

LEGAL NOTE

GENOCIDE: A SHORT PRIMER ON THE LAW

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A. EXECUTIVE SUMMARY

1. This note sets out the applicable law, with reference to current jurisprudence, relating to the crime of genocide.
2. The key international instrument setting out the law relating to genocide is the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide ("**Convention**").¹
3. Genocide is the commission of certain prohibited acts ("actus reus") committed with an intent to destroy, in whole or in part, ("mens rea") a protected group, as such.² The protected groups are national, ethnical, racial or religious groups and no others.
4. Genocide, as a legally delineated international crime, is to be clearly distinguished from other conceptions of genocide, such as cultural genocide. This note does not make any conclusions on the application of the law to any situation or a particular set of facts.
5. The character of certain crimes under international law (including genocide) are such that States must ensure they are not committed; States generally owe the duties and obligations to the international community of States to prohibit such crimes and protect individuals from them.³ There is a specific obligation on all States, under the Convention, to prevent the commission of genocide by using all means reasonably available, the instant a State learns, or should have learned, that there is a "serious risk" of genocide.⁴
6. The application of the law relating to the underlying prohibited acts of genocide, and the requisite intent, to factual scenarios generates legal complexity on which there is (often, but not always) jurisprudence or precedent. The complexity has been omitted for readability and ease of access.
7. This note does not provide detailed directions on issues related to State responsibility or standards of proof or forms of individual criminal responsibility save for the final section which provides a straightforward direction on the difference between individual criminal responsibility and State responsibility when attributing crimes (such as genocide) to State agents, organs and officials. The final section also considers the standard of proof ordinarily applied to State attribution of genocide under proceedings before extant international bodies such as the International Criminal Court ("ICC") or the International Court of Justice ("ICJ").
 - i. There are divergent views among academics and practitioners as to State responsibility and individual criminal responsibility, as well as with respect to standards of proof. Further clarification on the divergent views or the complexity arising can be provided, upon request.
 - ii. There are various forms of criminal responsibility: direct commission (by high-level, mid-level or low-level perpetrators); conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; aiding and abetting, *among others*. This note is restricted to the commission of genocide by direct perpetration (by high-level, mid-level or low-level perpetrators). Further advice can be provided on responsibility, upon request.
8. This note on the applicable law is provided in as succinct a manner possible without losing important, and sometimes critical, legal nuance and specificity. The note is in summary form only.

9. This note has been adapted from a legal opinion provided, by Aarif Abraham to the Panel of the Uyghur Tribunal where he acted as the Principal Legal Adviser in an *independent* capacity from the Panel. A formal legal opinion on matters addressed in this note may be commissioned.

B. GENOCIDE, THE FIVE PROHIBITED ACTS (*ACTUS REUS*) & GROUP PROTECTION

10. Genocide is the commission of certain prohibited acts ("actus reus") committed with an intent to destroy, in whole or in part, ("mens rea") a protected group, as such.⁵ The protected groups are national, ethnical, racial or religious groups. Groups not characterised as such are not "protected groups" for the purposes of the Genocide Convention.⁶
11. The protected group must constitute a collection of people with a particular group identity⁷ which must be defined positively and have unique distinguishing characteristics either objectively or subjectively ascertained.⁸ If subjective, then from the psyche of the perpetrator, the group should still be, in some form, "stable" or "permanent" such that victims cannot ordinarily be dissociated from the group.⁹ A protected group cannot be defined negatively.¹⁰
12. When assessing the actus reus of genocide, the acts or omissions of perpetrators must relate to at least one of the prohibited acts; other culpable acts such as arbitrary detention, enforced disappearances and other general human rights violations, in and of themselves, are not within scope. The underlying prohibited acts, or actus reus, of genocide, each of which is required to be volitional or intentional,¹¹ are:
- i. killing members of the group;
 - a. The material elements of killing are equivalent to the elements of murder.¹²
 - ii. causing serious bodily or mental harm to members of the group;
 - a. The bodily or mental harm caused must be of such a serious nature "as to contribute or tend to contribute" to the destruction of the group.¹³ The acts causing such harm may include torture, rape, sexual violence, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.¹⁴ The harm must be inflicted intentionally.¹⁵ The harm does not need to be inflicted on each and every member of the group.
 - iii. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part;
 - a. The words "calculated to bring about its physical destruction" has been construed to mean "methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction."¹⁶ The acts may include: systematic expulsion from homes; denial of medical services; and the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing, and hygiene or excessive work or physical exertion.¹⁷ The acts must be carried out 'deliberately'.¹⁸ The mere "dissolution" of the group (through fragmentation of the group, cultural disappearance, displacement and assimilation) is not within scope.¹⁹ For example, the forcible transfer or deportation of a group or part of a group does not, by itself, constitute a prohibited act of genocide, but it is "a relevant consideration as part of the overall factual assessment"²⁰ and "could be an additional means by which to ensure the physical destruction" of the protected group.²¹ As such, the *manner* in which forcible transfer is carried out can ensure the physical destruction of the group by leading to conditions of life calculated to bring about a group's physical destruction.²² In the case of *Al-Bashir*, for instance, the Pre-Trial Chamber found that there were reasonable grounds to believe that forcible transfer of the protected groups together with contamination of

