AL-HAQ

THE
GENOCIDE
SERIES

AL-HAQ LEGAL BRIEF I:

SPECIAL INTENT (*DOLUS SPECIALIS*) REQUIRED TO CLASSIFY ACTS AS GENOCIDE

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INTRODUCTION

Genocide is defined under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (emphasis added) "as 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."[1]

This brief will discuss the special "intent to destroy", also described as the *dolus specialis*, that must accompany any of those acts enumerated in Article II in order to characterise such acts as Genocide.

In order to do so, this brief will assess the overall notion of special intent *(dolus specialis*) (**Part I)**, and address various aspects of the definition of genocidal intent, namely the "intent to destroy" (**Part II**), "a national, ethnical, racial or religious group" (**Part III**), "in whole or in part" (**Part IV**), and "as such" (**Part V**). It will subsequently assess the evidence required in order to prove that certain acts were committed, or are being committed, with such special intent (**Part VI)**, addressing both individual liability (**Part VI (a)**), and State responsibility (**Part VI (b))**, and conclude **(Part VII)**.

I. SPECIAL INTENT

Genocide requires a *dolus specialis* (a **special intent**), not merely a *dolus directus*[2] – *i.e.,* the acts enumerated in Article II must be accompanied not merely by an intent to commit them in the immediate sense (*e.g.,* an intent to murder, for the act of killing), but must be accompanied by an intent to – through those acts – destroy a protected group in whole or in part, as such. Hence, 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, and must be established in addition to it:[3]

> "*Genocide is distinct from other crimes inasmuch as it embodies a special intent or dolus specialis. Special intent of a crime is the specific intention, required as a constitutive element of the crime,*

1 This definition corresponds to the definitions laid down under Article 2(2) of the Statute of the International Criminal Tribunal for Rwanda (ICTR); Article 4(2) of the International Criminal Tribunal for the former Yugoslavia; Article 5 of the Rome Statute of the International Criminal Court; and Article 4 of the Statute of the Extraordinary Chambers in the Courts of Cambodia (Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)).

2 *Prosecutor v. Bemba et al*., Trial Chamber VII, Public Redacted Version of Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (19 October 2016): "*Dolus directus in the first degree requires that the witness knows that his or her acts or omissions will bring about the material elements of the offence.*"

3 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Bosnia v. Serbia), Judgment, I.C.J. Reports 2007,* para. 187:
"In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "intent to destroy, in whole or in part, . . . [the protected] group, as such". It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or dolus specialis; in the present Judgment it will usually be referred to as the "specific intent (dolus specialis)".

> *which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."*[4]

While the International Criminal Tribunal for the former Yugoslavia (ICTY) remarked that the *dolus specialis* cannot be equated to *dolus eventualis* (an acceptance of the consequence of the risk that accompanies the acts (recklessness)),[5] this notion has been subject to continued debate, especially as to whether knowledge of group destruction resulting from a perpetrator's acts – and the continuation of such acts with such knowledge – constitutes proof of an underlying genocidal intent.[6]

II. INTENT TO DESTROY

A. The intended v. effective destruction of a group, in whole or in part

To establish that such genocidal intent, *i.e.,* the intent to destroy a group in whole or in part, exists, it is not required for the protected group to have been effectively destroyed, in whole or in part. It is the intended destruction, not the actual destruction, that constitutes the mental element of the crime of genocide:[7]

> *"In addition to the material elements enumerated in (a) through (e) in Article 2(2), the specific intent for genocide requires that the perpetrator target his victims because of their membership of a protected group, with the intent to destroy at least a substantial part of that group… The actual destruction of a substantial part of the group is not a required material element of the offence, but may assist in determining whether the accused intended to bring about that result."*[8]

It is also not required to demonstrate that the acts committed constitute the most effective or efficient manner to pursue the purpose of group destruction, in whole or in part. Perpetrators could have been restricted by global attention or the presence of observers. However, where the actual destruction of a group, or a part thereof, has occurred, or where such effective methods have been adopted by perpetrators, they can assist in demonstrating the presence of an underlying genocidal intent:

4 *Ibid*.; *The Prosecutor v. Akayesu,* Trial Chamber I, Judgment, ICTR-96-4-T (2 September 1998) (*Akayesu,* Trial Judgment), para. 498.

5 *Prosecutor v. Stakić*, Trial Chamber II, Judgment, IT-97-24-T (31 July 2003) (*Stakić*, Trial Judgment), para. 587:*"The technical definition of dolus eventualis is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of death."*

6 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Declaration of Intervention by Ireland pursuant to Article 63 of the Statute of the International Court of Justice, https://icj-cij.org/sites/default/files/case-related/178/178-20241220-int-01-00-en.pdf,* paras. 22-30; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Declaration of Intervention by Ireland pursuant to Article 63 of the Statute of the International Court of Justice*, https://www.icj-cij.org/sites/default/files/case-related/192/192-20250106-int-01-00-en.pdf, paras. 24-32. See also *e.g.* Ambos, Kai. "What does 'intent to destroy' in genocide mean?", *International review of the Red Cross* (2005), Volume 91, Issue 876; Triffterer, Otto. "Genocide, its particular intent to destroy in whole or in part the group as such", *Leiden Journal of International Law* (2001), Volume 14, Issue 2; Quigley, John B. "Legal Standard for Genocide Intent: An Uphill Climb for Israel in Gaza Suit", *EJIL:Talk!* (14 March 2024), https://www.ejiltalk.org/legal-standard-for-genocide-intent-an-uphill-climb-for-israel-in-gaza-suit/; Agenjo, Adrián. "Expanding the Limits of Genocidal Intent: a protective interpretation", *Völkerrechtsblog* (18 May 2024), https://voelkerrechtsblog.org/expanding-the-limits-of-genocidal-intent/. See also *supra* Part VI (a), section on 'Genocidal intent and knowledge or awareness'.

