actionable as genocide under article 6 of the Rome Statute.

³⁵ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, Sept. 2, 1998, para. 596.

³⁶ Prosecutor v. Bemba, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, March 21, 2016, para. 99.

³⁷ Prosecutor v. Bemba, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, March 21, 2016, para. 102.

Historically, rape and other forms of sexual violence had been prosecuted as genocide as acts that cause serious bodily or mental harm.³⁸ Beginning with the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014), however, rape was included in the list of acts that could constitute genocide on their own.³⁹

The Rome Statute identifies the following five elements as relevant to a finding of rape or other forms of sexual violence as an act of genocide:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body;
2. The invasion was committed by force, by 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 another person, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent;
3. The victims belonged to a particular national, ethnic, racial, or religious group;
4. The perpetrator intended to destroy, in whole or in part, that specific group; and
5. 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.⁴⁰

Questions:

Material Element 1:

³⁸ Daniel D. Ntanda Nsereko & Manuel J. Ventura, *Perspectives on the International Criminal Jurisdiction of the African Court of Justice and Human Rights Pursuant to the Malabo Protocol (2014)* in THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT 265 (Charles C. Jalloh et al. eds. 2019), available at <https://www.cambridge.org/core/books/african-court-of-justice-and-human-and-peoples-rights-in-context/perspectives-on-the-international-criminal-jurisdiction-of-the-african-court-of-justice-and-human-rights-pursuant-to-the-malabo-protocol-2014/60C6787782D09D437D49C4BE76EE158C/core-reader>.

³⁹ Daniel D. Ntanda Nsereko & Manuel J. Ventura, *Perspectives on the International Criminal Jurisdiction of the African Court of Justice and Human Rights Pursuant to the Malabo Protocol (2014)* in THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT 265 (Charles C. Jalloh et al. eds. 2019), available at <https://www.cambridge.org/core/books/african-court-of-justice-and-human-and-peoples-rights-in-context/perspectives-on-the-international-criminal-jurisdiction-of-the-african-court-of-justice-and-human-rights-pursuant-to-the-malabo-protocol-2014/60C6787782D09D437D49C4BE76EE158C/core-reader>.

⁴⁰ The International Criminal Court (ICC), *Elements of Crimes*, ICC, arts. 6(a)-(e) & 7(1)(g)-1 (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

1. What happened? When and where did it happen?
2. Was a sexual organ inserted into any part of your body? Were you forced to insert a sexual organ into another's body?
3. Was any object or body part inserted into your anal or genital opening?
4. What physical injuries did you sustain during the attack? How have you felt since the attack?
5. Did the perpetrator(s) touch your genitals or breasts? Did the perpetrator rub your inner thighs? Did the perpetrator use a weapon?
6. Did the perpetrator(s) make sexual threats to you?
7. Did the perpetrator(s) injure your genitals or breasts?
8. Did the perpetrator(s) make you engage in a sexual act with another person?
9. Did the perpetrator(s) make you dress provocatively, undress or to be nude?
10. Were you forced to bathe or massage someone while they were naked?

Material Element 2:

1. Who were the perpetrator(s)? What were the perpetrator(s) wearing? What language(s) were they speaking? What weapon(s) were they carrying? How many perpetrator(s) were there? Do you know the faction to which the perpetrator(s) belonged?
2. Did you consent to the act(s)?
3. Did the perpetrator(s) cause—by way of physical force, threats coercion, promises, or any other acting causing one to fear for their life or safety—you or someone you saw to engage in sexual acts?
4. Were you imprisoned at the time of the act(s)?
5. Were you separated from your family at the time of the act(s)?
6. Was the harm committed against someone incapable of giving genuine consent—meaning the victim was underage, unconscious, threatened, afraid for their life, or without the mental capacity? How so?
7. Did the perpetrator(s) say anything to you or to each other? What did they say?

Rape | *as a Crime Against Humanity*

Rape and other forms of sexual violence are actionable as crimes against humanity under article 7 of the Rome Statute.

