

ETHNIC CLEANSING IN ARTSAKH (NAGORNO-KARABAKH): ISSUES OF DEFINITION AND CRIMINAL RESPONSIBILITY

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Abstract

After ten months of blockade-resulted starvation and medical emergencies, on 19 September 2023, Nagorno-Karabakh, or Artsakh Republic, was brutally attacked by Azerbaijan, resulting in a forced capitulation of the de facto state. Considering the long-lasting history of violence, institutionalized anti-Armenian hatred, persecution, and annihilation of Armenians by the Republic of Azerbaijan, an exodus of Armenians began in the following days, resulting in forced displacement of nearly 120,000 Armenians from their indigenous lands.

These atrocious events were soon labeled as ethnic cleansing by some actors of the international community. Currently, there is no legal definition of ethnic cleansing; using the term to mark the forced displacement of Armenians from Artsakh raises issues of definition and responsibility.

This article aims to analyze the concept of ethnic cleansing in its historical and legal development and evaluate its application in the context of the forced displacement of Armenians from Artsakh.

Keywords: Nagorno Karabakh, forced displacement, ethnic cleansing, genocide, crimes against humanity, war crimes, responsibility.

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Introduction

On 27 September 2020, during the outbreak of COVID-19, the Republic of Azerbaijan launched an unprovoked aggression on Nagorno-Karabakh or Artsakh Republic, committing gross violation of human rights and humanitarian law, by targeting civilians and civilian infrastructure, using widely banned cluster munitions and other weaponry.¹ A ceasefire brokered by Russia on 9 November 2020 was soon violated by Azerbaijan through systematic violations of the ceasefire regime and creeping military advances, which culminated in the blocking of the Lachin Corridor – the only connecting road of Artsakh with Armenia.² This marked the beginning of nearly ten months blockade of Nagorno-Karabakh, which was accompanied by a cut-off of essential resources and weaponizing humanitarian aid. The blockade disrupted and nearly severed access to critical goods and services, including food, fuel, and medication, among the population of Artsakh. The low quantity of basic food and supplies (groceries, oil, sugar) that remain in Artsakh were provided to people in minimal portions. There was no formula available to feed babies. The blockade's impact on healthcare provision (through a lack of medication and the physical inhibition of medical care) had resulted in reported deaths. Meanwhile, hundreds of families remained separated for months.

This humanitarian crisis was further aggravated by Azerbaijan's occasional disruption of the natural gas and electricity supply to Artsakh, leaving houses, hospitals, and schools without heating in lethal conditions. Within the ongoing case regarding the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Armenia v. Azerbaijan*), the International Court of Justice, in delivering its judgment on the provisional measures, called upon Azerbaijan to “ensure unimpeded movement of persons, vehicles, and cargo along the Lachin Corridor in both directions.”³

During this period of total blockade, individual experts and institutions had qualified what was happening against the Armenians in Artsakh as a crime of genocide: “This inhumane policy highlights the practice of effectively carrying out genocide by attrition against the 120,000 Armenians living in Artsakh, as this blockade has generated a dire humanitarian crisis that significantly affects every single Armenian in Artsakh” (*Armenian Genocide Museum-Institute Foundation*);⁴ “There is an ongoing Genocide against 120,000

1 “Azerbaijan: Cluster Munitions Used in Nagorno-Karabakh Stop Use of Banned Weapons; Secure and Destroy Stocks,” at <https://www.hrw.org/news/2020/10/23/azerbaijan-cluster-munitions-used-nagorno-karabakh>; “Armenia/Azerbaijan: First confirmed use of cluster munitions by Armenia ‘cruel and reckless,’” <https://www.amnesty.org/en/latest/press-release/2020/10/armenia-azerbaijan-first-confirmed-use-of-cluster-munitions-by-armenia-cruel-and-reckless/>, accessed 12.10.2023.

2 Lindsey Snell, “Uncovering the Truth behind Azerbaijan’s “Ecological” Blockade of Nagorno-Karabakh: The Role of Government-Linked Volunteer Organizations in the Lachin Corridor,” *Genocide Studies International* 15, No.1(2021): 69-76.

3 Order of 6 July 2023. Document Number 180-20230706-ORD-01-00-EN, Case 180 – Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Armenia v. Azerbaijan*), at <https://www.icj-cij.org/node/202958>.

4 Edita Gzoyan, “Artsakh: A Genocide by Attrition,” at <http://www.genocide-museum.am/eng/1.19.01.23.php>,

Armenians living in Nagorno-Karabakh, also known as Artsakh,” (Luis Moreno Ocampo, former Prosecutor of the International Criminal Court (2003-2012));⁵ “Evidence presented here suggests that the crime of genocide may already be taking place in the form of the blockade, which is both “Causing serious bodily or mental harm to members of the group” and “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” (Lemkin Institute for Genocide Prevention);⁶ “Under the circumstances, it is my considered opinion that the facts outlined above constitute sufficient reason to proffer an early warning to the international community that the population of Nagorno-Karabakh is at risk of suffering “serious bodily or mental harm to members of the group” (Article 2, paragraph b of the Convention on the Prevention and Punishment of Genocide) (Juan Ernesto Mendez, Former Special Advisor to the Secretary-General on the Prevention of Genocide (2004-2007), Professor of Human Rights Law in Residence, Commissioner, International Commission of Jurists, Former UN Special Rapporteur on Torture (2010-16)).⁷

After ten months of blockade-resulted starvation and medical emergencies, on 19 September 2023, the Armenians of Artsakh entered a physical extermination stage, being attacked by drones, airstrikes, and mass shelling. There were deaths and wounded among the civilians, as well as children. Many were reported missing. Considering the long-lasting history of violence, institutionalized anti-Armenian hatred, persecution, and annihilation of Armenians by the Republic of Azerbaijan, the forced exodus of Armenians began in the following days, resulting in the forced displacement of nearly 120,000 Armenians from their indigenous lands. In a matter of several days, the region was ethnically cleansed from its indigenous population.

Ethnic Cleansing in International Law

Ethnic cleansing, a concept known to scholars for quite some time, has been acknowledged within the structures of international law through organs such as the United Nations Security Council (UN SC), the International Court of Justice (ICJ), and the International Criminal Court (ICC). Nevertheless, ethnic cleansing remains a predominantly theoretical concept within the legal lexicon, lacking a universally accepted

accessed 26.09.2023.

5 Luis Moreno Ocampo, “Expert Opinion: Genocide against Armenians in 2023,” at https://luismorenocampo.com/lmo_en/report-armenia/, accessed 20.10.2023.

6 “Risk Factors and Indicators of the Crime of Genocide in the Republic of Artsakh: Applying the UN Framework of Analysis for Atrocity Crimes to the Nagorno-Karabakh Conflict,” Report 5 September 2023, https://www.lemkininstitute.com/_files/ugd/9bc553_c6b61de5918f4670bec931b3a79d1baa.pdf, accessed 22.10.2023.

7 Juan Ernesto Mendez, “Preliminary Opinion on the situation in Nagorno-Karabakh and on the need for the international community to adopt measures to prevent atrocity crimes,” 23 August 2023, at chrome-extension://efaidnbmnnnlpcapcgpcjglclcfndmkaj/https://un.mfa.am/file_manager/un_mission/Preliminary%20Opinion%20-%2023.08.2023.pdf?fbclid=IwAR0ydh2YB6zd2brS1mQRwUSuC1eSZDqODmB3Js3P5aDfy-wDIGzIoxthcUIA accessed 20.10.2023.

definition and precise qualifications, while serving as a term increasingly utilized by a global community to characterize specific situations worldwide.

