

No. 7

LEGAL NOTE:

GENOCIDE AND GENDER

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ACCOUNTABILITY
UNIT



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LEGAL NOTE:

GENOCIDE AND GENDER

EXECUTIVE SUMMARY

- Genocide is the commission of certain prohibited acts with a specific intent to destroy, in whole or in part, a national, ethnical, racial, or religious protected group, as such.
- Perceptions or beliefs about gender determine why, who and how perpetrators kill or abuse victims in genocidal conflicts.
- Sexual and gender-based violence are one of the early warning signs which, if identified by States, can prevent the escalation of conflict and of genocide.
- Sexual violence and gendered manifestations of prohibited acts of genocide continue to be overlooked in the prosecution and judicial context, though the past decade has seen major improvement.
- The prohibition of genocide is an obligation under the Genocide Convention and part of customary international law. States have the responsibility to prevent and punish the crime of genocide in all its forms and give domestic effect to these obligations including by consideration of sexual and gender-based violence.
- Impunity prevails as specific sexual and gender-based violence considerations in genocide risk assessments and accountability initiatives are still largely ignored.

BACKGROUND

Definition of genocide in international law

1. 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 Genocide is the commission of certain prohibited acts committed with an intent to destroy, in whole or in part, a protected group, as such.² The protected groups are national, ethnical, racial or religious groups and no others.³ They must constitute a group of people with a particular group identity⁴ which must be defined positively and have unique distinguishing characteristics.⁵ They cannot be defined negatively.⁶
 - i. 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.⁷ In determining substantiality, considerations may include: the relative numerical size of the targeted part, the prominence of the part of the group within the larger whole, the area of the perpetrators' activity and control, and the perpetrators' potential reach.⁸
2. The underlying prohibited acts, or *actus reus*, of genocide are: (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.⁹

3. The intent, or *mens rea*, required for genocide is a specific intent to destroy, in whole or in part, a protected group, as such. This specific intent distinguishes genocide from other international crimes as it requires the perpetrator is targeting an individual because they belong to the protected group rather than as an individual.¹⁰ The term 'destroy' is limited to the physical or biological destruction of the group.¹¹

INTERNATIONAL LAW

Elements of genocide

Actus reus: the prohibited acts

4. 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 are not within scope.
 - i. In relation to killing members of the group (2 (a) above) the material elements of killing are equivalent to the elements of murder.¹²
 - ii. In relation to (2 (b) above), causing serious bodily or mental harm to members of the group, 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; 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

- iii. In relation to (2 (c) above), deliberately inflicting on the group conditions of life calculated to destroy, 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.¹⁶ The acts must be carried out 'deliberately'.¹⁷
- iv. In relation to (2 (d) above), imposing measures intended to prevent births within the group, intended measures may be evidenced, *inter alia*, by 'sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriages'.¹⁸ 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.¹⁹
- v. In relation to (2 (e) above), forcibly transferring children of the group to another group, the forcible transfer must be of at least one child from the protected group to another.²⁰ A child is a person under the age of 18.²¹ 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.²²

Mens rea: specific intent

5. The *mens rea* required for genocide is 'a specific intent to destroy, in whole or in part, a protected group, as such' (see para. 3 above).²³
6. As direct evidence of specific intent is in most cases lacking, intent may be inferred from the surrounding facts and circumstances.²⁴ These may include: direct oral and/or written statements made by perpetrators advocating for the destruction of a protected group; the general context; the perpetration of other culpable acts systematically directed against the same group; the scale of the atrocities committed; the systematic targeting of victims on account of their membership in a particular group; proof of the perpetrators' mental state with respect to the commission of the underlying acts; the repetition of destructive and discriminatory acts; or the existence of a plan or policy.²⁵
7. In assessing specific intent, an accused's intention to destroy a protected group should not be considered separately through each of the prohibited acts. Instead, consideration ought to be given to all of the evidence collectively.²⁶
8. Other culpable acts which do not constitute prohibited acts may also be considered as evidence of specific intent.²⁷

Gender considerations

Judicial considerations of gender and genocide

9. Gendered manifestations of prohibited acts have traditionally been overlooked in the judicial context, as studies show that more attention is given to the way civilians in general experience conflict, rather than to how men and women experience conflict differently because of their gender.²⁸
10. As the international community began to move away from the perception that sexual violence is 'an inevitable side-effect of conflict',²⁹ substantial progress was made in international law. Notably, the judgments from the International Criminal Tribunal for Rwanda (ICTR) developed this area of international law, for instance, having clarified that rape and other forms of sexual violence can constitute genocide if the acts are committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.³⁰
11. Judicial discussion on the wider relevance of gender remains scarce, despite the predominance of sexual or gender-based violence in genocidal conflicts.³¹ This lack of judicial consideration impedes transitional justice, as the impunity of perpetrators effectively means the victims continue to suffer from lack of accountability or recognition.³² Moreover, this shortcoming further hinders the potential for prevention or early cessation of genocide where it is occurring,³³ as the swift identification of gendered violence may help States and/or the international community to end the proliferation of human rights violations which are known to create environments conducive to the commission of atrocity crimes.³⁴