To be a crime against humanity, the act of rape must be committed within the context of a widespread or systematic attack aimed at a civilian population; thus, combatants cannot be victims of rape as a crime against humanity.⁴¹

The Rome Statute identifies the following four elements as relevant to a finding of rape as an a crime against humanity:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body;
2. The invasion was committed by force, by 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 another person, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent;
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
4. 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.⁴²

Questions:

Material Element 1:

1. What happened? When and where did it happen?
2. Was a sexual organ inserted into any part of your body? Were you forced to insert a sexual organ into another's body?
3. Was any object or body part inserted into your anal or genital opening?
4. What physical injuries did you sustain during the attack? How have you felt since the attack?

Material Element 2:

⁴¹ Mark Klamburg, COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 49-50, n. 52 (2017), available at <https://www.legal-tools.org/doc/aa0e2b/pdf>.

⁴² The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 7(1)(g)-1 & 8(2)(e)(vi)-1 (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

1. Who were the perpetrator(s)? What were the perpetrator(s) wearing? What language(s) were they speaking? What weapon(s) were they carrying? How many perpetrators were there? Do you know to which faction the perpetrator(s) belonged?
2. Did you consent to the act(s)?
3. Did the perpetrator(s) cause—by way of physical force, threats coercion, promises, or any other acting causing one to fear for their life or safety—you or someone you saw to engage in sexual acts?
4. Were you imprisoned at the time of the act(s)?
5. Were you separated from your family at the time of the act(s)?
6. Was the harm committed against someone incapable of giving genuine consent—meaning someone underage, unconscious, threatened, afraid for their life, or without the mental capacity to give consent? How so?
7. Did the perpetrator(s) say anything to you, or to each other? What did they say?

Sexual Slavery | *as a Crime Against Humanity*

Sexual slavery is one specific form of sexual violence listed as a crime against humanity under article 7 of the Rome Statute.

Sexual slavery is a kind of enslavement that limits a victim's autonomy, freedom of movement, and power to decide matters relating to their sexual activity. There are two parts to the crime: (1) enslavement, and (2) causing the enslaved person to engage in act(s) of a sexual nature.⁴³ Sexual slavery includes forced marriages, forced rapes, domestic servitude, or other forced labor that ultimately involves forced sexual activity.⁴⁴

The Rome Statute identifies the following four elements as relevant to a finding of sexual slavery as a crime against humanity:

1. The perpetrator exercised the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
2. The perpetrator caused persons to engage in one or more acts of a sexual nature;

⁴³ See Prosecutor v. Taylor, SCSL-03-01-T, Judgment, May 18, 2002, at para. 421.

⁴⁴ Mark Klamburg, COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 51-52, n. 53 (2017), available at <https://www.legal-tools.org/doc/aa0e2b/pdf>.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
4. 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.⁴⁵

Questions:

Material Element 1:

1. What happened? When and where did it happen? Who were the perpetrator(s)?
2. Were you or someone you know under the control of someone else?
3. How long were you or someone you know under the control of the perpetrator? How did the perpetrator(s) exercise over you or them? What kind of force, threat, or coercion was used against you or them?
4. Did the perpetrator(s) say anything to you, or to each other? What did they say?
5. Were you or someone you know bought, sold, or exchanged for money, goods, or services? What was the exchange?
6. Were you or someone you know lent to others to act under different people's control? Who were those people?
7. Could you have left if you wanted to? Did the perpetrator(s) force you to be where you were? What did the perpetrator(s) do or say to make you think this?

Material Element 2:

1. Were you or someone you know forced to perform sexual acts against your or their will?
2. Did the perpetrator cause—by way of physical force, threats coercion, promises, or any other acting causing one to fear for their life or safety—you or someone you saw to engage in sexual acts?

Enforced prostitution | *as a Crime Against Humanity*

⁴⁵ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 7(1)(g)-2, (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

Enforced prostitution is another form of sexual violence listed as a crime against humanity under article 7 of the Rome Statute.

