

Questions and Answers on the Crime of Genocide

Legal Briefing Note, August 2018

ICJ Global Redress and Accountability Initiative

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ICJ Global Redress and Accountability Initiative

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International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

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"Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations."¹

¹ United Nations General Assembly Resolution 96(I) (1946).

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1. Introduction

Genocide is a particularly heinous crime whose genesis as a crime under international law resides in the extermination policies of the Nazi regime during World War Two.

Under customary international law and the Convention on the Prevention and Punishment of the Crime of Genocide 1948 ("Genocide Convention"), all States have a duty to prevent and punish genocide.² Genocide was declared a crime under international law by the UN General Assembly in 1946, and the prohibition of genocide has since been recognized peremptory norm of international law, meaning it is absolute and unconditional.

UN agencies and independent analysts have reported credible and consistent information that serious crimes have been committed under domestic and international law against Rohingya Muslims in Myanmar, including the crimes against humanity of deportation, rape and murder.³

A number of experts and authorities have also suggested that genocide may have been committed and have called for investigations in that respect.

On 27 August 2018, the Independent International Fact-Finding Mission on Myanmar (IFFM) said "... there is sufficient information to warrant the investigation and prosecution of senior officials in the Tatmadaw chain of command, so that a competent court can determine their liability for genocide in relation to the situation in Rakhine State".⁴

This announcement followed the United Nations High Commissioner for Human Rights, Zeid Ra'ad al-Husseini's statement in December 2017 that "elements of genocide may be present."⁵ And in March 2018, UN Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee, and UN Special Adviser on the Prevention of Genocide, Adama Dieng, raised the possibility that Myanmar's treatment of Rohingyas may amount to genocide.⁶

Rohingyas constitute the vast majority of the more than 700,000 persons displaced as a result of security operations commanded by Myanmar's military in northern Rakhine State, following attacks on police posts by the Arakan Rohingya Salvation Army (ARSA) on 25 August 2017.

Genocide is a complex crime that in many instances may be difficult to establish beyond reasonable doubt in a trial setting. One area that has proved particularly challenging is the requirement to prove "special intent" or "genocidal intent", which is a critical constitutive and distinctive element of the crime of genocide.

² The Genocide Convention has 149 States Parties, including Myanmar.

³ A non-exhaustive list includes: UN Office of the High Commissioner for Human Rights, "Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016," 3 February 2017; UNOHCHR, "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017," October 2017; Médecins Sans Frontières, "No one was left" Death and Violence Against the Rohingya in Rakhine State, Myanmar," 9 March 2018; Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar, "Report of the Special Rapporteur on the situation of human rights in Myanmar," 9 March 2018, UN Doc. A/HRC/37/70; Amnesty International, "We Will Destroy Everything," 27 June 2018.

⁴ "Report of the Independent International Fact-Finding Mission on Myanmar," 27 August 2018, A/HRC/39/64.

⁵ Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein at the Special Session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in Rakhine State, 5 December 2017.

⁶ Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council, 12 March 2018; Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on his visit to Bangladesh to assess the situation of Rohingya refugees from Myanmar, 13 March 2018.

The International Commission of Jurists (ICJ) issues this *Questions and Answers* briefing note to assist those who are examining whether genocide has been committed against the Rohingya population and, if so, whether anyone can be held individually criminally responsible.

2. What is the definition of genocide?

Summary:

The international normative framework for the crime of genocide is set out in the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention" or "Convention"), which recognizes genocide as a crime under international law, whether committed in time of peace or in time of war. The Genocide Convention establishes a duty for State parties to prevent genocide and to enact legislation to criminalize and punish individuals responsible for its commission, regardless of whether they are public officials or private individuals. The prohibition of genocide is *jus cogens*, meaning that it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. Several contemporary international and *ad hoc* criminal courts and tribunals have jurisdiction over the crime of genocide, including the International Criminal Court (ICC). A critical constitutive and distinctive element of the crime of genocide is "special intent" or "genocidal intent." The requirement of proving the element of genocidal intent beyond reasonable doubt makes establishing the crime of genocide particularly difficult in a trial setting.

The international normative framework for the crime of genocide is principally set out in the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention" or "Convention").⁷ Contemporary international criminal tribunals have largely absorbed the framework of the Genocide Convention, but have built on it to provide elements essential for operational purposes to allow for effective prosecution.

Article II of the Genocide Convention defines genocide as follows:

- "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group."

Pursuant to article III of the Genocide Convention, the following acts are punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; and (e) complicity in genocide. These acts are referred to as "punishable acts" and identify what kind of involvement in the perpetration of the crime of genocide may result in individual criminal responsibility under the Genocide Convention.

The Genocide Convention recognizes genocide as a crime under international law, whether committed in time of peace or in time of war, and establishes a duty for State parties to prevent genocide and to enact legislation to criminalize and punish those individuals responsible for its commission, regardless of whether they are public officials or private individuals. At least since the International Court of Justice (ICJ) ruling in *Reservations to the Genocide Convention* case in 1951, the Genocide Convention has been widely accepted as embodying

⁷ Convention on the Prevention and Punishment of Genocide, (1951) 78 UNTS 277; For a commentary on the Genocide Convention, see also the Draft Code of Crimes Against the Peace and Security of Mankind (1996) II(2), *Yearbook of the International Law Commission* (ILC Draft Code), article 17.

principles that are part of customary international law. In recognizing the customary nature of the Genocide Convention, the ICJ held:

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and the spirit and aims of the United Nations [...]. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’.”⁸

Critically, the ICJ confirmed that the prohibition of genocide is certainly also a peremptory norm of international law, or *jus cogens*, meaning, in the words of article 53 of the Vienna Convention on the Law of Treaties, that it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. The practical significance of this designation is that if this norm (the prohibition of genocide) and corresponding State obligations come into conflict with any other norm or rule of non-peremptory character, the obligation relating to the prohibition of genocide will supersede it.⁹

While this note concerns itself with the definitional elements of the crime of genocide for purposes of establishing the criminal responsibility of individuals, it should be noted that the Genocide Convention is an instrument that ascribes obligations to prevent and prosecute crimes, in the first instance of States. The ICJ has been called on to pronounce itself upon inter-State disputes arising from the interpretation, application or fulfilment of the Genocide Convention.¹⁰ Indeed, the responsibility of the State in principle may be engaged, quite separately from the question of individual criminal responsibility. The conduct not only of State officials, but also non-State actors may, in circumstances, engage the responsibility of the State, for instance when those persons are under the effective control of the State. The State also has specific preventative obligations. However, the ICJ has clarified that obligations to make reparation for failure to prevent genocide will require a finding that genocide has actually occurred, and, in respect of compensatory damages, that a causal link can be established between the State’s failure to take preventative measures and the genocide.¹¹

A number of contemporary international and *ad hoc* criminal courts or tribunals have jurisdiction over the crime of genocide, notably the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). The ICC Statute replicates the provisions of article II of the Genocide Convention without amendment, while the

⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* (1951) ICJ Reports, p.23.

⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (2006) ICJ Reports, para 64. The customary status and *jus cogens* nature of the Genocide Convention have also been repeatedly emphasized in the jurisprudence of the ICC, the ICTY and the ICTR.

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) ICJ Reports (ICJ 2007 genocide judgment); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (2015) ICJ Reports (ICJ 2015 genocide judgment).

¹¹ ICJ 2007 genocide judgment, para 430.

Statutes of ICTY and the ICTR have adopted *verbatim* the provisions of articles II and III of the Convention.¹²

Similarly, a number of commissions of inquiry have been set up by the United Nations to investigate whether acts of genocide have occurred, for instance in South Sudan, in Sudan (Darfur), in the Central African Republic and in Syria.¹³

The jurisprudence of these courts and tribunals, particularly that of the ICTY and of the ICTR,¹⁴ as well as reports of these commissions of inquiry have provided a significant contribution in clarifying the crime of genocide and have been instrumental in setting out the scope and parameters of its constitutive elements. They also provide guidance on the determination of individual criminal responsibility for the commission of genocide as well as its relationship with other crimes under international law. They have also underscored, however, the inherent complexities and ambiguities attaching to this crime.

One area that has proved particularly challenging if not contentious is the “special intent” or “genocidal intent” as a critical constitutive and distinctive element of the crime of genocide. Building upon the most relevant international jurisprudence on the crime of genocide, this note addresses a number of specific areas which have emerged as of interest in the application of the Genocide Convention and in the determination of the genocidal intent, namely:

1. The legal meaning of genocidal intent;
2. The similarities and differences between genocide and the crime against humanity of persecution, as arising from their respective ‘special intent’ constitutive elements;
3. How genocidal intent can be proved, particularly through contextual inferences; and
4. Whether evidence constituting the crimes against humanity of deportation or forcible transfer can also be relied upon to infer genocidal intent.

This analysis will illustrate how the requirement of proving the element of genocidal intent beyond reasonable doubt may in some instances make establishing the crime of genocide particularly challenging in a trial setting. In its judgments relevant to State responsibility for genocide committed in the Former Yugoslavia, for instance, while the ICJ found that certain underlying acts of genocide were committed, it was unable to draw an inference as to the

¹² Rome Statute of the International Criminal Court (ICC Statute), article 6; Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), article 4; Statute of the International Tribunal for Rwanda (ICTR Statute), article 2. The punishable acts listed in article III of the Genocide Convention were not included in the ICC Statute to avoid it being redundant or contradict the Statute. Instead, the modes of liability attracting individual criminal responsibility for genocide are the same as those set out for all other offences under the ICC Statute and enumerated in article 25 of its Statute. Article 25 of the ICC Statute omits conspiracy to commit genocide as a punishable offence. See also ECCC Law, article 4. The Special Panels for Serious Crimes established by the United Nations Transitional Administration in East Timor (UNTAET) also had jurisdiction over genocide: see UNTAET Regulation 2000/15, section 4. The UNTAET Regulation follows the ICC Statute in that, instead of reproducing article III of the Genocide Convention, it reproduces article 25 of the ICC Statute in its section 14.

¹³ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005 (Darfur report); Report of the International Commission of Inquiry on the Central African Republic, UN Doc S/2014/928 (2014) (CAR report); Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc A/HRC/32/CRP.2 (2016) (Yazidis report); and Report of the Commission on Human Rights in South Sudan, UN Doc A/HRC/37/CRP.2 (2018).

¹⁴ To date, the ICC has not issued any judgment concerning genocide, although its constitutive elements, as applicable before the ICC, are identified in the ICC Elements of Crimes and were also discussed in the *Al Bashir* Case. See *The Prosecutor v Al Bashir*, ICC-02/05-01/09, 4 March 2009 (ICC *Al Bashir* confirmation of charges decision).

existence of genocidal intent, and thus was unable to conclude that genocide had been committed.¹⁵ Similarly, commissions of inquiry in Sudan (Darfur) and in the Central African Republic were unable to find that underlying acts of genocide were committed with the required genocidal intent.¹⁶

The complexity of establishing genocidal intent may, however, be considered appropriate to the specific character of the crime of genocide, as well as to safeguard against identifying as genocide a broader set of acts or conduct that do not share the same legal elements of genocide or are not addressed to the same legal interests.

¹⁵ ICJ 2007 genocide judgment, paras 277, 319 and 370; ICJ 2015 genocide judgment, para 440. The ICJ, however, does not operate as a criminal court conducting full evidentiary hearings to identify perpetrators or establish their individual criminal responsibility.

¹⁶ Darfur report, paras 513-522; CAR report, para 471. Generally, commissions of inquiry adopt an evidentiary standard which is lower than the standard of proof beyond reasonable doubt adopted by international courts or tribunals.