7 See *Akayesu*, Trial Judgment, para. 497.

8 *The Prosecutor v. Ndindabahizi,* Trial Chamber I, Judgment and Sentence, ICTR-2001-71-I (15 July 2004) (Ndindabahizi, Trial Judgment), para. 454.

> *"In determining that genocide occurred at Srebrenica, the cardinal question is whether the intent to commit genocide existed. While this intent must be supported by the factual matrix, the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent. The international attention focused on Srebrenica, combined with the presence of the UN troops in the area, prevented those members of the VRS Main Staff who devised the genocidal plan from putting it into action in the most direct and efficient way. Constrained by the circumstances, they adopted the method which would allow them to implement the genocidal design while minimizing the risk of retribution."*[9]

Other offences: a range of other acts attached to genocide are also considered offences *as per* the Genocide Convention. Some of those offences are inchoate, *i.e.,* they can be determined to have taken place without an actual finding of genocide. These include: the attempt to commit genocide, conspiracy to commit genocide, and incitement to commit genocide. However, those offences still require a finding of genocidal intent on part of those engaged in them.[10]

B. Physical and biological destruction

The term "destroy" in the definition of genocidal intent has often been characterized by international Courts and Tribunals as **limited to the physical or biological destruction** of the group. In other words, the characterization of destruction is often viewed as excluding destruction of a group in terms of linguistic, cultural, or sociological destruction, or other elements which give to a specific group its own identity distinct from the rest of the human community:

> *"…[h]ence, 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."*[11]

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.[12]

Actus reus: A limitation of the notion of "destruction" to physical or biological destruction is not only relevant to the *mens rea*, but also to the *actus reus*.[13] With respect to *e.g.,* Article II(c) the International Court of Justice (ICJ) found that:

> *"the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the*

9 *Prosecutor v. Krstić*, Appeals Chamber, Judgment, IT-98-33-A (19 April 2004) (Krstić, Appeal Judgment), para. 32.

10 See also Ambos, Kai. "What does 'intent to destroy' in genocide mean?", *International review of the Red Cross* (2005), Volume 91, Issue 876.

11 *Prosecutor v. Krstić*, Trial Chamber, Judgment, IT-98-33-T (2 August 2001) (Krstić, Trial Judgment), para. 580. See Krstić, Appeal Judgment, para. 25; *Report of the International Law Commission on the work of its Forty-eighth Session*, Yearbook of the International Law Commission 1996, Vol. II, Part Two, pp. 45-46, para. 12

12 *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, http://www.preventgenocide.org/law/convention/drafts/.

13 See also, *e.g., South Africa v. Israel, Declaration of Intervention by the United Mexican States pursuant to Article 63 of the Statute of the International Court of Justice,* https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-int-01-00-en.pdf, paras. 34-37, in which Mexico clarifies its understanding of Article II (b) (physical and mental harm) as to include harm resulting from "*the massive destruction of cultural property and the eradication of any cultural symbol related to a group*", and the "*intentionally targeting or destruction of the cultural legacy attached to the identity of a group*".

> *elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. . . "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." (Report of the International Law Commission on the work of its Forty-eighth Session, Yearbook of the International Law Commission 1996, Vol. II, Part Two, pp. 45-46, para. 12.) (…) The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be genocidal act within the meaning of Article II of the Genocide Convention."*[14]

Mens Rea evidence: However, while the ICJ deemed such destruction did not constitute a relevant genocidal act, and while the intent to destroy a group culturally, linguistically, or socially has not been deemed to constitute genocidal intent by international criminal tribunals *per se*, **acts of cultural and social destruction could still be aimed at achieving the physical and biological destruction of the group, or could still accompany it.** In the *Krstić* Case the International Criminal Tribunal for the former Yugoslavia (ICTY) endorsed the observation that (emphasis added):

> *"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."*[15]

In the *Blagojević and Jokić* case, the ICTY Trial Chamber made the following observation regarding forced transfer, which could apply *mutatis mutandis* to other acts, such as cultural or social destruction:

> *"The Trial Chamber finds in this respect that the physical or biological destruction of a group is not necessarily the death of the group members. 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. **A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land. The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members.** In such cases the Trial Chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was. The Trial Chamber emphasises that its reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical or biological destruction."*[16]

The ICTY also acknowledged in the *Krstić* trial that "recent developments" had moved to recognise "cultural genocide" as genocide – *i.e.,* had moved to consider the destruction of a group, in whole or in part, included its destruction beyond physical and biological extermination. It cited, for example, the Federal Constitutional Court of Germany's December 2000 ruling that:

14 *Bosnia v.* Serbia, Judgment of 26 February 2007, para. 344.

15 See *Krstić*, Trial Judgment, para. 580. See also *ibid.*; *Prosecutor v. Popović et al.*, Trial Chamber II, Judgment, IT-05-88-T (10 June 2010) (*Popović et al.*, Trial Judgment), para. 822.