Enforced prostitution is when a victim is forced to engage in acts of a sexual nature by physical force, threat, coercion, fear, or promises. The perpetrator subsequently obtains, or expects to obtain money, goods, services, favors or other advantages in exchange for the victim's sexual acts. This exchange differentiates prostitution from sexual slavery.⁴⁶ The fact that someone other than the perpetrator profits from this exchange, in addition to or in lieu of the perpetrator, does not appear to preclude prosecution.⁴⁷

The Rome Statute identifies the following four elements as relevant to a finding of forced pregnancy as a crime against humanity:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by 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 or such person's or persons' incapacity to give genuine consent;
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature;
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
4. 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.⁴⁸

Questions:

Material Element 1:

⁴⁶ Mark Klamberg, COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 53, N. 54 (2017), available at <https://www.legal-tools.org/doc/aa0e2b/pdf>.

⁴⁷ See, e.g., Netherlands v. Awochi, Case No. 76, Outline of the Proceedings, Oct 26, 1946, 125, available at http://www.worldcourts.com/imt/eng/decisions/1946.10.25_Netherlands_v_Awochi.pdf.

⁴⁸ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 7(1)(g)-3, (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

1. What happened? When and where did it happen? Who were the perpetrator(s)?
2. Did the perpetrator(s) touch your genitals or breasts? Did the perpetrator(s) rub your inner thighs? Did the perpetrator use a weapon?
3. Did the perpetrator(s) injure your genitals or breasts?
4. Did the perpetrator(s) make you engage in a sexual act with another person?
5. Did the perpetrator(s) make you dress provocatively, undress, or to be nude?
6. Were you forced to bathe or massage someone while they were naked?
7. What were the perpetrator(s) wearing? What language(s) were they speaking? What weapon(s) were they carrying? How many perpetrators were there? Do you know to which faction the perpetrators belonged?
8. Did you consent to the act(s)?
9. Did the perpetrator cause—by way of physical force, threats coercion, promises, or any other acting causing one to fear for their life or safety—you or someone you know to engage in sexual acts?
10. Were you imprisoned at the time of the act(s)?
11. Were you separated from your family at the time of the act(s)?
12. Was the harm committed against someone incapable of giving genuine consent--meaning, was the victim underage, unconscious, threatened, afraid for their life, or without the mental capacity? How so?
13. Did the perpetrator(s) say anything to you? Did the perpetrator(s) say anything to each other? What did they say?

Material Element 2:

1. Did you, the perpetrator, or another person obtain or expect money, goods, favors, an advantage, or anything else in exchange for the sexual acts? What was the exchange?

Forced pregnancy | as a Crime Against Humanity

Forced pregnancy is another form of sexual violence listed as a crime against humanity under article 7 of the Rome Statute.

Forced pregnancy is 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.⁴⁹ The essence of this crime is the confinement of a victim, or unlawfully placing the victim in a position where

⁴⁹ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 7(1)(g)-4, (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

she cannot choose whether to continue the pregnancy, rather than the act of rape or impregnation.⁵⁰ A perpetrator is guilty if the perpetrator holds a woman who has been impregnated by someone else against her will, denying her access to an otherwise available abortion. However, the mere fact that an abortion is not legally available does not constitute forced pregnancy. The use of physical force is not required; a perpetrator can be guilty where there is some form of coercion.

The Rome Statute identifies the following four elements as relevant to a finding of forced pregnancy as an a crime against humanity:

1. The perpetrator confined one or more women forcibly made pregnant;
2. With the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
4. 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.⁵¹

Questions:

Material Element 1:

1. What happened? When and where did it happen? Who were the perpetrator(s)?
2. Were you or someone you know forced to continue a pregnancy? Did you have a choice as to whether to continue the pregnancy?
3. Did the perpetrator(s) want to impact your or their ethnic community? How do you know?
4. Did the perpetrator cause—by way of physical force, threats, coercion, promises, or any other act(s) causing one to fear for their life or safety—you or someone you know to continue the pregnancy?
5. Did the perpetrator(s) say anything to you, or to each other? What did they say?

⁵⁰ Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges Against Dominic Ongwen, March 23, 2016, para. 99.