The discussion surrounding the role and nature of ethnic cleansing has been ongoing since its inception, with scholars either seeking to refuse it as a distinct crime entirely⁸ or delving into an in-depth examination of this phenomenon. Andrew Bell-Fialkoff argues that the first probable instance of ethnic cleansing dates back to 883–859 B.C. when the Assyrians displaced 4.5 million conquered individuals to expand their territories.⁹ He further posited that similar acts of ethnic cleansing can be traced throughout Ancient History, with examples from the Neo-Babylonian Empire, Ancient Greece, and the Roman Empire, all driven, in Bell-Fialkoff's perspective, by economic motives tied to territorial expansion.¹⁰

Jennifer Jackson-Preece draws attention to the aftermath of World War I and World War II, highlighting various population displacements.¹¹ Jaakko Heiskanen points to the rise of the ethnically homogeneous nation-states in Europe as closely linked to the concept of ethnic cleansing.¹² By referencing Ther, he states that mention of “cleansing” or “purification” of territory can be found in numerous European languages (English, French, German, Czech, Polish, Russian, and Serbo-Croatian) already from the 19th century.¹³ The idea of making the territory homogeneous was also present in the perceptions of Young Turks. In 1914, one of their main ideologues, Zia Gokalp, stated that the state could survive only by relying on one nation because the representatives of different countries cannot love the same homeland and be loyal to it. The Greek, Armenian, and Assyrian population of the empire, according to the ideologue, would always remain a “foreign body” in the Turkish nation-state.¹⁴ The resolution was to cleanse the Ottoman Empire of the unwanted elements. Benjamin Lieberman qualifies the Armenian Genocide as a case when ethnic cleansing resulted in genocide, as was in the case of the Holocaust.¹⁵ During

8 In their article, Gregory H. Stanton, Rony Blum, Shira Sagi, and Elihu D. Richter criticised the use of the term “ethnic cleansing” because it “bleaches” the atrocities of genocide. See, Gregory H. Stanton, Rony Blum, Shira Sagi, and Elihu D. Richter, “Ethnic Cleansing” bleaches the Atrocities of Genocide,” *The European Journal of Public Health* 18, no. 2 (2008): 204.

9 Andrew Bell-Fialkoff, “A Brief History of Ethnic Cleansing,” *Foreign Affairs* 72, no 3 (1993): 117.

10 Ibid, 117-120.

11 Jennifer Jackson-Preece, “Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms,” *Human Rights Quarterly* 20 (1998): 818–819.

12 Jaakko Heiskanen, “In the Shadow of Genocide: Ethnocide, Ethnic Cleansing, and International Order,” *Global Studies Quarterly* 2 (2021): 6.

13 Philipp Ther, *The Dark Side of Nation-States: Ethnic Cleansing in Modern Europe*, translated by Charlotte Kreutzmüller (New York: Berghahn, 2014), 4.

14 Uriel Heyd, *Foundations of Turkish Nationalism: The Life and Teachings of Ziya Gökalp* (London: Luzac & Co., 1950), 132. For more on this see Regina A. Galustyan, “Perceptions of “Vital Space” in the Worldview of Union and Progress Committee and the Armenian Genocide,” *Tseghaspanagitakan handes* 9, no. 1 (2021): 9-36.

15 Benjamin Lieberman, ““Ethnic cleansing” versus genocide?” in *The Oxford Handbook of Genocide Studies*, edited by Donald Bloxham and Dirk Moses (Oxford: Oxford University Press, 2010), 51, 52.

the Second World War, Nazis invoked the metaphor of “clean of Jews”.¹⁶ Another wide-scale program of “purging” was carried out in the Soviet Union, when from 1937 to 1951, over two million members of ethnic minorities were sent to Siberia, Central Asia, and Ural.¹⁷

Summarizing the characteristics of ethnic cleansings, Norman Naimark mentions that ethnic cleansing always involves violence and is often closely related to war; it has a totalistic quality, as the aim is to remove each member of the targeted nation, is misogynistic, as it usually involves men attacking women, and applies also crimes against property together with crimes against people.¹⁸ According to Lieberman, “As a form of violent social engineering, ethnic cleansing is closely associated with powerful dictatorships.”¹⁹

The modern notion of ethnic cleansing appeared in the discourse recently. Although the majority of experts mention its first use in the context of events that unfolded in Yugoslavia from 1991 to 1995, when specific actions were officially recognized as ethnic cleansing by various international bodies, so far, the first mention is to the Russian equivalent of the expression – *etniceskie chistki/ etnischeskoye chischeniye* – used by Soviet authorities to describe the forced exodus of Armenians from Azerbaijan during the Nagorno-Karabakh crisis in the 1980s.²⁰ However, only in the context of atrocities perpetrated in former Yugoslavia did the term “ethnic cleansing” gradually penetrate the official language of the press²¹, diplomacy, and international law, with the implication, as Schabas explains, to be applied to situations that could not satisfy the intent requirement for a genocide.²²

In response to the atrocities unfolding in Yugoslavia, the United Nations adopted several resolutions addressing the horrors unfolding in Yugoslavia and defining the crimes being perpetrated.

The very first definition was in the report of the Special Rapporteur Tadeusz Mazowiecki in November 1992. It was explicitly noted that “The term ethnic cleansing refers to the elimination by the ethnic group exerting control over a given territory of members of other ethnic groups.”²³ The next reference was in the Interim report of the

16 Bell-Fialkoff, “A Brief History of Ethnic Cleansing,” 114.

17 J. Otto Pohl, “Stalin’s Genocide against the ‘Repressed Peoples,’” *Journal of Genocide Research* 2, no. 2 (2000): 267–293.

18 Norman Naimark, *Fires of Hatred: Ethnic Cleansing in 20th Century Europe* (Cambridge, Massachusetts, London, England: Harvard University Press), 185-198.

19 Lieberman, “‘Ethnic cleansing’ versus genocide?” 56.

20 Marcus Banks and Monica Wolfe, “Ethnicity and Reports of the 1992-95 Bosnian Conflict,” in *The Media of Conflict: War Reporting and Representations of Ethnic Violence*, edited by Tim Allen and Jean Seaton (London: Zed Books, 1999), 152.

21 Rony Blum, Gregory H. Stanton, Shira Sagi, Elihu D. Richter, “‘Ethnic cleansing’ bleaches the atrocities of genocide,” *European Journal of Public Health* 18, No. 2 (2008): 204–209.

22 William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), 200.

23 Report on the situation of human rights in the territory of the former Yugoslavia / submitted by Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution

United Nations Commission of Experts of February 1993. In their report, the Commission of Experts established by the United Nations officially cited the term ethnic cleansing and defined within the context of the conflicts in the former Yugoslavia: “Considered in the context of the conflicts in the former Yugoslavia, “ethnic cleansing” means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area. ‘Ethnic cleansing’ is contrary to international law.”²⁴ This definition was further reiterated in the Final Report of the Commission (May 1994), which defined ethnic cleansing as “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.”²⁵

This is the first official definition of the term “ethnic cleansing” within the framework of international law. Although, as was mentioned, the majority of experts and scholars state that the term originates from the Serbo-Croatian expression *etničko čišćenje*, the exact inception of the term in the Commission of Experts’ Report and its specific rationale for selecting it is unclear.²⁶ However, it is known that before the Srebrenica massacre of July 1995, Serbian commanders were using *etničko ciscenj* and *ciscenje prostor* or *ciscenje terena* to express the intent to exterminate everyone.²⁷

Other resolutions adopted by the United Nations Security Council and General Assembly explicitly referenced to ethnic cleansing.²⁸ Among the early resolutions characterizing the term was Security Council Resolution 771, which addresses explicitly “violations of international humanitarian law, strongly condemning practices associated with ‘ethnic cleansing.’”²⁹ While the mentioned Security Council resolutions merely referenced ethnic cleansing without elaborating on the concept, Resolution 47/121 introduced a broader definition:

Gravely concerned about the deterioration of the situation in the Republic of Bosnia and Herzegovina owing to intensified aggressive

1992/S-1/1 of 14 August 1992, at <https://digitallibrary.un.org/record/226088?ln=en>, accessed 08.09.2023.