3. What does “genocidal intent” mean legally?

Summary:

Genocide primarily distinguishes itself from other international crimes such as war crimes and crimes against humanity, with the exception of the crime against humanity of persecution, because it requires special intent (*dolus specialis*). The special intent of the crime of genocide is identified in article II of the Genocide Convention, as well as in article 6 of the ICC Statute, as “the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”. The crime of genocide does not require the actual destruction of a protected group - a person may be held liable for the crime of genocide without any killings taking place. Genocidal intent has to be established beyond reasonable doubt to prove genocide. Genocidal intent should not be confused with, and is independent from, any personal motives prompting the actions of a perpetrator. The intent refers to the person’s state of mind at the time of committing the crime, i.e. the intended destruction of a protected group. The main difficulty with genocidal intent, it has been argued, is in obtaining evidence sufficient to prove, beyond a reasonable doubt, the perpetrators’ intentions to destroy the group. As a result, prosecutors have not always been able to prove genocidal intent beyond reasonable doubt in relation to a number of individuals tried for genocide, particularly before the ICTY, although there have been some successes.

Genocidal intent will first be analyzed in detail, particularly by discussing each of its main constitutive sub-elements. This will be followed by a discussion of whether the mere knowledge by an alleged perpetrator of the existence of a broader genocidal intent, particularly when several individuals are involved in the commission of acts of genocide, is sufficient to attract individual criminal responsibility for genocide. Finally, the particular relationship between genocidal intent and the specific modes of liability of commission as part of a joint criminal enterprise (JCE), aiding and abetting genocide, and superior responsibility will be discussed.

3.1 Genocide as a special intent crime

Genocide primarily distinguishes itself from other crimes under international law, such as war crimes and crimes against humanity, with the possible exception of the crime against humanity of persecution (see 4.4 below), because it requires special intent (*dolus specialis*). Generally speaking, the special intent of a crime is an aggravated criminal intention, as an element of the crime, requiring that the perpetrator sought and intended a specific result. The special intent of the crime of genocide is identified in article II of the Genocide Convention, as well as in article 6 of the ICC Statute, as “the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”.¹⁷ This special intent has also been referred to as the genocidal intent or specific intent, among other descriptions, while the groups listed in the Genocide Convention are also referred to as “protected groups”.

Genocidal intent is separate and distinct from the intent (*mens rea*) also attaching to each of the specific prohibited underlying acts (*actus reus*) of genocide listed in article II(a)-(e) of the Genocide Convention. Accordingly, an individual may be convicted of the crime of genocide only where it is established that, in addition to the *mens rea* relevant to each and any of the acts of genocide

¹⁷ See also: *The Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998 (*Akayesu* trial judgment”), para 498; ICC 2007 genocide judgment, para 187.

referred to in the Genocide Convention, she or he committed such acts with the specific intent to destroy, in whole or in part, a particular national, ethnic, racial or religious group, as such.¹⁸

It is paramount to stress that the crime of genocide does not require the actual destruction of a protected group. A person may be held liable for the crime of genocide without any killings taking place, particularly since inchoate conduct, such as attempt to commit genocide or conspiracy to commit genocide are also punishable. The existence of a genocidal intent requires that, when committing one of the prohibited underlying acts of genocide, the perpetrator intended the destruction, in total or partially, of the group, regardless of whether she or he was ultimately successful in achieving those intentions.¹⁹

Genocidal intent has to be established beyond reasonable doubt to prove genocide.²⁰ It is not sufficient for a perpetrator to merely envisage the destruction of a protected group or regard it as a possibility arising from her or his actions. Genocidal intent must also have been formed prior to the commission of the underlying genocidal acts.²¹ In addition, while premeditation might well have occurred *in fact*, for instance when planning the crime, premeditation is not in itself a necessary element of genocidal intent.²²

Genocidal intent should not be confused with, and is independent from, any personal motives prompting the actions of a perpetrator. The intent refers to the person's state of mind at the time of committing the crime, i.e. the intended destruction of a protected group. A motive, on the other hand, refers to what drives the perpetrator to commit the crime, for instance racist motivations, an extremist agenda, spreading terror or obtaining financial, political or personal gains. A personal motive is legally irrelevant in the context of the genocidal intent. As discussed below (see 5.4), however, the existence of a personal motive when carrying out a particular conduct might be taken into account when evaluating whether the perpetrator also acted with genocidal intent.²³

3.2 "Destroy": physical or biological destruction of the group

Within the meaning of the Genocide Convention, the term "destroy" is limited to the physical or biological destruction of the group and excludes attempts to annihilate those linguistic, cultural, sociological or other elements which give to that group its own identity distinct from the rest of the community.²⁴ As discussed further below (see 5.2), however, attacks on cultural and religious property and symbols of the targeted group often occur alongside to and simultaneously with

¹⁸ ICJ 2007 genocide judgment, para 187.

¹⁹ *Akayesu* trial judgment, para 497; *The Prosecutor v Nindabahizi*, ICTR-2001-71-I, 15 July 2004 (*Nindabahizi* trial judgment), para 454; *The Prosecutor v Krstić*, IT-98-33-A, 19 April 2004 (*Krstić* appeal judgment), para 32.

²⁰ *Krstić* appeal judgment, para 134. See also Darfur report, para 503.

²¹ *The Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999 (*Kayishema and Ruzindana* trial judgment), para 91.

²² *The Prosecutor v Jelisić*, IT-95-10-T, 14 December 1999 (*Jelisić* trial judgment), para 100; *The Prosecutor v Krstić*, IT-98-33-T, 2 August 2001 (*Krstić* trial judgment), para 572.

²³ *The Prosecutor v Simba*, ICTR-01-76-A, 27 November 2007 (*Simba* appeal judgment), paras 88 and 269; *The Prosecutor v Stakić*, IT-97-24-A, 22 March 2006 (*Stakić* appeal judgment), para 45; *The Prosecutor v Jelisić*, IT-95-10-A, 5 July 2001 (*Jelisić* appeal judgment), paras 49 and 71. See also: *Kayishema and Ruzindana* appeal judgment, para 161; ICJ 2007 genocide judgment, para 189.

²⁴ *Krstić* trial judgment, para 580; *Krstić* appeal judgment, para 25; ICJ 2007 genocide judgment, para 344. The preparatory work of the Genocide Convention points out that the inclusion of "cultural" destruction of a group was rejected after having been considered too vague and too removed from the physical or biological destruction that motivated the Convention. See also ILC Draft Code, pp.45-46, para 12.

physical or biological destruction and may legitimately be considered as evidence of an intent to physically destroy the group.²⁵

While the physical and biological destruction of a group are often referred to jointly, physical destruction of a group refers to those acts intended to cause the death of members of a group, or injuring their health or physical integrity; while biological destruction is characterized by measures aimed at the extinction of the group by systematic restrictions of births without which the group cannot survive.²⁶

The destruction of a protected group goes beyond causing the suffering of the group or discriminating against it. The physical or biological destruction of a group, however, is not limited only to the ultimate death of group members. Indeed, destruction of the group could also be conceived through the purposeful eradication of its culture and identity, resulting in the extinction of the group as an entity distinct from the remainder of the community. As stated in the *Blagojević* trial judgment at the ICTY, "while killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group".²⁷ The physical or biological destruction of the group, therefore, might also encompass other acts distinct from those causing death, extending, for instance, to forced displacement or sexual violence, where the acts lead to the material destruction of the group, since the group ceases to exist as a group.²⁸

Forced displacement and sexual violence, discussed below in connection with their potential probative role to establish genocidal intent (see 5.5 and 6), are relevant as conduct that may be involved when the destruction of the targeted group, while intended, might also not be the immediate result of the actions of the perpetrator. Sexual violence, particularly the crime of rape, is significant, as it may aim to destroy the victim as an incremental step towards annihilating the group. In patriarchal societies, for instance, female survivors of sexual violence are likely to be cast out by their community, unable to marry, or abandoned by their husbands. Sexual violence may also act as a measure preventing births or, in case of forced pregnancy, to create an ethnically homogenous community different from the targeted group. Its impact and effects towards the destruction of a group might, therefore, manifest themselves separately from the immediate actions of the perpetrator.²⁹

3.3 "In whole or in part": the substantiality requirement

The intended destruction of a group under the Genocide Convention does not mean that the group in its entirety must be exterminated.³⁰ The words "in whole or in part" were inserted in the Convention to make it clear that it is not

²⁵ *Krstić* trial judgment, para 580. See also: ICJ 2007 genocide judgment, para 344; *The Prosecutor v Popović et al*, IT-05-88-T, 10 June 2010 (*Popović* trial judgment), para 822.

²⁶ See, for instance, the *travaux préparatoires* of the Genocide Convention: Draft Convention on the Crime of Genocide Prepared by the Secretary-General in Pursuance of the Economic and Social Council Resolution 47 (IV), UN Doc E/447 (1947), pp.25-26. According to the International Law Commission, this distinction is also reflected in article II(a)-(c) of the Genocide Convention, which list acts of physical genocide, and article II(d)-(e), which list acts of biological genocide: see ILC Draft Code, p.46, para 12.

²⁷ *The Prosecutor v Blagojević and Jokić*, IT-02-60-T, 17 January 2005 (*Blagojević and Jokić* trial judgment), para 666.

²⁸ *Kayishema and Ruzindana* trial judgment, para 95; *Krstić* appeal judgment, para 31; *Akayesu* trial judgment, paras 731-732; *The Prosecutor v Musema*, ICTR-96-13-T, 27 January 2000 (*Musema* trial judgment), para 933. See also Yazidis report, para 139.

²⁹ See also: *Akayesu* trial judgment, para 507; Yazidis report, para 123. For the destructive effects arising from forced displacement, see *The Prosecutor v Tolimir et al*, IT-05-88/2-A, 8 April 2015 (*Tolimir* appeal judgment), para 209.

³⁰ *Jelisić* trial judgment, para 80; *Kayishema and Ruzindana* trial judgment, para 95.

necessary to aim at destroying all the members of the group. This in turn raises a question of how broadly or narrowly the protected group is considered and what, respectively, constitutes the entirety of or part of that group.

The expression “in whole or in part” speaks to the intended scope of destruction, as opposed to the actual destruction of the group, and must be interpreted as requiring that the perpetrator intended to destroy “at least a substantial part of the protected group”.³¹ The substantiality requirement captures the defining character of genocide as a crime of massive proportions and reflects the concern expressed within the Genocide Convention about the impact that the destruction of the targeted part will have on the overall survival of the group.³²

The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. These considerations, however, are neither exhaustive nor dispositive. The applicability of the following factors, as well as their relative weight, will vary depending on the circumstances of each particular case. Among the factors to consider when determining whether the targeted part of the group is substantial enough to satisfy the meaning of the Genocide Convention is, first of all, its numeric size. In any event, the size of the group should be evaluated not only in absolute terms, but should also take into consideration the contextual characteristics of the targeted part of the group, such as its relation to the overall size of the entire group, the prominence of the part of the group within the larger whole, and the geographical area of the perpetrators’ activity and control as well as the possible extent of their reach within that area.³³

A targeted part of a group, however, would be classed as substantial not only where the intent is to harm a portion of the group in question, but also because the targeted members constitute a “significant” part of the group, such as its leadership. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others who play a significant role or are fundamental for the physical survival of the group and whose elimination could in turn impact on the group as a whole.³⁴

³¹ *Krstić* appeal judgment, paras 12-14. See also: *Jelisić* trial judgment, para 82; *The Prosecutor v Sikirica et al*, IT-95-8-T, 3 September 2001 (*Sikirica* Rule 98bis decision), paras 66-86; *The Prosecutor v Semanza*, ICTR-97-20-T, 15 May 2003 (*Semanza* trial judgment), para 312; *The Prosecutor v Nahimana et al*, ICTR-99-52-T, 3 December 2003 (*Nahimana* trial judgment), para 948; *The Prosecutor v Ndindabahizi*, ICTR-2001-71-I, 15 July 2004 (*Ndindabahizi* trial judgment), para 454; ICJ 2007 genocide judgment, para 198; ILC Draft Code, p.44, para 8.