⁵¹ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 7(1)(g)-4, (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

Any other form of sexual violence of comparable gravity | as a Crime Against Humanity

There is a catch-all category for “any other form of sexual violence of comparable gravity” for the provision in article 7 of the Rome Statute that outlines SGBV that constitute crimes against humanity.

In addition to the specific crimes listed in that provision, “sexual violence” refers to many different crimes including sexual mutilation, sexual humiliation, or other sexual acts committed against or inflicted upon an individual under circumstances which are coercive.⁵² Sexual violence is “not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact,”⁵³ such as actions which humiliate or degrade the victim in a sexual manner,⁵⁴ like forced nudity.⁵⁵ Victims of sexual violence can be of any gender.⁵⁶ In addition, coercion need not be related to physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence.⁵⁷

The Rome Statute identifies the following five elements as relevant to a finding of sexual violence as an a crime against humanity:

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person(s) to engage in an act of a sexual nature by force, or by 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 or such person’s or persons’ incapacity to give genuine consent;

⁵² The United Nations, *Women2000*, (April 1998), available at <https://www.unwomen.org/-/media/headquarters/media/publications/un/en/cover.pdf?la=en&vs=954>; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, Sept. 2, 1998, para. 688.

⁵³ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, Sept. 2, 1998, para. 688.

⁵⁴ Prosecutor v. Milutinovic, Case No. IT-05-87-T, Feb. 26, 2009, Vol. 1, para. 199 (finding that “sexual assault” may be committed in situations where there is no physical contact between the perpetrator and the victim, if the actions of the perpetrator nonetheless serve to humiliate and degrade the victim in a sexual manner”).

⁵⁵ The International Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, at 13, para. 17 (June 2014), available at <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

⁵⁶ The International Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, at 12, para. 16 (June 2014), available at <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

⁵⁷ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, Sept. 2, 1998, para. 688.

2. Such conduct was of a gravity comparable to the other sex offenses in the Statute;
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct;
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
5. 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.⁵⁸

Questions:

Material Element 1:

1. What happened? When and where did it happen? Who were the perpetrator(s)?
2. Did the perpetrator(s) touch your genitals or breasts? Did the perpetrator(s) rub your inner thighs? Did the perpetrator(s) use a weapon?
3. Did the perpetrator(s) injure your genitals or breasts?
4. Did the perpetrator(s) make you engage in a sexual act with another person?
5. Did the perpetrator(s) make you dress provocatively, undress, or to be nude?
6. Were you forced to bathe or massage someone while they were naked?
7. What were the perpetrator(s) wearing? What language(s) were they speaking? What weapon(s) were they carrying? How many perpetrator(s) were there? Do you know to which faction the perpetrators belonged?
8. Did you consent to the act(s)?
9. Did the perpetrator(s) cause—by way of physical force, threats coercion, promises, or any other acting causing one to fear for their life or safety—you or someone you know to engage in sexual acts?
10. Were you imprisoned at the time of the act?
11. Were you separated from your family at the time of the act?
12. Was the harm committed against someone incapable of giving genuine consent—meaning someone underage, unconscious, threatened, afraid for their life, or without the mental capacity to give consent? How so?
13. Did the perpetrator(s) say anything to you, or to each other? What did they say?

Material Element 2:

⁵⁸ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 7(1)(g)-6, (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

1. What impact did the attack have on you or someone you know? Are you or someone you know traumatized or unable to perform tasks you were previously able to?
2. Did you suffer any lasting physical injuries because of the attack?

Material Element 3:

1. Were the perpetrator(s) aware that their acts would cause harm to you?
2. Did the perpetrator(s) say anything to you, or to each other? What did they say?

Other International Crimes Related to SGBV

International crimes with similar or shared elements:

- Enslavement | *Crimes Against Humanity*
- Imprisonment or other severe deprivation of physical liberty | *Crimes Against Humanity*
- Imposing measures intended to prevent births within the group | *Genocide*
- Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault | *War Crimes*

International crimes that SGBV could give rise to:

- Causing serious bodily or mental harm to members of the group | *Genocide*
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part | *Genocide*
- Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault | *War Crimes*
- Torture | *Crimes Against Humanity*

d. Displacement

Deportation or forcible transfer of population | *Crimes Against Humanity*

Deportation and forcible transfer of a population are crimes against humanity under article 7 of the Rome Statute.