24 United Nations, Security Council, Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), 27 May 1994, UN Doc. S/1994/674 (1994), Part III: General Studies, B. Ethnic Cleansing, para. 129, p. 33 referring to para. 55 of the Interim Report S/25274.

25 UN Security Council, Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), 27 May 1994, S/1994/674, para 130, at <https://www.refworld.org/docid/582060704.html>, accessed 28.09.2023.

26 Drazen Petrovic, “Ethnic Cleansing – An Attempt at Methodology,” *European Journal of International Law* 5 (1994): 343.

27 Ibid., 344-345.

28 See Security Council Resolution 771, 13 August 1992, UN Doc. S/RES/771; Security Council Resolution 780, 6 October 1992, UN Doc. S/RES/780; Security Council Resolution 808, 22 February 1993, UN Doc. S/RES/808; Security Council Resolution 787, 16 November 1992, UN Doc. S/RES/787, General Assembly Resolution 46/242, The Situation in Bosnia and Herzegovina, 25 August 1992, 91st plenary meeting, UN Doc. A/RES/46/242.

29 Security Council Resolution 771, 13 August 1992, UN Doc. S/RES/771.

acts by the Serbian and Montenegrin forces to acquire more territories by force, characterized by a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee population resulting from mass expulsions of defenseless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of “ethnic cleansing”, which is a form of genocide.³⁰

The analysis of the Resolution presents some aspects of the definition and categorization of ethnic cleansing. First, the phrase “mass expulsions of defenseless civilians from their homes” is mentioned as a component of the crime of ethnic cleansing and not a comprehensive depiction. Second, ethnic cleansing is recognized as a crime that implies deliberate planning and organization by the state authorities. The Resolution openly labels ethnic cleansing as a form of genocide. However, this position of recognizing ethnic cleansing as a form of genocide was later debated by not only scholars but also UN bodies.

The Security Council subsequently adopted Resolution 819, which added further details to the understanding of the term “ethnic cleansing”, recognizing the practice as a violation of humanitarian law and the individual responsibility of perpetrators who committed such acts. The Resolution mentions explicitly that the Security Council “Reaffirms its condemnation of all violations of international humanitarian law, in particular, the practice of “ethnic cleansing” and reaffirms that those who commit or order the commission of such acts shall be held individually responsible in respect to such acts.”³¹

This statement is significant as the Security Council unequivocally establishes that ethnic cleansing is a crime punishable under international law, as well as addresses individual responsibility, encompassing two dimensions: the accountability of an individual who directly perpetrates ethnic cleansing and the responsibility of an individual who orders or commands such actions.

In addressing potential questions about the binding nature of resolutions of the Security Council or the General Assembly, it is essential to consider the legal framework established by the United Nations Charter. According to Articles 24 and 25 of the Charter, the Security Council possesses the legal authority to adopt resolutions binding upon all member states of the UN.³² Article 25 specifically articulates, “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”³³

30 The situation in Bosnia and Herzegovina, G.A. res. 47/121, 47 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/47/49 (1992).

31 Article 7 of Security Council Resolution 819, 16 April 1993, UN Doc. S/RES/819.

32 UN Charter signed on 26 June 1945 at the San Francisco Conference, article 24, 25.

33 Ibid, article 25.

Despite this, it is crucial to note that not all resolutions of the Security Council possess binding force. In its Advisory Opinion in the *Namibia* case, the International Court of Justice acknowledges the following:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.³⁴

A critical element that renders a Security Council resolution binding is the robust language employed, particularly for actions deemed a threat to international peace and security. The gravity of ethnic cleansing as a crime that can pose a threat to the global community is exemplified, *inter alia*, in the case of *Prosecutor v Krnojelac*, wherein it is noted that “the Security Council was particularly concerned about acts of ethnic cleansing and wished to confer jurisdiction on the Tribunal to judge such crimes, regardless of whether they had been committed in an internal or an international armed conflict.”³⁵ Linguistically, the term “concerned” may lack an imperative character. Still, the fact that the Security Council was willing to include ethnic cleansing in the crimes to be adjudicated by the Tribunal for the former Yugoslavia, highlights the fact that ethnic cleansing has significant impact on the global community.

Thus, even if Security Council resolutions may, in certain circumstances, be devoid of an imperative value (e.g., this might be the case when an SC resolution has not been adopted based on Chapter VII of the UN Charter) and instead be more of hortatory nature, this by far does not diminish or disparage the role of ethnic cleansing as a threat to international peace and security.

Ethnic Cleansing as a Crime against Humanity or War Crime

The ongoing debates surrounding ethnic cleansing underscore the absence of a universally accepted definition. Despite concerted efforts by scholars and international bodies such as the United Nations to establish a common understanding, ambiguity persists. In 1992, the Final Report of the Commission of Experts provided a working definition, stating that

³⁴ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ, Advisory Opinion, 21 June 1971, ICJ Reports 1971, p. 16, p. 53 para. 114.

³⁵ *Prosecutor v Milorad Krnojelac* (“Foča”), Case No IT-97-25-A, Judgment, Appeals Chamber, 17 September 2003, para. 221.

“ethnic cleansing” involves making an area ethnically homogeneous through the use of force or intimidation to expel individuals from specific ethnic groups.³⁶ This expulsion is accomplished through various means, including murder, torture, arbitrary arrests, extra-judicial executions, rape, and sexual assaults.³⁷ Additionally, it encompasses actions such as confining the civilian population to ghetto areas, forcibly removing, displacing, and deporting civilians, conducting deliberate military attacks on civilians and civilian areas, and wanton destruction of property.³⁸ The challenge of defining ethnic cleansing is further compounded by the document attempting to elucidate the issue. On the one hand, the paper eliminates the boundaries of ethnic cleansing, while on the other, it broadens the concept immensely. The document states that those practices constitute crimes against humanity and can be assimilated into specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention.³⁹

This definition, while outlining certain specific characteristics of ethnic cleansing, ultimately suggests that ethnic cleansing is not a distinct criminal act. Instead, it is portrayed as crimes against humanity, with the potential for classification as war crimes or genocide in certain situations. The exact categorization of ethnic cleansing under a specific crime is left undefined, prompting a closer examination.

The Charter and Judgment of the Nuremberg Tribunal first defined war crimes.⁴⁰ Nevertheless, war crimes have undergone natural development over time and adapted to the needs of the changing world, as acknowledged by the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁴¹ In their ultimate form, war crimes are currently established in the Rome Statute.⁴² The Statute defines “unlawful deportation or transfer or unlawful confinement” as a war crime.⁴³ In the definition of ethnic cleansing, the notion of expelling people to leave their homes is mentioned, raising the question of whether ethnic cleansing can be considered a form of war crime.

Forced population transfers were internationally condemned in 1986, when the International Law Association adopted the Declaration of the Principles of International Law on Mass Expulsions. Although not binding, the Declaration defined expulsion as “an act or a failure to act ... with the intended effect of forcing the departure of persons against

36 UN Security Council: Final Report of the Commission of Experts established Pursuant to Security Council Resolution 780 (1992), para 55.

37 Ibid, para 56.

38 Ibid.

39 Ibid.

40 Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London, on 8 August 1945, article 6.

41 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-A and No. IT-96-23/1-A, Decision, Appeals Chamber, 12 June 2002, paragraph 67.