16 *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Judgment, IT-02-60-T (17 January 2005) (*Blagojević and Jokić*, Trial Judgment), para. 666. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, para. 136.

> *"…the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the social existence of the group [...] the intent to destroy the group [...] extends beyond physical and biological extermination [...] The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group".*[17]

Nevertheless, the Trial Chamber ruled "despite" these "recent developments" that 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."[18]

Practitioners and academics have continued to argue however that the position of the international tribunals on cultural genocide is not an accurate reflection of how genocidal processes occur and groups are destroyed; nor an accurate reflection of the Genocide Convention – as it is "not consistent with the general principles of interpretation laid down in the Vienna Convention on the Law of Treaties (VCLT)".[19] This especially so in light of the various manners in which indigenous groups have been destroyed, in whole or in part. In that context:

> *"interpreting genocidal intent as encompassing only physical and biological destruction does not accord with the ordinary meaning of the word "destruction" in its context (i.e. the prohibited acts) and in light of the object and purpose of the Convention. Moreover, a restrictive interpretation of the term "destroy" leads to absurd results, particularly the forcible transfer of children, but also many non-lethal genocidal conduct encompassed in the definition, which can hardly be reconciled with any of those aims."*[20]

III. "A NATIONAL, ETHNICAL, RACIAL OR RELIGIOUS GROUP"

In order to constitute genocidal intent, the intent to destroy must be aimed at a specific group, and not at a mere amalgam of persons. The type of groups that are protected under the Convention or under the customary law prohibition on genocide, and how to determine whether a collective of individuals constitute such a protected group, are discussed further in 'Al-Haq Legal Brief II: Protected Groups under the Genocide Convention'.

17 Germany, Federal Constitutional Court, 2 BvR 1290/99, 12 December 2000, para. (III)(4)(a)(aa), in *Krstić,* Trial Judgment, para. 580.

18 *Ibid.* See also *Krstić,* Appeal Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, paras. 48, 52-53:
"*The proposition that the intended destruction must always be physical or biological is supported by much in the literature. However, the proposition overlooks a distinction between the nature of the listed "acts" and the "intent" with which they are done. From their nature, the listed (or initial) acts must indeed take a physical or biological form, but the accompanying intent, by those acts, to destroy the group in whole or in part need not always lead to a destruction of the same character. It is the group which is protected. A group is constituted by characteristics – often intangible – binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.*"

19 Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *A Legal Analysis of Genocide: supplementary report of the National inquiry into Missing And Mudered Indigenous Women and Girls* (2019), https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf, p. 21.

20 *Ibid.* See also Bonnie, St. Charles, "You're on Native Land: The Genocide Convention, Cultural Genocide, and Prevention of Indigenous Land Takings", *Chicago Journal of International Law,* Vol. 21 No. 1 (2020), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1783&context=cjil, pp. 242-247.

IV. "IN WHOLE OR IN PART"

The intent to destroy a protected group can be directed at the entirety of the protected group, or at a part thereof. 'Al-Haq Legal Brief II: Protected Groups under the Genocide Convention' further elaborates on what the criteria are for determining members of a group constitute a "part" of the group for the purpose of determining the presence of genocidal intent – addressing the requirement of **substantiality**, and addressing how case-law has dealt with the destruction of parts of a group located in a **geographically limited area**.

V. "AS SUCH"

The requirement to destroy a group "as such" has been taken to refer to either the purpose of a genocidal act – *i.e.,* the underlying intent must be to destroy a protected group in whole or in part – or, conversely, is understood to refer to the 'motive' of the destruction (as a consequence of the propositions regarding motive preceding the adoption during the Genocide Convention's *travaux préparatoires* of the term "as such").[21]

First, it should be highlighted that genocidal intent is a separate and independent matter from, and should not be confused with, any personal motives prompting the actions of a perpetrator. Genocidal 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 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.[22]

Second, in relation to the *travaux préparatoires,* the International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber in *Niyitegeka* clarified that the term "as such" referred to the special intent required, and not to the motive underlying the acts of a perpetrator.[23] It did so invoking the Appeals Chamber's ruling in *Kayishema and Ruzandina*,[24] and the ICTY Appeals Chamber's findings in *Jelisić*, which stated that:

> *"The Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide."*[25]

In both those judgments the respective Tribunals' Appeals Chambers made reference to the *Tadić* Case, in which the same question had come up with respect to crimes against humanity. The Appeals Chamber there had highlighted the absurdity of a potential situation in which *e.g.,* a high-ranking SS official would be entitled to an acquittal for having participated in the genocide of Jewish and Roma people, invoking he did so only for the purely personal motive of fearing losing his job. It concluded that, for these and other reasons, the "inscrutability of motives" was subsequently deemed irrelevant in criminal law.[26]

Third, the question remains – what then is the requirement with respect to "intent" that is encompassed in the definition of genocidal intent by the words "as such"? In the *Bosnian Genocide* Case, the ICJ observed that (emphasis added):

21 Schabas, William A. *Genocide in International Law: The Crime of Crimes*, (Cambridge, Cambridge University Press, 2009), Second Edition, pp. 294-306.

22 See *e.g,. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council resolution 1564 (2004) of 18 September 2004,* S/2005/60 (1 February 2005), para. 493.