Deportation and forcible transfer of a population both involve the forced displacement of persons by expulsion or other coercive acts from the location in which they are lawfully present, across a state border.⁵⁹ The displacement must be involuntary in nature, and the affected persons had no genuine choice.⁶⁰ The difference between deportation and forcible transfer is the final location of the transferees.⁶¹ If the transferees are relocated across an international boundary, then the perpetrator may be guilty of deportation. If the transferees remain in the same state, then the perpetrator may be guilty of forcible transfer of population.⁶²

The Rome Statute identifies the following five elements as relevant to a finding of deportation or forcible transfer as an a crime against humanity:

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts;
2. Such person(s) were lawfully present in the area from which they were so deported or transferred;
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence;
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
5. 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.⁶³

Questions:

Material Element 1:

1. What happened? When and where did it happen? Who were the perpetrator(s)?
2. What were the perpetrator(s) wearing? What language(s) were they speaking? What weapon(s) were they carrying? How many perpetrators were there? Do you know which faction the perpetrator(s) belonged to?
3. Were the persons who were relocated civilians? Were any military personnel forced to relocate?

⁵⁹ Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, Mar 22, 2006, para. 278.

⁶⁰ Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, Mar 22, 2006, para. 279.

⁶¹ Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, April 15, 2011, para. 1738.

⁶² Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, April 15, 2011, para. 1738.

⁶³ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art 7(1)(d), (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

4. Did you feel you had a choice whether or not to relocate? Could you have stayed if you wanted to? What did the perpetrator(s) say or do to make you feel this way?
5. Did the perpetrator(s) commit violent acts or threaten to commit violent acts?
6. Could the relocation have been to protect the civilian population? How so? Was the threat to the civilian property caused by the perpetrator?
7. Did the people who were forced to relocate contribute to the military or armed forces in any way? How so?
8. Did the perpetrator(s) say why you were being relocated?
9. Were you ever allowed to return to the place from which you were relocated?

Material Element 2:

1. Did you live in the place from which you were relocated? Were you visiting friends or family in the place from which you were relocated?
2. Were you conducting business in the place from which you were relocated?
3. Were you trespassing in the place from which you were relocated?

Material Element 3:

1. Did the perpetrator(s) know that you lived in, were visiting, or conducting business in the place from which you were relocated? How do you know?

Displacing civilians | *War Crimes*

Displacement is an actionable international crime under article 8 of the Rome Statute. The full provision for the prohibited act reads: “Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.”

This provision prohibits the displacement of civilians absent exigent circumstances. “Displacement” includes the evacuation of civilians both within and outside the state’s territory. There are two exceptions: perpetrators may order the displacement for the security of the civilians involved, or for important military reasons.⁶⁴ Unlike displacement as a crime against humanity, ordering the

⁶⁴ See Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, June 29, 2004, para. 151 (citing International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 17, June 8, 1977, 1125 U.N.T.S. 609, available at <https://www.refworld.org/docid/3ae6b37f40.html>; COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 142, n. 137 (Mark Klamberg ed. 2017), available at <https://www.legal-tools.org/doc/aa0e2b/pdf>.

displacement of a civilian population as a war crime focuses on the *order* itself, rather than the resulting displacement.⁶⁵ The order need only be made by an individual within a political or military chain of command who is also capable of affecting the displacement, and need not be made directly to the civilian population at issue or be issued in writing.⁶⁶

Under the Rome Statute, the following five elements must be present for the corresponding crime to be actionable:

1. The perpetrator ordered a displacement of a civilian population;
2. Such order was not justified by the security of the civilians involved or by military necessity;
3. The perpetrator was in a position to effect such displacement by giving such order;
4. The conduct took place in the context of, and was associated with, an armed conflict not of an international character; and
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁶⁷

Questions:

Material Element 1:

1. What happened? When and where did it happen? Who were the perpetrator(s)?
2. Did someone order people to leave a place in which they were lawfully present? Who gave the order? What did you see or hear to make you think this?
3. Were the people ordered to leave civilians?