42 Rome Statute of the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 UN Doc. A/CONF.183/9, art. 8 (2).

43 Ibid, Article 8 (2), (a), (vii).

their will ... for the reason of race, nationality, membership of a particular social group or political opinion.”⁴⁴

The Council of Europe, in its report on Enforced population transfer as a human rights violation, explicitly notes that “Population transfer is a practice or policy having the purpose or effect of moving persons into or out of an area, either within or across an international border, or within, into, or out of an occupied territory, without the free and informed consent of the transferred population and any receiving population. It involves collective expulsions or deportations and often ethnic cleansing.”⁴⁵ A similar position was expressed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in Resolution 1997/29.⁴⁶ The International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights have also declared forced transfer of populations illegal.⁴⁷

The challenge here lies in the fact that unlawful displacement for ethnic cleansing is just one element and does not in and by itself constitute the entirety of the action. Therefore, only a specific subset of acts associated with ethnic cleansing may fall under the category of war crimes.

The next issue is connected with the context of war crimes. According to Article 8 of the Rome Statute, war crimes occur during armed conflicts. However, does ethnic cleansing occur only in times of peace? If we exclusively link ethnic cleansing to war crimes, we automatically exclude acts of ethnic cleansing that may occur in peacetime.

The Rome Statute defines crimes against humanity as a crime committed “...against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, as defined in paragraph 3, or other grounds...”⁴⁸ In the *Kupreskic* case, the ICTY noted that there are crimes committed on discriminatory grounds that do not fully correspond to the *mens rea* of genocide, and ethnic cleansing serves as an example to that. In its decision, the Tribunal equates ethnic cleansing with crimes against humanity but separately emphasizes that ethnic cleansing is not a legal term in and of itself.⁴⁹ In *Nikolic* case, ICTY draws parallels between ethnic cleansing and crimes against humanity, emphasizing the discriminatory motives in both cases. “The implementation

44 Principle 14 of the Declaration of the Principles of International Law on Mass Expulsions, cited in The Realization of Economic, Social and Cultural Rights: The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers, UN ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Session, Provisional Agenda Item 8, UN DOC. E/CN.4/Sub.2/1993/17 (1993), p. 78, para. 354.

45 Council of Europe, Committee on Legal Affairs and Human Rights, Enforced population transfer as a human rights violation, Rapporteur: Mr Egidijus Vareikis, Lithuania, Group of the European Peoples’ Party, AS/Jur (2011) 49, 5 December 2011.

46 Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1997/29, “Freedom of Movement and Population Transfer”, 36th meeting, 28 August 1997.

47 For more on this see Clotilde Pégrier, *Ethnic Cleansing: A Legal Qualification* (London and New York: Routledge, 2013), 141-144.

48 Rome Statute, Article 7 (h).

49 *Prosecutor v Kupreskic et al.* (Case No. IT-95-16 T) Judgment 14 January 2000, para 606.

of that discriminatory policy, commonly referred to as ‘ethnic cleansing,’ over the region of Vlasenica alone seems to have been so widespread as to fall within the Tribunal’s jurisdiction under Article 5 [crimes against humanity⁵⁰].⁵¹

The Rome Statute defines two vital substantive elements of crimes against humanity – “widespread or systematic attack”.⁵² Thus, for acts of ethnic cleansing to fall under crimes against humanity, they must exhibit these two substantive elements.

Although there is no precise definition of “widespread or systematic attack”, the ICTY noted that the interpretation of these elements should be made on a case-by-case basis, noting that “The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon this population, ascertain whether the attack was indeed widespread or systematic.”⁵³

Experts have also established that ethnic cleansing may have a systematic nature. Thus, in one report, it was articulated that “Ethnic cleansing may be equated with the systematic purge of the civilian population based on ethnic criteria, with the view to forcing it to abandon the territories where it lives.”⁵⁴

Nevertheless, the material element alone is insufficient for us to qualify an act as a crime against humanity; the presence of a mental element is also crucial. As indicated by the Tribunal in the *Tadić* case, “Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than an ordinary crime. Thus, to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related.”⁵⁵

In addition to these two elements, crimes against humanity also require the presence of acts “directed against any civilian population”. In various instances, authors and judicial bodies invoke the concept of the civilian population when defining ethnic cleansing. For example, Judge Lauterpacht, on one occasion, determinatively opined that ethnic cleansing is “the forced migration of civilians”.⁵⁶

50 Article 5 of the ICTY Statute enunciates that “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts. See https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, accessed 12.08.2023.

51 *Prosecutor v Dragan Nikolic* (“Sušica Camp”), Case No IT-94-2-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber I, 20 October 1995, para. 27

52 Rome Statute, Article 7.

53 *Prosecutor v Dragoljub Kunarac et al.* (“Foc’a”), Cases No IT-96-23-T and No IT-96-23/1-T, Judgment, Trial Chamber I, 22 February 2001, para 430.

54 Sixth Mazowiecki Report II, pursuant to paragraph 23 of the Resolution of the Commission on Human Rights 1993/7 of 23 February 1993, Report of 21 February 1994, UN Doc E/CN.4/1994/110, p. 44 para 283.

55 *Prosecutor v. Duško Tadić* (“Prijedor”), Case N° IT-94-1-A, Appeals Judgment, Appeals Chamber, 15 July 1999, para. 271.

56 Case concerning Application of the Convention on the Prevention and Prosecution of the Crime of Genocide

Thus, ethnic cleansing may fall under crimes against humanity if it is widespread and systematic, directed against any civilian population, and it relates to the crimes committed against civilians. Thus, whether ethnic cleansing qualifies as a crime against humanity should be considered on a case-by-case basis, implying that not all acts may align with the elements of crimes against humanity.

Ethnic Cleansing As a Crime of Genocide

The relationship between ethnic cleansing and genocide is more complex. The focal point in this rubric is whether ethnic cleansing is a separate, distinct concept or merely a euphemism that obscures the horrors of genocide, or to phrase in the parlance of legal scholarship, “bleaches the atrocities of genocide”⁵⁷ or “shadowing the genocide”,⁵⁸ “to sugarcoat the cruel reality”.⁵⁹ For some scholars, the link between genocide and ethnic cleansing is a bit complicated.

For Michael Mann, genocide is the most severe form of ethnic cleansing,⁶⁰ a position that Andrew Bell-Fialkoff largely shares. According to him, coercion to leave a territory is vital in labeling an ethnic cleansing genocide.⁶¹

According to Benjamin Lieberman, the significant overlap happens when the forced removal of a population resulted in their destruction.⁶² The idea is to differentiate the intent of the perpetrator, whether the intent is to remove a group from a territory, or to destroy that group.⁶³

Other scholars consider ethnic cleansing as a form of genocide⁶⁴ and consider using “ethnic cleansing” as a lack of willingness to prevent genocide, which, in turn, could lead to higher casualties and undermine legal obligations to acknowledge instances of genocide. Their primary argument was that “ethnic cleansing” did not have an established legal status, unlike genocide, which was clearly defined in international law.⁶⁵

(Bosnia Herzegovina and Others v. Yugoslavia), ICJ, Further Requests for the Indication of Provisional Measures, Order, 13 September 1993, ICJ Reports 1993, p. 325, Separate Opinion of Judge ad hoc Lauterpacht, p. 431, para. 69.

57 Rony Blum, Gregory H. Stanton, Shira Sagi and Elihu D. Richter, “‘Ethnic Cleansing’ bleaches the Atrocities of Genocide’, *The European Journal of Public Health* (2007):1.

58 Jaakko Heiskanen, “In the Shadow of Genocide: Ethnocide, Ethnic Cleansing, and International Order,” *Global Studies Quarterly* 2 (2021): 2.