23 *Niyitegeka v. The Prosecutor,* Appeals Chamber, Judgment, ICTR-96-14-A (9 July 2004) (*Niyitegeka*, Appeal Judgment), paras. 49-53.

24 *Kayishema and Ruzandina v. The Prosecutor,* Appeals Chamber, Judgment (Reasons), ICTR-95-1-A (1 June 2001) (*Kayishema and Ruzindana*, Appeal Judgment), para. 161.

25 *Prosecutor v. Jelisić*, Appeals Chamber, Judgment, IT-95-10-A (5 July 2001) (*Jelisić*, Appeal Judgment), para. 49.

26 *Prosecutor v. Tadić,* Appeals Chamber, Judgment (15 July 1999) (*Tadić*, Appeal Judgment), paras. 255-270.

> *"In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "intent to destroy, in whole or in part, . . . [the protected] group, as such". It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred.... **It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group**."*[27]

In other words, the terms "as such" entail that the crime of genocide requires on the one hand the intent to destroy a collection of people, and on the other hand, to do so because of their particular group identity based on nationality, race, ethnicity, or religion:[28]

> *"The term "as such" has the effet utile of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term "as such" clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting "as such" to mean that the proscribed acts were committed against the victims because of their membership in the protected group, but not solely because of such membership."*[29]

What characterizes genocide remains that, although the individual victims of the underlying act are selected by reason of their membership in a group, "the victim of the crime of genocide is the group itself and not only the individual".[30] In the *Sikirica* case at the ICTY, the Trial Chamber expanded upon this notion 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"*[31]

Fourth, as a personal motive is legally irrelevant in the context of the genocidal intent, the existence of a personal motive does "not preclude the possession of genocidal intent".[32] This is especially relevant where military considerations are invoked by a party. If such considerations in fact constitute "the motives underlying its conduct", they do not preclude a finding of genocidal intent.[33]

27 *Bosnia v. Serbia, Judgement of 26 February 2007, para. 187.*

28 *Niyitegeka*, Appeal Judgment, para. 53. *Prosecutor v. Stakić*, Appeals Chamber, Judgment, IT-97-24-A (22 March 2006) (Appeal Judgment), para. 20; *Prosecutor v. Brđanin* Trial Chamber II, Judgment, IT-99-36-T (1 September 2004) (*Brđanin*, Trial Judgment), paras. 698-699.

29 *Niyitegeka*, Appeal Judgement, para. 53.

30 *Akayesu*, Trial Judgment, para. 521. See also *Brđanin*, Trial Judgment, para. 698; *Bosnia v. Serbia, Judgement of 26 February 2007*, para. 187.

31 *Prosecutor v. Sikirica et al.*, Trial Chamber III, Judgment on Defence Motions to Acquit, IT-95-8-T (3 September 2001) (*Sikirica et al.*, Judgment on Motions to Acquit), para. 89.

32 *Simba v. The Prosecutor*, Appeals Chamber, Judgment, ICTR-01-76-A (27 November 2007) (*Simba*, Appeal Judgment) paras. 88 and 269; *Jelisić*, Appeal Judgment, para. 71.

33 Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/32/CRP.2 (15 June 2016), para. 158: "Motives, such as the desire for territorial control of the Sinjar region or the sexual gratification that resulted from the sexual enslavement of Yazidi women and girls, do not preclude ISIS fighters from having the specific intent to commit genocide." See further *The Gambia v. Myanmar, Déclaration d'Intervention du Royaume de Belgique en vertu de l'Article 63 du Statut de la Cour Internationale de Justice,* https://icj-cij.org/sites/default/files/case-related/178/178-20241212-int-01-00-fr.pdf, p. 10.

VI. EVIDENCE OF THE PRESENCE OF *DOLUS SPECIALIS*

Establishing genocidal intent is usually a difficult endeavour, as perpetrators rarely declare such intent openly, explicitly and unequivocally.[34] Case-law from the International Criminal Tribunals and from the International Court of Justice however has firmly established the types of evidence that can be relied upon in order to establish the presence of an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The ICTR and ICTY therefore repeatedly clarified that "[*i*]*n the absence of explicit, direct proof, the dolus specialis may therefore be inferred from the relevant facts and circumstances*."[35] Some examples of general "facts and circumstances", from which such proof may "be inferred", include:

> *"the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive discriminatory acts."*[36]

Examples may also include the general political doctrine that gave rise to the acts and may include acts which the perpetrators consider to violate the very foundations of the group (such as a project of "ethnic cleansing"), even though they are not the acts of genocide listed in the Convention or the Rome Statute ((a)-(e)).[37]

Only reasonable inference: When the ICJ addressed the question of inferring intent from facts and circumstances in the *Bosnia v. Serbia* case in 2007, it stressed that (emphasis added):

> *"[t]he dolus specialis, 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 stated 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****".*[38]

34 *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. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from 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. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."

35 *Ibid.; Rutaganda v. The Prosecutor*, Appeals Chamber, Judgment, ICTR-96-3-A (26 May 2003) (*Rutaganda*, Appeals Judgment), para. 525; *Krstić*, Appeal Judgment, para. 34.

36 *Jelisić,* Appeal Judgement, para. 47.