³² *Krstić* appeal judgment, para 8. See also: *Krstić* trial judgment, para 590; *Jelisić* trial judgment, para 82; *Sikirica* Rule 98bis decision, para 77.

³³ *Krstić* appeal judgment, paras 12-13, also stating that: “The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him”. See also: *The Prosecutor v Popović et al*, IT-05-88-A, 30 January 2015 (*Popović* appeal judgment), para 422; ICJ 2007 genocide judgment, paras 198-199; ICC *Al Bashir* confirmation of charges decision, para 146. Some jurisprudence from the ICTY and the ICTR permits a characterization of genocide even when the specific intent extends only to a limited geographical area, such as a municipality. See *Jelisić* trial judgment, para 83; *Akayesu* trial judgment, paras 704 and 733; *Sikirica* Rule 98bis decision, para 68; *Stakić* trial judgment, para 533.

³⁴ *Jelisić* trial judgment, para 82; *Krstić* appeal judgment, para 12; *Tolimir* appeal judgment, para 269; ICJ 2007 genocide judgment, para 200; ICJ 2015 genocide judgment, para 142. See also Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc S/1994/674 (1994) (ICTY experts report), para 94.

3.4 “A national, ethnic, racial or religious group”: defining the group

The Genocide Convention protects national, ethnical, racial or religious groups, although it does not further define these terms. Consequently, the ICTY and the ICTR attempted to provide general definitions for each of these groups, although these definitions are limited to the legal purview of the Genocide Convention and are restricted to the specific factual circumstances relevant to proceedings before these tribunals.

According to the *Akayesu* trial judgment at the ICTR, which sought to identify a targeted group based upon the general criteria of its stability: a **national** group could be defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties; an **ethnic** group is generally defined as a group whose members share a common language or culture; the conventional definition of a **racial** group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors; and, finally, a **religious** group is one whose members share the same religion, religious denomination or mode of worship.³⁵

Each of these concepts must be assessed in light of a particular political, social, historical and cultural context.³⁶ Although membership of the targeted group must be an objective feature, the ICTR has held that a subjective dimension may also to be taken into consideration. A group might not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Consequently, the correct determination of the relevant protected group has to be made on a case-by-case basis, applying both objective and subjective criteria.³⁷ The relevant protected group, for instance, may be identified by means of the subjective criterion of the stigmatization of the group, notably as applied by the perpetrators, on the basis of its perceived national, ethnical, racial or religious characteristics.³⁸

3.5 “As such”: the group as a separate and distinct identity

The intent to destroy a group “as such” presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought, as opposed to be targeted for their individual identity.³⁹ The term “as such”, therefore has great significance as it shows that the crime of genocide requires the intent to destroy a collection of people because of their particular group identity based on nationality, race, ethnicity, or religion.⁴⁰ It also reinforces the

³⁵ *Akayesu* trial judgment, paras 512-515. See also: *Kayishema and Ruzindana* trial judgment, para 98; *Krstić* trial judgment, paras 555-559; Darfur report, paras 493-501.

³⁶ *The Prosecutor v Rutaganda*, ICTR-96-3-T, 6 December 1999 (*Rutaganda* trial judgment), para 56.

³⁷ *Semanza* trial judgment, para 317; *The Prosecutor v Kajelijeli*, ICTR-98-44A-T, 1 December 2003 (*Kajelijeli* trial judgment), para 811; *The Prosecutor v Brđanin*, IT-99-36-T, 1 December 2004 (*Brđanin* trial judgment), para 684; *The Prosecutor v Bagilishema et al*, ICTR-95-1A-T, 7 June 2001 (*Bagilishema* trial judgment), para 65.

³⁸ *Krstić* trial judgment, para 557; *Jelisić* trial judgment, para 70. In some instances, it is the victim that may perceive herself or himself as belonging to a particular group: see *Rutaganda* trial judgment, para 56; *Krstić* trial judgment, para 559. See also Yazidis report, para 104.

³⁹ The *Krstić* Trial Chamber held that perpetrators of genocide: “must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such”: see para 590.

⁴⁰ *Stakić* appeal judgment, para 20; *The Prosecutor v Niyitegeka*, ICTR-96-14-A, 9 July 2004 (*Niyitegeka* appeal judgment), para 53.

relevance of the distinction between the genocidal intent and any personal motives held by the perpetrator, as discussed above (see 3.1).⁴¹

The term “as such” re-emphasizes the prohibition of the destruction of the protected group itself as a separate and distinct identity, as opposed to the destruction of a collection of the group’s individual members.⁴² Although the individual victims of the underlying act are selected by reason of their membership in a group, as indicated in the *Akayesu* trial judgment at the ICTR, “the victim of the crime of genocide is the group itself and not only the individual”.⁴³ From the perspective of the perpetrator, therefore, victims must have been selected because of their membership of the group.⁴⁴

A group may be identified by way of positive or negative criteria. A positive approach would consist of the perpetrators of the crime distinguishing a group by characteristics which they deem to be particular to a national, ethnical, racial or religious group. The identification of the relevant targeted group, however, cannot be made on the basis of negative criteria, consisting of identifying individuals as not being part of the group to which the perpetrators consider that they themselves belong to.⁴⁵

3.6 A “purpose-based” and a “knowledge-based” approach to genocidal intent

Genocidal intent is traditionally understood as requiring a specific purpose or result, namely the destruction of a protected group. As such, genocidal intent has often been described also as “purpose-based” intent. Some scholars, however, have argued that genocidal intent, at least with regards to the intent of direct perpetrators and mid-level commanders, encompasses a more lenient requirement of mere knowledge as the sufficient *mens rea* for genocide.⁴⁶ Central to this “knowledge-based” approach is the likely systematic and organized nature of genocide, which typically entails large-scale participation by a plurality of individuals, often performing different roles in the perpetration of the crime.

A challenge in establishing genocidal intent, is in obtaining evidence sufficient to prove, beyond a reasonable doubt, that the perpetrators’ intentions to destroy the group. As a result, prosecutors have been unable to prove genocidal intent beyond reasonable doubt in relation to a number of individuals tried for genocide, particularly before the ICTY, although in other instances they have been successful. Applying the knowledge-based approach to the crime of genocide would significantly lower the evidentiary standard to prove genocidal intent: as

⁴¹ See also *Niyitegeka* appeal judgment, para 53.

⁴² *Stakić* appeal judgment, para 20; *Brđanin* trial judgment, para 698.

⁴³ *Akayesu* trial judgment, para 521. See also: *Niyitegeka* appeal judgment, para 53; *The Case of the Prosecutor v Tolimir*, IT-05-88/2-T, 12 December 2012 (*Tolimir* trial judgment) para 747; ICJ 2007 genocide judgment, para 187. This point has been further expanded in the *Sikirica* case at the ICTY, in the following terms: “Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group” – see *Sikirica* Rule 98bis decision para 89. See also ILC Draft Code, p.46, para 6.

⁴⁴ *Semanza* trial judgment, para 312.

⁴⁵ *Jelisić* trial judgment, para 71; *Brđanin* trial judgment, para 685; *Stakić* appeal judgment, paras 20-28; ICJ 2007 genocide judgment, paras 193-194.

⁴⁶ See for instance, Otto Triffterer, ‘Genocide, its particular intent to destroy in whole or in part the group as such’ (2001) 14 *Leiden Journal of International Law*, pp.399-408; Katherine Goldsmith, ‘The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach’ (2010) 5(3) *Genocide Studies and Prevention: An International Journal*; Alexander Greenawalt, ‘Rethinking genocidal intent: The case for a knowledge-based interpretation’ (1999) 99 *Columbia Law Review*; Kai Ambos, ‘What does “intent to destroy” in genocide mean?’ (2009) 91 (876) *International Review of the Red Cross*.

long as those senior political or military leaders who planned and set into motion a genocidal campaign act with the requisite genocidal intent, lower level perpetrators could also be found guilty of genocide if they willingly commit a prohibited act merely with knowledge of the intent of their superiors and that this would bring about the destruction of the targeted group.⁴⁷

With the exception of certain modes of liability, further discussed in the following section, a strictly knowledge-based approach to genocidal intent has been rejected by the ICTY and the ICTR, particularly with regards to the responsibility of principal perpetrators.⁴⁸ According to the jurisprudence of these tribunals, a knowledge-based approach would critically dilute genocide of its defining element, the genocidal intent. As stated by the ICTY Trial Chamber in the *Jelisić* case, “an accused could not be found guilty if he himself did not share the goal of destroying in part or in whole a group even if he knew that he was contributing to or through his acts might be contributing to the partial or total destruction of the group”.⁴⁹ As discussed further below (see 5.2), the perpetrator’s own knowledge could still be relevant, albeit not sufficient, to draw an inference of, and as evidence towards, establishing genocidal intent.

The knowledge-based approach has also been rejected by the ICC. In its decision on the confirmation of charges in the *Al Bashir* case, the ICC Pre-Trial Chamber held that the knowledge-based approach would be relevant only in those cases in which mid-level superiors and low-level physical perpetrators are subject to prosecution as principal perpetrators of genocide. In those cases, nevertheless, the Chamber held that “the literal interpretation of the definition of the crime of genocide in article 6 of the Statute and in the Elements of Crimes makes clear that only those who act with the requisite genocidal intent can be principals to such a crime”. Those perpetrators who are only aware of the genocidal nature of the campaign, but do not share the genocidal intent, can accordingly only be held liable as accessories to the perpetration of the crime.⁵⁰

3.7 Genocidal intent and modes of liability: joint criminal enterprise, aiding and abetting, superior responsibility

Genocidal intent should not be conflated with the mental requirement of the modes of liability by which criminal responsibility is attached to the perpetrator.⁵¹ In this regard, knowledge of the existence of a genocidal intent is relevant to certain modes of liability other than direct perpetration, namely for the commission of genocide as part of a joint criminal enterprise (JCE), for aiding or abetting genocide, as well as in relation to superior responsibility for genocide. This differentiation in the genocidal intent is also highlighted by an apparent overlap between the act of genocide listed in article III of the Genocide

⁴⁷ This standard is similar to that applicable to persecution as a crime against humanity. See *Stakić* trial judgment, para 743: “In cases of indirect perpetration, proof is required only of the general discriminatory intent of the indirect perpetrator in relation to the attack committed by the direct perpetrators/actors. Even if the direct perpetrator/actor did not act with a discriminatory intent, this, as such, does not exclude the fact that the same act may be considered part of a discriminatory attack if only the indirect perpetrator had the discriminatory intent”.

⁴⁸ For a critical analysis of the knowledge-based approach, see Janine Clark, ‘Elucidating the *Dolus Specialis*: An Analysis of the ICTY Jurisprudence on Genocidal Intent’ (2015) 26 *Criminal Law Forum* 516-525. See also: Guenael Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), pp.211-215.

⁴⁹ *Jelisić* trial judgment, para 86. See also: *Akayesu* trial judgment, paras 544-547; *Krstić* trial judgment, para 590.

⁵⁰ ICC *Al Bashir* confirmation of charges decision, para 139, at note 154.

⁵¹ *The Prosecutor v Brđanin*, IT-99-36-A, 19 March 2004 (*Brđanin* Rule 98bis appeal decision), para 7.