59 Brooke Chambers, and Joachim Savelsberg, “Genocide and Ethnic Cleansing,” *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Oxford: Oxford University Press, 2020), 4. <https://doi.org/10.1093/acrefore/9780190264079.013.594>

60 Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge: Cambridge University Press, 2004).

61 Bell-Fialkoff, “A Brief History of Ethnic Cleansing.”

62 Lieberman, “‘Ethnic cleansing’ versus genocide?” 42, 46.

63 Ibid.

64 Pégorier, *Ethnic Cleansing*, 58-59; Chambers et al., “Genocide and Ethnic Cleansing,” 4; Heiskanen, “In the Shadow of Genocide.”

65 Blum et al., “‘Ethnic Cleansing,” 1.

One of the main criticisms is that (a) ethnic cleansing is not established in any international treaty as an international crime, and (b) the UN bodies themselves have expressed conflicting views. The matter becomes more complicated when seen from the perspective that, on the one hand, mention is made that ethnic cleansing is part of international crimes, and on the other, consistently noting that only some acts of ethnic cleansing may fall under specific international crimes.

To understand the connection between ethnic cleansing and genocide, it is necessary to delve into the history of genocide.

According to Raphael Lemkin, genocide is not limited to physical extermination; it is “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, to annihilate the groups themselves. The objectives of such a plan would be a disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.”⁶⁶

Jaakko Heiskanen argues that Lemkin’s understanding of genocide “included what today would be called ethnocide – the destruction of the culture of an ethnic group – as well as what today would be called ethnic cleansing – the forced displacement of an ethnic group from a given territory.”⁶⁷ Heiskanen further singled out ethnocide and ethnic cleansing among many neologisms developed by genocide scholars because the concepts have developed outside the theoretical framework and gained international, political significance, and both are rooted in the concept of ethnicity, which is very close to Lemkin’s understanding of genocide.

As the *travaux préparatoires* of the Genocide Convention attest, the omission of cultural genocide from the Convention was connected with the objection stemming from the then colonial powers,⁶⁸ with their long-lasting history of oppression and forced assimilation against the minorities. The issue of ethnic cleansing was also discussed during the drafting of the Convention. An amendment presented by Syria offered to include “measures intended to oblige members of a group to abandon their homes to escape the threat of subsequent ill-treatment” as an act of genocide (A/C.6/234).⁶⁹ The Indian delegate objected to this proposal on the grounds that “abandonment of homes under the threat of ill-treatment and not even the threat of genocide should not be considered genocide.”⁷⁰ The representative of Yugoslavia defended the inclusion of the amendment, referring to the Nazi’s operations in Yugoslavia when a Slav majority was removed from

66 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace, 1944), 79.

67 Heiskanen, “In the Shadow of Genocide.”

68 *The Genocide Convention. The Travaux Préparatoires*, edited by Hiram Abtahi and Philippa Webb (Leiden, Boston: Martinus Nijhoff, 2008).

69 *The Genocide Convention*, 1479.

70 *Ibid.*, 1490.

certain territories to establish a German majority there. Other delegates believed that the amendment deviated from the original concept of the genocide, while in the opinion of the USSR delegate, the “measures compelling members of a group to abandon their homes” were already provided for in the draft Convention and would be punishable after the convention would be signed.⁷¹

Although Lemkin used the word *ethnocide* as a synonym to the word of genocide,⁷² its later articulations served as a supplementary concept that captured those forms of cultural oppression and forced assimilation that escaped the legal definition of genocide.⁷³

From the very beginning of the conflict in the former Yugoslavia, the terms “ethnic cleansing” and “genocide” were used interchangeably to describe perpetrated violence. In 1992, the UN General Assembly denounced the “abhorrent policy of “ethnic cleansing” as a form of genocide.⁷⁴

In the case of *Nikolić*, the ICTY established:

In this instance, this policy of “ethnic cleansing” took the form of discriminatory acts of extreme seriousness which tend to show its genocidal character. For instance, the Chamber notes the statements by some witnesses which point, among other crimes, to mass murders being committed in the region. More specifically, the constitutive intent of the crime of genocide may be inferred from the very gravity of those discriminatory acts. [...] The Chamber considers that the Tribunal may possibly have jurisdiction in this case under Article 4 of the Statute [Genocide]. It would therefore invite the Prosecutor to pursue his investigations, if feasible and advisable, with a view to indicting Dragan Nikolić for complicity in genocide or acts of genocide.⁷⁵

Nevertheless, one cannot categorize all cases of ethnic cleansing as genocide due to the clearly defined specific mental element of genocide, *mens rea*.⁷⁶ As noted by Schabas, “where the specified intent is not established, the act remains punishable, but not as genocide. It may be classified as crimes against humanity, or it may be simply a crime under ordinary criminal law.”⁷⁷

Therefore, the intent to destroy expresses the specificity of genocide and constitutes its crucial element in the definition and understanding of this crime. Without it, genocide

71 Ibid., 1490-1491.

72 Lemkin, *Axis Rule*, 79, footnote 1.

73 Ibid.

74 UN General Assembly Resolution 47/121(1992), “The Situation in Bosnia and Herzegovina,” December 18, 1992, UN Doc. A/RES/47/121; UN Doc. A/47/PV.91, p. 99.

75 *Prosecutor v. Dragan Nikolić* (“Sushica Camp”), Case No. IT-94-2-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber I, October 20, 1995, para 34.

76 Rome Statute, art. 6.

77 Schabas, *Genocide in International Law*, 214.

cannot be considered to have been committed. As confirmed by the Trial Chamber in the case of *Kayishema and Ruzindana*:

A distinguishing aspect of the crime of genocide is the specific intent (*dolus specialis*) to destroy a group in whole or in part. The *dolus specialis* applies to all acts of genocide mentioned in Article 2(a) to (e) of the Statute, that is, all the enumerated acts must be committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’. It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder.⁷⁸

The International Court of Justice, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, noted that there are obvious similarities between a genocidal policy and the policy of ethnic cleansing, while also mentioning that “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself amount to the crime of genocide.”⁷⁹ In other words, to qualify ethnic cleansing as genocide, the acts listed in Article II of the Genocide Convention and the intent to destroy the group as such should be present.

The same ambiguity and inconsistency are also present in the jurisprudence of the International Criminal Court.⁸⁰

Nonetheless, several evolutionary proclamations by the ICC coupled with the respective progressive jurisprudence of the International Court of Justice seem to draw a clearer and unprecedented picture. Thus, in its *Al Bashir* case, the ICC held that “practice of ethnic cleansing ... may result in genocide if it brings about the commission of the objective elements of genocide provided in Article 6 of the Statute and the Elements of Crimes with the specific intent to destroy in whole or in part the targeted group”.⁸¹ Meanwhile, in its *Croatian Genocide* case, the ICJ, in its turn, affirmed that ethnic cleansing may potentially amount to genocide, and that acts of ethnic cleansing may occur in parallel to acts prohibited by Article II of the Genocide Convention, and what is even more that ethnic cleansing may be significant in terms of evidencing the presence of a specific intent (*dolus specialis*) giving rise to or inspiring those acts.⁸² As a demonstration

78 *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR, June 1, 2001, para 91.

79 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 11 July 1996, paragraph 163.

80 For more on this see Pégrier, *Ethnic Cleansing*, 58-105.

81 Situation in Darfur, Sudan, *Prosecutor v Al Bashir* (Omar Hassan Ahmad), Decision on the Prosecution’s application for a warrant of arrest against Omar Hassan Ahmad Al Bashir, Case No ICC-02/05-01/09, ICC-02/05-01/09-3, 4th March 2009, International Criminal Court [ICC]; Pre-Trial Chamber I [ICC], para. 145.