37 *Prosecutor v. Karadzić and Mladić*, Trial Chamber, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-5-R61 and IT-95-18-R61 (11 July 1996), para. 94:
"…In this case, the plans of the SDS in Bosnia and Herzegovina contain elements which would lead to the destruction of the non-Serbian groups. The project of an ethnically homogeneous State formulated against a backdrop of mixed populations necessarily envisages the exclusion of any group not identified with the Serbian one. The concrete expressions of these plans by the SDS before the conflict would confirm the existence of an intent to exclude those groups by violence. The project does not exclude the use of force against civilian populations… In this case, the massive deportations may be construed as the first step in a process of elimination. These elements, taken together, would confirm that the project which inspired the offences before the Trial Chamber, contemplates the destruction of the non-Serbian groups, and specifically the Bosnian Muslim group, as the ultimate step. In addition, certain methods used for implementing the project of "ethnic cleansing" appear to reveal an aggravated intent as, for example, the massive scale of the effect of the destruction. The number of the victims selected only because of their membership in a group would lead one to the conclusion that an intent to destroy the group, at least in part, was present. Furthermore, the specific nature of some of the means used to achieve the objective of "ethnic cleansing" tends to underscore that the perpetration of the acts is designed to reach the very foundations of the group or what is considered as such. The systematic rape of women, to which material submitted to the Trial Chamber attests, is in some cases intended to transmit a new ethnic identity to the child. In other cases, humiliation and terror serve to dismember the group. The destruction of mosques or Catholic churches is designed to annihilate the centuries-long presence of the group or groups; the destruction of the libraries is intended to annihilate a culture which was enriched through the participation of the various national components of the population."

38 *Bosnia v. Serbia*, *Judgement of 26 February 2007*, para. 373.

In 2015 in *Croatia v. Serbia*, the Court subsequently further clarified that (emphasis added): "to state that, "for a pattern of conduct to be accepted as evidence of . . . existence [of genocidal intent], it [must] be such that it could only point to the existence of such intent" amounts to saying that in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the **only inference that could reasonably be drawn** from the acts in question".[39]

The '**only reasonable inference' standard** is commonly perceived as similar to the 'beyond reasonable doubt' standard of proof applied in the realm of individual criminal responsibility under international criminal law. It entails that the patterns of conduct alleged by the prosecution, or party in the dispute alleging genocide, have no other reasonable explanation but genocidal intent. In their joint intervention in *The Gambia v. Myanmar*, Canada, Denmark, France, Germany, the Netherlands and the United Kingdom opined that:

> *"when determining whether or not specific intent can be inferred from conduct, a court or tribunal must weigh the evidence before it, and filter out inferences that are not reasonable. Put differently, the "only reasonable inference" test applies only between alternative explanations that have been found to be reasonably supported by the evidence."*[40]

In its intervention in that Case, Belgium also stressed its interpretation of the relationship between military objectives and the only reasonable inference test, stating that: to rule out genocidal intent, the alleged military objective cannot merely be one of several possible explanations for the belligerent's conduct, coexisting with the intent to destroy, in whole or in part, a protected group as such. It must be the sole explanation for this conduct, based on the evidence available.[41] The Court's ruling in *The Gambia v. Myanmar* will likely further clarify what test it considers applicable to assess whether genocidal intent constitutes the only reasonable inference from a pattern of conduct, or a range of patterns of conduct.

A. Individual liability

In order to establish criminal liability of a perpetrator under international criminal law for the commission of the crime of genocide, they must be proven to have performed the *actus reus* of genocide with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[42]

Premeditation and genocidal intent: The Case-law establishes that genocidal intent cannot have arisen spontaneously at the time of the genocidal act, rather, it must have been formed *prior* to the commission of the underlying genocidal acts. Such prior formation of intent is not the same, however, as premeditation.[43]

39 *Croatia v. Serbia, Judgment of 3 February 2015,* para. 148.

40 *The Gambia v. Myanmar, Joint declaration of intervention of Canada, the kingdom of Denmark, the French Republic, the Federal Republic of Germany, the kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland pursuant to Article 63 of the Statute of the International Court of Justice*, https://icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf, para. 52.

41 *The Gambia v. Myanmar, Déclaration d'Intervention du Royaume de Belgique,* pp. 8-10.

42 ICC, Elements of Crime, Article 6(a) to Article 6(e).

43 *The Prosecutor v. Kayishema and Ruzindana*, Trial Chamber II, Judgment, ICTR-95-1-T (21 May 1999) (*Kayishema and Ruzindana*, Trial Judgment), para. 91:

> *"(…) The Trial Chamber opines that for the crime of genocide to occur, the mens rea must be formed prior to the commission of the genocidal acts. The individual acts themselves, however, do not require premeditation; the only consideration is that the act should be done in furtherance of the genocidal intent."*;

Prosecutor v. Jelisić, Trial Chamber, Judgment, IT-95-10-T (14 December 1999), para. 100:

> "(…) In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the ad hoc committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text and that such precision would only make the burden of proof even greater. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such."