wells and water pumps into inhospitable terrain (together with a denial of medical and humanitarian assistance) did fulfil the conditions of life element.²³

- iv. imposing measures intended to prevent births within the group; and
 - a. The intended measures may be evidenced, inter alia, by 'sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages'.²⁴ The words 'intended to' can be interpreted in two ways. On the one hand, the words may indicate that the perpetrator's subjective belief that the measures are capable of preventing births is sufficient for the actus reus to exist. On the other, they may indicate that the imposed measures ought to be objectively capable of preventing births, and thus that the perpetrator's sole "subjective tendency" is not sufficient.²⁵
 - e. forcibly transferring children of the group to another group.²⁶
 - a. The forcible transfer must be of at least one child from the protected group to another.²⁷ A child is a person under the age of 18.²⁸ The term 'forcibly' is not confined to physical force but may include other forms of coercion such as threat of violence, psychological pressure, duress and detention.²⁹
- 13. Three of the five acts above require proof of a result (namely, killing, causing serious bodily or mental harm and the transfer of children from one group to another). Two do not demand such proof (namely, the conditions of life element and measures intended to restrict births).

C. MENS REA – INTENT TO DESTROY PROTECTED GROUP, IN WHOLE OR IN PART, AS SUCH

- 14. The mental element, or mens rea, required for genocide is a specific intent to destroy, in whole or in part, a protected group, as such.³⁰ This specific intent distinguishes genocide from other international crimes as it requires that the perpetrator is targeting an individual because they belong to the protected group rather than as an individual *per se*.³¹ Specific intent has been described in the following way:

*"For any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group."*³²
- 15. The specific intent must be directed at the destruction of the protected group, in whole or in part. The destruction need not objectively occur but merely be intended.
- 16. The term 'destroy', in respect of the intent requirement, is limited to the physical or biological destruction of all or part of the group.³³ This restrictive interpretation has been advanced by the International Law Commission,³⁴ the jurisprudence of all international courts to date,³⁵ and some academics.
 - i. The original basis for this interpretation is said to be found in the preparatory works to the Genocide Convention whereby "cultural genocide in the form of destroying a group's national, linguistic, religious, cultural, or other existence was ultimately (despite a proposal by the Ad Hoc Committee) not included in the Convention." Cultural destruction or destruction resulting in 'mere dissolution of the group', therefore, have not been accepted by the ICC, ICTY or ICTR.³⁶
 - ii. There is a view, although not currently reflected in the international jurisprudence, that a plain reading of Convention and reference to the "group, as such" shows that the prohibition on genocide "is intended to protect not only the physical existence of the individual members of the group, but the group as a social entity." The German Federal Supreme Court