82 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, paras 162–63, 478. See also, Robin Geiß,

of this, the ICJ directly referenced to “acts described as ethnic cleansing that can be characterized as deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, contrary to Article II(c) of the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*).”⁸³

Thus, the concept of ethnic cleansing was mainly used as a euphemistic alternative to genocide to enable the international community to condemn the actions of other states as morally wrong without burdening themselves with the responsibility to intervene or calling into question the universalistic ideals upon which the international order is founded. If the articulation of ethnocide has sought to undo some of the containments and closures of genocide discourse, then the expression of ethnic cleansing has proved to reinforce them.

The Progressive Content of Ethnic Cleansing

During the last decades of the 20th century and on, the world has witnessed the most horrendous crimes. The genocides in Cambodia, Rwanda, and Srebrenica, as mass atrocities in Burundi, Bosnia, Angola (the Halloween massacre), Kosovo, Liberia, and elsewhere, exposed the weaknesses of the United Nations Organization and even brought discredit to its viability. And it was not until these events that the international community started to find ways to reconcile between the principles of state sovereignty and the protection of human rights.

In 2000, the Canadian government took the initiative in this regard and created the International Commission on Intervention and State Sovereignty (ICISS), which dramatically shifted from the Westphalian sovereignty model toward a sovereignty based on rights and responsibilities.

The propositions enshrined in the ICISS Report provided a conceptual change in general understanding of humanitarian intervention.⁸⁴ At the outset, the Report states that military intervention may only be resorted to when there is either (a) a large-scale loss of life or (b) a large-scale “ethnic cleansing”.⁸⁵ The latter was qualified as actual or apprehended, whether carried out by killing, forced expulsion, acts of terror, or rape.⁸⁶

Inspired by the ICISS Report, the UN General Assembly adopted the Outcome Document four years later in its 2005 World Summit.⁸⁷ The significance of the Outcome Document is impossible to circumvent for one reason: it was one of the largest

Asli Ozcelik, “Ethnic Cleansing,” *Max Planck Encyclopedias of International Law* (2021), para. 29, at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e789>, accessed 21.09.2023.

83 Geiß and Ozcelik, “Ethnic Cleansing.”

84 Report of the International Commission on Intervention and State Sovereignty. The Responsibility to Protect, [ICISS Report], December 2001.

85 Ibid, p. XII.

86 Ibid.

87 2005 World Summit Outcome, General Assembly Resolution 60/1, U.N. Doc. A/Res/60/1 (2005).

conventions of heads of state and government representing over 170 states, who convened to endorse, *inter alia*, the Responsibility to Protect principle for the first time at this level.

Based on paragraphs 138 and 139 of the Document, states explicitly endorse the principle of the Responsibility to Protect (R2P) and acknowledge that each state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.⁸⁸ As can be observed, the Outcome Document provides only for international crimes as enshrined in Article 5 of the Rome Statute of the International Criminal Court, and thereby, significantly limited the scope of R2P, whereas the ICISS Report provided a more expanded scope for the just cause, i.e., “large-scale loss of life” and “large-scale ethnic cleansing.” Besides, the Document stresses the importance of international assistance to “those who are under stress before crises and conflicts break out,” but does not provide appropriate forms of such aid.⁸⁹

Interestingly, another four years later, in 2009, the Secretary-General’s Report on Implementing the Responsibility to Protect stated that acts of ethnic cleansing may constitute one of the other three crimes, that is, genocide, crimes against humanity, and war crimes.⁹⁰

The cumulative analysis of the above contextual advancements regarding the notion of ethnic cleansing allows us to conclude that ethnic cleansing constitutes a standalone, autonomous form of crime distinct from crimes against humanity, war crimes, and genocide. Such a reading, nonetheless, does not *per se* exclude the potential overlap that ethnic cleansing might have with the other three forms of crimes. For that, what remains to be answered on a case-by-case basis is whether ethnic cleansing fits out to the necessary prerequisites of either of the other crimes.

Naming the Crime: Ethnic Cleansing in Artsakh

On 19 September 2023, Azerbaijan launched a large-scale assault on Nagorno-Karabakh, proclaiming that it would continue “until the end.”⁹¹ Although it was not specified what was the anticipated end, it was clear – the final destruction of Armenianness in Artsakh. In 24 hours, Azerbaijani forces were using heavy artillery, drones, and mortars, resulting in the loss of hundreds of lives, among them also civilians, and causing substantial damage to civilian infrastructure.⁹²

⁸⁸ Ibid, 30.

⁸⁹ General Assembly Resolution 60/1, U.N. Doc. A/Res/60/1.

⁹⁰ The Secretary-General, Report of the Secretary-General, Implementing the Responsibility to Protect, UN Doc. A/63/677 (2009), p. 5.

⁹¹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination Armenia v. Azerbaijan, Request by The Republic of Armenia for the Indication of Provisional Measures, Volume I., 28 September 2023, p. 20.

⁹² Global Center for the responsibility to protect, Atrocity Alert No. 366: Nagorno-Karabakh, Ukraine and Venezuela, at <https://www.globalr2p.org/publications/atrocity-alert-no-366/>, accessed 01.10.2023

After blockading Artsakh for more than nine months, Azerbaijan soon reopened the Lachin corridor as a last accord in its aim to de-Armenize Artsakh. The indigenous Armenians of Artsakh had no other choice than to immediately leave their homeland for fear of violence and physical extermination. According to the President of the RA Special Investigative Committee, more than 70 people died during this forced exodus.⁹³ They were also in “dire humanitarian needs”⁹⁴ because the nine-month siege resulted in physiological issues and shortages of food, medications, and other essential supplies.⁹⁵

The absence or shortage of medicines and medical supplies was regularly recorded in Artsakh with life-threatening consequences.⁹⁶ The blockade has created problems related to all four components of the right to food as defined by the UN: availability, accessibility, utilization, and stability.⁹⁷ Several cases of fainting and death were recorded during the blockade due to chronic malnutrition and deficiency of vital nutrition elements.⁹⁸ Azerbaijan has also entirely or partially interrupted the gas supply from Armenia to Artsakh, which further deteriorated the humanitarian situation in Artsakh, intensifying human rights violations.⁹⁹

September 19 attack was added to decades-long history of persecution, discrimination, and hatred towards Armenians. Azerbaijan has sought to suppress any expression of ethnic Armenian identity in Azerbaijan. It has systematically worked to destroy all traces of Armenian cultural heritage and to rewrite the history of the region to erase the presence of ethnic Armenians.¹⁰⁰

93 “More than 70 people died during the exodus from Nagorno Karabakh. Argishti Kyaramyan provided details,” 04.01.2024, at <https://www.armtimes.com/hy/article/277088>, accessed 04.01.2024.

94 “Azerbaijan: Ensure Civilians’ Rights in Nagorno Karabakh,” *Human Rights Watch*, 23 September 2023, at <https://www.hrw.org/news/2023/09/23/azerbaijan-ensure-civilians-rights-nagorno-karabakh>, PDF p. 1 (“Thousands of civilians in Nagorno-Karabakh have dire humanitarian needs following Azerbaijan’s military operation to regain control over the region”), accessed 30.09.2023.

95 “Azerbaijan: Ensure Civilians’ Rights in Nagorno Karabakh,” *Human Rights Watch*, 23 September 2023, at <https://www.hrw.org/news/2023/09/23/azerbaijan-ensure-civilians-rights-nagorno-karabakh>, President of Artsakh Republic declares nationwide disaster, asks UN to intervene, Public Radio of Armenia, 25 July 2023, at <https://en.armradio.am/2023/07/25/174716/>, accessed 10.09.2023.