Convention and the relevant general provisions for criminal liability applying to all the offences under the jurisdiction of the ICTY and the ICTR, including genocide.⁵²

According to the mode of liability of superior or command responsibility, a commander may be held responsible for a crime committed by his or her subordinates if the commander knew or had reason to know that his or her subordinates were about to commit the crime or were in the course of committing it, or had done so and the commander failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁵³ The ICTY Appeals Chamber in the *Brđanin* case held that superior criminal responsibility is a form of criminal liability that does not require proof of intent to commit a crime on the part of a superior before criminal liability can attach.⁵⁴ It is necessary, therefore, to distinguish between the *mens rea* required for the crime perpetrated by the subordinates and that required for the superior. Accordingly, to be held responsible for genocide on the basis of superior responsibility, it must be proven only that the superior knew or had reason to know that his subordinates were about to commit or had committed genocide and that the subordinates possessed the requisite genocidal intent.⁵⁵ Specific genocidal intent of the superior or commanding officer is not required.

Aiding or abetting is a form of accessory liability to the commission of a crime, whereby an individual might incur criminal responsibility where she or he knowingly provides practical assistance, encouragement or moral support to the principal perpetrator. An individual who aids or abets a specific intent offence may be held responsible if she or he assists the commission of the crime knowing the intent behind the crime.⁵⁶ Accordingly, departing from earlier jurisprudence, the ICTY Appeals Chamber held in the *Krstić* case that an individual may be held criminally responsible as an aider or abettor of the crime of genocide where she or he is aware of the criminal act, and that the criminal act had been committed with genocidal intent on the part of the physical perpetrator. To be convicted for aiding or abetting genocide, therefore, it need not be proven that this individual shared the physical perpetrator's genocidal intent, but only that she or he knew about the principal perpetrator's genocidal intent.⁵⁷ Thus, while genocidal intent of the aider or abettor is not necessary, nor is it enough that the accused merely knew of the likely destruction of the targeted group, knowledge of the principal's genocidal intent is required.

While the first two 'categories' of JCE require a shared intent, an individual may be convicted of genocide through the 'third category' of JCE, a species of conspiracy, even where her or his specific intent has not been proven. This mode of liability holds any individual responsible for the commission of a crime jointly with other perpetrators outside the JCE's common purpose if, in the circumstances of the case, it was foreseeable that such a crime might be perpetrated by one or other members of the group and that individual willingly

⁵² *Krstić* trial judgment, para 640; *Semanza* trial judgment, paras 394-395 and note 655.

⁵³ *The Prosecutor v Mucić et al*, IT-96-21-Abis, 8 April 2003, para 239.

⁵⁴ *Brđanin* Rule 98bis appeal decision, para 7.

⁵⁵ *Brđanin* trial judgment, paras 720-721.

⁵⁶ *The Prosecutor v Krnojelac*, IT-97-25-A, 17 September 2003 (*Krnojelac* appeal judgment), para 52; *The Prosecutor v Vasilević*, IT-98-32-A, 25 February 2004 (*Vasilević* appeal judgment), para 142.

⁵⁷ *Krstić* appeal judgment, paras 134-141; *The Prosecutor v Blagojević & Jokić*, IT-02-60-A, 9 May 2007 (*Blagojević and Jokić* appeal judgment), paras 119-124. See also: *Krnojelac* appeal judgment, para 52; *Brđanin* Rule 98bis appeal decision, paras 8-10; *The Prosecutor v Ntakirutimana et al*, ICTR-96-17-A, 13 December 2004 (*Ntakirutimana* appeal judgment), paras 500-502; *Vasiljević* appeal judgment, paras 142-143; *The Prosecutor v Semanza*, ICTR-97-20-A, 20 May 2005 (*Semanza* appeal judgment), para 316.

took that risk (*dolus eventualis*).⁵⁸ Specifically, an individual may be held responsible for genocide under this mode of liability if it was reasonably foreseeable from the JCE's common purpose that an act specified in article II of the Genocide Convention would be committed with genocidal intent and the individual in question was aware of this possibility when she or he participated in the JCE.⁵⁹

⁵⁸ *Stakić* appeal judgment, para 65; *The Prosecutor v Kvočka et al*, IT-98-30/1-A, 28 February 2005 (*Kvočka* appeal judgment), para 83; *The Prosecutor v Blaškić*, IT-95-14-A, 29 July 2004 (*Blaškić* appeal judgment), para 33; *Vasiljević* appeal judgment, paras 96–99; *Krnjelac* appeal judgment, para 89; *The Prosecutor v Tadić*, IT-94-1-A, 19 July 1999 (*Tadić* appeal judgment), paras 202–204.

⁵⁹ *Popović* trial judgment, para 1031; *Brđanin* Rule 98bis appeal decision, paras 6-7; *The Prosecutor v Karadžić*, IT-95-5/18-T, 24 March 2016 (*Karadžić* trial judgment), para 570. The *Stakić* Trial Chamber instead required proof of genocidal intent also for the third category of JCE; see *The Prosecutor v Stakić*, IT-97-24-T, 31 July 2003 (*Stakić* trial judgment), para 530.

4. What are the similarities and differences between the international crimes of persecution and genocide?

Summary:

In general, genocidal intent sets the crime of genocide apart from other crimes under international law falling under the jurisdiction of international tribunals, namely crimes against humanity and war crimes. The only exception relates to the crime against humanity of persecution, defined by article 7(2)(g) of the ICC Statute, which is also characterized by a special intent (*dolus specialis*), namely the intent to discriminate on listed grounds (political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law). It has been said that persecution shares the same genus as genocide, and this is also reflected both factually and evidentially, in that these crimes are often based on the same factual allegations and their intent can be inferred contextually. Genocide and persecution, however, are also characterized by distinctive and specific elements that distinguish them as separate crimes. Genocide differs from persecution in light of the latter's characterization as a crime against humanity. Unlike genocide, persecution needs to occur, and is assessed, in the context of a widespread and systematic attack against the civilian population. Genocide can occur both in time of peace as well as in time of war and regardless of whether victims are civilians or combatants. Genocide and persecution are both characterized by their special intent elements as being discriminatory in nature. Both crimes also share a common target, in that they are directed at and target members of a particular group. While their specific intent element and the relation of the crimes and the targeted group are similar, this is also where genocide and persecution show their most significant differences: For genocide, the intent to discriminate is identified on account of individual membership in a national, ethnic, racial or religious group, while for persecution, under article 7(1)(h) of the ICC Statute, membership relates to political, racial, national, ethnic, cultural, religious and gender grounds, or other grounds universally recognized under international law. Most importantly, genocide targets the members of a group "as such", in other words the group itself, while persecution focuses on a group insofar as it identifies the individual victim, as its ultimate target. Genocidal intent is the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Discriminatory intent for persecution lacks this destructive element towards a targeted group and, instead, consists of the intent to discriminate against individuals on the listed grounds, by violating their fundamental human rights. Genocide and persecution differ also in relation to their *actus reus*. The crime of genocide protects the targeted group, as such, through the physical and mental integrity of its members. The crime of persecution, on the contrary, protects fundamental human rights that also extend to individual freedoms and personal property. The range of underlying offences which may qualify as persecution is also broader than offences which may qualify as genocide, as persecution covers acts of a greater variety and is determined in terms of their severity.

In general, genocidal intent sets the crime of genocide apart from crimes under international law falling under the jurisdiction of international tribunals, namely crimes against humanity and war crimes. The only exception relates to the crime against humanity of persecution, which is also characterized by a special intent (*dolus specialis*). This section will first introduce the constitutive elements of the crime of persecution and will then further focus on the relationship between persecution and genocide, with particular emphasis on their respective special intent elements.

4.1 The constitutive elements of persecution

Persecution is defined by article 7(2)(g) of the ICC Statute as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.⁶⁰ According to article 7(1)(h) of the ICC Statute, persecution must be committed “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 acts referred to in this paragraph or any crime within the jurisdiction of the Court”.⁶¹

Like all other underlying offences of crimes against humanity, persecution must be committed in the context of certain general or “chapeaux” requirements, namely in the context of a “widespread and systematic attack against the civilian population”.

Persecution may be committed through acts or omissions. An act or omission is discriminatory in fact if the victim is targeted due to her or his membership in a group, when such group is defined by the perpetrator on any of the grounds listed above.⁶²

4.2 Underlying acts of persecution

In practice, acts of persecution may encompass different inhumane forms. An act or omission, enumerated in the other underlying offences of crimes against humanity, as well as other relevant offences regardless of their inclusion within the statutes of international tribunals, may constitute the *actus reus* of persecution, when committed on discriminatory grounds.⁶³ Indeed, while acts or omissions underlying persecution would have to constitute a human rights

⁶⁰ The ICC Statute is the only universal treaty providing for a definition of crimes against humanity. Its provisions have been included *verbatim* in the International Law Commission recent draft articles on crimes against humanity. See Report of the International Law Commission, UN Doc A/72/10 (2017), Chapter IV.

⁶¹ ICC Statute, article 7(1)(h). The elements of persecution have been the subject of intense debate before the ICTY. See Ken Roberts, ‘Striving for Definition: The Law of Persecution from Its Origins to the ICTY’, in Hiram Habtahi and Gideon Boas (eds.), *The Dynamics of International Criminal Justice* (Brill, 2006), pp.257-299. The ICTY Appeal Chamber, in the *Krnjelac* case, finally defined persecution as an act or omission which discriminates in fact and denies or infringes upon a fundamental right laid down in international customary law or treaty law (*actus reus*), and is carried out deliberately with the intention to discriminate on certain listed grounds (*mens rea*). The Statutes of the ICTY and the ICTR list these grounds as “political, racial, or religious grounds”: see, respectively, ICTY Statute, article 5(h), and ICTR Statute, article 5(h). The Statute of the Special Court for Sierra Leone (SCSL), article 2(h), lists “political, racial, ethnic or religious grounds”, while the ECCC Law, article 5, lists “national, political, ethnical, racial or religious grounds”. These grounds have been interpreted as alternatives and, consequently, any one of which suffices for a finding of persecution: see *The Prosecutor v Tadić*, IT-94-1-T, 7 May 1997 (*Tadić* trial judgment), para 713.

⁶² *Brđanin* trial judgment, para 992, note 2484. See also: *The Prosecutor v Nahimana et al*, ICTR-99-52-A, 28 November 2007 (*Nahimana* appeal judgment), paras 986-988; *Stakić* appeal judgment, paras 327-328; *Popović* trial judgment, para 968. The targeted group may be considered to include persons whom the perpetrator assumes belong to the targeted group as a result of their close affiliations or sympathies for the victim group: see *The Prosecutor v Naletilić and Martinović*, IT-98-34-T, 31 March 2003 (*Naletilić and Martinović* trial judgment), para 636.

⁶³ *Krnjelac* appeal judgment, para 219; *The Prosecutor v Brđanin*, IT-99-36-A, 3 April 2007 (*Brđanin* appeal judgment), para 296; *Kvočka* appeal judgment, para 323; *Popović* trial judgment, para 966.

violation under international law, it is not required that such conduct be considered as crimes under international law.⁶⁴

Not every denial or infringement of a fundamental human right, however, is sufficiently serious to qualify as a crime against humanity, since the deprivation must be “severe” according to article 7(2)(g) of the ICC Statute.⁶⁵ Underlying offences of crimes against humanity are by definition considered to be serious enough to amount to persecution. For other acts or omissions to amount to persecution, however, these must constitute a gross or blatant denial of a fundamental right laid down in international customary or treaty law, such as the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment, freedom of expression, freedom of assembly and association, and the right to private property.⁶⁶ It is not necessary that every individual act underlying the crime of persecution be of a gravity corresponding to other crimes against humanity. Underlying acts of persecution can also be considered together. In this case, it is their cumulative effect that must reach a level of gravity equivalent to that for other crimes against humanity.⁶⁷

In light of this, there is no comprehensive list of acts or omissions that may amount to the crime of persecution, and the determination of whether certain underlying acts might constitute persecution needs to be assessed on a case-by-case basis.⁶⁸ The jurisprudence of the ICTY and the ICTR, however, has identified the following as acts of persecution: murder; cruel and inhuman treatment; terrorizing the civilian population; destruction of personal property; forcible transfer and deportation; torture, beatings, and physical and psychological abuse; rape and other acts of sexual violence; establishment and perpetuation of inhumane living conditions; unlawful detention; forced labour; the use of human shields; appropriation or plunder of property; wanton destruction of private property, including cultural monuments and sacred sites; the imposition and maintenance of restrictive and discriminatory measures; indiscriminate attacks on towns and villages and other public or private property not justified by military necessity and carried unlawfully, wantonly and discriminatorily.⁶⁹

From an evidentiary point of view, persecutory acts might often form part of a discriminatory policy or at least of a pattern of discriminatory practice. Similarly to genocide (see 5.4), however, the existence of a discriminatory policy is not a necessary requirement for proving persecution.⁷⁰

⁶⁴ *Brđanin* appeal judgment, para 296; *Kvočka* appeal judgment, paras 323-325; *Nahimana* appeal judgment, para 985.