(Bundesgerichtshof) and Federal Constitutional Court (Bundesverfassungsgericht), have found in 2000 that the intent to destroy 'extends beyond physical and biological interpretation'³⁷ and that "text of the law does not...compel the interpretations that the culprit's intent must be to exterminate physically...members of the group."³⁸ Ambos (2014) has approved of the broader approach noting "Such a broader interpretation also conforms to the fact that the actual destruction of peoples often begins with vicious assaults on culture, particular languages, and religious and cultural monuments and institutions. Thus, such acts will often indicate the perpetrators' intent to destroy."³⁹ This view has been considered albeit, to date, discounted by the *ad hoc* international Tribunals and not adopted by any international court or tribunal:

*"The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of nullum crimen sine lege. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group."*⁴⁰

17. Specific intent to destroy may thus be found in direct oral and/or written statements made by perpetrators advocating for the destruction of a protected group. However, because direct evidence of intent is, in most cases, lacking, specific intent may be inferred from the surrounding facts and circumstances in which prohibited acts occur.⁴¹

i. When assessing specific intent, consideration ought to be given to all of the evidence collectively.⁴² The circumstances of the case may include:

*"(a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) proof of the mental state with respect to the commission of the underlying prohibited acts, (i) the repetition of destructive and discriminatory acts, (j) the existence of a plan or policy,⁴³ and (k) the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators."*⁴⁴

ii. Ordinarily, "other culpable acts" do not constitute prohibited acts, but they may be considered as evidence pointing towards the specific intent of a perpetrator to destroy the group.⁴⁵

iii. The existence of a plan or policy is not a legal element of the crime of genocide; it may become a possible relevant factor to prove the specific intent.⁴⁶ But just the same, evidence of policies or motives of alleged perpetrators may not be reflective or relevant at all to the issue of intent; motive generally is irrelevant.⁴⁷ Intent (i.e. a psychological state of mind) must attach

to the commission of crimes; policies or motives may, however, be achieved through the commission of crimes.⁴⁸

- iv. Finally, the courts and tribunals have consistently rejected⁴⁹ a knowledge-based approach to genocide i.e., that it is sufficient that the perpetrator knew or ought to have known about the destruction of the protected group.⁵⁰ A perpetrator must “clearly seek[s] to produce the act charged”⁵¹ or, in other words, have “the clear intent to cause the offence”.⁵²

D. MENS REA – INTENT TO DESTROY ‘A PART’ OF THE PROTECTED GROUP

18. It is sufficient that a perpetrator’s specific intent is directed at the destruction of the group ‘in part’ as opposed to the whole. Where only part of a protected group is targeted, that part must constitute a substantial part of that group such that it is significant enough to have an impact on the group, as a whole.⁵³ In determining substantiality, non-exhaustive considerations may include: as a starting point, the numerical size of the targeted part (evaluated not only in absolute terms, but also in relation to the overall size of the entire group); the prominence of the part of the group within the larger whole; whether the targeted part is emblematic of the overall group or essential to its survival; the area of the perpetrators’ activity and control; and the perpetrators’ potential reach.⁵⁴
 - i. In the *Karadžić* and *Mladić* cases at the ICTY, the Bosnian Muslims of Srebrenica were seen as a substantial part of the protected group (i.e. Bosnian Muslims in BiH) notwithstanding that they comprised just 2% of the Bosnian Muslim population. This was because the Trial Chamber found Srebrenica: had a strategic political significance; was designated a UN safe area; carried some emblematic significance; and was controlled by the physical perpetrators (*Mladić*, paras 3553-3554). The Trial Chamber reiterated that neither the absolute nor the relative numbers were determinative and that trial chambers may consider any number of non-exhaustive criteria both objective and subjective (following guidelines in the *Krstić* Appeal Judgment, paras 12-14).
19. As the question of substantiality is one of intent, it follows that the part of the group itself need not be actually targeted by a perpetrator but merely that the perpetrator intends to target ‘a substantial part’ of the protected group.