96 Human Rights Defender of the Republic of Artsakh, Report on the Violations of Individual and Collective Human Rights as a Result of Azerbaijan’s Blockade of Artsakh, 12 June 2023, p.11.

97 OHCHR, Key aspects of the right to food, at <https://www.ohchr.org/en/food>, accessed 09.10.2023.

98 Artsakh Human Rights Defender, Press Release, Person Died from starvation in Artsakh, at <https://artsakhombuds.am/en/news/747>, accessed at 09.10.2023.

99 Human Rights Defender of the Republic of Artsakh, Report on the Violations of Individual and Collective Human Rights, p.17.

100 Simon Maghakyan and Sarah Pickman, “A Regime Conceals Its Erasure of Indigenous Armenian Culture,” *Hyperallergic*, 18.02.2019, at <https://hyperallergic.com/482353/a-regime-conceals-its-erasure-of-indigenous-ar-menian-culture/>; Sylvia Maus, “A Violent Effort to Rewrite History? Destruction of Religious Sites in Nagorno-Karabagh and the Concept of Cultural Genocide,” *Völkerrechtsblog*, 19 April 2021, https://intr2dok.vifa-recht.de/receive/mir_mods_00010644, accessed 05.03.2022. Hayastan Martirosyan, “Azerbaijan’s Policy of Forced Cultural Appropriation after the Second Artsakh War: The Case of Dadivank Monastery,” *International Journal of Armenian Genocide Studies* 7, no. 2 (2022): 91-135. For more information see Monument Watch, at <https://monumentwatch.org/en/>. See also different chapters in *Monuments and Identities in the Caucasus. Karabagh, Nakhichevan and Azerbaijan in Contemporary Geopolitical Conflict*, Texts and Studies in Eastern

Prejudice against Armenians “is so ingrained that describing someone as an Armenian in the media” is considered to be “an insult that justifies initiating judicial proceedings against the persons making such statements.”¹⁰¹ Given also the Government’s own “condon[ing] [of] racial hatred and hate crimes,” offenses against Armenians go unpunished. A stamp issued by Azerbaijan’s State-owned postage stamp company in the wake of the armed conflict sought to commemorate those violations by depicting the chemical “disinfecting” of Artsakh. As Alexander Galitsky put it, “[n]ot since Nazi Germany has such a blatant example of genocidal symbolism been deployed so brazenly by a state actor.”¹⁰²

This anti-Armenian rhetoric is being organized and encouraged on a state level.¹⁰³ The president of Azerbaijan Ilham Aliyev is routinely using derogatory terms to label Armenians as “bandits”, “vandals”, “fascists”, and “barbarians”, and as having a “cowardly nature”, comparing them with “animals”, especially “dogs”. Other government institutions and high-ranking officials are also following this wording.¹⁰⁴

The European Commission against Racism and Intolerance has observed that “Azerbaijan’s leadership, education system and media are very prolific in their denigration of Armenians”, and that “an entire generation of Azerbaijanis has now grown up listening to this hateful rhetoric.”¹⁰⁵

Similarly, the Committee on the Elimination of Racial Discrimination expressed concern about “the repeated and unpunished use of inflammatory language by [Azerbaijani] politicians speaking about the Nagorno-Karabakh conflict and its adverse impact on the public’s view of ethnic Armenians.”¹⁰⁶

There is also a long history of violence against Armenians. From the beginning of the 1900s, anti-Armenian propaganda and hatred resulted in a series of massacres perpetrated

Christianity, Volume 31, edited by Igor Dorfmann-Lazarev and Haroutioun Khatchadourian (Leiden, Boston: Brill, 2023).

101 European Commission against Racism and Intolerance, *ECRI Report on Azerbaijan (fourth monitoring cycle)* (31 May 2011), available at <https://rm.coe.int/third-report-on-azerbaijan/16808b557e>, para. 99.

102 Alexander Galitsky, “Azerbaijan’s Dehumanization of Armenians Echoes Horrors of Holocaust,” *The Times of Israel*, 30 January 2021, at <https://blogs.timesofisrael.com/azerbaijans-dehumanization-of-armenians-echoes-horrors-of-holocaust/>, accessed 10.09.2023.

103 Naira E. Sahakyan, “The Rhetorical Face of Enmity: The Nagorno-Karabakh Conflict and the Dehumanization of Armenians in the Speeches by Ilham Aliyev,” *Southeast European and Black Sea Studies* 23, no. 4 (2023): 863-882.

104 International Court of Justice, Application Instituting Proceedings Containing a Request for Provisional Measures Filed in the Registry of the Court on 16 September 2021. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia V. Azerbaijan), pp. 27-28.

105 European Commission against Racism and Intolerance, *ECRI Report on Azerbaijan (fifth monitoring cycle)* (7 June 2016), available at <https://rm.coe.int/fourth-report-on-azerbaijan/16808b5581>, pp. 9, 17. See also United States Department of State, *2019 Country Reports on Human Rights Practices: Azerbaijan* (11 March 2020), at <https://www.state.gov/wp-content/uploads/2020/02/AZERBAIJAN-2019-HUMAN-RIGHTS-REPORT.pdf>, p. 38.

106 CERD Committee, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Azerbaijan*, UN doc. CERD/C/AZE/CO/7-9 (10 June 2016), para. 27.

against Armenians in Baku, Shushi,¹⁰⁷ and other places.¹⁰⁸ After the illegal incorporation of Nagorno-Karabakh into the Azerbaijan Soviet Republic, Armenians of the region protested against Azerbaijan's control and oppression. In 1963, a petition addressed to the then-First Secretary of the Communist Party of the Soviet Union and Chairman of the USSR's Council of Ministers, Nikita Khrushchev, denounced the "chauvinist policy" of Azerbaijan designed to "ruin the economy of the Armenian population and, eventually, to force the Armenians to leave [Nagorno-Karabakh]."¹⁰⁹ The petition then detailed how discrimination was present in all spheres, from agriculture to education and culture.¹¹⁰ Azerbaijani officials responded with illegal imprisonments, murders committed with impunity, and official threats, forcing many Armenians to go into exile.¹¹¹ Heydar Aliyev, the former President of Azerbaijan and then-First Secretary of the Communist Party of Azerbaijan, who is also the father of the current President of Azerbaijan, openly acknowledged attempting to alter the local demographics by "increasing the number of Azeris there and reducing the number of the Armenians."¹¹²

In 1968, after an ethnic Azerbaijani teacher reportedly killed an Armenian pupil and was not charged, clashes between Armenians and Azeris erupted in Stepanakert.¹¹³ Instances of violence were reported also during the following years. In 1977, the clashes intensified. In his letter addressed to Breznev, former Armenian Communist Party's Central Committee member Sero Khanzadian complained that "national injustice" in Nagorno-Karabakh was the basis for disorders and casualties and demanded that Nagorno-Karabakh be incorporated into Soviet Armenia.¹¹⁴

At the beginning of 1988, the peaceful demand of Nagorno-Karabakh to be united with Armenia was met with violence, which escalated into armed conflict, lasting from 1988 until 1994. During that period, a series of violent massacres of Armenians were perpetrated. In February 1988, Azerbaijani mobs indiscriminately killed, raped, maimed, and even burned alive ethnic Armenians in Sumgait, currently the second-largest city in Azerbaijan.¹¹⁵ Large massacres occurred in Kirovabad, Shamakhi, Shamkhor in November

107 Vahram Balayan, "The Massacre of the Armenians of Shushi on March 23, 1920 as a Consequence of Impunity of the Armenian Genocide in 1915," *Journal of Armenian Studies* 2 (2016): 95-105.