Material Element 2:

1. Was the order directed at the military or armed forces in any way? How so?
2. Did the order offer a definite military advantage to the perpetrator? How so?
3. Could the order have been to protect the safety of civilians? How so?

⁶⁵ Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, July 8, 2019, para. 1080.

⁶⁶ Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, July 8, 2019, paras. 1081-82.

⁶⁷ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 8(2)(e)(viii) (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

Material Element 3:

1. Was the person who gave the order in a leadership position? Could their order have led to subordinates carrying out the displacement?
2. Did the person who gave the order exercise any power over the place from which the victims were to be displaced? How so?

Other International Crimes Related to Displacement

International crimes with similar or shared elements:

- Forcibly transferring children of the group to another group | *Genocide*
- Enslavement | *Crimes Against Humanity*
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law | *Crimes Against Humanity*

International crimes that displacement could give rise to:

- Deliberately inflicting on the group conditions of life calculated to bring about, in whole or in part, its physical destruction | *Genocide*
- Forcibly transferring children of the group to another group | *Genocide*

e. Enforced Disappearance

An enforced disappearance is the act of making someone disappear, beginning with an arrest, imprisonment or abduction of an individual by some organized entity, followed by a refusal to acknowledge the whereabouts or fate of that individual.⁶⁸ Victims are usually never released, and are often tortured, killed, or held in a perpetual state of fear.⁶⁹ Perpetrators may be State officials, actors with the state's authorization, support or acquiescence, or political organizations such as armed opposition groups.⁷⁰ The refusal to acknowledge the deprivation of freedom, the whereabouts, or the fate of the victim is the key element of enforced disappearance. The perpetrator can communicate this refusal in many ways; for example, questions about the location of the individual may be met with official

⁶⁸ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 7(1)(i) (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

⁶⁹ Amnesty International, *Enforced Disappearances* (Last Accessed Apr. 27, 2021), available at <https://www.amnesty.org/en/what-we-do/disappearances/>.

⁷⁰ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 7(1)(i) (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

denials, false statements, or outright silence. Authorities may also use scare tactics to cause people to be too afraid to question or seek information about the victim.⁷¹

Enforced disappearance of persons | *Crimes Against Humanity*

Enforced disappearance of persons is a crime categorized as a crime against humanity under article 7 of the Rome Statute.

The Rome Statute identifies several material elements as relevant to a finding of enforced disappearance as a crime against humanity. Simplified, these elements are:

1. Deprivation of an individual's liberty;
2. By agents of a State or by (groups of) persons acting with the authorization, support or acquiescence of a State;
3. Accompanied by the refusal to acknowledge the deprivation or to give information on the fate or whereabouts of the individual;
4. Which places the individual outside of the protection of the law.⁷²

Questions:

Material Element 1:

1. What happened? When and where did it happen?
2. From where were you or someone you know taken? To where were you or they brought?
3. Were you arrested or imprisoned on any criminal charges?
4. Were you able to leave the control of the perpetrator(s)? Did the perpetrator(s) force you to stay where you were? What did the perpetrator(s) do or say to make you think this?

Material Element 2:

1. Who were the perpetrator(s)? Do you know who ordered the attack? How do you know?

⁷¹ See, e.g., Committee on Enforced Disappearances, Views Approved by the Committee Under Article 31 of the Convention for Communication No. 1/2013 (Yrusta v. Argentina), para 8.6, U.N. Doc. CED/C/10/D/1/2013 (2013); Prosecutor v. Nuon Case No. 002/19-09-2007/ECCC/TC, Judgment, para. 641 (Aug. 7, 2014).

⁷² United Nations Office of the High Commissioner, International Convention for the Protection of All Persons from Enforced Disappearance, art. 2 (Feb. 6, 2007), available at <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx>.