D. STANDARD OF PROOF & STATE RESPONSIBILITY FOR GENOCIDE

20. The ordinary standard of proof in establishing individual criminal responsibility for genocide in international courts or tribunals is beyond reasonable doubt.⁵⁵ Where an inference is drawn as to specific intent, that inference must be the only reasonable inference from the totality of the evidence.⁵⁶
21. States are prohibited from committing any act of genocide, which means they must refrain from: (a) the commission of prohibited acts by its own organs, agents and/or officials; and/or (b) the commission of prohibited acts by others acting on their behalf or at their direction and control. (Genocide Convention, Art III)⁵⁷ (“State attribution”). States can, thereby, incur responsibility for the commission of genocide.⁵⁸
22. In addition, States as a matter of customary international law and treaty:
 - i. must use “all means reasonably available” to prevent a possible genocide the instant it learns, or should have learned, of a “serious risk of genocide”.⁵⁹ (Genocide Convention, Art I) If genocide is ongoing, the duty to prevent remains engaged and a State: must also not aid or assist possible perpetrators; should cooperate to bring to an end a situation in which genocide is occurring; and should not recognise as lawful the situation created by the breach of the law

relating to genocide.⁶⁰ The obligation, and consequent duty, are greater on a State that has a greater capacity to “effectively influence” a situation.⁶¹

- ii. must not be complicit in prohibited acts committed by others within its State. (Genocide Convention, Art III(e), IV)
 - iii. must punish persons where the crime has occurred. (Genocide Convention, Art I, IV) The latter would necessarily entail efforts at investigating whether genocide has occurred and/or is occurring.
 - iv. must enact necessary legislation to give effect to its obligations under the Genocide Convention. (Genocide Convention, Art V)
23. The attribution of crimes to State organs, agents and officials is not to be confused with other duties on States under customary international law or the Convention, as detailed above. For instance, States have an (ongoing) duty to prevent genocide. That duty necessarily is prior to the commission of genocide and entails a duty to stop (prevent) further prohibited acts once genocide might have begun. The standard of proof to be applied to State responsibility for genocide is set out below.
24. In respect of State attribution, a State absent a person (organ, agent or official) cannot commit a crime as the ILC and the ICJ have rejected the notion of State crimes and there is no consistent State practice or significant jurisprudence relating to the same. However, that does not preclude a finding of State responsibility for genocide where no individual has been convicted of the crime (as the State itself may have hindered prosecution and/or conviction of individuals).⁶²
25. The ICJ has applied a standard of proof “at a high level of certainty appropriate to the seriousness of the allegation” given the “charges of exceptional gravity”⁶³ such that the evidence “is fully conclusive”.⁶⁴ In another case involving genocide the ICJ re-stated with respect to standard of proof that it “requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.”⁶⁵
- i. There is academic/practitioner disagreement about the law relating to State responsibility for genocide and the standard of proof required. This note does not go into the complexity other than provide a summary (as above) of State responsibility for the crime and the standard of proof applied to date in an international forum seized of jurisdiction, namely the ICJ.
 - ii. It should be noted that the ICJ’s ruling on standard of proof in relation to genocide does not apply to CAH as it determined it had no jurisdiction to rule on them in the particular case.⁶⁶

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This legal note, drafted by [Aarif Abraham](#), is provided as an explanatory note only.

Gratitude is owed to other colleagues for their external reviews including Dr [Tatyana Eatwell](#).