⁶⁵ See also: *Blagojević and Jokić* trial judgment, para 580; *Brđanin* trial judgment, para 995. See also *Nahimana* appeal judgment, para 985.

⁶⁶ *Situation in the Republic of Burundi*, ICC-01/17, 9 November 2017, para 132. The jurisprudence of the ICTY indicates that these violations must reach the same level of gravity as other acts or omissions prohibited as crimes against humanity. See *Brđanin* appeal judgment, para 296; *Kvočka* appeal judgment, para 321; *Naletilić and Martinović* trial judgment, para 635; *The Prosecutor v Krnojelac*, IT-97-25-T, 15 March 2002 (*Krnojelac* trial judgment), para 434; *The Prosecutor v Kvočka et al*, IT-98-30/1-T, 2 November 2001 (*Kvočka* trial judgment), paras 184-185; *The Prosecutor v Kupreškić et al*, IT-95-16-T, 14 January 2000 (*Kupreškić* trial judgment), paras 620-621, 627.

⁶⁷ *Nahimana* appeal judgment, para 987. *Krnojelac* appeal judgment, para 199.

⁶⁸ *Brđanin* trial judgment, para 994; *Stakić* trial judgment, para 735; *Blaškić* trial judgment, para 219; *Kupreškić* trial judgment, paras 567, 626; *Krnojelac* trial judgment, para 433; ECCC Case 002/01 trial judgment, para 166.

⁶⁹ *The Prosecutor v Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001 (*Kordić and Čerkez* trial judgment), paras 198-210; *Stakić* trial judgment, paras 747-773; *Naletilić and Martinović* trial judgment, paras 633-715; *Blaškić* appeal judgment, paras 143-159; *Kupreškić* trial judgment, paras 615-631. See also ILC Draft Code, p.98.

⁷⁰ *Blagojević and Jokić* trial judgment, para 582; *Brđanin* trial judgment, para 996; *Stakić* trial judgment, para 739; *Krnojelac* trial judgment, para 435.

4.3 Discriminatory intent

The crime of persecution entails a special *mens rea*, namely the intent to discriminate on the listed grounds in the definition.⁷¹ This special “discriminatory intent” is the distinctive feature, and an indispensable legal element, of the crime of persecution. Thus, persecution differs from other crimes against humanity by additionally requiring proof of the perpetrator’s intent to harm the victim on the basis of her or his affiliation with a particular group. The discriminatory intent is additional to the perpetrator’s intent to commit each of the underlying persecutorial acts.

Most importantly, discriminatory intent is not a requirement in relation to the attack against the civilian population and its systematic or widespread nature, as with the chapeaux elements for crimes against humanity. Just like all other underlying offences of crimes against humanity, it is sufficient also for the crime of persecution that the perpetrator must have known that there is an attack on the civilian population and that her or his acts comprise part of that attack. Knowledge of specific details of the attack against the civilian population by the perpetrator is not necessary. Similarly, the perpetrator’s motives for taking part in the attack are not relevant and the perpetrator need not share the purpose or goal behind the attack, and she or he may act purely for personal reasons.⁷² Discriminatory intent, therefore, is limited to the underlying acts of persecution.

For discriminatory intent to exist, it is not sufficient for the perpetrator to be aware that she or he is in fact acting in a way that is discriminatory; she or he must consciously intend to discriminate.⁷³

Similarly to genocidal intent, as discussed further below (see 5.2), discriminatory intent for persecution can also be inferred contextually. While discriminatory intent may not be inferred solely from the general discriminatory nature of an attack against the civilian population, it may be inferred from the context as long as circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.⁷⁴ Circumstances which may be taken into account include the systematic nature of the crimes committed against a certain group and the general attitude of the alleged perpetrator as demonstrated by her or his behaviour.⁷⁵

4.4 Genocide and persecution, genocidal intent and discriminatory intent

As indicated, genocide and persecution share a number of common general features and elements, the most significant being the requirement for a special intent as *mens rea*. As indicated by the ICTY, persecution shares the same genus as genocide,⁷⁶ and this is also reflected both factually and evidentially, in that these crimes are often based on the same factual allegations and their intent can be inferred contextually. Genocide and persecution, however, are also

⁷¹ *Krnjelac* appeal judgment, para 184; *Stakić* appeal judgment, para 328; *Nahimana* appeal judgment, para 985.

⁷² *Kordić and Čerkez* appeal judgment, para 99; *Blaškić* appeal judgment, para 124; *Tadić* appeal judgment, paras 248-272.

⁷³ *Krnjelac* trial judgment, para 435; *The Prosecutor v Vasilević*, IT-98-32-T, 29 November 2002, para 248.

⁷⁴ *Kordić and Čerkez* appeal judgment, para 110; *Blaškić* appeal judgment, para 164; *Krnjelac* appeal judgment, para 184.

⁷⁵ *Kvočka* appeal judgment, para 460; *Krnjelac* appeal judgment, para 184; *Karadžić* trial judgment, para 500; ECCC Case 002/01 trial judgment, para 429.

⁷⁶ *Kupreškić* trial judgment, para 636.

characterized by distinctive and specific elements that distinguish them as separate crimes.⁷⁷

More generally, genocide differs from persecution, because persecution must meet specific elements ascribed to crimes against humanity, whereas genocide does not. Unlike genocide, persecution needs to occur, and is assessed, in the context of a widespread and systematic attack against the civilian population. Genocide can occur both in time of peace as well as in time of war and regardless of whether victims are protected civilians or combatants or other persons taking direct part in hostilities.

Genocide and persecution are characterized by their special intent elements as both being discriminatory in nature. Both crimes also share a common target, in that they are directed at and target the members of a particular group. While their specific intent and the relation of the crimes and the targeted group are similar, this is also where genocide and persecution show their most significant divergence. For genocide, the intent to discriminate is identified on account of an individual membership of a national, ethnic, racial or religious group, while for persecution, under article 7(1)(h) of the ICC Statute, membership relates to political, racial, national, ethnic, cultural, religious and gender grounds, or other grounds universally recognized under international law. Most importantly, genocide targets the members of a group “as such”, in other words the group itself, while persecution focuses on a group insofar as it identifies the individual victim, as its ultimate target. Genocidal intent is the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Discriminatory intent for persecution lacks this destructive element towards a targeted group and, instead, consists of the intent to discriminate against individuals on the listed grounds, by violating their fundamental human rights.⁷⁸

As a crime of special intent, similarly to genocide (see 3.7), persecution also requires mere knowledge by the perpetrator of the existence of respective special intent in connection with the modes of liability of commission as part of a JCE, in its third and extended form, for aiding and abetting, as well as in relation to superior responsibility.⁷⁹

Finally, genocide and persecution differ also in relation to their *actus reus*. The crime of genocide protects the targeted group, as such, through the physical and mental integrity of its members. The crime of persecution, on the contrary, protects fundamental human rights. The range of underlying offences which may qualify as persecution is also broader than those that may qualify as genocide, as persecution covers acts of a greater variety and is determined in terms of their severity.⁸⁰

⁷⁷ Accordingly, cumulative convictions for genocide and persecution in relation to the same conduct are possible: see *Krstić* appeal judgment, para 229.

⁷⁸ *Kupreškić* trial judgment, para 636; *Sikirica* Rule 98bis decision, paras 58, 89; *Jelisić* trial judgment, paras 68, 79; *Krstić* trial judgment, para 684; *Tadić* appeal judgment, para 305. See also: ICC *Al Bashir* confirmation of charges decision, para 141; ICJ 2007 genocide judgment, para 188.

⁷⁹ *Krnojelac* appeal judgment, para 52; *Brđanin* Rule 98bis appeal decision, paras 5-8; *Karadžić* trial judgment, para 570.

⁸⁰ *Blaškić* trial judgment, para 218-234; *Tadić* trial judgment, para 704.

5. How have different jurisdictions approached genocidal intent factually?

Summary:

The perpetrator's genocidal intent should be determined, above all, from her or his words and deeds. Direct or explicit proof of genocidal intent, however, has sometimes proved difficult to establish, particularly given the manner in which perpetrators might express their volition. Absent a direct expression of an intent or motive, through direct public utterances or readily ascertainable non-public ones, it will typically be difficult to directly establish whether a perpetrator possessed the required genocidal intent while committing any of the underlying acts of genocide. In light of the difficulties of relying upon explicit and direct evidence of genocidal intent, the ICTY and the ICTR have consistently held that genocidal intent can be adduced, through inference, from a number of facts, circumstances or factors, including from circumstantial evidence, which may include: the general context in which the acts occurred; the perpetration of other culpable acts systematically directed against the same protected group, whether these acts were committed by the same offender or by others; the scale of the atrocities; the awareness of the detrimental effect and long-term impact that the atrocities will have on the targeted group and on its survival; the methodical and systemic nature of the attacks; the systematic targeting of victims on account of their membership in a particular targeted group; the repetition of destructive and discriminatory acts; the number of victims; the attempt to conceal the bodies of victims; the targeting of members of the group without distinction of age and gender; the means and methods used to carry out the crimes; and the geographical area in which the perpetrator was active. Other factors include the gravity of the acts; the scale of the atrocities and their occurrence in a region or country; the fact that members of a particular group are targeted, while members of other groups are excluded; the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning; the systematic manner of killing. The position and the role of the perpetrator, either official or *de facto* status within a community or a geographic area, also when compounded with her or his specific actions, have been deemed to be significant factors contributing to the determination of genocidal intent. By its very nature, gravity and scale, the perpetration of genocide may *de facto* require a set of concerted and coordinated actions undertaken by a multiplicity of actors or an organization, which may suggest a plan or a state policy to commit genocide relevant to the inference of genocidal intent. Evidence on the implication of multiple levels of military command in a genocidal operation can also establish the systematic nature of the culpable acts and an organized plan of destruction, which may be relied upon to infer genocidal intent. Sexual offences, including rape, can be perpetrated as an act of genocide and contribute to the physical and biological destruction of the targeted group.

The inherent complexities of genocidal intent are reflected in varying approaches as to how this intent is assessed and established factually. This section will first highlight difficulties in the direct determination of genocidal intent and then discuss in greater detail how genocidal intent has been adduced from a number of circumstances or factors, focusing in particular on the acts and conduct of a perpetrator, the existence of a genocidal plan, and the occurrence of sexual offences.