2. What were the perpetrator(s) wearing? What language(s) were they speaking? What weapon(s) were they carrying? How many perpetrators were there? Do you know which faction the perpetrator(s) belonged to?
3. Were the perpetrator(s) working for the state?

Material Element 3:

1. Did the perpetrator(s) tell you or someone you know why the victim was being taken away?
2. Did you or someone you know approach anyone to find out the whereabouts of the victim? Whom did you ask? What did you ask them? What was their response?
3. Did you or someone you know ask anyone to conduct an investigation into the disappearance? Was an investigation ever conducted? What was the result?
4. Were you or someone you know afraid to ask about the whereabouts of the victim? Why?

Material Element 4:

1. Were you or someone you know permitted to contact family or friends?
2. Did you or someone you know have access to an attorney?
3. Did you or someone you know ever appear before a judge?
4. For how long were you or someone you know taken?
5. How long did the perpetrator(s) intend to keep you? What did they say or do to make you think this?

Other International Crimes Related to Enforced Disappearance

International crimes that enforced disappearance could give rise to:

- Forcibly transferring children of the group to another group | *Genocide*
- Taking of hostages | *War Crimes*
- Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities | *Other*

f. Property Crimes

Destroying or seizing the enemy's property | *War Crimes*

Destruction or seizure of the enemy's property constitutes an actionable international crime under article 8 of the Rome Statute, unless such destruction was "imperatively demanded by the necessities of the conflict."

The definition of "destruction" for this crime has been interpreted in the same way as it is dealt with in Article 8(2)(a)(iv) of the Rome Statute: the war crime of destruction and appropriation of property. The main difference between the provisions relates to the scope and the intensity of destruction required. Article 8(2)(a)(iv) requires the destruction to be "extensive" while Article 8(2)(e)(xii) contains no such requirement, so long as the destruction is not justified by military necessity, and is carried out unlawfully and wantonly.⁷³ The definition of "destroy" is read broadly to include both partially and completely destroyed property.⁷⁴ It may include such acts as setting fire to, pulling down, mutilating or damaging property.⁷⁵ Likewise, "property" is construed broadly and includes moveable and immovable property, as well as both public and private property, so long as it belongs to a party opposed or hostile to the perpetrator.⁷⁶ The definition of "seizure" has been construed in the context of similar crimes to encompass any act of appropriation undertaken by the perpetrator, whether it constitutes an isolated act or part of a systematic campaign.⁷⁷ The property must belong to individuals or entities aligned with or in allegiance to a party to the armed conflict that is adverse or hostile to the perpetrator. This link can be established through ethnicity or place of residence.⁷⁸

The Rome Statute identifies the following seven elements as relevant for the crime to be actionable as an international crime:

1. The perpetrator destroyed or seized certain property;
2. Such property was property of an adversary;
3. Such property was protected from that destruction or seizure under the international law of armed conflict;

⁷³ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* 251 (2009).

⁷⁴ *Prosecutor v. Kordic*, Case No. IT-95-14/2, Judgment, Feb. 26, 2001, para. 346.

⁷⁵ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* 252 (2009).

⁷⁶ *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, Oct. 14, 2008, para 310 (discussing "property" as understood in the war crime of destroying the enemy's property, pursuant to Art. 8(2)(b)(xii) of the Rome Statute).

⁷⁷ *Prosecutor v. Gotovina*, Case No. IT-06-90-T Judgment, April 15, 2011, para. 1778 (discussing the term as understood pursuant to Art. 3(e) of the ICTY statute).

⁷⁸ *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, March 7, 2014, para 892 (discussing "property" as understood in the war crime of destroying the enemy's property, pursuant to Art. 8(2)(b)(xii) of the Rome Statute).

4. The perpetrator was aware of the factual circumstances that established the status of the property;
5. The destruction or seizure was not required by military necessity;
6. The conduct took place in the context of, and was associated with, an armed conflict not of an international character; and
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁷⁹

Questions:

Material Element 1:

1. What happened? When and where did it happen? Who were the perpetrator(s)?
2. Was any property destroyed beyond repair? What did they destroy? How was it destroyed? How do you know?
3. Did the perpetrator(s) take any property, even for a short period of time? What did they take? For how long did they take it?