It also does not preclude a situation in which an act started based on an intent different from genocidal intent, and that the genocidal intent arose later (emphasis added):

> *"Article 4 of the Statute does not require that the genocidal acts be premeditated over a long period.* ***It is conceivable that, although the intention at the outset of an operation was not the destruction of a group, it may become the goal at some later point during the implementation of the operation****. For instance, an armed force could decide to destroy a protected group during a military operation whose primary objective was totally unrelated to the fate of the group. The Appeals Chamber, in a recent decision, indicated that the existence of a plan was not a legal ingredient of the crime of genocide but could be of evidential assistance to prove the intent of the authors of the criminal act(s)..."*[44]

The existence of a plan or policy: These findings are relevant to the question of whether a plan or policy, and organization or system must exist, underlying the crime of genocide. While a plan or policy is not necessary in order to establish the existence of genocidal intent, in practice, the absence of such a plan or policy may present difficulties from the point of view of proving or inferring the *dolus specialis*.[45] It emphasizes the difficulties in practice of proving genocidal intent "*if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system*."[46]

Manifest pattern of similar conduct: The Rome Statute subsequently laid down, in the elements of crime, that to find an individual's conduct constitutes the genocidal acts (killing, physical and mental harm, inflicting certain conditions of life, prevention of births and transfer of children), that conduct must have taken place "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."[47] This requirement has been argued to "implicitly support[…] the State policy requirement, thus rejecting the lone génocidaire theory".[48] The reasoning behind this requirement is further clarified by Ireland in its intervention in *The Gambia v. Myanmar*:

> "Moreover, except in the most extreme of instances, an individual cannot realistically expect to destroy the protected group in whole or in part by his or her own actions. On that basis, the individual's intent must in some way relate to a wider destructive campaign or effort which he or she understands those actions will facilitate or to which they will contribute."[49]

Note however, that in the trial of *Vujadin Popović et al*., the ICTY's Trial Chamber II addressed this requirement, acknowledging that:

> "the language of the ICC Elements of Crimes, in requiring that acts of genocide must be committed in the context of a manifest pattern of similar conduct, implicitly excludes random or isolated acts of genocide. However, the Trial Chamber notes that the Appeals Chamber in *Krstić* held that 'reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite'. The Appeals Chamber further clarified that the ICC Elements of Crimes 'are not binding rules, but only auxiliary means of interpretation' of the Statute. Finally, it has been clearly established by jurisprudence that the requirement that the prohibited conduct be part of a widespread or systematic attack 'was not mandated by customary international law'."[50]

44 *Krstić*, Trial Judgment, para. 572.

45 *Jelisić,* Appeal Judgment, para. 48; *Jelisić,* Trial Judgment, paras. 100-101, 108. See also *Stakić*, Trial Judgment, para. 549.

46 *Ibid.,* para. 101.

47 ICC, Elements of Crime, Article 6(a) to Article 6(e).

48 Schabas, William A. as quoted by *Popović et al.*, Trial Judgment, para. 827.

49 *The Gambia v. Myanmar, Declaration of Intervention by Ireland,* para. 25.

50 *Popović et al.,* Trial Judgment, para. 829.

As such, the Trial Chamber also concluded that a plan or policy – including a State policy – was not a legal ingredient of the crime of genocide, though it could aid in the inference of genocidal intent.[51]

Genocidal intent and knowledge or awareness: There has been a consistent debate among scholars as to whether proving an individual perpetrator acted with genocide intent involves a "purpose-based" test (subjective intent) – showing that the perpetrator desired and aimed at an outcome of group destruction –, or a "knowledge-based" test (constructive intent) – involving the perpetrator merely knowing that their actions would result in group destruction.

It has been proposed that applying a knowledge-based approach to the crime of genocide would be more appropriate, especially with respect to acts of direct perpetrators and mid-level commanders.[52] In those cases, the evidentiary standard would subsequently be significantly lower and only require knowledge by the perpetrator of the systematic and organized nature of genocidal conduct, a genocidal plan or policy. Such conduct would usually involve large-scale participation by a plurality of individuals, often performing different roles in the perpetration of the crime.[53] A strictly knowledge-based approach to genocidal intent has however been rejected by the ICTY and the ICTR – with an exception for some modes of liability[54] – particularly with regards to the responsibility of principal perpetrators involved in the *commission* of genocide:

> *"The Trial Chamber notes that, contrary to the Prosecutor's contention, the Tribunal for Rwanda in the Akayesu case considered that any person accused of genocide for having committed, executed or even only aided and abetted must have had "the specific intent to commit genocide", defined as "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such". The Akayesu Trial Chamber found that an accused could not be found guilty of genocide 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 a group…".* [55]

In sum, the general approach the International Criminal Tribunals have settled on is therefore a mix between a knowledge and purpose-based test: while knowledge remains relevant in terms of inferring genocidal intent from the knowledge and awareness that perpetrators have of a genocidal plan, policy, or widespread genocidal conduct; it is often not – in itself – sufficient to establish the presence of the *dolus specialis*.

Mitigating factors: A certain **lack of independent thinking** – in cases of indoctrination[56] or of perpetrators who "allowed themselves to be drawn into a maelstrom of violence"[57] – has been accepted as relevant to the potential mitigation of sentences. The same may hold for a perpetrator's assistance (*e.g.,* humanitarian

51 *Ibid.*, para. 830.

52 Triffterer, Otto. "Genocide, its particular intent to destroy in whole or in part the group as such", *Leiden Journal of International Law* (2001), Volume 14, Issue 2.

53 See International Commission of Jurists, *Questions and Answers on the Crime of Genocide (2018) - Legal Briefing Note, August 2018 - ICJ Global Redress and Accountability Initiative* (August 2018), https://www.icj.org/wp-content/uploads/2018/08/Universal-Genocide-Q-A-FINAL-Advocacy-analysis-brief-2018-ENG.pdf, p. 16.