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REFERENCES

- 1 The definition of genocide in the Convention is widely accepted as the authoritative definition of the crime of genocide. The crime as defined in the Convention is not only part of customary international law but also reproduced in national and international instruments. On a national level, the definition found in the Convention is reproduced verbatim in the national legislation on genocide of some countries, such as in those of Austria, Germany, Israel and the UK. On an international level, the definitions of the crime of genocide in some international instruments are modelled upon the definition in the Convention, e.g. in the ILC's Draft Codes of 1954, art. 2(10) and of 1996, art. 17; in the ICTR Statute, art. 2.; in the ICTY Statute, art. 4; and in the ICC Statute, art. 6. See F. Jessberger, *The Definition and the Elements of the Crime on Genocide*, in P. Gaeta (eds.), *Oxford Commentaries on International Law: The UN Genocide Convention*, Oxford University Press, 2009, p. 88.
- 2 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, (entered into force 12 January 1951), art. 2; Note the importance of the term 'as such', which shows that the offence 'requires intent to destroy a collection of people who have a particular group identity'. See also ICTY, *Prosecutor v. Milomir Stakić*, Appeal Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 20.
- 3 A Jus cogens or peremptory norm is a norm accepted and recognised by the international community of States as a whole, from which no derogation is permitted. (Art 53, 64 VCLT 1969); According to the International Law Commission (ILC), 'Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination' (ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1., pp. 112-113.)
- 4 *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, 26 February 2007, 430:
- 5 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, (entered into force 12 January 1951), art. II; Note the importance of the term "as such", which shows that the offence "requires intent to destroy a collection of people who have a particular group identity". See ICTY, *Prosecutor v. Milomir Stakić*, Appeal Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 20.
- 6 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, Chamber I, 2 September 1998, paras. 512-515.
- 7 ICTY, *Prosecutor v. Milomir Stakić*, Appeal Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 20.
- 8 *Ibid.*, paras 16-28.
- 9 ICTR, *Prosecutor v Akayesu*, No. ICTR-96-4-T, paras 511, 516, 702; ICTR, *Prosecutor v Rutaganda*, No. ICTR-96-3-T, para. 56; ICTY, *Prosecutor v Jelisić*, No. IT-95-10-T, para. 69.
- 10 ICTY, *Prosecutor v. Goran Jelisić*, Trial Judgment, Case No. IT-95-10-T, Trial Chamber, 14 December 1999, para.72.
- 11 ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), para. 186.
- 12 ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Appeal Judgment, Case No. ICTR-95-1-A, Appeals Chamber, 1 June 2001, para. 151.
- 13 ICTR, *The Prosecutor v. Athanase Seromba*, Appeal Judgment, Case No. ICTR-2001-66-A, Appeals Chamber, 12 March 2008, para. 46; ICTY, *Prosecutor v. Tolimir*, Appeal Judgment, Case No. IT-05-88/2-A, Appeals Chamber, 8 April 2015, para. 203.
- 14 ICTR, *The Prosecutor v. Athanase Seromba*, ICTR-2001-66-A, Appeal Judgment,, 12 March 2008, para. 46. The Appeal Chamber in Krstić held that 'forcible transfer does not constitute in and of itself a genocidal act'. In some circumstances, however, forcible transfer can be an underlying act that causes serious bodily or mental harm, in particular if the forcible transfer operation was attended by such circumstances as to lead to the death of the whole or part of the displaced population. See ICTY, *Prosecutor v. Radislav Krstić*, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, para. 33; ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeal Judgment, Case No. IT-02-60-A, Appeals Chamber, 9 May 2007, para. 123.
- 15 ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Judgment, Case No. IT-99-36-T, Trial Chamber II, 1 September 2004, para. 690; ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Trial Judgment, Case No. IT-02-60-T, Trial Chamber I Section A, 17 January 2005, para. 645.
- 16 See, *Stakić*, Trial Judgment, paras 518-519; *Akayesu* Trial Judgment, para. 505; *Tolimir* Appeal Judgment, paras 225-228
- 17 ICTY, *Prosecutor v. Milomir Stakić*, Trial Judgment, Case No. IT-97-24-T, Trial Chamber II, 31 July 2003, para. 517; ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Judgment, Case No. IT-99-36-T, Trial Chamber II, 1 September 2004, para. 691; ICTY, *Prosecutor v. Vujadin Popović et al.*, Trial Judgment, Case No. IT-05-88-T, Trial Chamber II, 10 June 2010, para. 815. As noted above, the Appeal Chamber in Krstić held that 'forcible transfer does not constitute in and of itself a genocidal act'. In some cases, however, systematic expulsion from homes, which may amount to forcible transfer, may be a potential means of inflicting conditions of life calculated to bring about destruction. See ICTY, *Prosecutor v. Radislav Krstić*, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, para. 33; ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeal Judgment, Case No. IT-02-60-A, Appeals Chamber, 9 May 2007, para. 123.
- 18 ICTY, *Prosecutor v. Milomir Stakić*, Trial Judgment, Case No. IT-97-24-T, Trial Chamber II, 31 July 2003, para. 508.
- 19 *Stakić*, Trial Judgment, para. 519; *Tolimir*, Trial Judgment, para. 762. See also, Mettraux, Guénael. 2019. *International crimes, law and practice*. Volume 1, Volume 1. Oxford: Oxford University Press, para. 10.4.1.3.
- 20 *Blagojević and Jokić* Appeal Judgment, para.123. See also *Krstić* Appeal Judgment, para.33.
- 21 *Tolimir*, Appeal Judgment, paras 209, 225; *Croatia v Serbia*, ICJ Judgment, para. 162.
- 22 *Tolimir*, Appeal Judgment, paras 209. See, for instance, *Prosecutor v Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest, paras 32-40 (12 July 2010).