Material Element 2:

1. Do you belong to a particular racial, national, ethnic, or religious group? Do you know if the perpetrator(s) belongs to a particular racial, national, ethnic, or religious group? How do you know?
2. What were the perpetrator(s) wearing? What language(s) were they speaking? What weapon(s) were they carrying? How many perpetrators were there? Do you know which faction the perpetrator(s) belonged to?
3. Do you support any side of the conflict? Which one?

Material Element 3:

1. What property was destroyed or taken?
2. Was the property destroyed or taken owned by the military?
3. Was the property destroyed or taken owned by civilians?

Core Element 4:

⁷⁹ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 8(2)(e)(xii) (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

1. Did the perpetrator(s) know that the property taken or destroyed was used by civilians? How do you know?

Core Element 5:

1. Was the property destroyed or taken used by the military or armed forces in any way? How so?
2. Was the property destroyed or taken used only by civilians? How was it used?

Pillage | *War Crimes*

The crime of pillage, or pillaging—also sometimes referred to as “plunder” or “looting”—is actionable as a war crime under article 8 of the Statute.

Pillage includes “all forms of unlawful seizure or appropriation of property during armed conflict.”⁸⁰ This can include stealing or looting valuables from homes or other buildings, taking or invading homes, and stealing from religious centers.⁸¹

The crime of “pillage” is separate and distinct from mere destruction of enemy property.⁸² Because the crime of pillage requires that property be appropriated, this element cannot be fulfilled where the property is destroyed, though such evidence may be relevant in proving other crimes.⁸³ Some courts (e.g., the ICC⁸⁴ and the ICTY⁸⁵) require the property taken to be intended for private or personal use by the perpetrator, but other courts (e.g., the SCSL⁸⁶) have held that property taken for any purpose, including military necessity, can constitute pillage.

The Rome Statute identifies the following five elements as relevant for pillage to constitute a war crime:

1. The perpetrator appropriated certain property;

⁸⁰ Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, March 3, 2000, para. 184 (quoting Prosecutor v. Delalić (Čelebići Case), Case No. IT-96-21-T, Judgment, Nov. 16, 1998, para. 422).

⁸¹ See, e.g., Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, March 3, 2000, para. 424.

⁸² See Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, Aug. 2, 2007, para. 166.

⁸³ Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, Aug. 2, 2007, para. 166.

⁸⁴ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art. 8(2)(e)(v) (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

⁸⁵ Prosecutor v. Delalić (Čelebići Case), Case No. IT-96-21-T, Judgment, Nov. 16, 1998, para. 590.

⁸⁶ Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, Aug. 2, 2007, para. 160.

2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;
3. The property was appropriated without the consent of the owner;
4. The conduct took place in the context of, and was associated with, an armed conflict not of an international character; and
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁸⁷

Questions:

Material Element 1:

1. What happened? When and where did it happen? Who was the perpetrator?
2. What were the perpetrators wearing? What languages were they speaking? What weapons were they carrying? How many perpetrators were there?
3. Did the perpetrator(s) take property? What property did they take? How do you know?
4. Did you personally observe the taking of property? If not, how did you learn of the taking?
5. Do you belong to a particular racial, national, ethnic, or religious group? Do you know if the perpetrator(s) belong to a particular racial, national, ethnic, or religious group? How do you know?

Material Element 2:

1. How did the perpetrator(s) intend to use the property he took? How do you know?
2. Was the property taken used by the military or armed forces in any way? How so?
3. Was the property taken used only by civilians? How was it used?
4. Did the perpetrator(s) ask your permission before taking property? Did you consent to the taking?

Other International Crimes Related to Property Crimes

International crimes with similar or shared elements:

⁸⁷ The International Criminal Court (ICC), *Elements of Crimes*, ICC, art 8(2)(e)(v) (2013), available at <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>.

- Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law | *Other*
- Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations and/or the Constitutive Act of the African Union, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict | *Other*
- Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives | *Other*

International crimes that property crimes could give rise to:

- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part | *Other*