

**Questions and Answers on the Crime of
Genocide (summary report)**
Legal Briefing Note, August 2018

ICJ Global Redress and Accountability Initiative

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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

Note: this document is a summary version of a 36-page report published on 27 August 2018 by the Geneva-based International Commission of Jurists. The full report should be referred to for a full legal analysis of the crime of genocide.²

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

² <https://www.icj.org/icj-releases-legal-q-a-on-crime-of-genocide/>

Note on the terminology of the term “genocide” in Burmese language.

Common translations of the term genocide into the Burmese language are legally incorrect and contribute to misunderstandings about the nature of the crime. Genocide is generally translated in Burmese language as “lu myo tone that pyet mu” (လူမျိုးတုံးသတ်ဖြတ်မှု) or “lu myo tone thoke tin mu” (လူမျိုးတုံးသုတ်သင်မှု). Within these two terms which have a similar meaning as each other, the term “lu myo tone” (လူမျိုးတုံး) is commonly understood as meaning that “the entire population of a particular group was killed, or a large number of that particular group was killed”.

This meaning is inconsistent with the legal definition of genocide, found in the UN Convention on the Prevention and Punishment of the Crime of Genocide. The Convention lists five different acts that constitute the crime of genocide if “committed with intent to destroy, in whole or in part” a particular group. As a matter of law, killings are not required in order for the crime of genocide to have been committed. So the common translation can lead to misunderstandings.

While capturing the meaning of genocide in translation remains difficult, the most appropriate translation in the Burmese language appears to be “myo nwel su ta su ko myo phyoke chin” (မျိုးနွယ်စုတစ်စုကို မျိုးဖြတ်ခြင်း) or “oke su ta su arr myo phyoke chin” (အုပ်စုတစ်ခုအား မျိုးဖြတ်ခြင်း). This term better reflects the legal definition in the Convention, that does not limit genocidal acts to killings alone. Other actors, including the United Nations Fact Finding Mission, have also used this definition.³

³ See: Independent International Fact Finding Mission on Myanmar, “Burmese Summary Report,” 24 August 2018, page 35, footnote 12. For further discussion and examples of terminology, see: Dr Myint Zaw, “Genocide and Crimes Against Humanity,” 2018.

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.⁴ 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 experts 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.⁵

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".⁶

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."⁷ 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.⁸

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.

⁴ The Genocide Convention has 149 States Parties, including Myanmar.

⁵ 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.

⁶ "Report of the Independent International Fact-Finding Mission on Myanmar," 27 August 2018, A/HRC/39/64.

⁷ 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.

⁸ 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?

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.

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.

3. What does "genocidal intent" mean legally?

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.

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

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.

5. How have different jurisdictions approached genocidal intent factually?

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.

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.

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*.

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.

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?

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.