5.1 Direct determination of genocidal intent

The perpetrator's genocidal intent should be determined, above all, from her or his words and deeds.⁸¹ Direct or explicit proof of genocidal intent, however, has sometimes proved difficult to establish, particularly given the manner in which perpetrators might express their volition. Direct determination of whether a perpetrator acts with genocidal intent will require evidence of her or his particular state of mind and objective. Absent a direct expression of an intent or motive, through direct public utterances or readily ascertainable non-public ones, it is a particular challenge to directly establish whether a perpetrator possessed the required genocidal intent while committing any of the underlying acts of genocide listed in article II of the Genocide Convention and replicated in article 6 of the ICC Statute. As stated in the *Kayishema and Ruzindana* appeal judgment at the ICTR, "explicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials".⁸² The *Akayesu* trial judgment at the ICTR went even further, stating that, "intent is a mental factor which is difficult, even impossible, to determine".⁸³

5.2 Adducing genocidal intent: a review of some jurisprudence

In light of the difficulties of relying upon explicit and direct evidence of genocidal intent, the ICTY and the ICTR have consistently held that genocidal intent can be adduced, through inference, from a number of facts, circumstances or factors, including from circumstantial evidence.⁸⁴

A review of the jurisprudence of the ICTY and of the ICTR reveals multiple factors which could be determinative of the existence of genocidal intent, which may include: the general context in which the acts occurred; perpetration of other culpable acts systematically directed against the same protected group, whether these acts were committed by the same offender or by others; the scale of the atrocities; the awareness of the detrimental effect and long-term impact that the atrocities will have on the targeted group and on its survival; the methodic and systemic nature of the attacks; the systematic targeting of victims on account of their membership in a particular targeted group; the repetition of destructive and discriminatory acts; the number of victims; the attempt to conceal the bodies of victims; the targeting of members of the group without distinction of age and gender; the means and methods used to carry out the crimes; and the geographical area in which the perpetrator was active. Other factors include the gravity of the acts; the scale of the atrocities and their occurrence in a region or country; the fact that members of a particular group are targeted, while members of other groups are excluded; the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning; the systematic manner of killing.⁸⁵ An attack on cultural or religious

⁸¹ *The Prosecutor v Bagosora et al*, ICTR-98-41-T, 18 December 2008, para 63.

⁸² *The Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-A, 1 June 2001 (Kayishema and Ruzindana appeal judgment), para 159. See also *Kayishema and Ruzindana* trial judgment, para 93.

⁸³ *Akayesu* trial judgment, para 523: "On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact."

⁸⁴ See, for instance: *The Prosecutor v Popović et al*, IT-05-88-A, 30 January 2015 (*Popović* appeal judgment), para 468; *Stakić* appeal judgment, para 55; *Krstić* appeal judgment, para 34; *Jelisić* appeal judgment, para 47.

⁸⁵ See, for instance: *Jelisić* appeal judgment, para 47; *Tolimir* trial judgment, para 745; *Kayishema and Ruzindana* trial judgment, paras 93, 532-533; *Akayesu* trial judgment, paras 523-524; *Krstić* trial judgment, paras 31, 596; *The Prosecutor v Rutaganda*, ICTR-

property or symbols of the targeted group could also be considered as evidence of the intent to physically destroy the group.⁸⁶ The fact that a perpetrator did not choose the most efficient method to destroy the targeted group is not necessarily dispositive of a lack of genocidal intent.⁸⁷

Case Study 1: Prosecutor v Tolimir, ICTY, IT-05-88/2 – Trial Judgment

Zdravko Tolimir was an Assistant Commander and the Chief of the Sector for Intelligence and Security Affairs of the Main Staff of the Army of the Republika Srpska ("VRS"). *Tolimir* was charged with genocide as a member of a joint criminal enterprise ("JCE") to murder Bosnian Muslim men and to forcibly remove the Bosnian Muslim population from Srebrenica and Zepa. During the trial, in addition to testimonies of witnesses, including witnesses associated with the armed conflict, and survivors, as well as expert witnesses, the Chamber relied on testimonies of individuals previously convicted for events alleged in the indictment. The Chamber also relied upon documentary, audio and video evidence. Notably, the Chamber relied upon Directive 7 of March of 1995, signed by the President of Republika Srpska and drafted by the VRS Main Staff, including the Sector of Intelligence and Security Affairs, as evidence of a policy to remove the Bosnian Muslim population from eastern Bosnia and Herzegovina. Finally, the Chamber also relied upon DNA evidence, intercepted communications, aerial imagery and demographic data.

The majority of the Chamber found that *Tolimir* was part of the JCEs to murder able-bodied Bosnian Muslim men from Srebrenica and to forcibly remove the Bosnian Muslim population from Srebrenica and Zepa. From 13 July to August 1995, at least 4,970 Bosnian Muslim men were murdered. *Tolimir's* significant contribution entailed a continuing involvement in concealing the murder operation and his failure to protect Bosnian Muslim prisoners. Through effective communication channels with his subordinates and his superior, *Radko Mladić*, *Tolimir* engaged in covering up the JCEs, despite his knowledge of the situation on the ground and of his obligations. During the same period, 30,000 to 35,000 Bosnian Muslims from Srebrenica and Zepa enclaves were also forcibly removed. *Tolimir* played a coordinating and directing role, participated in restricting aid convoys for the civilian population from entering the enclaves; facilitated the VRS's takeover of the enclaves; and was aware, through the presence on the ground of his subordinates in the chain of command, of the forcible removal.

The crimes were massive in scale, severe in intensity, and devastating in effect. The implementation of the JCEs occurred over a very short period of time in a small geographical area. *Tolimir* not only had knowledge of the genocidal intent of the others, but also possessed it himself. In reaching its conclusion, the majority took into account *Tolimir's* functions and authority; via reliable communication channels, *Tolimir* remained up to date with what was afoot on the ground, through his subordinates and subordinate organs. *Tolimir* was one of *Mladić's* most trusted associates and the two were in close contact.

The majority found that the only reasonable inference to be drawn from the evidence is that members of Bosnian Serb Forces, including *Tolimir's* superior and subordinate officers, were extensively involved in the murder operation, the implementation of which was carried out with genocidal intent. *Tolimir's* actions and omissions contributed to this joint effort. The majority also found that *Tolimir* was aware that the suffering inflicted upon the Bosnian Muslim population as a result of the forcible removal operation was committed with genocidal intent.

96-3-A, 26 May 2003 (*Rutaganda* appeal judgment), paras 525-526. See also: Darfur report, para 502; Yazidis report, para 152.

⁸⁶ *Tolimir* trial judgment, para 746; *Krstić* appeal judgment, paras 25-26; See also ICJ 2007 genocide judgment, para 344.

⁸⁷ *Krstić* appeal judgment, para 32; *Tolimir* trial judgment, para 748.

While the identity of the perpetrators is relevant to establish and attribute individual criminal responsibility for the commission of genocide, this is not in itself determinative of the existence of genocidal intent. In this regard, the *Krstić* appeal judgment at the ICTY held that, “(t)he inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified”.⁸⁸

As a specific intent offence, genocide requires proof of intent to commit the underlying act along with proof of intent to destroy the targeted group. Genocidal intent, therefore, can also be inferred from evidence of the mental state of the perpetrator with respect to the commission of any of the underlying acts of genocide listed in article II(a)-(e) of the Genocide Convention, and replicated in and article 6 of the ICC Statute.⁸⁹

Assessment of the existence of genocidal intent has to be based on all of the evidence taken together.⁹⁰ Any inquiry into genocidal intent, therefore, should not be compartmentalized into considering separately whether there was specific intent to destroy a protected group through each of the genocidal acts specified in article II of the Geneva Convention.⁹¹ Finally, particularly where the genocidal intent is established on the basis of circumstantial evidence, this has to be the only reasonable conclusion that can be drawn in light of the available evidence.⁹²

Case Study 2: Prosecutor v Kayishema and Ruzindana, ICTR-95-1 – Trial Judgment

Clément Kayishema was the prefect of Kibuye Prefecture in Rwanda and controlled the Gendarmerie Nationale, while *Obed Ruzindana* was a commercial trader in Kigali. *Kayishema* and *Ruzindana* were charged with genocide in relation to a number of massacres committed in Kibuye Prefecture and tried jointly in relation to some of these massacres. Given that the massacres in Rwanda in 1994 left only little formal documentation behind, both parties of the proceedings relied predominantly upon testimonies of witnesses, including several prosecution witnesses who were Tutsi survivors of the attacks. Both *Kayishema* and *Ruzindana* raised the defence of alibi, asserting that they were not at the sites when any of the massacres occurred, but in light of contradictions in the defences raised by both accused, including *Kayishema*'s own testimony and the evidence and credibility of some of other witnesses called on their behalf, the Chamber dismissed their alibi defence.

The Trial Chamber found that on 17 April 1994, *Kayishema* ordered the Gendarmerie Nationale and others to attack the Catholic Church and Home St. Jean Complex in Kibuye, and that *Kayishema* participated in and played a leading role in the massacres. In addition, the Chamber found that *Kayishema* ordered the Gendarmerie Nationale, the police and others to attack unarmed Tutsis who sought refuge at the Kibuye Stadium on 18 April 1994, and that *Kayishema* and his subordinates were present and participated in attacks at the Church in Mubuga on 14 April 1994. The Trial Chamber found that *Ruzindana* directed and took part in a series of massacres and mass killings in various locations in the Bisesero area in April, May and June 1994, at times in concert with *Kayishema*.

⁸⁸ *Krstić* appeal judgment, para 34.

⁸⁹ *Krstić* appeal judgment, para 20.

⁹⁰ See, for instance, *Stakić* trial judgment, para 55.

⁹¹ *Stakić* appeal judgment, para 55. *Karadžić* trial judgment, para 550; See also ICJ 2015 genocide judgment, para 419.

⁹² *Brđanin* trial judgment, para 970; *Akayesu* trial judgment, para 523; *Nahimana* appeal judgment, para 524; ICJ 2015 genocide judgment, paras 143-148.

The Chamber found that the massacres in Kibuye Prefecture were pre-arranged. For months before the commencement of the massacres, *bourgmestres* were communicating lists of suspects from their commune to the prefects. Written communications between the Central Authorities, *Kayishema* and the Communal Authorities contain language regarding whether “work has begun”. A letter sent by *Kayishema* to the Minister of Defence requested military hardware and reinforcement to undertake clean-up efforts in Bisesero. Some of the most brutal massacres occurred after meetings organized by the local authorities and attended by the heads of the Rwandan interim government and/or ordinary citizens. During one of these meetings, *Kayishema* was heard requesting reinforcement from the central authorities to deal with the security problem in Bisesero.

In assessing *Kayishema* and *Ruzindana*'s genocidal intent, the Chamber took into account the massive scale of the massacres in the prefecture. Not only were Tutsis killed in tremendous numbers, but they were also killed regardless of gender or age. Men and women, old and young, were killed. The Chamber also considered the consistent and methodical pattern of killing as further evidence of the genocidal intent. *Kayishema* and *Ruzindana* were both instrumental in executing this pattern of killing. Finally, the Chamber also considered *Kayishema* and *Ruzindana*'s utterances, before, during and after the massacres, to demonstrate the existence of their genocidal intent.

The ICTY and the ICTR routinely applied at least some of the factors referred to above to determine whether genocidal intent could be inferred and to enter findings as to whether genocide had occurred in the former Yugoslavia and in Rwanda. These factors should be considered holistically rather than in isolation, and need to be evaluated on a case-by-case basis. In confirming the previous findings of the Trial Chamber that genocide occurred against Bosnian Muslims in Srebrenica, the ICTY Appeals Chamber in the *Krstić* Case provides a significant example of how genocidal intent can be inferred from a number of factors and circumstances:

“By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide.”⁹³

5.3 Genocidal intent and the position of the perpetrator

Among the factors upon which is possible to draw the inference of the existence of genocidal intent, the position of the perpetrator and her or his acts and utterances are particularly significant and merit separate discussion.