- 23 Prosecutor v Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest, paras 32-40 (12 July 2010).
- 24 ICTR, The Prosecutor v. Jean-Paul Akayesu, Trial Judgment, Case No. ICTR-96-4-T, Chamber I, 2 September 1998, para. 507.
- 25 K. Kreß, The Crime of Genocide under International Law, *International Criminal Law Review*, 6, 2006, p. 483
- 26 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, (entered into force 12 January 1951), art. 2.
- 27 Elements of Crimes reproduced from the International Criminal Court, Assembly of State Parties First Session, ICC-ASP/1/3, 3-10 September 2002, Art.6(e) (1).
- 28 Convention on the Rights of the Child, 1989, (entered into force 2 September 1990), art. I.; Elements of Crimes reproduced from the International Criminal Court, Assembly of State Parties First Session, ICC-ASP/1/3, 3-10 September 2002, Art.6(e)5).
- 29 Elements of Crimes reproduced from the International Criminal Court, Assembly of State Parties First Session, ICC-ASP/1/3, 3-10 September 2002, Art.6(e) footnote 5.
- 30 ICTR, The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Trial Judgment, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999, para.59.
- 31 ICTY, Prosecutor v. Goran Jelisić, Trial Judgment, Case No. IT-95-10-T, Trial Chamber, 14 December 1999, para.67.
- 32 Rutaganda, ICTR-96-3-T, para. 60.
- 33 ICTY, Prosecutor v. Radislav Krstić, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, para. 25.
- 34 ILC, Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May – 26 July 1996, UN Doc. No. A/51/10, in *Yearbook of the International Law Commission 1996*, vol. 2, part II, New York and Geneva: UN, 1996, at 1, A/CN.4/SER.A/1996/Add.I (Part 2), pp. 90–1: 'As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group'; see also the earlier statement in Report of the ILC to the General Assembly on the Work of its Forty-First Session, UN Doc. A/CN.4/SER.A/1989/Add.1 (part 2), p. 102, para. (4); see further, Ambos, Kai, *Treatise on International Criminal Law, Volume II, The Crimes and Sentencing*. Oxford: OUP, 2014, pp.38.
- 35 ICTY, Prosecutor v. Krstić, IT-98-33-T, Trial Judgment para. 580; ICTR, Prosecutor v. Muhimana, ICTR-95-1B-T, Trial Judgment, para. 497 with further references in n. 456; see also ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), paras. 190, 328.
- 36 ICTY, Prosecutor v. Krstić, IT-98-33-T, Trial Judgment para. 580; ICTY, Prosecutor v. Krstić, IT-98-33-A, Appeal Judgment, para. 25; ICTY, Prosecutor v. Stakić, No. IT-97-24-T, Trial Judgment, para. 519.