54 With respect to liability of a 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 (See *e.g.* Article 6(3) of the Statute of the ICTR). 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 (*Prosecutor v. Brđanin,* Appeals Chamber, Judgment, IT-99-36-A (19 March 2004) (*Brđanin*, Appeal Judgment), para. 7).

55 *Jelisić*, Trial Judgment, para. 86. See also *e.g. Krstić*, Appeal Judgment, para. 134.

56 *The Prosecutor v. Ruggiu*, Trial Chamber, Judgement and Sentence, ICTR-97-32-I (1 June 2000), (*Ruggiu,* Trial Judgment) para. 63.

57 *Krstić,* Trial Judgment, para. 711.

assistance) to victims that are members of the targeted group.[58] However, such assistance can also be explained as resulting from an awareness of the attention of the international community the consequences of negative public opinion.[59]

B. State responsibility

This Part assesses how and when the commission of genocide can be attributed to a State, and how the assessment of the presence of genocidal intent relates to such attribution.

Internationally wrongful acts: The Commission of Genocide in breach of the Genocide Convention constitutes an internationally wrongful act.[60] The prohibition on Genocide is also a norm of *ius cogens*,[61] and as such, all States are under an obligation not to commit genocide, aid or assist in the commission of genocide, or not to recognise the situation created the commission of genocide as lawful or render aid or assistance in maintaining it.[62]

Modes of attribution: There are three overall modes through which the commission of genocide can be attributed to a State. First, the clearest form of attribution, is where there exists a clear **genocidal plan or policy on a State-level** ("a systematic attack on a particular group allegedly in pursuance of a governmental plan or policy").[63] A second mode of attribution, is following the rules of customary international law of State responsibility,[64] *i.e.,* where **acts constituting the commission of genocide are committed by (a) State organ(s) or person(s) or entities exercising elements of governmental authority.** In such situations, those organs', persons' or entities' genocidal conduct is attributable to the State and the State is internationally responsible for the commission of genocide.[65] This also extends to instances where the organ, person or entity acting in that capacity "exceeds its authority or contravenes instructions".[66] A third mode of attribution is the commission of genocide by a person or group of persons, which would be attributable to the State if the person or group of persons is in fact acting on the instructions of, or under the direction or "**effective control" of, that State**.[67] In both the second and third mode of attribution, it would already have to be determined that the perpetrator acted with genocidal intent in order to find that the perpetrator committed a genocidal act, which might be attributable to the State.

58 See Behrens, Paul. "A Moment of Kindness? Consistency and Genocidal Intent" in *ed.* Henham and Behrens, *The Criminal Law of Genocide*, (Burlington: Ashgate Publishers, 2007).

59 *Krstić*, Appeal Judgment, para. 31.

60 *Bosnia v. Serbia*, *Judgement of 26 February 2007*, para. 166.

61 *Croatia v. Serbia, Judgment of 3 February 2015,* para. 87.

62 International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Yearbook of the International Law Commission, 2001, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, Article 16 and Article 41; ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens) 2022*, Yearbook of the International Law Commission, 2022, vol. II, Part Two, Conclusion 19.

63 See *e.g.* Gaeta, Paola. "On What Conditions Can a State Be Held Responsible for Genocide?", European Journal of International Law (2007), Volume 18, Issue 4.

64 *Bosnia v. Serbia, Judgement of 26 February 2007*, paras. 379, 384-385; ILC, *Draft Articles on State Responsibility*, Articles 4-7.

65 *Ibid.* See also Milanović, Marko. "State Responsibility for Genocide", European Journal of International Law (2006), Volume 17, Issue 3.

66 *Ibid.*

67 *Bosnia v. Serbia, Judgement of 26 February 2007*, para. 384, 396-412; ILC, *Draft Articles on State Responsibility*, Article 8; Milanović, Marko. "State Responsibility for Genocide", European Journal of International Law (2006), Volume 17, Issue 3.

VII. CONCLUSION AND RECOMMENDATIONS FOR FURTHER RESEARCH

Proving genocidal intent, in the absence of a clear admission (*expressis verbis*) by the perpetrator or responsible State, continues to pose a challenge to advocates seeking to end the intentional destruction of groups, or their parts. The Jurisprudence of the ICJ, finding genocide occurred only in *Srebrenica* during the Bosnian War, and making no finding of genocide in *Croatia v. Serbia,* has led to repeated criticism that it has "imposed too high a threshold for the determination of *mens rea* of genocide".[68] This deficiency has been especially evident in the context of colonial genocides, where colonial processes of elimination – often involving "security" argumentation[69] – have been implemented over long periods of time, "systematically and at low intensity" but with atrocious spikes;[70] and where States "design and implement policies whose extended implementation over time aims to conceal the *dolus specialis*".[71]

How genocidal intent is inferred and determined to exist, will likely further be elucidated in how the Court rules on the merits in *The Gambia v. Myanmar*, and *South Africa v. Israel.*

68 *Croatia v. Serbia, Dissenting Opinion of Judge Cançado Trindade,* https://icj-cij.org/sites/default/files/case-related/118/118-20150203-JUD-01-05-EN.pdf, para. 467. See also, *e.g.* Gurmendi Dunkelberg, Alonso. "How to Hide a Genocide: Modern/Colonial International Law and the Construction of Impunity", Journal of Genocide Research (2025), 1–24.