Perceptions or beliefs about gender and the commission of crimes

12. Specific perceptions or beliefs about gender determine why, who and how perpetrators kill or abuse victims in genocidal conflicts.³⁵ During conflict, males are commonly seen as 'protectors' and 'martyrs' and females as 'protected' and 'victims'.³⁶ Because perpetrators see males as a greater physical threat over females, males are more likely to be victims of mass killings in conflicts, while females are more likely to be victims of sexual violence.³⁷
13. The objectives of the perpetrators are reflected in their chosen war tactics: by killing men, the perpetrators eliminate their greatest threat, and by abusing women, they not only reaffirm concepts of male dominance and female subordination, but also attack the masculinity of the men in the protected group, for failing to protect their wives, mothers, and daughters.³⁸
14. Females are the primary victims of sexual and 'slow-death' violence³⁹ because they are seen as 'bearers of community and culture',⁴⁰ responsible for the existence and survival of a national, ethnical, racial or religious group.
15. By attacking the reproductive capacity of women, the perpetrators impede the survival of a protected group. Sexual violence, aside from inflicting corporal harm, also generates a number of mental harms, including refusal and fear of relationships with the opposite sex, PTSD, stigma, reduced access to services and voluntary or forced ostracisation.⁴¹
16. Rejection from the original community is a particularly common consequence of rape, especially when rape survivors give birth to a child from a forced pregnancy,⁴² a 'war tactic' commonly used by perpetrators in genocidal conflicts.⁴³
17. Gender-based sexual violence – which could fall under both prohibited acts (2 (b) and (c) above)⁴⁴ – may also be indicative of a specific intent to destroy if the violence is designed to generate such deep reluctance towards sexual relationships, as to prevent births within the community.⁴⁵
18. The judgment in *Prosecutor v. Krnojelac* suggested that specific intent may also be inferred where suicide is a foreseeable consequence of the perpetrators' acts or omissions.⁴⁶ Seeing as survivors of sexual violence often die by suicide,⁴⁷ the foreseeable consequences of the perpetrators' acts may be construed as genocidal killing.
19. Although males are victims of sexual violence too⁴⁸ they are largely omitted from trials of this nature,⁴⁹ mainly because the already-limited legal attention given to gendered harm is given to female survivors, due to the widespread presumption that 'rape is a female issue'.⁵⁰ Perpetrators rape men to attack social norms of masculinity defined by strength and dominance;⁵¹ being 'sexually overpowered' by perpetrators results in intense psychological trauma, making male survivors unable to form intimate relationships or build a family⁵² just like female survivors. Specific intent to destroy may be found

in these cases as this type of gender-based sexual violence is intended to limit reproductive capacity by preventing births within a group.

Biological sex and the commission of crimes

20. Biological sex also plays a significant role with regards to the way perpetrators manifest their specific intent. By destroying the group's ability to reproduce – mostly by inflicting irreversible damage to female or male reproductive organs through rape or mutilation – the perpetrators' acts may indicate specific intent to destroy the group.⁵³
21. Sexual mutilation and rape are another common 'war tactic' in genocidal conflicts,⁵⁴ as evidenced in the findings of the International Criminal Tribunal for the Former Yugoslavia and the ICTR.⁵⁵
22. The extermination of one sex raises procreative implications due to an imbalance in the sex ratio in the group, which can demonstrate the existence of a specific intent to destroy.⁵⁶ For instance, in Srebrenica, the direct killing of males combined with the forced expulsion of females was evidence of a specific intent to destroy, as one sex was eliminated and the other physically separated.⁵⁷
23. In armed conflict situations, male and female children also suffer from different forms of violence based on their gender.⁵⁸ Captured or abducted male children are generally forced to join the perpetrators' military forces against their own group⁵⁹ or are targets of killings because they are seen as 'potential future combatants'.⁶⁰

Female children are either killed or sexually enslaved and forced to serve the perpetrators.⁶¹

24. Children are also told to dissociate with their past and are indoctrinated to follow the perpetrators' practices, which include the demonisation and rejection of their original group.⁶² Post-conflict, some children are forced to stay with the perpetrators, while the ones who return either suffer from rejection and ostracisation from the original community, or from trauma resulting from the abduction and ill-treatment suffered at the perpetrators' hands.⁶³ Specific intent to destroy may thus be inferred from the surrounding circumstances when perpetrators foresee the destructive consequences and resulting 'social death' of transferring children from their protected group.⁶⁴

ACCOUNTABILITY FOR GENDERED MANIFESTATIONS OF GENOCIDE

State obligations and individual criminal responsibility

25. The following acts are punishable under the Convention: (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.⁶⁵ That is the case whether the individuals concerned are constitutionally responsible rulers, public officials or private individuals.⁶⁶ States have an obligation to not commit genocide, to prevent genocide and to punish individuals where the genocide has occurred.⁶⁷