- 37 German Federal Constitutional Court (BVerfG), NJW, 54 (2001), 1850 ('Die Zerstörungsabsicht wird ebenfalls weiter verstanden als physisch-biologische Vernichtung'; English translation quoted according to Krstić, No. IT-98-33-T, para. 579); similar, Blagojević and Jokić, No. IT-02-60-T, para. 666; Krajišnik, No. IT-00-39-T, para. 854; Werle, 'Rechtsprechung zur Zerstörungsabsicht', in Hettinger et al., *FS Küper* (2007), pp. 688–9. See further Ambos (2014, Vol II), pp. 39-40, from which this reference is taken.
- 38 German Federal Constitutional Court (BVerfG), NJW, 54 (2001), 1850–1 ('Im völkerrechtlichen Schrifttum wird der Völkermordtatbestand zum Teil als auf die physisch-biologische Vernichtung einer geschützten Gruppe bzw. einer substantiellen Zahl ihrer Mitglieder beschränkt gesehen. Dies ist nach dem Wortlaut der Vorschrift jedoch nicht zwingend'). See further Ambos (2014, Vol II), pp. 39-40, from which this reference is taken.
- 39 Ambos (2014, Vol II), p 40.
- 40 ICTY, Prosecutor v. Krstić, IT-98-33-T, Trial Judgment para. 580.
- 41 ICTR, The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Trial Judgment, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999, para.63.; ICTR, The Prosecutor v. Jean-Paul Akayesu, Trial Judgment, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998, para. 523.
- 42 ICTY, Prosecutor v. Milomir Stakić, Appeal Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 55; ICTY, Prosecutor v. Radovan Karadžić, Rule 98 bis Appeal Judgment, Case No. IT-95-5/18-AR98bis.1, Appeals Chamber, 11 July 2013, para. 56. See also ICTY, Prosecutor v. Tolimir, Appeal Judgment, Case No. IT-05-88/2-A, Appeals Chamber, 8 April 2015, paras 246–248, 253.
- 43 ICTY, Prosecutor v. Mladic, IT-09-92, Trial Judgment, para. 3545; ICTY, Prosecutor v. Goran Jelisić, Appeal Judgment, Case No. IT-95-10-A, Appeals Chamber, 5 July 2001, paras 47-48; ICTY, Prosecutor v. Radislav Krstić, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, para. 34; ICTY, Prosecutor v. Milomir Stakić, Appeal Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 55; ICTR, *Ildephonse Hategekimana v. The Prosecutor*, Appeal Judgment, Case No. ICTR-00-55B-A, Appeals Chamber, 8 May 2012, para. 133; ICTY, Prosecutor v. Radovan Karadžić, Rule 98 bis Appeal Judgment, Case No. IT-95-5/18-AR98bis.1, Appeals Chamber, 11 July 2013, paras 80, 99; ICTY, Prosecutor v. Vujadin Popović et al., Appeal Judgment, Case No. IT-05-88-A, Appeals Chamber, 30 January 2015, paras 430, 440, 468; also ICTY, Prosecutor v. Tolimir, Appeal Judgment, Case No. IT-05-88/2-A, Appeals Chamber, 8 April 2015, paras 246, 248, 253.
- 44 ICTR, The Prosecutor v. Athanase Seromba, ICTR-2001-66-A, Appeal Judgment,, 12 March 2008, para. 178 citing Seromba, Trial Judgment, 21 May 1999, para. 320.