69 See *e.g* Sultany, Nimer. "A Threshold Crossed: On Genocidal Intent and the Duty to Prevent Genocide in Palestine", Journal of Genocide Research (2024), 1–26.

70 See *e.g. South Africa v. Israel, Declaration d'Intervention de la Republique de Cuba à la Cour Internationale de Justice, https://www.icj-cij.org/sites/default/files/case-related/192/192-20250110-inv-01-00-fr.pdf,* para. 128, see also paras. 26, 61-63, 71, 88, 99, 112, 199; Gurmendi Dunkelberg, Alonso. "How to Hide a Genocide: Modern/Colonial International Law and the Construction of Impunity", Journal of Genocide Research (2025), 1–24.

71 *Ibid., South Africa v. Israel, Declaration d'Intervention de la Republique de Cuba,* para. 26, see also *e.g.* paras. 61-63, 71, 88, 99, 112, 128, 199.

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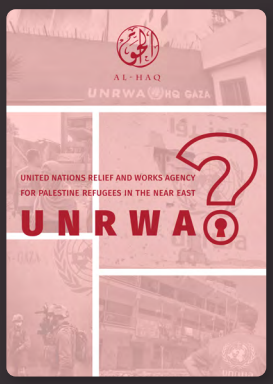

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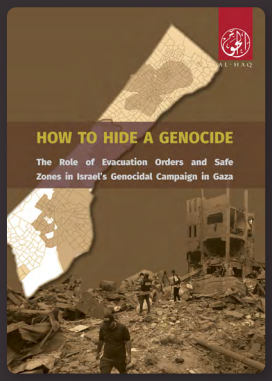

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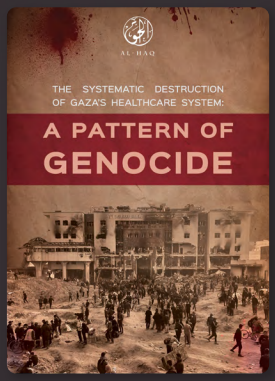

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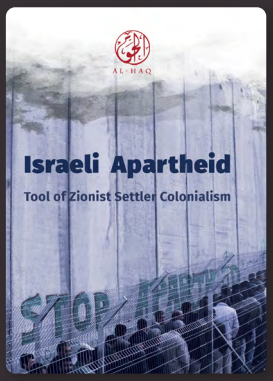

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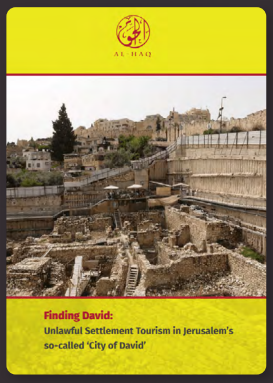

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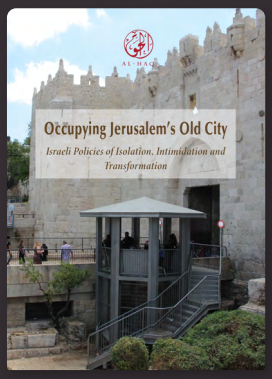

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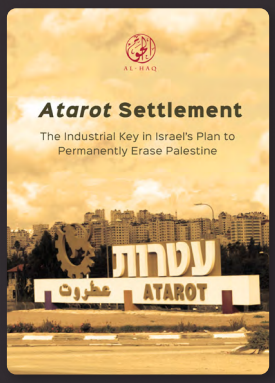

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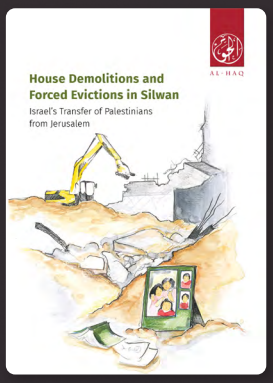

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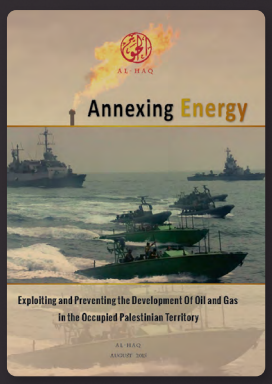

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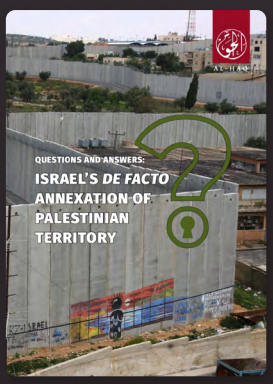

Questions and Answers:
Israel's De Facto Annexation of Palestinian Territory

AL-HAQ

About Al-Haq

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah in the Occupied Palestinian Territory (OPT). Established in 1979 to protect and promote human rights and the rule of law in the OPT, the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. Al-Haq conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. Al-Haq has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), ESCR-Net – The International Network for Economic, Social and Cultural Rights, the Palestinian Human Rights Organizations Council (PHROC), and the Palestinian NGO Network (PNGO). In 2018, Al-Haq was a co-recipient of the French Republic Human Rights Award, whereas in 2019, Al-Haq was the recipient of the Human Rights and Business Award. In 2020, Al-Haq received the Gwynne Skinner Human Rights Award presented by the International Corporate Accountability Roundtable (ICAR) for its outstanding work in the field of corporate accountability. Al-Haq was awarded the prestigious Bruno Kreisky Prize and the MESA Academic Freedom Award in 2022.