States must also enact necessary legislation to give effect to the Convention.⁶⁸

26. As a *jus cogens* norm, the international community recognises the prohibition of genocide, and thus the primary responsibility of States to protect populations from genocide.⁶⁹ *Jus cogens* are overriding norms in international law which cannot be set aside under any circumstances.⁷⁰
27. The UN Security Council (UNSC) has endorsed more than 50 resolutions with regard to the responsibility to protect from genocide, while the Human Rights Council has endorsed 20 of a similar nature, specifically urging Member States to work on preventing situations that could lead to atrocity crimes and on taking early action.⁷¹
28. Nevertheless, as of 2023, 40 out of 193 UN Member States are still not party to the Convention on the Prevention and Punishment of the Crime of Genocide⁷² and 16 have reservations on its dispute resolution clause, which affords the International Court of Justice jurisdiction in case of dispute as to the application, interpretation or fulfilment of the Convention.⁷³
29. Gender-based violence in conflicts mostly manifests itself as sexual violence, which may in itself constitute a violation of the right to life, prohibition of torture, inhuman or degrading treatment, prohibition of discrimination, right to family life, prohibition of slavery and prohibition of trafficking.⁷⁴ All these acts are in breach of international human rights law (IHRL), as well as customary international law and rules of war.⁷⁵

30. States are under the responsibility to prosecute atrocity crimes like genocide committed by individuals within their territory under rules of international law and, in particular, in line with the principle of complementarity between the International Criminal Court (ICC) and national jurisdictions of States Parties to the Rome Statute.⁷⁶ If they fail to do so, other States are permitted to prosecute such alleged crimes under universal jurisdiction,⁷⁷ while the UNSC reserves the authority to refer cases to the ICC (where a State is not party to the Rome Statute) and to establish *ad hoc* tribunals.⁷⁸
31. While there is no binding human rights treaty directed at eliminating sexual or gender-based violence,⁷⁹ Article 7 of the Rome Statute criminalises persecution on the basis of gender as a crime against humanity.⁸⁰ This crime has recently been charged at the ICC on three occasions related to the crimes committed in Darfur,⁸¹ but the general lack of judicial precedents for this crime limits the scope of implementation of the article.⁸²
32. Sexual violence in general is under-represented in major international convictions,⁸³ mostly due to the absence of comprehensive prosecution strategies which incorporate effective sexual violence investigations and collection of evidence.⁸⁴ The recognition of a separate crime of 'gender-based persecution'⁸⁵ could pave way for a more effective implementation of justice internationally, as the investigation and prosecution of such atrocity crimes would give wider attention to the roots and patterns of sexual and gender-based violence.⁸⁶ This approach may be also appropriate in relation to risk-assessment,

prevention and prosecution strategies for crimes of genocide.

Genocide prevention from a gendered perspective

33. Gender-based violence in genocidal conflicts is a widespread occurrence, documented by all historical conflicts. Thus, the most effective way to prevent genocide is by identifying early warning signs which often manifest themselves as gendered crimes. As the existence of a serious risk of genocide is generally seen to arise with the initiation of mass killings, early warning signs characterised by sexual or gender-based violence are rarely taken into consideration on their own.⁸⁷ That is because of the persistence of incorrect beliefs and perceptions about gender and partly because clear specific intent to destroy is hard to establish or infer before larger-scale atrocity crimes, such as mass killings, take place.⁸⁸ This makes it hard to assess risk, as sexual and gender-based violence may be scattered across territories or remain unreported for long periods of time.
34. Moreover, although the UN Framework of Analysis for Atrocity Crimes enumerates common signs of genocidal intent,⁸⁹ there is no comprehensive text to date which differentiates and delineates the risk factors from a gender-based perspective. Gender-specific analyses of risk factors leading to genocide, as well as gender-specific protections from genocide should be adopted by the international community to ensure a more thorough protection from mass atrocity crimes.

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3. ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, Chamber I, 2 September 1998, paras. 512-515.
4. ICTY, *Prosecutor v. Milomir Stakić*, Appeal Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 20.
5. *Ibid.*, paras. 16-28.
6. ICTY, *Prosecutor v. Goran Jelisić*, Trial Judgment, Case No. IT-95-10-T, Trial Chamber, 14 December 1999, para. 72.
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14. ICTR, *The Prosecutor v. Athanase Seromba*, Appeal Judgment, Case No. ICTR-2001-66-A, Appeals Chamber, 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 also 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.
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16. 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 the physical destruction of the targeted group in whole or in part. See also 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.
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27. 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, Case No. IT-97-24-T, Trial Chamber II, 31 July 2003, para. 519) – may indicate specific 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. See also 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.
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CONTACT INFORMATION

This legal note is published to provide general information and not as legal advice. Please contact a member of the Accountability Unit Legal Team or Research Team if you would like to discuss the contents of this note.

This legal note was drafted by **Benedetta Locatelli** and reviewed by **Aarif Abraham**, who also made some contributions to the draft. It was also reviewed by Dr. **Tatyana Eatwell**.

Accountability Unit
Reg. Charity No: 1166018
Website: accountabilityunit.org
LinkedIn: Accountability Unit
Twitter: [AU_Feed](#)