- 45 For instance, the forcible transfer or deportation of a group - a culpable act which is not one of the prohibited acts of genocide (ICTY, Prosecutor v. Milomir Stakić, Trial Judgment, IT-97-24-T, Trial Chamber II, 31 July 2003, para. 519) - may indicate intent to destroy if the perpetrators expel all members of a protected group from a specific area, while detaining only women of child-bearing age, as the culpable act indicates specific intent to destroy by imposing measures intended to prevent births. ICTY, Prosecutor v. Radislav Krstić, Trial Judgment, Case No. IT-98-33-T, Trial Chamber, 2 August 2001, para. 580; ICTY, Prosecutor v. Tolimir, Appeal Judgment, Case No. IT-05-88/2-A, Appeals Chamber, 8 April 2015, paras 230, 254. See also ICTY, Prosecutor v. Vidoje Blagojević and Dragan Jokić, Appeal Judgment, Case No. IT-02-60-A, Appeals Chamber, 9 May 2007, para. 123; ICTY, Prosecutor v. Radislav Krstić, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, paras 33, 133.
- 46 ICTY, Prosecutor v. Jelisić, No. IT-95-10-A, Appeal Judgment, para. 48; ICTY, Prosecutor v. Krstić, IT-98-33-A, Appeal Judgment, para. 225; Prosecutor v. Jelisić, IT-95-10-T, Trial Judgment paras. 100, 101; ICTR, Prosecutor v Kayishema and Ruzindana, ICTR-95-1-A, Appeal Judgment, Judgment (Reasons), para. 138 (1 June 2001); ICTR, Prosecutor v Kayishema and Ruzindana, ICTR-95-1-T, Trial Judgment, para. 276; ICTR, Prosecutor v Simba, ICTR-01-76-A, Appeal Judgment, para. 260 (27 November 2007); ICTY, ICTR, Prosecutor v Popović et al., IT-05-88-T, Trial Judgment, para. 830.
- 47 ICTY, Prosecutor v Jelisić, IT-95-10-A, Appeal Judgment, para. 71; ICTR, ICTR, Prosecutor v Kayishema and Ruzindana Appeal Judgment, para. 161; ICTR, ICTR, Prosecutor v Kanyarukiga, Appeal Judgment, para. 262.
- 48 ICTY, Prosecutor v Jelisić, IT-95-10-A, para. 49, citing ICTY, Prosecutor v Duško Tadić, IT-94-1-A, Appeal Judgment, para. 269 (15 July 2009).
- 49 Although many academics support a knowledge-based approach. See further, Ambos (2014, Vol II), pp. 20-38.
- 50 ICTY, Prosecutor v Jelisić, IT-95-10-A, Appeal Judgment, para. 52; ICTY, Prosecutor v Krstić, IT-98-33, Appeal Judgment, para. 134. See further Ambos (2014, Vol II), pp 23-25, and footnote 178: "Al Bashir, No. ICC-02/05-01/09, paras. 139-40 with n. 154 following the ICJ position in ICJ, Bosnia and Herzegovina v Serbia and Montenegro, Judgment (26 February 2007), and stating (in n. 154) that the 'knowledge-based approach' would only make a difference as to low- or mid-level perpetrators and is, therefore, not relevant for the ICC."
- 51 ICTR, Prosecutor v Akayesu, ICTR-96-4-T, Trial Judgment, para. 498.
- 52 ICTR, Prosecutor v Akayesu, ICTR-96-4-T, Trial Judgment, para. 518.
- 53 ICTY, Prosecutor v. Radislav Krstić, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, para. 8; ICJ, Bosnia and Herzegovina v Yugoslavia, Judgment (26 February 2007), para. 198.
- 54 Ibid., paras 12-14; ICTY, Prosecutor v Mladic, MICT-13-56-A, Appeal Judgment, paras 578-583; ICTY, Prosecutor v Mladic, IT-09-92, Trial Judgment, para. 3528.
- 55 See, for instance: Article 66, Rome Statute; ICTY, Prosecutor v. Stakić, Appeal Judgment, IT-97-24-A, Appeal Judgment, 22 March 2006, paras 219-220; ICTY, Prosecutor v. Vasiljević Appeal Judgment, para. 120; ICTR, Prosecutor v. Ntakirutimana Appeal Judgment, para. 171; ICTR, Prosecutor v. Semanza Trial Judgment, para. 148; ICTR, Prosecutor v. Musema Trial Judgment, para. 108; Čelebići Trial Judgment, para. 601.
- 56 ICTR, Nahimana et al. Appeal Judgment, para. 524; ICTR, Prosecutor v. Sylvestre Gacumbitsi, ICTR-2001-64-A, Appeal Judgment, 7 July 2006; ICTY, Prosecutor v Krstić, IT-98-33, Appeal Judgment, para. 34.
- 57 ICJ, Bosnia and Herzegovina v Yugoslavia, Judgment (26 February 2007), paras 385-386, 391-393; Croatia v Serbia, para. 170-179. See also, Article 8, ILC Articles on State Responsibility.
- 58 ICJ, Bosnia and Herzegovina v Yugoslavia, Judgment (26 February 2007), paras 168-169, 174 and 471, sub-para. (5).
- 59 *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, 26 February 2007, 430: "[...] it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment in concreto, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce."
- 60 Arts 16, 40-41, International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.
- 61 *Ibid.*
- 62 ICJ, Bosnia v Serbia, para. 182.
- 63 ICJ, Bosnia v Serbia, paras 209-210.

⁶⁴ ICJ, *Bosnia v. Serbia*, 2007, para. 209.

⁶⁵ ICJ, *Croatia v Serbia*, paras 177-179.

⁶⁶ The ICJ held it: "has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed erga omnes" (*ICJ, Bosnia v. Serbia*, 2007, para. 147)."