108 Richard G. Hovannissian, *The Republic of Armenia: The First Year, 1918–1919. Vol. 1.* (Berkeley: University of California Press, 1971), 237-238; Ibidem., *The First Republic of Armenia. Vol. II. From Versailles to London, 1919-1920* (Berkeley, Los Angeles, London: University of California Press, 1982), 168-240.

109 Claude Mutaftian, "The Years of Suppression: 1923-1987," in *Armenia and Karabagh: The Struggle for Unity*, edited by Christopher J. Walker (London: Minority Rights Publications, 1991), 118.

110 Ibid.

111 Ibid., 118-119.

112 Mutaftian, "The Years of Suppression," 116.

113 United States Department of State, Bureau of Intelligence and Research, Soviet Nationalities Survey. Special Issue: Crisis in the Caucasus, N 15, August 22, 1988, I.

114 Ibid., I-II.

115 Mutaftian, "The Years of Suppression," 124. See also "In Recognition of the Victims of the Baku and Sumgait Pogroms" (Extension of Remarks), *Congressional Record Vol. 166, No. 20* (30 January 2020), at <https://www.congress.gov/congressional-record/2020/01/30/extensions-of-remarks-section/article/E112-3>; Jacques Derrida

1988. During the same period, in November and December 1988, 50 Armenian settlements were displaced. In another attempt, the Azerbaijani policy of systematic attacks against the ethnic Armenian population, Armenians of Baku faced a large-scale series of pogroms from 13 through 19 January 1990. Hundreds of Armenians were murdered, mutilated, persecuted, and displaced.¹¹⁶ Under the threat of extermination, around 250,000 Armenians were forced to flee Azerbaijan.¹¹⁷

When Nagorno-Karabakh declared its independence on 2 September 1991, the Azerbaijani army carried out another series of massacres of Armenians.¹¹⁸ Several years of heavy fighting resulted in further casualties and displacement of Armenians from their homes in Nagorno-Karabakh and the surrounding region.

Thus, having a long history of persecution and discrimination, with many episodes of violence and massacres, after nearly 10-month blockade and under the imminent threat of physical extermination, Armenians of Artsakh had no other choice than to leave their indigenous lands.

Epilogue

In the case of Artsakh as a state devoid of *de jure* recognition, equally significant is the interplay between the concepts of *deportation* and *forcible transfer*. The two shall not be deemed synonymously. The jurisprudence of international tribunals indicates that even though both deportation and forcible transfer deal with involuntary and illegal uprooting of people from the place of their habitation, deportation nonetheless assumes the transfer of people across State borders. In contrast, forcible transfer may, *inter alia*, presume displacements of people within the boundaries of a State. The Appeals Chamber in *Milutinović*, by narrowing the difference between deportation and forcible transfer, held that under certain circumstances, displacement across a *de facto* border may be sufficient to amount to deportation.¹¹⁹ Such a reading is pivotal in terms of refuting arguments directed to rendering inapplicable the deportation of Artsakh Armenians to ethnic cleansing because Artsakh does not enjoy a *de jure* recognition.

et al., "An Open Letter on Anti-Armenian Pogroms in the Soviet Union", *The New York Review* (27 September 1990), at <https://www.nybooks.com/articles/1990/09/27/an-open-letter-on-anti-armenian-pogroms-in-the-sov/>.

116 For more details see Gayane S. Hovhannisyan, "The Sumgait Massacres: Characteristics and Definitions," *International Journal of Armenian Genocide Studies* 7, no. 2 (2022): 63-90; Ministry of Foreign Affairs, republic of Artsakh, Armenian Pogroms in Azerbaijan 1988-1990, at <https://www.nkr.am/en/armenian-pogroms>, accessed 23.09.2023.

117 Parliamentary Assembly, Written declaration No. 708, Doc. 15064, 31 January 2020.

118 Lucy Poghosyan, "The Maragha Massacre: The Other Face of the Coin in the Karabakh War," *The Armenian Weekly*, 10 April 2020, at <https://armenianweekly.com/2020/04/10/the-maragha-massacre-the-other-face-of-the-coin-in-the-karabakh-war/>, accessed 03.09.2023.

119 Šainović *et al*, *Prosecutor v Milutinović* (Milan) *et al.*, Trial judgment, Case No IT-05-87-T, 26th February 2009, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]; Trial Chamber III [ICTY], para. 169.

Another important point here is the *forced* displacement of Armenians. In the Elements of Crimes of the International Criminal Court, in the case of deportation or forcible transfer of population, mention is made that “The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”¹²⁰ It was evident that the Armenians of Artsakh were forced to leave their indigenous lands due to imminent and actual threat of force, under the duress, detention, and psychological oppression of more than nine months of blockade and having a clear history of institutionalized violence, hatred, and discrimination.

A closing question that looms is whether ethnic cleansing should be used to describe the forced displacement of Armenians when the concept itself is not criminalized and, as such, does not trigger any criminal liability, and in case of using the concept one needs to understand within what crime it should be used.

The long enduring anti-Armenian policy by Azerbaijan directed against Artsakh Armenians has been a blatant manifestation of long-lasting practice of ethnic cleansing that has ultimately been blended with the objective elements of genocide through the accumulation of isolated yet consistent physical annihilation of Artsakh Armenians along with the deliberate infliction upon the latter non-viable conditions with the purpose of their physical destruction. As for the mental element requirement of genocide, ethnic cleansing in itself evidences the presence of the specific intent that inspired those acts, and as seen, this has been well established through the jurisprudence of international tribunals.

Azerbaijan has executed a master plan of expulsion of Armenians, destruction of Artsakh and now its replacement, along with de-Armenization and Azeriation of Artsakh. It is wiping out the history of Armenian Artsakh to write that of Azeris over it with the continuous imposition of Azeri national patterns over anything that is Armenian. We are witnessing a systematic, scholarly, political, and military attempt to de-armenize the land, its names,¹²¹ geography,¹²² and history,¹²³ which resembles Lemkin’s notion of genocide – process – the destruction of the national pattern of the targeted group and the imposition of the national pattern of the oppressor. He further explains that it is not enough to impose a national pattern of the oppressor on the targeted group – the targeted group should also

120 *Elements of Crimes* (The Hague: International Criminal Court, 2013), 4, ft. 12.

121 Mass changes to locations in Artsakh with fake Azerbaijani names on Google maps, at https://www.reddit.com/r/armenia/comments/14obwn2/mass_changes_to_locations_in_artsakh_with_fake/, accessed 12.10.2023.

122 Rouben Galichian, *Clash of Histories in the South Caucasus: Redrawing the map of Azerbaijan, Armenia and Iran* (London: Bennet & Bloom, 2012).

123 See e.g. Hratch Tchilingirian, “Christianity in Karabakh: Azerbaijani Efforts At Rewriting History Are Not New,” *EVN Report*, 22 November 2020, at <https://evnreport.com/spotlight-karabakh/christianity-in-karabakh-azerbaijani-efforts-at-rewriting-history-are-not-new/>; “The Armenian Art That Azerbaijan May ‘Erase’ From Churches,” *Monument Watch*, 12 February 2022, at <https://monumentwatch.org/en/2022/02/12/the-armenian-art-that-azerbaijan-may-erase-from-churches/>, accessed 10.09.2023; Artak Maghalyan, “Falsification Of The History of the Artsakh Meliqdoms by Azerbaijani Historiography,” *Fundamental Armenology* 2 (2015): 328-336.

be attacked in a physical sense and be removed and supplanted by the population of the oppressor nation.¹²⁴

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¹²⁴ Lemkin, *Axis Rule in Occupied Europe*, 79–80.

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