The position and the role of the perpetrator, either official or *de facto* status within a community or a geographic area, also when compounded with her or his specific actions, have been deemed to be significant factors contributing to the determination of genocidal intent. The *Tolimir* trial judgment at the ICTY, for instance, shows how the perpetrator's functions and position of authority as chief

⁹³ *Krstić* appeal judgment, para 37.

of intelligence and security affairs within the Bosnia Serb Army led to the finding of the perpetrator's genocidal intent:

"In view of the facts that in his position as Chief of the Sector for Intelligence and Security Affairs the Accused had knowledge of the large-scale criminal operations on the ground, that he knew of the genocidal intentions of the JCE members, that he actively contributed to the JCEs to Forcibly Remove and to Murder, that the Accused freely used derogatory and dehumanising language, and that the Accused proposed to destroy groups of fleeing refugees, the only reasonable inference that the Majority can draw on the totality of the evidence is that the Accused possessed genocidal intent."⁹⁴

Even when not constituting direct evidence of genocidal intent, statements and utterances of the perpetrator, or of those under her or his authority, permit this inference, particularly when these encompass the use of derogatory language against the targeted group or some of its members.⁹⁵ This inference extends to writing or publications and is relevant, in particular, in relation to the underlying punishable acts of conspiracy and of direct and public incitement to commit genocide under article III(b) and (c) of the Genocide Convention. In affirming the perpetrator's genocidal intent, the *Gacumbitsi* trial judgment at the ICTR, for instance, relied on the following finding:

"[O]n 14 April 1994, the Accused, accompanied by communal police officers, went to Rwanteru commercial centre, where he addressed about one hundred people and incited them to arm themselves with machetes and to participate in the fight against the enemy, specifying that they had to hunt down all the Tutsi. After his speech, he went towards Kigarama, followed by a part of the population. When they arrived at Kigarama, the assailants attacked the house and property of a Tutsi called Callixte and plundered property belonging to other Tutsi. [...] [A]nother group, comprising those who were also present when the Accused gave his speech at Rwanteru, attacked the property of a Tutsi called Buhanda. The Chamber considers that such attacks were the direct consequences of the inciting words uttered by the Accused at the Rwanteru commercial centre, and that the attack at Kigarama was carried out under his personal supervision, whereas the attack on Buhanda's house was carried out under the supervision of his representative."⁹⁶

5.4 Genocidal plan, State policy and genocidal intent

By its very nature, gravity and scale, the perpetration of genocide may *de facto* require a set of concerted and coordinated actions undertaken by a multiplicity of actors or an organization.⁹⁷ This leads to the issue of the relevance of a plan or state policy to commit genocide, particularly with regard to inference of genocidal intent.

Premeditation and personal motives, albeit relevant as evidence to establish elements of the crime of genocide, are not by themselves elements of this crime (see 3.1 above). By contrast, under the ICC Statute, pursuant to the Elements of Crimes, for genocide it is necessary that that "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".⁹⁸ By introducing a

⁹⁴ *Tolimir* trial judgment, paras 1172. This finding was confirmed in appeal: see *Tolimir* appeal judgment, paras 560-562.

⁹⁵ *Kayishema and Ruzindana* trial judgment, para 93; *The Prosecutor v Gacumbitsi*, ICTR-01-64-T, 17 June 2004 (*Gacumbitsi* trial judgment), paras 252-253; *Tolimir* trial judgment, para 745; *The Prosecutor v Gacumbitsi*, ICTR-01-64-A, 7 July 2006 (*Gacumbitsi* appeal judgment), para 43; *Kajelijeli* trial judgment, para 531; *Karadžić* trial judgment, para 550. *Akayesu* trial judgment, paras 728-729.

⁹⁶ *Gacumbitsi* trial judgment, para 98. This finding was also confirmed on Appeal: see *Gacumbitsi* appeal judgment, paras 42-45.

⁹⁷ *Krstić* trial judgment, para 549; *Kayishema and Ruzindana* trial judgment, para 94.

⁹⁸ ICC Elements of Crimes, article 6(a), Element 3. See also ICC *Al Bashir* confirmation of charges decision, paras 121-133.

contextual element, this language appears to implicitly exclude random or isolated acts of genocide, thus also supporting a plan or State policy requirement.⁹⁹

Whether or not a genocidal plan is a constituent element of the crime of genocide, the existence of such a plan, if proven, would certainly have evidentiary value in determining the genocidal intent of the perpetrator.¹⁰⁰ This was underscored by the ICJ:

“The specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.”¹⁰¹

In this regard, the *Kayishema and Ruzindana* trial judgment at the ICTR discussed whether a genocidal plan existed in Rwanda and whether this could lead to inference of the existence of a genocidal intent by the perpetrators. In its finding on the existence of a genocidal intent, the Trial Chamber held that:

“The massacres of the Tutsi population indeed were ‘meticulously planned and systematically co-ordinated’ by top level Hutu extremists in the former Rwandan government at the time in question. The widespread nature of the attacks and the sheer number of those who perished within just three months is compelling evidence of this fact. This plan could not have been implemented without the participation of the militias and the Hutu population who had been convinced by these extremists that the Tutsi population, in fact, was the enemy and responsible for the downing of President Habyarimana’s airplane.”¹⁰²

The excerpt above also highlights the potential impact of military operations in carrying out underlying acts of genocide. Evidence in relation to multiple levels of military command in a genocidal operation can also establish the systematic nature of the culpable acts and an organized plan of destruction, which may be relied upon to infer genocidal intent.¹⁰³

The critical nature of the existence of a coordinated plan in suggesting genocidal intent is implicitly confirmed in the *Jelisić* and *Stakić* cases at the ICTY. In both cases, the respective Trial Chambers were unable to find that a genocidal plan existed and, on that basis, were consequently also unable to conclude beyond reasonable doubt that the perpetrators possessed a genocidal intent.¹⁰⁴

5.5 Genocidal intent and sexual offences

Sexual offences, including rape, can be perpetrated as an act of genocide and contribute to the physical and biological destruction of the targeted group. As discussed above (see 3.2), physical and psychological damage resulting from sexual violence can render the victim unable or unwilling to have children. Perpetrators may use sexual violence to achieve cultural and community

⁹⁹ The ICTY and the ICTR, however, held that the existence of a genocidal plan or a state policy are not legal elements of genocide. See: *Kayishema and Ruzindana* appeal judgment, para 138; *Jelisić* appeal judgment, para 48; *Popović* appeal judgment, paras 430-440; *Krstić* appeal judgment, paras 224-225. Additionally, the ICTY Appeal Chamber in the *Krstić* and *Popović* cases found that the ICC Elements of Crimes do not reflect customary international law as it existed at the time of the commission of the crimes tried before the ICTY, nor is the ICC Statute itself, as a multilateral treaty, binding on the ICTY.

¹⁰⁰ *Kayishema and Ruzindana* appeal judgment, para 138; *Karadžić* trial judgment, para 80; *Krstić* appeal judgment, para 572.

¹⁰¹ ICJ 2007 genocide judgment, para 373.

¹⁰² *Kayishema and Ruzindana* trial judgment, para 289.

¹⁰³ *Tolimir* appeal judgment, para 252.

¹⁰⁴ *Jelisić* trial judgment, paras 98-108. This finding was later overturned on Appeal: see *Jelisić* appeal judgment, para 68. See also *Stakić* trial judgment, paras 547-549.

destruction, and isolate and humiliate women and men of the same culture, particularly in cultures where victims of sexual violence are perceived as unfit for marriage. In patrilineal societies, the infliction of forced pregnancy may affect the protected population, at least where any child resulting from forced pregnancy is labelled with the father's ethnic status and affiliation.

The *Akayesu* Case at the ICTR is considered ground-breaking in that it is the first case which found that rape and sexual violence constitute serious harm on both physical and mental levels and consequently, if carried out with specific intent to destroy, in whole or in part, a protected group, constitute punishable acts of genocide under article II(b) of the Genocide Convention:

“Rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”¹⁰⁵

Findings confirming that rape and sexual violence were acts of genocide, were also subsequently made at both the ICTY and ICTR.¹⁰⁶ As acts of genocide, sexual offences, including rape, can therefore also be considered in inferring genocidal intent, including when designed or implemented to violate the very foundation of the targeted group.¹⁰⁷

¹⁰⁵ *Akayesu* trial judgment, para 731. See also: Darfur report, para. 358; Yazidis report, paras 113, 122.

¹⁰⁶ *Stakić* trial judgment, para 516; *Rutaganda* trial judgment, paras 51-53; *Musema* trial judgment, paras 156-158; *Gacumbitsi* trial judgment, paras 291-292; *Kayishema and Ruzindana* trial judgment, para 116. See also: *Akayesu* trial judgment, paras 507-508; ICJ 2007 genocide judgment, para 300.

¹⁰⁷ *The Prosecutor v Karadžić*, IT-95-5/18-AR98bis.1, 11 July 2013, paras 99-101; *Musema* trial judgment, para 933. See also *The Prosecutor v Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, 11 July 1996, para 94.

6. How relevant is any establishment of the intent element of the underlying crimes against humanity of deportation or forcible transfer to the genocidal intent?

Summary:

The crime against humanity of deportation or forcible transfer can *de facto* play a significant role in the perpetration of genocide - it can be relevant in relation to the underlying acts of genocide, to the identification of a genocidal policy and, more particularly, to the assessment of genocidal intent. Together with persecution, deportation or forcible transfer are also relied upon to effectively criminalize "ethnic cleansing", which does not have a formal legal definition of its own. Ethnic cleansing, in turn, has been often referred to together with or as a form of genocide. Deportation or forcible transfer often does not occur in a vacuum, and might be committed as a part of a wider set of criminal acts, often of an organized or systematic nature. Therefore, the determination of the relevance of deportation or forced transfer to infer genocidal intent will depend on its combined evaluation with other criminal acts, taking into consideration specific facts and circumstances of each case.

The crime against humanity of deportation or forcible transfer¹⁰⁸ can *de facto* play a significant role in the perpetration of genocide. It can be relevant in relation to the underlying acts of genocide, to the identification of a genocidal policy and, more particularly, to the assessment of genocidal intent. Together with persecution, deportation or forcible transfer are also relied upon to effectively criminalize "ethnic cleansing", which does not have a formal legal definition of its own. Ethnic cleansing, in turn, has been often referred to together with or as a form of genocide. In light of these singularities, this section will discuss the relationship between deportation or forcible transfer with the determination of genocidal intent, also focusing on its connection with ethnic cleansing.

6.1 The constitutive elements of deportation or forcible transfer

Article 7(d) of the ICC Statute provides for deportation or forcible transfer together as an underlying offence of crimes against humanity.¹⁰⁹ Deportation is also listed as an underlying offence of crime against humanity in the Statutes of the ICTY and ICTR.¹¹⁰ Although not specifically listed as such in the Statutes of the ICTY and ICTR, due to its gravity, forcible transfer has been deemed to be falling within the residual category of "Other Inhumane Acts" as a crime against humanity.¹¹¹

The elements of deportation and forcible transfer are substantially similar. Deportation and forcible transfer are defined as the forced displacement of one or more persons by expulsion or other forms of coercion, from an area in which they

¹⁰⁸ The ICC Statute provides for deportation and forced transfer together as an underlying offence of crimes against humanity. While they share some inherent similarities in their constitutive elements, as discussed below, deportation and forced transfer are legally distinct. For ease of reference, however, where possible they will be discussed here jointly.

¹⁰⁹ ICC Statute, article 7(d).

¹¹⁰ ICTY Statute, article 5(d); and ICTR Statute, article 3(d). See also: ECCC Law, article 5; SCSL Statute, article 2. Deportation was also expressly recognized as a crime against humanity in article 6(c) of the Nuremberg Charter.

¹¹¹ *Stakić* appeal judgment, para 317; *The Prosecutor v Krajišnik*, IT-00-39-A, 17 March 2009 (*Krajišnik* appeal judgment), para 331; ECCC Case 002/01 trial judgment, para 455. Forcible transfer was firstly given express recognition in article 18(g) of the ILC's 1996 Draft Code.

are lawfully present and without grounds permitted under international law. Deportation and forcible transfer, however, are not synonymous. As affirmed by the Appeals Chamber of the ICTY and recently discussed by the ICC Prosecutor, deportation and forced transfer are legally distinct. For deportation, the displacement must be across a *de jure* border between two states or, in certain circumstances, a *de facto* border. For forcible transfer, the removal takes place within national boundaries.¹¹² As held by the ICTY Appeal Chamber in *Krnjelac*, however, “the forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent”.¹¹³

To establish deportation and forcible transfer, there must be a forced displacement of persons carried out by expulsion or other forms of coercion. This may include physical force, as well as the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, abuse of power, or the act of taking advantage of a coercive environment. The forced character of the displacement is determined by the absence of genuine choice by the victim in his or her displacement. The essential element is that the displacement be involuntary in nature, where relevant persons had no real choice. While persons may consent to, or even request, their removal, any consent or request to be displaced must be given voluntarily and as a result of the individual’s free will, assessed in light of surrounding circumstances of the particular case.¹¹⁴ For instance, fleeing in order to escape persecution or targeted violence is not a genuine choice. A lack of genuine choice may also be inferred from the looting or burning of property belonging to the targeted population. These crimes must be calculated to terrify the population and make them leave the area with no hope of return.¹¹⁵

With regards to the *mens rea* for deportation or forcible transfer, the jurisprudence of the ICTY indicates that the displacement does not require that the perpetrator intended to displace the individuals on a permanent basis.¹¹⁶

The involvement of non-governmental organizations in facilitating displacements does not in and of itself render lawful an otherwise unlawful transfer. An agreement among military commanders, political leaders, or other representatives of the parties in a conflict cannot make a displacement lawful either.¹¹⁷

¹¹² *Krajišnik* appeal judgment, para 304; *Stakić* appeal judgment, paras 278, 289–300, 317; *Tolimir* trial judgment, para 793; *Popović* trial judgment, paras 891–892; Prosecution’s Request of 9 April 2018, ICC-RoC46(3)-01/18-1, paras 15–17. The ICC Prosecutor is also of the view that deportation and forcible transfer protect different values. While both safeguard the right of individuals to live in their communities and homes, deportation also protects the right of individuals to live in the particular State in which they were lawfully present including living within a particular culture, society, language, set of values, and legal protections.

¹¹³ *Krnjelac* appeal judgment, para 218.

¹¹⁴ *Krajišnik* appeal judgment, para 319; *Stakić* appeal judgment, paras 279, 281–282; *Krnjelac* appeal judgment, paras 229, 233; *Blagojević and Jokić* trial judgment, para 596; *Brđanin* trial judgment, para 543.

¹¹⁵ See also CAR report, paras 440–441.

¹¹⁶ *Stakić* appeal judgment, paras 278, 307; *Brđanin* appeal judgment, para 206. Earlier jurisprudence from the ICTY at the trial level required that the perpetrator intended the displacement to be permanent, particularly with regards to deportation. See Judgment of 17 October 2003, International Criminal Tribunal for the Former Yugoslavia, Case of The Prosecutor v. Simić et al., IT-95-9-T (“*Simić* trial judgment”), para 134; *Naletilić and Martinović* trial judgment, para 520; *Stakić* trial judgment, para 687.

¹¹⁷ *Tolimir* trial judgment, para 796; *Popović* trial judgment, para 897; *Simić* trial judgment, paras 127–128; *Naletilić and Martinović* trial judgment, para 523; *Stakić* appeal judgment, para 286.

Not all displacements are unlawful. International law recognizes that forced removals are permitted under certain grounds, such as the evacuation of a civilian population for the population's security or for imperative military reasons, and the evacuation of prisoners of war out of combat zones. If an act of forced removal is carried out on such bases, that act cannot constitute deportation or forcible transfer. It is unlawful, however, to use evacuation measures based on imperative military reasons as a pretext to remove the civilian population and seize control over a desired territory. Although forced removal for humanitarian reasons is justifiable in certain situations, it is not justified where the humanitarian crisis that caused the displacement is itself the result of the perpetrator's own unlawful activity.¹¹⁸

Forced transfers undertaken in the interest of civilian security or military necessity, just as all measures restricting freedom of movement, must conform to the principle of proportionality. They must also be appropriate to achieve their protective function, they must be the least intrusive instrument amongst those which may achieve the desired result, and they must be proportionate to the interest to be protected. For a transfer to be considered proportionate, evacuees must be transferred back to their homes as soon as hostilities in the area in question have ceased. In addition, those responsible for a transfer must ensure, to the greatest practicable extent, that proper accommodation is provided to receive protected persons, that removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.¹¹⁹

Mass deportations or collective expulsions are also prohibited by all of the main human rights treaties.¹²⁰ This prohibition is considered to have assumed the status of customary international law. At the heart of the prohibition on collective expulsions is a requirement that individual, fair and objective consideration be given to each case. The expulsion procedure must afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned have been genuinely and individually taken into account. Proceedings must be individual, evaluate the personal circumstances of each subject and comply with the prohibition of collective expulsions. Furthermore, proceedings should not discriminate on grounds of nationality, color, race, sex, language, religion, political opinion, social origin or other status, and must observe minimum guarantees such as the right to be formally informed of the reasons for the expulsion or deportation, the right to contest a decision to expel or deport and to receive legal assistance; and the right to have a decision to expel or deport be reviewed by a competent authority.¹²¹

6.2 Deportation or forcible transfer as an act of persecution

As noted above (see 4.2), other underlying offences of crimes against humanity, as well as other relevant offences regardless of their inclusion within the statutes of international tribunals, may constitute underlying acts of persecution, when

¹¹⁸ *Stakić* appeal judgment, paras 284-285. See also: *Popović* trial judgment, paras 901-902; *Blagojević and Jokić* trial judgment, para 597; Geneva Convention (III) relative to the Treatment of Prisoners of War, article 19; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, (Geneva Convention IV), article 49; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), article 17.

¹¹⁹ ECCC Case 002/01 trial judgment, para 450. See also Geneva Convention IV, article 49.

¹²⁰ See, for instance: Protocol 4 to the European Convention on Human Rights, article 4; African Charter on Human and Peoples' Rights, article 12(5); American Convention on Human Rights, article 22(9); Arab Charter on Human Rights, article 26(2).

¹²¹ See also International Commission of Jurists, *Migration and International Human Rights Law, A Practitioners' Guide*, 2014, pp.163-165.

serious enough and committed on discriminatory grounds. This extends to deportation or forced transfer. When committed, separately or cumulatively, with the requisite discriminatory intent, acts of displacement within a national territory or across its borders may also constitute persecution.¹²²

6.3 Deportation or forcible transfer and a policy of “ethnic cleansing”

Deportation or forcible transfer is of particular significance also in relation to the so-called policy of “ethnic cleansing”, because of their factual and legal similarities. Ethnic cleansing is not referred to in the Genocide Convention or in the statutes of the ICC, ICTY and ICTR. Although no formal or autonomous legal definition of ethnic cleansing as an international crime exists, it is commonly referred to as practice consisting of “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area”.¹²³

Because of the similarities in their underlying criminal acts, ethnic cleansing is typically criminalized as deportation or forced transfer as crimes against humanity, as well as persecution, when accompanied with a discriminatory intent.¹²⁴ For the same reasons, however, a policy of ethnic cleansing also bears obvious similarities with genocide.¹²⁵

6.4 Adducing genocidal intent through deportation or forcible transfer

The jurisprudence of the ICTY consistently held that forcible transfer, including the forcible removal of an ethnic group, is not itself a genocidal act but could be an additional means by which to ensure the physical destruction of a targeted group.¹²⁶ In this regard, a clear distinction must be drawn between the physical destruction of a group, as an element of genocide, and its mere dissolution. Only when the process of forcibly removing a population causes its physical destruction, therefore, does deportation or forced transfer qualify as a genocidal act, particularly the act of causing serious bodily or mental harm to members of the group. Indeed, the destruction of the group could be achieved in different ways. As held by the Appeals Chamber in the *Tolimir* Case:

“Nothing in the Tribunal’s jurisprudence or in the Genocide Convention provides that a forcible transfer operation may only support a finding of genocide if the displaced population is transferred to concentration camps or places of execution [...] A forcible transfer operation may still “ensure the physical destruction” of the protected group by causing serious mental harm or leading to conditions of life calculated to bring about the group’s physical destruction, even if the group members are not transferred to places of execution. In past cases before the Tribunal, various trial chambers have recognised that forced displacement may – depending on the circumstances of the case – inflict serious mental harm, by causing grave and long-term disadvantage to a person’s ability to lead a normal

¹²² *Krnjelac* appeal judgment, paras 219-222; *Karadžić* trial judgment, para 516. See also Darfur report, paras 331-332.

¹²³ ICJ 2007 genocide judgment, para 190; ICC *Al Bashir* confirmation of charges decision, paras 143-145. See also ICTY experts report, paras 129-130. Ethnic cleansing is also recognized in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, at paras 23-24, and 28.

¹²⁴ *Simić* trial judgment, para 133; *Kupreškić* trial judgment, paras 606-607. Underlying acts of ethnic cleansing, however, extend beyond deportation or forced transfer, and can also comprise murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. See ICTY experts report, para. 129.

¹²⁵ *Krstić* trial judgment, para 562; *Brđanin* trial judgment, para 981. See also ICC *Al Bashir* confirmation of charges decision, para 145.

¹²⁶ *Stakić* trial judgment, para 519; *Krstić* appeal judgment, para 31. See also CAR report, paras 452-454.

and constructive life so as to contribute or tend to contribute to the destruction of the group as a whole or a part thereof.¹²⁷

Just as acts of deportation or forcible transfer may be used as support for, but do not constitute genocidal acts, intent to commit acts of deportation or forced transfer does not constitute, in and of itself, genocidal intent. This extends to the policy of ethnic cleansing. In other words, the intent to displace is not equivalent to the intent to destroy. Indeed, in its 2007 judgment on genocide, the ICJ held that:

“Neither the intent, as a matter of policy, to render an area ‘ethnically homogeneous’, nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is ‘to destroy, in whole or in part’ a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.”¹²⁸

Despite these limitations, evidence of deportation or forced transfer, as well as of ethnic cleansing, may still be relevant to prove genocidal intent. Genocidal intent may be inferred, among other facts, from evidence of other culpable acts systematically directed against the same group, particularly those acts enumerated in article II of the Genocide Convention. Significantly, these acts might include deportation or forcible transfer. Forced displacements could indeed be indicative to infer existence of genocidal intent, when accompanied by or occurring in parallel with other contextual elements, such as mass killings or other acts of destruction.¹²⁹

This analysis underscores how acts of deportation or forcible transfer, even when amounting to ethnic cleansing, cannot in themselves establish genocide or genocidal intent. Critically, the reliance on physically destructive means by perpetrators, when committed systematically, continues to be a fundamental factor in evaluating and proving genocide. Deportation or forcible transfer, however, often does not occur in a vacuum, and might be committed as a part of a wider set of criminal acts, often of an organized or systematic nature. The determination of the relevance of deportation or forced transfer to infer genocidal intent will, therefore, depend on its combined evaluation with other criminal acts, taking into consideration the specific facts and circumstances of each case.

¹²⁷ *Tolimir* appeal judgment, para 209. See also: *Blagojević and Jokić* trial judgment, paras 646, 665; *Krstić* trial judgment, paras 513, 518; *The Prosecutor v Krajišnik*, IT-00-39-T, 27 September 2006, para 862.

¹²⁸ ICJ 2007 genocide judgment, para 190; ICJ 2015 genocide judgment, para 434; *Krstić* appeal judgment, para 33.

¹²⁹ *Blagojević and Jokić* trial judgment, para 123; ICJ 2007 genocide judgment, para 190; *Krstić* appeal judgment, para 33. See also CAR report, paras 458-459.

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**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org